



Our Ref: 22-008477(b)

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ATTORNEY GENERAL

MINISTER FOR HEALTH; ELECTORAL AFFAIRS

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FOR WESTERN AUSTRALIA

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Mr Nigel Pratt  
Clerk Assistant (House)  
Legislative Council  
Parliament House  
Harvest Terrace  
PERTH WA 6000

Dear Mr Pratt

**GOVERNMENT RESPONSE – SELECT COMMITTEE INTO THE DEPARTMENT OF EDUCATION AND TRAINING**

In December 2006, the Legislative Council Select Committee into the Department of Education and Training, chaired by the Honourable Giz Watson MLC, delivered its report. The Government was asked to respond to recommendations 1, 2 and 4.

The Government does not object to recommendations 1 and 2.

Recommendation 1 stated:

The Committee recommends that the Corruption and Crime Commission of Western Australia provide courtesy copies of its annual report to the offices of any Ministers whose portfolio may be affected by any ongoing investigation or proposed report mentioned in the annual report.

Recommendation 2 stated:

The Committee recommends that the Corruption and Crime Commission of Western Australia ensure that a courtesy copy of any media statements that it issues be provided to the Office of any Minister whose portfolio may be affected by the contents of the media statement.

These recommendations are of an administrative nature to be carried out by the Corruption and Crime Commission and do not require legislative change.

In relation to recommendation 4, which recommended the Government clarify the anti-disclosure provisions of the *Corruption and Crime Commission Act 2003* to enable public sector chief executive officers to be able to freely discuss with their Ministers all matters relevant to the Minister's portfolio, legal advice was sought from the State Counsel, Mr George Tannin SC.

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4th Floor London House  
216 St George's Terrace Perth WA 6000  
Tel: +61 8 9422 3000 Fax: +61 8 9422 3001

ABN: 61313082730

I refer to my previous correspondence to you dated 2 May 2007 (tabled paper No. 2657 in the Legislative Council). For ease of reference, I repeat the substance of the Government's response to recommendation 4 below.

The *Corruption and Crime Commission Act 2003* prohibits the disclosure of "restricted matter" under section 151(3), with section 151(7) further providing that disclosing matter contrary to this section is an offence with a penalty of three years imprisonment and a \$60,000 fine.

What constitutes disclosure is provided for in the Interpretation section of the Act:

### 3. Terms used in this Act

In this Act unless the contrary intention appears —

“disclose” means —

- (a) publish in any way; or
- (b) divulge or communicate to any person in any way;

Under this definition, communications between the public sector CEO and the Minister would constitute a disclosure. For those disclosures to constitute an offence under the Act, the matter disclosed must be "restricted", as defined by the Act:

#### 151. Disclosure of certain information restricted

(1) In this section —

“restricted matter” means any of the following —

- (a) any evidence given before the Commission;
- (b) the contents of any statement of information or document, or a description of any thing, produced to the Commission;
- (c) the contents of any document, or a description of any thing, seized under this Act;
- (d) any information that might enable a person who has been, or is about to be, examined before the Commission to be identified or located;
- (e) the fact that any person has been or may be about to be examined before the Commission.

The definition of restricted matter does not generally preclude a public sector CEO from discussing with the relevant Minister the fact that a particular allegation of conduct has been referred to the CCC, or the fact that a particular investigation is taking place. The definitions of what is restricted matter are confined to the evidence and people appearing before the Commission. The definition of "restricted matter" has been deliberately drafted narrowly. In the second reading speech of the *Corruption and Crime Commission Act 2003*, the Hon Nick Griffiths MLC observed that under this legislation, "less secrecy will surround the CCC generally".<sup>1</sup> The advice received from the State Counsel provides that general discussions about investigations and matters in relation to investigations by the CCC are not prohibited by the legislation, unless they are expressly defined as restricted matter within the meaning of the *Corruption and Crime Commission Act 2003*.

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<sup>1</sup> Hansard, Legislative Council, 2nd reading, *Corruption and Crime Commission Bill*, 10 June 2003, 8357.

Restricted matter may be disclosed in some circumstances which are prescribed under the Act.

Under section 151(4)(a) of the *Corruption and Crime Commission Act 2003*, the Commission may direct that a restricted matter may be disclosed. In situations where a matter pertains to a Minister's particular portfolio, it is unlikely that the Commission would act so unreasonably and irresponsibly as to not allow the CEO to discuss it with the relevant Minister, unless there were clear and valid operational reasons for so doing, for example, where the Minister himself or herself was under investigation. Generally, a Minister of the State is responsible to the Parliament and the community for the conduct and proper administration of his ministerial portfolio. Our democracy requires ministerial integrity, transparency and accountability. It would be impossible for a Minister of the State to discharge his or her ministerial duties and responsibilities and give proper account to Parliament without candid and forthright communications with his CEO and other Departmental officers.

Further, the *Corruption and Crime Commission Act 2003* permits disclosure of restricted matter:

- to a legal practitioner for the purpose of obtaining legal advice or representation relating to a notice, summons or matter (section 151(4)(b))
- to a person for the purpose of obtaining legal aid relating to a notice, summons or matter (section 151(4)(c))

The words "legal aid" are not to be read as confining disclosure for the purposes of obtaining legal services provided by or arranged through the Legal Aid Commission under the *Legal Aid Commission Act 1976*, as per the broad definition of "legal aid" under section 4(1) of that Act. Therefore, the *Corruption and Crime Commission Act 2003* clearly permits a public sector CEO to disclose restricted matter, provided it is for the purposes of obtaining legal advice.

However, the procedure stipulated by the Hon Premier's Circular No. 2007/03 for obtaining legal advice from and through the State Solicitor does not provide for communication between the Minister and the Director General. Rather, any eligible witness who is a member of Ministerial staff contacts their Minister and any public sector employee contacts the Director General, both of whom contact the State Solicitor for legal advice on behalf of their employee. Unless there are particular circumstances where it is necessary for the CEO of the public sector and the Minister to confer in relation to obtaining legal advice, the provisions in the *Corruption and Crime Commission Act 2003* allowing disclosure to obtain legal advice will not apply here.

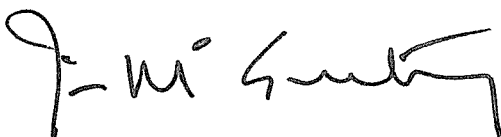
Finally, it is important to note that even if matter is not defined as "restricted matter" for the purposes of the *Corruption and Crime Commission Act 2003*, in some circumstances, restrictions on disclosure may exist under other legislation. For example, section 16(3) of the *Public Interest Disclosure Act 2003* prohibits the disclosure of information that may identify a person in respect of whom a disclosure of public interest information has been made under that Act.

The ordinary provisions of the *Criminal Code* also continue to apply. For example, section 143 of the *Criminal Code* provides that any person who attempts to obstruct, prevent, pervert,

or defeat the course of justice is guilty of a crime and liable to imprisonment for 7 years. Any act which has a tendency to effect this impairment may amount to an attempt to pervert the course of justice.<sup>2</sup>

Subject to the above, public sector CEO's can discuss Commission matters with their Ministers, provided discussions do not include "restricted matter". Restricted matter can only be discussed in the context of obtaining legal advice or after an order is made by the Commission permitting such discussion.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jim McGinty', with a stylized flourish at the end.

JIM MCGINTY MLA  
ATTORNEY GENERAL

cc Corruption and Crime Commission

21 MAY 2007

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<sup>2</sup> *R v Rogerson* (1992) 174 CLR 268.