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PARLIAMENTARY CRIME AND
MISCONDUCT COMMITTEE



**Queensland
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Office of the
Director-General

Department of
Emergency Services

24 OCT 2008

Mr Paul Hoolihan MP
Chairman
Parliamentary Crime and Misconduct Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Mr Hoolihan

Thank you for your correspondence received on 22 September 2008 regarding the three yearly review of the Crime and Misconduct Commission (CMC) by the Parliamentary Crime and Misconduct Committee (PCMC).

The following submission focuses on the processes, definitions and interpretations that affect the referral of matters of suspected official misconduct (OM) to the CMC.

Reporting requirements under section 14 and 15 of the *Crime and Misconduct Act 2001* (the Act).

Currently, agencies are required under section 38 of the Act to refer all matters of suspected OM (as defined in sections 14 and 15 of the Act), to the CMC. Referrals must be either immediate (as per section 38 of the Act) or by way of a schedule of matters (as provided for in section 40 of the Act).

Referral of cases to the CMC is resource intensive and, depending on the nature of the matter referred, may involve the following tasks:

- Assessment by the department of whether the allegations raise a suspicion of OM;
- Completion of the CMC Referral template;
- Receipt of the CMC's assessment of the matter;
- Updating the department's database with the CMC's assessment; and
- Reporting the outcome of the matter to the CMC or more frequent reports if the matter is being actively monitored by the CMC.

Creating a safer Queensland

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Application of the official misconduct definition

The Department of Emergency Services acknowledges that the definition of suspected OM is, by necessity a broad one. However, it believes that over time, the threshold for reporting matters to the CMC, has been lowered significantly. In addition, the department perceives that the CMC has varied its interpretation of the broad OM definition at different times.

The net effect on the department has been:

- increased overall reporting of matters to the CMC;
- increased reporting of relatively minor matters to the CMC; and
- a lack of certainty in how the OM definition is to be applied in individual cases.

The department notes that a very high proportion of matters referred to the CMC are assessed as "outcome advice only". These matters are referred back to the department to manage and resolve, with outcome advice being provided to the CMC.

The department believes that the current arrangement results in a high number of relatively minor matters being referred to the CMC and subsequently being referred back to the agency to manage. Whilst the department appreciates the discretion provided by the CMC to manage those matters to resolution, it remains an issue concerning the resources needed to maintain this level of reporting to the CMC and the lack of certainty in applying the OM definition to actual allegations.

Referral to the CMC on the basis of holding a mere suspicion of OM

Section 38(1) of the Act applies if a public official suspects that a complaint, or information or matter (also a **complaint**), involves, or may involve, OM.

In relation to section 38(1) of the Act, the CMC currently instructs agencies to refer allegations or information to the CMC for which they hold a mere suspicion that the complaint involves or may involve OM, rather than a consideration of the allegation or information concerning the actual conduct of the officer involved. By necessity, the assessment is made on the "bald allegation" rather than an objective consideration of the actual conduct alleged. The requisite suspicion is determined without the agency conducting any additional inquiry into the matter.

Again, this requirement has a direct influence on the high number of matters which are referred to the CMC, even where the agency may be able to readily obtain information that may assist in making a determination by conducting some preliminary inquiry. It is noted that the CMC advise that if there are documents or other information that is known that indicates to the agency that the conduct could not possibly have occurred as alleged, then the complaint or information does not need to be referred in accordance with the Act. However, this is limited to a review of documents or other information that is already at hand, without the conduct of further inquiry.

The department proposes that this requirement be revised so that matters do not require referral to the CMC on the mere suspicion of OM alone. Instead, agencies should be given more discretion to undertake preliminary inquiries to determine whether the bald allegations have substance. The department is not proposing that it be fully satisfied that a matter is not OM, but rather that it be able to conduct some preliminary inquiry to determine whether allegations or information in its possession have substance prior to referral.

Arguably, this is consistent with section 34 of the Act, outlining the principles that apply to the CMC in performing its misconduct functions, including cooperation, capacity building and devolution. The department contends that the robustness of such a process would still be open to sufficient scrutiny given:

- The CMC's ongoing monitoring role and liaison with agencies; and
- The discretion that complainants have to refer their concerns directly to the CMC.

Dismissible matters

Further issues arise in assessing a complaint or information that involves or may involve OM.

Section 15 of the Act states that OM is 'conduct' that could, if proved, be:

- a) a criminal offence; or
- b) a disciplinary breach providing reasonable grounds for terminating the person's services, if the person is or was the holder of an appointment.

The department is concerned with the consistency in which section 15(b) of the Act is interpreted, particularly the aspect of "*reasonable grounds for terminating the person's services.*"

In relation to specific cases, both the department and the CMC have a role in determining whether a matter contains conduct that, if proven, provides reasonable grounds for termination. The department notes that the CMC's assessments on this aspect of the definition does not always accord with its own view. It has been noted that the CMC's view about what constitutes "*reasonable grounds for terminating an officer's services*" has tended to be much broader than that of the department. The CMC's view appears to be that an allegation falls into the category of OM on the basis that if discipline is at all a possibility in relation to conduct that is proven, then the sanction of dismissal is always an option within such a discipline process. This wide interpretation does not take into account the propensity of the agency to actually implement a sanction of dismissal against employees in circumstances where such conduct is proven.

It can be argued that each agency is in the best position to make the determination about what constitutes reasonable grounds for terminating an officer's services, based on:

- its published values, code of conduct and other policies;
- the nature of the services it provides to the community; and
- the precedent established within the agency for matters where a sanction of dismissal has been considered in the past.

The department believes each agency should have increased discretion to determine whether an allegation which may constitute OM, is one that, if proven, would fall within the realm of a dismissible matter. This may be achieved by way of a protocol developed in consultation with agencies.

The department believes that if agencies were provided with this increased discretionary authority and certainty in the application of this part of the OM definition, a reduction in the number of minor matters being referred to the CMC might be achieved.

Summary of Departmental proposals

The department proposes that the number of minor matters being referred by agencies to the CMC be reduced by developing protocols for:

- a) Providing greater discretionary authority to agencies in determining whether allegations have substance prior to referral to the CMC, particularly when forming the requisition suspicion of misconduct; and
- b) Providing greater discretionary authority to agencies in determining whether a matter warrants referral to the CMC on the basis that the conduct, if proven, provides reasonable grounds for terminating an officer's services.

Department of Emergency Services' current relationship with the CMC

I note that the department has a sound and beneficial relationship with the CMC, in particular the CMC's complaint services section. The department's Ethical Standards Unit appreciates the assistance of the CMC in providing advice and information in management of complex matters involving OM. I also acknowledge the CMC's interest in the department's capacity to engage in effective misconduct prevention activities, especially in key risk areas.

The department appreciates the opportunity to provide this submission to the PCMC. The proposals made in this submission have been developed in the interests of maintaining a productive relationship between the department and the CMC on matters of suspected OM.

Yours sincerely

A handwritten signature in black ink, appearing to read 'J. McGowan', with a long horizontal stroke extending to the right.

Jim McGowan
Director-General