



Public Accounts Committee

**Final Report of the Inquiry into
Amendments to the
*Public Sector Management Act 1994***

**Report No. 6
August 2014**

Legislative Assembly
Parliament of Western Australia

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Report No. 6

Presented by

Mr S.K. L'Estrange, MLA

Laid on the Table of the Legislative Assembly on 21 August 2014

Chairman's Foreword

In this, its sixth report, the Public Accounts Committee (the Committee) has examined the *Public Sector Management Act 1994*, in light of amendments to the Act that were initially proposed in 2009 by the Premier, the Hon Colin Barnett, before being passed in 2010.

As part of these amendments a new statutory office, the Public Sector Commissioner (the Commissioner), was established and given responsibility for overseeing the efficient and effective operation of the public sector. Responsibility in this area had previously resided with the Premier, as Minister responsible for administering the Act.

The Committee undertook this Inquiry with several objectives in mind. Prominent among these was to consider the extent to which the amended Act promotes a public sector that is both operationally independent, while at the same time sufficiently responsible to the policy priorities of the government of the day.

It appears, based on the findings of the Committee, that a reasonable balance is being struck between these two potentially conflicting aims. The report considers this in the context of departmental CEO employment-related matters, and this is another area where the Commissioner has assumed some responsibilities from the Premier. Despite its initial concerns, the Committee is satisfied that there remains sufficient opportunity for ministerial involvement in the functions discharged by the Commissioner in this area. However, in a theme it has tried to adopt through the Inquiry, the Committee has looked for areas where current processes might be strengthened. In this respect, one of the report's key recommendations relates to ways in which the Commissioner might be able to make CEO performance management more robust and meaningful.

Another key objective of the Inquiry was to examine whether the accountability and transparency provisions in place for the new Commissioner are commensurate to the increased level of responsibility the position has assumed. Chapter Eight considers this issue in detail and makes a series of recommendations, two of which the Committee believes will enhance the accountability framework applicable to the Commissioner. The Committee believes there is opportunity for both the Executive, and the Parliament (primarily through its committee system), to take a more active role in assessing the performance of the Commissioner in the exercising of the statutory functions that he performs for these respective bodies.

This report is somewhat unprecedented in that it includes a series of recommendations directed at processes overseen by the Public Sector Commissioner who is not required to provide a response to Parliament in the same way that a minister of a government department is required to do under the Legislative Assembly's Standing Orders.

The Committee acknowledges the limitations of its remit, but is of the view these recommendations are worthy of consideration in the context of the Commissioner's functions.

In this respect, Recommendations 1-6, and 8-10, are directed to the Premier, as Minister responsible for administering the Act, in order for the Premier to seek and report on any response the Commissioner might wish to provide in response to the initiatives proposed by the Committee.

I would like to extend my deepest gratitude to the parties that assisted the Committee throughout its evidence gathering. The Committee consulted with a range of eminent stakeholders during this Inquiry, both here and interstate. I believe the report is significantly better for the willing contribution of these individuals, all of whom are listed in Appendices Three and Four. In particular, I would like to thank the current Commissioner, Mr Mal Wauchope, and his Executive team for their ongoing cooperation and assistance throughout the Inquiry.

Finally, I would like to acknowledge the efforts of my fellow Committee members (former Chairman, Hon Dean Nalder; Deputy Chairman, Ben Wyatt; Glenys Godfrey; Bill Johnston; and Matt Taylor), and the Committee Secretariat (Tim Hughes; Michele Chiasson; Lucy Roberts; and Daniel Govus) for bringing this report to fruition.

I commend this report to the House and I trust it will assist members and the broader public in gaining a greater understanding of the management and administration of the state's public sector.

MR S.K. L'ESTRANGE, MLA
CHAIRMAN

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Executive Summary

The current legislation overseeing public sector management and administration in Western Australia (WA) is the *Public Sector Management Act 1994* (the PSM Act). In 2009, the Premier, the Hon Colin Barnett, proposed a series of amendments to the PSM Act via the introduction to Parliament of the Public Sector Reform Bill 2009 (the Reform Bill). As part of these amendments a new statutory office, the Public Sector Commissioner (the Commissioner), was established and given responsibility for overseeing the efficient and effective operation of the public sector and for maintaining minimum standards of conduct among public sector employing authorities and employees.

Under the former legislative framework, responsibility for administering and managing the public sector resided with the Premier, as the Minister responsible for overseeing the PSM Act. The amendments in the Reform Bill were partly aimed at breaking this nexus and developing a more independent and professional public sector that remained nonetheless responsive to the policy agenda of current and future governments.

These same amendments have granted the Commissioner an unprecedented level of power over public sector operations in WA. Only in a select few areas, as defined in the Act, is the Commissioner subject to direction from the Premier (undertaking Reviews or Special Inquiries, and implementing Machinery of Government changes).

While there was general support for the concept of establishing the office of Public Sector Commissioner during the Reform Bill debates, the level of power assumed by the incumbent has since been questioned in some quarters, most notably, by the state's highest judicial officer, Chief Justice Wayne Martin. In a lecture delivered in August 2013, the Chief Justice questioned the transparency and accountability measures in place for a selection of statutory officers, including the Public Sector Commissioner, given the powers these officers have been granted by the Parliament.

The Public Accounts Committee (the Committee) had noted the content of the Chief Justice's lecture and the subsequent commentary that followed both in the print media and the Parliament. Given the amendments to the PSM Act had been in place for three years by this time, the Committee felt it timely to review certain aspects of the legislation, with a particular focus on the provisions relating to:

- the appointment and subsequent management of Chief Executive Officers (CEOs);

- the framework for establishing and monitoring compliance with public sector standards and ethical codes; and
- the mechanisms used to investigate conduct and operational issues within the public sector.

The Committee undertook to inquire into these areas with four objectives in mind:

- to provide Parliament with a greater understanding of what is widely considered to be a complex piece of legislation;
- to report on how the amendments to the PSM Act have manifested in practice, with a particular emphasis on the roles performed by the Commissioner, heads of departments (Directors General or CEOs), and their relevant Ministers, and the manner in which these parties interact;
- to consider the extent to which the PSM Act promotes a public sector that is both operationally independent, but sufficiently responsive to the policy agenda of an elected government; and
- to examine whether the accountability and transparency provisions in place for the new Commissioner are commensurate to the increased level of responsibility the position has assumed.

The first two chapters of the report are contextual. They provide further detail on the origins of the Inquiry and outline the evolution of the legislation governing public sector management and administration dating back to 1904.

The remaining chapters contain both descriptive and evaluative elements as the Committee addresses its Terms of Reference, starting in Chapter Three where the Commissioner's functions and powers relating to the employment of Chief Executive Officers (CEOs) are examined.

As part of the suite of amendments in the Reform Bill, the Commissioner has assumed the responsibilities formerly vested with the Premier in the areas of recommending CEO appointments; reappointments; transfers; removals; and directing employees into acting CEO roles.

The Committee supports the concept of these amendments, designed as they are to mitigate the risk of undue political involvement in CEO employment-related matters. However, there was initial concern around the potential autonomy the Commissioner had acquired in these areas and whether, as a result, Ministers would still have appropriate input into decisions regarding the heads of the departments for which they were accountable to the public and the Parliament.

These initial concerns have been largely allayed, as the processes that have evolved under the amended legislation appear to afford sufficient opportunity for ministerial involvement in each of these areas. It is notable that even where there is no statutory requirement for the Commissioner to consult with the relevant Minister (e.g. CEO reappointment and removal), the Commissioner has indicated that consultation would always occur in such circumstances.

The Committee was also interested in acquiring further knowledge on how the CEO performance management process had manifested since the amendments took effect.

Under the amended legislation, CEOs now enter into a performance agreement with the Commissioner and the relevant minister in accordance with the Commissioner's Approved Procedure 8 – *Timing and assessment of CEO performance agreements*. While section 47 of the PSM Act stipulates the assessment of a CEO's performance is the responsibility of the relevant minister, in practice, the Commissioner assists in the assessment of the performance of a CEO. The Committee has learned through its evidence gathering that the level of input from the Commissioner varies from assessing the performance to noting the final assessment.

The Committee has registered some concern regarding the outcomes being achieved under the current CEO performance management process after learning that of the 76 CEOs for whom the Commissioner is the employing authority, none have received a negative performance rating over the last three years. The Committee believes there is scope for making the overall performance management framework more robust and meaningful through the Commissioner amending Approved Procedure 8 so that the financial performance of a department against its allocated budget is given appropriate weighting in a CEO's annual assessment. The Committee also sees value in requiring the formal input of the Commissioner and Treasury in the assessment process, having noted the merit of some multiple stakeholder approaches evident in other Australian jurisdictions.

In Chapter Four the Committee looks at Commissioner's Instructions (CIs), which are a new feature in the amended PSM Act. CIs are instruments the Commissioner can use to direct public sector bodies and / or employees on matters relating to the Commissioner's functions or the application of the PSM Act.

The original PSM Act allowed for various instruments to serve this purpose. Some were available exclusively to the then Commissioner for Public Sector Standards (whose position was abolished under the Reform Bill amendments), while others were available to the Premier who had assumed responsibility in 1994 for promoting the overall effectiveness and efficiency of the Public Sector.

In some areas, the Commissioner is required by the Act to issue CIs for specific purposes. For example, the Commissioner must issue CIs to establish public sector standards relating to human resource management activities, and codes of ethics setting out minimum standards of conduct and integrity to be complied with across the sector.

The Commissioner also has the capacity to issue CIs relating to a host of other matters including management and administration of the sector, and the processes for dealing with disciplinary matters outlined under Part 5 of the PSM Act. Currently there are nine CIs in place.

The Committee looked at the processes for establishing, amending, revoking, and publishing CIs as well as the debates surrounding the legal power these instruments carry. Generally speaking, the Committee is satisfied with the framework in place.

The Commissioner advised that CIs were introduced to streamline and simplify public sector administration by reducing the multiplicity of instruments which previously applied. This is consistent with one of the primary aims of the Reform Bill.

In terms of the legal effect of CIs, the Committee is confident the Commissioner cannot exercise unfettered power through the issuance of these instruments. As it stands, CIs relating to public sector standards or ethical codes are disallowable by the Parliament and the courts have the capacity to inquire into and decide on their validity. In addition, amendments to section 108 give scope for Regulations to make provisions for any matter for which CIs may provide. This ensures that the Executive arm of Government has the ability to check the intent of the Commissioner regarding any CI.

In Chapter Five, the Committee uses a case study of Commissioner's Instruction No. 3: *Discipline – general* (CI No. 3), to examine how CIs work in practice. This study also offers an opportunity to gain a greater understanding of the disciplinary framework applicable to those public sector employees captured under Part 5 of the PSM Act. (Notably a large number of disciplinary investigations relating to employees outside this framework are conducted under various other instruments).

CI No. 3 was established on 28 March 2011 and was reviewed by the Commissioner and re-issued on 8 November 2012. It contains the minimum procedural requirements employing authorities should follow when dealing with suspected breaches of discipline or disciplinary matters, and taking disciplinary action, under Part 5 of the PSM Act. The full text of these requirements is included at Appendix Seven.

The parliamentary debates for the Reform Bill indicated broad support for amending the disciplinary framework under Part 5 of the PSM Act to one that was less convoluted than its predecessor, but still retained full natural justice.

The majority of Chapter Five examines and assesses arguments made around the extent to which CI No. 3, in its current form, promotes a disciplinary regime that is consistent with these aims.

Ultimately, while the Committee believes there are some shortcomings in the current content of CI No. 3, it thinks the procedural principles outlined in the document are meritorious and should be given broader application across a larger part of the public sector. This would promote a more uniform, and arguably more efficient, disciplinary regime.

In regards to what it sees as shortcomings in the current content of CI No. 3, the Committee makes some suggestions as to how it thinks procedural fairness might be enhanced. These include incorporating explicit statements in CI No. 3 advising employing authorities: of the requirement to apply procedural fairness to all parties; to provide employees with specific details of allegations; and to provide reasons for all disciplinary decisions to employees.

In terms of the timeliness of disciplinary proceedings, the Committee was concerned to hear of some investigations under the PSM Act framework (and other instruments outside the PSM Act) taking between 18 months and two years to complete. While recent data indicates some improvement, the Committee stresses that it is incumbent upon agencies to act decisively to ensure average timeframes continue to come down.

The Committee's attention in Chapter Six turns to the manner in which the Commissioner monitors and reports on compliance with public sector standards and ethical codes as per the requirements of sections 21, 22C, and 22D of the PSM Act.

The Commissioner takes a multi-methodological approach to compliance monitoring, with the majority of oversight performed under a variety of instruments collectively referred to as the 'monitoring and evaluation framework'. The framework includes, but is not restricted to, data from the Commission's Annual agency survey (AAS) and Employee Perception Survey (EPS), and claims lodged by employees alleging a breach of public sector standards.

The monitoring and evaluation framework looks to be a well-established process from which information relating to compliance issues can be obtained by the Commission from across the sector.

In terms of reporting, the Commissioner is required to report to Parliament each year on the degree of compliance across the sector with public sector standards and ethical codes. A similar function was performed by the former Commissioner for Public Sector Standards under the original PSM Act. The Commissioner's Annual Report provides some commentary on these issues. However, since 2012, the Commissioner has also published a State of the Sector report (SOS Report) with an accompanying Statistical

Bulletin. These documents serve as the primary vehicle for reporting on compliance matters and providing a general overview of public sector management and administration.

The reporting framework adopted by the Commission is detailed and informative. The SOS Report, and the Statistical Bulletin in particular, are still evolving but already provide a significant level of pertinent data on the current condition of the public sector.

While generally satisfied with the overall compliance monitoring and reporting regime adopted by the Commissioner, the Committee has again sought to suggest ways in which processes might be enhanced. In this respect, it would like the Commissioner to consider ways in which employee exit interviews might be used as another data source from which issues impacting the sector might be addressed.

The Committee concludes this chapter with a brief overview of the Breach of Standard (BOS) claim process, the information from which is used as part of the Commission's aforementioned monitoring and evaluation framework.

Should a person feel they have been adversely affected by the decision of an employing authority following a human resource management process covered by one of six current public sector standards (other than the Discipline Standard, where breaches are pursued under Part 5 of the PSM Act), that person may seek relief by lodging a BOS claim. Section 97(1)(a) of the PSM Act requires the Commissioner to make recommendations to the Premier regarding the establishment, amendment, or repeal of regulations prescribing procedures for BOS claims.

The initial attempt to resolve the claim must be undertaken by the public sector body. If the claim is not resolved within 15 days, the matter is referred to the Commissioner for possible review. Under the current Regulations, the Commissioner may determine that a breach has occurred and recommend or direct a public sector body provide relief. Alternatively, the Commissioner can dismiss the claim or decline to review it.

After describing how the BOS Claims currently operates, the Committee looks at some of the critical commentary around the process. The primary concern raised was about the inability to have decisions made by the Commissioner referred to the Public Service Appeal Board as constituted by the WA Industrial Relations Commission. The Committee recognises this issue has been contentious throughout the life of the PSM Act. However, having considered the respective arguments on the issue, the Committee is not convinced of the necessity to change this aspect of current practice. Nonetheless, the Committee does see merit in the Commissioner facilitating amendments to the Regulations to enable all parties the right to representation during a BOS Claim process.

In Chapter Seven, the Committee looks at the provisions of the PSM Act relating to a selection of other investigatory mechanisms: Reviews; Special Inquiries; and Investigations.

This chapter looks at the differences between the various instruments, their purposes, and their respective powers. The Commissioner has acquired the power to initiate Reviews and Special Inquiries. Previously, these powers rested exclusively with the Premier. Notably, the Premier can still direct the Commissioner to undertake a Review, or to arrange for the holding of a Special Inquiry, and the Commissioner is required to comply with such a directive unless the Commissioner is of the view there are exceptional circumstances for not complying.

In this chapter the Committee lists the various Reviews, Special Inquiries, and Investigations that have been conducted since the Commissioner's position was established. The Committee's main focus was on the level of transparency applied to final reports given the Commissioner has no statutory requirement to make their contents public. The Committee has concluded that, apart from one exception, where the final report of a Review was tabled 12 months after it was completed, the Commissioner has generally been proactive in this respect.

In the final section of this chapter, the Committee looks at the treatment of evidence obtained as part of Special Inquiries. The Act is silent in this respect, although a separate section provides a special inquirer with the authority to determine the appropriate procedure. As the Committee demonstrates, the approaches adopted by the individual inquirers regarding the release of evidentiary material are as diverse as the subject matter of their inquiries. While the Committee does not oppose the current discretion available to Special Inquirers, it sees merit in amending the Act to the extent that it promotes the principle of disclosure.

Having looked at several of the key amendments to the PSM Act, the Committee considers in the final chapter whether the accountability provisions in place for the Commissioner are commensurate to the increased level of responsibility the position has assumed.

To answer this question, the Committee looks in detail at the provisions of the Act relating to the Commissioner's: appointment; reappointment; performance management; removal; reporting requirements; and parliamentary oversight. Yet before venturing into these areas, the Committee has tried to determine whether, or to whom, the position of Commissioner is accountable.

Ultimately, the Committee has formed the view that the Commissioner is a statutory officer with legislative authority to act independently in relation to his or her functions.

Despite this, there is capacity for the position to be accountable to both the Executive and the Parliament – bodies to whom the Commissioner has statutory responsibilities.

The recommendations that follow in this chapter offer a means by which the Committee believes the accountability framework for the Commissioner can be enhanced. This is most evident in the sections discussing performance management and committee oversight.

In respect of the former, the Committee acknowledges the Commissioner is one of numerous statutory officers in WA not subject to a prescribed performance management framework. This appears to reflect common practice in respect of other Commissioners throughout Australia.

In regards to the Commissioner's responsibilities to the Executive, regular meetings are currently held between the incumbent and the Premier to discuss various matters pertaining to the management and administration of the public sector. The Commissioner also provides the Premier, as Minister responsible for administering the PSM Act, with an annual statement of intent on which the Premier is invited to provide comment.

The Committee thinks this current process should be formalised and made more reflective of a measurable performance assessment, noting that the Commissioner is currently exempt from the performance management framework in place for most other CEOs under section 47 of the PSM Act. Such a process would be limited to the extent that it only assessed the Commissioner's functions pertaining to the Executive as prescribed within the Act. The Committee sees this as an issue worth consideration by the Premier and has recommended he examine means by which such a framework could be established.

Parliament also has an important role to play in the accountability framework of the Commissioner and Committee oversight is the ideal vehicle by which this might be done. Throughout the course of this Inquiry, the Committee received testimony from numerous authoritative figures endorsing this view. Capacity for such oversight exists within the current standing committee system—this Inquiry is illustrative of that fact. However, the recent record of this Parliament, and others throughout Australia, suggests ongoing engagement with public sector chiefs will not occur in the absence of either the establishment of a dedicated oversight committee or a prescribed function being assigned to an existing committee.

Based on this point, the Committee has made a further recommendation to Premier to facilitate the establishment of a mechanism whereby the Commissioner is subject to regular parliamentary committee oversight. The functions prescribed to the current Joint Standing Committee on the Commissioner for Children and

Young People are cited as a possible example. These functions include regular consultation with the Commissioner for Children and Young People and examination of that Commissioner's annual and other reports.

Ministerial Response

In accordance with Standing Order 277(1) of the Standing Orders of the Legislative Assembly, the Public Accounts Committee directs that the Premier report to the Assembly as to the action, if any, proposed to be taken by the Government with respect to the recommendations of the Committee.

Findings and Recommendations

Finding 1

Page 19

The Public Sector Reform Bill 2009 received Royal Assent on 1 October 2010 resulting in a series of amendments to the *Public Sector Management Act 1994* (WA).

As a result of these amendments there is no longer capacity to appoint a person as Chief Executive Officer (CEO) on a term-of-government basis.

Finding 2

Page 23

The Public Sector Commissioner may direct someone to act in the office of a CEO during a vacancy or absence for a period not exceeding 12 months. However, a number of acting CEOs have had their position renewed for an additional period of time.

Finding 3

Page 26

Under the 2010 amendments to sections 45 and 46 of the *Public Sector Management Act 1994*, the Public Sector Commissioner has formally assumed responsibility for recommending the appointment and reappointment of Chief Executive Officers (CEOs) to the Governor.

Under amendments to section 51, the Commissioner has acquired the capacity to direct a public sector employee to act in the role of CEO if required.

Prior to the 2010 amendments, the Act prescribed these responsibilities to the Premier.

The Committee is satisfied with the provisions in section 51 that allow the Commissioner to direct a public sector employee to act in the role of Chief Executive Officer.

Finding 4

Page 26

While the Commissioner has assumed the Premier's former responsibilities for CEO employment-related matters under the 2010 amendments, current processes appear to indicate there is sufficient opportunity for ministerial involvement in decisions relating to CEO appointments and reappointments.

Finding 5

Page 28

The 2010 amendments to section 47 removed the requirement for the Premier to sign off on CEO performance agreements and assessments.

Finding 6**Page 35**

The financial performance of a department against its budgeted appropriation is not currently included as a measurable component for CEOs within the performance management framework as prescribed by the Public Sector Commissioner under Approved Procedure 8 – Timing and assessment of CEO performance agreements.

Finding 7**Page 35**

Multi-stakeholder input is a feature of the CEO performance assessment frameworks in place in the Commonwealth and NSW jurisdictions.

Recommendation 1**Page 35**

The Premier seek and report on any response from the Public Sector Commissioner regarding the possibility of the Commissioner amending Approved Procedure 8 – Timing and assessment of CEO performance agreements, to ensure:

- the financial performance of the department against the budgeted appropriation is incorporated as one of the required components of a CEO performance agreement; and
- the annual CEO performance assessment process includes formal participation of Treasury and the Public Sector Commissioner regarding the achievements of CEOs against relevant performance criteria.

Finding 8**Page 43**

Under the amendment to section 49, the Public Sector Commissioner has assumed responsibility for recommending the Governor remove a CEO. This responsibility was formerly with the Premier.

The deletion of the former section 48 means that the Commissioner is not required to consult anyone before making such a recommendation. However, the Commissioner has confirmed the relevant minister would always be consulted prior to any decision being made under this section.

In practice, ministers retain a significant level of influence in the decision-making process prior to a CEO being removed from office under section 49.

Recommendation 2**Page 43**

The Premier seek and report on any response from the Public Sector Commissioner regarding the possibility of the Commissioner ensuring that the relevant minister continues to be consulted when a recommendation to remove a CEO is being considered under section 49 of the PSM Act.

Finding 9**Page 47**

Under the amendment to section 50, the Public Sector Commissioner has assumed the former responsibility of the Premier for recommending to the Governor the transfer of a CEO. Notwithstanding this amendment, there appears to be sufficient opportunity for ministerial input in the decision-making process relating to CEO transfers.

Finding 10**Page 61**

Commissioner's Instructions pertain to operations within the public sector for which the Commissioner should be given reasonable scope to discharge his or her statutory functions under section 21A of the *Public Sector Management Act 1994* (WA).

Finding 11**Page 61**

In the absence of further evidence regarding the pros and cons of making all Commissioner's Instructions disallowable, the Committee believes there is no need to depart from the current practice. Still, the Committee believes the practical outcomes of Commissioner's Instructions should continue to be monitored by Parliament and the wider community.

Finding 12**Page 80**

The requirements of Commissioner's Instruction No. 3: *Discipline – general*, apply only to employing authorities whose employees fall within the disciplinary provisions of Part 5 of the *Public Sector Management Act 1994* (PSM Act). Disciplinary investigations of employees not captured under the PSM Act are conducted under the provisions of other instruments.

Finding 13**Page 80**

Standardising the procedural requirements in Commissioner's Instruction No. 3: *Discipline – general*, so that they also apply to disciplinary proceedings outside the current remit of the *Public Sector Management Act 1994*, would promote efficiency by encouraging the development of a more uniform disciplinary regime.

Recommendation 3**Page 81**

The Premier seek and report on any response from the Public Sector Commissioner regarding the possibility of the Commissioner amending Commissioner's Instruction No. 3: *Discipline – general*, or issuing a new Instruction, to ensure the procedural requirements of the Instruction apply beyond its current remit to cover disciplinary proceedings conducted under other instruments outside Part 5 of the *Public Sector Management Act 1994*.

Finding 14**Page 81**

A set of rules defining procedural fairness need not be made explicit within Commissioner's Instruction No. 3: *Discipline – general*, as they are explained in

reasonable detail in the various supporting documents accompanying the Instruction. However, the Instruction should make clear the requirement for employing authorities to observe procedural fairness when undertaking disciplinary proceedings.

Recommendation 4

Page 81

The Premier seek and report on any response from the Public Sector Commissioner regarding the possibility of the Commissioner amending Commissioner's Instruction No. 3: *Discipline – general*, to include an explicit, and binding, statement that employing authorities are required to ensure procedural fairness is applied to all parties during disciplinary proceedings.

Finding 15

Page 81

Commissioner's Instruction No. 3: *Discipline – general*, currently requires employing authorities to provide an employee with 'sufficient' detail of an allegation that forms part of a disciplinary proceeding under Part 5 of the *Public Sector Management Act 1994*. A requirement to provide specific details of such allegations would be more consistent with the fair and equitable process that the rules of procedural fairness are intended to promote.

Recommendation 5

Page 81

The Premier seek and report on any response from the Public Sector Commissioner regarding the possibility of the Commissioner amending Clause 1.4 of Commissioner's Instruction No. 3: *Discipline – general*, to require employing authorities to provide employees with the specific details of allegations made, prior to commencing disciplinary proceedings under Part 5 Division 3 of the *Public Sector Management Act 1994*.

Finding 16

Page 82

Commissioner's Instruction No. 3: *Discipline - general*, currently requires employing authorities to provide reasons for disciplinary decisions made under Part 5 of the *Public Sector Management Act 1994* only if requested by the employee under investigation. Making this process mandatory should ensure all employees are afforded this aspect of their rights, while encouraging employing authorities to make sure decisions relating to disciplinary actions are soundly-based.

Recommendation 6

Page 82

The Premier seek and report on any response from the Public Sector Commissioner regarding the possibility of the Commissioner amending Clause 1.9 of Commissioner's Instruction No. 3: *Discipline – general*, to require reasons for disciplinary decisions to be made available as a matter of course rather than at the request of the employee.

Finding 17**Page 85**

As a result of amendments to the *Public Administration Act 2004* in Victoria, the Public Sector Commissioner in that jurisdiction must decline to conduct any inquiry, review, or other activity required of them under the legislation, if the Commissioner considers that they have a conflict of interest in the relevant matter. This amendment was designed to protect the integrity and reputation of the Victorian Public Sector Commission.

Such an initiative may derive similar benefit in Western Australia, particularly if the Public Sector Commissioner feels that a conflict of interest or a perception of bias may exist when he is required to investigate the conduct of a Chief Executive Officer under Part 5 or Part 7 of the *Public Sector Management Act 1994*.

In making this finding, the Committee stresses that it is not calling into question the integrity of the current Commissioner in the performance of these functions to date.

Recommendation 7**Page 85**

The Premier consider incorporating into the *Public Sector Management Act 1994*, a conflict of interest and apprehended bias provision similar to the conflict of interest provision which exists under section 50 of the *Public Administration Act 2004* (Victoria).

Finding 18**Page 91**

The Public Sector Commission's monitoring and evaluation framework is a well-established process from which information relating to compliance issues can be obtained from across the sector.

Finding 19**Page 96**

While the Committee is generally satisfied with the compliance monitoring and reporting processes adopted by the Public Sector Commission, it believes there is scope for further enhancements in both areas via the use of employee exit interview data.

Recommendation 8**Page 96**

The Premier seek and report on any response from the Public Sector Commissioner regarding the possibility of the Commissioner considering ways in which key trends identified in employee exit interviews can be utilised for compliance monitoring activities and published in summary form in the Commission's annual State of the Sector report and Statistical Bulletin.

Finding 20**Page 98**

While the Committee's assessment of the compliance reporting framework is generally positive, it has identified some areas for improvement. Particularly problematic is the

current capacity of the Department of Education to provide a complete data set to the Annual Agency Survey questionnaire. Resolution of this issue, which the Public Sector Commission is currently working towards with the department, will go a long way to rectifying some anomalies currently evident in the State of the Sector Statistical Bulletin published by the Commission.

Finding 21

Page 107

The Committee is not convinced it is necessary to allow decisions relating to Breach of Standard Claims to be referable to the WA Industrial Relations Commission at this time.

Finding 22

Page 107

The Committee is concerned about the provisions within the *Public Sector Management (Breaches of Public Sector Standards) Regulations 2005* that generally preclude parties from being represented during a Breach of Standard Claim process.

Recommendation 9

Page 107

The Premier seek and report on any response from the Public Sector Commissioner regarding the possibility of the Commissioner facilitating amendments to the *Public Sector Management (Breaches of Public Sector Standards) Regulations 2005* to enable all parties the right to representation during a Breach of Standard Claim process.

Finding 23

Page 124

Under the 2010 amendments to the *Public Sector Management Act 1994*, the Public Sector Commissioner has acquired the powers to initiate Reviews and Special Inquiries (new sections 24B and 24H).

The powers to initiate Reviews and Special Inquiries previously rested exclusively with the Premier, in his capacity as Minister responsible for administering the Act. The Premier can still direct the Commissioner to conduct a Review or arrange for the holding of a Special Inquiry. The Commissioner can refuse to comply with such directions but must prepare written reasons for the failure to comply and include these in the Public Sector Commission's Annual Report.

Since the amendments have come into effect, the Commissioner has arranged for the holding of four Special Inquiries at the direction of the Premier.

Finding 24

Page 125

The Public Sector Commissioner has generally been proactive in his approach to publishing the final reports of Special Inquiries, Investigations, and Reviews despite having no prescribed requirement to do so. The one notable exception occurred with the delayed tabling of the final report of the *Review of the Relationship Between the Minister for Training and the Department of Training and Workforce Development*.

Recommendation 10**Page 125**

The Premier seek and report on any response from the Public Sector Commissioner regarding the possibility of the Commissioner continuing to apply the practice of openness in reporting to ensure all Special Inquiries, Reviews, and Investigations (with the exception of those relating to possible public interest disclosures), are tabled in a timely manner.

Finding 25**Page 127**

Special Inquirers currently have discretion as to whether or not evidence will be taken in public and / or made public at a later time. While the instances where special inquirers have directed that all evidence be kept confidential is rare, it is nonetheless worth considering ways in which the principle of disclosure can be promoted within the Special Inquiry provisions of the *Public Sector Management Act 1994*.

Recommendation 11**Page 127**

The Premier look at ways to amend to *Public Sector Management Act 1994* to encourage special inquirers to make evidence public whenever possible, while requiring them to provide detailed reasons whenever they issue a direction that material remain confidential.

Finding 26**Page 132**

While the Public Sector Commissioner is an independent statutory officer, there is capacity for the position to be accountable to both the Executive and the Parliament.

Finding 27**Page 138**

The transparency and integrity of the process for appointing the Public Sector Commissioner could benefit from parliamentary participation involving the committee system.

Recommendation 12**Page 138**

The Public Accounts Committee be consulted as part of the process for the appointment of Public Sector Commissioners.

Finding 28**Page 142**

The *Public Sector Management Act 1994* is silent on the process that is undertaken to reappoint the Public Sector Commissioner, although in practice the decision to reappoint rests with the Premier as Minister responsible for administering the Act.

The absence of a prescribed process relating to reappointment is evident in the enabling legislation for other statutory officers in Western Australia and other public sector chiefs across Australia.

Finding 29**Page 142**

Change is not required in the area of reappointment provisions for the Public Sector Commissioner. Based on the last two decades' experience in WA (and in Canberra), it appears that renewal occurs within the office of Commissioner without it having to be prescribed.

Finding 30**Page 150**

The Public Sector Commissioner is one of numerous statutory officers in Western Australia not subject to a prescribed performance management framework. This appears to reflect common practice for commissioners across other Australian jurisdictions.

Finding 31**Page 150**

Both Parliament and the Executive have roles to play in monitoring the performance of the Public Sector Commissioner, particularly given the expanded functions and responsibilities the position has assumed.

Recommendation 13**Page 151**

The Premier, as Minister responsible for administering the *Public Sector Management Act 1994*, examine means by which a framework can be established for regularly evaluating the performance of the Public Sector Commissioner where the statutory functions of the Commissioner are conducted for, or impact the operations of, the Executive branch of Government.

Finding 32**Page 154**

The amendments to the *Public Sector Management Act 1994* have vested the Public Sector Commissioner with an unprecedented level of independence and power and an increased range of functions and responsibilities. At the same time, these amendments have also expanded the position's reporting obligations to the Parliament when compared with former commissioners. For example, the Commissioner is now required to report annually on the state of administration and management of the Public Sector.

These reporting obligations afford Parliament the opportunity to scrutinise the performance and many of the activities of the Commissioner.

Finding 33**Page 160**

The *Public Sector Management Act 1994* makes no provision for a particular committee to have oversight of the Public Sector Commissioner. This is consistent with practices observed in other Australian jurisdictions.

Finding 34**Page 162**

Given the significance of the Public Sector Commissioner's statutory responsibilities to the Parliament under the *Public Sector Management Act 1994*, it is critical that the incumbent office holder's performance in these areas is subject to regular parliamentary oversight.

Recommendation 14**Page 162**

The Premier facilitate the establishment of a mechanism whereby the Public Sector Commissioner is subject to regular oversight through the parliamentary committee system. Ideally, this oversight should encompass functions similar to those currently prescribed to the Joint Standing Committee on the Commissioner for Children and Young People: namely, to examine the reports of, and consult with, the Commissioner.

Chapter 1

Background to the Inquiry

- 1.1 The public sector is the state's largest employer. As at June 2013, it comprised 110,544 Full Time Equivalent (FTE) positions with 138,863 staff employed.¹ It is crucial that an entity this size is appropriately structured, managed, and administered, and for more than 100 years now, Western Australia (WA) has had some form of legislation in place directed towards achieving this aim.
- 1.2 Since 1904, this legislation has provided for a leadership role as part of the bureaucracy, charged with overseeing the efficient and effective operation of the public sector and the conduct of public servants. This position has continued in various manifestations in the years that have followed, and there have been periods where some functions have been assumed by political office holders.
- 1.3 The current legislation overseeing public sector management and administration is the *Public Sector Management Act 1994* (the PSM Act). The PSM Act underwent significant reform in 2010, part of which included the formal establishment of a new position heading the public sector, called the Public Sector Commissioner (the Commissioner). This position had been established by the Premier under delegated authority in 2008 with former Director General of Department of Premier and Cabinet, Mr Malcolm Wauchope, appointed to the role.

Commentary on the amended *Public Sector Management Act 1994*

- 1.4 The amendments to the PSM Act passed in 2010 have granted an unprecedented level of power to the Commissioner over operations within the WA public sector. The shift in powers towards the Commissioner has been noted, with some disquiet, by the state's most eminent judicial officer, Chief Justice Wayne Martin.
- 1.5 On 1 August 2013, Chief Justice Martin delivered the annual Whitmore Lecture in Sydney before the Council of Australasian Tribunals. His lecture was entitled *Forewarned and Four-Armed—Administrative Law Values and the Fourth Arm of Government*, and his focus was on a group of statutory offices in WA that he

1 Public Sector Commission, *State of the sector report 2013*, 19 November 2013, Cover Letter, p. 3. Available at: http://www.publicsector.wa.gov.au/sites/default/files/documents/state_of_the_sector_report_2013.pdf. Accessed on 22 May 2014.

Chapter 1

referred to as “integrity agencies”. These agencies included the Public Sector Commissioner, along with the Auditor General; the Ombudsman; the Information Commissioner; the Inspector of Custodial Services; the Corruption and Crime Commission (CCC); the Parliamentary Inspector of the CCC; and the Commissioner for Children and Young People.

- 1.6 The Chief Justice was concerned about the level of transparency and accountability that accompanied the operation of these agencies, given the powers they had been granted by the WA Parliament.
- 1.7 Notably, the Chief Justice expressed some alarm at the degree of independence and power the Public Sector Commissioner now exercised, particularly in the management and administration of public sector bodies. He went on to acknowledge the role that independent integrity agencies had to play, but argued the balance between independence and accountability had shifted too far towards independence.²
- 1.8 The Whitmore Lecture prompted a series of opinion pieces in the WA print media.³ During this period the Commissioner, Mr Wauchope, responded publicly to the commentary that had emanated from the Chief Justice’s speech, telling *The Weekend West*:

*In my view, academia is an appropriate forum for such theoretical concepts to be explored and debated and, the Chief Justice’s speech aside, the concept has not to my knowledge attained any broader gravitas in the State to date.*⁴

Inquiry into the 2010 amendments to the *Public Sector Management Act 1994*

- 1.9 The Whitmore Lecture also generated interest within the Parliament, where several members acknowledged the potential significance of the points raised by the Chief Justice regarding the power and accountability of the Public Sector Commissioner (and other integrity offices).⁵

2 Chief Justice Wayne Martin, *Whitmore Lecture 2013: Forewarned and Four-Armed – Administrative Law Values and the Fourth Arm of Government*, 1 August 2013. Available at: <http://www.aspg.org.au/conferences/perth2013/Whitmore%20Lecture%202013%20Chief%20Justice%20Martin%201%20Aug%202013.pdf> Accessed on 12 May 2014.

3 See for example, Paul Murray, 'Who is watching the integrity watchdogs?', *West Australian*, 7 August 2013, p. 24; Paul Murray, 'An act of betrayal in public accountability', *West Australian*, 14 August 2014, p. 22.

4 Gary Adshead, 'Wauchope hits back at critical comments', *The Weekend West*, 24 August 2013, p. 30.

5 Mr Paul Papalia MLA, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 14 August 2013, pp. 3431-3435; Mr John Quigley MLA, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 15 August 2013, pp. 3545-3547; Hon Mark McGowan MLA, Leader of the Opposition,

- 1.10 Members of the Public Accounts Committee (the Committee) had also noted the content of the Whitmore Lecture and asked the Chief Justice to a briefing to elaborate on the issues he had raised. Following those discussions—and noting the interest from other members of the Parliament—the Committee resolved on 26 September 2013 to examine and report on the PSM Act in light of the reforms that were passed in 2010. The Committee decided to consider the following issues:
- 1) The current functions and powers of the Public Sector Commissioner with a particular emphasis on:
 - a. the provisions relating to the appointment and management of Chief Executive Officers;
 - b. the establishment and monitoring of public sector standards, codes of ethics, and codes of conduct;
 - c. the application and operation of Commissioner’s Instructions;
 - d. the provisions relating to reviews and special inquiries; and
 - 2) The respective roles of the Commissioner and relevant Ministers, and the reporting provisions and accountability framework applicable to the Commissioner, in the discharge of these functions and powers.

Objectives of the Inquiry

- 1.11 The Committee believes that it is important for the Parliament to remain appropriately informed as to the adequacy of legislation governing public sector management and administration. The Committee also shares the view—conveyed by the Commissioner during the subsequent course of this Inquiry—that Parliament is ‘the proper domain for adjudicating on whether the statutory framework [for the public sector] is appropriate for current needs and expectations.’⁶
- 1.12 The Committee felt an Inquiry into the PSM Act was timely and undertook its work with four objectives in mind:

and Hon Michael Sutherland, Speaker, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 20 August 2013, pp. 5-7.

6 Submission No. 5 from the Public Sector Commission, 14 November 2013, Covering Letter, p. 1.

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- 1) To provide Parliament with a greater understanding of what has been acknowledged by some eminent former members as a highly complex piece of legislation.⁷
 - 2) To report on how the amendments passed in 2010 have manifested in practice.
 - 3) To report on the extent to which the PSM Act in its current form promotes a public sector that is balanced between operational independence and responsiveness to the policy agenda of an elected government.
 - 4) To report on whether the accountability and transparency provisions in place for the Commissioner are commensurate to the increased level of responsibility the position has assumed.
- 1.13 The Committee would like to acknowledge some limitations at the outset of this report. Neither the Inquiry nor this final report is intended to be definitive or exhaustive. The Committee concurs with the Hon Norman Moore's observation during the debate on the amendments that '[t]rying to become an expert on the *Public Sector Management Act* is virtually impossible.'⁸
- 1.14 Similarly, the Committee did not attempt to examine every amendment that was passed, focusing instead on what it deemed to be some of the more salient transfers in responsibilities and power to the Commissioner.
- 1.15 The Committee also recognises there is an element of subjectivity in any findings that are made in relation to objectives 3 and 4. In particular, the question of what is an appropriate balance between independence and responsiveness has been a vexed issue in Westminster systems for over 200 years.⁹ Professor John Nethercote from the Public Policy Institute at the Australian Catholic University has observed that there remains 'an absence of any settled philosophy of how they [senior public officers] fit into contemporary government and what role they should play.'¹⁰

7 D.L Smith, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 7 June 1994, p. 1084; Hon Norman Moore, Leader of the Government, WA, Legislative Council, *Parliamentary Debates* (Hansard), 14 September 2010, p. 6444.

8 Hon Norman Moore MLC, Leader of the Government, WA, Legislative Council, *Parliamentary Debates* (Hansard), 14 September 2010, p. 6444.

9 Professor John Nethercote, Adjunct Professor, Canberra Campus, Australian Catholic University, Canberra, Briefing, 27 March 2014.

10 *ibid.*

- 1.16 The Committee notes that a report of the previous Public Accounts Committee in 2009 (referred to at 2.23 below) examined this same question and conceded that it is always going to be subject to debate.¹¹
- 1.17 The philosophical position of this Committee is that the Commissioner has an important role to play in ensuring that the public sector does not become politicised. However, this has to be balanced against the Commissioner's statutory obligation for the Public Sector:
- ... to be so structured and organised as to achieve and maintain operational responsiveness and flexibility, thus enabling it to adapt quickly and effectively to changes in government policies and priorities.*¹²
- 1.18 While adopting these contrasting positions, the Committee nonetheless remains wary of the general historical observation of former Premier, the Hon Richard Court—that independent officers who assume significant powers, 'often ... tend to overreach.'¹³
- 1.19 In this respect, the findings and observations made by the Committee are driven by the belief that the Commissioner should possess what Professor Nethercote refers to as 'sufficient independence' from the Executive in a range of functions. This applies particularly to the areas covered in Chapters Four through Seven. However, where this independence is exercised, the Commissioner should remain appropriately accountable to the Parliament.
- 1.20 While the Committee makes some critical comments throughout this report, the report should not be read as a performance assessment of the current Commissioner.
- 1.21 The ultimate aim of the Committee is to inform Parliament as to how the current regulatory regime operates three years since the amendments took effect and, where appropriate, to offer suggestions on how some accountability processes might be improved.

Acknowledgements

- 1.22 Throughout the course of this Inquiry, the Committee has consulted with current and former statutory officers including a selection of interstate Commissioners. The Committee has also spoken with parliamentary oversight

11 Public Accounts Committee, *Report of the Inquiry Into the Implications of the New Structure and Functions of the Department of the Premier and Cabinet and the Public Sector Commission*, 11 June 2009, pp. 32-34.

12 Section 7(b) *Public Sector Management Act 1994* (WA) current.

13 Hon Richard Court AC, *Transcript of Evidence*, 7 May 2014, p. 3.

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committees in the Commonwealth and Victorian Parliaments, and several academics specialising in comparative public sector management models. These entities and individuals are listed in Appendices Three and Four and the Committee would like to formally acknowledge their contributions.

- 1.23 The Committee would also like to specially acknowledge the ongoing cooperation and assistance it received throughout the Inquiry from the Public Sector Commissioner, Mr Mal Wauchope, and his Executive team of: Ms Fiona Roche; Mr Dan Volaric; Ms Rebecca Harris; Mr John Lightowlers; and Mr Lindsay Warner.

Key definitions

- 1.24 There are several key terms that are referred to frequently throughout the report. Most prominent among these are “public sector” and “public service”. Information on these terms, as they are currently defined, is included in the text box immediately below. Where appropriate in subsequent chapters, similar text boxes are included to assist the reader.

What constitutes the “public sector”?

*The public sector is defined under section 3 of the Public Sector Management Act 1994 (the PSM Act) as: all **agencies**, ministerial offices and **non-SES organisations**.*

*Agencies are defined as departments established under section 35 of the PSM Act or **SES-organisations**.*

*(The acronym “SES” in this context refers to the **Senior Executive Service**, a cohort of employees appointed to executive roles as defined under section 43(1) of the PSM Act and Regulation 6 of the Public Sector Management (General) Regulations 1994).⁺*

SES and non-SES organisations are both established for public purposes under written laws to perform defined statutory functions. Each is usually responsible to a Minister through a board, but non-SES organisations commonly have a degree of operational independence. The Rottnest Island Authority is an example of an SES Organisation. The Corruption and Crime Commission is an example of a non-SES organisation.⁺⁺

The most recent [Chart of the Western Australian Government](#) indicates that there are currently 40 departments, 46 SES-organisations, and at least 52 non-SES organisations within the state public sector.

What constitutes the “public service”?

Under section 34 of the PSM Act, the public service is constituted by: all departments; and any SES-organisations that contain Senior Executive Service positions within their organisational structure; all persons employed within those entities; and any other persons employed under Part 3 of the PSM Act.

⁺ Ms Rebecca Harris, Director, Office of the Commissioner, Public Sector Commission, Email, 26 June 2014.

⁺⁺ Public Sector Commission, [State of the sector statistical bulletin 2013](#), November 2013, pp. 99-100.

Chapter 2

Evolution of Public Sector Management Legislation in WA

- 2.1 Before considering the operation of the current PSM Act in greater detail, this chapter looks to provide a brief historical overview of public sector legislation up to and including the 2010 amendments.
- 2.2 This overview is intended to be brief, and selective, with the focus being on the elements of public sector management and administration that are highlighted in the Inquiry's terms of reference.

The evolution of public sector legislation in WA

- 2.3 The *Public Service Act 1904* made provision for the Governor to appoint a Public Service Commissioner who would be responsible for 'ensur[ing] the establishment and continuance of a proper standard of efficiency and economy' in what was then called the Public Service.¹⁴ For this purpose, the Commissioner was expected, 'as far as practicable', to inspect the operations of each department and 'the character of work performed by every officer therein.'¹⁵ The Commissioner acquired broad investigatory powers to ensure compliance with the Act and could make recommendations to the Governor regarding the general structure of the public service, including the 'disposition of officers and offices.'¹⁶
- 2.4 A three-member Appeal Board, which included the Commissioner, was established to hear appeals against decisions made by the Commissioner relating to the classification of positions and penalties imposed on officers found to have breached the Act.¹⁷
- 2.5 The Commissioner was required to report sporadically to the Governor and at least annually to the Parliament on the performance of his functions. The report to Parliament had to include notice of any confirmed breaches of the Act and 'set forth any changes and measures necessary for improving the method of the working of the Public Service.'¹⁸

14 Section 9(1) *Public Service Act 1904* (WA).

15 *ibid.*

16 *ibid.*, Sections 9(2) and 11.

17 *ibid.*, Sections 10, 47, and 49-51.

18 Section 14 *Public Service Act 1904* (WA). See also Section 8.

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- 2.6 The *Public Service Act 1978* repealed the 1904 legislation and abolished the position of the former Commissioner. In its place, a three-member Public Service Board (the Board) was established headed by a Chairman appointed for a seven-year term.¹⁹
- 2.7 The Board assumed many of the roles and investigatory powers of the former Commissioner under a mandate to ‘promote and maintain effective, efficient, and economic management and operation of the Public Service of the State.’²⁰
- 2.8 Notably, the Board was granted ‘exclusive authority’ over matters relating to the configuration of ‘offices’ and the employment and placement of public service staff. However, the process of making recommendations to the Governor still applied to: the configuration of ‘departments’; the designation of positions as ‘senior offices’ and the appointment and removal of individuals as senior officers or departmental heads.²¹ The new Act also made explicit that departmental heads were responsible to their Minister ‘for the general management of the Department’, but would also ‘consult and work with the Board’ to achieve optimal operational efficiency.²²
- 2.9 The former disciplinary framework was retained in a similar form with the Board now determining the application of penalties for a range of ‘offences’ listed in the Act. Under the new regime, aggrieved parties retained a right of appeal to a revised Public Service Appeal Board that had commenced operation in 1966.²³
- 2.10 The provision for reporting annually to Parliament on the ‘condition and efficiency of the Public Service’ was maintained.²⁴
- 2.11 In 1986, the Burke Government released a White Paper entitled *Managing Change in the Public Sector*. This was followed by the passage of the *Acts Amendment (Public Service) Act 1987*, which abolished the Board and reverted to a single Public Service Commissioner who assumed the Board’s responsibilities. Under the 1987 amendments, a Senior Executive Service (SES)

19 Section 6(1)-(3) *Public Service Act 1978* (WA).

20 *ibid.*, Sections 14(1) and 17-18.

21 *ibid.*, Sections 14(3) and 28-29. See section 3 for definition of ‘office’, ‘senior office’, and ‘department’.

22 *ibid.*, Section 27.

23 *ibid.*, Sections 44, 46(1)(d), 47, and 51. The Public Service Appeal Board was established under Part III of the *Public Service Arbitration Act 1966*.

24 *ibid.*, Section 15.

was established and departmental heads were designated as chief executive officers (CEOs).²⁵

The *Public Sector Management Act 1994*

2.12 By 1994, the structure and management of the public service under the Burke Government had been subject to strong criticism in two major reports. Both the 1992 Royal Commission into the Commercial Activities of Government (WA Inc Royal Commission) and the 1993 Independent Commission to Review Public Sector Finances (the McCarrey Commission) made a range of sweeping recommendations relating to various issues including employment practices and general conduct.

2.13 The recommendations for change in these reports were 'in the main given effect'²⁶ by a bill presented by then-Premier, the Hon Richard Court, in September 1993. The passage of this bill the following year saw the *Public Sector Management Act 1994* (the PSM Act) come into effect.

2.14 The purpose of the PSM Act was:

*... to provide for the administration of the Public Sector of Western Australia and the management of the Public Service and of public sector employment; to repeal the Public Service Act 1978; and to provide for related matters.*²⁷

2.15 Notable features of the PSM Act included:

- General principles of official conduct were articulated (under section 9).
- The position of Public Sector Commissioner was abolished and replaced by a Commissioner for Public Sector Standards. The new Commissioner was an independent statutory officer responsible for establishing and monitoring a code of ethics and standards of conduct for the sector, and reporting to relevant Ministers and to the Parliament on the compliance of departments with these standards and codes (s21).
- Responsibility for promoting the overall efficiency and effectiveness of the public sector moved from the former Commissioner to the Minister responsible for administering the new Act (the Premier as the Minister for Public Sector Management). In this capacity, the Premier would advise other

25 Sections 5 and 21 *Acts Amendment (Public Service) Act 1987* (WA); Submission No. 5 from the Public Sector Commission, 14 November 2013, p. 56.

26 Submission No. 5 from the Public Sector Commission, 14 November 2013, pp. 57-59.

27 Page 1 *Public Sector Management Act 1994* (WA).

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Ministers on any structural changes and policies relating to management that, in his or her opinion, were required for this purpose (s10(1)).

- The Premier acquired the capacity to arrange for reviews in respect to the operation of any public sector body and to direct 'Special Inquiries' into any matter relating to the Public Sector (ss10(1)(d), and 11).
- The Premier also oversaw the processes to be followed by CEOs for dealing with substandard performance or disciplinary matters within each department and recourse to the Public Sector Appeal Board was retained for certain administrative decisions (Part 5).
- While the new Commissioner undertook CEO recruitment processes, this was done on the advice of the Premier, who assumed responsibility for recommending appointments (and removals) to the Governor (ss45 and 49).
- The scope of the legislation was broadened so that it applied to a much greater proportion of public sector bodies (under the previous legislation, only one-fifth of public servants were within the Commissioner's jurisdiction).²⁸

2.16 For the next 14 years, the PSM Act operated without substantial change, notwithstanding the completion of several reports that examined various aspects of its operation.²⁹

The Public Sector Reform Bill 2009

2.17 In the lead up to the 2008 state election, the Liberal Party Opposition indicated its intention to reform the public sector by establishing a Public Sector Management and Standards Commissioner. This position would work independently of the Department of Premier and Cabinet (DPC) which, up until that time, had been responsible for discharging the Premier's functions under the PSM Act (see 2.15 above).³⁰

28 Hon Richard Court MLA, Premier, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 September 1993, p. 5026; J.F. Gregor (et al.), *Commission on Government Report No. 3* (1996), Perth, WA, p. 189.

29 These include: J.F. Gregor (et al.), *Commission on Government Report No. 3* (1996), Perth, WA; Gavin Fielding, *Review of Public Sector Management Act* (1996), Perth, WA; Des Kelly, *Public Sector Management Act 1994: Final Report of the Working Party Established to Provide Specific Recommendations on the Amendments Proposed by Commissioner Gavin Fielding* (1997), Perth, WA; The Machinery of Government Taskforce, *Government Structures for Better Results: The Report of the Taskforce Established to Review the Machinery of Western Australia's Government* (2001), Perth, WA; and Noel Whitehead, *Review of the Public Sector Management Act 1994* (2004), Perth, WA.

30 Liberal Party of Western Australia, *Government Accountability and Public Sector Management*, Media Statement, Downloaded from Liberal Party website 1 September 2008.

- 2.18 On 30 September 2008, the new Premier, the Hon Colin Barnett, established a new department known as the Public Sector Commission. Mr Mal Wauchope—who until that time had served as the head of the Department of Premier and Cabinet since 1997—was appointed as the CEO of the new department and acquired the title of Public Sector Commissioner.
- 2.19 By way of delegated authority available to the Premier under section 15 of the PSM Act, the new Commissioner assumed all functions administered by the Minister for Public Sector Management, with the exception of exercising powers relating to Special Inquiries and the employment of ministerial officers.³¹
- 2.20 Under the changes, the Commissioner for Public Sector Standards continued to oversee the administration of CEO recruitment processes and retained responsibility for establishing and monitoring compliance with ethical codes and standards.
- 2.21 The new Public Sector Commission commenced operation on 28 November 2008, with the Premier announcing:
- '[t]he separation of functions between the commission and the department [of Premier and Cabinet] gives clearer lines of duty and focus that will result in a more independent and professional public service.'*³²
- 2.22 On 13 July 2009, the Premier announced his intention to amend the PSM Act to implement further reforms including a merger of the roles of Public Sector Commissioner and Commissioner for Public Sector Standards. Mr Wauchope would perform the merged functions and would report to Parliament on the matters under the remit of the outgoing Commissioner for Public Sector Standards.³³
- 2.23 There had been an element of overlap in these two positions and the concept of merging the roles had been recommended a month earlier in a report of the Public Accounts Committee of the 38th Parliament (the PAC 2009 Report) that

31 Hon Colin Barnett MLA, (Premier), *Establishment of the Public Sector Commission and position of Public Sector Commissioner*, Media Statement, 30 September 2008.

32 *ibid.*; Hon Colin Barnett MLA, (Premier), *Public Sector Commission to deliver a better public service*, Media Statement, 28 November 2008.

33 Hon Colin Barnett MLA, (Premier), *Liberal-National Government moves to further reform the Public Sector*, Media Statement, 13 July 2009.

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looked into structure and functions of DPC and the Public Sector Commission.³⁴

- 2.24 In order to facilitate this merger, and to formally transfer to the new Commissioner the duties he was already performing under delegated authority (see 2.19 above), the Premier introduced the Public Sector Reform Bill 2009 (the Reform Bill) into the Legislative Assembly on 25 November 2009.

- 2.25 The Premier explained that the Bill:

... underpin[ned] the Public Sector Commissioner's capacity to operate as an independent statutory body with general responsibility for management and administration of the public sector ...

and added that;

*Overall, there will be a more logical and integrated approach to ensuring both management efficiency ... and appropriate standards of conduct and behaviour.*³⁵

- 2.26 During the debates on the Reform Bill, there was general support for establishing the Public Sector Commissioner as a statutory officer.³⁶ In the end, the majority of clauses were put and passed without debate and the Reform Bill was assented to on 1 October 2010. The subsequent amendments to the PSM Act relating to public sector administration took effect on 1 December 2010, while those relating to disciplinary procedures commenced on 28 March 2011.
- 2.27 The remainder of the report goes on to examine and assess how these amendments have manifested in practice, starting with the provisions for CEO appointment and performance management.

34 Public Accounts Committee, *Report of the Inquiry into the Implications of the New Structure and Functions of the Department of the Premier and Cabinet and the Public Sector Commission*, 11 June 2009, p. xiv.

35 Hon Colin Barnett MLA, Premier, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 25 November 2009, pp. 9769-9770.

36 See, for example: Hon John Kobelke MLA and Hon Eric Ripper MLA, Leader of the Opposition, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 June 2010, pp. 4256-4263; Hon Alison Xamon MLC, WA, Legislative Council, *Parliamentary Debates* (Hansard), 18 August 2010, pp. 5699-5701.

Chapter 3

Chief Executive Officer Appointment and Performance Management

Definitions

Employing Authority

- 3.1 For the purposes of this report, the employing authority of a chief executive officer (CEO) is the Public Sector Commissioner (the Commissioner), as defined by section 5(1)(a) of the current Public Sector Management Act 1994 (PSM Act).³⁷
- 3.2 The original PSM Act made the Minister responsible for administering the Act the employing authority for CEOs, but section 15 allowed the Minister to delegate their powers or duties, including the employing authority for CEOs.³⁸
- 3.3 The 2010 amendments conferred the employing authority functions of a CEO on the Commissioner and deleted section 15 - *Delegatory Power of the Minister*.³⁹
- 3.4 As such, the Commissioner is now the employing authority of approximately 76 CEOs.⁴⁰

Minister

- 3.5 'Minister' is defined in the PSM Act as 'the Minister to whom the administration of this Act is for the time being committed by the Governor'.⁴¹
- 3.6 In practice, the Premier has been the minister responsible for administering the PSM Act throughout its existence. Accordingly, any reference to 'the Minister' throughout the PSM Act will be cited as 'the Premier' within this report.

37 Public Sector Management Act 1994 (WA) current.

38 Public Sector Management Act 1994 (WA) original.

39 Public Sector Management Act 1994 (WA) current.

40 Submission No. 5 from Public Sector Commission, 14 November 2013, Covering Letter, p. 4.

41 Section 3 Public Sector Management Act 1994 (WA) current.

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Responsible Authority

- 3.7 A responsible authority is defined by section 3 of the current PSM Act, in relation to a department or organisation, as a board, or in the absence of a board, the minister responsible for that department or organisation.⁴²
- 3.8 The amendments passed in 2010 did not make any relevant changes to the definition of responsible authority.
- 3.9 For the purposes of this report, the relevant minister is the responsible authority for their respective government departments as established under section 35 of the PSM Act. The Public Sector Commission provided a list of agencies, 39 in total, that have a minister as the responsible authority.⁴³

Consult

- 3.10 The current PSM Act states the Commissioner must 'consult' with the Premier, and responsible minister on certain matters; for example, prior to a CEO transfer or acting arrangement.⁴⁴
- 3.11 'Consult' is not defined in the PSM Act.
- 3.12 The Committee requested the Commissioner provide a definition of what 'consult' means in practice. He provided the following:

*We have had previous legal advice – informally, not in writing – some years ago that advises that the intent of consultation is to have a clear mind in relation to a proposal. When consulting ministers – this can be undertaken in writing by either a formal letter or email, via a phone conversation or in a face-to-face discussion – it can be with the minister or with the minister's agent; that is, the chief of staff or some other recognised person.*⁴⁵

Governor

- 3.13 According to Section 60 of the *Interpretation Act 1984* (WA):

[W]here in a written law the Governor is authorised or required to do any act, matter or thing, it shall be taken to mean that such act,

42 *Public Sector Management Act 1994* (WA) current.

43 Submission No. 5a from Public Sector Commission, 12 March 2014.

44 Sections 50 and 51 *Public Sector Management Act 1994* (WA) current.

45 Mr Malcolm Wauchope, Public Sector Commissioner, Public Sector Commission, *Transcript of Evidence*, 12 March 2014, p. 2.

*matter, or thing may or shall be done by the Governor with the advice and consent of the Executive Council.*⁴⁶

- 3.14 'Executive Council' is defined as 'the formal meeting of the Governor with the Ministers of the Crown'.⁴⁷

Appointment, Reappointment and Acting Provisions

The evolution of public sector legislation in WA

- 3.15 In November 1990, following the political and business dealings of the 1980s known as 'WA Inc', the Royal Commission into Commercial Activities of Government and Other Matters was established by Premier, the Hon Carmen Lawrence. The final report was tabled nearly two years later and a critical finding was the lack of independence in public sector management. It was believed the merit principle had been jeopardised and people had been "parachuted" into the public sector.⁴⁸
- 3.16 The Royal Commission's report highlighted the importance of reinstating the merit principle when appointing public servants and recommended procedures for recruiting and appointing public sector CEOs. These procedures would give a proposed independent commissioner the responsibility for nominating a suitable candidate to the minister⁴⁹ after inviting the relevant minister to provide initial input on any matter they wished to be considered regarding the particular vacancy. A further recommendation made provision for the Governor to reject the nominee and appoint another person instead, noting the responsible minister would then be obligated to inform Parliament of the decision.⁵⁰

The Public Sector Management Act 1994

- 3.17 The Public Sector Management Bill (PSM Bill) was introduced to Parliament by the Hon Richard Court, Premier, in 1993. Once passed, the original PSM Act specified appointment, reappointment and acting appointment procedures for CEOs and the role of the ministers and the newly established Commissioner for

46 Section 60 *Interpretation Act 1984* (WA).

47 Phillips, Harry C.J., *A Citizen's Guide to the Western Australian Parliament*, State Law Publisher, Perth WA, 2006, p. 130.

48 *Royal Commission into Commercial Activities of Government and Other Matters*, Report Two, November 1992, para. 6.3.1. Available at: [http://www.slp.wa.gov.au/publications/publications.nsf/DocByAgency/EB7A73F79B8C4FCA482569850012E10E/\\$file/report2.pdf](http://www.slp.wa.gov.au/publications/publications.nsf/DocByAgency/EB7A73F79B8C4FCA482569850012E10E/$file/report2.pdf). Accessed on 14 May 2014.

49 While not specified in the Royal Commission's report, the Committee is under the assumption the 'minister' is the Premier.

50 *ibid.*, para. 6.3.5 and 6.3.8.

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Public Sector Standards (CPSS) in the process at sections 45, 46 and 51 respectively.⁵¹

- 3.18 Section 45 established the provisions for CEO appointment. The Governor had the authority to appoint a CEO on the recommendation of the Premier for a maximum of five years. The CPSS, after seeking advice from the Premier and the relevant minister, conducted the recruitment and provided the Premier with one or more suitable candidates. If the candidate was accepted by the Premier and the relevant minister, the nominee was recommended for appointment. If the nominee was rejected, the Premier could request a further nomination or recommend a different person for appointment. The decision to recommend a person not nominated by the CPSS needed to be published in the *Government Gazette* (the Gazette).⁵²
- 3.19 During the debates in Parliament the Opposition repeatedly claimed that the PSM bill further enabled the politicisation of CEO appointments. They argued the CEO appointment provisions allowed the Premier to override the recommendations of the CPSS and appoint a CEO of their choice.⁵³ They also raised concerns with the proposed dynamic between the CPSS, the Premier, and the CEOs, preferring the CPSS to 'have more control with a greater buffer between the Executive and the CEO'.⁵⁴
- 3.20 Mr Court argued that the obligation for the Premier to publish their decision to reject a CPSS' nomination would make the Premier 100 per cent accountable for the CEO's performance; therefore, it was in the best interest of the Premier to recommend the most suitably qualified person for appointment to the office of CEO.⁵⁵
- 3.21 This section was passed without any amendments being proposed, marking the first time since the introduction of the *Public Service Act in 1904* that a departmental head could be appointed on the recommendation of a Premier.⁵⁶
- 3.22 Section 46 of the original PSM Act enabled the Governor to reappoint an incumbent CEO for another five-year contract on the recommendation of the

51 *Public Sector Management Act 1994* (WA) original.

52 *ibid.*, Section 45.

53 Hon Dr Geoff Gallop MLA, Opposition Leader, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 07 June 1994, p. 1135.

54 Hon Kim Chance MLC, WA, Legislative Council, *Parliamentary Debates* (Hansard), 7 June 1994, p. 2313.

55 Hon Richard Court MLA, Premier, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 7 June 1994, p. 1136.

56 Section 17 *Public Services Act 1900* (WA); Section 18 *Public Services Act 1904* (WA); Section 29 *Public Service Act 1978* (WA).

Premier.⁵⁷ There was no limit to the number of times a CEO could be reappointed. Involvement of the CPSS was not written into the legislation for the reappointment of a CEO.

- 3.23 Without a legislated requirement for input from the CPSS, the Opposition was concerned the Premier held too much power in determining if CEOs were reappointed. However, the Government was confident the legislation included sufficient safeguards to prevent unchecked ministerial involvement in the CEO reappointment process.⁵⁸
- 3.24 Section 51 set out the provisions for the Premier to direct an employee to act as a CEO for a period not exceeding 12 months. Prior to giving such a direction the Premier was required to consult the relevant minister.⁵⁹ This section did not require involvement from the CPSS.
- 3.25 The PSM Act received royal assent in July 1994 and functioned largely unchanged for the next 14 years. In fact, a Select Committee from the Parliament of Tasmania's Legislative Council provided an interim report on Public Sector Executive Appointments in which the Western Australian model was cited as 'best practice'.⁶⁰

The Public Sector Reform Bill 2009

- 3.26 Following the Liberal Party's election victory in 2008, the new Premier, the Hon Colin Barnett, appointed Mr Mal Wauchop to the newly established role of Public Sector Commissioner (the Commissioner). Under the delegated authority of the Premier, the Commissioner assumed many of the functions legislated to the Premier in the original PSM Act, including those relating to CEO appointments (see 2.19 above).⁶¹
- 3.27 In November 2009 the Premier introduced the Public Sector Reform Bill 2009 (the Reform Bill) to Parliament. The introduction of the Reform Bill was widely supported by both Labor and the Greens with a few exceptions.⁶²

57 Section 46 *Public Sector Management Act 1994* (WA) original.

58 Hon Dr Geoff Gallop MLA, Opposition Leader and Hon Richard Court MLA, Premier, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 7 June 1994, p. 1138.

59 Section 51 *Public Sector Management Act 1994* (WA) original.

60 Legislative Council Select Committee, *Public Sector Executive Appointments*, Parliament of Tasmania, April 2009, p. 163.

61 Hon Colin Barnett MLA, (Premier), *Establishment of the Public Sector Commission and position of Public Sector Commissioner*, Media Statement, 30 September 2008.

62 Hon Eric Ripper MLA, Leader of the Opposition and Hon Fran Logan MLA, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 June 2010, pp. 4256-4299; Hon Alison Xamon MLC, WA, Legislative Council, *Parliamentary Debates* (Hansard), 18 August 2010, pp. 5697-5705;

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- 3.28 With regard to CEO appointments, in his second reading speech to the Legislative Assembly, the Premier indicated the Reform Bill would provide:

*...the capacity for the appointment of chief executive officers by the government of the day, but with such appointments limited to the term of government. While it is expected that, in most cases, a normal selection and appointment process will proceed, the minister responsible for public sector management will be empowered to require the commissioner to appoint a person nominated by the Minister. Such a requirement must be made transparently and accountably.*⁶³

This was consistent with the recommendation made in the 2009 PAC report (referred to at 2.23 above).

- 3.29 However, amendments were made to the first draft of the Reform Bill, prior to the consideration in detail debates, effectively removing the provision for the Minister to direct the Commissioner to recommend the appointment of a specified person to the office of CEO.⁶⁴

- 3.30 Despite the removal of this provision, support for ministerial-directed CEO appointments remained in the debate. The Leader of the Opposition, the Hon Eric Ripper stated there had to be 'residual power to direct the commissioner for accountability reasons.'⁶⁵ Later in the same debate, the Premier responded:

*There should be some limited scope for elected governments to appoint a person that they wish to appoint as long as it is very transparent and done openly...This bill proposes to give the government the right to appoint a CEO but only to do so for its term of government.*⁶⁶

- 3.31 Confusion over the status of the ministerial-directed CEO appointment provisions continued during the second reading speeches in the Legislative

Hon Ljiljanna Ravlich MLC, WA, Legislative Council, *Parliamentary Debates* (Hansard). 18 August 2010, pp. 5697-5698.

63 Hon Colin Barnett MLA, Premier, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 25 November, pp.9769-7990. During his second reading speech the Premier was referencing section 45(11) and section 45(12) from the first draft of the Public Sector Reform Bill 2009.

64 Hon Colin Barnett MLA, Premier, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 June 2010, pp. 4460-4470.

65 Hon Eric Ripper MLA, Leader of the Opposition, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 June 2010, pp. 4460-4470.

66 Hon Colin Barnett MLA, Premier; WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 June 2010, pp. 4460-4470.

Council until the Hon Norman Moore clarified the changes to the first version of the Bill:

*Amendments moved by the government in the other place have removed from the bill the capacity for government to direct the Public Sector Commissioner to appoint a person as CEO on a term-of-government basis. This came about following consultation on the original bill with the numerous stakeholders, including the opposition...The appointment of CEOs in the public sector will be the responsibly of the PSC. There is no provision in the bill for those appointments to be made on a term-of-government basis or for a minister to direct the PSC to appoint a particular person.*⁶⁷

- 3.32 The Legislative Council passed the sections relating to CEO appointment, reappointment and acting appointment procedures without amendment.

- 3.33 According to the Public Sector Commission:

*The removal of the Premier in much of the process has lessened the potential for political interference in the recruitment and appointment of CEOs... it has, in some ways, returned the arrangements to those previously operating under the Public Services Act 1978.*⁶⁸

- 3.34 In addition, by abolishing the office of the Commissioner for Public Sector Standards, the process for recruiting, appointing, reappointing and managing acting arrangements of CEOs became more streamlined.⁶⁹

Finding 1

The Public Sector Reform Bill 2009 received Royal Assent on 1 October 2010 resulting in a series of amendments to the *Public Sector Management Act 1994* (WA).

As a result of these amendments there is no longer capacity to appoint a person as Chief Executive Officer (CEO) on a term-of-government basis.

Amended *Public Sector Management Act 1994* in practice

CEO Appointment

- 3.35 The Committee held a public hearing with the Commissioner at which he stated:

67 Hon Norman Moore MLC, Leader of the House, WA, Legislative Council, *Parliamentary Debates* (Hansard), 14 September 2010, pp.6421-6430.

68 Submission No. 5 from Public Sector Commission, 14 November 2013, p. 12.

69 *ibid.*, p.11.

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*While the legislation was amended in 2009, in practice, the processes for selection of CEOs were pretty well set back when the inaugural Public Sector Standards Commissioner, Digby Blight, was appointed, and pretty well everyone has followed the same processes subsequently.*⁷⁰

- 3.36 While the process itself may not have changed in practice, the authority of key decision-makers involved in CEO appointment, reappointment and acting CEO arrangements certainly has. In essence, the amendments formalised the fact that the Commissioner now has the responsibilities previously held by the Premier, but exercised by the Commissioner under delegated authority since 2009.
- 3.37 Under the PSM Act it is now the responsibility of the Commissioner to recommend to the Governor the appointment of a CEO.⁷¹
- 3.38 Section 45(4) of the PSM Act requires the Commissioner to invite the Premier, the responsible authority, and the responsible minister (if they are not the responsible authority), to inform the Commissioner of ‘any matters’ they wish to be taken into account during recruitment.⁷²
- 3.39 This is the last stage where the Premier is required, under the legislation, to be involved in the recruitment process. However, the PSM Act permits ongoing discussions between the ‘Commissioner and a Minister, concerning the selection, appointment or reappointment of a CEO’.⁷³
- 3.40 In practice, prior to commencing the recruitment process the Commissioner will meet with the relevant stakeholders to discuss the priorities for the job, the general characteristics being sought, and any prospective panel members.⁷⁴
- 3.41 Noting the removal of the ability for a minister to direct a CEO appointment, the Committee asked the Commissioner if provisions existed under the amended legislation for a minister to identify a potential CEO candidate. The Commissioner responded as follows:

In going through a recruitment process I would always say to the minister that if they were aware of anybody out there that should be considered, let me know and we will put their name to the consultant.

70 Mr Malcolm Wauchope, Public Sector Commissioner, *Transcript of Evidence*, 12 March 2014, p. 5.

71 Section 45(1) *Public Sector Management Act 1994* (WA) current.

72 *ibid.*, Section 45(4).

73 *ibid.*, Section 105(2)(b)(ii).

74 Mr Malcolm Wauchope, Public Sector Commissioner, *Transcript of Evidence*, 12 March 2014, p. 5.

*That is certainly available and I think encouraged, because we try and get as wide a field as we can.*⁷⁵

- 3.42 Once the position and required qualifications have been identified, the Commissioner advertises the vacancy.
- 3.43 The PSM Act permits the Commissioner to seek advice from other sources considered relevant. In addition, the Commissioner may invite such other persons to assist in deciding the person(s) most suitable for appointment.⁷⁶ This section basically allows the establishment of a selection panel, an opportunity for the relevant minister to meet potential candidates, and it also enables the Commissioner to engage the services of a recruitment agency if necessary.
- 3.44 The selection panel is established under the Commissioner's authority, with input from the relevant minister, and is typically comprised of a Director General from a relevant agency, industry experts, and representatives from within the public sector.⁷⁷
- 3.45 From the written applications the panel will likely interview five or six applicants and establish a refined shortlist. The Commissioner prefers to provide a selection of suitable candidates, ideally three, to the relevant minister. The final decision lies with the Commissioner, but once the relevant minister indicates a preference, that name is forwarded to the Premier. If the Premier is satisfied with the preferred candidate the Commissioner will draft a Cabinet submission to recommend the appointment of that person.⁷⁸
- 3.46 If the responsible minister or Premier rejected the Commissioner's nominee the panel would conduct further recruitment to identify an alternative candidate. In practice there has only been one instance of a minister rejecting all nominees.⁷⁹
- 3.47 The Committee questioned what would happen should the Premier reject the alternative candidates. The Commissioner provided the following response:

There would be serious conversations between the Premier, myself and the responsible minister. The options open to use are: we could go out for further nominations, we could extend the search process, we could

75 Mr Malcolm Wauchope, Public Sector Commissioner, *Transcript of Evidence*, 12 March 2014, p.9.
 76 Section 45(7) *Public Sector Management Act 1994* (WA) current.
 77 Mr Malcolm Wauchope, Public Sector Commissioner, *Transcript of Evidence*, 12 March 2014, p. 5.
 78 *ibid.*, p. 6.
 79 Mr Dan Volaric, Deputy Public Sector Commissioner, Public Sector Commission, *Transcript of Evidence*, 12 March 2014, p. 7.

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*consider a transfer of someone within the system if that was appropriate, or we could elect not to make an appointment at that time.*⁸⁰

- 3.48 While the opportunity for direct ministerial involvement in the selection process was removed with the 2009 amendments, the Commissioner believes appropriate checks and balances exist in the selection process, as ‘any recommendation for appointment of a CEO is referred to Cabinet prior to being submitted to the Governor.’⁸¹

CEO Reappointment

- 3.49 Section 46 of the PSM Act has shifted the responsibility for recommending an incumbent CEO for reappointment from the Premier to the Commissioner. If the Commissioner recommends reappointment the Governor shall reappoint the incumbent for a term not exceeding five years. If a reappointment is not recommended the vacancy shall be filled according to normal CEO appointment provisions.⁸²
- 3.50 The PSM Act does not require consultation with the relevant minister, but the Commissioner considers this consultation to be ‘good practice’ to determine support for CEO reappointment.⁸³
- 3.51 If the CEO wishes to continue in their role and the relevant minister supports the decision, the Commissioner drafts a Cabinet submission. If the reappointment is endorsed by Cabinet the Commissioner recommends reappointment to the Governor.⁸⁴

Acting CEO Arrangements

- 3.52 The Commissioner may direct someone to act in the office of a CEO during a vacancy or absence for a period not exceeding 12 months. However, an acting CEO appointment can be renewed repeatedly.⁸⁵ Prior to giving such a direction the Commissioner must consult the relevant minister. The Commissioner may cancel such direction at any time.⁸⁶

80 Mr Dan Volaric, Deputy Public Sector Commissioner, Public Sector Commission, *Transcript of Evidence*, 12 March 2014, p. 8.

81 Submission No. 5 from Public Sector Commission, 14 November 2013, p. 8.

82 Section 46 *Public Sector Management Act 1994* (WA) current.

83 Mr Malcolm Wauchope, Public Sector Commissioner, *Transcript of Evidence*, 12 March 2014, p. 10.

84 Submission No. 5 from Public Sector Commission, 14 November 2013, p. 18.

85 Mr Malcolm Wauchope, Public Sector Commissioner, *Transcript of Evidence*, 12 March 2014, p. 4.

86 Section 51 *Public Sector Management Act 1994* (WA) current.

Finding 2

The Public Sector Commissioner may direct someone to act in the office of a CEO during a vacancy or absence for a period not exceeding 12 months. However, a number of acting CEOs have had their position renewed for an additional period of time.

- 3.53 The requirement to consult with the relevant minister is quite clear in the legislation, in practice this consultation would likely involve identifying relevant portfolio issues, the duration of the acting arrangement, the capacity of the employee, and if any actual or perceived conflicts of interest exist and how these could be potentially managed.⁸⁷
- 3.54 An acting CEO cannot be recruited from outside the public sector, but the Commissioner can use this provision as an opportunity for professional development of a public sector employee, for example, a deputy director general may step into the CEO role.⁸⁸
- 3.55 As at 30 April 2014, there were five acting departmental CEOs in the Western Australian Public Sector and the duration of these current acting arrangements ranges from two to thirteen months.⁸⁹

Notable practices in other jurisdictions

- 3.56 The Premier (or Prime Minister) is the employing authority of CEOs in Victoria, New South Wales (NSW), and the Commonwealth, and retains a reasonable degree of influence over the CEO selection process.⁹⁰ Evidence indicates the respective Commissioners are consulted on matters relating to CEO appointment, reappointment and acting appointments in some form or another.
- 3.57 Similar to Western Australia, the New Zealand model places the responsibility for appointing, reappointing and directing acting CEOs with the State Services Commissioner.⁹¹

Commonwealth

- 3.58 Under the *Public Service Act 1999*, amended by the Public Service Amendment Bill 2013, CEOs (known as Secretaries) are appointed by the Governor General

87 Submission No. 5 from Public Sector Commission, 14 November 2014, p. 19.

88 Mr Malcolm Wauchope, Public Sector Commissioner, *Transcript of Evidence*, 12 March 2014, p. 4.

89 Public Accounts Committee, CEO Survey 2014 (closed evidence).

90 *Public Administration Act 2004* (Victoria); *Government Sector Employment Act 2013* (NSW); *Public Services Act 1999* (Commonwealth).

91 *State Sector Amendment Act 2013* (New Zealand).

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on the recommendation of the Prime Minister for a contract of up to five years.⁹²

- 3.59 When there is a vacancy at the CEO level (apart from the Department of Prime Minister and Cabinet) the Secretary of the Department of Prime Minister and Cabinet (Secretary PMC) liaises with the Australian Public Service Commissioner (the APS Commissioner) and seeks input from the relevant ministers and the Prime Minister. A report is drafted by the Secretary PMC recommending a candidate for appointment. Any dissenting opinions of the Secretary and the APS Commissioner are included in the report which is then provided to the Prime Minister (the 2013 amendments formalised the requirement that the APS Commissioner is to be consulted in finalising a report). While the Prime Minister is not bound to accept the recommendation, the APS Commissioner could not recall any situation when the recommended candidate was rejected. In the case of the Secretary PMC the report is prepared by the APS Commissioner.⁹³
- 3.60 CEOs are appointed for terms of up to five years. They are eligible for re-appointment.⁹⁴

Victoria

- 3.61 CEOs (known as Department Heads or Secretaries) are appointed by the Premier on a contract of up to five years.⁹⁵ In practice, the Premier seeks advice from the Secretary of the Department of Premier and Cabinet (DPC) regarding CEO appointments and reappointments.⁹⁶
- 3.62 Recent amendments to the Victorian *Public Administration Act 2004* established a Victorian Public Sector Commission headed by a single Commissioner. Although not formally in the legislation, it is envisioned the Secretary of DPC may consult with the new Victorian Commissioner when recommending CEOs for appointment. The Premier is empowered to appoint any person but, in practice, generally seeks advice from the Secretary of DPC.⁹⁷

New South Wales

- 3.63 The *Government Sector Employment Act 2013* came into operation in early 2014. Under this Act the Premier is the employer of CEOs (known as

92 *Public Service Act 1999* (Commonwealth).

93 Mr Stephen Sedgwick AO, Australian Public Service Commissioner, Briefing, 27 March 2014.

94 *ibid.*

95 *Public Administration Act 2004* (Victoria).

96 Mr Andrew Tongue PSM, Secretary, Department of Premier and Cabinet (VIC), Briefing, 28 March 2014.

97 *ibid.*

Departmental Secretaries),⁹⁸ but the Premier may delegate the responsibility for CEO appointments to ‘an authorised person’.⁹⁹

- 3.64 The Premier, or their delegate, has the authority to appoint and terminate a CEO independently. However, in practice, the NSW Commissioner would be consulted prior to a decision being made on these matters.¹⁰⁰

New Zealand

- 3.65 By contrast, New Zealand has a framework more aligned with what is now in place under the current PSM Act in WA. The *State Sector Act 1988* (amended in 2013¹⁰¹) is very prescriptive in outlining the process for recruitment and appointment of CEOs. The State Services Commissioner is responsible for appointing CEOs and may sit on the CEO selection panel as Chairperson. A preferred candidate is identified then recommended to the Governor General in Council. If the recommendation is declined, the New Zealand model differs from WA in that the Governor General may direct the appointment of a ‘named person’. Notice of this direction must be published in the *Gazette*.¹⁰²

Committee considerations

- 3.66 The Committee supports the intent of the 2010 amendments in reducing the risk of undue political involvement in CEO employment matters. However, it was initially concerned that the transfer of responsibility for CEO appointment to the Commissioner might preclude ministers from having appropriate input into the appointment of agency heads. These concerns were exacerbated to a degree by the removal of 45(12) from the original PSM Act.¹⁰³
- 3.67 These concerns have been largely allayed, as the processes that have evolved under the amended legislation appear to afford sufficient opportunity for ministerial involvement in CEO appointments. Furthermore, while consultation with the relevant minister prior to CEO reappointment is not a statutory requirement, the Commissioner has confirmed he considers it ‘good practice’.

98 Section 26(2) *Government Sector Employment Act 2013* (NSW). The Committee notes, in NSW, the term Chief Executive Officer formally applies to the heads of other non-departmental public sector agencies.

99 *ibid.*, Section 81.

100 Mr Graeme Head, NSW Public Service Commissioner, Briefing, 26 March 2014.

101 *State Sector Amendment Act 2013* (New Zealand).

102 *ibid.*, Section 35.

103 Section 45(12) *Public Sector Management Act 1994* (WA) original. This section contained the provision for the Premier to recommend the appointment of a CEO not nominated by the CPSS. This provision was deleted by the 2010 amendments.

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- 3.68 The Committee is satisfied with the provisions contained in the PSM Act for directing a public sector employee to act in the office of CEO.

Finding 3

Under the 2010 amendments to sections 45 and 46 of the *Public Sector Management Act 1994*, the Public Sector Commissioner has formally assumed responsibility for recommending the appointment and reappointment of Chief Executive Officers (CEOs) to the Governor.

Under amendments to section 51, the Commissioner has acquired the capacity to direct a public sector employee to act in the role of CEO if required.

Prior to the 2010 amendments, the Act prescribed these responsibilities to the Premier.

The Committee is satisfied with the provisions in section 51 that allow the Commissioner to direct a public sector employee to act in the role of Chief Executive Officer.

Finding 4

While the Commissioner has assumed the Premier's former responsibilities for CEO employment-related matters under the 2010 amendments, current processes appear to indicate there is sufficient opportunity for ministerial involvement in decisions relating to CEO appointments and reappointments.

CEO Performance Management

- 3.69 During the Inquiry the Committee conducted a survey of departmental CEOs who have a minister as their responsible authority. The Committee received 34 responses, which have been aggregated and used as supporting evidence throughout this chapter.

Evolution of public sector legislation in WA

- 3.70 In the lead up to the original PSM Act, there was growing support for CEOs to take on more managerial responsibility for their respective departments.¹⁰⁴ The McCarrey Commission (see 2.12 above) called for an independent

¹⁰⁴ [*Royal Commission into Commercial Activities of Government and Other Matters, Report Two*](#), November 1992, para. 6.3.6.

commissioner to be ‘the custodian of CEO contracts and ensure an adequate system of performance monitoring and reporting is established’.¹⁰⁵

Public Sector Management Act 1994

- 3.71 Upon introducing the PSM Bill, the Hon Richard Court confirmed CEO performance agreements would become mandatory, arguing that:

*The authority of chief executive officers and boards of management to manage their organisations, balanced by appropriate accountability arrangements, are cornerstone principles of this legislation.*¹⁰⁶

- 3.72 Under the legislation that was subsequently passed, section 47 required a CEO to enter into a performance agreement with their relevant minister. The agreement needed to be drafted in accordance with the procedures set out by the CPSS and signed by the Premier, the relevant minister, and the CEO. The relevant minister was responsible for assessing the CEOs performance.¹⁰⁷
- 3.73 From 1994 to 2008 the PSM Act was the subject of numerous reviews, the majority of which supported the principle of CEO performance agreements.¹⁰⁸

Public Sector Reform Bill 2009

- 3.74 The proposed amendments to section 47 were largely administrative and necessary to reflect the intent of the Reform Bill. Primarily, the Premier was removed from the process. As a result, a CEO would enter into a performance agreement with the Commissioner and the relevant minister in accordance with the Commissioner’s Approved Procedure 8 – *Timing and assessment of CEO performance agreements*.¹⁰⁹

105 Independent Commission to Review Public Sector Finances, *Agenda for Reform*, Government of Western Australia, Perth, 1993, p. xxxix.

106 Hon Richard Court MLA, Premier, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 September 1993, pp. 5025-5026.

107 Section 47 *Public Sector Management Act 1994* (WA) original.

108 For example see Des Kelly, *Public Sector Management Act 1994: Final Report of the Working Party Established to Provide Specific Recommendations on the Amendments Proposed by Commissioner Gavin Fielding* (1997).

109 In accordance with the transitional provisions contained in *the Public Sector Management Act 1994* (current) Approved Procedures are taken to be Commissioner Instructions (see 4.30 below).

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Approved Procedure 8 – Timing and assessment of CEO performance agreements

- 3.75 Approved Procedure 8 is a detailed document that applies to all CEOs. It is ‘intended to support high performance leadership and clear accountability across the public sector’.¹¹⁰
- 3.76 According to Approved Procedure 8, a performance agreement must have three components: agency-specific goals and commitments; sector-wide initiatives; and personal developments goals. It also outlines the timeline for performance agreements and assessments, and establishes the minimal requirements for CEO assessment.¹¹¹

Finding 5

The 2010 amendments to section 47 removed the requirement for the Premier to sign off on CEO performance agreements and assessments.

Amended *Public Sector Management Act 1994* in practice

CEO Performance Agreement

- 3.77 The PSM Act requires a CEO, on appointment, to enter into a performance agreement with the Commissioner and their relevant Minister.¹¹²
- 3.78 The performance agreements drafted in accordance with Approved Procedure 8 are tailored to the individual CEO in their specific role, but *Part 3B – Chief executive officers and chief employees* of the PSM Act sets out the generic functions, duties and responsibilities of all public sector CEOs.¹¹³
- 3.79 When establishing a performance agreement the CEO and relevant Minister must discuss the agency specific goals and commitments before prioritising which portfolio issues will be incorporated.¹¹⁴ In addition, the CEO and the Commissioner ‘agree on contributions towards sector-wide administrative and management priorities’.¹¹⁵ There are currently five sector-wide priorities identified by the Commission:

110 Public Sector Commission, *Approved Procedure 8*, 27 May 2011, p. 1. Available at: http://www.publicsector.wa.gov.au/sites/default/files/documents/approved_procedure_8_-_timing_and_assessment_of_ceo_performance_agreements_0_0.pdf Accessed on 23 May 2014.

111 *ibid.*, pp. 2, 4-5.

112 Section 47 *Public Sector Management Act 1994* (WA) current.

113 *ibid.*, Part 3B.

114 Mr Malcolm Wauchope, Public Sector Commissioner, *Transcript of Evidence*, 12 March 2014, p. 15.

115 Mr Dan Volaric, Deputy Commissioner, Public Sector Commission, *Transcript of Evidence*, 9 April 2014, p. 20.

- 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.
 - Innovation.
 - Decommissioning the Office of Shared Services.¹¹⁶
- 3.80 Evidence suggests that it is not uncommon for senior departmental employees to also have input into the performance agreement for their respective CEO.¹¹⁷
- 3.81 In terms of financial accountability, under the current system the budgetary performance of a department is governed by the *Financial Management Act 2006* (FM Act) and therefore falls outside the scope of the PSM Act. The FM Act, requires most CEOs to enter into a 'resource agreement'¹¹⁸ with the Treasurer and their relevant minister. This appears to be the main instrument of financial accountability for a CEO.
- 3.82 Notwithstanding the resource agreements, other financial-based performance indicators can be included in performance agreements established under the PSM Act. For example, CEOs can be accountable for:
- ensuring the department receives a clear audit opinion with respect to its financial performance;
 - budget management of key government initiatives within their respective portfolios; and
 - the delivery of capital works projects on time and on budget.¹¹⁹

116 Mr Dan Volaric, Deputy Commissioner, Public Sector Commission, *Transcript of Evidence*, 9 April 2014, p. 20.

117 Public Accounts Committee, CEO Survey 2014 (closed evidence).

118 Sections 41, 43 and 51(1) *Financial Management Act 2006* (WA). A 'resource agreement' is an agreement between the accountable authority of an agency and the Treasurer (approved by the Premier) that specifies the total amount of resources that are expected to be made available to the agency for the financial year; services proposed to be provided by the agency during the financial year; and, any other matters required by the Treasurer to be specified in the agreement.

119 Public Accounts Committee, CEO Survey 2014 (closed evidence).

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CEO Performance Assessment

- 3.83 While section 47 of the PSM Act stipulates the assessment of a CEO's performance is the responsibility of the relevant minister, in practice the Commissioner assists 'in the assessment of the performance of a CEO'.¹²⁰
- 3.84 With the exception of a few newly appointed CEOs, the survey results indicated annual performance assessments are all conducted by the relevant minister. In addition, CEOs that are responsible to more than one minister are subject to multiple performance agreements and assessments. The survey showed the level of input from the Commissioner varies from assessing the performance to noting the final assessment.¹²¹
- 3.85 CEO performance assessments are completed on a template document published by the Commissioner in accordance with Approved Procedure 8. The template includes a four-tiered scale for overall assessment of performance by the relevant minister. The rating options include 'outstanding, highly satisfactory, satisfactory and unsatisfactory'.¹²²
- 3.86 In terms of outcomes of performance assessments, the Acting Commissioner confirmed that no CEO has received a rating of substandard since the amendments to the PSM Act came into effect.¹²³ The Committee understands this to mean no CEO has received an 'unsatisfactory' rating on their performance assessments during this period.
- 3.87 However, the Commissioner has previously noted the formal performance assessment process does not preclude on-going discussions between the Commissioner or relevant minister, and the CEO, regarding performance and potential areas that need to be addressed or improved.¹²⁴

Administration of the Performance Management Process

- 3.88 In terms of the administration of the process across the sector, there is a unit within the Commission responsible for ensuring the completion of

120 Submission No. 5 from Public Sector Commission, 14 November 2013, p. 23.

121 Public Accounts Committee 2014, CEO Survey (closed evidence).

122 Public Sector Commission, *Chief Executive Officer's Performance Agreement/Assessment 2013-14*, Available at: <http://www.publicsector.wa.gov.au/document/ceo-performance-agreement-2013-2014-template>. Accessed on 28 May 2014.

123 Mr Dan Volaric, Acting Public Sector Commissioner, *Transcript of Evidence*, 9 April 2014, p.20.

124 Mr Malcolm Wauchope, Public Sector Commissioner, *Transcript of Evidence*, 12 March 2014, p. 15.

performance agreements and assessments. To achieve this, the unit conducts regular follow-ups with the CEO and the relevant ministerial offices.¹²⁵

- 3.89 Appearing before the Committee, the Commissioner admitted that assessments are not always done in a timely manner.¹²⁶ The survey results support this comment with several performance assessments taking 7 or 8 months to finalise.¹²⁷
- 3.90 Speaking generally, the Commissioner admitted performance management could be done better across the public sector, although he believes there has been an improvement in recent times. He added that having early, honest and sometimes difficult conversations outside the formal assessment process is necessary to improve performance management in the public sector.¹²⁸

Notable practices in other jurisdictions

- 3.91 The Commissioner highlighted the Australian Public Service as the sector with 'best practice' regarding performance management sector-wide, although he indicated it too has problems with managing poor performance.¹²⁹

Commonwealth

- 3.92 The annual review of CEO performance is governed by section 61A of the *Public Service Act 1999* and must be carried out in accordance with a framework established by the Secretary of Prime Minister and Cabinet (Secretary PMC) and the APS Commissioner.¹³⁰
- 3.93 CEOs are responsible for drafting their annual performance agreements in consultation with their relevant ministers. The agreements are then submitted to the Secretary PMC and the APS Commissioner for approval.¹³¹
- 3.94 The annual CEO performance review consists of a CEO self-assessment, a '270 degree assessment'¹³² conducted by the Public Service Commission and feedback from the relevant minister. Once these elements (plus other

125 Mr Dan Volaric, Deputy Commissioner, Public Sector Commission, *Transcript of Evidence*, 12 March 2014, p. 15.

126 Mr Malcolm Wauchope, Public Sector Commissioner, *Transcript of Evidence*, 12 March 2014, p. 15.

127 Public Accounts Committee, CEO Survey 2014 (closed evidence).

128 Mr Malcolm Wauchope, Public Sector Commissioner, *Transcript of Evidence*, 12 March 2014, p. 16.

129 *ibid.*

130 Section 61A *Public Service Act 1999* (Commonwealth).

131 Mr Stephen Sedgwick AO, Australian Public Service Commissioner, Briefing, 27 March 2014.

132 A '270 degree assessment' includes feedback from peers, direct reports, Senior Executive Service employees within relevant organisation and key stakeholders.

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available data) have been collected, the Secretary PMC and APS Commissioner meet with the CEO to discuss their performance.¹³³

Victoria

- 3.95 Under the recent amendments to the *Victorian Public Administration Act 2004*, section 17(1) simply states the Victorian Public Sector Commissioner (VPS Commissioner) is responsible for conducting CEO performance reviews at the Premier's discretion.¹³⁴
- 3.96 When the Committee met with the Victorian Department of Premier and Cabinet (DPC) the process for CEO performance assessment had not been finalised. However, the Committee learned one possible model would involve the Secretary of DPC working with the VPS Commissioner to conduct the assessment. The assessment would include input from the relevant ministers.¹³⁵

New South Wales

- 3.97 Section 39(4) of the *Government Sector Employment Act 2013* stipulates that CEOs must have a performance agreement established and an annual review conducted.¹³⁶
- 3.98 The performance assessment is ultimately ratified by the Premier, but appears to have a reasonable level of involvement by the Commissioner in the coordination of the process. The process includes input from an assessment panel and a self-assessment from the CEO. The assessment panel includes: the Premier, the Secretary of Premier and Cabinet, the relevant minister, the Secretary of Treasury, and the Commissioner. Any concerns with the CEO's performance will be discussed with the CEO and an improvement plan may be implemented.¹³⁷
- 3.99 The CEO is responsible for the financial performance of the department, but decisions of government and other factors outside the CEO's control, are taken into account when considering this aspect of their assessment.¹³⁸

133 Mr Stephen Sedgwick AO, Australian Public Service Commissioner, Briefing, 27 March 2014.

134 Section 17(1) *Public Administration Act 2004* (Victoria).

135 Mr Andrew Tongue PSM, Secretary Department of Premier and Cabinet (Victoria), Briefing, 28 March 2014.

136 Section 39 (4) *Government Sector Employment Act 2013* (NSW).

137 Mr Graeme Head, NSW Public Service Commissioner, Briefing, 26 March 2014.

138 *ibid.*

New Zealand

- 3.100 According to section 43 of the *State Services Act 1988* the State Services Commissioner is responsible to the relevant minister for reviewing the performance of each CEO.¹³⁹
- 3.101 The State Services Commissioner sets clear measurable expectations for CEOs and provides ongoing support. CEO achievement against these expectations is reviewed annually using an outcomes-based self-assessment. A CEOs overall performance is reported to the relevant minister.¹⁴⁰

Committee considerations

- 3.102 The Committee is concerned with the outcomes being achieved under the current CEO performance management framework administered by the Commission. These concerns may be attributable to deficiencies relating to the current absence of formalised input from key stakeholders in the CEO assessment process and ambiguity around the financial accountability of CEOs.
- 3.103 The Commission has confirmed there has been no CEO performance assessments recorded as substandard or 'unsatisfactory' since 2010 (see 3.86 above).
- 3.104 The Committee acknowledges the formal CEO performance assessment process can include 'informal' and ongoing discussions between the CEO, Commissioner and relevant minister. These may lead to a CEO undertaking improvement measures to lift their performance, or ultimately leaving their position, irrespective of whether they receive a performance rating of 'satisfactory' or above on their formal appraisal.
- 3.105 Notwithstanding this point, the Committee notes there are 76 CEOs for whom the Commissioner is the employing authority, none of whom has received a negative performance rating over the last three years.
- 3.106 The Committee thinks the absence of any substandard performance ratings may foster a belief among CEOs that there are no consequences for failure to meet their mutually agreed performance indicators.
- 3.107 There are at least two factors that are likely to limit the extent to which such a culture may develop. One is the spectre of section 49 of the current PSM Act, which pertains to the removal of CEOs (discussed from 3.136 below). As the Commission has noted, this section is 'fairly blunt, [it] says that a CEO can be

139 Section 43 *State Services Act 1988* (New Zealand).

140 State Services Commission, Performance Management of Chief Executives, 6 May 2011. Available at: <http://www.ssc.govt.nz/performance>. Accessed on 26 May 2014.

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removed from office by the governor, full stop!’¹⁴¹ The other factor is that CEOs should generally be motivated to perform at a high standard because of concerns for their reputation rather than the fear of termination inherent in section 49.¹⁴²

- 3.108 The Committee acknowledges these factors, but still holds the view there is a risk of complacency developing among CEOs regarding the performance management framework. The Committee believes there is scope for making this framework more robust and meaningful, through the formal introduction of financial KPIs and the prescribed requirement for input from the Commissioner and Treasury.
- 3.109 The issue of CEO financial accountability was raised throughout the hearings, briefings, and CEO survey. The evidence gathered has left the Committee concerned that the financial performance of a department against the budgeted appropriation is not a key deliverable under the current CEO performance management framework.
- 3.110 The Committee understands that, in theory, CEOs can be held accountable to Treasury and their relevant ministers for the financial performance of their departments against the funds allocated through the budget (see paragraph 3.81 above). The Committee notes two examples of departments that consistently exceed the annual appropriation for delivery of services, the Department of Education and the Department of Health.¹⁴³ While such results may be attributable to matters beyond a CEO’s control, this should not negate the need for the CEO’s management of the department’s finances to be formally reviewed each year.
- 3.111 Accordingly, the Committee believes that the financial performance of a department against budget should be given appropriate weighting within the framework for CEO performance management. Approved Procedure 8 (see 3.75 and 3.76 above) appears to be the logical vehicle by which this process can be formalised. The Committee sees value in amending Approved Procedure 8 to include the financial performance of the department as one of the required components of CEO Performance Agreements. The Committee sees further merit in amending Approved Procedure 8 to require the input of Treasury on this aspect of the CEO’s subsequent performance assessment.

141 Mr John Lightowlers, General Counsel, Public Sector Commission, *Transcript of Evidence*, 12 March 2014, p. 17.

142 Professor Mike Wood, School of Business, University of Notre Dame, *Transcript of Evidence*, 2 April 2014, p. 6.

143 Based on the ‘Budget Estimate’ versus ‘Actual’ figures for the appropriation to deliver services to each department across the 2006-2007 through 2012-2013 financial years. Data taken from each year’s respective Budget Papers.

- 3.112 The Committee also notes that under the current version of Approved Procedure 8, the Commissioner ‘may’ assist the relevant minister during the CEO performance assessment process by providing information relating to the CEO’s performance against agreed criteria.¹⁴⁴ The Committee would like to see the Procedure amended to ensure the Commissioner formally participates in the assessment of a CEO.
- 3.113 Formalising the requirement for the participation of the Treasury and the Commissioner would be more reflective of the multi-stakeholder feedback approach practiced in the Commonwealth and NSW jurisdictions. This would provide the relevant minister with greater capacity to ensure the ongoing assessment of CEO performance is appropriately informed and pertinent.

Finding 6

The financial performance of a department against its budgeted appropriation is not currently included as a measurable component for CEOs within the performance management framework as prescribed by the Public Sector Commissioner under Approved Procedure 8 – Timing and assessment of CEO performance agreements.

Finding 7

Multi-stakeholder input is a feature of the CEO performance assessment frameworks in place in the Commonwealth and NSW jurisdictions.

Recommendation 1

The Premier seek and report on any response from the Public Sector Commissioner regarding the possibility of the Commissioner amending Approved Procedure 8 – Timing and assessment of CEO performance agreements, to ensure:

- the financial performance of the department against the budgeted appropriation is incorporated as one of the required components of a CEO performance agreement; and
- the annual CEO performance assessment process includes formal participation of Treasury and the Public Sector Commissioner regarding the achievements of CEOs against relevant performance criteria.

144 Public Sector Commission, [Approved Procedure 8 – Timing and assessment of CEO performance agreements](#), 27 May 2011, para 5.2.

Chapter 3

Removal of a CEO from Office

The evolution of public sector legislation in WA

- 3.114 Under the 1904 and 1978 legislation permanent departmental heads could only be dismissed if they were found guilty of committing an offence as prescribed in the respective acts.¹⁴⁵
- 3.115 The permanency of departmental heads came into question during the 1993 McCarrey Commission, which resulted in the following recommendation:
- [CEOs] should be subject to performance contracts for five-year terms, renewable or able to be terminated at the end of that period.*¹⁴⁶
- 3.116 The Commission went on to state that a provision for early termination of CEO contracts in the case of ‘consistent unsatisfactory performance’ was necessary to avoid the need for large severance payments if termination occurs early into the five-year contract.¹⁴⁷

The *Public Sector Management Act 1994*

- 3.117 In adopting the McCarrey Commission’s recommendation, the original PSM Act introduced five-year (maximum) fixed-term contracts for all public sector CEOs.¹⁴⁸ This was a significant change from the permanency inherent under previous legislation. In addition to fixed-term contracts, the new legislation included explicit provisions for removing a CEO from office.¹⁴⁹
- 3.118 Section 48 outlined the procedure for removing a CEO from office at the expiry of their contract or any other time.¹⁵⁰ Under this provision, if the Premier did not wish to recommend reappointment of a CEO, or wished to remove a CEO for another reason, the Premier was required to consult the relevant minister to obtain:
- an assessment of the CEO’s performance; and
 - a recommendation indicating whether to reappoint or remove the CEO.¹⁵¹

145 Section 47 and 49(2) *Public Service Act 1904* (WA); Section 44 and 49(2) *Public Service Act 1978* (WA).

146 Independent Commission to Review Public Sector Finances, *Agenda for Reform*, Government of Western Australia, Perth, 1993, p. xxxix.

147 *ibid.*, p. 195.

148 Section 56 *Public Sector Management Act 1994* (WA) original.

149 *ibid.*, Section 48 and 49.

150 *ibid.*, Section 48.

151 *ibid.*, Section 48(1)(c) and 48(1)(d)(i).

- 3.119 In addition, the Premier had to seek advice from the CPSS regarding the appropriateness of the recommendation put forward by the relevant minister.¹⁵²
- 3.120 Based on the assessment, recommendation, and advice, the Premier could make a decision regarding the reappointment or removal of a CEO. If the Premier's decision was contrary to the advice from the CPSS, that decision had to be published in the Gazette.¹⁵³
- 3.121 A Premier who complied with section 48 could recommend to the Governor the removal of a CEO from office 'at any time' under section 49.¹⁵⁴
- 3.122 The power of the Premier to recommend removal of a CEO from office under section 49, coupled with the new provisions under section 52, which took 'away the industrial and legal rights of a CEO in respect of their position under the government of the day',¹⁵⁵ was the cause of great concern for the Opposition when debating the PSM Bill in 1994. The Opposition argued the former section placed too much power with the Premier and the latter took away rights from the CEO.¹⁵⁶
- 3.123 The Government was confident the legislation contained sufficient safeguards, highlighting section 48 as an appropriate check against unfair dismissal.¹⁵⁷
- 3.124 The original PSM Act included sections similar to the previous pieces of legislation outlining the CEO dismissal provisions for substandard performance (section 79) and breaches of discipline (section 89).¹⁵⁸
- 3.125 Section 79 of the original PSM Act outlined the process for determining if the performance of an employee was substandard and the potential consequences for substandard performance.¹⁵⁹ For the purposes of this chapter, section 79 will be examined only in how it pertains to CEOs in the public sector.

152 Section 48(1)(d)(ii) *Public Sector Management Act 1994* (WA) original.

153 *ibid.*, Section 48(2).

154 *ibid.*, Section 49.

155 *ibid.*, Section 52.

156 Hon Dr Geoff Gallop MLA, Opposition Leader, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 June 1994, pp. 1245-1246.

157 Hon Richard Court MLA, Premier, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 7 June 1994, p. 1140.

158 *Public Sector Management Act 1994* (WA) current.

159 Section 79 *Public Sector Management Act 1994* (WA) original.

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- 3.126 Section 79 enabled the Premier (as the employing authority) to recommend the Governor terminate the employment of a CEO if the performance of that CEO was deemed substandard in the opinion of the Premier.¹⁶⁰
- 3.127 Consultation with the CPSS was not required under this section. However, prior to determining if a CEO's performance was substandard, consideration had to be given to the CEO's level of performance against the duties and functions required of them.¹⁶¹
- 3.128 If the CEO did not admit their performance was substandard, the Premier was required to initiate an investigation to determine whether the performance was substandard. This investigation took the same form as the process under section 48 (see 3.118 through 3.120 above).¹⁶²
- 3.129 Section 89 of the original PSM Act provided guidance to the Premier with regards to CEO dismissal on disciplinary grounds.¹⁶³ Under section 89, if a CEO admitted, or was found, to have committed a breach of discipline following an investigation or a special disciplinary inquiry and that breach was relevant to section 94(4)¹⁶⁴ of the original PSM Act, the Premier was required to recommend to the Governor that the CEO be dismissed and the Governor was required to dismiss the CEO.¹⁶⁵ If the breach of discipline was not relevant to section 94(4), but the Premier considered the CEO ought to be dismissed then the Premier was required to recommend dismissal to the Governor who 'may' dismiss the CEO.¹⁶⁶

Public Sector Reform Bill 2009

- 3.130 In 1996, a review of the original PSM Act was conducted by Industrial Commissioner Mr Gavin Fielding. In his final report he recommended the provisions of section 48 be repealed and that CEOs should have the 'right of appeal to the Industrial Relations Commission in respect to adverse finding against them for breaches of discipline'.¹⁶⁷
- 3.131 The amendments to the PSM Act removed section 48, the rationale being that section 48 had 'served as a mechanism to ensure the Premier did not

160 Section 79(4)(b) *Public Sector Management Act 1994* (WA) original.

161 *ibid.*, Section 79(2).

162 *ibid.*, Section 79(5) and 6(b).

163 *ibid.*, Section 89.

164 If a public sector employee has been found to have disobeyed or disregarded a 'lawful order, regarding redeployment they will be deemed to have committed a section 94 breach of discipline. Section 94(4) *Public Sector Management Act 1994* (WA) original.

165 *ibid.*, Section 89(1).

166 *ibid.*, Section 81(2).

167 Gavin Fielding, *Review of Public Sector Management Act* (1996), pp. 90 and 101.

circumvent the involvement of the [CPSS],¹⁶⁸ prior to making a decision to remove or not reappoint a CEO. By merging the role of the Premier and the CPSS into one, the new Commissioner would be responsible for both functions, making this section redundant.¹⁶⁹

- 3.132 Section 49 was amended to reflect the deletion of section 48 and to reflect the new role of the Commissioner, meaning the Commissioner could, theoretically, recommend the Governor remove a CEO from office at any time.¹⁷⁰ Section 52 was not amended by the Reform Bill.
- 3.133 The amendments did not change the process for determining if a CEO's performance is substandard under section 79. However, the amendments have given the Commissioner the authority to recommend the termination of a CEO for substandard performance. In these circumstances, the relevant minister must be consulted prior to such a recommendation being made.¹⁷¹
- 3.134 In addition, it is the Commissioner (as the employing authority), rather than the Premier, who must now initiate an inquiry should the CEO not admit to the accusation of substandard performance (see 3.128 above).¹⁷²
- 3.135 Amendments to section 89 have transferred responsibility for recommending dismissal of a CEO on disciplinary grounds from the Premier to the Commissioner. In addition, these amendments also provided the Commissioner with greater powers when recommending the dismissal of a CEO to the Governor. Section 89(2) of the original PSM Act stated 'the Governor may' comply with the recommendation from the Premier,¹⁷³ under the current legislation 'the Governor must' comply with the recommendation from the Commissioner.¹⁷⁴

Amended *Public Sector Management Act 1994* in practice

- 3.136 Since removal of section 48 and its inherent checks and balances, section 49 could be interpreted as vesting a considerable degree of power in one person. Under the current legislation there is no requirement for the Commissioner to consult anyone prior to recommending the removal of a CEO. In practice this is not the case. According to the Commissioner, prior to making any decisions regarding CEO removal, the relevant minister would always be consulted and

168 Explanatory Memorandum, Public Sector Reform Bill 2009 (WA) p. 8.

169 *ibid.*

170 Section 49 *Public Sector Management Act 1994* (WA) current.

171 *ibid.*, Section 79(5A) and 79(5B).

172 *ibid.*, Section 79(5).

173 Section 89(2) *Public Sector Management Act 1994* (WA) original.

174 Section 89(2) *Public Sector Management Act 1994* (WA) current.

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consideration would be given to the extent to which the CEO has met the obligations set out in their performance agreement.¹⁷⁵

- 3.137 Acknowledging the provisions for CEO dismissal on the ground of substandard performance or a breach of discipline, the Committee asked the Commissioner to clarify the actual level of ministerial involvement in terminating a CEO on these grounds. The Commissioner provided the following response:

*To the best of our knowledge, no CEO has been dismissed for either disciplinary or substandard performance, so that occasion has not arisen. But, should it arise, there obviously would be extensive discussions with the [relevant] minister around what the issues were and why certain actions were being proposed before we got down that far.*¹⁷⁶

- 3.138 The Committee followed up the Commissioner's response by asking if it is more a case of CEOs resigning rather being terminated for substandard performance. The Commissioner confirmed that in practice, 'things get worked out' prior to reaching the point of dismissal.¹⁷⁷
- 3.139 The Commissioner's claim has been supported by evidence which suggests a CEO's tenure can end for a variety of reasons other than substandard performance.
- 3.140 The CEO of the Department of Regional Development recently resigned following a meeting with the Minister for Regional Development regarding 'leadership within the [department] and directions that [the] government is taking with regional development'.¹⁷⁸ This example is interesting for two reasons. First, it demonstrates that a CEO can be removed because the relevant minister is seeking a leadership change to better suit the future direction of the department; and second, while the Acting Commissioner was consulted¹⁷⁹, the decision was made by mutual agreement of the relevant minister and the outgoing CEO.¹⁸⁰

175 Submission No. 5 from Public Sector Commission, 14 November, p. 22.

176 Mr Malcolm Wauchope, Public Sector Commissioner, *Transcript of Evidence*, 12 March 2014, p. 11.

177 *ibid.*

178 Hon Terry Redman MLA, Minister for Regional Development, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 April 2014, p. 2222.

179 Mr Dan Volaric, Acting Public Sector Commissioner, Public Sector Commission, *Transcript of Evidence*, 9 April 2014, p. 21.

180 Hon Terry Redman MLA, Minister for Regional Development, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 April 2014, p. 2222.

- 3.141 Another example of a CEO being removed for reasons other than substandard performance or a breach of discipline is the resignation of the former CEO of Corrective Services in 2013. The incumbent had been in the role for several years and received positive performance assessments from different ministers during his tenure. However, not long after being appointed Minister for Corrective Services, the Hon Joe Francis raised concerns with the Commissioner 'regarding the leadership and management of the Department of Corrective Services'.¹⁸¹ The Commissioner shared these concerns.¹⁸²
- 3.142 The Commissioner confirmed that ultimately the relevant minister 'lacked confidence in the CEO', and this led to the CEO's departure.¹⁸³
- 3.143 In other instances where the current CEO does not fit the new direction of their department, or there is a relationship breakdown with the relevant minister, the Commissioner can try to 'offer alternative possibilities for the CEO'.¹⁸⁴ This can take the form of a CEO transfer, to be discussed in greater detail later in this chapter.

Notable practices in other jurisdictions

Commonwealth

- 3.144 The *Public Service Act 1999* states '[CEOs] can be removed by the Governor General (within a term) on the recommendation of the Prime Minister'.¹⁸⁵ However, the Prime Minister cannot act until a report, similar to the one used for CEO appointments, is received from the Commissioner and the Secretary of PMC. CEOs are afforded natural justice before the report to the Prime Minister is finalised and these reports must be considered before a final decision regarding the employment of a CEO can be made. As in the case of an appointment, the report in respect of a termination of the Secretary PMC is prepared by the APS Commissioner.¹⁸⁶
- 3.145 At the Commonwealth level a want of confidence from the Prime Minister is sufficient to remove a CEO prior to the expiration of their term, but it should be noted that CEOs can be offered other roles.¹⁸⁷

181 Submission No. 6 from the Hon Joe Francis MLA, Minister for Corrective Services, 14 November 2013.

182 Mr Malcolm Wauchope, Public Sector Commissioner, *Transcript of Evidence*, 12 March 2014, p. 7.

183 *ibid.*

184 *ibid.*, p. 11.

185 Section 59 *Public Service Act 1999* (Commonwealth).

186 Mr Stephen Sedgwick AO, Australian Public Service Commissioner, Briefing, 27 March 2014.

187 *ibid.*

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New South Wales

- 3.146 The system in NSW for removing a CEO is not entirely dissimilar to WA in that CEOs can be dismissed ‘at any time for no stated reason’. However, unlike the WA model, it is the Premier who is responsible for the decision-making, not the Commissioner.¹⁸⁸
- 3.147 In practice, the NSW Commissioner would be consulted by the Premier before making a decision to terminate a CEO.¹⁸⁹

New Zealand

- 3.148 The New Zealand model is most similar to WA in that section 39 of the *State Sector Act 1988* allows the State Services Commissioner to remove a CEO from office ‘for just cause or excuse’ providing there is agreement from the Governor General in Council.¹⁹⁰

Committee considerations

- 3.149 Under section 49 of the PSM Act formal input from the relevant minister is not required when removing a CEO from office. As such, the Committee queried the level of actual ministerial involvement in the process.
- 3.150 Based on the evidence gathered it would appear that, in practice, ministers retain a significant level of influence in the decision-making process prior to removing a CEO from office under section 49.
- 3.151 The Committee is satisfied in knowing that a CEO can be removed if the relevant minister loses confidence in the CEO¹⁹¹, or if a change in leadership and/or management is required to take the department in a new policy direction.¹⁹²
- 3.152 The Committee’s concerns were further allayed by the Hon Joe Francis in his submission which stated:

I have found the system established by the relevant sections of the [PSM] Act to be both flexible and responsive to Government, while

188 Section 41(1) *Government Sector Employment Act 2013* (NSW).

189 Mr Graeme Head, NSW Public Sector Commissioner, Briefing, 26 March 2014.

190 Section 39 *State Sector Act 1988* (New Zealand).

191 Mr Malcolm Wauchope, Public Sector Commissioner, *Transcript of Evidence*, 12 March 2014, p. 7.

192 Hon Terry Redman MLA, Minister for Regional Development, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 April 2014, p. 2222.

*maintaining the necessary independence of the senior levels of the Western Australian public service.*¹⁹³

Finding 8

Under the amendment to section 49, the Public Sector Commissioner has assumed responsibility for recommending the Governor remove a CEO. This responsibility was formerly with the Premier.

The deletion of the former section 48 means that the Commissioner is not required to consult anyone before making such a recommendation. However, the Commissioner has confirmed the relevant minister would always be consulted prior to any decision being made under this section.

In practice, ministers retain a significant level of influence in the decision-making process prior to a CEO being removed from office under section 49.

Recommendation 2

The Premier seek and report on any response from the Public Sector Commissioner regarding the possibility of the Commissioner ensuring that the relevant minister continues to be consulted when a recommendation to remove a CEO is being considered under section 49 of the PSM Act.

CEO Transfer Provisions

Evolution of public sector legislation in WA

- 3.153 The authority to transfer a Public Sector CEO to another department, office or agency has been vested with the Governor of Western Australia since 1904. The *Public Service Act 1904* authorised the Governor to act, on the recommendation of the Public Service Commissioner, to transfer staff 'of any department' including departmental heads.¹⁹⁴
- 3.154 The *Public Service Act 1978* permitted the Governor to transfer a CEO, on the recommendation of the Public Service Board, as a consequence of substandard performance and/or as a penalty for committing an offence under the legislation.¹⁹⁵

193 Submission No. 6 from the Hon Joe Francis MLA, Minister for Corrective Services, 14 November 2013.

194 Section 9(6) *Public Service Act 1904* (WA).

195 Section 29(4) and 49(2) and 49(3) *Public Service Act 1978* (WA).

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Public Sector Management Act 1994

- 3.155 The 1993 PSM Bill introduced a specific clause that permitted the transfer of a CEO and outlined the process to be followed.¹⁹⁶ These provisions were not discussed during the 1994 debates and the clause was passed without any amendments proposed.
- 3.156 Section 50 – Transfer of CEOs, enabled the Governor, on the recommendation of the Premier, to transfer a CEO to a vacant office, or to other functions in the Senior Executive Service (SES), at or below their current level of classification.¹⁹⁷ A CEO transfer did not affect the terms and conditions of their employment contract such as salary.¹⁹⁸
- 3.157 Prior to making such a recommendation, the Premier was required to consult the CEO, the CEO's relevant minister, and the relevant minister of the destination agency.¹⁹⁹
- 3.158 In addition to section 50, the original PSM Act also contained a provision for the Premier to recommend the transfer of a CEO on disciplinary grounds; providing the breach of discipline did not relate to section 94.²⁰⁰

Public Sector Reform Bill 2009

- 3.159 In accordance with the intent of the 2009 Reform Bill, the amendments to section 50 gave the Commissioner the responsibility—previously vested with the Premier—for recommending the transfer of a CEO. This included the requirement to consult the CEO and the relevant ministers from both the originating and destination agencies. The terms and conditions of a CEO contract remain unchanged following a transfer under this section.²⁰¹
- 3.160 The capacity to transfer a CEO on disciplinary grounds was retained under a different section with the responsibility again shifting from the Premier to the Commissioner.²⁰²

Amended Public Sector Management Act 1994 in practice

- 3.161 The provisions under the PSM Act for transferring a Public Sector CEO are quite clear and are reflected in practice:

196 Section 50 *Public Sector Management Act 1994* (WA) original.

197 Ibid., Section 50(1) *Public Sector Management Act 1994* (WA) original.

198 Ibid., Section 50(3) and 50(4).

199 Ibid., Section 50(2).

200 Ibid., Section 86(3)(b)(ii).

201 Section 50 *Public Sector Management Act 1994* (WA) current.

202 Ibid., Section 80A(c).

*Section 50 provides for the Governor, on the recommendation of the Commissioner, to transfer a CEO from their office to another vacant CEO office at the same or lower level or to the performance of other functions in the SES.*²⁰³

- 3.162 The Commissioner consults the relevant parties as per the legislation and ‘transfers do not alter a CEO’s contract of employment or remuneration’.²⁰⁴
- 3.163 Appearing before the Committee, the Commissioner confirmed that CEO transfers are done directly and without the requirement for a formal recruitment selection process.²⁰⁵ Furthermore, there is no obligation to advertise the vacancy if it can be filled by means of a CEO transfer.²⁰⁶
- 3.164 The recent transfer of Mr Tim Marney from his previous role as state Under Treasurer to Mental Health Commissioner provides a contemporary example of the CEO transfer process in practice. In February 2014, Mr Marney was transferred to the role of Mental Health Commissioner and retained his former salary. Mr Marney’s salary, determined by the Salaries and Allowances Tribunal, is written into his contract, which expires in June 2015. The transfer of Mr Marney followed discussions between the relevant minister and the Commissioner and consultation with the previous Mental Health Commissioner.²⁰⁷
- 3.165 The Commissioner confirmed the transfer involved discussions with the Treasurer and the Minister for Mental Health. The Minister, while not criticising the performance of the previous Mental Health Commissioner, was not confident he had the necessary skills required to lead the Mental Health Commission under a planned restructure.²⁰⁸ Mr Marney indicated his interest in the transfer and was appointed in accordance with section 50 of the PSM Act.²⁰⁹

203 Submission No. 5 from Public Sector Commission, 14 November 2013, p. 21.

204 *ibid.*

205 Mr Malcolm Wauchope, Public Sector Commissioner, *Transcript of Evidence*, 12 March 2014, p. 3.

206 Hon Peter Collier, MLC, Leader of the House representing the Premier, WA, Legislative Council, *Parliamentary Debates* (Hansard), 20 February 2014, p. 412.

207 Hon Peter Collier MLC, Leader of the House representing the Premier, WA, Legislative Council, *Parliamentary Debates* (Hansard), 20 February 2014, p. 412.

208 The former Mental Health Commissioner was ‘transferred to the performance of other functions in the Senior Executive Service’ – *ibid.*

209 Mr Malcolm Wauchope, Public Sector Commissioner, *Transcript of Evidence*, 12 March 2014, p. 3.

Chapter 3

Notable Practices in other jurisdictions

- 3.166 The relevant legislation in NSW and the Commonwealth does not provide specific provisions for the transfer of a CEO.²¹⁰ While section 64 of the *Government Sector Employment Act 2013* permits the transfer of Public Sector employees in NSW, it does not apply to CEOs.²¹¹

Victoria

- 3.167 Under section 13 of the *Public Administration Act 2004* the Premier may transfer a CEO following consultation with the Victorian Public Sector Commissioner.²¹²

New Zealand

- 3.168 The process for transferring a State Services CEO in New Zealand is not entirely dissimilar to WA. A transfer can be done on the recommendation of the State Services Commissioner. Prior to making this recommendation the State Services Commissioner must believe the transfer is in the public interest, obtain consent from the CEO, and consult the appropriate ministers.²¹³

Committee considerations

- 3.169 The amendments passed in 2010 affected limited change to the CEO transfer provisions within the PSM Act. Despite the Commissioner acquiring the former responsibilities of the Premier, there appears to be sufficient opportunity for ministerial input in the decision-making process relating to CEO transfers.
- 3.170 Similar to the CEO removal provisions, the Committee is satisfied a CEO, regardless of their level of performance, can be transferred to suit the overarching needs of the department; the policy decisions of government; or when the relationship between a relevant minister and a CEO is strained.
- 3.171 The Committee initially raised concerns upon hearing of the salary discrepancies between the previous and the newly appointed Mental Health Commissioner. Evidence suggests the provision for a transferred CEO to retain the terms and conditions of their original contract was written into the initial PSM Act to prevent people from being transferred to a lower classification as a punitive measure.²¹⁴

210 *Government Sector Employment Act 2013* (NSW) and *Public Service Act 1999* (Commonwealth). See also Schedule 2, Regulation 29.

211 Section 64 *Government Sector Employment Act 2013* (NSW).

212 Section 13 *Public Administration Act 2004* (Victoria).

213 Section 37A(1) and 37A(4) *State Sector Act 1988* (New Zealand).

214 Mr Malcolm Wauchope, Public Sector Commissioner, *Transcript of Evidence*, 12 March 2014, p. 12.

Finding 9

Under the amendment to section 50, the Public Sector Commissioner has assumed the former responsibility of the Premier for recommending to the Governor the transfer of a CEO. Notwithstanding this amendment, there appears to be sufficient opportunity for ministerial input in the decision-making process relating to CEO transfers.

Chapter 4

Commissioner's Instructions (Public Sector Standards and Ethical Codes)

Establishment of Commissioner's Instructions

Framework under the original *Public Sector Management Act 1994*

- 4.1 Former WA Public Service Commissioner, Professor Mike Wood, has said that the Commissioner 'must have a way of communicating with the public sector that gives effect to the powers and functions provided [to the Commissioner] by Parliament.'²¹⁵
- 4.2 The original PSM Act allowed for various instruments to serve this purpose. Some were available exclusively to the newly established Commissioner for Public Sector Standards, while others were available to the Premier who had assumed responsibility in 1994 for promoting the overall effectiveness and efficiency of the Public Sector (see 2.15 above).

Directives used by Commissioners

- 4.3 Under section 21(1)(a) of the original PSM Act, the Commissioner for Public Sector Standards was required to establish (and monitor compliance with) **public sector standards** 'setting out minimum standards of merit, equity and probity to be complied with in the Public Sector'.²¹⁶ These standards were applicable to a range of human resource management procedures (e.g. performance management, termination, redeployment).
- 4.4 Under section 21(1)(b) of the original PSM Act, the Commissioner was also required to establish (and monitor compliance with) **codes of ethics** 'setting out minimum standards of conduct and integrity to be complied with by public sector bodies and employees.'²¹⁷
- 4.5 Public sector standards and codes of ethics were given substantial legal weight, in that they had the force of law 'in relation to other Acts and subsidiary

215 Submission No. 1 from Professor Mike Wood, 6 November 2013, p. 5. Professor Wood served as Public Service Commissioner from June 1990 to July 1993.

216 Section 21(1)(a) *Public Sector Management Act 1994* (WA) original.

217 *ibid.*

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legislation'.²¹⁸ Moreover, in the event of conflict, they were to prevail over the written law of any department or organisation.²¹⁹

- 4.6 However, public sector standards and codes of ethics had to have regard to the 'Public Sector principles' outlined in sections 7, 8, and 9 of the Act and both instruments were classified as regulations. As such, they were disallowable by Parliament under section 42 of the *Interpretation Act 1984*.²²⁰
- 4.7 In addition, the Act made clear that nothing prevented a court from inquiring into whether a public sector standard or code of ethics: had been validly established; was inconsistent with the Act; or was unrelated to the powers relating to their establishment as conferred by the Act.²²¹
- 4.8 Moreover, the Commissioner was required to consult 'such persons he or she consider[ed] desirable or practicable to consult', before establishing, revoking, or amending any standard or code.²²²
- 4.9 The Commissioner could also use **Administrative Instructions** to discharge any prescribed functions and powers. Administrative Instructions were originally vested with the Board of Commissioners under section 19 of the *Public Service Act 1978* and any such instructions that were still current when the original PSM Act came into effect continued to operate under transitional provisions in the 1994 legislation.²²³

Directives used by the Premier as Minister responsible for administering the Act

- 4.10 Under the original PSM Act, **Premier's Circulars** were used to communicate administrative and management requirements to be observed by public sector bodies. These circulars were issued by the Premier as part of their statutory function to improve the efficiency and effectiveness of the sector as per section 10(1) then in effect.²²⁴

218 Section 21(9) *Public Sector Management Act 1994* (WA) original.

219 *ibid.*, Section 32(2).

220 *ibid.*, Sections 21(1) and 21(7).

221 *ibid.*, Section 21(10).

222 *ibid.*, Section 21(4).

223 Section 19 *Public Service Act 1978* (WA); Schedule 5 Section 5 *Public Sector Management Act 1994* (WA) original. Note that similar administrative instruments were also available to the original Public Service Commissioner under the *Public Service Act 1904* (WA). Submission No. 5 from the Public Sector Commissioner, 14 November 2013, p. 32.

224 Similar directives were issued during the period when the *Public Service Act 1978* (WA) was in operation. See list at Department of Premier and Cabinet, *Premier's Circulars*, 6 August 2013. Available at:

http://www.dpc.wa.gov.au/GuidelinesAndPolicies/PremiersCirculars/Pages/Default.aspx?Paged=TRUE&PagedPrev=TRUE&p_Number=1997%2f01&p_ID=173&View=%7b133E470A%2dC251%2d46C5%2d8F1B%2d9950BC9FF2AC%7d&PageLastRow=200. Accessed on 15 May 2014.

- 4.11 After Premier Barnett delegated authority for this function to Commissioner Wauchope in 2008 (see 2.19 above), those circulars still in operation were re-issued as **Public Sector Commissioner's Circulars (Commissioner's Circulars)**. However, Premier's Circulars continued to be issued by the Premier's Department where such directives related to 'policies of the Government of the day and whole of State legislative/policy requirements'²²⁵ that did not fall under the PSM Act.
- 4.12 Under section 3(2)(a) of the original PSM Act, the Premier, again as the Minister responsible for administering the Act, could authorise the establishment of 'any procedure' relating to the job classification system approved for use within the public sector.²²⁶
- 4.13 From this provision, **Approved Procedures** were established. Ultimately, these instruments were used to outline the 'procedural steps to be taken by human resource managers in regards to classification, appointment and remuneration matters'²²⁷ contained within the Act.
- 4.14 As with Premier's Circulars, authority for administering and maintaining Approved Procedures was delegated to the Public Sector Commission by the Premier in 2008.

Public Sector Reform Bill 2009

- 4.15 Following the passage of the amendments in the Reform Bill, the Public Sector Commissioner can now act independently in relation to public sector directives and in performing the roles previously undertaken by the Premier and the Commissioner for Public Sector Standards in this area.
- 4.16 The amended Act also makes provision for a new directive instrument: the **Commissioner's Instruction (CI)**.

²²⁵ Public Sector Commission, *Public Sector Commissioner's Circulars*, 3 July 2009 (archived).

Available at:

<http://web.archive.org/web/20090703214121/http://www.publicsector.wa.gov.au/PSCCirculars/Pages/Default.aspx>. Accessed on 15 May 2014. Note that the former Public Service Commissioner under the provisions of the *Public Service Act 1978* in place by 1990 could also issue Circulars. See for example, Circular to Chief Executive Officers No. 9 of 1991: Code of Conduct—Conflict of Interest Provisions, as referred to in J.F. Gregor (et al.), *Commission on Government Report No. 3* (1996), Perth, WA, p. 194.

²²⁶ Hon Richard Court MLA, Premier, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 7 June 1994, p. 1089. See also section 3(2)(a) *Public Sector Management Act 1994* (WA) original.

²²⁷ Public Sector Commission, *Approved Procedures*, 3 July 2009 (archived). Available at: <http://web.archive.org/web/20090703172618/http://www.dpc.wa.gov.au/PSMD/PeopleManagement/Employment/Pages/ApprovedProcedures.aspx>. Accessed on 15 May 2014.

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- 4.17 CIs are defined as instruments by which the Commissioner can direct ‘public sector bodies and / or employees on matters relating to the Commissioner’s functions or the application of the PSM Act.’²²⁸ The bodies or parties to whom a particular CI applies are determined by the Commissioner and outlined in the instruction itself.²²⁹
- 4.18 The Commissioner has discretionary and obligatory functions in relation to CIs. The range of matters for which the Commissioner ‘may’ issue CIs is extensive and includes: management and administration of public sector bodies and the SES; human resource management; official conduct; and, more broadly:
- ... any other matter in connection with the functions of the Commissioner in respect of which the Commissioner considers it necessary or desirable to issue instructions.*²³⁰
- 4.19 In terms of mandatory obligations, the Commissioner must issue instructions to ‘enhance procedural fairness in action taken in relation to disciplinary cases’²³¹ conducted under Part 5 of the Act. The Commissioner also has an explicit function to issue CIs establishing public sector standards and codes of ethics for the same purposes as were defined under the original PSM Act (see 4.3 and 4.4 above).²³²
- 4.20 The consultation regime that previously applied to the Commissioner when establishing, amending, or revoking public sector standards and codes of ethics (see 4.8 above), has now been extended to apply to any CI.
- 4.21 Any CIs issued by the Commissioner must have regard to the Public Sector principles listed in sections 7 through 9 and must not be inconsistent with the broader PSM Act.²³³
- 4.22 The amended Act requires the Commissioner to make CIs public, but only ‘in such manner as the Commissioner thinks appropriate.’²³⁴ The exceptions to this rule are public sector standards and codes of ethics. These instruments, as subsidiary legislation, need to be published in the *Government Gazette* (the

228 Public Sector Commission, *Commissioner’s Instructions*, 22 April 2014. Available at: <http://www.publicsector.wa.gov.au/publications-resources/instructions-standards-and-circulars/commissioners-instructions>. Accessed on 15 May 2014.

229 Section 22A(3) *Public Sector Management Act 1994* (WA) current.

230 *ibid.*, Section 22A(1). Refer to sub sections (a)-(h) for the full list. Note that following the recent passage of the Workforce Reform Bill 2013, section 22A(1) of the PSM Act has been amended. As a result, the Commissioner ‘may’ also issue Instructions dealing with redeployment and redundancy of employees as well as termination of employment. See new section 22A(1)(ga).

231 Submission No. 5 from Public Sector Commission, 14 November 2013, p. 32.

232 Sections 21(1)(a)-(b) *Public Sector Management Act 1994* (WA) current.

233 *ibid.*, Section 22A(2).

234 *ibid.*, Section 22A(4).

Gazette). This provision was included in the original PSM Act and has been retained.²³⁵

- 4.23 CIs have assumed much of the legal power previously conferred upon public sector standards and codes of ethics (see 4.5 through 4.7 above). The amended Act also makes clear the requirement for all public sector bodies and employees to comply with any CI.²³⁶ However, this obligation only applies to the content listed under the heading 'instruction' on the CI, not to any supporting information or guidelines subsequently issued by the Commissioner.²³⁷
- 4.24 A hierarchy has been established within the amended Act in the event of any inconsistency between the respective categories of CIs. At its apex are public sector standards, followed by codes of ethics, then departmental codes of conduct, and, finally, any other CI.²³⁸
- 4.25 Notably, public sector standards and codes of ethics are the only CIs disallowable by Parliament or that have an explicit provision allowing them to be challenged by a court.²³⁹ However, the amended Act allows the Government to retain the capacity to issue regulations that can effectively override any CI.²⁴⁰

Intent of the Reform Bill changes

- 4.26 The Public Sector Commissioner has confirmed that the introduction of CIs was intended to 'streamline and simplify public sector administration by reducing the multiplicity of instruments which previously applied.'²⁴¹ Ultimately, the Commissioner is seeking to convert the various instruments referred to above

235 Section 21(5) *Public Sector Management Act 1994* (WA) current.

236 *ibid.*, Section 9(a)(ii). Section 30(b) makes specific reference to the need for CEOs to observe any CI in the performance of their functions.

237 Public Sector Commission, [Commissioner's Instructions](#), 22 April 2014. Accessed on 15 May 2014.

238 Section 21(11) *Public Sector Management Act 1994* (WA) current.

239 *ibid.*, Section 21(10). It should be noted that the power of the Court is not limited to challenging public sector standards and codes of ethics. The Supreme Court has the capacity to review any administrative decision made under the PSM Act by way of prerogative writ. Mr Dan Volaric, Acting Commissioner, Public Sector Commission, *Transcript of Evidence*, 9 April 2014, p. 12. Prerogative or 'constitutional' writs as they are now more commonly known are vehicles by which a person aggrieved by an administrative decision by a public sector body can have the lawfulness of that decision reviewed by a court. The most common remedies available via constitutional writ are *mandamus*, *prohibition*, and *certiorari*. For more information on this aspect of administrative law, see Fitzroy Legal Service, '21.2 Judicial Review', *The Law Handbook* (Online), 30 June 2013. Available at: <http://www.lawhandbook.org.au/handbook/ch21s02.php>. Accessed on 30 June 2014.

240 *ibid.*, Section 108(2A) and (2).

241 Submission No. 5 from Public Sector Commission, 14 November 2013, p. 34.

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(in paragraphs 4.3 through 4.14 above) into CIs following a series of ongoing reviews.

- 4.27 Thus far, four public sector standards pertaining to: recruitment, selection, and appointment; transfer; temporary deployment; and secondment have been repealed and replaced by CI No. 1 – Employment Standard (see Table 1 below). Five other standards, addressing: discipline; grievance resolution; performance management; redeployment; and termination, have operated as standards since 1 July 2001. These were carried over under the transitional provisions in 2010 and, along with CI No. 1, are referred to collectively as the ‘Public Sector Standards in Human Resource Management.’²⁴²
- 4.28 The Code of Ethics that was established by the former Commissioner for Public Sector Standards on 1 February 2008 has been repealed and reissued as a CI (No. 7 – Code of ethics). This CI commenced on 3 July 2012 and the content of the code is unchanged from its predecessor.²⁴³
- 4.29 The transitional provisions of the PSM Act also enable Administrative Instructions to continue operating until they are repealed either by a CI or under Regulations.²⁴⁴ Currently, six Administrative Instructions remain in force, while three have been repealed and replaced by CI No. 8 – Codes of conduct and integrity training.²⁴⁵
- 4.30 The transitional provisions further confirmed that any Approved Procedures in place at the time of the 2010 amendments were automatically taken to be CIs. Notwithstanding this provision, the Commissioner is in the process of formally converting these instruments to CIs. So far, two have been repealed and replaced by CI No. 2 – Filling a public sector vacancy. This leaves six instruments operating under the old title of Approved Procedures.²⁴⁶

242 Public Sector Commission, *Public Sector Standards in Human Resource Management*, 12 February 2014, pp. 4,18. Available at:

http://www.publicsector.wa.gov.au/sites/default/files/documents/hrm_standards_0.pdf.

Accessed on 17 May 2014. See also Schedule 7 Clause 4 *Public Sector Management Act 1994* (WA) current.

243 Submission No. 5 from Public Sector Commission, 14 November 2013, p. 34.

244 See Schedule 5 Clause 5 *Public Sector Management Act 1994* (WA) current.

245 Public Sector Commission, *Commissioner’s Instruction No. 8 – Codes of conduct and integrity training*, 3 July 2012, p. 1. Available at:

http://www.publicsector.wa.gov.au/sites/default/files/documents/commissioners_instruction_0_8_codes_of_conduct_and_integrity_training.pdf. Accessed on 15 May 2014.

246 See, [Public Sector Commission, *Approved Procedures, 3 July 2009 \(archived\)*](#). Accessed on 15 May 2014; Public Sector Commission, *Approved Procedures*, 11 September 2012. Available at:

<http://www.publicsector.wa.gov.au/publications-resources/instructions-standards-and-circulars/approved-procedures>. Accessed on 15 May 2014; Schedule 7 Clause 4(1) *Public Sector Management Act 1994* (WA) current.

- 4.31 Commissioner's Circulars, by contrast, remain available to the Commissioner to issue under section 21A (General Functions) or section 22G (Powers). However, Acting Commissioner, Mr Dan Volaric, advised that these instruments 'relate to public sector management policy or arrangements that are mainly advisory or guiding, rather than compulsory.'²⁴⁷ Mr Volaric added that in the event of any inconsistency, a CI would prevail over a circular, although this scenario was unlikely to occur as the instruments are generally used for different purposes.²⁴⁸
- 4.32 Therefore, only where the content of a circular is within the jurisdiction of the Commissioner under the PSM Act will it be subject to conversion to a CI. Currently, three circulars have been repealed and replaced by CIs: two under CI No. 8 – Code of conduct and integrity training, and one under CI No. 6 – Workforce data reporting obligations.

Commissioner's Instructions in practice

- 4.33 The full list of current CIs is listed immediately below in Table 1.

Table 1 Commissioner's Instructions issued since 21 February 2011²⁴⁹

CI No	Name	Commencement ⁺	Review Date
1	Employment Standard	21 February 2011	Not stated
2	Filling a Public Sector Vacancy	21 February 2011	17 April 2015
3	Discipline – general	8 November 2012	31 December 2015
4	Discipline – former employees	8 November 2012	31 December 2015
5	Publishing a public sector notice	1 July 2012	31 December 2013
6	Workforce data reporting obligations	1 July 2012	31 December 2016
7	Code of ethics	3 July 2012	31 December 2016
8	Codes of conduct and integrity training	3 July 2012	31 December 2016
10	Review of classification level of employees seconded to special offices to assist a political office holder	5 February 2013	31 December 2014

⁺ Commencement date refers to the date when the current version of the CI took effect. Some were established earlier [e.g. CI. No 3 on 28 March 2011] and have since been reviewed.

²⁴⁷ Mr Dan Volaric, Acting Commissioner, Public Sector Commissioner, *Transcript of Evidence*, 9 April 2014 p. 7.

²⁴⁸ *ibid.*, pp. 7-8. For example, Commissioner's Circulars can be issued for matters relating to mandatory compliance obligations that originate from outside the PSM Act. See, Public Sector Commission, *Public Sector Commissioner's Circulars*, 13 March 2014. Available at: <http://www.publicsector.wa.gov.au/publications-resources/instructions-standards-and-circulars/public-sector-commissioners-circulars>. Accessed on 17 May 2014.

²⁴⁹ Data taken from Public Sector Commission, *Commissioner's Instructions*, 22 April 2014. Accessed on 15 May 2014. CI No. 3 and 4 review dates were extended from 31 March 2014. Mr Dan Volaric, Acting Commissioner, Public Sector Commission, *Transcript of Evidence*, 9 April 2014, p. 2.

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- 4.34 The Public Sector Commission has confirmed that the absence of CI No. 9 is due to an administrative error in the numbering sequence and that the next CI to be published will take this number.²⁵⁰
- 4.35 Each of the CIs in Table 1 is subject to a review process. The purpose of these reviews is to ensure that CIs ‘continue to meet the requirements’ of the Act and do not impede the efficient and effective operation of the public sector.²⁵¹ Reviews are conducted at the discretion of the Commissioner and are undertaken by Commission staff.²⁵²
- 4.36 The level of information contained in these CIs varies with most including directions to other reference materials including Guidelines, Supporting Information, Question and Answer (Q & A) Sheets, or Conduct Guides. Among the most detailed is CI No. 2, which is 11 pages long, has links to a Q & A sheet, and directions to three other supporting documents. In contrast, CI No. 5 is two-pages long and has no auxiliary materials. In terms of the level of information provided, the Commissioner has explained that:

*Commissioner’s Instructions are formulated to achieve a balance between an appropriate level of direction, ensuring consistency with the principles set out in the PSM Act, and a level of flexibility required for agencies to manage according to their own business context.*²⁵³

Debate over Commissioner’s Instructions

- 4.37 Several concerns have been raised regarding the introduction of CIs. The first of these relates to the consultation process to be followed by the Commissioner when dealing with CIs.
- 4.38 During the Reform Bill debates in 2010, the Labor Opposition sought unsuccessfully to introduce an explicit requirement on the Commissioner to consult with public sector union representatives when establishing, amending, or revoking a CI. In speaking to the amendment in the Legislative Council, the Hon Ljiljanna Ravlich, argued ‘we do not want some groups or organisations frozen out of the consultation process.’²⁵⁴

250 Mr Dan Volaric, Acting Commissioner, Public Sector Commission, *Transcript of Evidence*, 9 April 2014, p. 2.

251 Submission No. 5 from Public Sector Commission, 14 November 2013, p. 34.

252 Mr Dan Volaric, Acting Commissioner, Public Sector Commission, *Transcript of Evidence*, 9 April 2014, p. 2.

253 Submission No. 5 from Public Sector Commission, 14 November 2013, p. 34.

254 Hon Ljiljanna Ravlich MLC, WA, Legislative Council, *Parliamentary Debates* (Hansard), 14 September 2010, p. 6439.

- 4.39 Speaking against the same amendment after it was introduced in the Legislative Assembly, the Premier described the proposed amendments as ‘prescriptive’ and ‘unnecessary’ in light of the consultation clause the Government was introducing in section 22A(6A). The Hon Mr Barnett argued that the Commissioner already consulted with employee organisations before going on to say, ‘I expect and hope that the Commissioner will continue that practice’.²⁵⁵
- 4.40 The second concern related to the independent authority that was being granted to the Commissioner through the introduction of CIs. The Hon Ms Ravlich urged caution regarding the ‘pretty amazing power’ that the Commissioner would acquire to write instructions in respect of sector-wide administration.²⁵⁶ Of particular concern were the CIs that were not public sector standards or codes of ethics (and therefore not disallowable).
- 4.41 As subsidiary legislation, public sector standards and codes of ethics are required to be published in the *Gazette* and then tabled in each House of Parliament within six sitting days of publication.²⁵⁷ This gives parliamentarians time to consider whether they would like to move that the instruments be disallowed. The Hon Ms Ravlich noted that other categories of CI would not be subject to this process and asked for specific comment on the non-requirement for gazettal.
- 4.42 The Hon Norman Moore responded on behalf of the Government in the Legislative Council. His advice was that the CIs being referred to by the Hon Ms Ravlich were those replacing ‘administrative instructions and procedures that are not considered to be of such significant magnitude as to be required to be gazetted now.’²⁵⁸ Therefore, there would be no change from current practice under the CI framework being proposed. The Hon Mr Moore then drew attention to the fact that the Commissioner would still be required to make CIs public ‘in such a manner as the Commissioner thinks appropriate’²⁵⁹ under section 22A(4).
- 4.43 The power afforded to Commissioner via CIs has been noted more recently by Chief Justice Martin in his Whitmore Lecture. When referring to CIs, the Chief

255 Hon Colin Barnett MLA, Premier, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 June 2010, pp. 4256-4299.

256 Hon Ljiljanna Ravlich MLC, WA, Legislative Council, *Parliamentary Debates* (Hansard), 14 September 2010, pp. 6428-6429.

257 Sections 41 and 42 *Interpretation Act 1984* (WA).

258 Hon Norman Moore MLC, WA, Legislative Council, *Parliamentary Debates* (Hansard), 14 September 2010, pp. 6428-6429.

259 *ibid.*

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Justice stated that the WA legislature has effectively provided the Commissioner ‘the power to override laws of the Parliament’.²⁶⁰

- 4.44 The Chief Justice’s concerns were directed in the main towards the legal weight afforded public sector standards and codes of ethics (see 4.5 above). He also drew attention to section 32 of the PSM Act, which states that CEOs are required to comply with any lawful directions given to them by a Minister, subject to ‘any Commissioner’s instruction, public sector standards or code of ethics’.²⁶¹ Summarising his concerns, the Chief Justice argued:

*So, under the laws of Western Australia, the power of a Minister to direct the CEO of an agency for which he or she is responsible is, understandably, subject to any written law and independence in human resourcing matters, but both the written law and any directions of the Minister are trumped by any public sector standard or code of ethics published by the Commissioner, who is not subject to direction by anyone.*²⁶²

- 4.45 In his submission to the Committee, the Commissioner addressed the arguments of Chief Justice Martin. According to the Commissioner, the mechanism within section 32 was introduced in 1994 to protect the independence of the public sector from the types of political influence that emerged during the ‘WA Inc’ period. Thus:

*We cannot wish for independence in ethical standards with which the public sector must comply and at the same time lament the inability of a Minister to ‘trump’ the WA Code of Ethics and Public Sector Standards mandated under the PSM Act to achieve that.*²⁶³

- 4.46 The Commissioner went on to add that section 32 had applied to standards and codes since the inception of the PSM Act ‘without criticism or concerns being raised’.²⁶⁴ The fact that these instruments were subsidiary legislation that were reviewed and could be disallowed by Parliament led the Commissioner to conclude that he was not operating with an ‘unrestricted or unaccountable delegation of legislative power’.²⁶⁵

260 Chief Justice Wayne Martin, [*Whitmore Lecture 2013: Forewarned and Four-Armed – Administrative Law Values and the Fourth Arm of Government*](#), 1 August 2013, p. 25.

261 Section 32(1)(b) *Public Sector Management Act* (Current) 1994 (WA).

262 Chief Justice Wayne Martin, [*Whitmore Lecture 2013: Forewarned and Four-Armed – Administrative Law Values and the Fourth Arm of Government*](#), 1 August 2013, p. 26.

263 Submission No. 5 from Public Sector Commission, 14 November 2013, Cover Letter, p. 2.

264 *ibid.*

265 *ibid.*

- 4.47 Later in his submission, the Commissioner drew attention to the fact that he was ultimately subject to a check and balance on all CIs via the Executive branch, which, under amendments to Section 108, retained the authority to make regulations that would prevail over any CI issued.²⁶⁶

Committee considerations

- 4.48 The Committee supports the concept and intent behind introducing CIs as an overarching mechanism under which directives relating to public sector management and administration are issued. Any attempt to narrow the number of instruments used for this purpose is consistent with one of the primary aims of the Reform Bill, namely ‘to address a range of administrative inefficiencies’.²⁶⁷
- 4.49 Regarding the concerns raised, the Committee is satisfied with the manner in which the consultation process has evolved under the PSM Act since the amendments took effect.
- 4.50 Significantly, the amendments introduced in section 22A(6A)²⁶⁸ have broadened the scope of the consultation requirements of the Commissioner beyond public sector standards and codes as had previously been the case. Now other directives are captured.
- 4.51 The Commissioner has confirmed that the extent of consultation regarding the establishment, revocation, or amendment of CIs is varied and dependent upon the nature of the CI. However, parties currently consulted can include: CEOs; chief employees; the Community and Public Sector Union/Civil Service Association of WA (CSA) or other relevant unions; labour relations divisions of the Department of Commerce; the State Solicitor’s Office (SSO); and ‘other relevant stakeholders or occupational groups’.²⁶⁹
- 4.52 Importantly, in the context of the Reform Bill debates, the CSA appears to be a regular participant in consultations regarding CIs. In its submissions to the Inquiry, the CSA did not allude to the fact that it was dissatisfied with the extent of its participation in the consultation process. The CSA confirmed that it was asked to put a submission in during the development of CI No. 8, and it also had the opportunity to view the draft instruction and Guidelines when CI No. 3 was being put together. While the group suggested its concerns were not

266 Section 108(2A) and (2) *Public Sector Management Act 1994* (WA) current; Submission No. 5 from Public Sector Commission, 14 November 2013, p. 26.

267 Outline (c), Explanatory Memorandum *Public Sector Reform Bill 2009* (WA).

268 Note the proposed section 22A(6A) that was referred to during the debates on the Reform Bill now reads as section 22A(6) in the amended PSM Act.

269 Mr Dan Volaric, Acting Commissioner, Public Sector Commission, *Transcript of Evidence*, 9 April 2014, p. 2.

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always appropriately addressed (a point to be explored in the following chapters), it did not indicate that its participation was being stymied.²⁷⁰

4.53 On the issue of powers vested with the Commissioner, the Committee understands the importance of the Commissioner needing to act independently in the discharge of his or her functions and of the public sector needing to be protected from undue and inappropriate political influence. The Committee also notes that, despite the concerns raised by the Chief Justice regarding the potential influence the Commissioner could exercise over a CEO, it has not been made aware of any examples where a Ministerial directive has been ignored by a CEO citing deference to a CI.

4.54 The Committee is confident that the Commissioner cannot exercise unfettered power through the issuance of CIs under the amended Act. The Explanatory Memorandum to the Reform Bill confirms that amendments to section 108 were designed to ensure that:

*... regulations may make provisions for or with respect to any matter for which the Commissioner's instructions may provide and that these to the extent of any conflict have overriding effect.*²⁷¹

4.55 This ensures that at least the Executive arm of Government has the capacity to check the intent of the Commissioner regarding any CI, while the wider Parliament retains the ability to disallow any proposal pertaining to public sector standards and codes of ethics (under section 21(7)-(8)).

4.56 The Committee has considered whether all CIs should be disallowable. Apart from the inferences that can be drawn from the Chief Justice's lecture, the Committee did not receive a lot of input on this question throughout its evidence gathering.

4.57 Practices in other jurisdictions vary in this regard. Under the NSW legislation, the Public Service Commissioner can issue both Government Sector Employment Rules and Directions, neither of which are disallowable.²⁷² By contrast, any 'directions' issued by the Australian Public Service Commissioner are defined as 'legislative instruments' and are therefore subject to the disallowance provisions applicable in that jurisdiction.²⁷³

270 Submission No. 4 from Community & Public Sector Union/Civil Service Association of WA, 13 November 2013; Mr Warwick Claydon, Senior Industrial Officer, Community & Public Sector Union/Civil Service Association of WA, *Transcript of Evidence*, 2 April 2014, p. 10; Submission No. 4(a) from Community & Public Sector Union/Civil Service Association of WA, 28 April 2014, p. 1.

271 Clause 61, Explanatory Memorandum *Public Sector Reform Bill 2009* (WA).

272 Mr Graeme Head, NSW Public Service Commissioner, Committee Briefing, 26 March 2014.

273 Section 42 *Public Service Act 1999* (Cwth) and Section 42 *Legislative Instruments Act 2003* (Cwth).

- 4.58 The Explanatory Memorandum for the Reform Bill was clear in its intent that with the exception of public sectors standards and codes of ethics, CIs 'are not required to be *Gazetted* or dealt with as subsidiary legislation.'²⁷⁴
- 4.59 The Hon Norman Moore indicated during the Reform Bill debates that the CIs this provision was meant to capture were largely administrative in nature, along the lines of the former Administrative Instructions and Approved Procedures (see 4.42 above). The Hon Mr Moore was correct in that many of these directives pertain to operations within the sector for which the Commissioner should be given reasonable scope to discharge his or her statutory functions under section 21A. Examples include: Administrative Instruction 601 – Sick Leave (were it to be converted to a CI); and CI No. 5 – Publishing a public sector notice.
- 4.60 In the absence of further evidence regarding the pros and cons of making all CIs disallowable, the Committee believes there is no need to depart from the current practice. Still, the Committee believes the practical outcomes of Commissioner's Instructions should continue to be monitored by Parliament and the wider community.

Finding 10

Commissioner's Instructions pertain to operations within the public sector for which the Commissioner should be given reasonable scope to discharge his or her statutory functions under section 21A of the *Public Sector Management Act 1994* (WA).

Finding 11

In the absence of further evidence regarding the pros and cons of making all Commissioner's Instructions disallowable, the Committee believes there is no need to depart from the current practice. Still, the Committee believes the practical outcomes of Commissioner's Instructions should continue to be monitored by Parliament and the wider community.

274 Clause 20, Explanatory Memorandum *Public Sector Reform Bill 2009* (WA).

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Application and Operation of Commissioner's Instructions – A Case Study

Subject of Case Study: Commissioner's Instruction No. 3: *Discipline - general*

- 5.1 In order to acquire a greater understanding how CIs work in practice, the Committee has chosen No. 3: Discipline – general for closer examination. This CI addresses the disciplinary framework under the PSM Act. Before proceeding into a study of the CI, it is important to understand the provisions relating to this framework.

Background: Disciplinary framework under Part 5 of the *Public Sector Management Act 1994*

- 5.2 A disciplinary framework is enshrined in Part 5 of the PSM Act, a part which also covers the processes for dealing with substandard performance. Division 3 of Part 5 (sections 80A through 93A) includes all the provisions relating to disciplinary matters.
- 5.3 Those to whom Part 5 applies are outlined in section 76, and include 'public service' officers, ministerial officers, and anyone employed under Part 3 of the Act. Under the Reform Bill amendments passed in 2010, those who were formerly employed within these entities or under Part 3 are now also captured.²⁷⁵
- 5.4 Certain members of the broader public sector are not defined as public service officers and are therefore excluded from Part 5. These include employees of non-SES organisations, or any public service entity (e.g. departments, SES-organisations) that does not contain a Senior Executive Service (SES) position within its structure.²⁷⁶ The PSM Act does allow these employees to come under Part 5 if prescribed under other legislation. For example, teachers and other officers within the Department of Education were brought under the Part 5 provisions through section 239 of the *School Education Act 1999*.²⁷⁷

²⁷⁵ Section 76(1)-(4) *Public Sector Management Act 1994* (WA) current.

²⁷⁶ Taken from the definitions of public sector and public service under sections 3 and 34 of *Public Sector Management Act 1994* (WA) current. For definitions of SES, SES-Organisations, and non-SES organisations, refer to text box immediately below paragraph 1.24 above.

²⁷⁷ Section 239 *School Education Act 1999* (WA).

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- 5.5 Part 5 only applies to an employee in the broader public sector if that employee is suspected by their employing authority of having disobeyed or disregarded a 'lawful order' regarding redeployment (referred to in the PSM Act as a 'section 94 breach of discipline').²⁷⁸
- 5.6 Part 5 lists a range of other actions which, if proven, also constitute 'breaches of discipline'. These include:
- disobeying or disregarding a lawful order;
 - contravening any provision of the PSM Act, any public sector standard, or code of ethics;
 - committing an act of misconduct;
 - being negligent or careless in the performance of functions; or
 - committing an act of victimisation as defined in section 15 of the *Public Interest Disclosure Act 2003* (WA).²⁷⁹
- 5.7 Further provision is made to account for a 'serious offence', the definition of which includes indictable offences against laws in other jurisdictions, both national and international.²⁸⁰
- 5.8 Part 5 contains a range of 'disciplinary action[s]' that may be applied if a breach of discipline is substantiated, or if an employee is convicted of a serious offence. These actions include: reprimand; a fine of no more than one week's salary; transfer to another department; transfer to another public sector body; internal transfer; reduction in salary; reduction in classification; and dismissal.²⁸¹ Where an employee is found to have committed a section 94 breach, the only disciplinary action available is dismissal.²⁸²
- 5.9 Employing authorities are responsible for dealing with suspected breaches of discipline by employees within their organisation.²⁸³ The procedures available to employing authorities in these circumstances were streamlined following the passage of the Reform Bill. Under the amended section 81, employing

278 Sections 76(3), 80A for reference to 'lawful order', and 94(4) *Public Sector Management Act 1994* (WA) current.

279 *ibid.*, Section 80A.

280 *ibid.*

281 *ibid.*, Sections 80A and 92.

282 *ibid.*, Section 82A (3)(A).

283 *ibid.*, Section 81. In the case of employees of a department, the employing authority would normally be the CEO. In the case of a CEO, the employing authority is the Commissioner. In the case of a ministerial officer, the employing authority is the Premier. See section 5(1)(a),(b), and (d).

authorities now have the option of taking ‘improvement action’²⁸⁴ with respect to the employee, or they can decide to take no further action.²⁸⁵

- 5.10 New provisions outline explicit requirements for employing authorities when dealing with a disciplinary matter. To the extent permitted by the CIs and Division 3 of Part 5, employing authorities may determine the procedure they wish to follow and they ‘must proceed with as little formality and technicality’ as possible.²⁸⁶ When discharging these functions, employing authorities are not bound by the rules of evidence.²⁸⁷
- 5.11 Should they elect to proceed—or if they are awaiting the outcome of a criminal charge against an employee—employing authorities have the capacity of suspending that employee on full, part, or no pay.²⁸⁸
- 5.12 New provisions have also seen the Commissioner assume some significant powers within Part 5. Firstly, the Commissioner has replaced the Premier as the employing authority of CEOs and therefore becomes responsible for dealing with suspected breaches of discipline involving department and agency heads.
- 5.13 Secondly, the Commissioner may—at any time before an employing authority decides how they will proceed—direct that a ‘special disciplinary inquiry’ (SDI) be undertaken into a suspected breach. The Commissioner may make a similar direction at the request of the employing authority. SDIs have broader investigatory powers than a standard investigation under Part 5.²⁸⁹ The power to direct such inquiries was formerly vested with the Premier who was more limited in his or her capacity to invoke this mechanism.
- 5.14 Whoever is directed to conduct an SDI must prepare a report that includes a finding as to whether or not a breach has been committed. This report must be provided to the Commissioner and the employing authority, the latter of whom must decide the action to be taken in response to the finding.²⁹⁰
- 5.15 Notably, the PSM Act makes provision for appeal to a Public Service Appeal Board constituted by the WA Industrial Relations Commission (WAIRC) for

284 Improvement action was introduced as a new term within section 3 and includes options of counselling; training and development; and issuing warnings.

285 Section 81(1) *Public Sector Management Act 1994* (WA) current.

286 *ibid.*, Section 82A(1).

287 *ibid.*

288 *ibid.*, Section 82.

289 A person directed to conduct an SDI has the same powers as a Special Inquirer as per sections 24I and 24J of the Act. Special Inquiries are examined in greater detail in Chapter Seven.

290 Sections 87 and 88 *Public Sector Management Act 1994* (WA) current.

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some administrative decisions made under Part 5.²⁹¹ The Commission has confirmed these decisions include:

- Taking disciplinary action against an employee following a disciplinary matter or conviction for a serious offence.
- Taking action to dismiss an employee for a section 94 breach after the conclusion of a disciplinary matter.
- Making a finding from an SDI that an employee has committed a breach of discipline (including a section 94 breach).
- Reducing the classification of an employee.
- Terminating employment (other than that of a CEO).
- Suspending an employee on part or no pay.²⁹²

5.16 The Commission has further advised that any other decisions not appealable under this particular section 'are reviewable by the Supreme Court by way of prerogative writ.'²⁹³

Commissioner's Instruction No. 3: *Discipline - general*

- 5.17 CI No. 3 'contains the minimum procedural requirements to be followed by employing authorities when dealing with suspected breaches of discipline or disciplinary matters and taking disciplinary action, under Part 5 of the PSM Act.'²⁹⁴
- 5.18 The Commissioner is given scope to issue a CI for this specific purpose under section 22A(1)(f) of the Act. At a minimum, under section 22A(2A) the Commissioner must issue an instruction ensuring that employees are informed of, and are able to respond to, any proceedings that commence relating to a suspected breach of discipline (see 4.19 above).²⁹⁵
- 5.19 CI No. 3 is four pages in total. It was originally established on 28 March 2011 and was reviewed and re-issued on 8 November 2012.

291 Section 78(1)-(3) *Public Sector Management Act 1994* (WA) current.

292 Mr Dan Volaric, Acting Commissioner, Public Sector Commission, *Transcript of Evidence*, 9 April 2014, p. 12.

293 *ibid.*

294 Public Sector Commission, *Commissioner's Instruction No. 3 – Discipline – general*, 8 November 2012, p. 1. Available at: http://www.publicsector.wa.gov.au/sites/default/files/documents/commissioners_instruction_03_-_discipline_-_general_0.pdf. Accessed on 15 May 2014.

295 Section 22A(1)(f) and 22A(2A) *Public Sector Management Act 1994* (WA) current.

- 5.20 As with other CIs, CI No. 3 confirms the scope and application of the instruction. In this instance, the CI applies to all employing authorities whose employees fall under the disciplinary provisions of Part 5 and it relates to any disciplinary proceedings conducted within these provisions that commenced on or after 28 March 2011.²⁹⁶
- 5.21 CI No. 3 also specifies several ‘references’ against which employing authorities must comply when acting under this area of Part 5. These references are: the CI itself; the PSM Act (Part 5 Divisions 1 and 3); the rules of procedural fairness; and the Discipline Standard.²⁹⁷

What is the Discipline Standard?

The Discipline Standard is one of the six Public Sector Standards in Human Resource Management currently in operation (see 4.27 above). The Discipline Standard applies to all disciplinary proceedings across the public sector, not just those pertaining to Part 5 of the PSM Act.

There is less detail included in the Discipline Standard when compared to CI. No 3. The Standard simply defines three principles that reflect the minimum standard of ‘merit, equity and probity’ that must be observed by employing authorities during a disciplinary process. It also includes a stated outcome that ‘[t]he discipline process observes procedural fairness.’

The Standard includes some ‘Explanatory notes’ that do not form part of the Standard itself. Among other things, these notes confirm that nothing in the Standard overrides the discipline procedures in Part 5 of the PSM Act or any CI relating to discipline.

Sources: Public Sector Commission, *Discipline Standard*, 27 September 2012. Available at: <http://www.publicsector.wa.gov.au/publications-resources/instructions-standards-and-circulars/public-sector-standards-human-resource-management/discipline-standard>. Accessed on 20 May 2014; Public Sector Commission, *A guide to the disciplinary provisions contained in Part 5 of the PSM Act*, 2011, p. 9. Available at: http://www.publicsector.wa.gov.au/sites/default/files/documents/part_5_discipline_guidelines.pdf. Accessed on 22 May 2014.

- 5.22 The CI offers a broad explanation as to how procedural fairness is determined before listing 15 further instructions that detail how employing authorities are required to act when undertaking disciplinary proceedings.
- 5.23 These further instructions confirm when disciplinary proceedings are considered to have commenced and the conduct expected of employing

²⁹⁶ Public Sector Commission, [*Commissioner’s Instruction No. 3: Discipline – general*](#), 8 November 2012, p. 1.

²⁹⁷ *ibid.*

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authorities or those delegated to deal with a disciplinary matter. Also included are instructions outlining the entitlements of an employee regarding:

- information about an allegation and the range of possible penalties;
- opportunities to respond to an allegation and to have that response genuinely considered;
- support or representation during proceedings; and
- the right to reasons for any findings made and actions taken.

- 5.24 The final four instructions cover the entitlements of an employee to respond to a proposed suspension and the criteria under which an employing authority may withhold that right.²⁹⁸ The full text of these instructions (or binding clauses of CI No. 3) has been included in Appendix Seven.
- 5.25 The CI contains a review date. In the case of CI No. 3, the current review date is listed as 31 March 2014. The Committee has questioned the Commission about the status of this review. This issue is discussed from paragraph 5.55 below.
- 5.26 At the end of CI No. 3 there is a link to supporting information. This link directs readers to a 36-page document entitled, *A guide to the disciplinary provisions contained in Part 5 of the PSM Act* (the Guide). The Guide ‘aims to explain the legislative requirements as contained in Part 5 of the PSM Act and associated instruments’, including CI No. 3.²⁹⁹ The Guide emphasises that it represents ‘suggested practice only and is in no way binding on agencies.’³⁰⁰
- 5.27 Examples of issues on which the Guide provides further commentary include: procedural fairness; defining a breach of discipline; the standard of proof required in disciplinary matters (balance of probabilities); the suspension framework; and the rights of the employee.³⁰¹
- 5.28 There are also examples of suggested practice for employing authorities including the following:

298 Public Sector Commission, [Commissioner’s Instruction No. 3: Discipline – general](#), 8 November 2012, pp. 2-4.

299 Public Sector Commission, *A guide to the disciplinary provisions contained in Part 5 of the PSM Act*, 2011, p. 5. Available at: http://www.publicsector.wa.gov.au/sites/default/files/documents/part_5_discipline_guidelines.pdf. Accessed on 22 May 2014.

300 *ibid.*, Inside cover page.

301 Public Sector Commission, [A guide to the disciplinary provisions contained in Part 5 of the PSM Act](#), 2011, pp. 7-8, 11-12, 25-30.

*There is no legislative requirement that an employee is informed of their avenue of appeal when a finding or decision is made. However it is considered good practice that the employee is made aware of any appeal rights that they may have.*³⁰²

- 5.29 The Guide has now been complemented with another document published in 2013 and titled, *Disciplinary investigations under Part 5 of the Public Sector Management Act 1994: A guide for agencies* (the Agency Guide). The Agency Guide is designed to provide 'practical advice in relation to conducting investigative practices'³⁰³ and compiles relevant information from applicable legislation, CIs, awards, agreements, and precedents from previous disciplinary matters. Again, the Commissioner stresses that the guide 'does not form part of the regulatory regime'³⁰⁴ applicable to Part 5 of the PSM Act.
- 5.30 The Commission has delivered training sessions to human resource practitioners and other relevant staff following the release of the Agency Guide.³⁰⁵ In addition, the Commission's Agency Support Division takes ongoing enquiries into any matters relating to CI No. 3 and any of its supporting documentation.

Commentary surrounding Commissioner Instruction No. 3

- 5.31 The majority of commentary received by the Committee relating to CI No. 3 came from the Community and Public Sector Union/Civil Service Association of WA (CSA).
- 5.32 The CSA is often asked to assist its members who are subject to actions proposed or taken under Part 5 of the PSM Act relating to both discipline and substandard performance.
- 5.33 The CSA provided data showing the number of new and recurrent breach of discipline and substandard performance cases it is pursuing on behalf of its members. For the period January 2013 through January 2014, the number of open cases rose from 37 to 51 despite 25 cases being concluded. The CSA

302 Public Sector Commission, [A guide to the disciplinary provisions contained in Part 5 of the PSM Act](#), 2011, p. 30.

303 Public Sector Commission, *Disciplinary investigations under Part 5 of the Public Sector Management Act 1994: A guide for agencies*, 2013, p. 5. Available at: http://www.publicsector.wa.gov.au/sites/default/files/documents/disciplinary_investigations_under_part5_of_the_psm_act_-_a_guide_for_agencies_2.pdf. Accessed on 22 May 2014.

304 *ibid.*

305 Public Sector Commission, [State of the sector report 2013](#), 19 November 2013, p. 25.

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indicated approximately 90 per cent of these cases related to disciplinary matters.³⁰⁶

- 5.34 While the factors behind the rising trend in open cases were not attributed to any one issue, the CSA stated in its earlier submission that it ‘continues to have serious reservations’³⁰⁷ about how CI No. 3 is working in practice.
- 5.35 Among the broader concerns for the CSA is that the rules of procedural fairness (see text box, next page) are not fully articulated in the CI. Instead, this information is included in the Guide and the Agency Guide, documents which have no legislative effect on employing authorities. During the drafting of the CI, the CSA sought unsuccessfully to have these rules incorporated along with a statement regarding how investigations under Part 5 should be conducted. The CSA advised that concerns around procedural fairness are expressed as ‘a common daily practice’ when discussing matters with its members.³⁰⁸
- 5.36 The CSA highlighted several other areas where it felt the current CI needed amendment, a key issue being the need for employing authorities to ‘crystallise and particularise’ an allegation before contemplating a disciplinary investigation or a suspension against an employee:

*The concern there deals with the failure by agencies to properly particularise the allegations so that the person who is being investigated understands where they are coming from. The failure often causes the CSA to go to the arbitrator to seek further and better particulars. It is a bit of a struggle.*³⁰⁹

- 5.37 The CSA referred to approximately 10 instances during the last 18 months where it had argued with agencies over the failure to specify an allegation. As a result, it was recommending that clauses 1.4 and 2 of the CI needed to be amended.³¹⁰ (Note: see Appendix Seven for the full text of each clause of CI No. 3).

306 Submission No. 4a from Community & Public Sector Union/Civil Service Association of WA, 28 April 2014, pp. 5-6.

307 Submission No. 4 from Community & Public Sector Union/Civil Service Association of WA, 13 November 2013, p. 4.

308 Mr Warwick Claydon, Senior Industrial Officer, Community & Public Sector Union/Civil Service Association of WA, *Transcript of Evidence*, 2 April 2014, pp. 1-3.

309 *ibid.*, p. 2.

310 Mr Warwick Claydon, Senior Industrial Officer, Community & Public Sector Union/Civil Service Association of WA, *Transcript of Evidence*, 2 April 2014, p. 3; Submission No. 4 from Community & Public Sector Union/Civil Service Association of WA, 13 November 2013, p. 3.

What are the rules of procedural fairness?

Procedural fairness concerns rules of common law relating to how a decision maker should act when making decisions that may adversely impact upon a person's rights or interests to ensure there is a fair and equitable process.⁺

There are three elements or 'rules' of procedural fairness that need to be applied when considering any disciplinary matter:

- **Bias rule:** *the decision maker does not hold, nor is perceived to hold, a vested interest in the outcome of the process. An investigator should not approach a task entrusted to them with bias or apparent bias.*
- **Hearing rule:** *the employee is provided with a fair hearing. For example: the employee is given sufficient information relating to all of the allegations to form a response; the information is provided within a reasonable time frame; the employee is given the opportunity to make their response; and the response is genuinely considered.*
- **Evidence rule:** *recommendations made by an investigator (and subsequent decisions made by an employing authority) are based on logically compelling evidence, and irrelevant considerations are not taken into account when coming to a decision.*

The requirements to satisfy procedural fairness will vary according to the circumstances of the matter.⁺⁺

Source: ⁺ Definition as quoted in Public Sector Commission, [A guide to the disciplinary provisions contained in Part 5 of the PSM Act](#), 2011, p. 7.

⁺⁺ Rules as quoted in Public Sector Commission, [Disciplinary investigations under Part 5 of the Public Sector Management Act 1994: A guide for agencies](#), 2013, p. 9. These rules are also articulated in a similar, but not identical, form on page 7 of the Guide.

- 5.38 The relevant part of clause 1.4 referred to by the CSA states no finding of a breach of discipline can be made unless during the course of the disciplinary process the employee has been notified in writing:

...of the conduct relating to the possible breach of discipline, in sufficient detail to enable the employee to know what is alleged against him or her.³¹¹

- 5.39 Clause 2, which relates to the suspension procedures, does not currently address the process of communicating an allegation, focusing instead on the employee's rights to respond to a proposed suspension, including scenarios when these rights may not be available.³¹²
- 5.40 A third issue for the CSA relates to the requirements on employing authorities to provide reasons for disciplinary decisions such as findings and penalties. The union argues that the relevant provisions of the CI—Clauses 1.7 and 1.9—are

³¹¹ Public Sector Commission, [Commissioner's Instruction No. 3: Discipline – general](#), 8 November 2012, clause 1.4(a)(i).

³¹² *ibid.*, clause 2.1-2.3.

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‘either ambiguous or lack clarity.’³¹³ It refers to section 6.1 of the Guide which, by contrast, is more prescriptive.³¹⁴

- 5.41 Currently clause 1.7 says that employees must be notified of any finding and proposed actions with 14 days. There is no stipulation to include reasons for the decisions. Clause 1.9, on the other hand, does make provision for reasons to be provided ‘[if] requested by the employee’.³¹⁵
- 5.42 A further problem for the CSA related to the time departments take to notify employees about disciplinary findings and penalties. Despite the fact that the CI contains various clauses outlining 14-day deadlines for notifications in these areas, the CSA claims there is a ‘delaying culture’ within departments around communicating.³¹⁶
- 5.43 When appearing before the Committee, the CSA gave a detailed account of a particular case to support its collective concerns. The case related to an employee of the Disability Services Commission who was stood down following the receipt of two separate allegations that were ultimately referred to the Corruption and Crime Commission (CCC) and resulted in criminal charges being laid. While both charges have since been withdrawn, one matter remains unresolved after two years because it is still being investigated as a potential disciplinary matter within the department.³¹⁷
- 5.44 For the CSA, the fault originated in the fact the employee was ‘only told part of the allegation’³¹⁸ at the outset, despite further details being available the day after the initial complaint was lodged. This impacted the employee’s capacity to respond appropriately to the allegations put. The CSA argued:

*If he had been told [the full details] the very next day after he was alleged to have done this, there was an incredibly reasonable explanation for it, which was supported.*³¹⁹

313 Submission No. 4a from Community & Public Sector Union/Civil Service Association of WA, 28 April 2014, p. 4.

314 *ibid.*

315 Public Sector Commission, [*Commissioner’s Instruction No. 3: Discipline – general*](#), 8 November 2012, clause 1.9. See also clause 1.7.

316 Submission No. 4a from Community & Public Sector Union/Civil Service Association of WA, 28 April 2014, p. 2.

317 For further details of this case as conveyed by the CSA, refer to, Ms Jeannette O’Keefe, Industrial Officer, Community & Public Sector Union/Civil Service Association of WA, *Transcript of Evidence*, 2 April 2014, pp. 4-5.

318 *ibid.*, p. 4.

319 *ibid.*

- 5.45 The concerns of the CSA—regarding both that individual case and the operation of CI No. 3 more generally—were put to the Commissioner for a response.
- 5.46 In regards to the case referred to by the CSA, the Commissioner advised this matter involved a Social Trainer employed by the Disability Services Commission (DSC). While some DSC employees are covered by Part 5 of the PSM Act, Social Trainers are not. As such, the requirements of CI No. 3 were not applicable in this instance. However, DSC was now seeking to have Social Trainers prescribed under section 76(1)(b) of the PSM Act so that these provisions would apply in future.³²⁰
- 5.47 Responding more generally on the absence of the rules of procedural fairness in CI No. 3, the Commissioner acknowledged this matter was ‘considered extensively’ during the drafting stage. Legal advice was sought as part of this process. A decision was made not to codify these rules within the CI, as procedural fairness is still ‘an evolving legal concept’.³²¹ Placing these rules within the CI ‘could result in undesirable inflexibility in [their] application’.³²²
- 5.48 Nonetheless, the Commissioner argued that ‘the key applicable elements of procedural fairness are reflected in the CI.’³²³ These include the requirements of the employing authority to: act fairly and avoid bias (clause 1.3); give written notice of accusations against an employee (1.4(a)); allow an employee to respond to the allegations (1.4(b)); and to notify an employee of a decision and provide reasons (1.6-1.10).
- 5.49 On the failure to particularise allegations at the commencement of a disciplinary process (as appears to have occurred in the example given by the CSA), the Commissioner referred to clause 1.4 of the CI (cited above at 0) and stated:

The flexibilities around when those particulars are put to the employee are an important provision to allow for sufficient information to be gathered to aid in formulating the allegations accurately.

The Public Sector Commission supports notifying employees of allegations at the earliest possible opportunity, but sees the need for this to be balanced against agencies having and providing sufficient detail in the allegations to enable a sensible response from the individual and being able to react in a timely way to protect the public

320 Submission No. 5b from Public Sector Commission, 5 May 2014, p. 3.

321 *ibid.*, p. 4.

322 *ibid.*

323 *ibid.*

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*interest. It is also important to avoid inappropriately revealing an investigation prior to the notification of a decision having been taken by an employing authority to deal with the matter as a breach of discipline.*³²⁴

- 5.50 On the issue of timeliness, the Commissioner agreed that investigations should be conducted and resolved in a timely manner, taking into account the circumstances of each case and the need to ensure that procedural fairness is afforded. However, there are occasions where delays are attributable to mandatory obligations under other legislation or legal proceedings.³²⁵
- 5.51 For example, under the current definition of misconduct in the *Corruption and Crime Commission Act 2003* (WA) (CCC Act), all ‘serious disciplinary allegations’ must be reported to the CCC.³²⁶ The CCC may then order an employing authority to suspend its investigation while the CCC ‘considers the matter’.³²⁷
- 5.52 Similarly, if an allegation relates to a criminal matter being investigated by the WA Police, any internal investigation under Part 5 of the PSM Act will again be put on hold. This is to respect the employee’s right to silence, which is available during a criminal investigation, but not in a Part 5 disciplinary setting. Given that answers compelled during a disciplinary investigation may prejudice the outcome of a trial process, the former is put on hold while the latter runs its course.³²⁸
- 5.53 While the provisions of Part 5 did not apply to the Social Trainer at DSC (referred to at 5.46 above), the Commissioner noted the disciplinary investigation DSC undertook was nonetheless suspended while the CCC and WA Police looked into the allegations.
- 5.54 The Commissioner went on to argue that, ‘at a practical level, the example provided [by the CSA to the Committee] could be regarded as an exceptional case and not necessarily representative of a typical disciplinary process’.³²⁹ To support his argument, the Commissioner cited agency survey data reporting that 88 per cent of the 1,518 investigations³³⁰ into suspected breaches across the broader public sector in 2012/13 were completed within 6 months.³³¹

324 Submission No. 5b from Public Sector Commission, 5 May 2014, p. 5.

325 *ibid.*, p. 4.

326 *ibid.*

327 *ibid.*; Section 42 *Corruption and Crime Commission Act 2003* (WA).

328 *ibid.*

329 *ibid.*

330 NOTE: Of these 1,518 investigations, 625 were conducted under the provisions of the PSM Act. The other 893 were conducted under other instruments (e.g. industrial awards, policies). See Public Sector Commission, *State of the sector statistical bulletin 2013*, 2013, p. 49. Available at:

- 5.55 Given the concerns raised by the CSA, the Committee sought the Commission's feedback on how CIs were reviewed. This question was further prompted by the fact CI No.3's published review date of 31 March 2014 fell during the course of the Inquiry. As noted at 4.35 above, the Acting Commissioner, Mr Dan Volaric, advised that reviews are conducted at the discretion of the Commissioner and undertaken by Commission staff.
- 5.56 In the case of CI No. 3 (and CI No. 4 – Discipline (former employees)), the decision has been made to defer the review until 31 December 2015. Mr Volaric said that both CIs were reviewed in 2012 during which time the public sector unions and government agencies were consulted. Mr Volaric added that 'no significant issues were raised with regard to the operation of the instructions', hence the decision to defer.³³² Mr Volaric was also of the view that timelines for investigations were not raised as an issue in 2012, although he acknowledged they 'may have been discussed' during the initial drafting stage.³³³
- 5.57 Appearing with Mr Volaric, Mr Lindsay Warner, Director Policy and Reform, indicated the unions do raise their concerns around the disciplinary process sporadically 'and we are more than happy to continue to consider any concerns that they raise.'³³⁴
- 5.58 Mr Volaric added that the Commission undertakes advisory and support services to agencies. If an issue such as failure to particularise allegations was raised by unions, 'it would certainly form part of our advisory service to inform agencies about their obligations under the Commissioner's Instruction.'³³⁵

Committee considerations

- 5.59 The parliamentary debates for the 2009 Reform Bill indicated broad support for amending the disciplinary framework under Part 5 of the PSM Act to one

<http://www.publicsector.wa.gov.au/document/state-sector-statistical-bulletin-2013> . Accessed on 21 March 2014.

331 Submission No. 5b from Public Sector Commission, 5 May 2014, p. 4.

332 Mr Dan Volaric, Acting Commissioner, Public Sector Commission, *Transcript of Evidence*, 9 April 2014, p. 2.

333 *ibid.*, p. 3.

334 Mr Lindsay Warner, Director Policy and Reform, Public Sector Commission, *Transcript of Evidence*, 9 April 2014, p. 3.

335 Mr Dan Volaric, Acting Commissioner, Public Sector Commission, *Transcript of Evidence*, 9 April 2014, p. 3.

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that was less convoluted than its predecessor, but still ‘retain[ed] full natural justice.’³³⁶

- 5.60 As a result of the ensuing amendments, in particular those to section 81 (see 5.9 above), employing authorities now have the flexibility to deal with behavioural issues without having to resort to a formal disciplinary process. However, should disciplinary proceedings be deemed necessary, CI No. 3 and its accompanying guidelines have been introduced to direct employing authorities as to the process that needs to be followed. The Committee believes the procedural principles outlined in CI No. 3, while limited in some aspects of their underlying content, are nonetheless meritorious and should be given scope across a larger part of the public sector.
- 5.61 In terms of scope, CI No. 3 currently applies only to ‘employing authorities whose employees are subject to the disciplinary provisions of Part 5 of the PSM Act’.³³⁷ By contrast, the Discipline Standard (see text box following paragraph 5.21 above) applies to all disciplinary proceedings across the public sector, not just those conducted under Part 5 of the PSM Act. The Committee would like to see the procedural requirements of CI No. 3—which are more prescriptive than the requirements of the Discipline Standard—be given similarly broad coverage.
- 5.62 The Committee understands that the current application of CI No. 3 is consistent with the Commissioner’s statutory function to issue instructions dealing specifically with the disciplinary framework articulated in Part 5 of the PSM Act (see 5.18 above).³³⁸ However, the Commissioner can also issue instructions for ‘any other matter in connection with the functions of the Commissioner in respect of which the Commissioner considers it necessary or desirable to issue instructions.’³³⁹ The Commissioner’s functions include promoting the efficiency and effectiveness of the public sector. The Committee believes that standardising the procedural requirements outlined in CI No. 3 as far as is logistically possible across the sector would promote efficiency by encouraging the development of a more uniform disciplinary regime. Whether under Part 5 of the PSM Act, or under the various other instruments currently in place for conducting disciplinary processes, the same procedural requirements should apply. The Committee would like to see the

336 Ms Andrea Mitchell MLA and Hon Eric Ripper MLA, Leader of the Opposition, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 June 2010, pp. 4282-4283, 4256-4258; Hon Alison Xamon MLC, WA, Legislative Council, *Parliamentary Debates*, 18 Aug 2010, p. 5700.

337 Public Sector Commission, [*Commissioner’s Instruction No. 3: Discipline – general*](#), 8 November 2012, p. 1.

338 Section 22A(1)(f) *Public Sector Management Act 1994* (WA) current.

339 *ibid.*, Section 22A(1)(h).

Commissioner work to achieve this outcome, either through amending CI No. 3 or by issuing a new instruction.

- 5.63 Regarding the adequacy of the content within the Instruction itself, the Committee has considered the arguments around the extent to which the rules of procedural fairness should be codified within CI No. 3. It has formed the view that such rules need not be made explicit within the CI, as they are explained in reasonable detail in the various supporting documents accompanying the instruction.³⁴⁰ One example is the list of ‘common mistakes that can result in a lack of procedural fairness’³⁴¹ that is included in the Commission’s Agency Guide. However, the Committee thinks CI No. 3 should make clearer the requirement for employing authorities to observe procedural fairness when undertaking disciplinary proceedings.
- 5.64 In its current form, CI No. 3 provides a general statement as to what procedural fairness represents before directing readers to sources of further information outlining how the principles of procedural fairness apply in disciplinary proceedings. Once again, this stands in contrast to the Discipline Standard, which lists as its sole required outcome: ‘[that] the discipline process observes procedural fairness.’³⁴² The Discipline Standard also makes clear that the minimum standard of merit, equity and probity for disciplinary proceedings requires employing authorities to ensure ‘procedural fairness is ‘applied to all parties’.³⁴³
- 5.65 The Commissioner made the point that there are references to elements of the bias, hearing, and evidence rules of procedural fairness³⁴⁴ in several of the clauses listed under the ‘Instruction’ section of CI No. 3 (see 5.48 above). The Committee accepts this point and notes that this section of the CI is binding upon employing authorities. However, given the evidence received during the Inquiry, the Committee thinks this section of CI No. 3 should include an explicit statement advising employing authorities of the requirement to observe procedural fairness throughout disciplinary proceedings. The Committee believes such an amendment will provide employing authorities with greater clarity as to their responsibilities without making the disciplinary regime overly prescriptive. This is likely to facilitate a more consistent application of the

340 Public Sector Commission, [A guide to the disciplinary provisions contained in Part 5 of the PSM Act](#), 2011, pp. 4-5, 7-8, 13, 22, and 25.

341 Public Sector Commission, [Disciplinary investigations under Part 5 of the Public Sector Management Act 1994: A guide for agencies](#), 2013, p. 30.

342 Public Sector Commission, [Discipline Standard](#), 27 September 2012.

343 *ibid.*

344 For more on the bias, hearing, and evidence rules of procedural fairness, refer back to the text box beneath paragraph 5.37)

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principles of procedural fairness, which the Committee sees as a critical outcome.

- 5.66 There are other areas within CI No. 3 where the Committee thinks changes should be made to the content. Firstly, the Committee urges the Commissioner to amend the current wording of Clause 1.4 of CI No. 3 to ensure that allegations in disciplinary matters are particularised. Currently, the Agency Guide, which is suggestive, warns employing authorities that ‘failure to communicate all allegations to the respondent’³⁴⁵ can result in a lack of procedural fairness. However, Clause 1.4(a)(i) of CI No. 3, to which employing authorities are bound, makes it a requirement to notify an employee in writing only ‘in sufficient detail to enable the employee to know what is alleged against him or her’.³⁴⁶
- 5.67 There is an element of subjectivity involved when determining what is ‘sufficient’ when an employing authority provides details of an allegation to an employee as part of a disciplinary procedure under the PSM Act. Each party may have quite divergent views on what level of detail is sufficient in these circumstances. It is arguable that Clause 1.4 could be adjusted to make the requirement more specific, and thus more equitable.
- 5.68 The Committee notes that during consideration in detail of the 2009 Reform Bill, the Hon Eric Ripper withdrew a proposed amendment to section 22A(2A), which sought to include in the CI on disciplinary matters the directive that an employee be given ‘written details of the specific allegations’ made against them.³⁴⁷ This amendment was withdrawn on the basis of advice to the Government, which indicated that the section as it read in the Reform Bill would have the same effect as what Mr Ripper was proposing.³⁴⁸ The concerns raised during the Inquiry around the application of CI No. 3 suggest this may not always be the case.
- 5.69 Therefore, it may be that CEOs need greater clarity in the Instruction as to the level of detail required when making an allegation as part of a disciplinary matter. This may not require the legislative change that the Hon Mr Ripper intended to propose in 2009. Indeed, it is arguable that the wording of Clause 1.4(a)(i) could be amended to ensure that employing authorities are required

345 [Emphasis added] Public Sector Commission, [*Disciplinary investigations under Part 5 of the Public Sector Management Act 1994: A guide for agencies*](#), 2013, p. 30.

346 [Emphasis added] Public Sector Commission, [*Commissioner’s Instruction No. 3: Discipline – general*](#), 8 November 2012.

347 Hon Eric Ripper MLA, Leader of the Opposition, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 June 2010, pp. 4519-4520.

348 Debate on Clause 93A Public Sector Reform Bill 2009. Hon Colin Barnett MLA, Premier, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 June 2010, pp. 4519-4520.

to provide “specific”, rather than “sufficient”, details of any allegation that forms part of a disciplinary proceeding under Part 5 Division 3 of the PSM Act. The Committee thinks this practice should apply throughout all stages of a disciplinary proceeding, so that an employee remains fully informed as relevant evidence comes to light. This would be more consistent with the fair and equitable process that the rules of procedural fairness are intended to promote.

- 5.70 To further promote the application of procedural fairness, the Committee also sees merit in amending Clause 1.9 so that the reasons for disciplinary decisions are made available automatically rather than at the request of the employee as is currently prescribed. This would increase the likelihood that employees who are not well-versed in the Part 5 disciplinary process would automatically be afforded this aspect of their rights. It also serves to encourage employing authorities to make sure decisions relating to disciplinary actions are soundly-based and will stand up to scrutiny.

- 5.71 The final issue considered by the Committee was the timeliness of investigations. In this area the Committee makes no recommendations, but urges employing authorities and the Commission to exercise ongoing vigilance in respect of timeframes.

- 5.72 The Committee is not convinced that CCC or Police investigations need be a significant factor in the delay of disciplinary proceedings under the PSM Act (or other instruments). While the Commission made this argument, its own Agency Guide confirms that ‘[i]n most cases, an employing authority is generally free to continue a disciplinary investigation and take action ... despite any involvement of the police or the CCC.’³⁴⁹

- 5.73 The Committee was concerned to hear of some investigations taking between 18 months and two years regardless of whether or not they were conducted under the provisions of the PSM Act. That said, the Committee notes there has been a significant reduction in the number of prolonged investigations over the 2012–2013 reporting years.

- 5.74 Agency survey data reported by the Commission shows that in 2011/2012 there were 27 (of 1,344) disciplinary investigations that took between 12 and 18 months to complete. A further seven took longer than 18 months. Unfortunately this data did not indicate which investigations were conducted under the PSM Act and which were conducted under other instruments. In

³⁴⁹ Public Sector Commission, [*Disciplinary investigations under Part 5 of the Public Sector Management Act 1994: A guide for agencies*](#), 2013, p. 28.

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addition, data on timeliness was not available for over 800 investigations (the issue of data availability is examined in Chapter Six).³⁵⁰

- 5.75 By contrast, there were 1,518 disciplinary investigations completed in 2012/2013, of which 625 were conducted under the PSM Act. Of these: 206 were completed within 3 months; 270 within 3 to 6 months; 3 within 6 to 12 months; and 146 had no data available. Of the 893 investigations conducted under other instruments, data was not available for 51 cases, but only one investigation was reported as taking longer than 12 months.³⁵¹
- 5.76 While this data indicates that disciplinary processes are improving, it is incumbent upon agencies to act decisively to ensure average timeframes continue to come down. Agencies need to be mindful of the social and financial implications of prolonged disciplinary investigations. From the employee's perspective, future employment prospects may be jeopardised if the individual is suspended (with or without pay) while the process is conducted. Similarly, the efficiency of the agency may suffer both financially and operationally if some staff are suspended and others are required to participate in the disciplinary investigation.

Finding 12

The requirements of Commissioner's Instruction No. 3: *Discipline – general*, apply only to employing authorities whose employees fall within the disciplinary provisions of Part 5 of the *Public Sector Management Act 1994* (PSM Act). Disciplinary investigations of employees not captured under the PSM Act are conducted under the provisions of other instruments.

Finding 13

Standardising the procedural requirements in Commissioner's Instruction No. 3: *Discipline – general*, so that they also apply to disciplinary proceedings outside the current remit of the *Public Sector Management Act 1994*, would promote efficiency by encouraging the development of a more uniform disciplinary regime.

350 All data extrapolated from raw figures listed in Public Sector Commission, *State of the sector 2012 – Statistical bulletin*, 2012, pp. 64-75. Available at: http://www.publicsector.wa.gov.au/sites/default/files/documents/state_of_the_sector_2012_statistical_bulletin.pdf. Accessed on 3 June 2014.

351 Timeliness data extrapolated from raw figures listed in Public Sector Commission, *State of the sector statistical bulletin 2013*, 2013, pp. 46-49.

Recommendation 3

The Premier seek and report on any response from the Public Sector Commissioner regarding the possibility of the Commissioner amending Commissioner's Instruction No. 3: *Discipline – general*, or issuing a new Instruction, to ensure the procedural requirements of the Instruction apply beyond its current remit to cover disciplinary proceedings conducted under other instruments outside Part 5 of the *Public Sector Management Act 1994*.

Finding 14

A set of rules defining procedural fairness need not be made explicit within Commissioner's Instruction No. 3: *Discipline – general*, as they are explained in reasonable detail in the various supporting documents accompanying the Instruction. However, the Instruction should make clear the requirement for employing authorities to observe procedural fairness when undertaking disciplinary proceedings.

Recommendation 4

The Premier seek and report on any response from the Public Sector Commissioner regarding the possibility of the Commissioner amending Commissioner's Instruction No. 3: *Discipline – general*, to include an explicit, and binding, statement that employing authorities are required to ensure procedural fairness is applied to all parties during disciplinary proceedings.

Finding 15

Commissioner's Instruction No. 3: *Discipline – general*, currently requires employing authorities to provide an employee with 'sufficient' detail of an allegation that forms part of a disciplinary proceeding under Part 5 of the *Public Sector Management Act 1994*. A requirement to provide specific details of such allegations would be more consistent with the fair and equitable process that the rules of procedural fairness are intended to promote.

Recommendation 5

The Premier seek and report on any response from the Public Sector Commissioner regarding the possibility of the Commissioner amending Clause 1.4 of Commissioner's Instruction No. 3: *Discipline – general*, to require employing authorities to provide employees with the specific details of allegations made, prior to commencing

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disciplinary proceedings under Part 5 Division 3 of the *Public Sector Management Act 1994*.

Finding 16

Commissioner's Instruction No. 3: *Discipline - general*, currently requires employing authorities to provide reasons for disciplinary decisions made under Part 5 of the *Public Sector Management Act 1994* only if requested by the employee under investigation. Making this process mandatory should ensure all employees are afforded this aspect of their rights, while encouraging employing authorities to make sure decisions relating to disciplinary actions are soundly-based.

Recommendation 6

The Premier seek and report on any response from the Public Sector Commissioner regarding the possibility of the Commissioner amending Clause 1.9 of Commissioner's Instruction No. 3: *Discipline – general*, to require reasons for disciplinary decisions to be made available as a matter of course rather than at the request of the employee.

Disciplinary matters involving a CEO: Is the Commissioner conflicted?

- 5.77 Clause 1.3 of CI No. 3 confirms that employing authorities must, when dealing with disciplinary matters, ensure 'that all issues of perceived or actual bias, or conflicts of interest, are appropriately recorded and resolved.'³⁵² The Guide that accompanies the CI, when elaborating on the bias rule of procedural fairness, adds that employing authorities should not hold, nor be perceived to hold, 'a vested or direct personal interest in the outcome of the [disciplinary] process.' In a similar vein, the Agency Guide simply states that, for investigators, '[b]ias, actual or perceived, must be avoided.'³⁵³
- 5.78 The Commissioner is the employing authority of 76 CEOs across the public sector (see 3.4 above) and is directly involved in their appointment, reappointment, and ongoing performance assessment. Given this link, is there a risk of actual or perceived conflict or bias arising should a CEO be subject to an allegation determinable under Part 5 of the PSM Act? This is a question the Committee has considered during the course of its examination of CI No. 3.

352 Public Sector Commission, [Commissioner's Instruction No. 3: Discipline – general](#), 8 November 2012, 1.3.

353 Public Sector Commission, [Disciplinary investigations under Part 5 of the Public Sector Management Act 1994: A guide for agencies](#), 2013, p. 31.

- 5.79 The Integrity Coordinating Group (ICG) is a forum comprised of the Commissioner and four other of the state's statutory officers.³⁵⁴ The ICG has published guidelines defining a conflict of interest as: 'a situation arising from conflict between the performance of public duty and private or personal interests.'³⁵⁵ The ICG refers to a paper published by the Organisation for Economic Cooperation and Development (OECD). This paper makes the point that private or personal interests are not exclusively pecuniary, but can also relate to:

*... personal affiliations and associations if those interests could reasonably be considered likely to influence improperly the official's performance of their duties.*³⁵⁶

- 5.80 Bias is less complex as a concept and can be defined in the context of a disciplinary proceeding as 'a predisposition or prejudice.'³⁵⁷
- 5.81 As acknowledged in CI No. 3 (at 5.77 above), conflicts of interest and bias can be actual or perceived. When referring to conflicts of interest, the ICG's guidelines stress that '[p]erception ... is important to consider because public confidence in the integrity of an organisation is vital.'³⁵⁸ The ICG's guidelines then make the valid point that it is not 'wrong or unethical' to have a conflict. 'However, identifying and managing the situation is important.'³⁵⁹
- 5.82 The Committee sought the Commissioner's views on conflict of interest in relation to allegations against CEOs for disciplinary breaches under Part 5 of the PSM Act, and breaches of public sector standards (which fall under Part 7 and are explored in further detail in the next chapter).
- 5.83 By way of background, the Commission confirmed that since 2010, 33 complaints have been made against CEOs that did not progress to a

354 The other members of the ICG are the Auditor General, the Corruption and Crime Commissioner, the WA Ombudsman, and the Information Commissioner. The Integrity Coordinating Group, *About the ICG*, no date. Available at: <http://icg.wa.gov.au/about-icg>. Accessed on 24 May 2014.

355 The Integrity Coordinating Group, *Conflicts of Interests: Guidelines for the Western Australia Public Sector*, June 2011, Cover Page. Available at: <http://www.icg.wa.gov.au/sites/default/files/documents/Conflicts%20of%20interest%20-%20Guidelines%20for%20the%20WA%20public%20sector.pdf>. Accessed on 24 May 2014.

356 Taken from a document referred to by the ICG in its materials about conflicts of interest. OECD, *Recommendation of the Council on Guidelines for Managing Conflict of Interest in the Public Service*, 2003, p. 4. Available at: <http://www.oecd.org/governance/ethics/2957360.pdf>. Accessed on 24 May 2014.

357 Sara Tulloch (ed.), *The Reader's Digest – Oxford Complete Wordfinder*, Oxford University Press, Oxford, 1993, p. 134.

358 The Integrity Coordinating Group, *Conflicts of Interests: Guidelines for the Western Australia Public Sector*, June 2011, p. 3.

359 *ibid.*

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disciplinary process for an alleged breach of discipline under section 81.³⁶⁰ A number of these were multiple complaints from the same complainant. Some others were considered to be frivolous, vexatious, or lacking substance. However, in one instance an allegation did proceed as a suspected breach where it was ultimately decided to take no further action.³⁶¹

- 5.84 The Committee asked Acting Commissioner, Mr Volaric, whether there was an inherent conflict of interest in the Commissioner conducting a review, inquiry, or investigation into alleged breaches of discipline by CEOs. Mr Volaric replied:

*...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.*³⁶²

- 5.85 Mr Volaric then confirmed that the Commissioner had not delegated his functions or powers in this area since 2010 due to any perceived conflict of interest.³⁶³

- 5.86 In subsequent correspondence to the Committee, the Commissioner also confirmed he had also not delegated his authority when reviewing five breach of standard claims that had been lodged against CEOs since 2010.³⁶⁴

- 5.87 Given the importance of perception to public confidence in the integrity of the disciplinary framework, as acknowledged by the ICG (see 5.81 above), the Committee has noted a way in which any negative perceptions relating to the Commissioner's role might be mitigated.

- 5.88 The example comes from Victoria, which has recently passed amendments to its *Public Administration Act 2004*. The amended legislation now requires the newly established Victorian Public Sector Commissioner to defer their responsibilities to the Secretary of the Department of Premier and Cabinet:

If the Commissioner considers that he or she has a conflict of interest in any matter that is the subject of an inquiry, a review of an

360 The options available under section 81 were described in paragraph 5.9 above.

361 As per section 81(1)(b)(ii) *Public Sector Management Act 1994* (WA) current; Submission No. 5b from Public Sector Commission, 5 May 2014, p. 2.

362 Mr Dan Volaric, Acting Commissioner, Public Sector Commission, 9 April 2014, p. 19.

363 *ibid.*

364 Submission No. 5b from Public Sector Commission, 5 May 2014, p. 1.

*employment related action or any other activity required or requested to be conducted by the Commission.*³⁶⁵

- 5.89 Importantly, this requirement is not overly prescriptive on the Victorian Commissioner, who still retains the capacity to determine whether a conflict of interest is present. The rationale behind the amendment was explained simply as ‘serv[ing] to protect the integrity and reputation of the Commission.’³⁶⁶
- 5.90 In concluding discussion on this matter, the Committee would like to stress it is not calling into question the integrity of the current Commissioner in the performance of his duties as employing authority under the disciplinary provisions of Part 5 (and Part 7) of the PSM Act.

Finding 17

As a result of amendments to the *Public Administration Act 2004* in Victoria, the Public Sector Commissioner in that jurisdiction must decline to conduct any inquiry, review, or other activity required of them under the legislation, if the Commissioner considers that they have a conflict of interest in the relevant matter. This amendment was designed to protect the integrity and reputation of the Victorian Public Sector Commission.

Such an initiative may derive similar benefit in Western Australia, particularly if the Public Sector Commissioner feels that a conflict of interest or a perception of bias may exist when he is required to investigate the conduct of a Chief Executive Officer under Part 5 or Part 7 of the *Public Sector Management Act 1994*.

In making this finding, the Committee stresses that it is not calling into question the integrity of the current Commissioner in the performance of these functions to date.

Recommendation 7

The Premier consider incorporating into the *Public Sector Management Act 1994*, a conflict of interest and apprehended bias provision similar to the conflict of interest provision which exists under section 50 of the *Public Administration Act 2004* (Victoria).

365 Section 50(1) *Public Administration Act 2004* (Victoria). See Appendix Eight for the full text of section 50.

366 Clause 10 (p. 5) Explanatory Memorandum Public Administration Amendment (Public Sector Improvement) Bill 2013 (Victoria).

Chapter 6

Monitoring and Reporting Compliance with Public Sector Standards and Ethical Codes

- 6.1 The Commissioner has confirmed that an ‘important part’ of his role ‘is to monitor and report on how public sector bodies comply with public sector standards and ethical codes under the PSM Act.’³⁶⁷
- 6.2 In this chapter, the Committee looks to examine the ways in which the Commissioner conducts both functions.

Compliance Monitoring Framework

- 6.3 As noted at 4.19 above, the Commissioner’s statutory functions include issuing CIs establishing public sector standards and codes of ethics. Another function is assisting public sector bodies to establish, amend, or repeal codes of conduct applicable exclusively to those bodies.³⁶⁸
- 6.4 The Act also requires the Commissioner to monitor the extent to which public sector bodies comply with respective standards and codes. This monitoring function extends further to include compliance by public sector bodies and employees with principles in Part 2 of the Act pertaining to conduct and human resource management.³⁶⁹
- 6.5 While it is the responsibility of CEOs to ensure compliance within their respective entities, the Commissioner oversees how this process is working across the sector.
- 6.6 Prior to the 2009 Reform Bill, responsibility for compliance monitoring (and reporting) rested with the former Commissioner for Public Sector Standards.³⁷⁰ The amendments enabling the new Commissioner to assume these roles were not questioned during the Reform Bill debate.

367 Submission No. 5 from Public Sector Commission, 14 November 2013, p. 29.

368 ‘A code of conduct is a formal written policy applicable within each public sector body that expands on the principles set out in the Code of Ethics.’ Public Sector Commission, [State of the sector report 2013](#), 19 November 2013, p. 154.

369 Sections 21(1)(a)-(e) *Public Sector Management Act 1994* (WA) current. See sections 8(1)(a)-(c) and 9 for the relevant principles.

370 Submission No. 5 from Public Sector Commission, 14 November 2013, p. 25.

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Tools for compliance monitoring

6.7 The Commissioner takes a ‘multi-methodological approach’ to compliance monitoring.³⁷¹ While this can include invoking his broad review, inquiry, and investigatory powers available under Division 3, Part 3A of the PSM Act³⁷², the majority of compliance oversight is performed using various instruments under what the Commission calls a monitoring and evaluation framework.

6.8 The framework includes the instruments listed in Table 2 below.

Table 2 Monitoring and evaluation framework - Public Sector Commission³⁷³

Framework component	Period in operation
Annual agency survey	6 years (reviewed annually)
Annual public interest disclosure survey	8 years (reviewed annually)
Compliance assessments and general enquiries	18 years
Employee perception survey	18 years (reviewed 4 times)
Human resource minimum obligatory information requirement (HRMOIR) workforce data	20 years

6.9 Further detail on these components is available in the Commission’s *State of the sector report 2013*³⁷⁴, but a basic summary is provided below for context.

6.10 The **Annual agency survey (AAS)** is a tool that has been designed to help public sector bodies meet their compliance reporting requirements under section 31 of the PSM Act. The AAS is sent to over 100 entities each year and seeks responses to a series of standardised questions covering areas including: integrity and ethics; workforce management and planning; innovation; governance and administration.³⁷⁵ The data collected from this survey forms the basis for performance assessment of sector-wide initiatives outlined in CEO performance agreements.³⁷⁶

6.11 The **Annual public interest disclosure survey (PID)** is designed to assist authorities that are not public sector entities—and therefore exempt from completing the AAS—to report on compliance requirements included within the *Public Interest Disclosure Act 2003* (PID Act). Public sector bodies

371 Submission No. 5 from Public Sector Commission, 14 November 2013, p. 29.

372 Mr Dan Volaric, Acting Commissioner, Public Sector Commission, *Transcript of Evidence*, 9 April 2014, p. 14.

373 Public Sector Commission, *State of the sector report 2013*, 19 November 2013, p. 113.

374 *ibid.*, pp. 112-122.

375 Public Sector Commission, *State of the sector statistical bulletin 2013*, 2013, pp. 34-35; Public Sector Commission, *State of the Sector Report 2013*, 19 November 2013, pp. 115-118.

376 Public Sector Commission, *Annual Agency Survey 2013*, p2. Copy of survey available at: www.psc.wa.gov.au. Accessed on 1 April 2014.

completing the AAS include this information in responses to questions contained in the integrity and ethics section of that survey.³⁷⁷

- 6.12 **Compliance assessments and general enquiries** refers to the analysis of data from three separate sources within the Commission: the Advisory service; matters of referral; and Breach of Standard claims.
- 6.13 The *Advisory service* takes enquiries from public sector bodies on a variety of matters relating to public sector standards, ethical codes, and public interest disclosure. The Advisory service responded to 2,100 such enquiries in 2012/13.³⁷⁸
- 6.14 *Matters of referral* come to the Commission in the form of requests for advice or complaints seeking action on issues of management, governance, compliance with standards, or allegations of unethical behaviour. Matters of referral are subject to a preliminary assessment by the Commission before a decision is made on what further action may need to be taken. In 2012/13, 102 matters of referral were considered.³⁷⁹
- 6.15 *Breach of Standard claims* are available for persons to pursue if they feel a public sector entity has breached a public sector standard and they have been adversely effected by that breach. Claims are initially lodged within the agency involved, but can be referred to the Commissioner for review if not resolved within 15 days. In 2012/13, 116 such claims were finalised by the Commission.³⁸⁰
- 6.16 Collectively, data from the advisory services, matters of referral, and breach of standard claims are analysed by the Commission 'to determine key [compliance] trends and identify areas where assistance may be required.'³⁸¹
- 6.17 The **Employee Perception Survey (EPS)** is used by the Commission to ascertain employee views on the extent to which behaviour in their agency is consistent with human resource standards, the Code of Ethics, and principles of equity and diversity. It also aims to gauge employee satisfaction with: their work; knowledge of and confidence in the public interest disclosure process; and views on management and administration systems in their agency. From this data, areas of good practice can be acknowledged. Conversely, anomalous

377 Public Sector Commission, [State of the sector report 2013](#), 19 November 2013, p. 121.

378 *ibid.*, p. 114.

379 *ibid.*

380 *ibid.*, p. 113.

381 *ibid.*, p. 114.

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data received from an agency may prompt the Commissioner to enter discussions with a CEO regarding causal factors that might need addressing.³⁸²

- 6.18 Finally, **Human resource minimum obligatory information requirement (HRMOIR)** workforce data is collected quarterly by the Commission. It includes demographic information that is used for entity-specific and sector-wide workforce planning and reporting.³⁸³ The Commissioner has issued CI No. 6 – Workforce data reporting obligations, to guide public sector bodies on complying with the requirements of HRMOIR reporting.

Committee considerations

- 6.19 The monitoring and evaluation framework is a well-established process from which information relating to compliance issues can be obtained by the Commission from across the sector.
- 6.20 The HRMOIR and survey data provide a means by which the Commission can evaluate compliance with standards, the code of ethics, and codes of conduct. The survey data—in particular the data obtained from the EPS—also provides an important barometer of morale among public sector workers.
- 6.21 Collectively, these data sets can be used by the Commissioner both initially to determine areas within the sector that require further action, and then to gauge the success of these corrective measures over subsequent years.
- 6.22 Equally important, trends in this data allow the Executive and the Parliament to assess the performance of the Commissioner in addressing issues of repeated non-compliance and low morale in agencies. (The extent to which Parliament currently conducts such oversight is discussed further in Chapter Eight).
- 6.23 Survey processes are subject to regular review, which gives the Commission the opportunity to improve its data-gathering capacities.
- 6.24 The Committee is generally satisfied with the framework the Commission has implemented to monitor compliance.

382 Public Sector Commission, [State of the sector report 2013](#), 19 November 2013, p. 122; Mr Mal Wauchope, Public Sector Commissioner, Public Sector Commission, *Transcript of Evidence*, 12 March 2014, p. 14.

383 Public Sector Commission, [State of the sector report 2013](#), 19 November 2013, p. 115.

Finding 18

The Public Sector Commission's monitoring and evaluation framework is a well-established process from which information relating to compliance issues can be obtained from across the sector.

Compliance Reporting Framework

- 6.25 Predecessors to the current Commissioner have all had some form of reporting obligation regarding the operation of the sector. For example, the *Public Service Act 1978* required the Commissioner to report annually to Parliament on the 'condition and efficiency of the Public Service' (see 2.10 above).
- 6.26 With the introduction of the original PSM Act, the reporting requirements of the newly created position of Commissioner for Public Sector Standards were broadened. The Commissioner was required to establish public sector standards and ethical codes and report to Parliament at least annually, and to the relevant minister 'from time to time', on compliance and non-compliance with these instruments by public sector bodies and their employees. Compliance reporting was also required against some general principles of official conduct that had been enshrined under sections 8 and 9.³⁸⁴
- 6.27 These provisions were largely maintained in the Reform Bill and assumed by the new Commissioner, although some subtle changes were passed under new sections 22C through 22F.
- 6.28 Firstly, the new section 22C has removed the requirement to report to the relevant Minister and left this at the Commissioner's discretion. Under the new section 22D, a report must still be provided to Parliament each year on the degree of compliance with standards and codes. However, any report prepared for this purpose must be tabled in Parliament within 14 days of sign-off by the Commissioner.³⁸⁵ Section 22D also requires the Commissioner to report on 'the state of administration and management of the Public Sector.'³⁸⁶ Under the new section 22E the Commissioner retains the capacity to prepare additional reports on these matters at any other time, but such reports must also be tabled within 14 days.³⁸⁷
- 6.29 When the Reform Bill was debated, these provisions passed through both Houses without contention.

384 Section 21(1) *Public Sector Management Act* (Current) 1994 (WA).

385 *ibid.*, Section 22F.

386 *ibid.*, Section 22D(1).

387 *ibid.*, Section 22D.

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- 6.30 The Commissioner uses a suite of tools to report on compliance with standards, ethical codes and the principles of conduct.
- 6.31 The Commissioner publishes an **Annual Report** detailing the activities of the Commission throughout the year, its financial statements, and an overview of its key performance indicators. This report is prepared in accordance with the requirements of sections 61-64 of the *Financial Management Act 2006*. While section 22D of the PSM Act allows the Commissioner to include data on compliance with standards and codes in this report, the Commissioner appears to limit the amount of such information provided. For example, in the 2013 Annual Report, two pages are dedicated to '[a]ssessing compliance with standards and ethical codes.'³⁸⁸
- 6.32 The **State of the Sector report** (SOS Report) is the primary vehicle by which the Commissioner reports on compliance matters, and provides an overview of public sector management and administration. The SOS Report is prepared and tabled annually in accordance with section 22D. The Commissioner, who has discretion over the content and detail of this report, told the Committee of his preferred approach:
- What I have endeavoured to try and do is to use the state of the sector report to actually provide some positive stories around the public sector, and change it from simply a compliance report to a report that has a bit of a narrative about what the public sector is doing and what the challenges are going to be for the future.'*³⁸⁹
- 6.33 The SOS Report provides a comprehensive summary of the data obtained from across the public sector through the HRMOIR process and the AAS, EPS, and PID survey questionnaires (described in 6.10 through 6.18 above).
- 6.34 A chapter in the 2013 SOS Report is dedicated to Workforce Management and contains data on the level of compliance with public sector standards. Included is tabular data quantifying: the number of Breach of Standard claims for the year; the particular standards against which claims were lodged; and the outcome of these claims. (Data from this table is referred to in Table 4 below, where Breach of Standard claims are examined in greater detail).
- 6.35 The report also compiles responses from the AAS questionnaire to demonstrate the extent to which entities are implementing strategies

388 Public Sector Commission, *Annual Report 2012/13*, 4 September 2013, pp. 311-32 Available at: http://www.publicsector.wa.gov.au/sites/default/files/documents/psc_annual_report_2013_1.pdf. Accessed on 29 May 2013.

389 Mr Mal Wauchope, Public Sector Commissioner, Public Sector Commission, *Transcript of Evidence*, 12 March 2014, p. 21.

promoted by the Commission to ensure compliance with all public sector standards.³⁹⁰

- 6.36 Another chapter addresses Integrity and Ethical Conduct, the purpose of which is to provide a summary of the level of compliance with the accountability framework across the sector and the extent to which entities are promoting integrity.³⁹¹
- 6.37 This chapter includes data on breach of discipline investigations conducted under both Part 5 of the PSM Act and other legislative instruments. The 2013 report notes there were 1,518 investigations completed in 2012/13, of which 1,234 were for alleged breaches of the code of ethics or code of conduct. Of these 1,234 investigations, 479 (39 per cent) were substantiated. An accompanying table quantifies the types of breaches investigated and substantiated, while another provides total figures for the various outcomes that were ordered as a result of the findings.³⁹²
- 6.38 While acknowledging just over one-third of the 1,518 cases were substantiated, the report extrapolates this figure across the entirety of the public sector workforce to suggest:

*...this represents a very low level of misconduct in the public sector, averaging four substantiated breaches of discipline for every 1000 employees.*³⁹³
- 6.39 Each chapter concludes with key findings. In this instance, misconduct is seen as rare in the context of the substantial number of decisions made across the sector each day. The Commission adds that if misconduct does occur, 'it is well managed.'³⁹⁴
- 6.40 The SOS Report is accompanied by a **Statistical Bulletin** that presents the data taken from the HRMOIR process and the respective survey questionnaires broken down by individual respondent entity.
- 6.41 The document is highly technical, but nonetheless informative. It is used by the Commission for 'developing and implementing its oversight, assistance, and capability programs.'³⁹⁵ Both the SOS Report and the Statistical Bulletin are

390 Public Sector Commission, [State of the sector report 2013](#), 19 November 2013, pp. 75-78.

391 *ibid.*, p. 13.

392 *ibid.*, pp. 26-28.

393 *ibid.*, p. 26.

394 *ibid.*, p. 34.

395 *ibid.*, p. 1.

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published on the Commission's website. The SOS Report is tabled in Parliament as part of the requirements of section 22D.

- 6.42 Table 3 below provides examples of the sorts of information reported for each respondent entity in the Statistical Bulletin.

Table 3 Information presented in State of the sector statistical bulletin 2013

Data Source	Information types
HRMOIR	<ul style="list-style-type: none">• Gender, salary, occupational profile, regional workforce distribution
AAS	<ul style="list-style-type: none">• Strategies for promoting employee awareness of Code of Ethics• Number of staff undertaking ethics training• Strategies in place for managing and investigating unethical behaviour• Processes for monitoring compliance with public sector standards• Strategies for raising awareness of Breach of Standard claim process• Data on breach of standard claims• Data on breach of discipline investigations (split by investigations under the PSM Act and other instruments)• Data on grievance cases conducted as per the Grievance Resolution Standard• Time taken to complete breach of discipline and grievance cases
EPS	<ul style="list-style-type: none">• Awareness of Code of Ethics and internal Code of Conduct• Awareness of public sector standards• Levels of observed compliance with public sector standards• Ethical behaviour of management and colleagues

Committee considerations

- 6.43 The reporting framework adopted by the Commission is detailed and informative and reflects practices emerging in some other jurisdictions.³⁹⁶
- 6.44 The Committee notes several positive features of this framework, the first of which pertains to the manner in which the statistical information is conveyed.
- 6.45 Critical to the comprehension of such a mass of data is its presentation, particularly with the Statistical Bulletin. Here, the Committee observed some notable improvements in the data sets of 2013 when compared with the previous year. Examples include:

³⁹⁶ See for example, Australian Public Service Commission, *State of the Service Report – State of the Service Series 2012-13*, 2 December 2013. Available at: http://www.apsc.gov.au/data/assets/pdf_file/0018/29223/SOSR-2012_13-final-tagged2.pdf. Accessed on 28 May 2014.

- The introduction of ‘Total’ figures at the bottom of columns in the AAS response tables. With over 100 entities reporting across multiple pages, the introduction of totals enables quicker comprehension of sector-wide trends.
 - The inclusion of quantifiable data relating to Breach of Standard claims resolved internally within agencies (e.g. number of claims and confirmation of the standards against which claims are made).
 - Simplification of the data relating to disciplinary investigations. The 2013 breach of discipline data allows the reader to easily determine the numbers of investigations conducted under Part 5 of the PSM Act relative to other instruments. This is offset to some extent by the removal of data showing the nature of the breaches being investigated.
- 6.46 The SOS Report and Statistical Bulletin have been in use for two years now and are clearly still evolving. No doubt they will benefit in future from a more consistent reporting methodology that will allow longitudinal analysis of compliance trends.
- 6.47 Another positive feature is the element of balance in the evaluative aspects of the SOS Report. While the Commissioner has his preference for a positive narrative (see 6.32 above), there are examples where shortcomings in current compliance processes are acknowledged. The following examples are illustrative:
- 6.48 On performance assessment processes:
- ... recorded participation in performance management continues to be relatively poor across the sector it is important that performance monitoring, particularly in instances of substandard performance, is maintained to target strategies to improve workforce management and overall efficiency.*³⁹⁷
- 6.49 On the processes for reporting unethical behaviour, and in reference to EPS data showing 35 per cent of respondents had never reported unethical behaviour they had witnessed:
- ... While the occurrence of unethical behaviour is low, and most employees know how to report unethical behaviour if it does occur, confidence in reporting could be improved.*³⁹⁸

397 Public Sector Commission, [State of the sector report 2013](#), 19 November 2013, p. 78.

398 *ibid.*, p. 22.

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- 6.50 These acknowledgements, coupled with the relevant data on entity performance in the Statistical Bulletin, can serve as a prompt to public sector bodies to improve performance. They also give the Commission cause to reassess training and support programs in areas where performance is poor.
- 6.51 The Committee believes that both State of the Sector reports and the accompanying Statistical Bulletins would be further enhanced by the inclusion of data extracted from exit interviews as people move between agencies or leave the public sector entirely. The Committee has not ascertained whether the Commission collates such data, but there does not appear to be any reference to it in broader monitoring and evaluation framework used by the Commission for information gathering (described in 6.7 and 6.8 above).
- 6.52 Exit interviews are a potentially valuable data set. They offer further insight in to staff morale from which systemic or cultural issues detrimental to efficiency of the public sector and its overall appeal for prospective employees might be identified and corrected.

Finding 19

While the Committee is generally satisfied with the compliance monitoring and reporting processes adopted by the Public Sector Commission, it believes there is scope for further enhancements in both areas via the use of employee exit interview data.

Recommendation 8

The Premier seek and report on any response from the Public Sector Commissioner regarding the possibility of the Commissioner considering ways in which key trends identified in employee exit interviews can be utilised for compliance monitoring activities and published in summary form in the Commission's annual State of the Sector report and Statistical Bulletin.

- 6.53 While the Committee's assessment of the compliance reporting framework is generally positive, it has identified some areas for improvement. The main issue relates to the capacity of some agencies to provide data to the AAS questionnaire.
- 6.54 In its 2012 SOS Report, the Commission confirmed '35% of large agencies, which deal with the majority of disciplinary matters, are unable to report on the duration of investigations.'³⁹⁹ An examination of the 2012 Statistical

³⁹⁹ Public Sector Commission, *State of the sector report 2012*, November 2012, p. 111. Available at:

Bulletin reveals that neither the Department of Health nor the Department of Education could provide this data in 2012. Collectively, both departments were responsible for 833 of the 1,344 investigations undertaken across the sector that year (under Part 5 of the PSM Act and other instruments).⁴⁰⁰

- 6.55 By 2013, Health was able to provide timeliness indicators. As a result, reporting in this area improved markedly. Of the 1,518 reported disciplinary investigations conducted across the sector in 2013, only 197 had no data on the completion times. This figure was dominated by Education, which could not confirm the average time it took to complete 161 investigations.

- 6.56 In 2012, Education was also unable to provide data on the nature of the alleged breaches of discipline, the number of allegations substantiated, nor the outcomes decided as a result of a proven breach.⁴⁰¹ In 2013, it again failed to provide data on the timing of breach of discipline investigations (data on the nature of disciplinary breaches were not included in the AAS in 2013). Nor was the department able to provide information on a range of questions relating to grievance cases.⁴⁰²

- 6.57 The inability of a large department like Education to provide full responses to the AAS questionnaire is of concern as it skews the integrity of the data that is reported in key compliance areas. The Committee followed this up with the Commissioner, asking him what steps the Commission was taking regarding Education's failure to provide a range of data for the 2013 AAS.

- 6.58 The Commissioner made the point that Education was particularly challenged in responding quickly to new and evolving questionnaires due to the sheer size of the department (800 sites sector-wide) and the devolved nature of its management. Nonetheless, the Commission is currently working with the Department:

...to identify factors contributing to data gaps in the 2013 survey and where improvements or amendments may be required to systems and

http://www.publicsector.wa.gov.au/sites/default/files/documents/state_of_the_sector_2012_1.pdf. Accessed on 29 May 2014.

400 Data on total investigations based on calculations as data totals were not available in 2012. Public Sector Commission, *State of the sector 2012 – Statistical bulletin*, 2012, pp. 65-72. Available at:

http://www.publicsector.wa.gov.au/sites/default/files/documents/state_of_the_sector_2012_statistical_bulletin.pdf. Accessed on 3 June 2014.

401 *ibid.*, pp. 71-77.

402 Public Sector Commission, *State of the sector statistical bulletin 2013*, 2013, pp. 39-46, and 53.

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*processes, and to discuss options for maximising data collection capacity for the 2014 process and for future surveys.*⁴⁰³

- 6.59 Resolution of this issue with Education will go a long way to rectifying current anomalies in some of the data sets reported in the Statistical Bulletin.
- 6.60 Another concern for the Committee was the integrity of the data collected, and how the Commission ensures the data it receives, via its surveys and HRMOIR obligations, is robust. The Commissioner provided a two-page response to this question listing a range of initiatives it is undertaking in this area. These include, but are not restricted to:
- Having CEOs sign to confirm the accuracy of survey responses.
 - Developing on-line survey tools to reduce the risk of error.
 - Developing and trialling a verification methodology across several departments.
 - Commission staff identifying gaps in data and following-up with agencies to discuss options for improving data collection on future surveys.⁴⁰⁴
- 6.61 The Commissioner's response gives reason to suggest that the Commission is making reasonable attempts to ensure the integrity of the data it collects for the purpose of compliance reporting.

Finding 20

While the Committee's assessment of the compliance reporting framework is generally positive, it has identified some areas for improvement. Particularly problematic is the current capacity of the Department of Education to provide a complete data set to the Annual Agency Survey questionnaire. Resolution of this issue, which the Public Sector Commission is currently working towards with the department, will go a long way to rectifying some anomalies currently evident in the State of the Sector Statistical Bulletin published by the Commission.

Other issues

- 6.62 The Committee followed up on two other issues regarding the compliance reporting framework that were of initial concern. The first related to the amendment to the PSM Act that made the reporting to the relevant Minister optional under the new section 22C (see 6.28 above).

403 Submission No. 5c from Public Sector Commission, 21 May 2014, p. 3.

404 *ibid.*, pp. 1-2.

- 6.63 Acting Commissioner, Dan Volaric, confirmed that no such report has been made by the Commissioner since this amendment took effect. Mr Volaric said that reporting via this mechanism would be undertaken if a particular compliance issue had been identified that had sector-wide implications or would impact directly on a particular minister. Should a report of this type be necessary, it would be in the form of a discrete report with findings, recommendations, and any proposed follow-up planned by the Commission.⁴⁰⁵
- 6.64 The second issue related to the fact that compliance with Commissioner's Instructions (CIs), other than public sector standards and the code of ethics, does not get captured in the reporting provisions of section 22D. Examples of such CIs are: No. 5 - Publishing a public sector notice; and No. 6 - Workforce data reporting obligations (relating to the HRMOIR process requirements).
- 6.65 The Commission confirmed the Committee's interpretation of 22D was correct. The Commission's General Counsel, Mr John Lightowlers, explained the possible intent behind this exclusion:
- 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.*⁴⁰⁶
- 6.66 There is validity in attempting to reduce the mandatory reporting burden of the Commissioner, particularly given the extent of the content included in the SOS Report and Statistical Bulletin. Notably, section 22D allows the Commissioner to report on any other matter arising out of his functions that he 'considers of such significance to require reporting in that matter.'⁴⁰⁷ The Committee trusts that should significant issues relating to these other CIs arise, the Commissioner will exercise his discretion and report as appropriate to the relevant Minister or Parliament as required.

Breach of Standard Claims

- 6.67 When evaluating the compliance monitoring and reporting framework adopted by the Commissioner, the Committee observed some concerns that were raised about the Breach of Standard (BOS) claim process. These concerns warrant further examination.

405 Mr Dan Volaric, Acting Commissioner, Public Sector Commission, *Transcript of Evidence*, 12 April 2014, pp. 4-5.

406 Mr John Lightowlers, General Counsel, Public Sector Commission, *Transcript of Evidence*, 9 April 2014, p. 5.

407 Section 22D(1)(c) *Public Sector Management Act 1994* (WA) current.

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- 6.68 Currently, there are six Public Sector Standards in Human Resource Management that have been issued by the Commissioner (see 4.27 above). These establish the 'minimum standards of merit, equity and probity to be complied with in the public sector' in relation to: Employment; Performance Management; Grievance Resolution; Redeployment; Termination; and Discipline.⁴⁰⁸
- 6.69 Should a person feel they have been adversely affected by the decision of an employing authority following a process covered by one of these standards (other than the Discipline Standard)⁴⁰⁹, that person may seek relief by lodging a BOS claim. For example, employees or applicants can lodge a claim for a breach of the Employment Standard if they are unsuccessful during a recruitment and selection process.⁴¹⁰

Breach of Standard claim process explained

- 6.70 Section 97(1)(a) of the PSM Act requires the Commissioner to make recommendations to the Premier regarding the establishment, amendment, or repeal of regulations prescribing procedures for BOS claims. This provision was established in 1994 and is another function the Commissioner assumed from the former Commissioner for Public Sector Standards through the passage of the Reform Bill.
- 6.71 The current BOS claim procedure is outlined in the Public Sector Management (Breaches of Public Sector Standards) Regulations 2005 (hereafter BOS Regulations).
- 6.72 In summary, a claimant must first lodge a written submission to the public sector body they claim has breached a standard. The general rule is that the submission must be lodged within 10 days of the complainant becoming aware of the decision or 30 days after the decision was made. Exceptions to this rule apply to claims for a breach of the Employment or Grievance Resolution Standard.⁴¹¹

408 Public Sector Commission, *Public Sector Standards in Human Resource Management*, 25 September 2012. Available at: <http://www.publicsector.wa.gov.au/publications-resources/instructions-standards-and-circulars/public-sector-standards-human-resource-management>. Accessed on 26 May 2014.

409 Alleged breaches of the Discipline Standard are pursued under the disciplinary provisions of Part 5 of the PSM Act. For information on the Discipline Standard, refer to 5.21 above (including accompanying text box).

410 Public Sector Commission, *Annual Report 2011/12*, 11 September 2012, p. 26. Available at: http://www.publicsector.wa.gov.au/sites/default/files/documents/annual_report_2011-12.pdf. Accessed on 29 May 2014.

411 Regulations 5-7 *Public Sector Management (Breaches of Public Sector Standards) Regulations 2005* (WA).

- 6.73 The initial attempt to resolve the claim must be undertaken by the public sector body. If the claim is not resolved within 15 days, the matter is referred to the Commissioner.
- 6.74 Under amendments to the BOS Regulations that were passed in 2011, the Commissioner can now decide not to deal with the claim for a variety of reasons. These include:
- if the claim does not relate to a matter over which the Commissioner has jurisdiction; or
 - '[if] in the opinion of the Commissioner, the claim is vexatious, frivolous or lacking in substance or does not warrant further action'; or
 - the matter has been, or is already being, dealt with 'adequately by the Commissioner or another entity'.⁴¹²
- 6.75 Otherwise, the Commissioner can appoint an officer to conduct a conciliation process, a review process, or both. The 'conciliation and review officer' must first 'invite and encourage' the claimant and the employing authority of the public sector body to reach an agreement over the claim. If agreement is not reached, the officer may opt either to repeat the process or to proceed to review the claim following the procedures prescribed. A report of this review, presenting the facts of the claim as they relate to the relevant standard, is provided to the Commissioner who makes a final determination on the claim.⁴¹³
- 6.76 The Commissioner can determine there was no breach and dismiss the claim. Alternatively, the Commissioner may determine a breach has occurred and make a recommendation as to whether relief should or should not be given to the claimant.⁴¹⁴ Under further amendments to the Regulations passed in 2014, the Commissioner can now go beyond a recommendation and direct a public sector body to provide relief.⁴¹⁵ The Commissioner has confirmed that relief remedies 'mostly call on the agency to recommence the process'⁴¹⁶ from the point at which it is deemed the breach occurred.

412 Regulation 11A(1)(a)-(c) *Public Sector Management (Breaches of Public Sector Standards) Regulations 2005* (WA).

413 *ibid.*, Regulations 11(2), 14, 17-19-20. In 2012/13, Commission staff were appointed conciliation and review officers for 95 of the finalised claims. Public Sector Commission, [Annual Report 2012/13](#), 4 September 2013, p. 31.

414 Regulation 20 *Public Sector Management (Breaches of Public Sector Standards) Regulations 2005* (WA).

415 *ibid.*, Regulation 20(2)(a).

416 Submission No. 5 from Public Sector Commission, 14 November 2013, p. 28.

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- 6.77 The Commissioner must notify the claimant and the public sector body of a determination, including any recommendation or direction issued. Reasons for the determination must also be provided.⁴¹⁷
- 6.78 The public sector body is then required to inform the Commissioner and the claimant within 10 days of its intended response to any recommendation from the review. Another 2014 amendment now enables the Commissioner, if he deems this response to be inappropriate, to direct the public sector body or its employing authority to give relief as per the conditions specified in that direction.⁴¹⁸
- 6.79 If the public sector body has not complied with such a direction, or if it fails to comply with any of the regulations, the Commissioner may give a report of the matter to the employing authority, the relevant Minister, and each House of Parliament.⁴¹⁹
- 6.80 Normally, neither the claimant nor the public sector body is entitled to representation during a BOS Claim, unless the conciliation and review officer deems this necessary in order for the process to proceed. Still, the parties are entitled to either a support person (for the claimant), or another person to assist (for the public sector body), unless the same officer decides the involvement of these parties would impede the proceedings.⁴²⁰
- 6.81 There is nothing explicit in the PSM Act or the BOS Regulations regarding avenues of appeal for decisions relating to BOS claims. The Acting Commissioner, Mr Volaric, has confirmed there is no recourse via the WA Industrial Relations Commission (WAIRC) where the Commissioner declines to review, or dismisses, a BOS claim:
- ... the options open to a claimant would include direct appeal to the commissioner via the [internal] complaints framework, referral to the state Ombudsman or through legal avenues.*⁴²¹

417 Regulation 21(1) *Public Sector Management (Breaches of Public Sector Standards) Regulations 2005* (WA).

418 *ibid.*, Regulations 21(2A) and 22(1).

419 *ibid.*, Regulation 30.

420 *ibid.*, Regulation 27(1)-(4).

421 Mr Dan Volaric, Acting Commissioner, Public Sector Commission, *Transcript of Evidence*, 9 April 2014, p. 10. The complaints framework referred to by Mr Volaric is the Commission's 'Customer Service Charter'. The charter enables a claimant, who has concerns with the management of their Breach of Standard Claim, to raise these matters with the Commissioner for an independent assessment by the Director of his office. Should the claimant not wish to raise these matters with the Commissioner, or after dealing with the Director of the Office of the Commissioner they are not satisfied with the outcome, they may refer the matter to the Ombudsman WA for further

- 6.82 To assist agencies and potential claimants in learning more about the overall process, the Commission has posted a range of supporting materials and guidelines on its website. These include template claim forms and an agency checklist.⁴²²
- 6.83 The Commission publishes data on the outcome of BOS claims in its Annual Report and its state of the sector reports. The data in Table 4 below shows the result of claims referred to the Commissioner and finalised in 2011/12 and 2012/13.

Table 4 Breach of Standard Claims referred to the Commissioner: Final Outcomes⁴²³

Year	Claims Finalised ⁺	Breach	No Breach	Declined	Conciliated	Other ⁺⁺
2011/12	128	13	62	30	5	18
2012/13	116	5	87	10	3	11

⁺ Figure does not include claims that are carried over into the next reporting year (18 in 2011/12 and 9 in 2012/13).

⁺⁺ Other outcomes include withdrawn or lapsed claims (as per r 23-24 of the BOS Regs); and claims deemed invalid.

- 6.84 Data published in 2013 also confirms that for the 2012/13 reporting year, a total of 181 BOS claims were lodged, with 65 of these (36 per cent of the total figure) resolved internally by the public sector body.⁴²⁴ Data across both reporting years shows that the overwhelming majority of claims finalised by the Commissioner related to the Employment Standard (76.5 per cent in 2011/12 and 85.3 per cent in 2012/13), and the Grievance Resolution Standard (18 per cent and 12 per cent respectively).⁴²⁵

Concerns raised about the Breach of Standard claim process

- 6.85 The primary concern raised about the BOS claim process is the inability to have decisions made by the Commissioner referred to the Public Service Appeal Board as constituted by the WAIRC. The CSA cited this as a 'long-term' concern when it appeared before the Committee.⁴²⁶ In its submission, the CSA added that the BOS claim system is 'massively underutilised' by its members

investigation. Ms Rebecca Harris, Director, Office of the Commissioner, Public Sector Commission, Email, 27 May 2014.

422 Public Sector Commission, *Guidance for agencies*, 5 March 2014. Available at: <http://www.publicsector.wa.gov.au/publications-resources/instructions-standards-and-circulars/public-sector-standards-human-resource-management/breach-standard-claims/guidance-agencies>. Accessed on 26 May 2014.

423 Data taken from: Public Sector Commission, *State of the sector report 2012*, November 2012, p. 199; Public Sector Commission, *State of the sector report 2013*, 19 November 2013, p. 76; Submission No. 5 from Public Sector Commission, 14 November 2013, p. 27.

424 Public Sector Commission, *State of the sector report 2013*, 19 November 2013, p. 76.

425 Calculated from data in Public Sector Commission, *State of the sector report 2012*, November 2012, p. 199; and Public Sector Commission, *State of the sector report 2013*, 19 November 2013, p. 76.

426 Mr Warwick Claydon, Senior Industrial Officer, Community & Public Sector Union/Civil Service Association of WA, *Transcript of Evidence*, 2 April 2014, p. 2.

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because ‘the inadequacies of the regime are well known.’⁴²⁷ The CSA and its members view the current process as neither ‘fair’ nor ‘transparent’.⁴²⁸

- 6.86 Concerns similar to those raised by the CSA during this Inquiry were put forward by the current National Party member for North West Central, Mr Vince Catania, when the 2009 Reform Bill was debated in 2010. Mr Catania was calling for appeal to the WAIRC to be permitted for two reasons.
- 6.87 Firstly, the Commissioner at that time had no power to direct an employer to remedy a breach of a standard.⁴²⁹ Notably, amendments to the BOS Regulations passed this year, now give the Commissioner that power (see 6.76 to 6.78 above)
- 6.88 The second reason, consistent with the views of the CSA, was to give employees confidence in the BOS claim system by having an avenue of appeal for the number of claims that were declined. Mr Catania proposed the deletion of section 99 of the PSM Act, which excluded matters relating to standards from being considered as part of industrial agreements under the *Industrial Relations Act 1979* (WA) (the IR Act).⁴³⁰
- 6.89 Mr Catania’s amendment was supported by the Labor Opposition and was agreed to by the Premier. While the Premier ‘did not have an objection’ to public sector workers being able to take disputes to the WAIRC, he was concerned about the potential for two decision-making jurisdictions being established:

*One is now within the Public Sector Commission, where I think public sector issues should be dealt with, particularly regarding standards of conduct and disciplinary issues. If that goes across to the Industrial Relations Commission, we will get arguably another set of decisions and different criteria, and we will have two sets of rules. Therefore, I have a concern about that in a practical sense.*⁴³¹

- 6.90 The Premier also raised the point that for Mr Catania’s intended outcome to be achieved, an additional amendment involving other legislation would have to be proposed. Specifically, section 80E(7) of the IR Act would need to be

427 Submission No. 4 from Community & Public Sector Union/Civil Service Association of WA, 13 November 2013, pp. 8-9.

428 *ibid.*, p. 5

429 Mr Vince Catania MLA, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 June 2010, p. 4470a, 4516-4518.

430 *ibid.*

431 Hon Colin Barnett MLA, Premier, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 June 201, p. 4511b.

repealed, as it states that no arbitrator established by the WAIRC has jurisdiction to:

*enquire into or deal with, or refer to the Commission in Court Session or the Full Bench, any matter in respect of which a procedure referred to in section 97(1)(a) of the Public Sector Management Act 1994 is, or may be, prescribed under that Act.*⁴³²

Committee considerations

- 6.91 The Committee supports the capacity given to the Commissioner to make and change BOS claim procedures through regulations. These powers are not unchecked, as the Commissioner can only effect change via recommendations to the Premier. If these recommendations are adopted, they are passed as Regulations, which are ultimately subject to the possibility of disallowance by Parliament.
- 6.92 The place of the WAIRC within the BOS claim framework has been contentious throughout the life of the PSM Act. Several reviews into the Act have looked at the issue and formed varying opinions on the extent to which the WAIRC should be available for employees affected by decisions relating to public sector standards.⁴³³
- 6.93 Two main reasons for change were raised in the Reform Bill debates and during this Inquiry. One issue was the inability to force public sector bodies to provide relief when a breach has been substantiated. This issue appears to have been largely mitigated by the powers now afforded the Commissioner to direct relief under amendments to the Regulations passed earlier this year (see 6.76 through 6.78 above).
- 6.94 The second issue regarding the right of appeal to the WAIRC remains unresolved. It is arguable that the issue has been exacerbated by the new Regulation 11A that allows the Commissioner to decline to review a claim.
- 6.95 The data in Table 4 above shows that Commissioner declined to review 30 of the 128 claims that were finalised in 2011/12 (23.4 per cent). Notably, this figure dropped significantly to 10 of 116 in 2012/13 (8.6 per cent).
- 6.96 The Commissioner has previously reported that the decision to decline the 10 claims in 2012/13 'ensur[ed] agency processes were not unduly delayed by

⁴³² Section 80E(7) *Industrial Relations Act 1979* (WA).

⁴³³ J.F. Gregor (et al.), *Commission on Government Report No. 5 (Summary Report)*, (1996), Perth, WA, Recommendation 83(3), p. 163; Gavin Fielding, *Review of Public Sector Management Act* (1996), Perth, WA, Recommendations 71-73, pp. 185-190; Noel Whitehead, "Review of the Public Sector Management Act 1994" (2004), Perth, WA, Recommendations 5-8, pp. 29-30.

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matters that were considered lacking in substance, not within jurisdiction or not warranting further action.⁴³⁴

- 6.97 The Committee understands the rationale behind the implementation of Regulation 11A. Allowing vexatious and frivolous claims to be dealt with quickly promotes efficient handling of the claims process. Importantly, Regulation 11A requires the Commissioner to provide reasons when declining to review a claim so that his decisions can be subject to scrutiny, albeit not by the WAIRC.⁴³⁵
- 6.98 Calls for the Commissioner's decisions to be reviewable before the WAIRC need to be weighed against the potential cost and time implications of expanding the WAIRC's remit.
- 6.99 It has been previously argued that both public sector bodies, and the WAIRC itself, would have to seek extra resources specialising in the BOS claim appeal process. It was further suggested Parliament would 'lose the sector-wide perspective on the level of compliance with public sector standards' that a Commissioner provides as overseer of the system.⁴³⁶
- 6.100 Having considered the respective arguments, the Committee is not convinced it is necessary to make BOS Claims referrable to the WAIRC at this time.
- 6.101 As a separate issue, the Committee is concerned about the provisions within the BOS Regulations (referred to at 6.80 above) that generally preclude parties from being represented during a claim process before the conciliation and review officer. Without the right to representation, an inexperienced claimant may be intimidated in an environment in which they are not well-versed and unable to put their case forward accurately and with confidence. This may lead to outcomes based on testimonies that are not truly reflective of the circumstances of the case before the conciliation and review officer. To make the process more equitable, the Committee sees merit in making available the right to representation for any party wishing to seek it.

434 Public Sector Commission, [Annual Report 2012/13](#), 4 September 2013, p. 31.

435 Regulation 11A(2) *Public Sector Management (Breaches of Public Sector Standards) Regulations 2005* (WA).

436 This was an argument made by the Department of Premier and Cabinet in a submission to the review of the PSM Act by Noel Whitehead in 2004. See Noel Whitehead, *Review of the Public Sector Management Act 1994* (2004), Perth, WA, p. 14.

Finding 21

The Committee is not convinced it is necessary to allow decisions relating to Breach of Standard Claims to be referable to the WA Industrial Relations Commission at this time.

Finding 22

The Committee is concerned about the provisions within the *Public Sector Management (Breaches of Public Sector Standards) Regulations 2005* that generally preclude parties from being represented during a Breach of Standard Claim process.

Recommendation 9

The Premier seek and report on any response from the Public Sector Commissioner regarding the possibility of the Commissioner facilitating amendments to the *Public Sector Management (Breaches of Public Sector Standards) Regulations 2005* to enable all parties the right to representation during a Breach of Standard Claim process.

Chapter 7

Special Inquiries, Reviews, and Investigations

Evolution of investigatory mechanisms

- 7.1 Under the *Public Service Act 1904*, the then-Commissioner was responsible for ensuring the continuance of a ‘proper standard’ of efficiency and effectiveness throughout the Public Service. As part of that role, the Commissioner was required to ‘as far as practicable, personally inspect each department, and investigate the character of the work performed by every officer therein.’⁴³⁷
- 7.2 To assist, the Commissioner was given powers to call departmental heads or any other witness deemed necessary as part of any ‘inspection, inquiry, or investigation under the Act’.⁴³⁸ Witnesses could be summonsed to appear and produce records and could be required to give evidence on oath if requested by the Commissioner. However, they were not compelled to provide answers should those answers ‘tend to incriminate’ them. In limited instances, the Commissioner had the capacity to delegate these investigatory functions and powers.⁴³⁹
- 7.3 The 1978 legislation gave the Board of Commissioners power to ‘conduct such inspections, inquiries and investigations’⁴⁴⁰ as it considered necessary for the purposes of the Act. Like the Commissioner that preceded it, the Board was able to summons witnesses and records and could require a witness to provide evidence on oath. Witnesses again had the right not to answer on the grounds of incrimination.⁴⁴¹

The emergence of Reviews, Special Inquiries, and Investigations

- 7.4 The original PSM Act represented a fundamental overhaul of the earlier framework. A key element of this overhaul was the classification of investigative instruments into three categories: Reviews, Special Inquiries and Investigations. In another notable departure from previous practice, the Premier assumed responsibility for ‘promot[ing] the overall effectiveness and

437 Section 9(1) *Public Service Act 1904* (WA).

438 *ibid.*, Section.

439 *ibid.*, Section 11.

440 Section 17 *Public Service Act 1978* (WA).

441 *ibid.*, Section 18(2)-(3).

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efficiency of the Public Sector'.⁴⁴² Within this remit, the Premier was tasked with organising Reviews and Special Inquiries.⁴⁴³

Reviews

- 7.5 The original PSM Act enabled the Premier to conduct **Reviews** 'in respect of the functions, management, or operations of one or more public sector bodies'.⁴⁴⁴ The Premier could initiate such reviews independently, or at the request of another minister.
- 7.6 The party conducting the Review, either the Premier or an authorised employee, had powers of entry and was able to order the production of any documentary record for examination. The reviewer could also compel a public sector employee to answer questions.⁴⁴⁵ Despite this, employees had the same privileges in relation to answering questions and producing documents as was available to a witness in Supreme Court proceedings.⁴⁴⁶ Moreover, the powers available to the reviewer could only be exercised after consultation with the employing authority of the public sector body and the relevant minister.⁴⁴⁷

Special Inquiries

- 7.7 The original PSM Act also made provision for the Premier to direct a 'suitably qualified, person or persons to conduct a **Special Inquiry** into any matter 'relating to the Public Sector'.⁴⁴⁸ The powers available to special inquirers were listed in a Schedule to the Bill and included: the power to summons witnesses and documents; and the power to examine on oath or affirmation.⁴⁴⁹ This Schedule confirmed that while witnesses would not retain the right to silence during questioning, any answers given would not be admissible in any civil or criminal proceedings.⁴⁵⁰

442 Section 10(1)(a) *Public Sector Management Act 1994* (WA) original.

443 *ibid.*, Section 10(1)(d) and 11.

444 *ibid.*, Section 10(1)(d).

445 *ibid.*, Section 10(3)-(4).

446 *ibid.*, Section 10(6). The rights and privileges of witnesses in Supreme Court proceedings are determined by rules established by the Supreme Court in accordance with Section 167(1)(o)-(p) of the *Supreme Court Act 1935* (WA). The current *Rules of the Supreme Court 1971* (WA) address a wide range of matters including the production of documents (Order 36.11) and objection to questions (Order 38.12).

447 Section 10(5) *Public Sector Management Act 1994* (WA) original.

448 *ibid.*, Section 11(1).

449 *ibid.*, Schedule 3 Clauses 1 and 3.

450 *ibid.*, Schedule 3 Clause 3(6).

- 7.8 A special inquirer was required to prepare a report, which might include findings and recommendations, and to provide a copy of that report to the Premier as soon as it was completed.⁴⁵¹
- 7.9 When explaining the rationale for the Review and Special Inquiry provisions that were contained in the Bill from which the original PSM Act emerged, the Hon Richard Court, argued:
- ...such functions within our Westminster traditions are rightly assigned to a Minister of the Crown as it is the Government which should be responsible for the overall management function. By contrast I do not believe that the Commissioner for Public Sector Standards should be held accountable for public sector effectiveness and efficiency.*⁴⁵²
- 7.10 While the Labor Opposition had several questions regarding the Review provisions in the Bill, it did not oppose the passage of the relevant clauses. In contrast, the Opposition expressed considerable concern over the scope and location of the Special Inquiry powers arguing that they gave:
- ...too much power to the government of the day in relation to the Public Service and that will impinge on the ability of the Public Service to operate properly in our Westminster system of government.*⁴⁵³
- 7.11 Ultimately, the Special Inquiry clauses were passed after being put to a vote in the Assembly.

Investigations

- 7.12 A separate Part of the original PSM Act included provisions for the Commissioner for Public Sector Standards to carry out **Investigations** ‘for the purpose of performing his or her functions’ under the Act. Under these provisions, the Commissioner, or a person authorised in writing by the Commissioner, acquired all the powers available to a special inquirer, for the purposes of the investigation. As with a special inquirer, there was an obligation to prepare and submit a report to the Premier at the conclusion of the process.⁴⁵⁴
- 7.13 During the debate on the original 1993 PSM Bill, the Hon Mr Court envisaged that the Commissioner might use the Investigation powers to ensure that

451 Section 14 *Public Sector Management Act 1994* (WA) original.

452 Hon Richard Court MLA, Premier, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 September 1993, p. 5025.

453 Hon Dr Geoff Gallop MLA, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 7 June 1994, p. 1105.

454 Sections 14 and 24(2) *Public Sector Management Act 1994* (WA) original.

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departments were adhering to public sector standards.⁴⁵⁵ This aspect of the Bill proved less contentious than the Special Inquiry provisions and was passed without debate in both Houses.

Public Sector Reform Bill 2009

- 7.14 Under the amendments that followed the passage of the Reform Bill, responsibility for promoting the effectiveness and efficiency of the public sector was transferred from the Premier to the new Public Sector Commissioner under the new Part 3A of the PSM Act. This resulted in changes to management of Reviews, Special Inquiries and, to a lesser extent, Investigations. These changes passed both Houses without debate.

Reviews

- 7.15 The 2009 Reform Bill changes saw the Commissioner acquire the power to conduct **Reviews**, 'on his or her own initiative', into the management, functions, or operations of public sector bodies. Despite this change, the Premier retained the capacity to direct the Commissioner to undertake a Review. The Commissioner is required to comply with such a directive unless, 'in the Commissioner's opinion, there are exceptional circumstances for not complying.'⁴⁵⁶ In these circumstances, the Commissioner is required to prepare written reasons for the non-compliance and to include a copy of them in the Commission's Annual Report. If the Commissioner complies with the directive and completes the Review, a report must be provided to the Premier.⁴⁵⁷
- 7.16 The powers available to the Commissioner, or a person authorised by the Commissioner, when conducting a Review are largely unchanged from what was previously available to the Premier. However, there is greater clarity around the process for ordering the production of documents and the powers of the reviewer to inspect and hold such documents. The requirement to consult with the employing authority and the relevant minister of the department under examination before exercising the Review powers has been carried over and now applies to the Commissioner (rather than the Premier).⁴⁵⁸ For employees under examination, the privileges and protections afforded in the original PSM Act have also been carried over.⁴⁵⁹

455 Hon Richard Court MLA, Premier, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 7 June 1994, p. 1125.

456 Section 24B(1)-(4) *Public Sector Management Act 1994* (WA) current.

457 *ibid.*, Section 24B(5), 24G.

458 *ibid.*, Section 24D-E.

459 *ibid.*, Section 24F.

Special Inquiries

- 7.17 In a similar vein to the Review provisions, the Commissioner is now responsible for ordering **Special Inquiries**, either on his initiative or at the behest of the Premier. Once again, the Commissioner can refuse a directive from the Premier, but has to follow the same process for reporting non-compliance as is required for Reviews. When an inquiry is conducted at the request of the Premier, a copy of the final report must go to the Premier and a copy of the original directive from the Premier has to be included in the Commissioner's next Annual Report.⁴⁶⁰
- 7.18 The powers available to a special inquirer as outlined in Schedule 3 remain unchanged and can be exercised without consultation.

Investigations

- 7.19 The new Commissioner has acquired the responsibilities formerly vested with the Commissioner for Public Sector Standards for conducting **Investigations**. As an investigator, the Commissioner, or a person authorised by the Commissioner, retains the same powers as that of a special inquirer and can exercise them without consultation. The final findings of an Investigation are now submitted to the Commissioner, rather than the Premier, as it is the Commissioner who is now responsible for promoting the efficiency and effectiveness of the public sector.⁴⁶¹

Amended provisions in practice

- 7.20 Acting Commissioner, Mr Dan Volaric, confirmed that Reviews, Special Inquiries, and Investigations 'are exercisable only in respect of public sector bodies and their activities. They are not directed at individuals.'⁴⁶² The processes applicable to individuals are captured under the disciplinary provisions of Part 5, which were addressed in Chapter Five.
- 7.21 The Commissioner applies a public interest test in determining whether to invoke his powers of review, inquiry or investigation:

*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.*⁴⁶³

460 Section 24H, 24K(2) *Public Sector Management Act 1994* (WA) current.

461 *ibid.*, Section 24.

462 Mr Dan Volaric, Acting Commissioner, Public Sector Commission, *Transcript of Evidence*, 9 April 2014, p. 13.

463 *ibid.*, p. 14.

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- 7.22 While the Commissioner has discretion over whether to publish any findings from a Review, Special Inquiry, or Investigation, if any report is prepared under sections 22D or 22E of the PSM Act (see 8.100 through 8.104 below), it must be tabled in Parliament.⁴⁶⁴

Reviews

- 7.23 The Commission has advised that Reviews are most likely to focus on the ‘structures, systems, policies and processes’ within one or more public sector bodies.⁴⁶⁵ Four reports have been completed under the Review powers since the 2010 amendments took effect. These are listed in Table 5 on the following page.
- 7.24 As Table 5 indicates, all four reports have ultimately been made available to Parliament and the public albeit via differing circumstances. The Reviews into performance management and the promotion of integrity were posted straight onto the Commission’s website following their completion. By contrast, the Review of the National Trust was tabled by the Minister in Parliament, while the examination of the relationship between the Minister for Training and the Department of Training and Workforce Development was tabled in Parliament a year after it was initially completed.
- 7.25 With this latter Review, the Commissioner opted to exercise his discretion to prepare a brief report under section 22E to inform Parliament as to how the review was undertaken. This explanatory report had a full copy of the final report from the original Review appended. In his report to Parliament, the Commissioner explained his belated decision to table the document:

*When that review was completed, I did not consider the matter to be of such significance to warrant a report to Parliament. However, given recent interest and public speculation about matters related to the review, I feel it is now necessary to provide this report to accurately inform Parliament about the review, the actions I have taken, the reasons for the approach I took and the outcomes resulting from the review.*⁴⁶⁶

464 Mr John Lightowlers, General Counsel, Public Sector Commission, *Transcript of Evidence*, 9 April 2014, p. 14.

465 Mr Dan Volaric, Acting Commissioner, Public Sector Commission, *Transcript of Evidence*, 9 April 2014, p. 14.

466 Public Sector Commission, [Report on an examination into the relationship between the Office of the former Minister for Training and the Department of Training and Workforce Development](#), 2 September 2011, p. 1 (Tabled Paper 659, 10 September 2013).

Table 5 Reviews undertaken since 2010 under section 24B of the PSM Act⁴⁶⁷

Review Title	Origins of Review / Reporting Procedure
<i>Review of the National Trust of Australia (WA)</i>	<ul style="list-style-type: none"> Commenced on 2 February 2011 and concluded on 2 September 2011 Review initiated by the Commissioner following a written request from the Minister for Heritage Copy of final report provided to the Minister Minister subsequently tabled the report in Parliament on 29 February 2012
<i>Review of the Relationship Between the Minister for Training and the Department of Training and Workforce Development</i>	<ul style="list-style-type: none"> Commenced in April 2011 and concluded in August 2012 Review initiated by the Commissioner following discussions with the Minister and the Director General Copy of final report provided to the Minister and the Director General Commissioner subsequently tabled a report about the review in Parliament on 10 September 2013
<i>Review of Performance Management in the Public Sector</i>	<ul style="list-style-type: none"> Commenced on 17 January 2012 and concluded on 30 August 2013 Initiated by the Commissioner following an undertaking in the <i>State of the Sector 2012</i> report Final report published on Commission's website
<i>Review of How Agencies Promote Integrity in the Public Sector</i>	<ul style="list-style-type: none"> Commenced on 17 January 2013 and concluded on 30 August 2013 Initiated by the Commissioner Final report published on Commission's website

7.26 Part of the heightened interest in this Review revolved around the consultation process after the Minister's department had corresponded with the

467 Public Sector Commission, *Report on an examination into the relationship between the Office of the former Minister for Training and the Department of Training and Workforce Development*, 2 September 2011, p. 1 (Tabled Paper 659, 10 September 2013), p. 13. See also Public Sector Commission, *Review of the National Trust of Australia (WA)*, 2 September 2011, p. 4 (Tabled Paper 4545, 29 February 2012). Available at: [http://www.parliament.wa.gov.au/publications/taledpapers.nsf/displaypaper/3814545ac5e5626577a17f74482579c700106935/\\$file/4545.pdf](http://www.parliament.wa.gov.au/publications/taledpapers.nsf/displaypaper/3814545ac5e5626577a17f74482579c700106935/$file/4545.pdf). Accessed on 14 August 2014; Public Sector Commission, *Report on an examination into the relationship between the Office of the former Minister for Training and the Department of Training and Workforce Development*, 2 September 2011, p. 4 (Tabled Paper 659, 10 September 2013). Available at: [http://www.parliament.wa.gov.au/publications/taledpapers.nsf/displaypaper/3910659ab2c83daf47ba616948257be200372706/\\$file/659.pdf](http://www.parliament.wa.gov.au/publications/taledpapers.nsf/displaypaper/3910659ab2c83daf47ba616948257be200372706/$file/659.pdf). Accessed on 14 August 2014. Public Sector Commission, *Performance management in the public sector: A review of how agencies conduct performance management*, 30 August 2013, p. 6. Available at: http://www.publicsector.wa.gov.au/sites/default/files/documents/performance_management.pdf. Accessed on 10 June 2014; Public Sector Commission, *A review of how agencies promote integrity*, August 2013, p. 5. Available at: http://www.publicsector.wa.gov.au/sites/default/files/documents/review_into_how_agencies_promote_integrity_0.pdf. Accessed on 10 June 2014.

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Commissioner via text message regarding the terms of reference for the review. During the 2013 Estimates Committee debates, questions were put to the Premier as to whether he thought this process represented a minister dictating terms of reference to an independent commissioner. As part of the Premier's response, the Commissioner was invited to comment:

*Anything that we might look at or that may assist a minister or an agency, including any terms of reference or guidance, will be a matter of discussion between the parties. It is not something I do in isolation.*⁴⁶⁸

7.27 Later during the same exchange the Commissioner went on to add:

*When looking at that matter, it is not possible to proceed without discussing it with the minister and, indeed, the department, which is what I did.*⁴⁶⁹

Special Inquiries

7.28 According to the Commission, while Special Inquiries can look into any matter, they are more likely to be directed towards 'sensitive matters with heightened public interest'.⁴⁷⁰ The broad powers available to special inquirers allow problems in the public sector 'to be identified, examined, and corrective measures instituted.'⁴⁷¹

7.29 The Commissioner is yet to exercise his power to initiate a Special Inquiry, with the four inquiries that have taken place since 2011 having occurred as a result of a direction from the Premier (see Table 6).

Table 6 Special Inquiries conducted since 2011 under the PSM Act

Inquiry Report Title	Origins of Inquiry / Reporting Procedure
<i>A Shared Responsibility: The Report of the Perth Hills Bushfire February 2013 Review</i>	<ul style="list-style-type: none">• Established under direction from Premier dated 23 February 2011• Mick Keelty appointed special inquirer as per Premier's directive• Inquiry completed 16 June 2011• Final report tabled 17 August 2011 and since published on Commission's website• Direction from Premier included in Commission's 2010/2011 Annual Report

468 Mr Mal Wauchope, Public Sector Commissioner, WA, Legislative Assembly, *Estimates Committees* (Hansard), 20 August 2013, pp. 61-62.

469 *ibid.*

470 Mr Dan Volaric, Acting Commissioner, Public Sector Commission, *Transcript of Evidence*, 9 April 2014, p. 14.

471 *ibid.*

Inquiry Report Title	Origins of Inquiry / Reporting Procedure
<i>Appreciating the Risk: Report of the Special Inquiry into the November 2011 Margaret River Bushfire</i>	<ul style="list-style-type: none"> Established under direction from Premier dated 5 December 2011 Mick Keelty appointed special inquirer as per Premier's directive Inquiry completed 27 January 2012 Final report tabled 23 February 2012 and since published on Commission's website Direction from Premier included in the Commission's 2011/2012 Annual Report
<i>St Andrew's Hostel Katanning: How the System and Society Failed Our Children. A Special Inquiry into the response of government agencies and officials to allegations of sexual abuse</i>	<ul style="list-style-type: none"> Established under direction from Premier dated 15 November 2011 The Hon Peter Blaxell appointed special inquirer as per Premier's directive Inquiry completion date not available Final report tabled 19 September 2012 and since published on Commission's website Direction from Premier included in the Commission's 2011/2012 Annual Report
<i>Peel Health Campus: Contract Management and Clinical Outcomes. A Special Inquiry examining the delivery of public health services at the Peel Health Campus</i>	<ul style="list-style-type: none"> Established under direction from Premier dated 6 April 2012 Professor Bryant Stokes appointed special inquirer as per Premier's directive Inquiry completed 28 March 2013 Final report tabled 17 April 2013 and since published on the Commission's website Direction from Premier included in the Commission's 2012/2013 Annual Report

7.30 In terms of the Special Inquiry process, Commission staff can be seconded to perform administrative, research or support roles.⁴⁷² Notwithstanding any research support that Commission staff may provide throughout an inquiry, final editorial authority for the report rests with the special inquirer.⁴⁷³

7.31 While the PSM Act does not require that the final report of a special inquirer be made public, all of the above reports have been tabled in Parliament and subsequently published on the Commission's website.

⁴⁷² Mr John Lightowlers, General Counsel, Public Sector Commission, *Transcript of Evidence*, 12 April 2014, p. 15. For an example, see Professor Bryant Stokes, [*Peel Health Campus: Contract Management and Clinical Outcomes. A Special Inquiry examining the delivery of public health services at the Peel Health Campus*](#), 28 March 2013, Acknowledgements.

⁴⁷³ Mr Dan Volaric, Acting Commissioner, Public Sector Commission, *Transcript of Evidence*, 12 April 2014, p. 15.

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Investigations

- 7.32 Investigations can examine the activities of a public sector body, but are 'more likely to be initiated in relation to specific actions, activities or questions of conduct.'⁴⁷⁴ To date, the Commissioner's Investigation powers have been invoked five times since 2011.
- 7.33 The first occasion was in 2011, when Deputy Commissioner, Ms Fiona Roche, conducted and completed an Investigation with a final report titled, *Investigation Report: Matter involving the report titled "Orchestrating Lives: An Evaluation of the Early Intervention Conductive Education Trial at Carson Street School*.
- 7.34 The Commissioner chose to exercise the Investigation powers following a request from the Premier conveyed in letters dated 22 and 23 June 2011. The Investigation looked into whether officers from the Department of Education or the Education Minister's office had changed the content of the "Orchestrating Lives" report.⁴⁷⁵
- 7.35 Even though the PSM Act does not require the findings of the Investigation to be published, the Commissioner chose to table the report under the provisions of section 22E (explained at 7.22 above), deeming the matter to be of 'such significance' as to require reporting to the Parliament.⁴⁷⁶
- 7.36 The other four occasions in which these powers were used related to Investigations into possible disclosures of public interest information within the Departments of Premier and Cabinet; Corrective Services; Fisheries; and Parks and Wildlife. According to the Commission, the *Public Interest Disclosure Act 2003* does not contain the investigative powers sufficient for 'proper authorities'⁴⁷⁷ to investigate such matters. Hence, the Commission's use of the relevant provisions of the PSM Act.⁴⁷⁸

474 Mr Dan Volaric, Acting Commissioner, Public Sector Commission, *Transcript of Evidence*, 12 April 2014, p. 14.

475 Submission No. 5 from Public Sector Commission, 14 November 2013, p. 43.

476 Public Sector Commission, *Investigation Report: Matter involving the report titled "Orchestrating Lives: An Evaluation of the Early Intervention Conductive Education Trial at Carson Street School*, 8 August 2011, p. 3. Available at: http://www.publicsector.wa.gov.au/sites/default/files/documents/carson_st_investigation_report.pdf. Accessed on 10 June 2014.

477 A Proper Authority is defined as 'a person to whom an appropriate disclosure of public interest information has been made in accordance with section 5(3), except that it does not include the Chief Justice or the Presiding Officer of a House of Parliament.' Section 7 *Public Interest Disclosure Act 2003* (WA).

478 Submission No. 5c from Public Sector Commission, 21 May 2014, pp. 4-5, and 8.

- 7.37 The Commission has advised that Investigations into disclosures of public interest information ‘are not made publicly available.’⁴⁷⁹

Notable practices in other jurisdictions

- 7.38 The Commissioner confirmed provisions to ‘review or inspect public sector operations’ are evident in all Australian jurisdictions.⁴⁸⁰ What is notable when examining several of these jurisdictions is the variable level of autonomy afforded to the respective commissioners for these purposes.
- 7.39 In Victoria (Inquiries) and the ACT (Management Reviews), the Commissioner acts on the direction of the Premier and Chief Minister respectively.⁴⁸¹
- 7.40 In NSW, both the Commissioner and the Secretary of Department of Premier and Cabinet ‘may conduct an inquiry into any matter relating to the administration or management of a government sector agency’.⁴⁸² The NSW legislation also enables the Premier to appoint a person to conduct a Special Ministerial Inquiry. These inquiries have a similar remit, but the inquirer is provided with the ‘functions, protections and immunities conferred on a Commissioner’⁴⁸³ as per the *Royal Commissions Act 1923* (NSW).
- 7.41 The jurisdictions most similar to WA, where the Commissioner can act independently or be directed by the Premier or Prime Minister, are South Australia (Reviews) and the Commonwealth (Systems Reviews and Special Reviews).⁴⁸⁴
- 7.42 All jurisdictions appear to be reasonably similar in the breadth of powers prescribed for those conducting reviews or inquiries, with some subtle variations evident in the wording of the legislation.
- 7.43 Most jurisdictions are also similar in respect of not prescribing for reports to be tabled in the Parliament. The notable exceptions here are Special Ministerial Inquiries in NSW and any inquiries in Victoria that relate to ‘special bodies’.⁴⁸⁵

479 Submission No. 5c from Public Sector Commission, 21 May 2014, p. 4.

480 Submission No. 5 from Public Sector Commission, 14 November 2013, p. 44.

481 Sections 39(1)(d) and 56 *Public Administration Act 2004* (Vic); Submission No. 5 from Public Sector Commission, 11 June 2014, p. 44.

482 Section 83(2) *Government Sector Employment Act 2013* (NSW).

483 *ibid.*, Section 82(1)-(4).

484 Section 14(1)(f) *Public Sector Act 2009* (SA); Sections 41(2)(j), 41C, and 41D *Public Service Act 1999* (Cwth).

485 Special bodies are defined under section 6 of the *Public Administration Act 2004* (Vic) and include a list of statutory offices (e.g. Ombudsman) and departments of the Parliament of Victoria; See also, Section 82(10) *Government Sector Employment Act 2013* (NSW).

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- 7.44 Victoria is also notable for its recent amendments which merged two former investigative mechanisms—Special Reviews and Special Inquiries—into a single Inquiry provision. The rationale for the merger was, in part, to reduce the complexity of the former legislative framework, which included multiple processes with similar investigative options and purposes.⁴⁸⁶

Commentary surrounding investigatory mechanisms

- 7.45 The majority of critical commentary surrounding the investigatory mechanisms within the PSM Act has come from Chief Justice Martin in his 2013 Whitmore Lecture. In this speech, the Chief Justice took aim more at the investigatory framework in place within the PSM Act rather than the Commissioner's use of the powers available within this framework.
- 7.46 The first concern related to the ambiguity surrounding the purposes for which the respective instruments might be used. The Chief Justice argued, '[t]he distinction between a review, a special inquiry and an investigation is not at all clear from the terms of the legislation.'⁴⁸⁷
- 7.47 The other issues raised by the Chief Justice were framed in the context of a comparison between Special Inquiries and Royal Commissions, instruments with similar investigative powers. The Chief Justice claimed Special Inquiries were 'necessarily constrained' when compared with Royal Commissions, as the scope of inquiries under the PSM Act is limited to the conduct of public sector bodies and officers.⁴⁸⁸
- 7.48 The St Andrew's Hostel inquiry was offered as an example to support his argument. The Chief Justice noted that in this particular inquiry, the responses from police officers and local councillors to allegations of abuse were largely beyond the scope of the inquirer because these individuals were not defined as part of the public sector under the PSM Act.⁴⁸⁹
- 7.49 The Chief Justice was also critical of the fact there is 'no statutory prescription of any form of transparency in relation to the conduct of [an] inquiry.'⁴⁹⁰ To demonstrate his concerns about transparency of the inquiry process, the Chief Justice referred to the Peel Health Campus inquiry. In this inquiry, the special inquirer, Professor Bryant Stokes, exercised the powers available to him under section 24J(4) of the PSM Act to direct that the submissions, transcripts, and

486 Mr Andrew Tongue PSM, Secretary, Department of Premier and Cabinet (Vic), Briefing, 28 March 2014.

487 Chief Justice Wayne Martin, [*Whitmore Lecture 2013: Forewarned and Four-Armed – Administrative Law Values and the Fourth Arm of Government*](#), 1 August 2013, p. 10.

488 *ibid.*, p. 11.

489 *ibid.*, p. 12.

490 *ibid.*, p. 11.

identities of witnesses be suppressed with the intention that they not be made available via requests under the *Freedom of Information Act 1992* (FOI Act).⁴⁹¹ This inquiry, argued the Chief Justice, was conducted ‘without the degree of transparency which would normally attend a Royal Commission.’⁴⁹²

7.50 The Chief Justice’s concerns around transparency extended to the outcomes of inquiries, where the PSM Act only prescribes that a final report of a Special Inquiry be provided to the Commissioner and to the Premier (if the Premier directed the inquiry be undertaken). While acknowledging there was no such provision in the *Royal Commissions Act 1968*, the Chief Justice stated ‘there is a well-developed expectation that the report of such a Commission will be tabled in Parliament.’⁴⁹³

7.51 During this Inquiry, the Commissioner and other members of the Commission’s executive team provided testimony regarding the amendments to Review, Special Inquiry, and Investigation powers. On the reason for the Commissioner acquiring the powers to initiate Reviews and Special Inquiries, Acting Commissioner Dan Volaric, pointed to the fact that the Commissioner had assumed responsibility for monitoring the structure, administration and management of the public sector from the Premier after the Reform Bill passed. Therefore, it was thought:

*The commissioner should have the same probative powers previously available to the minister [the Premier] and the predecessor commissioner in the course of performing those functions.*⁴⁹⁴

7.52 Mr Volaric added that with the ability to invoke the powers available under Reviews, Special Inquiries, and Investigations, the Commissioner had the capacity to ‘effectively carry out’ his administrative and oversight functions as prescribed in the Act.⁴⁹⁵

7.53 Referring to the issue of Special Inquiries in his submission, the Commissioner acknowledged that the powers of Special Inquiries and Royal Commissions were quite similar with the exception that Royal Commissions can obtain search warrants. The Commissioner saw Special Inquiries as an efficient means

491 Professor Bryant Stokes, [Peel Health Campus: Contract Management and Clinical Outcomes. A Special Inquiry examining the delivery of public health services at the Peel Health Campus](#), 28 March 2013, Directions, p. 1.

492 Chief Justice Wayne Martin, [Whitmore Lecture 2013: Forewarned and Four-Armed – Administrative Law Values and the Fourth Arm of Government](#), 1 August 2013, p. 13.

493 *ibid.*, p. 11.

494 Mr Dan Volaric, Acting Commissioner, Public Sector Commission, *Transcript of Evidence*, 12 April 2014, p. 13.

495 *ibid.*

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by which matters of significant public interest could be dealt with in a comparatively prompt and economical way. The Commissioner submitted that Royal Commissions:

*... have tended to be used for more complex issues or law, be headed by retired judges, and involve a more legalistic approach.*⁴⁹⁶

- 7.54 The Commissioner also confirmed that he had not yet sought to exercise his Special Inquiry powers independently.⁴⁹⁷
- 7.55 In terms of the transparency of actions, the Commissioner stressed that all four inquiries to date had been tabled in Parliament and published on the Commission's website despite there being no statutory requirement to do so.⁴⁹⁸
- 7.56 As to the transparency attached to the inquiry process, the Commissioner noted similar powers were available to Royal Commissioners, namely the capacity to conduct private hearings and to restrict the publication of documentary evidence. As for Special Inquiries, disclosure may be restricted for matters 'of a personal, confidential or commercial nature, or [that] ... relate to recommendations to consider criminal prosecution.'⁴⁹⁹
- 7.57 When answering questions relating to the Peel Health Campus inquiry, the Commissioner confirmed the material Professor Stokes directed to be suppressed remained confidential and that no requests for access had been received as yet. Notwithstanding this point, 'and despite any restriction imposed by a special inquirer'⁵⁰⁰, all records held by the Commissioner are eligible for Freedom of Information (FOI) applications.
- 7.58 The Commissioner also noted that the process for the Peel Health Campus inquiry was not unprecedented, with a similar 'non-publication direction' issued as part of the final report of a 2001 Special Inquiry into obstetric and gynaecological services at King Edward Memorial Hospital.⁵⁰¹

Committee considerations

- 7.59 The Committee has not focused on the content of the Reviews, Special Inquiries, and Investigations conducted since the amendments to the PSM Act

496 Submission No. 5 from Public Sector Commission, 14 November 2013, p. 42.

497 Ibid., p. 38.

498 Ibid.

499 Ibid., p. 41.

500 Submission No. 5c from Public Sector Commission, 21 May 2014, p. 5.

501 Ibid.

came into operation. The Committee's interest relates more to how the amended provisions work in practice.

- 7.60 The Committee acknowledges the point raised by Chief Justice Martin about the ambiguity surrounding the purpose of the three investigative instruments. In this respect, the Committee notes the recent initiative in Victoria—where two investigative instruments have been merged under a single Inquiry provision (see 7.44 above)—as an initiative that may be considered in the future for WA.

- 7.61 In regards to the Chief Justice's concerns around the limited scope of Special Inquiries versus Royal Commissions, the Committee notes this relates to provisions that have been in place since the inception of the PSM Act in 1994. The Committee has not given extensive consideration to this matter, as it holds the view that it is the prerogative of the Executive to determine whether a Special Inquiry or a Royal Commission should be undertaken.⁵⁰² The Executive is then accountable to the Parliament for any decision it exercises in this respect.

- 7.62 The main area of interest to the Committee is the level of transparency applied to the final reports provided to the Commissioner under the Review, Special Inquiry, and Investigation provisions. In this respect, the Committee shares some of the Chief Justice's concerns regarding the openness of the current framework both as it relates to the publication of final reports and the process regarding access to evidence.

- 7.63 On the first matter, the Committee acknowledges the Commissioner has generally been proactive in his approach to making public the final reports of Special Inquiries, Investigations, and Reviews, despite having no prescribed requirement to do so.

- 7.64 With respect to the four Special Inquiries that have been conducted since the Reform Bill amendments took effect, all have been tabled in Parliament and published on the Commission's website.

- 7.65 Regarding Investigations, only one of five have been tabled and published. The four that were withheld related to possible disclosures of public interest information obtained under the *Public Interest Disclosure Act 2003* (WA). The Committee accepts the rationale behind the Commissioner not publishing the results of such Investigations, which are likely to contain sensitive information

⁵⁰² A point acknowledged by the Chief Justice in his Whitmore Lecture. See, Chief Justice Wayne Martin, [*Whitmore Lecture 2013: Forewarned and Four-Armed – Administrative Law Values and the Fourth Arm of Government*](#), 1 August 2013, p. 14.

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around the identity of the parties involved, and may not necessarily pertain to matters of heightened public interest. Importantly, Parliament has the capacity, especially through its committee system, to question the Commissioner on his work in this area should it so choose.

- 7.66 In relation to Reviews, there was one notable departure from the Commissioner's general tendency towards timely openness in reporting. This occurred with the final report of the *Review of the Relationship Between the Minister for Training and the Department of Training and Workforce Development*, which was tabled a year after it was completed and only after the Commissioner determined that ongoing interest from the Parliament and the public warranted its disclosure.
- 7.67 The Committee notes the acknowledgement of the Acting Commissioner that a public interest test is applied when determining whether an issue is of such significance as to warrant a Special Inquiry, an Investigation, or a Review (see 7.21 above). For the Committee, it logically follows that if the Commissioner invokes these powers there will always be a similarly sufficient level of public interest in the outcome.
- 7.68 Consequently, the Committee would like to see all such reports, with the exception of investigations into possible public interest information disclosures, tabled in a timely manner. The Committee does not think it is necessary to amend the PSM Act to mandate publication at this time, as it believes the reporting provisions under sections 22D and 22E are currently adequate in this respect. However, it does urge the Commissioner to consistently apply the practice of openness in reporting he has generally exercised since 2010.

Finding 23

Under the 2010 amendments to the *Public Sector Management Act 1994*, the Public Sector Commissioner has acquired the powers to initiate Reviews and Special Inquiries (new sections 24B and 24H).

The powers to initiate Reviews and Special Inquiries previously rested exclusively with the Premier, in his capacity as Minister responsible for administering the Act. The Premier can still direct the Commissioner to conduct a Review or arrange for the holding of a Special Inquiry. The Commissioner can refuse to comply with such directions but must prepare written reasons for the failure to comply and include these in the Public Sector Commission's Annual Report.

Since the amendments have come into effect, the Commissioner has arranged for the holding of four Special Inquiries at the direction of the Premier.

Finding 24

The Public Sector Commissioner has generally been proactive in his approach to publishing the final reports of Special Inquiries, Investigations, and Reviews despite having no prescribed requirement to do so. The one notable exception occurred with the delayed tabling of the final report of the *Review of the Relationship Between the Minister for Training and the Department of Training and Workforce Development*.

Recommendation 10

The Premier seek and report on any response from the Public Sector Commissioner regarding the possibility of the Commissioner continuing to apply the practice of openness in reporting to ensure all Special Inquiries, Reviews, and Investigations (with the exception of those relating to possible public interest disclosures), are tabled in a timely manner.

- 7.69 The Committee also shares the concern of the Chief Justice regarding the degree of transparency that can attend Special Inquiries.
- 7.70 The PSM Act is silent on the matter of whether evidence will be taken in open forum and / or whether it will later be made public. As a result, special inquirers operate under the provisions of section 24J(4) which states:

To the extent that the practice or procedure of a special inquirer is not prescribed by or under this Act, it is to be as the special inquirer determines.

- 7.71 In the case of the Peel Health Campus inquiry, the special inquirer, Professor Bryant Stokes, directed that the identities of all witnesses, and the content of all submissions and transcripts of evidence, remain confidential both during and at the conclusion of the inquiry. The following explanation was provided:

*I adopted this course of action due to the nature of evidence, documents and issues for consideration in the Special Inquiry. In both written and oral submissions, it was contended that I should do all within my power to preserve the confidentiality of witness names, evidence and submissions. I accept the force of those submissions.*⁵⁰³

503 Professor Bryant Stokes, *Peel Health Campus: Contract Management and Clinical Outcomes. A Special Inquiry examining the delivery of public health services at the Peel Health Campus*, 28

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- 7.72 In contrast, the special inquirer into St Andrew's Hostel Katanning, Hon Peter Blaxell, under the same provision of the PSM Act, took evidence in public and allowed all transcripts of evidence to be published on the Public Sector Commission's website within one working day. While noting that it was sometimes in the interest of the inquiry to protect the identity of witness via redaction (in order to obtain key evidence), the Hon Mr Blaxell explained his preference for publishing the content of the hearings thus:

*It is a well-established principle that the hearings of an inquiry into matters of substantial public interest and controversy should be held in public. This principle recognises the desirability that members of the public be able to scrutinise an Inquiry's findings against the evidence on which those findings are based.*⁵⁰⁴

- 7.73 When responding to questions from the Committee regarding the evidence for the Peel Health Campus inquiry, the Public Sector Commission referred to the fact that the evidence ordered confidential by Professor Stokes was still capable of being requested via an FOI application. While this is technically correct, the reality is that there are numerous exemption provisions within the FOI Act that may preclude this information from being obtained.⁵⁰⁵ Arguably the most significant barrier to access in this instance would be Professor Stokes' request that the 'intention and content of my direction' be taken into account when assessing an FOI application.⁵⁰⁶
- 7.74 The Committee agrees with the sentiment expressed by Hon Mr Blaxell regarding the desirability for the public to have access to evidence in order to critique the findings of a special inquiry's final report. While noting that the instances in which special inquirers have directed all evidence to be withheld is rare, the Committee thinks it is nonetheless worth considering ways in which the principle of disclosure can be promoted within the Special Inquiry framework of the PSM Act.

March 2013, Direction, p. 1. Available at:

http://www.publicsector.wa.gov.au/sites/default/files/documents/peel_health_campus_inquiry.pdf. Accessed on 17 August 2014.

- 504 Hon Peter Blaxell, *St Andrew's Hostel Katanning: How the System and Society Failed Our Children. A Special Inquiry into the response of government agencies and officials to allegations of sexual abuse*, 19 September 2012, p. 11. Available at: <http://www.publicsector.wa.gov.au/public-administration/sector-performance-and-oversight/reviews-investigations-and-special-inquiries/special-inquiries/st-andrews-hostel-inquiry>. Accessed on 17 August 2014.

- 505 See, for example, Schedule 1, Clauses 1(d)(i), 3-6, 8, and 10 *Freedom of Information Act 1992* (WA).

- 506 Professor Bryant Stokes, *Peel Health Campus: Contract Management and Clinical Outcomes. A Special Inquiry examining the delivery of public health services at the Peel Health Campus*, 28 March 2013, Direction, p. 2.

- 7.75 The Committee does not seek to unwind the current discretion available to special inquirers to conduct proceedings as they deem appropriate. Indeed, the capacity to offer the condition of confidentiality may be critical to obtaining key evidence. However, to promote transparency, particularly at the conclusion of an inquiry, the Premier could consider incorporating into the Act a provision encouraging special inquirers to make evidence public whenever possible, while requiring them to provide detailed reasons whenever they direct that material be withheld.

Finding 25

Special Inquirers currently have discretion as to whether or not evidence will be taken in public and / or made public at a later time. While the instances where special inquirers have directed that all evidence be kept confidential is rare, it is nonetheless worth considering ways in which the principle of disclosure can be promoted within the Special Inquiry provisions of the *Public Sector Management Act 1994*.

Recommendation 11

The Premier look at ways to amend to *Public Sector Management Act 1994* to encourage special inquirers to make evidence public whenever possible, while requiring them to provide detailed reasons whenever they issue a direction that material remain confidential.

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Commissioner's Appointment and Accountability Framework

- 8.1 The amendments to the PSM Act have granted the Commissioner an unprecedented level of power over the management and administration of the public sector.
- 8.2 This report has looked at several of these key amendments and is generally satisfied with how they have manifested in practice. Still, it is important to ensure the accountability provisions in place for the Commissioner are commensurate to the increased level of responsibility the position has assumed.
- 8.3 This chapter aims to explore this issue in detail by looking at the provisions of the PSM Act relating to the Commissioner's: appointment; reappointment; performance management; removal; reporting requirements; and parliamentary oversight.
- 8.4 Before determining whether the current framework of accountability is appropriate, a key question needs to be considered: to whom should the Commissioner be accountable?

An Officer of the Parliament, the Executive, or Neither?

- 8.5 Throughout the course of its Inquiry, the Committee has come to view the Commissioner's role as that of an independent statutory officer, partly accountable to both the Executive and the Parliament.
- 8.6 In the lead up to the original PSM Act passing in 1994, the final report of the WA Inc Royal Commission had recommended several statutory offices be established as 'independent parliamentary agencies.' These included: the Auditor General; the Ombudsman; the Electoral Commissioner; the then-proposed Commissioner for the Investigation of Corrupt and Improper Conduct (later the Commissioner of the Corruption and Crime Commission); and the proposed Commissioner for Public Sector Standards.⁵⁰⁷

⁵⁰⁷ [*Royal Commission into Commercial Activities of Government and Other Matters, Report Two*](#), November 1992, p. 5-12.

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- 8.7 Despite this recommendation, in the years that have ensued, only the Auditor General has been statutorily recognised as ‘an independent officer of Parliament’.⁵⁰⁸
- 8.8 When the original PSM Act was passed, the Commissioner of Public Sector Standards was established. While the position had no statutory definition, provision was made for the Commissioner to ‘act independently in relation to the performance of his or her functions’⁵⁰⁹ that were then stipulated under section 21.
- 8.9 The role of Commissioner that emerged following the Reform Bill amendments is substantially different from that of its predecessor, and the position has a greater degree of independence. A new provision under section 22(2) has been added, making explicit that ‘the Commissioner is not subject to direction by the Minister or any other person’.⁵¹⁰ Another new subsection 22(3) provides that the Commissioner is also exempt from the provisions of Section 32 of the Act, which requires CEOs or chief employees to comply with lawful directions or instructions given to them by the responsible authority of the department or organisation.⁵¹¹
- 8.10 Only in a select few areas is the Commissioner subject to direction from the Premier. For example, the Commissioner must comply with a directive from the Premier to conduct either a review into the operations of public sector bodies or an inquiry into matters involving the sector. In both instances, the Commissioner can only refuse the direction in exceptional circumstances. These reasons must be written up and included in the Commission’s Annual Report.⁵¹² In addition, the new section 35(4) enables the Premier to direct the Commissioner to make recommendations to the Governor regarding machinery of government changes.
- 8.11 These changes did not prove controversial during the passage of the Reform Bill and were put through both Houses without debate or further amendments being proposed.
- 8.12 The level of independence granted to the Commissioner in WA is not unprecedented. As in WA, the equivalent legislation in the NSW and

508 Section 7 *Auditor General Act 2006* (WA).

509 Section 22 *Public Sector Management Act 1994* (WA) original.

510 Section 22(2) *Public Sector Management Act 1994* (WA) current.

511 A ‘responsible authority’ is defined in the Act as either ‘a board, committee or other body ...administering the department’ or ‘the Minister responsible for the department or organisation’. Section 3 *Public Sector Management Act 1994* (WA) current.

512 Submission No. 5 from Public Sector Commission, 14 November 2014, p. 29. See also sections 24B and 24H *Public Sector Management Act 1994* (WA) current.

Commonwealth jurisdictions precludes commissioners from being subject to ministerial direction in the performance of their statutory functions.⁵¹³

- 8.13 While the extent of the Commissioner's independence is defined, the question as to whom the Commissioner is accountable to is somewhat ambiguous. Indeed, the Commissioner's own description of his status serves to demonstrate this point.
- 8.14 In his submission, the Commissioner referred to his position as that of an independent statutory officer.⁵¹⁴ Such offices are created by Parliament. They 'exist to serve a broader public purpose, and are not responsive to the needs and demands of a Minister in the way that a typical government department is.'⁵¹⁵ However, the Commissioner added he is not an officer of Parliament, noting the term was not included in the Act. Indeed as the CEO of the Commission, 'the Commissioner is a part of the Executive and reports to a responsible minister [the Premier].'⁵¹⁶
- 8.15 Despite this, the Commissioner later reaffirmed before the Committee his inherent independence, arguing he still operated 'at arm's length from government ... in a way different from that typical of government departments.'⁵¹⁷ Earlier, in his submission, the Commissioner had stressed this degree of independence provided somewhat of a safeguard 'against any real or perceived politicisation of the public sector.'⁵¹⁸ However, it did not result in him acting as an unconstrained 'free agent' neglecting the policy imperatives of government.
- 8.16 To support this view, the Commissioner referred to section 7(b) of the PSM Act for which he must have regard when discharging his functions. This section requires the public sector to be so structured:

513 In NSW, there is a Public Service Commission Advisory Board that can set strategic directions for which the Commissioner has to comply. However, the Board, like the Premier, cannot fetter the Commissioner in the performance of his or her statutory functions. Mr Graeme Head, NSW Public Service Commissioner, Briefing, 26 March 2014. Section 14(1) *Government Sector Employment Act 2013* (NSW). Mr Steven Sedgwick, Australian Public Service Commissioner, Briefing, 27 March 2014.

514 Submission No. 5 from Public Sector Commission, 14 November 2013, p. 2.

515 *ibid.*

516 *ibid.*, p. 54.

517 Mr Mal Wauchope, Public Sector Commissioner, Public Sector Commission, *Transcript of Evidence*, 12 March 2014, p. 25.

518 Submission No. 5 from Public Sector Commission, 14 November 2013, p. 4.

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*...as to achieve and maintain operational responsiveness and flexibility, thus enabling it to adapt quickly and effectively to changes in government policies and priorities.*⁵¹⁹

- 8.17 To observe this principle, the Commissioner added he can only operate effectively within an environment of ongoing communication with the government of the day.⁵²⁰
- 8.18 Determining who the Commissioner should be accountable to in these circumstances is made more difficult by the fact that the Commissioner has statutory responsibilities to Parliament via his reporting requirements.
- 8.19 Former Commissioner, Professor Mike Wood, put this view forward when responding to whether the Commissioner was an officer of the Parliament or the Executive:

*Our system has ambiguity that we have to live with It is the office of the Parliament for purposes of reporting; but the office is responsive to the government of the day for matters effecting public sector policy achievement, employment and so on, otherwise things would not work.*⁵²¹

- 8.20 The Committee does not view this ambiguity as problematic as long as the position of Commissioner is sufficiently open and accountable in the performance of its expanded functions. In this respect, it appears the Executive and the Parliament both have roles to play.
- 8.21 The remaining sections of this chapter will look at the role each branch performs within the accountability framework of the Commissioner under the PSM Act.

Finding 26

While the Public Sector Commissioner is an independent statutory officer, there is capacity for the position to be accountable to both the Executive and the Parliament.

519 Section 7(b) *Public Sector Management Act 1994* (WA) current.

520 Submission No. 5 from Public Sector Commission, 14 Nov 2014, Cover letter, p. 4.

521 Professor Mike Wood, Adjunct Professor, University of Notre Dame Business School (WA), *Transcript of Evidence*, 2 April 2014, p. 7.

Appointment Provisions

Evolution of appointment provisions

- 8.22 Since the *Public Service Act 1904*, provision has always existed for a head of the public service/public sector in WA to be appointed by the Governor.⁵²²
- 8.23 The original PSM Act amended this provision, making it explicit that the appointment by the Governor would occur ‘on the recommendation of the Minister’ responsible for administering the Act: in effect, the Premier.⁵²³ The Premier could only make such a recommendation after consulting the leaders of each party in the Parliament.⁵²⁴
- 8.24 Another new clause required any incoming Commissioner to sign a declaration undertaking to perform the role to the best of their ability in an impartial manner.⁵²⁵
- 8.25 Unlike previous Commissioners, who were appointed for seven-years, the original PSM Act made the position a five-year term eligible for reappointment.⁵²⁶
- 8.26 With the exception of a slight change in the wording of the declaration, these provisions were not subject to amendment in the 2009 Reform Bill.⁵²⁷

Current appointment provisions in practice

- 8.27 The PSM Act does not stipulate a particular process to be followed by the Premier in order to determine a candidate for Commissioner. While Section 4 of the Act deems the Commissioner to be CEO, it also exempts the Commissioner’s position from the appointment provisions applicable to other CEOs under section 45 (that were examined in detail in Chapter Three). Several other statutory offices are exempted under section 4: the Auditor General; the Electoral Commissioner; and the Commissioner for Police.
- 8.28 The process for selecting candidates for appointment has varied with the last few Commissioners. As noted earlier in the report, the current Commissioner, Mr Wauchope, was appointed to the newly created position of Public Sector Commissioner on 30 September 2008. This occurred via the delegated authority then available to the Premier under section 15 of the original PSM Act and as part of the Premier’s planned program of reform (see 2.17 through

522 Section 6(1)-(2) *Public Service Act 1904* (WA); Section 6(2) *Public Service Act 1978* (WA).

523 Section 17(1) *Public Sector Management Act 1994* (WA) original.

524 *ibid.*, Section 17(2).

525 *ibid.*, Section 26.

526 *ibid.*, Section 17(3).

527 Section 17 *Public Sector Management Act 1994* (WA) current.

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2.24 above). When the amendments in the Premier's subsequent Reform Bill were passed, Mr Wauchope assumed the new statutory office of Commissioner under the transitional provisions of that Bill.⁵²⁸

- 8.29 The appointment provisions for other statutory officers in WA show some noticeable differences when compared with the provisions applicable to the Commissioner. These differences include the involvement of two parliamentary committees during two stages of the recruitment phase (Auditor General); the requirement for approval of the appointee from an oversight committee (Corruption and Crime Commissioner; Parliamentary Inspector of the Corruption and Crime Commission); and the requirement to advertise nationally for the role (Corruption and Crime Commissioner; Commissioner for Children and Young People). See Table 7 below for further details.

Table 7 Appointment provisions for statutory officers (WA)

Statutory Officer	Appointment Provisions ⁵²⁹
Public Sector Commissioner	<ul style="list-style-type: none"> • Appointed by Governor on recommendation from Minister (Premier) • Premier must consult leaders of each party in the Parliament before making the recommendation • Five-year term, renewable
Auditor General	<ul style="list-style-type: none"> • Appointed by Governor on recommendation from Minister • Minister (Treasurer) must consult the Assembly's Public Accounts Committee and the Council's Estimates and Financial Operations Committee before applications are sought and again before making a recommendation • Minister must consult with leaders of each party in the Parliament before making the recommendation • Ten-year term, non-renewable
Corruption and Crime Commissioner	<ul style="list-style-type: none"> • Appointed by Governor on recommendation from Premier • Short list of 3 candidates to be provided to the Premier from an independent nominating committee that includes judicial officers • Nominating committee to advertise nationally for position • Recommended appointee must have majority and bi-partisan support of Joint Standing Committee on the Corruption and Crime Commission (JSCCC) • Premier must consult JSCCC and leaders of each party before making recommendation • Five-year term, renewable once

⁵²⁸ Clause 66 Public Sector Reform Bill 2009 (WA).

⁵²⁹ Schedule 1 *Auditor General Act 2006* (WA); Sections 3-4, 189 and Schedules 2-3 *Corruption and Crime Commission Act 2003* (WA); Sections 7 and 9 *Commissioner for Children and Young People Act 2006* (WA); Section 5 *Parliamentary Commissioner Act 1971* (WA); and Mr Chris Field, Ombudsman, Letter, 21 May 2014.

Parliamentary Inspector of the Corruption and Crime Commissioner	<ul style="list-style-type: none"> • Appointed by Governor on recommendation from Premier • Short list of 3 candidates to be provided to the Premier from an independent nominating committee including judicial officers • Recommended appointee must have majority and bi-partisan support of JSCCCC • Five-year term, renewable once
Commissioner for Children and Young People	<ul style="list-style-type: none"> • Appointed by Governor on recommendation from Premier • Premier to advertise nationally for position • Premier must consult any party with two or more members before making recommendation • Children and young people must be involved in the selection process • Five-year term, renewable once
Ombudsman	<ul style="list-style-type: none"> • Appointed by Governor • Governor advised following open recruitment process (not prescribed) • Five-year term, renewable

Notable practices from other jurisdictions

- 8.30 In other jurisdictions examined by the Committee, it is commonplace for the equivalent of the Public Sector Commissioner to be appointed by the Governor on the recommendation of the leader of the government (e.g. Commonwealth; NSW; Victoria; South Australia; and New Zealand).
- 8.31 While the legislative requirements for the appointment of commissioners are similar between jurisdictions, NSW and Victoria are notable as having more prescriptive appointment provisions.
- 8.32 In NSW, the Public Service Commissioner is appointed after a recommendation has been made to the Premier by an Advisory Board. The Advisory Board consists of the Commissioner, the Secretary of the Department of Premier and Cabinet and four other people appointed by the Premier.⁵³⁰ These four appointees are to have expertise in human resources management, probity and accountability, strategic planning, budget and performance management and service delivery in the public, private, tertiary and not-for-profit sectors.⁵³¹
- 8.33 The Advisory Board serves as a selection panel for the appointment of a Commissioner, with its diverse range of skills and experience designed to ensure the candidate recommended to the Premier has the required attributes to successfully perform the role. The present NSW Commissioner was appointed to the role in 2010 and assisted in the drafting of the new legislation

⁵³⁰ Section 18(2) *Government Sector Employment Act 2013* (NSW).

⁵³¹ *ibid.*, Section 18(3).

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which established the office he currently holds.⁵³² This legislation commenced on 24 February 2014. As was the case with Mr Wauchope in WA, the NSW Commissioner assumed the role under transitional provisions within the new legislation.⁵³³

- 8.34 The provisions of the legislation in Victoria require that the Premier be satisfied that the recommended candidate has knowledge and experience in the fields of public administration, governance, law, public policy or senior management. In the recent appointment of the inaugural Victorian Public Sector Commissioner, the Victorian Department of Premier and Cabinet (VDPC) engaged the services of a recruitment firm. A set of selection criteria was established and a global search was conducted. The eventual appointee, Ms Belinda Clark, came from a public service background in New Zealand.⁵³⁴

Committee considerations

- 8.35 The appointment provisions within section 17 of the PSM Act remain largely unchanged from 1994 and reflect a key principle evident in other jurisdictions, the prerogative of the head of government in the final recommendation to the Governor. This principle is endorsed by the Committee.
- 8.36 While appointment provisions are in place, the recruitment process is not prescribed within the Act, thereby leaving scope for variation. While the manner in which the current Commissioner was recruited and appointed differs from that observed for other statutory officers in WA and for commissioners in other jurisdictions, the transition of an incumbent office holder during a time of significant reform is not unique to this state, as the case in NSW demonstrates.
- 8.37 With the Reform Bill amendments now settled, the Committee's focus is on the appointment provisions as they will relate to future Commissioners.
- 8.38 The Committee sought clarification from the Premier about how future Commissioners may be recruited and appointed. The Premier confirmed the process for appointment would be carried out in accordance with the provisions of section 17 and that a recommendation for appointment would include 'an assessment of the person's ability to undertake the functions of Public Sector Commissioner prescribed in the Act.'⁵³⁵ The Premier added that:

532 Hon Barry O'Farrell, Premier, NSW, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 September 2011, p. 5518 and 23 May 2013, pp. 20857-20858.

533 Schedule 4 part 2 *Government Sector Employment Act 2013* (NSW).

534 Mr Andrew Tongue PSM, Secretary, Department of Premier and Cabinet Victoria, Briefing, 28 March 2014.

535 Hon Colin Barnett MLA, Premier, Letter, 6 June 2014.

Past practice to recruit persons to fill vacancies in prominent statutory offices, including the former position of Public Sector Standards Commissioner ... has included the roles being advertised in local, national and interstate newspapers and inviting applications from suitable persons interested in being appointed to the respective office. A merit selection process is then conducted of all applicants by an independent selection panel prior to the formulation of a recommendation for the appointment of a suitable person.

*Following this an appointment is confirmed via Cabinet and the Governor in Executive Council.*⁵³⁶

- 8.39 Parliamentary participation in the appointment process currently occurs via the requirement in section 17 for the Premier to consult with party leaders.

- 8.40 The WA Inc Royal Commission final report had recommended the involvement of the committee system ‘in the processes leading up to the nomination’ of a candidate for the independent parliamentary agencies (those listed at 8.6 above).⁵³⁷ However, of the agencies referred to in that report that have since been established, only the Auditor General and the Corruption and Crime Commissioner have committee participation legislated in their appointment provisions.

- 8.41 As Table 7 above shows, the oversight committee for the Corruption and Crime Commissioner has the power to potentially reject a nominated candidate. In the case of the Public Sector Commissioner, where the office holder interacts significantly with the Executive, the parliamentary branch should not necessarily have the capacity to prevent the Premier’s short-listed nominee from being appointed. A requirement simply to consult an appropriate oversight committee prior to the recommendation to the Governor, similar in part to the current Auditor General’s appointment process, is considered more suitable.

- 8.42 As to what “consultation” should entail, the model put forward by former Treasurer, the Hon Eric Ripper, during debate on the Auditor General Bill in 2006, is worthy of consideration:

I undertake that I will inform the Public Accounts Committee and the parliamentary leader of each party with party status of the government’s proposed appointment to the position of Auditor

⁵³⁶ Hon Colin Barnett MLA, Premier, Letter, 6 June 2014.

⁵³⁷ [*Royal Commission into Commercial Activities of Government and Other Matters, Report Two*](#), 12 November 2012, pp. xiii-xiv.

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*General. I will do this in writing two weeks before making a recommendation to the Governor, thus providing an opportunity for those people to respond to the government's proposed appointment without unduly delaying the process.*⁵³⁸

- 8.43 The Hon Mr Ripper then went on to provide advice from the State Solicitor's Office regarding the term consult:

*In summary, the effect of the case law on the meaning of 'consult' generally is that, although its precise meaning will be dependent on the statutory context, what is required will be genuine and substantive engagement (or reasonable attempts to engage), rather than treatment of the process as a mere formality.*⁵³⁹

- 8.44 A similar form of consultation prior to the appointment of future Public Sector Commissioners would not be overly onerous, nor would it be designed to usurp the influence of the Executive. However, it is not unreasonable for a broader section of the legislature to learn more about a nominee for a role that has reporting obligations to the Parliament. In addition to allowing Parliament to play a greater part in overseeing activities relating to the Commissioner, it would also increase the transparency of the current appointment process.
- 8.45 The question remains as to which committee should be consulted were such a process to be legislated. Within the Legislative Assembly, the Public Accounts Committee (PAC) would be the most appropriate option given it has portfolio responsibility for the Premier who is the Minister responsible for administering the PSM Act.

Finding 27

The transparency and integrity of the process for appointing the Public Sector Commissioner could benefit from parliamentary participation involving the committee system.

Recommendation 12

The Public Accounts Committee be consulted as part of the process for the appointment of Public Sector Commissioners.

538 Hon Eric Ripper MLA, Treasurer, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 27 September 2006, p. 6771.

539 Parliament of Western Australia, *Auditor General Bill 2006 – Advice from State Solicitor's Office on Appointment of Auditor General – Meaning of Requirement to "Consult"*, Parl. Paper 1877, 21 September 2006, p2.

Reappointment Provisions

Evolution of reappointment provisions

- 8.46 Under the 1904 legislation, the state's inaugural Public Service Commissioner could serve a seven-year term and was eligible for reappointment. This provision was retained for the Board of Commissioners under *Public Service Act* 1978, although only the Chairman was granted a seven year-term. The other commissioners had five-year terms. A cap of 65 years of age was introduced for each commissioner, unless in the view of the Board it was 'in the interests of the public service'⁵⁴⁰ for an incumbent to continue. In these cases, the Governor would ultimately determine if the extension would be granted. When the Act was subsequently amended in 1987 and a single commissioner was re-introduced, the position was subject to the same terms as the former board, with the Governor deciding whether it was necessary for a term to be extended beyond the age cap.⁵⁴¹
- 8.47 When the Commissioner for Public Sector Standards was established under the original PSM Act, the age limit was removed and the term was reduced to five years, but the eligibility for reappointment was preserved.⁵⁴² When the Public Sector Commissioner's position was established under the Reform Bill amendments, the conditions relating to length of tenure and reappointment were unchanged. Mr Mal Wauchope officially commenced as Commissioner on 1 December 2010 and is eligible for reappointment on 1 December 2015.

Current reappointment provisions in practice

- 8.48 Since the PSM Act came into effect in 1994 no sitting commissioner has been reappointed. Of the four Commissioners for Public Sector Standards to serve before the current position was created, two retired after five years, one did not have their contract renewed, and the other became Director General of the Department of Training and Workforce Development after it was confirmed that the Commissioner's role was being abolished in 2009.⁵⁴³

⁵⁴⁰ Section 6(7) *Public Service Act* 1978 (WA).

⁵⁴¹ Section 6(2) *Public Service Act* 1904 (WA); Section 6(3) *Public Service Act* 1978 (WA); Section 6 *Acts Amendment (Public Service) Act* 1987 (WA).

⁵⁴² Section 17 *Public Sector Management Act* 1994 (WA) original.

⁵⁴³ Mr Digby Blight (1992-1997) and Mr Don Saunders (1997-2002) retired; Ms Maxine Murray (2002-2007) contract not renewed; Dr Ruth Shean 2007-2009 (position merged with the new Public Sector Commissioner).

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- 8.49 The PSM Act is silent on the process that is undertaken to reappoint the Commissioner although in practice the decision to reappoint rests with the Premier as Minister responsible for administering the Act.⁵⁴⁴ According to the current Commissioner, the factors that might be taken into account should he seek reappointment in 2015 have not been confirmed:

*I imagine this will be a matter for discussion with the Premier closer to the time, but, clearly, the discharge of the statutory functions will be one consideration I would think he would have regard for. That conversation has not been had at this stage; closer to the time, obviously it will.*⁵⁴⁵

- 8.50 The PSM Act is not unique in its failure to prescribe a process to follow when determining reappointment. In the case of other statutory officers in WA, listed in Table 7 above, the process is also left to convention.

Notable practices in other jurisdictions

- 8.51 In the other Westminster jurisdictions considered by the Committee, the legislation is again mostly silent on the process for reappointment.
- 8.52 As in WA, five-year terms, which are renewable, are in place for the Australian Public Service Commissioner, and the equivalents in Victoria, South Australia, and New Zealand.⁵⁴⁶
- 8.53 Among the more notable exceptions are NSW and the UK where Commissioners are subject to a fixed non-renewable term. In the UK it is five years, whereas in NSW, the Commissioner may be reappointed, but may only serve a total of seven years in the position. In addition to this, the Commissioner is not able to seek another role in the public service following the expiry of this term.⁵⁴⁷

Committee considerations

- 8.54 Throughout the Inquiry, the Committee gave thought to two main issues around reappointment. One related to the length of tenure for the Commissioner, the other concerned the lack of clarity around the re-appointment process.

544 Hon Colin Barnett MLA, Premier, Letter, 6 June 2014.

545 Mr Mal Wauchope, Public Sector Commissioner, Public Sector Commission, *Transcript of Evidence*, 12 March 2014, p. 19.

546 Section 45 *Public Service Act 1999* (Cwth); Mr Stephen Sedgwick AO, Australian Public Service Commissioner, Briefing, 27 March 2014; Section 44 *Public Administration Act 2004* (Vic); Section 13(3) *Public Sector Act 2009* (SA); Section 13 *State Sector Act 1988* (NZ).

547 Mr Graeme Head, NSW Public Service Commissioner, Briefing, 26 March 2014; Schedule 1 Part 1 *Constitutional Reform and Governance Act 2010* (UK).

- 8.55 On the first matter, the Committee formed the view there are pros and cons to the idea of prescribing a maximum term for the Commissioner. On the positive side, a fixed-term can ensure regular renewal and the introduction of fresh ideas. It can also counter the risk, real or perceived, of a culture of nepotism developing between CEOs and a Commissioner, particularly given the new role the Commissioner has under the PSM Act as their employing authority.
- 8.56 These need to be weighed against the fact that non-renewable terms might limit the pool of candidates likely to apply, particularly if this is coupled with a clause preventing further work in the public sector (as in the case of NSW).⁵⁴⁸ Perhaps more importantly, there is potential for what Professor John Nethercote called a ‘wobble’ towards the end of the term, where senior members of the public sector may not be as responsive to the directions of the soon-to-be-leaving chief.⁵⁴⁹ There is another risk should the incumbent be able to pursue other roles in the sector, as is the case in Western Australia.⁵⁵⁰ In these circumstances, the incumbent may become less independent and innovative towards the end of the term as they eye future opportunities.
- 8.57 In the end, the Committee came to the view that change is not required in this area. Based on the last two decades’ experience in WA (and in Canberra)⁵⁵¹, it appears that renewal occurs within the office of Commissioner without it having to be prescribed.
- 8.58 The Committee noted a lack of clarity around how the reappointment process works. In particular, whether there are formal criteria against which a reappointment decision will be based and the parties, besides the Commissioner, that were likely to be consulted before a decision is made to reappoint.
- 8.59 Towards the end of the Inquiry, the Committee sought a response from the Premier on these issues. The Premier confirmed there are no formal criteria or key performance indicators for the Commissioner whose functions are prescribed in Parts 3A, 3, 5, 6, 7 and 8 of the PSM Act. If a reappointment is proposed, ‘consultation with the incumbent to ascertain their interest in being reappointed would be suggested.’⁵⁵² The Premier also confirmed that, similar to the appointment provisions, consultation with the parliamentary leader of each party in the Parliament ‘would be initiated in the case of any

548 Mr Tony Harris, Briefing, 27 March 2014.

549 Professor John Nethercote, Adjunct Professor, Canberra Campus, Australian Catholic University, Canberra, Briefing, 27 March 2014.

550 Section 20(4) *Public Sector Management Act 1994* (WA) current.

551 Four individuals have served as Australian Public Service Commissioner since 1999.

552 Hon Colin Barnett MLA, Premier, Letter, 6 June 2014.

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reappointment action.⁵⁵³ Following this, the proposed reappointment would be referred to Cabinet.

Finding 28

The *Public Sector Management Act 1994* is silent on the process that is undertaken to reappoint the Public Sector Commissioner, although in practice the decision to reappoint rests with the Premier as Minister responsible for administering the Act.

The absence of a prescribed process relating to reappointment is evident in the enabling legislation for other statutory officers in Western Australia and other public sector chiefs across Australia.

Finding 29

Change is not required in the area of reappointment provisions for the Public Sector Commissioner. Based on the last two decades' experience in WA (and in Canberra), it appears that renewal occurs within the office of Commissioner without it having to be prescribed.

Removal Provisions

Evolution of removal provisions

- 8.60 The *Public Service Act 1904* provided for the Commissioner to be suspended by the Governor. The Act did not stipulate the circumstances under which the Governor would invoke a suspension. For the Commissioner to be removed, the Governor had to provide both Houses of Parliament a statement explaining the grounds for the suspension within seven sitting days. Following this, removal would take effect unless each House resolved to restore the Commissioner within 42 days of receiving the explanatory statement from the Governor.⁵⁵⁴
- 8.61 The Governor retained similar autonomy over suspending any member of the Board of Commissioners under the 1978 legislation, again providing an explanatory statement to Parliament within seven sitting days. Under a change in procedure, a suspended commissioner would be restored unless each House, within 21 sitting days of receiving the statement, presented the

⁵⁵³ Hon Colin Barnett MLA, Premier, Letter, 6 June 2014.

⁵⁵⁴ Section 7 *Public Service Act 1904* (WA).

Governor with an address praying for the removal of the commissioner 'on the grounds of proved misbehaviour or incapacity'.⁵⁵⁵

- 8.62 Another new provision gave the Governor the power to remove a commissioner if an address praying for removal on the same grounds was received from each House at any time in the same session of Parliament.⁵⁵⁶ Amendments to this Act were passed in 1987 maintaining the same regime, but applying it to the office of the single commissioner that had replaced the Board.
- 8.63 When the original PSM Act was introduced, section 18 provided for two mechanisms by which the new Commissioner for Public Sector Standards could be removed. Firstly, the Commissioner could be suspended or removed from office 'at any time' if the Governor received an address from both Houses of Parliament.⁵⁵⁷ The former provision limiting this action to instances of proven misbehaviour or incapacity was not included in the 1994 legislation, thereby giving Parliament broader scope to exercise this power.
- 8.64 The second mechanism, carried over from earlier legislation, enabled the Governor to suspend the Commissioner from office. However, the circumstances in which the Governor could act were now made explicit. To suspend the Commissioner, the Governor needed to be satisfied that the Commissioner:
- is incapable of properly performing the functions of his or her office; or
 - has shown himself or herself incompetent properly to perform, or has neglected to perform, the functions of his or her office; or
 - is according to the *Interpretation Act 1984* section 13D, a bankrupt or a person whose affairs are under insolvency laws; or
 - has been guilty of misconduct.⁵⁵⁸
- 8.65 The Commissioner would be restored to office following such a suspension unless the Governor provided a statement of reasons to Parliament within seven sitting days, and each House passed an address praying for the removal of the Commissioner within 30 sitting days of receiving the statement.⁵⁵⁹

555 Section 9(1)-(3) *Public Service Act 1978* (WA).

556 *ibid.*, Section 9(4).

557 *ibid.*, Section 18(3).

558 *ibid.*, Section 18(4).

559 *ibid.*, Section 18(5).

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- 8.66 These provisions were carried over in the Reform Bill and are now applicable to the Public Sector Commissioner.

Current removal provisions in practice

- 8.67 The removal provisions for the Commissioner are untested and are very similar to those applicable to the other statutory officers in WA that were listed in Table 7 above.⁵⁶⁰

Notable practices in other jurisdictions

- 8.68 One of the notable differences in most other Australian jurisdictions is the explicit inclusion of reasons that serve to restrict the circumstances under which a Commissioner can be removed. None enable both Houses to call for the removal of the Commissioner without reasons. Only Queensland has provisions for removal that are more sweeping than WA. In that jurisdiction, the fate of the Commissioner rests exclusively with the Executive. Table 8 below provides further details.

Table 8 Removal provisions for commissioners in other Australian jurisdictions⁵⁶¹

Jurisdiction	Removal Provision
Western Australian Public Service Commissioner	May be removed or suspended by the Governor at any time on an address from both Houses of Parliament. May be suspended by the Governor for various reasons including incapacity, incompetence, bankruptcy or misconduct. Can be restored to office following suspension unless the Governor provides a statement to the Parliament as to the reasons for the suspension and each House subsequently passes an address praying for the Commissioner's removal.
Australian Public Service Commissioner	May be removed by the Governor General (GG) if each House of Parliament presents an address praying for the Commissioner's removal due to misbehaviour, mental or physical incapacity. Must be removed by the GG in the event of bankruptcy, or of filing for bankruptcy.

⁵⁶⁰ The only noticeable difference being that the provisions relating to the Governor suspending both the Corruption and Crime Commissioner and the Parliamentary Inspector of the Corruption and Crime Commissioner do not stipulate bankruptcy as a criterion. Sections 12 and 192 *Corruption and Crime Commission Act 2003* (WA); Schedule 1, Clause 7 *Auditor General Act 2006* (WA); Section 8 *Commissioner for Children and Young People Act 2006* (WA); and Section 6 *Parliamentary Commissioner Act 1971* (WA).

⁵⁶¹ Section 47 *Public Service Act 1999* (Cwth); Section 9(4)-(5) and (7) and Schedule 2 *Government Sector Employment Act 2013* (NSW); Sections 45-46 *Public Administration Act 2004* (Vic); Section 13(4) *Public Sector Act 2009* (SA); Section 52(2)(c) *Public Service Act 2008* (Qld).

Jurisdiction	Removal Provision
NSW Public Service Commissioner	May be removed by the Governor for incapacity, incompetence, or misbehaviour. Can only be removed on the recommendation of the Advisory Board following an independent review of the performance or conduct of the Commissioner. The independent review may be initiated by the Premier or by the Advisory Board at the request of the Premier. Commissioner automatically ceases to hold office for various reasons including becoming insolvent, mentally incapacitated, or being convicted of an indictable offence.
Victorian Public Sector Commissioner	May be removed by the Governor in Council on the recommendation of the Premier only if the Premier is satisfied that the person is unfit to hold office due to incapacity, misconduct or bringing the Commission into disrepute. Commissioner automatically ceases to hold office for various reasons including insolvency or conviction for an indictable offence.
Commissioner for Public Sector Employment (South Australia)	May be removed by the Governor. Reasons for termination include: the Commissioner being proven guilty of misconduct; being declared bankrupt; becoming physically or mentally incapacitated to the extent they cannot perform their duties; neglecting duties or being incompetent.
Chief Executive, Queensland Public Service Commission	Contract may be terminated by the Governor in Council on one-month's written notice signed by the Minister.

- 8.69 While Queensland is notable due to the inherent power of the Executive, NSW is also interesting in that the legislation requires an independent assessment of the performance or the conduct of the Commissioner, and a recommendation from the Advisory Board (see 8.32 above), before removal can be effected.
- 8.70 The Commonwealth jurisdiction also provides an independent vehicle by which the conduct (but not the performance) of the Commissioner can be scrutinised. Under the Commonwealth's *Public Service Act 1999*, a Merit Protection Commissioner (MPC) was established. One of the functions of the MPC is to investigate the Commissioner for alleged breaches of the Australian Public Service's Code of Conduct. While the MPC may opt not to investigate an allegation it deems to be frivolous, the current Australian Public Service Commissioner has confirmed these provisions were introduced to ensure his position was as accountable as other public servants.⁵⁶²

⁵⁶² Section 50(1)(b) *Public Service Act 1999* (Cwth); Mr Stephen Sedgwick AO, Australian Public Service Commissioner, Briefing, 27 March 2014.

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Committee considerations

- 8.71 With the exception of Queensland, the provisions for removing a Commissioner in WA are among the broadest in the country. The Commissioner can be removed on the address of both Houses of Parliament for any reason. Theoretically, this could see a Commissioner removed following a personality clash with a Premier, although the Premier would have to convince a majority of both Houses that this was a necessary course of action.
- 8.72 The scenarios in which Parliament would be likely to exercise this power might be where a Commissioner is demonstrably incapable of performing the duties of office due to incapacity or conviction for an offence.
- 8.73 The requirement of Parliament's imprimatur to remove a Commissioner offers a check and balance that supports the independence of the Commissioner against any undue influence of the Executive branch.
- 8.74 The framework in place for the Commissioner is similar to other statutory offices in WA and is consistent with the model proposed in the WA Inc Royal Commission final report.⁵⁶³ As such, the Committee sees no need for change to these provisions of the PSM Act.

Performance Management

- 8.75 Earlier public sector legislation did not stipulate any requirement for the Commissioner (or Board of Commissioners under the 1978 Act) to be subject to a performance agreement or assessment.
- 8.76 This trend continued under the original PSM Act where Section 4 explicitly exempted the Commissioner for Public Sector Standards, the Auditor General, the Police Commissioner, and the Electoral Commissioner from the performance management provisions applicable to other CEOs under Part 3 of the Act. When explaining the rationale for this, then Premier, the Hon Richard Court, said '[t]he main reason for that is that their employment conditions are set out in their own legislation.'⁵⁶⁴

563 [*Royal Commission into Commercial Activities of Government and Other Matters, Report Two*](#), 12 November 2012, pp. 5.11-5.13.

564 Hon Richard Court, Premier, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 7 June 1004, p. 1091. As noted earlier, Section 4(6) also exempted these officers from other human resource management provisions under Part 3 (see 8.27 above), as well as the discipline provisions of Part 5. Section 4(6) provided an additional exemption from Part 6, which covers redundancy and redeployment provisions.

- 8.77 In the case of the Commissioner for Public Sector Standards, the employment conditions were outlined in sections 16-20 of the original PSM Act and did not include references to performance agreements or assessments. Following the passage of the Reform Bill there remains no performance management framework for the new Commissioner.

Current performance management provisions in practice

- 8.78 Notwithstanding the absence of a prescribed performance management regime, there are other means by which the Commissioner's performance is monitored and open to assessment.
- 8.79 Firstly, the Commissioner is responsible for the financial management of the Public Sector Commission. As the accountable authority of the Commission, the Commissioner agrees to a resource agreement and a set of KPIs with Treasury during the preparation of the state budget. These KPIs, along with the Commission's financial statements and financial controls, are subsequently audited by the Auditor General.⁵⁶⁵ These various measures are standard for CEOs of all agencies and are required under the *Financial Management Act 2006* (WA) (FM Act) and the *Auditor General Act 2006* (WA).
- 8.80 In terms of his responsibility to the Executive, the Commissioner provides the Premier, as Minister responsible for administering the PSM Act, an annual statement of intent. This outlines the priorities of the Commission for the next 12 months and the Premier is invited to provide comment.⁵⁶⁶
- 8.81 The Commissioner also meets regularly with the Premier to discuss various matters pertaining to the management and administration of the public sector. The Commissioner confirmed that he had scheduled nine meetings with the Premier in 2013, a year that was shortened by the extended caretaker period preceding and following the State Election.⁵⁶⁷
- 8.82 Items for discussion at those meetings included post-election machinery of government changes, CEO appointments and reappointments, and the future legislative program (e.g. proposed amendments to the CCC Act and the introduction of the Workforce Reform Bill 2013).⁵⁶⁸

⁵⁶⁵ Mr Mal Wauchope, Public Sector Commissioner, Public Sector Commission, *Transcript of Evidence*, 12 March 2014, p. 19.

⁵⁶⁶ *ibid.*

⁵⁶⁷ *ibid.*, p. 23.

⁵⁶⁸ *ibid.*

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- 8.83 The Commissioner confirmed those meetings were not minuted. When asked by the Committee as to whether he thought it would be better to have these meetings minuted as a reference point, the Commissioner replied:

*On some matters it might be, yes. But generally speaking, these are the sorts of conversations that you have fairly informally. We do not walk in with an agenda, necessarily.*⁵⁶⁹

- 8.84 The Commissioner went on to clarify that while there was no minuted record, notes are taken in relation to matters such as proposed machinery of government changes.⁵⁷⁰
- 8.85 While confirming he was not required to have a performance agreement established, the Commissioner made the point that the Auditor General and the Ombudsman operate under a similar framework.⁵⁷¹ The Committee has since confirmed the same applies to the other statutory officers exempted under section 4 of the PSM Act, namely the Electoral Commissioner and the Police Commissioner.
- 8.86 As will be discussed from paragraph 8.117 below, there are only a limited number of procedures currently in place to ensure the Commissioner's obligations to the Parliament are scrutinised. This stands in contrast to the Auditor General in particular, who is subject to a performance review every five years by a committee established for that purpose. The Auditor General's enabling legislation also facilitates regular contact with a standing committee of each House of the Parliament (see Table 9 below).

Notable practices from other jurisdictions

- 8.87 The absence of a prescribed performance management process for the head of the public service is common across Australian jurisdictions. Despite this, there are two jurisdictions where commissioners have initiated a reasonably formal process whereby informed feedback on their performance can be ascertained.
- 8.88 In Canberra, the Australian Public Service Commissioner, Mr Stephen Sedgwick, does not undergo a formal performance assessment. However, he is part of a Secretaries Board established under the *Public Service Act 1999*, which is chaired by the Secretary of Prime Minister and Cabinet, and includes all other departmental secretaries in its membership. Mr Sedgwick told the

569 Mr Mal Wauchope, Public Sector Commissioner, Public Sector Commission, *Transcript of Evidence*, 12 March 2014, p. 23.

570 *ibid.*

571 *ibid.*, p. 19.

Committee, 'if I am getting it wrong in the discharge of my human resource management functions, the feedback is pretty immediate.'⁵⁷²

- 8.89 A similar process has been adopted in NSW where the Public Service Commissioner, Mr Graeme Head, uses the Senior Management Council to conduct a 360 degree feedback process.⁵⁷³ The Senior Management Council is a peak leadership group of nine senior departmental secretaries with executive support provided by the Department of Premier and Cabinet.⁵⁷⁴
- 8.90 Arguably the process most reflective of a performance assessment is that established recently in Victoria, where the state's inaugural Public Sector Commissioner, Ms Belinda Clark, assumed office on 1 April 2014 following amendments to the *Public Administration Act 2004*. Under the amended legislative regime, the Victorian Commissioner is required to prepare a strategic plan each year. The plan will be developed in consultation with the new Advisory Board (chaired by the Secretary of the Department of Premier and Cabinet) and is ultimately approved by the Premier. While no formal performance assessment is prescribed, the Commissioner's performance against the Annual Plan will be considered by the Premier and form part of his or her deliberations regarding reappointment.⁵⁷⁵

Committee considerations

- 8.91 The Committee acknowledges the Commissioner is one of numerous statutory officers not subject to a prescribed performance management framework. Moreover, this appears to reflect common practice across other Australian jurisdictions.
- 8.92 Nonetheless, while the PSM Act may not require it, the accountability of the office of Commissioner would be enhanced by some form of robust performance assessment process taking place. This is even more important now given the increased responsibilities the Commissioner has assumed since 2010.
- 8.93 Given these responsibilities involve interaction with the Executive and the Parliament, the reality is both bodies have a part to play in assessing the performance of the incumbent.

572 Mr Stephen Sedgwick AO, Australian Public Service Commissioner, Briefing, 27 March 2014.

573 Mr Graeme Head, NSW Public Service Commissioner, Briefing, 26 March 2014.

574 *ibid.*; NSW Department of Premier and Cabinet, *Annual Report 2011-2012*, October 2012, p. 9. Available at:

http://www.dpc.nsw.gov.au/_data/assets/pdf_file/0006/146256/Department_of_Premier_and_Cabinet_Annual_Report_bm_2011-12.pdf. Accessed on 4 June 2014.

575 Mr Andrew Tongue PSM, Secretary, Department of Premier and Cabinet Victoria, Briefing, 28 March 2014.

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- 8.94 The role of the Parliament in this respect can best be discharged through the committee system. The manner in which this may be done within the current framework will be discussed below from paragraph 8.123.
- 8.95 In terms of assessment by the Executive branch, the Committee thinks the current process (described in 8.80 through 8.84 above) should be formalised and made more reflective of a measurable performance assessment.
- 8.96 While the Commissioner is not subject to the performance management framework in place for the majority of CEOs under section 47 of the PSM Act, the Committee sees no reason why the Commissioner's statutory functions, where they pertain to the Executive, could not be assessed on an ongoing basis. Areas open to assessment might include:
- the implementation of Machinery of Government changes;⁵⁷⁶ and
 - any functions that impact the efficiency and effectiveness of the public sector and its 'operational responsiveness and flexibility' in respect of 'changes in government policies and priorities.'⁵⁷⁷
- 8.97 The Committee concedes that such an approach would be unprecedented, but it holds the view that the independence of the office of Commissioner should not preclude that position from an ongoing assessment process. Nor does the Committee feel that such a process would impact the independence of the Commissioner.
- 8.98 The Committee therefore encourages the Premier, as Minister responsible for administering the PSM Act, to examine means by which this practice could be introduced.

Finding 30

The Public Sector Commissioner is one of numerous statutory officers in Western Australia not subject to a prescribed performance management framework. This appears to reflect common practice for commissioners across other Australian jurisdictions.

Finding 31

Both Parliament and the Executive have roles to play in monitoring the performance of the Public Sector Commissioner, particularly given the expanded functions and responsibilities the position has assumed.

⁵⁷⁶ In accordance with section 35(4) *Public Sector Management Act 1994* (current).

⁵⁷⁷ *ibid.*, Sections 21A and 7(b).

Recommendation 13

The Premier, as Minister responsible for administering the *Public Sector Management Act 1994*, examine means by which a framework can be established for regularly evaluating the performance of the Public Sector Commissioner where the statutory functions of the Commissioner are conducted for, or impact the operations of, the Executive branch of Government.

Reporting Provisions**Evolution of reporting provisions**

- 8.99 Commissioners in WA have always been subject to some form of reporting requirement to the Parliament. The various reporting regimes, including a summary of those introduced via the 2009 Reform Bill were detailed in paragraphs 6.25 through 6.29 above. The Reform Bill amendments expanded the reporting requirements of the current Commissioner to a level not witnessed in earlier legislation.
- 8.100 To reiterate, section 22D(1) requires the Commissioner to report to Parliament each year on:
- the 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; and
 - any other matters arising out of the performance of the Commissioner's functions that are, in the opinion of the Commissioner, of such significance as to require reporting in that manner.⁵⁷⁸
- 8.101 In addition to these requirements, which were prescribed in a similar form in the original PSM Act, the Commissioner must now also report annually on 'the state of administration and management of the Public Sector'.⁵⁷⁹
- 8.102 Reporting on these matters can be dealt with in conjunction with the Commissioner's obligations to report annually on the activities and financial position of the Commission as per the FM Act.⁵⁸⁰
- 8.103 Another provision, section 22E, allows the Commissioner to prepare additional reports on matters prescribed under section 22D(1). These discretionary

578 Section 22D(1)(b)-(c) *Public Sector Management Act 1994* (WA) current.

579 *ibid.*, Section 22D(1)(a).

580 *ibid.*, Section 22D(2).

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reports, and those required to be prepared each year, are to be transmitted to Parliament within 14 days of being signed off by the Commissioner.⁵⁸¹

Current reporting provisions in practice

- 8.104 To date, the Commissioner has prepared five reports under the discretionary reporting provisions as per section 22E. These are:
- *Review of the National Trust of Australia (WA).*
 - *Investigation Report: Matter involving the report titled 'Orchestrating Lives: An Evaluation of the Early Intervention Conductive Education Trial at Carson Street School'.*
 - *Assessment Report: Alleged Breaches of the Code of Ethics by Ministerial Officers.*
 - *Report of an Examination into the Relationship Between the Office of the Former Minister for Training and the Department of Training and Workforce Development.*
 - *More Than a Matter of Trust – An Examination of Integrity Checking Controls in Recruitment and Employee Induction Processes.*⁵⁸²
- 8.105 Some of these reports refer to the outcomes of Investigations and Reviews that the Commissioner is empowered to conduct under other sections of the PSM Act. These sections, as well as those relating to Special Inquiries were examined in Chapter Seven.
- 8.106 In terms of his mandatory annual reporting responsibilities, since 2011 the Commissioner has elected to table a separate Annual Report addressing the requirements of the FM Act by the end of September, as required by that Act. In addition, the Commissioner has presented a State of the Sector report (SOS Report) on compliance issues and public sector administration and management as per section 22D(1). A Statistical Bulletin has been prepared in conjunction with the SOS Report. The bulletin has not been tabled in Parliament, but has been published on the Commission's website.
- 8.107 The SOS Report and Statistical Bulletin were examined in Chapter Six (paragraphs 6.25 through 6.66 above). These documents are quite detailed and are reflective of practices emerging in other jurisdictions.

⁵⁸¹ Section 22F *Public Sector Management Act 1994* (WA) current.

⁵⁸² Confirmed by Mr Mal Wauchope, Public Sector Commissioner, Public Sector Commission, *Transcript of Evidence*, 12 March 2014, p. 21.

Notable practices from other jurisdictions

- 8.108 It is common across Australian jurisdictions for Commissioners to have a legislative requirement to submit an annual report of their department's activities and finances.⁵⁸³ There is also an increasing trend towards reporting more broadly on the performance of the Commission and the management and administration of the public sector.
- 8.109 For example, the Victorian Public Sector Commission's annual report must 'include explanations of how the operations of the Commission relate to its objectives and how the Commission has achieved its priorities identified in its annual and strategic plans'.⁵⁸⁴ The strategic plan is prepared every three years and must identify challenges and opportunities for the public sector and how the Commission's priorities align with these. This is prepared in consultation with the advisory board, with the draft sent to the Premier for approval. The Premier may amend the plan prior to approval.⁵⁸⁵ Annual plans must set out how they relate to and support the strategic plan, specify priorities for the year, and identify the Commission's activities and outputs for the year. This report must also be submitted to the Premier, who may also make amendments.⁵⁸⁶
- 8.110 In NSW the Commissioner is required to prepare an annual report on the Commission's 'work and activities' for that year, and an assessment of the performance of the government sector. It must also note achievements, challenges and priorities, and provide an analysis of government sector workforce data.⁵⁸⁷ Similar to WA, the Commissioner prepares a state of the sector report which profiles the current NSW workforce, updates the status of public sector reform programs, and identifies strategies to enhance the efficiency and service delivery of the public sector and improve its culture.⁵⁸⁸
- 8.111 The Commonwealth legislation requires the Australian Public Service Commissioner to produce a report at the end of each financial year which reports on the state of the Australian Public Service and the activities of the Australian Public Service Commission during the year. This report 'must be prepared in accordance with guidelines approved on behalf of the Parliament

583 Such jurisdictions include: Commonwealth; NSW; Victoria; Queensland; and South Australia.

584 Explanatory Memorandum, *Public Administration Amendment (Public Sector Improvement) Act 2014* (Victoria), p9.

585 Section 68 *Public Administration Amendment (Public Sector Improvement) Act 2014* (Victoria).

586 *ibid.*, Section 69.

587 Section 15 *Government Sector Employment Act 2013* (NSW).

588 NSW Public Sector Commission, *Getting into Shape: State of the NSW Public Sector Report 2013*, NSW. Available at: <http://www.psc.nsw.gov.au/About-the-Public-Sector/State-of-the-Sector-Report-2013>. Accessed on 8 August 2014.

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by the Joint Committee of Public Accounts and Audit (JCPAA)'.⁵⁸⁹ The JCPAA has confirmed this requirement is actually standard for all Australian Public Service annual reports, and that these guidelines are produced by the Department of Prime Minister and Cabinet.⁵⁹⁰

- 8.112 The APS Commissioner produces a 'State of the Service Report' and an annual report, which provides an overview of achievements against performance targets and financial statements. The State of the Service report covers leadership and culture, integrity and ethics, employee health and wellbeing, diversity and workforce planning and strategy.⁵⁹¹ The report is similar to reports produced in WA, NSW and South Australia. The State of the Service Report has been publicly scrutinised by the JCPAA as part of its annual public service update process. These updates are considered in further detail in the next section on committee oversight.

Committee considerations

- 8.113 The amendments to the PSM Act have increased the Commissioner's functions, powers, and independence, but they have also expanded the reporting responsibilities to the Parliament.
- 8.114 The Committee has noted earlier that the Commissioner has discretion over the content and detail of reports on compliance issues and public sector performance (see 6.32 above). However, it is satisfied with the way the Commissioner is currently exercising this discretion.
- 8.115 Importantly, the PSM Act affords Parliament the opportunity to scrutinise the work of the Commissioner via the reporting obligations imposed on the office.
- 8.116 The capacity of the Parliament to conduct such scrutiny will now be considered.

Finding 32

The amendments to the *Public Sector Management Act 1994* have vested the Public Sector Commissioner with an unprecedented level of independence and power and an increased range of functions and responsibilities. At the same time, these amendments have also expanded the position's reporting obligations to the Parliament when

589 Section 44 (4) *Public Service Act 1999* (Commonwealth).

590 Dr Andrew Southcott, MP, Chairman, Joint Committee of Public Accounts and Audit, Briefing, 27 March 2014. The JCPAA is sent any proposed amendments to the guidelines by the Department of Prime Minister and Cabinet. It considers these during its deliberations and clarifies any queries with the party proposing the amendment (which may be DPMC or another department). The Committee then adopts the guidelines, and acquaints DPMC accordingly.

591 Australian Public Service Commission, *State of the Service Report 2012-13*.

compared with former commissioners. For example, the Commissioner is now required to report annually on the state of administration and management of the Public Sector.

These reporting obligations afford Parliament the opportunity to scrutinise the performance and many of the activities of the Commissioner.

Parliamentary (Committee) Oversight

Evolution of committee oversight

- 8.117 Committees are an arm of the Parliament, designed to undertake parliamentary functions the plenary is not suited to perform. These functions can include scrutinising the operations of public sector bodies and statutory offices.
- 8.118 By the time of the WA Inc Royal Commission final report several committees had been established, most of which resided in the Legislative Council. This report saw potential in the committee system as a body to bring the entire public sector under the scrutiny and review of the Parliament.⁵⁹²
- 8.119 The report also saw merit in the use of committees as the means by which the state's then current and proposed statutory officers (see 8.6 above), could be accountable to Parliament, 'the body to which they should report and from which they derive their statutory mandate.'⁵⁹³
- 8.120 The report went on to call for the designation of these statutory officers as independent parliamentary agencies and recommended that parliamentary committees be involved in various aspects of their operation.⁵⁹⁴ When discussing its proposal for the establishment of a Commissioner for Public Sector Standards, the report added that:
- The Commissioner must be required both to report to the Parliament and to be accountable to such committee of the Parliament as is concerned with the organisation and operations of the public sector.*⁵⁹⁵
- 8.121 In the years that have followed, two of the statutory officers referred to in the WA Inc Royal Commission final report have had parliamentary committee oversight prescribed in their enabling legislation. Details of these agencies, and

592 [Royal Commission into Commercial Activities of Government and Other Matters, Report Two](#), 12 November 2012, p. 5-11.

593 *ibid.*, p. 5-12.

594 *ibid.*, pp. 5-12 and 5-13.

595 *ibid.*, para 6.2.6.

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the relevant committee functions, are included in Table 9 below. This table includes a third statutory officer, the Commissioner for Children and Young People, whose position was not contemplated at the time of the WA Inc Royal Commission.

Table 9 Statutory Officers with Prescribed Parliamentary Committee Oversight

Statutory Officer	Prescribed Committee Oversight
Auditor General (<i>Auditor General Act 2006</i>)	<ul style="list-style-type: none"> • Under s48, a Joint Standing Committee is to be established to conduct a review of the Act and a performance assessment of the Auditor General every five years. • Auditor General must have regard to the audit priorities of both the Assembly's Public Accounts Committee (PAC) and the Council's Estimates and Financial Operations Committee (EFOC) (s8). • Auditor General may carry out an audit at the request of the PAC or EFOC (s20). • Auditor General must advise the PAC and EFOC if he intends to dispense with an audit of an agency's accounts (s14). • Auditor General may submit a report on an examination or an investigation to the PAC and EFOC (s25).
Corruption and Crime Commissioner (<i>Corruption and Crime Commission Act 2003</i>)	<ul style="list-style-type: none"> • Under s216A, a Joint Standing Committee was established with functions and powers to be determined by both Houses. • Committee's subsequent terms of reference include monitoring and reporting to Parliament on the exercise of the functions of the CCC and the Parliamentary Inspector of the CCC.⁵⁹⁶
Commissioner for Children and Young People (<i>Commissioner for Children and Young People Act 2006</i>)	<ul style="list-style-type: none"> • Under s51, a Joint Standing Committee was established with functions and powers to be determined by both Houses. • Committee's subsequent terms of reference include: <ul style="list-style-type: none"> ○ to monitor, review and report to Parliament on the exercise of the functions of the Commissioner; ○ to examine Annual and other Reports of the Commissioner; and ○ To consult regularly with the Commissioner.⁵⁹⁷

8.122 Notwithstanding these developments, the PSM Act does not include a provision for a particular committee to have oversight of the Public Sector Commissioner.

⁵⁹⁶ Standing Order 289(a) *Standing Orders of the Legislative Assembly of the Parliament of Western Australia*, 5 December 2013.

⁵⁹⁷ Joint Committee on the Commissioner for Children and Young People, 'Functions and Powers of the Committee, 2014. Available at: <http://www.parliament.wa.gov.au/jscccyp>. Accessed on 3 June 2014.

Committee oversight in practice

- 8.123 Despite the absence of a prescribed committee oversight function within the PSM Act, the Commissioner is subject to periodic interaction with various committees of the Parliament.
- 8.124 As the Public Sector Commission is a line item authority in the state's budget papers, the Commissioner appears before the Assembly's annual Estimates Committees as part of the debate on the Appropriation Bills. In his appearance before the Estimates Committee, the Commissioner may be questioned, through the Premier, on aspects of Commission's performance and activities. The Commissioner may also be called to appear before the Council's Estimates and Financial Operations Committee as part of that committee's budget scrutiny function.
- 8.125 In addition, the Commissioner has appeared before various standing committees as part of their respective inquiries or legislative reviews. Examples in this regard include appearances before this committee as part of its current Inquiry and before the Council's Legislation Committee as part of its recent *Inquiry into the Workforce Reform Bill 2013*.
- 8.126 The other committee with which the Commissioner has some form of regular interaction is the Council's Public Administration Committee. The Commissioner confirmed that he has previously appeared before that committee in both closed and public hearings.⁵⁹⁸
- 8.127 Currently, the Public Administration Committee is the only parliamentary committee with any form of prescribed oversight function of the Commissioner. The committee's functions are contained in the Legislative Council's Standing Orders and include inquiring into and reporting on:
- i. the structure, efficiency and effectiveness of the system of public administration;
 - ii. the extent to which the principles of procedural fairness are embodied in any practice or procedure applied in decision making;
 - iii. the existence, adequacy, or availability, of merit and judicial review of administrative acts or decisions; and
 - iv. any Bill or other matter relating to the foregoing functions referred by the Council.

⁵⁹⁸ Submission No. 5 from Public Sector Commission, 14 November 2014, pp. 52-53.

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- 8.128 A further function of the Public Administration Committee is to ‘consult regularly’ with the following statutory officers: the Ombudsman; the Information Commissioner; the Inspector for Custodial Services; and the Public Sector Commissioner.
- 8.129 The Commissioner advised that he has met with the Public Administration Committee three times. One of these meetings has occurred in 39th Parliament (in closed session).⁵⁹⁹
- 8.130 Interestingly, the members of that committee in the 38th Parliament resolved to inquire into and report on, ‘the role and functions of bodies equivalent to the State Public Sector Commission in other jurisdictions’.⁶⁰⁰ However, the Committee was not able to complete its work before the 2013 State Election.

Notable practices from other jurisdictions

- 8.131 No Australian jurisdiction appears to have a committee that actively scrutinises the performance of its Public Sector Commissioner equivalent. The following reflections of Andrew Podger, Australian Public Service Commissioner from 2002-2004 indicates that this is not a recent phenomenon:

I think we were only once asked to appear during my time as Public Service Commissioner.

*This surprised me given the opportunity my State of the Service Report presented for senators to explore my views of the performance of individual agencies as well as the APS as a whole, and the degree to which the APS Values were being upheld under the Howard Government. Notwithstanding increasing media interest in the reports, as we introduced a survey of employees that contained such sensitive issues as relations with ministers and their offices, I was never asked questions on my reports by the Parliament.*⁶⁰¹

- 8.132 While this lack of regular scrutiny seems to reflect the norm across Australia, there was a noteworthy initiative undertaken in 2012 by the Commonwealth JCPAA (the committee referred to in 8.111 above). Under the Chairmanship of former Independent MHR, Mr Rob Oakeshott, the JCPAA decided to hold

599 Mr Mal Wauchope, Public Sector Commissioner, Public Sector Commission, *Transcript of Evidence*, 12 March 2014, p. 20; Dr Julia Lawrinson, Advisory Officer to the Standing Committee on Public Administration, Email, 18 June 2014.

600 See the relevant inquiry page of the Public Administration Committee. Available at: [http://www.parliament.wa.gov.au/Parliament/commit.nsf/\(EvidenceOnly\)/CE6BB13CFE95CFBA482579A000E9A32?opendocument](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(EvidenceOnly)/CE6BB13CFE95CFBA482579A000E9A32?opendocument). Accessed on 3 June 2014.

601 Andrew Podger, *The role of departmental secretaries: personal reflections on the breadth of responsibilities today*, 2009, ANU E Press, Canberra, p. 170.

regular public hearings with heads of key government agencies responsible for public sector governance and administration.⁶⁰² As part of this process, the Committee invited the current Australian Public Service Commissioner to a panel hearing to discuss ‘whole of government issues and trends.’⁶⁰³

- 8.133 The JCPAA tabled a report as a result of these hearings on 23 August 2012 entitled, *Fit for Service – Australian Public Service Annual Update*. In addition to its report, the Committee published a selection of responses to questions on notice it had put to the Commissioner. An example is included at Appendix Six.
- 8.134 No further reports of this nature have since been published and the JCPAA of the new Commonwealth Parliament is yet to continue with this process.⁶⁰⁴
- 8.135 Apart from this example from the Commonwealth Parliament, the two jurisdictions that have the closest approximation to regular committee oversight are NSW and Victoria, where advisory boards have been established to work in conjunction with their respective commissioners.
- 8.136 The functions of the NSW Public Service Commission Advisory Board (referred to at 8.32 above) include determining the general policies and strategic directions in relation to the functions of the Commissioner, and providing the Premier with advice on any matter relating to the management and performance of the government sector. The Premier may request this advice, or the Board may offer this advice on its own initiative.⁶⁰⁵
- 8.137 Victoria’s Advisory Board consists of the secretary to the Department of Premier and Cabinet and up to seven members appointed by the Premier. When appointing members to the Board, the Premier must have regard to members’ mix of knowledge, skills and experience of the public sector, business, service delivery and regional matters. Members serve for up to 3 years and can be reappointed. The Advisory Board provides advice in the preparation of the annual plan and strategic plan which must be prepared by the Commission, and in the performance of its duties and functions. The

602 The Australian Public Service Commission; Department of the Prime Minister and Cabinet; Department of Finance and Deregulation; and the Australian National Audit Office.

603 Joint Committee of Public Accounts and Audit, *Australian Public Service annual update*, no date. Available at: http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jcpaa/apsannualupdate.htm. Accessed on 3 June 2014.

604 Dr Andrew Southcott, MP, Chairman, Joint Committee of Public Accounts and Audit, Briefing, 27 March 2014.

605 Section 19 *Government Sector Employment Act 2013* (NSW).

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Victorian Public Sector Commission must have regard to the advice from the Board in these areas.⁶⁰⁶

Finding 33

The *Public Sector Management Act 1994* makes no provision for a particular committee to have oversight of the Public Sector Commissioner. This is consistent with practices observed in other Australian jurisdictions.

Committee considerations

8.138 The current Australian Public Service Commissioner told the Committee:

*There have been a number of us in the integrity space that have felt regular interest from parliamentary committee would be a good thing.*⁶⁰⁷

8.139 This committee concurs with that view. The importance of some form of ongoing parliamentary oversight of the Commissioner was highlighted more than twenty years ago in the WA Inc Royal Commission final report. These sentiments have greater relevance today given the increasing level of power and independence the office of Commissioner has assumed since the 2010 amendments were passed.

8.140 With the proliferation of standing committees since the time of the WA Inc Royal Commission final report, it could be argued that an appropriate accountability framework is in place. However, the ad-hoc manner in which the Commissioner is being asked to appear before these committees indicates the potential of this framework is not being realised.

8.141 A committee that conducted regular oversight of the Commissioner could perform two valuable accountability functions. Firstly, it could provide an ongoing check and balance to ensure the Commissioner's activities remain within the statutory remit of the office. An example here would be looking into whether Instructions issued by the Commissioner (see 4.21 above) are consistent with the PSM Act and have regard to the principles outlined in sections 7 through 9.

8.142 The second function relates to monitoring the extent to which the Commissioner's reporting obligations to the Parliament are being met. The value in committee scrutiny of state of the sector-style reports was alluded to by numerous participants in this Inquiry.

606 Section 52-55 *Public Administration Act 2004* (Victoria).

607 Mr Stephen Sedgwick AO, Australian Public Service Commissioner, Briefing, 27 March 2014.

8.143 According to Professor John Nethercote:

*Providing you get good public reporting and you augment it with at least an annual hearing before a Parliamentary Committee, I think the weight of evidence is that that is sufficient [in terms of accountability].*⁶⁰⁸

8.144 Former NSW Auditor General, Mr Tony Harris, suggested that a ‘very powerful, well resourced, and independent-minded committee’ would offer the ideal oversight of a Commissioner’s performance and reporting. Mr Harris believed ‘there is a story in every annual report’ and generally these are not ‘teased out’ by any review from a parliamentary body.⁶⁰⁹

8.145 Finally, former WA Public Service Commissioner, Professor Mike Wood, argued that regular discussion between a committee and the Commissioner regarding the latter’s reporting duties:

*... would strengthen and enhance Parliament’s traditional role, which gets lost a bit. It might bring the committee into some conflict with the executive in doing that. Whether it would need to be legislated, I am not sure. I would need to look at the legislation.*⁶¹⁰

8.146 The Committee feels there is a need to ensure the Commissioner is subject to regular oversight via the committee system of Parliament. Ideally, this oversight should encompass functions similar to those prescribed to the oversight Committee for the Commissioner for Children and Young People: to examine the reports of, and consult with, the Commissioner. Were such practices to apply to the Public Sector Commissioner following the tabling of the Commission’s annual and state of the sector reports, valuable insights could be drawn on issues relating to the state of administration and management of the sector. The Commissioner could be asked about trends emerging from the agency and employee survey data and the measures being taken to address any emerging or ongoing problems around compliance or morale.

8.147 Given the significance of the Commissioner’s statutory responsibilities to the Parliament, it is critical that the performance of the incumbent in discharging these functions is subject to regular parliamentary oversight. While the parliamentary committee system is the logical vehicle by which such work can

608 Professor John Nethercote, Adjunct Professor, Canberra Campus, Australian Catholic University, Canberra, Briefing, 27 March 2014.

609 Mr Tony Harris, Briefing, 27 March 2014.

610 Professor Mike Wood, Adjunct Professor, University of Notre Dame Business School (WA), *Transcript of Evidence*, 2 April 2014, p. 8

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be undertaken, the recent record of this Parliament, and others throughout Australia, suggests this will not occur in the absence of either the establishment of a dedicated oversight committee or a prescribed function being assigned to an existing committee.

- 8.148 Be it through an amendment to the PSM Act, or via an amendment to the Legislative Assembly's Standing Orders, the Committee recommends the Premier facilitate the establishment of a mechanism whereby the Public Sector Commissioner is subject to regular oversight via the parliamentary committee system. This will help ensure the Commissioner is subject to an appropriate level of parliamentary oversight.

Finding 34

Given the significance of the Public Sector Commissioner's statutory responsibilities to the Parliament under the *Public Sector Management Act 1994*, it is critical that the incumbent office holder's performance in these areas is subject to regular parliamentary oversight.

Recommendation 14

The Premier facilitate the establishment of a mechanism whereby the Public Sector Commissioner is subject to regular oversight through the parliamentary committee system. Ideally, this oversight should encompass functions similar to those currently prescribed to the Joint Standing Committee on the Commissioner for Children and Young People: namely, to examine the reports of, and consult with, the Commissioner.

Mr S.K. L'Estrange, MLA
CHAIRMAN

Appendix One

Inquiry Terms of Reference

The Public Accounts Committee will examine the *Public Sector Management Act 1994* (WA) in light of reforms to the Act passed in 2010 and consider the following issues:

- 1) The current functions and powers of the Public Sector Commissioner with a particular emphasis on:
 - a. the provisions relating to the appointment and management of Chief Executive Officers;
 - b. the establishment and monitoring of public sector standards, codes of ethics, and codes of conduct;
 - c. the application and operation of Commissioner's Instructions;
 - d. the provisions relating to reviews and special inquiries; and
- 2) The respective roles of the Commissioner and relevant Ministers, and the reporting provisions and accountability framework applicable to the Commissioner, in the discharge of these functions and powers.

Appendix Two

Committee's functions and powers

The Public Accounts Committee inquires into and reports to the Legislative Assembly on any proposal, matter or thing it considers necessary, connected with the receipt and expenditure of public moneys, including moneys allocated under the annual Appropriation bills and Loan Fund. Standing Order 286 of the Legislative Assembly states that:

The Committee may -

- 1 Examine the financial affairs and accounts of government agencies of the State which includes any statutory board, commission, authority, committee, or trust established or appointed pursuant to any rule, regulation, by-law, order, order in Council, proclamation, ministerial direction or any other like means.
- 2 Inquire into and report to the Assembly on any question which -
 - a) it deems necessary to investigate;
 - b) (Deleted V. & P. p. 225, 18 June 2008);
 - c) is referred to it by a Minister; or
 - d) is referred to it by the Auditor General.
- 3 Consider any papers on public expenditure presented to the Assembly and such of the expenditure as it sees fit to examine.
- 4 Consider whether the objectives of public expenditure are being achieved, or may be achieved more economically.
- 5 The Committee will investigate any matter which is referred to it by resolution of the Legislative Assembly.

Appendix Three

Submissions received

Name	Position	Organisation
Professor Mike Wood	Professor	School of Business, University of Notre Dame
Name withheld		
Professor Greg Craven	Vice-Chancellor	Australian Catholic University
Mr Mark Finnegan	Coordinator Member Services	Community and Public Sector Union, Civil Service Association of WA
Mr Warwick Claydon and Ms Jeannette O'Keefe	Senior Industrial Officer and Industrial Officer	Community and Public Sector Union, Civil Service Association of WA
Mr Malcolm Wauchope	Public Sector Commissioner	Public Sector Commission
Mr Malcolm Wauchope	Public Sector Commissioner	Public Sector Commission
Mr Malcolm Wauchope	Public Sector Commissioner	Public Sector Commission
Mr Malcolm Wauchope	Public Sector Commissioner	Public Sector Commission
Hon Joe Francis MLA	Minister for Emergency Services; Corrective Services; Small Business; Veterans	

Appendix Four

Public hearings and closed briefings

Public Hearings

Date	Name	Position	Organisation
12 March 2014	Mr Malcolm Wauchope	Public Sector Commissioner	Public Sector Commission
	Mr Dan Volaric	Deputy Public Sector Commissioner	
	Mr John Lightowlers	General Counsel	
	Mr Lindsay Warner	Director Policy and Reform	
2 April 2014	Mr Warwick Claydon	Senior Industrial Officer	Civil Service Association of WA
	Ms Jeannette O'Keefe	Industrial Officer	
2 April 2014	Professor Michael Wood	Academic	University of Notre Dame Business School
9 April 2014	Mr Dan Volaric	Acting/Public Sector Commissioner	Public Sector Commission
	Ms Fiona Roche	Deputy Public Sector Commissioner	
	Mr John Lightowlers	General Counsel	
	Mr Lindsay Warner	Director Policy and Reform	
7 May 2014	Hon Richard Court	Former Member of Parliament	

Closed Briefings

Date	Name	Position	Organisation
12 August 2013	Chief Justice Wayne Martin	Chief Justice	Supreme Court of Western Australia
	Dr Jeannine Purdy	Senior Legal Research Officer	
26 March 2014	Mr Graeme Head	NSW Public Service Commissioner	NSW Public Service Commission
27 March 2014	Dr Andrew Southcott MP	Chair	Joint Committee of Public Accounts and Audit
27 March 2014	Professor John Nethercote	Adjunct Professor	Canberra Campus, Australian Catholic University
27 March 2014	Mr Tony Harris	Former NSW Auditor General	
27 March 2014	Mr Stephen Sedgwick AO	Australian Public Service Commissioner	Australian Public Service Commission
28 March 2014	Dr Lynne Williams	Victorian Public Sector Standards Commissioner	State Service Authority
	Ms Pam White	Chief Executive Officer	
28 March 2014	Mr Andrew Tongue PSM	Secretary	Department of Premier and Cabinet (Victoria)
28 March 2014	Mr David Morris, MLA	Committee Chair	Public Accounts and Estimates Committee (Victoria)
	Mr Neil Angus, MLA	Committee Member	
	Mr Robin Scott, MLA	Committee Member	

Appendix Five

Acronym list

Term	Definition
AAS	Annual Agency Survey
APS	Australian Public Service
BOS	Breach of Standard
BOS Regulations	Public Sector Management (Breaches of Public Sector Standards) Regulations 2005
CCC	Corruption and Crime Commission
CCC Act	<i>Corruption and Crime Commission Act 2003 (WA)</i>
CEO	Chief Executive Officers
CI	Commissioner's Instruction
CPSS	Commissioner for Public Sector Standards
CSA	Commonwealth Public Sector Union/Civil Service Association of WA
DPC	Department of Premier and Cabinet
DSC	Disability Services Commission
EPS	Employee Perception Survey
FM Act	<i>Financial Management Act 2006 (WA)</i>
FOI	Freedom of Information
FOI Act	<i>Freedom of Information Act 1992</i>
FTE	Full Time Equivalent
HRMOIR	Human resource minimum obligatory information requirement
ICG	Integrity Coordinating Group
JCPAA	Joint Committee of Public Accounts and Audit
JSCCCC	Joint Standing Committee on the Corruption and Crime Commission
KPIs	Key Performance Indicators
MPC	Merit Protection Commissioner

Term	Definition
OECD	Organisation for Economic Cooperation and Development
PAC	Public Accounts Committee
PID	Annual Public Interest Disclosure Survey
PMC	Department of Prime Minister and Cabinet
PSM Act	<i>Public Sector Management Act 1994</i>
PSM Bill	Public Sector Management Bill
Q&A	Question and Answer
Reform Bill	Public Sector Reform Bill 2009
SDI	‘special disciplinary inquiry’
SES	Senior Executive Service
SOS Report	State of the Sector report
SSO	State Solicitor’s Office
the IR Act	<i>Industrial Relations Act 1979 (WA)</i>
VPS	Victorian Public Sector
WA	Western Australia
WAIRC	WA Industrial Relations Commission

Appendix Six

Extract from responses to questions from the Commonwealth
Joint Committee on Public Accounts and Audit's *Australian Public
Service Annual Update – 2012*.

SUBMISSION No. 2
APS Annual Update



Australian Government
Australian Public Service Commission

Response to Question on Notice

JOINT COMMITTEE OF PUBLIC ACCOUNTS AND AUDIT

Australian Public Service annual update

SPECIFIC QUESTIONS ON NOTICE

Question 5

Given the relatively low levels of satisfaction with senior leaders highlighted in the State of the Service report (p. 8), what actions are being undertaken to improve this?

Response

The Strategic Centre for Leadership, Learning and Development (the Strategic Centre) was established in the Australian Public Service Commission in July 2010 to respond to the findings in *Ahead of the Game: Blueprint for the Reform of Australian Government Administration*, that the APS could do more to improve senior leadership and management broadly across the APS. The Strategic Centre has focused on two specific reform areas recommended by the Blueprint: improving talent management across the APS, and expanding and strengthening learning and development.

In 2011, the Strategic Centre worked closely with APS Agencies to develop the first iteration of the APS Leadership Development Strategy. Research and consultation is now underway to validate and refresh the 2011 Strategy, so that the Strategic Centre's programs continue to reflect evidence-based, contemporary approaches to leadership development. The Strategy emphasises and recognises the importance of developing APS management knowledge and craft, developing leadership and management behaviours necessary for achieving results and the personal and vocational aspects of leadership. The 2012 Strategy is scheduled for completion in August 2012. However, the frameworks being adopted for the Strategy are already being used for learning and development in a number of departments and agencies across the APS.

The Strategic Centre's work program has also focused on implementation of the priorities in the 2011 strategy. The program includes the following initiatives:

- A refreshed SES Orientation program that began in July 2012, providing a transition program for new SES officers at the Band 1 and 2 level. The program provides six months of ongoing development, including classroom, peer-learning and on-the-job learning to ensure new SES have the skills they require to make a successful transition into the SES (noting that a significant proportion move into the SES from the private or not for profit sectors) and work effectively in their new roles.
- A pilot talent development program for Band 2 SES officers over 2012, comprising selection, assessment and personalised development for high performing SES Band 2s

with the potential to move into more complex senior roles. A mid-program evaluation indicates that the program is helping participants to develop their leadership capability in complex environments.

- Implementation of a talent development program for high potential Band 3 (Deputy Secretary) employees from July 2012.
- Commencement of the analysis and design phase of a refreshed SES leadership development suite. A design board comprising senior human resources and learning and development representatives from a range of agencies, including specialist delivery reform, Indigenous and disability advisers, has been formed to provide guidance on the suite design. The refreshed programs will be progressively launched from October 2012, with all three programs launched by June 2013. The suite has a particular focus on improving the delivery and implementation of government policies.
- Completion of the first phase of research and analysis for the core skills strategy that will enhance the APS's skill sets for all levels and refocus on our management skills at the middle to senior management layers.

The Strategic Centre is required to begin a formal evaluation of its work in June 2014, including a comprehensive evaluation of each of its programs to ensure that they are aligned with and build the capabilities identified in the APS Leadership Development Strategy. The Strategic Centre's evaluation approach includes tracking whether programs deliver sustained change to workplace behaviour and leadership practices over time, including using data from the State of the Service reports.

Appendix Seven

Binding clauses within Commissioner's Instruction No. 3:

*Discipline - general*⁶¹¹

1. Procedures (sections 81, 82A, 90 PSM Act)

- 1.1 Disciplinary proceedings commence at the point that an employing authority makes a decision under section 81(1)(a) to deal with a matter as a disciplinary matter. A record of this decision is to be made in writing by the employing authority as soon as is practicable.
- 1.2 The employing authority is to ensure that the process undertaken to determine if a breach of discipline occurred is completed as soon as is practicable.
- 1.3 The employing authority is to ensure that he or she, or any delegate or authorised person, acts fairly when dealing with disciplinary matters and that all issues of perceived or actual bias, or conflicts of interest, are appropriately recorded and resolved.
- 1.4 No finding can be made that an employee has committed a breach of discipline unless in the course of the disciplinary process:
 - a) the employee is notified in writing:
 - i. of the conduct relating to the possible breach of discipline, in sufficient detail to enable the employee to know what is alleged against him or her, and
 - ii. that if a breach of discipline is found to have occurred, action may be taken which may range from counselling to dismissal.
 - b) the employee is provided a reasonable opportunity to respond to the information referred to in 1.4(a)(i), either in person or in writing, and that response is genuinely considered by the employing authority.
- 1.5 The employing authority shall notify the employee that he or she may request a support person or representative to be present at any meetings or interviews to be held in relation to the disciplinary process.

⁶¹¹ Public Sector Commission, [Commissioner's Instruction No. 3: Discipline – general](#), 8 November 2012, pp. 2-4.

- 1.6 If it is found that no breach of discipline occurred, the employing authority is to notify the employee in writing of that finding within 14 days.
- 1.7 If the employing authority finds that a breach of discipline did occur, the employing authority is to notify the employee in writing of that finding within 14 days and of any proposed action that may be taken. The employee is to be given a reasonable opportunity to respond to the notification of proposed action and that response is to be genuinely considered by the employing authority.
- 1.8 Upon the taking of any action resulting from a finding that a breach of discipline occurred, the employee is to be notified in writing as soon as is practicable, but in any event within 14 days.
- 1.9 If requested by the employee, the employing authority shall provide reasons for the finding and/or disciplinary action taken.
- 1.10 If an employing authority decides to discontinue a discipline process, and the employee was aware that this process was underway, the employee is to be notified in writing of that decision within 14 days.
- 1.11 An employing authority may not recommence a discontinued discipline process unless substantial and material fresh evidence or information becomes available that in the employing authority's view warrants fresh proceedings being commenced.

2. Suspension (section 82 PSM Act)

- 2.1 Subject to 2.2, before any proposed suspension may take effect, the employee must be provided with a reasonable opportunity to respond in relation to the proposed suspension and this response must be genuinely considered by the employing authority.
- 2.2 Prior opportunity to respond in relation to a proposed suspension is not required where the employing authority holds a belief based on reasonable grounds that the employee's presence on workplace premises poses a serious risk to:
 - a) employee/public safety; or
 - b) the integrity of evidence relevant to the disciplinary matter; or
 - c) the operations of the organisation; or
 - d) the investigation of the disciplinary matter.

- 2.3 In instances where the employee has been suspended without a prior opportunity to respond, that suspension may only be suspension on pay and the employing authority is to provide the employee with the opportunity to respond and genuinely consider that response, to any proposal to continue the suspension.
- 2.4 In each case of suspension where forfeiture of pay is applicable, the employing authority is required to give consideration to whether forfeiture is, or is not, to occur, and require supporting rationale for the decision.

Appendix Eight

Section 50 *Public Administration Act 2004* (Victoria)

Conflict of interest

(1) If the Commissioner considers that he or she has a conflict of interest in any matter that is the subject of an inquiry, a review of an employment related action or any other activity required or requested to be conducted by the Commission, the Commissioner must—

- (a) decline to conduct the inquiry, review or other activity; and
- (b) notify the Secretary to the Department of Premier and Cabinet of the conflict of interest.

(2) On being notified by the Commissioner under subsection (1)(b) of a conflict of interest, the Secretary must authorise a person—

- (a) to conduct the inquiry, review or activity; and
- (b) in the case of an inquiry or a review of an employment related action, to make recommendations following the inquiry or review.

(3) The Secretary must not authorise a person under subsection (2) unless—

- (a) the Secretary is satisfied that—
 - (i) the person is qualified to be authorised because the person has appropriate knowledge and experience in one or more of the fields of public administration, governance, law, public policy or senior management; and
 - (ii) the person is unconnected with the matter of the inquiry, review or activity and does not have a conflict of interest in the matter; and
- (b) in the case of an authorisation to conduct an inquiry, the Premier has approved the authorisation of the person.

(4) In conducting an inquiry, a review of an employment related action or another activity, a person authorised under subsection (2)—

- (a) may exercise all the relevant powers and functions of the Commissioner; and

(b) in exercising those powers and performing those functions is subject to the same requirements that would apply to the Commissioner.

(5) An inquiry, a review of an employment related action or another activity conducted by a person authorised under subsection (2) is not invalid by virtue of a defect or irregularity in, or in connection with, the authorisation.

Appendix Nine

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