

MISCONDUCT ALLEGED BY PUBLIC OFFICERS WHO SUBSEQUENTLY BECOME OFFICERS OF THE CORRUPTION AND CRIME COMMISSION

Section 206 of the *Corruption, Crime and Misconduct Act 2003 (WA)*

14 December 2018

INDEX

1.	EXECUTIVE SUMMARY	1
2.	CASE STUDIES	2
	<u>The first case</u>	2
	<i>The facts</i>	2
	<i>The Commission's investigation of the officer's conduct</i>	3
	<i>Subsequent assessment of the officer's unlawful conduct in the agency</i>	4
	<u>The second case</u>	6
	<i>The Commission's notification to me of the allegation</i>	6
	<i>My intervention</i>	6
	<i>Police participation</i>	7
	<i>Further action by me</i>	8
3.	THE FLAW IN THE ACT	10
	<i>My misconduct function</i>	10
	<i>The flaw</i>	11
4.	MY RECOMMENDATIONS	13

1. EXECUTIVE SUMMARY

This report is made pursuant to my functions in s 195(1) of the *Corruption, Crime and Misconduct Act 2003 (WA)* to audit the operation of the Act, to deal with matters of misconduct on the part of the Commission and its officers, to assess the effectiveness and appropriateness of the Commission's procedures, and to report and make recommendations to either House of Parliament and to the Standing Committee.

The purpose of this report is to alert the Parliament to what seems to me to be a deficiency existing in the Act which prevents Parliament from being assured that an allegation of serious misconduct made against an officer of the Corruption and Crime Commission in relation to conduct as a public officer, but before the officer was employed by it, is independently investigated and authoritatively determined.¹

When such an allegation, involving allegedly serious misconduct, is made the only body within the State's misconduct statutory framework with jurisdiction to assess whether the officer's conduct constituted serious misconduct or not is the Commission itself. This leaves the Commission potentially conflicted, a situation which is not a problem in the ordinary situation in which the Commission is subject to my independent oversight.

However, in a case where the matter in question involves allegedly serious misconduct before the public officer comes into the employ of the Commission, I cannot intervene to direct the Commission to investigate the allegation if it, in my view, incorrectly or inappropriately decides not to do so; nor can I intervene if I consider that the Commission has wrongly categorised the conduct involved.

For the Commission to have no oversight in its handling of such matters is highly undesirable. It does not equate with the standard of objective oversight and investigation created by the Act in instances of alleged serious misconduct by Commission officers said to have been committed whilst employed by the Commission.

In this regard Parliament gave me the function to deal with allegations of serious misconduct by the Commission and its officers.² When such an allegation is made to the Commission rather than directly to me, the Act gives me the power to remove the allegation from the Commission, to annul its determination (if any is made) and to replace it with my own, as if I had commenced an investigation of the allegation myself.

The public policy, accountability and transparency reasons for Parliament's decision to give me this function and these powers are equally applicable to instances where the allegation of serious misconduct made against a public officer comes to light after that officer is subsequently employed by the Commission. A corrupt public officer unwittingly employed by the Commission could conceivably remain employed – and avoid the scrutiny and punishment otherwise envisaged by Parliament – if the Commission, in my view, improperly or erroneously decided to not investigate the

¹ Serious misconduct under s 4 of the Act is constituted by corruption or by the commission of a criminal offence punishable by two or more years' imprisonment.

² My function also includes minor misconduct by Commission officers. This aspect of my jurisdiction is discussed in Chapter 3 of this report.

allegation, or improperly or erroneously assessed it as not constituting serious misconduct. In such circumstances no power is vested in any person within the State's framework to enable the correction of such a serious mistake.

I therefore recommend to Parliament that the Act be appropriately amended to broaden my misconduct function to include the determination of an allegation of serious misconduct made against a Commission officer that relates to the officer's previous employment as a public officer.

2. CASE STUDIES

The first case

The facts

In November 2017 I reported to Parliament my investigation of an allegation of misconduct against a Commission officer.³ The allegation was that the officer⁴ unlawfully disclosed to another Commission officer a copy of a confidential and highly sensitive document which he unlawfully downloaded and removed from a public sector agency where he was employed immediately before being employed by the Commission. There was no doubt he was responsible for both unlawful acts.

I determined that the officer's conduct within the Commission constituted minor misconduct within the definition of s 4(d)(iv) and (vi) of the Act.

The scope of my misconduct function clearly encompassed dealing with the officer's conduct within the Commission, namely, investigating and authoritatively categorising it for the purpose of s 4 of the Act. For that to be effectively done, my investigation necessarily extended to investigating the circumstances surrounding his unlawful removal of the confidential document from his previous employer. However, the scope of my function precluded me from authoritatively categorising that removal for the purpose of s 4 of the Act because he was not a Commission officer at that time.

I ascertained from the officer and from the agency that he, without authorisation and without informing his manager, unlawfully downloaded a copy of the confidential document onto his private thumb-drive prior to leaving his employment with the agency. He signed a document on his last day before leaving the agency saying that he was not removing any property belonging to the agency.

The officer had ample opportunity to ask his manager, before downloading the confidential document, if he could do so. He did not. He had ample opportunity to ask his manager, before departing the agency with the document, if he could do so. He did not. The manager said it was his document, that the officer had no business in dealing with the document during his employment, and that the officer knew the document was highly sensitive and confidential.

³ *Misconduct: Unauthorised Disclosure of Confidential Information*, 30 November 2017, can be seen on my office's website at: <https://www.piccc.wa.gov.au>

⁴ The identity of the officer was not disclosed in my report, and he has since left his employment with the Commission.

After the allegation was made against, and put to, the officer, he subsequently misrepresented to the Commission (and as a consequence, to me) aspects of his conduct whilst employed by the agency, including his right to have access to and to use the confidential document, and his involvement in creating it.

At the behest of the Commission, but before the allegation had been referred to me by the Commission, the officer emailed his former manager at the agency to inform him of his retention and disclosure within the Commission of the document, but in a calculated manner, I concluded, deliberately misled him about the situation – including not identifying the document itself, but instead referring to a ‘range’ of documents he said he had accidentally retained.

The officer misled the Commission and its lawyers in his explanation as to how he came to possess the confidential document, and why he disclosed it within the Commission. In an attempt to justify his conduct, he suggested he had disclosed the document as a formal complaint of misconduct against the agency under s 25 of the Act.

The officer misled the Commission in a number of other important respects about his conduct.

I concluded the officer was not open, honest and transparent with the Commission, the agency or my investigation about his unlawful (and possibly criminal) removal of the confidential document from the agency, and his unlawful disclosure of it within the Commission.

The Commission’s investigation of the officer’s conduct

In my report I was critical of the Commission’s response to, and investigation of, the allegation made against the officer.⁵

Despite the serious nature of the allegation – including the obvious possibility that his unlawful disclosure of the document and his obtaining and retention of it may have constituted separate criminal offences – the Commission’s assessment of it was not commenced or subsequently conducted in an investigatory way that might later facilitate a proper criminal investigation.

The officer was interviewed, not by Commission investigators, but informally by Commission lawyers. Compounding this he liaised with the lawyers during their four month assessment process, providing them with documents and information which contributed to the Commission’s eventual determination that his conduct did not constitute a crime or serious misconduct (or even minor misconduct).

At no time did the Commission interview the officer’s former manager at the agency about any aspect of the allegation. The manager’s evidence – given to me subsequently during my investigation – if obtained from the outset by the Commission, would have demonstrated the untruthfulness of much of the officer’s explanations and justifications. Identifying his untruthfulness at that early stage would have

⁵ See pages 15-17 of my report dated 30 November 2017.

demonstrated the necessity for a broader criminal investigation into his conduct, both at the agency and within the Commission.⁶

The Commission's response to the allegation fatally eroded the prospects of any subsequent criminal investigation of the officer's conduct by the Police being effectively conducted.

Subsequent assessment of the officer's unlawful conduct in the agency

In light of the Commission's flawed assessment that the officer's conduct both in the agency and within the Commission did not involve any form of wrongdoing, and after tabling my report of my investigation, I referred the allegation concerning his conduct in the agency to the Public Sector Commissioner for investigation to determine the question of minor misconduct.⁷

The Public Sector Commissioner considered the conduct to potentially constitute a criminal offence under s 440A of the *Criminal Code*, therefore serious misconduct under s 4(c) of the Act, and thus outside his minor misconduct jurisdiction. On this basis he inexplicably referred the matter back to the Commission for investigation, despite the Commission's prior view that the officer had not committed any form of wrongdoing.

The Public Sector Commissioner added that in view of my thorough investigation of all the circumstances of the officer's conduct, and the public reporting of it, he would not be taking any further action on the question whether the officer's conduct in the agency constituted minor misconduct.

It is also unfortunate that the Public Sector Commissioner mistakenly concluded that my investigation and report authoritatively categorised and finalised the officer's conduct in the agency. It did not, and I stated so. It was not within my jurisdiction to do so. What I did do was ascertain certain facts surrounding the officer's conduct in the agency; the jurisdiction to categorise that conduct under the Act as serious misconduct or minor misconduct was respectively the Commission's and the Public Sector Commissioner's.

Shortly afterwards I wrote to Commissioner McKechnie QC about the Public Sector Commissioner's referral of the allegation back to the Commission for assessment, highlighting that the clear possibility of criminality on the part of the officer had yet to be properly investigated and concluded. In my letter I also formally referred the allegation to the Commission for investigation.

⁶ At the time of my report into the officer's conduct, I had previously been critical of the Commission's initial response to, and investigation of, allegations made against its officers: see the Joint Standing Committee's Report titled *The Parliamentary Inspector's Report on Allegations of Misconduct made against Officers in the Commission's Electronic Collection Unit*, November 2015, 37-42; The Joint Standing Committee's Report titled *The Parliamentary Inspector's Report on Misconduct and Related Issues in the Corruption and Crime Commission*, June 2015, 30-45, and my Report titled *Misconduct by a Corruption and Crime Commission Officer: Matthew John Lynch*, 8 February 2017, 12. I have since made identical observations: see *Misconduct: False Affidavit Sworn by an Officer of the Corruption and Crime Commission*, 21 December 2017, 16-19.

⁷ The Public Sector Commissioner has the function of investigating minor misconduct under the Act. Generally speaking the Corruption and Crime Commission does not.

Some months later, the Commission divided the officer’s conduct in the agency into two separate allegations: his unlawful use of the agency’s database in accessing and downloading the confidential document on the one hand, and his unlawful retention of it on the other. No rationale was given by the Commission for doing this. I have been unable to conceive any legitimate reason for it.

The Commission then referred the first allegation to the agency for its consideration, despite its criminal nature and despite knowing full well that the agency was powerless to properly determine the matter. Without explanation, the Commission also referred the second allegation back to the Public Sector Commission for investigation.

The Commission argues that this was essentially a jurisdictional decision, but, in my view it achieved nothing other than further delay, fragmentation of the issue and, as it turned out, ineffectiveness in dealing with the allegation. Splitting the officer’s conduct into two allegations prevented the conduct from being competently investigated as a premeditated criminal act by one investigative body.

The information gained during my investigation formed the basis for my suspicion that the officer’s intention whilst still employed by the agency (but having been successful in his application for employment to the Commission) was to download and retain the confidential document, and to then disclose it to his new employer for his own professional self-interest and advancement.

Two days after the Commission’s referral of the first allegation to the Public Sector Commissioner, the latter wrote to me and said he would not be further considering the officer’s conduct in the agency, citing once again the, in my view incorrect consideration that my report had thoroughly dealt with all aspects of the officer’s conduct. The present Public Sector Commissioner observes that this was a discretionary decision by her predecessor in office, no doubt concerned to achieve the most efficient and effective use of limited resources.

But I consider that the end result of this process of assessment and referral by the Commission and the Public Sector Commissioner of the officer’s conduct – conduct which was admitted by him during my investigation – is that no authoritative and sound determination of it within the contemplation of the State’s statutory misconduct framework was ever made. That unpalatable outcome remains.

The officer’s conduct was uncomplicated and unsophisticated.⁸ I have expressed the view there was no legitimate justification under the Act for the Commission to take the course it did, having the effect that the conduct escaped proper investigation and scrutiny. Neither I, nor any other person in the State’s statutory misconduct framework, has the function or power to correct this error.

The second case

⁸ The officer’s conduct was, for all intents and purposes, identical to that of a Public Transport Authority officer recently investigated by the Commission who was found by it to have committed serious misconduct; see the Commission’s report tabled in Parliament on 18 October 2018 titled *Report into unauthorised release of confidential information of the Public Transport Authority*.

The Commission's notification to me of the allegation

In June 2017 the Commission notified me of an allegation made against one of its investigators of an act of corruption he had committed many years ago as a police officer. The allegation was that, in exchange for oral sex from a female applicant, he would grant her a special category driver's licence. She said she performed the act and he granted the licence.

The allegation was made by the complainant to the officer's wife in June 2017. She in turn told the officer. He then informed the Commission (although he was under no legal requirement to do so), and when so doing he asserted the complainant was a known alcoholic and that he and his wife believed she was suffering from psychological problems. He denied the truth of the allegation.

Despite the seriousness of the allegation – which, if proved, would constitute the criminal offences of Corruption and Sexual Assault under the *Criminal Code* – Commissioner McKechnie QC wrote in his notification of the allegation to me under s 196(4) of the Act:

Currently the Commission has no information or evidence before it, beyond the bare assertion of [the complainant], which might support a reasonable suspicion of serious misconduct against [the officer].

It is open to [the complainant] to provide further information to the Commission at any time, if she is so inclined.

In the absence of such substantiation, the Commission will not be taking any further action in response to [the complainant's] statements.

My intervention

I considered the Commission's response to the allegation to be inadequate and inappropriate. I wrote shortly afterwards saying that the nature of the allegation and the officer's position as a Commission officer demanded a demonstrably high degree of thoroughness in the Commission's response.

I recommended that further investigations be conducted, given that the officer was, in fact, a police officer at the relevant time and that Department of Transport records may show, as corroboration, if the complainant was issued a special category driver's licence at the time.

A month later Commissioner McKechnie QC said the Commission had investigated the possible existence of Department of Transport driver's licence records at the time of the allegation, but that the records did not exist. However, he said he intended to refer the matter to the Police to see if the particular police station may have relevant records of its own, and if necessary, for the complainant to be interviewed by police.

A further month later the Commission's referral to the Police was made, explaining that it had not contacted the complainant or made any enquiries in relation to the matter, and that it did not intend to take any further action in respect of it.

Police participation

Three months later Commissioner McKechnie QC said the police had contacted the Commission saying they believed they had located the complainant, but that she ‘wanted nothing to do with the matter’. A short time later the police wrote to the Commissioner stating they had concluded their investigation of corruption and sexual assault, and closed their file with an outcome of ‘withdrawn by victim’. The Commissioner subsequently informed me that the Commission would not be taking any further action in response to the allegation.⁹

I suspected that the ‘matter’ to which the complainant was referring was, understandably, the prospect of a full criminal investigation into her allegation made against the officer (with all its ramifications for her as a prosecution witness), but not the existence of information and evidence that may support an investigation of serious misconduct under the Act. In this second respect, the allegation remained inadequately investigated for the purposes of the Act.

I subsequently spoke to the Superintendent in charge of the police unit making the enquiries, to discuss the case. She said the complainant had given a signed statement detailing the circumstances surrounding the incident the subject of her allegation, and that the complainant needed more time to reflect on the matter. Subsequently, the police gave me a copy of their investigation report and of the complainant’s statement which detailed the incident.

Soon afterwards Mr Ray Warnes, Chief Executive of the Commission, wrote to me saying that he had become aware of my communications with the police, but the fact remained that despite the complainant ‘personally engaging’ with the police, ‘there was insufficient evidence to substantiate the allegation.’

Mr Warnes’ letter was irrelevant to my oversight of the Commission’s assessment of the allegation. He appeared to have misconceived the respective evidentiary onus and process that applies to criminal proceedings on the one hand, and the determination of allegations of serious misconduct on the other. That the police do not prosecute an alleged wrongdoer for a criminal offence does not mean the alleged conduct falls outside the determination of serious misconduct under the Act.

Mr Warnes’ letter to me was probably prompted by a letter from the police Superintendent to the Commission the day before his letter to me, which said that the complainant did not wish to pursue a criminal investigation into the incident. However, the complainant had also said she was happy for a copy of her statement to be given to the Commission, if it wanted it. She said nothing about refusing to participate in a serious misconduct investigation of the allegation if the Commission was to conduct one, a point missed by Mr Warnes in his letter to me.

Further action by me

⁹ My observations in this paragraph are not criticism of the police, for they were clearly given a specific task to perform within their criminal law function by the Commission.

Two weeks after Mr Warnes' letter, I wrote to Commissioner McKechnie QC and gave him a copy of the complainant's statement, pointing out how detailed it was about the circumstances of the alleged incident. I also stated:

1. There were details in the statement about the premises in which the incident took place, and the complainant's employment at the time, that could be objectively verified through investigation;
2. The officer worked at the relevant police station at the time, and the complainant was a social acquaintance of him and his wife;
3. The officer was responsible for conducting driving tests for driver's licences at the time of the alleged incident;
4. Police found that the records showed the complainant had applied for the special category driver's licence on a particular day when she had been issued a normal driver's licence (the latter having been issued after a test conducted by a police officer);
5. The officer asserted the complainant's allegation was a fabrication, but did not give a reason why it might be made;
6. He refused to be interviewed by the police investigating the allegation, or to provide a statement, as he was clearly entitled to do, and
7. The police had identified another witness who the complainant said she told of the alleged incident a week after it happened, but who denied she did so.

I recommended that the Commission conduct further enquiries into the allegation against the officer because, in the end, the complainant had either fabricated her allegation for no apparent reason, or it was true and might be proved with further investigations by the Commission.

I also raised the possibility that the officer may also be guilty of either serious misconduct or minor misconduct if he knew the allegation was true, but falsely denied it to the Commission.

Commissioner McKechnie QC replied that the Commission would not be taking any further action in response to the allegation. He justified his decision by inferring that if the complainant was not prepared to be a witness in criminal proceedings then a serious misconduct investigation could not be grounded. Commissioner McKechnie QC added (correctly, I agree) that there was no evidence to provide independent corroboration of the allegation, and that he was satisfied that the action taken by the Commission had been appropriate. He continues to maintain that his decision in this regard was correct.

In my respectful opinion Commissioner McKechnie QC was mistaken in this approach. A capacity to conduct a successful criminal prosecution is not necessary before the Commission is able to form an opinion of serious misconduct about particular conduct. Further, there was, of course, corroborative evidence supporting central aspects of the complainant's statement, although not of the commission of the alleged offence.

Records show the complainant applied for a special category driver's licence at the time she said, and indeed was granted an ordinary driver's licence at the same time after undergoing a driving test administered by a police officer; the Commission officer was a police officer attached to the police station at the time; he had the responsibility of conducting driving tests at that time, and he and his wife knew her.

The police investigation did not conclude because of an absence of corroborative evidence, but because the complainant did not wish to participate in a criminal trial. Without her willingness to do so there was no case with which the police could proceed. The Commission was not, however, hamstrung by such considerations in respect of its investigation of the allegation, as it appeared to assert.

The Commission's decision not to investigate the allegation of serious misconduct against the officer when faced with the existence of evidence corroborative of the surrounding circumstances, and the potential for more to be discovered, was inexplicable. In this regard the Commission's decision is to be contrasted to its previous decisions to investigate allegations of serious misconduct received from an anonymous source and without corroborative evidence which, after the decision to investigate them was made, proved fruitful.¹⁰

I was not satisfied that this decision of the Commission should be the final outcome of the case, but, of course, the Commission was not bound to accept my recommendation that the matter of the allegations about the officer's conduct while a police officer should be more thoroughly investigated; and my function and power was limited to investigating misconduct as a Commission officer.

For the purpose of investigating that matter - whether the officer lied when he denied the truth of the complainant's allegation when reporting it to the Commission – I conducted an inquiry directed to seeing if I could determine where the truth lay in respect of the alleged sexual assault of which she complained.

I subsequently interviewed the complainant at length. I found her to be a credible witness. I had no basis upon which to question her honesty about the incident; she spoke about it with clarity and in a forthright, detailed way. Against the complainant's account, the witness to whom she claimed to have described the incident about a year after it allegedly occurred said that he did not recollect her so saying, and he did not want to cooperate with the police or my investigation. The witness did maintain that he believed the complainant to be capable of making up fantasies.

I interviewed the officer concerned about both the allegation made by the complainant and the circumstances surrounding the history of his family's association with the complainant and those surrounding her statements to him and his report to the Commission, in respect of which the question relevant to my investigation was, of course, whether his denial of the truth of her complaint was deliberately false.

¹⁰ For instance, the Commission's recent investigation into conduct within the North Metropolitan Health Service: see the Commission's report titled *Report into bribery and corruption in maintenance and service contracts within North Metropolitan Health Service*, 16 August 2018, [34]-[39], and also the Commission's report titled *Report into how conflicts of interest undermine good governance: a report on the Chief Executive Officer of the Shire of Halls Creek*, 30 August 2018, [11].

He denied that anything like her description of the sexual assault she alleged had occurred, and that he had lied when he reported the complaint she made to the Commission. He continuously referred to the complainant's mental and general health (of which he claimed accurate knowledge) and said that this made her allegation incredible. He presented arguments in support of his innocence. To my mind his credibility remained well and truly intact, but there was nothing to require a conclusion that his version of the facts should be positively accepted in preference to hers.

The information that was within my function and power to gather during my investigation, including the age and nature of the incident complained of by the complainant, the weight of the information that corroborated important aspects of her account, and her credibility in her interview with me, was not sufficient to enable me to definitively determine whether the officer did or did not commit an act of misconduct in reporting the allegation to the Commission.

In the end, by a rather convoluted process – one which saw me arguably stray beyond my capacity to deal with matters of misconduct by Commission officers acting as such – there was a thorough examination of the available facts, albeit one which failed to provide the capacity to make a finding about misconduct as a Commission officer and as a police officer.

This case and the first case described in this report do, however, demonstrate a flaw in the Act which prevents effective oversight of the Commission's handling of previously unaddressed allegations of serious misconduct made against its officers during their previous public service employment.

3. THE FLAW IN THE ACT

My misconduct function

Before identifying and discussing the ramifications of the flaw in the Act, it is necessary to consider the scope of my misconduct function under the Act and that of the Commission.

My misconduct function in s 195(1)(b) of the Act is:

to deal with matters of misconduct on the part of the Commission, officers of the Commission and officers of the Parliamentary Inspector.

The definition of 'misconduct' under the Act includes both minor and serious misconduct.

To 'deal' with matters of misconduct includes me authoritatively determining the question of whether such conduct was committed.

In contrast, the Commission's serious misconduct function under Part 3 of the Act empowers the Commission to make 'assessments', form 'opinions' and to make 'propositions' about the existence of serious misconduct. Such assessments, opinions and propositions do not determine the legal existence of serious misconduct. Indeed, s 217A of the Act explains that any assessment or opinion about a person's conduct 'is

not, and is not to be taken as, a finding or opinion that a particular person is guilty of or has committed, is committing or is about to commit a criminal offence or disciplinary offence.'

If an allegation is made to the Commission that concerns, or may concern, one of its officers, the Commission is obliged to notify me of it under s 196(4) of the Act. I may at any time assume control of the investigation of the allegation by removing it from the Commission; if necessary, annul the Commission's determination (if any is made) and substitute another; or make a determination as if I had exercised my original jurisdiction over it, or make any final or provisional ancillary order that is remedial or compensatory.

The Commission does not have a minor misconduct function.¹¹ It has no power to form an opinion whether a public officer – including its own officers – has or has not committed minor misconduct. While its serious misconduct function extends, in theory, to its own officers, the Commission, as seen, can only make an assessment of, or form an opinion about, its existence.

It is therefore evident that the Act grants me the only function to authoritatively determine minor or serious misconduct by officers of the Commission. The reasons for this are plain: it is to ensure the conduct of such officers is objectively assessed and determined and, when necessary, reported to the Parliament and its Joint Standing Committee, and that such officers possess the requisite character traits of integrity, honesty and professionalism required to hold their employment.

The flaw

If an allegation of serious misconduct is made against an officer of the Commission in relation to conduct before the officer was employed by it, and the allegation has not previously been investigated, the only body with the jurisdiction under the Act to assess the officer's conduct is the Commission itself.

This flaw places the Commission in a conflicted situation. In assessing and investigating its officer's conduct in his or her former employment, the Commission, in reality, is also determining the officer's employment in the Commission without any oversight under the Act.

The Commission would in every conceivable circumstance find it impossible to continue the employment of one of its officers after having assessed the person's pre-Commission conduct as either corrupt or having involved a criminal offence punishable by imprisonment for two years or more.

The dilemma created by the flaw in the Act is that an officer of the Commission against whom an allegation of serious misconduct is made concerning the officer's pre-Commission employment may remain employed by the Commission despite the allegation improperly not being investigated by it, or alternatively may be improperly treated by the Commission in its investigation of the allegation.

¹¹ This function is held by the Public Sector Commissioner under Part 4A of the Act.

The first scenario – demonstrated by the case studies in this report – subverts the objective of ensuring that only people with the requisite character traits remain officers of the Commission.

As the case studies show, had my misconduct jurisdiction extended to allegations of misconduct by a person before he or she became employed by the Commission, my investigation would have encompassed the entirety of the officers' questionable conduct:

- In the first case study the officer's conduct in the agency in unlawfully downloading and removing the confidential information would have properly been seen in the context of facilitating his subsequent unlawful disclosure of it within the Commission.

Had the totality of the officer's conduct been viewed and investigated by the Commission from this perspective, his conduct in the public sector agency is unlikely to have passed unscrutinised, as it has.

- In the second case study the officer's alleged conduct as a police officer would have been investigated and defined for the purposes of the Act to enable his conduct in reporting the allegation to the Commission to be properly scrutinised.

A person's pre-Commission conduct, whether minor or serious misconduct, can be of such a nature and so fundamental to the question of character that had it been known by the Commission before the person's employment, he or she would never have been considered suitable for employment by it. As demonstrated, such matters should be excluded from the Commission's jurisdiction and vested in me.

The Commissioner has declined to express a view on the recommendations which follow. The Public Sector Commissioner agrees there is a lacuna in the legislative scheme of the nature described above and observes that my recommendations provide 'a means by which the deficiency in the legislative provisions could be addressed'.

Finally, it should be expressly said that my power to investigate an allegation of misconduct by a Commission officer before his or her employment with the Commission, if the Act is amended as recommended, will not be reliant on the officer first being suspected of misconduct after employment with the Commission.

4. MY RECOMMENDATIONS

I recommend to Parliament that it considers making the appropriate amendments to the Act to overcome the flaw I have identified. Such amendments may include:

1. Section 195(1)(b) of the Act be amended to:

‘to deal with matters of misconduct on the part of the Commission, officers of the Commission, a person who becomes an officer of the Commission and officers of the Parliamentary Inspector;’

2. Section 196(1)(a) of the Act be amended to:

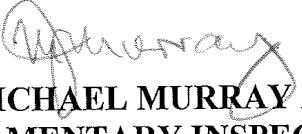
‘officers of the Commission or a person who becomes an officer of the Commission; or’

3. A new s 196(10) of the Act be introduced, stating:

‘When the Parliamentary Inspector exercises the misconduct function in s 195(1)(b) in respect of a person who becomes an officer of the Commission, the Parliamentary Inspector may exercise the same powers under s 196 and s 197 in respect of the person and the person’s former employer.’

4. A new s 196(11) of the Act be introduced, stating:

‘When the Parliamentary Inspector exercises the misconduct function in s 195(1)(b) in respect of a person who becomes an officer of the Commission, any exercise of power is limited to dealing with matters of misconduct which were not reported, or dealt with, or finalised during the person’s previous employment as a public officer.’



**HON MICHAEL MURRAY AM QC
PARLIAMENTARY INSPECTOR**