

PCMC 3 Yr Review - Addendum submission

Chapter 5: Continuously improving integrity and reducing misconduct in the Queensland public sector

'.. see advantage in making arrangements for short-term secondments of officers between the CMC and Main Roads.'

The CMC is keen to further explore a range of secondment arrangements for officers from public sector agencies, as well as for CMC officers. Such arrangements will help build the capacity of agencies. They will also provide an opportunity to enhance the CMC's understanding of the environment within which individual public sector agencies operate and the issues that they deal with in the practical implementation of their obligations and responsibilities under the *Crime and Misconduct Act 2001*.

Currently there are a number of secondees with the CMC or out posted from the CMC.

Chapter 6: CMC's work with the Queensland public sector (including local government)

GENERAL

Through our regular CMC Liaison Officers Meetings and our CMC/individual agency liaison meetings, as well as ad hoc workshops and information sessions, we work with the agencies to address the sorts of issues that have been raised in the submissions to this 3 Year Review.

Following a particularly successful session earlier this year when we workshopped agencies' concerns about the interpretation of 'a breach of the trust' (in the definition of official misconduct), we intend to hold another similar session in December to address, among other things, the issues raised in the submissions. The workshop will cover such topics as:

- a discussion of the interpretation of the definition of official misconduct, particularly focusing on the term '*reasonable grounds for terminating the person's services*' with the view to minimising the 'lack of certainty in how the OM definition is to be applied in individual cases'. It is acknowledged reasonable minds may differ on the application of the term in particular circumstances.
- the expansion and extension of section 40 directions to minimise to the extent possible the resource intensiveness of the notification requirements
- the identification of further allegation types and sub-types to capture more specifically particular types of conduct peculiar to individual agencies (e.g. theft of prescription drugs) to facilitate greater use of section 40 directions in appropriate categories.

THE SUBMISSIONS

Now turning to the specific issues raised in the submissions.

- *'... of the view that there exists further opportunities for the CMC to support investigations ... conducted by departments and agencies, by the conduct of joint investigations.'* (Q Health)
- *'... investigations into misconduct by Main Road's staff. These officers do not possess statutory powers to aid them in the discharge of their responsibilities. To address this shortcoming in attending to complex matters, which may be better dealt with by employing coercive powers, it would be of advantage for CMC investigators to be assigned to a department on a temporary basis.'* Main Roads

The CMC has increased the number of investigations conducted co-operatively with agencies, and sees the benefit from both the capacity building aspect and from the perspective of informing the CMC of aspects of the agencies' business that is unfamiliar to us. We will continue to conduct co-operative investigations where practicable, and we will also continue to assign to agencies CMC officers for particular aspects of an investigation that is being undertaken by the agency.

- *'... beneficial to review the definition of criminal offence as applied in the Crime and Misconduct Act 2001... At present any offence that attracts a penalty unit amounts to a criminal offence for the purpose of section 15... This interpretation sets a low bar as to what conduct amounts to official misconduct leading to almost every disclosure being a potential criminal offence.'* (Q Health)

The 'criminal offence' element of the definition of official misconduct must extend to an offence that attracts a penalty based on penalty units.

Public sector employees and public officials operate under various pieces of legislation, such as the *Child Protection Act 1999*, which impose statutory obligations and constraints in relation to the performance of their functions and exercise of powers. In many cases, failure to comply with such a legislative provision is an offence that attracts a penalty based on penalty units. Clearly such conduct raises integrity issues and should fall within the jurisdiction of the CMC.

It is acknowledged that in some cases alleged conduct that could constitute an offence *that attracts a penalty unit* may be comparatively minor in nature. The same may be the case for conduct that could constitute a criminal offence under the *Criminal Code*.

The CMC needs to be made aware of these comparatively 'low level' matters to ensure that they are being dealt with appropriately. Failure to manage such matters appropriately increases the opportunity for a culture to develop which may allow more serious misconduct to emerge.

The resource impact upon an agency of the requirement to notify the CMC of these low level matters can be minimised through development of more specific allegation types/subtypes and their inclusion in expanded section 40 directions. This will still allow for an appropriate level of CMC oversight.

- *'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"'*

... both the department and the CMC have a role in determining whether a matter contains (such) conduct ... noted .. the CMC's view ... has tended to be much

broader than that of the department. The CMC 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.

...

The department believes that 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.' (Emergency Services)

The interpretation of the provision: '... a disciplinary breach providing reasonable grounds for terminating the person's services' is difficult. However, it is not the CMC's view 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.*

Thomas J in *Re: Watson* describes this part of the definition of official misconduct as '*... a curiously circular provision ...*' and goes on to find that '*To satisfy these words .. it is at least necessary to show that the breach in question was such that termination would be a reasonably possible outcome. This does not pre-empt the penalty but it requires consideration of what the final result is capable of being.*'

The CMC proposes to work with individual agencies to identify from their complaints data the types of alleged conduct that raise this issue and to reach an understanding about whether the conduct falls within the definition of official misconduct.

- *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 requisite 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. (Emergency Services)*

- *'... agencies to refer allegations or information to the CMC for which they hold a mere suspicion ...*
.. this requirement has a direct influence on the high number of matters which are referred ..., even where the agency may be able to readily obtain information that may assist in making a determination by conducting some preliminary inquiry. ... noted that if there ... {is} ... information that is known that indicates.. conduct could not possibly have occurred ... does not need to be referred.

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. ... agencies should be given more discretion to undertake preliminary inquiries to determine whether the bald allegations have substance. ...

.. consistent with section 34 ... 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.' (Emergency Services)

To facilitate independent oversight by the CMC, and maintain public confidence, it is crucial that the threshold for notification to the CMC (s.38) remains a mere suspicion that a 'complaint' involves or may involve official misconduct.

The concern regarding the 'resource intensive' nature of the process of referral by agencies to the CMC can be reduced through an effective use of s.40 directions.

Section 40 directions in effect achieve the desired position in which agencies can on receipt of a complaint of a minor nature promptly undertake preliminary inquiries to determine whether the 'bald allegations have substance' and take appropriate action. This will reduce the extent of reporting to the CMC required.

Chapter 7: CMC's work with the Queensland Police Service

At the outset CMC acknowledges that comments made in the QPS submission are not designed to criticise the CMC, but to explore opportunities to improve the partnership between the agencies'. The CMC shares the QPS view about the importance of a strong robust partnership, with good lines of communication, between the agencies.

As a general comment it is evident that there remains some level of misunderstanding within the QPS, and in particular within the ESC, about the obligations and responsibilities of both the CMC and the QPS under the *Crime and Misconduct Act 2001* and the practical implementation of those obligations and responsibilities. The increasing rotation of staff within the ESC seems to have contributed to this. The CMC will need to work to address this.

The CMC is considering developing and delivering a version of our *Facing the Facts* workshop / information session specifically for the QPS, and particularly for the ESC. In addition, in consultation with the ESC, we could produce an induction manual for new officers joining the ESC explaining those obligations and responsibilities and the relevant CMC policies, procedures and processes.

- *'... ESC managers and regional Assistant Commissioners have experienced delays in matters raised at the CMC not being assessed and forwarded to the Service in a timely manner. Concerned parties are being interviewed by police some weeks after making the initial complaint to the CMC.'*
- *There is scope to improve communication between the agencies to commence investigations, inquiries and reviews in a timelier manner.'*

The CMC is continually focused on the timeliness of its processes. From time to time matters are not furnished to the QPS in as timely a manner as possible but these are relatively rare.

Our performance indicators reveal the following time taken to assess and refer matters to the ESC (target: 85% within one month), for example, for the month of October:

- Category 1 (matters which may warrant investigation by the CMC and which may involve pre-assessment inquiries by the CMC)
 - 11 matters:
 - 54.5 % within 5 days

- 90.9% within 10 days
 - 90.9% within 20 days
- Category 2 (matters which may warrant reviewing by the CMC and which may involve pre-assessment inquiries by the CMC)
 - 26 matters:
 - 42.3% within 5 days
 - 80.8% within 10 days
 - 100% within 20 days
- Category 3 (OAO matters – equivalent to section 40 matters)
 - 23 matters:
 - 91.3%% within 5 days
 - 100% within 10 days.

Fortunately, a recent audit picked up a number of complaints that had been made directly to the CMC by complainants in which the ESC had not received the Matters Assessed Report sent by the CMC. It seems that in a significant number of these cases, the email forwarding the MAR to the ESC had gone astray. It appeared to the CMC that the matters were with the ESC although they had been “lost into the ether”. We continue to work with the ESC to implement strategies to minimise the risk of these occurrences.

On 11 November 2008 we held a CMC / ESC Forum to discuss various issues with a view to enhancing our respective business processes. Various working parties were formed, including a Working Party - Assessment and Review Process. This Party will consider any possible changes to the process that might further improve timeliness and reduce the risk of complaints going astray.

- *‘ESC managers have raised concerns regarding some matters referred by the CMC to the QPS, in particular material supplied by the complainant to the CMC often does not accompany the referral. The CMC have provided advice to ESC that in some cases this is due to privacy issues, however this hinders the QPS investigation process.*

From time to time, through human error, material is advertently not sent to the ESC with the Matters Assessed Report. Once again this is rare and until now has not been raised as a problem.

There are occasions when material is deliberately not sent. In many cases this is due to the desire of a whistleblower that their name not be revealed, rather than an issue of ‘privacy’. It may also be that the material is, for example, an intelligence report that is not for dissemination.

In cases in which material is not sent, the purpose of the referral usually is not for a full investigation of the alleged conduct of an individual. Rather the referral is about taking an opportunity to ‘learn’ from the complaint. The QPS may make inquiries to ascertain any possible cause for the complainant’s concerns to satisfy itself, as far as is possible, that there is no systemic, procedural or workplace issues that require attention.

Possibly the CMC could make the purpose of the referral clearer in the comments made in the Matters Assessed Report.

Again this issue is something that the Working Party - Assessment and Review Process can further consider.

- *'ESC and regional police have experienced a tendency by the CMC to over evaluate complaints at the initial assessment stage.*

The effect of this can increase the allegation count, lead to multiple allegations and often duplicate assessments (i.e. same incident from more than one complainant/informant/notifier will generate multiple complaint reports and allegations)

Similarly there is a tendency by the CMC to assess complaints collectively as official misconduct pursuant to the Act. The CMC also assesses matters and classify complaints and allegations at the highest possible level, as opposed to a level based on known or likely facts. In such situations, this has the effect of over inflating the seriousness of the allegations.

... It is imperative that CSS accurately reflects the actual number of complaints, the classification of the complaint and the number of allegations made against members of the Service. Naturally, any change in the manner of recording complaints make comparisons difficult to monitor over time.'

The CMC is obliged to assess each complaint, taking the action the CMC considers most appropriate in the circumstances. Each person who makes a complaint must be given a response about the action taken and the reasons for that action. Therefore the CMC makes a separate record for each complaint from each complainant or informant even though arising out of the same incident. However, if there is the same allegation against an officer from more than one complainant arising from the one incident the CMC only counts the allegation once (COMPASS has the functionality to mark an allegation as already counted).

A complaint may contain a number of discrete allegations, which need to be distilled to assist in understanding the nature, scope and extent of the substance of the complaint. A separate record is made of each allegation.

Allegations are identified to direct attention to the issues that need to be dealt with in resolving the complaint. Identifying and recording all the allegations is also important to facilitate analysis to identify possible emerging trends and issues (at officer level through to Service level).

Some years ago the CMC and the QPS jointly developed a list of allegation types and sub-types to facilitate the recording and analysis of the types of conduct that are complained about.

The CMC Case Officer Guide, drawn from the CMC's Assessment policies and procedures, provides:

- **Each discrete incident/ act / omission / course of conduct should be the subject of a separate allegation. For example:**

A complainant alleges that he was assaulted by police (1) outside the Big Nite Out Club when they threw him to the ground, kicked him, and hit him with a baton; then they dragged him to the police vehicle and (2) deliberately rammed his head into the car door rim; (3) they drove the police vehicle erratically throwing him around; at the watchhouse they assaulted him at the (4) counter and then (5) in the cell.

- A case officer must identify the appropriate COMPASS allegation type, sub-type and
- If an incident involves conduct that could fit more than one allegation sub-type, select the sub-type that reflects the most serious aspect of the conduct.
- If an incident involves conduct which could be a criminal offence, you do not need to have 2 allegations – one which captures the type of conduct and one which captures the criminal nature of the conduct.
- A case officer must be careful to differentiate between a discrete allegation and what are particulars of an allegation [this will depend on the nature of the alleged conduct / course of conduct] to avoid unnecessarily making each particular a separate allegation.

The Case Officer Guide also provides:

- Take the nature of the alleged conduct at its highest, having regard to all the circumstances disclosed by the information (and other knowns, such as relevant legislation, policy and procedures), but do not speculate about what the complaint may be alleging.

Once the nature of the alleged conduct is identified, the allegation is classified as an allegation of either 'official misconduct' or 'police misconduct' or 'other' (i.e. a 'breach of discipline' or a 'client service complaint').

It is important for the CMC to distinguish between whether an allegation is one of 'official misconduct' or 'police misconduct' or 'other' as this determines the CMC's jurisdiction, and in the first two cases the extent of its power to monitor.

It has been suggested that there is a continuum of seriousness of conduct ranging from the least serious, a breach of discipline, through the next level, police misconduct, to the more serious 'official misconduct' and finally to 'a tier beyond' of criminal conduct.

Certainly a breach of discipline is less serious than either police misconduct or official misconduct. However, the definitions of both official misconduct and police misconduct cover a range of conduct from the comparatively minor in nature to the extremely serious, including criminal conduct.

The allegations distilled and classified are the CMC's best educated guess about the complainant's concerns based on the information provided (and the CMC's knowledge of other known factors).

It is acknowledged that what is alleged may be quite different from any actual conduct that may have given rise to the complaint.

In dealing with a complaint, (other than the level of CMC monitoring), the classification of an allegation as official misconduct or police misconduct is largely irrelevant. The focus of the QPS should be on determining the nature of any actual conduct and taking such action as may be appropriate to deal with any inappropriate conduct of a subject officer and addressing any systemic or prevention issues, and most importantly to resolve the complainant's concerns (as identified by the allegations).

The classification of the allegation does not determine the level of seriousness of the response to the complaint. An allegation of official misconduct may be dealt with by managerial resolution and an allegation of police misconduct may require a full investigation with a view to criminal prosecution.

In determining the integrity of the QPS and its officers, it is the outcome of the resolution of complaints that is important – that is the actual conduct that is identified and dealt with, not what was originally alleged.

The CMC invites the QPS/ ESC to continue, as it has in the past, to raise issues about individual complaints with the relevant senior CMC officer and we will look to resolve their concerns.

We will also continue to meet regularly to discuss issues generally.

We also note that the process for the assessment of a complaint by a QPS receiving officer is outlined in the CMC's Breach of Discipline Audit Report which was delivered in draft form to the QPS in December 2007.

- *.. the Service would benefit from CMC investigators providing a formal investigation report for matters that are sent to the Service for the purposes of any discipline proceedings.'*

A CMC / ESC Working Party –Investigation Reports is currently considering this issue.

- *'The standard of investigations conducted by the QPS is satisfactory for criminal standards; however, there are times where the CMC have a higher expectation of the Service concerning the extent of investigations reasonably necessary. This places unrealistic and unjustifiable use of resources to meet such standards, particularly where more and more investigations are being returned to the Service.'*

Firstly, the CMC is expecting that more and more complaints referred to the QPS will be dealt with other than by way of a full investigation.

In respect of investigations, the CMC is concerned to see, from the perspective of public confidence, transparency and accountability in the investigation process.

Our Monitoring Framework provides:

Upon receipt of {an investigation} report, the CMC will usually conduct a timely "full review" of the way in which the agency has dealt with the complaint, focused on:

- ***compliance with:***
 - ***any CMC directions;***
 - ***any relevant standards or guidelines issued by the CMC;***
 - ***the agency's policies and procedures, and relevant standards or guidelines;***

and

- ***the integrity of the manner in which the complaint has been dealt with, including consideration of:***

- *the adequacy, impartiality and transparency of any investigative, or other resolution, processes;*
- *the appropriateness of the conclusions and recommendations made as a result of any investigation or other action taken;*
- *the appropriateness of the decision whether to lay disciplinary charges or not;*
- *where no charges are laid, the appropriateness of any other action taken;*
- *where charges are laid, the appropriateness of the charges and of the tribunal of fact to hear the charges;*
- *the appropriateness of any finding and/or disciplinary sanction'.*

In considering the question of appropriateness, the CMC will not seek to assert a contrary view unless it considers the conclusions and recommendations are unsound or unreasonable or the discretion of the decision-maker in some way miscarried or the exercise of the discretion was unsound or unreasonable. The CMC acknowledges that there may be a range of courses of action available to the public official. The CMC review will look at whether the choice made is transparent, justifiable, and accountable and within the range.

Our Case Officer Guide also relevantly provides:

- *For category 1 & 2 matters, a case officer must make a recommendation about the appropriate assessment decision.*
 - *If the recommendation is to refer the complaint to the relevant agency to deal with subject to monitoring by way of review before – interim reports or review before – final report the case officer should:*
 - *first have communicated with the agency's CMC Liaison Officer / manger, ethical standards unit / equivalent and discussed the matter including the following:*
 - *the proposed recommendation ...;*
 - *if a review before - interim reports, the issues that the CMC expects to be covered by the first interim report (and any further interim reports) and the reasons why, and the proposed time frame for the interim report(s), and any difficulties anticipated by the UPA in making the necessary inquiries;*
 - *.....*
- *If there are any concerns about the UPA's timeliness, compliance with standards or integrity in dealing with the complaint the case officer will advise the Assistant Director (or if it is a significant complaint (including a Cat 1), through the Assistant Director to the Director Complaints Services) who will consider what action to take.*

If the concerns are significant, before any letter is written to the UPA about those concerns, the appropriate CMC officers, (as determined by the Assistant Director or the Director Complaints Services), must discuss with representatives of the UPA (and any external consultation, as may be necessary) the CMC's concerns with a view to reaching agreement, if possible, about how to address them.

Again the concerns raised are something that the CMC / ESC Working Party - Assessment and Review Process can consider.