



## **Protocol on the Disciplinary Process**

**December 1998**

ABBREVIATIONS

CEO	Chief Executive Officer
CJ Act	<i>Criminal Justice Act 1989</i>
CJC	Criminal Justice Commission
PCJC	Parliamentary Criminal Justice Committee
QPS	Queensland Police Service
UPA	Unit of public administration
WP Act	<i>Whistleblowers Protection Act 1994</i>

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# Contents

<b>Introduction</b>	<b>1</b>
Purpose	1
Rationale	1
<b>1 Functions and responsibilities</b>	<b>3</b>
1.1 Functions and responsibilities of the CJC	3
1.2 Responsibilities of CEOs	3
<b>2 Overlap of jurisdictions</b>	<b>4</b>
2.1 Distinction between ‘official misconduct’ and ‘misconduct’	4
2.2 Concurrent jurisdictions	4
<b>3 Referral of matters to the CJC</b>	<b>6</b>
3.1 Obligation to refer under the CJ Act	6
3.2 The referral threshold	6
3.3 Modification of requirement to refer	6
3.4 Action by a UPA relating to a referral	6
3.5 Matters referred to both the CJC and the QPS	7
<b>4 Initial assessment by the CJC</b>	<b>8</b>
4.1 Upon receipt	8
4.2 After assessment	8
<b>5 Referral to a UPA for action</b>	<b>10</b>
5.1 Misconduct or official misconduct — for such action as considered necessary	10
5.2 Official misconduct — for investigation or disciplinary action, or both, and CJC review	10
<b>6 Investigations by the CJC</b>	<b>11</b>
6.1 Time frame for investigation	11
6.2 Case management	11
6.3 Outcome of CJC investigation	11
<b>7 CJC review process</b>	<b>12</b>
7.1 Review of matters investigated by UPAs	12
7.2 Review of matters investigated by the QPS	12
<b>8 Action a CEO may take during a CJC/QPS investigation</b>	<b>13</b>
8.1 Systemic management or administrative issues	13
8.2 Peripheral disciplinary issues	13
<b>9 Other referral and investigation issues</b>	<b>14</b>
9.1 Reporting arrangements	14
9.2 Provision of investigation report	14
9.3 Review of suspension or transfer of employee	14
9.4 Delays in completion	14
9.5 Information to facilitate the process	15
<b>10 General issues</b>	<b>16</b>
10.1 Communication	16
10.2 Whistleblowers	16
10.3 Procedural recommendations made by the CJC	16
10.4 Corruption prevention	17
10.5 Audit role	17
10.6 CJC Liaison Officer	17
10.7 Right of appeal against a CJC determination	17
10.8 Modification of provisions of protocol	18

**Appendices:**

A: The Complaints Section	19
B: Definitions	20
C: Reporting Guidelines	21
D: Referral Threshold	22

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# Introduction

## Purpose

This protocol is designed to assist units of public administration (UPAs)<sup>1</sup> and the CJC to manage the disciplinary process effectively in instances where the jurisdiction of the CJC has been enlivened.

## Rationale

Improper conduct by an office holder in a UPA can at the one time amount to misconduct, a criminal offence, and official misconduct. For this reason, it is possible for a single act of misconduct to fall within the jurisdiction of the Queensland Police Service (QPS), the Criminal Justice Commission (CJC) and the Chief Executive Officer (CEO) of the particular UPA concerned. Therefore, jurisdictions sometimes overlap.

For a disciplinary system to be effective it must take into account these overlapping jurisdictions. Indeed, unless this overlap is effectively managed, all parties will suffer — the UPA, the employee and any victim — as well as the disciplinary process itself.

The disciplinary system is an integral part of a UPA's management structure. The purpose of discipline is to uphold proper standards of conduct for officers within the UPA; to provide an environment in which the UPA is able to fulfil its functions efficiently and effectively, unhampered by improper or corrupt conduct; to maintain public confidence in, and protect the reputation of, the UPA; and to sustain officers' confidence in the ability of the UPA to perform its functions and deal appropriately with inappropriate conduct.

The chief concern of many CEOs is not so much that an external agency such as the QPS or the CJC becomes involved in a UPA's internal disciplinary system, but the time it takes to deal with a matter once an external agency is brought in, resulting in possible delays in the implementation of important internal disciplinary action or managerial reform, and the difficulties of managing the personnel involved in the complaint.

The parties to this protocol recognise the obvious benefits of a consistent and comprehensive public-sector-wide approach to the problems caused by multiple, overlapping jurisdictions. Through this protocol, the CJC seeks to enhance the ability of UPAs to manage their internal disciplinary processes effectively when external agencies such as the CJC and the QPS need to become involved.

To help all parties understand each other's jurisdiction and disciplinary process better, this protocol sets out the functions and responsibilities of the various parties, with reference to the relevant legislation and definitions.

The protocol outlines agreed practices and procedures to be followed by all parties to maximise mutual support and cooperation.

This protocol answers such questions as:

- What is the difference between misconduct and official misconduct and how do they overlap?
- How should a UPA handle a matter that comes under the jurisdiction of the CJC or the QPS or both?
- When is a UPA obliged to refer a matter to the CJC?

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<sup>1</sup> The term 'unit of public administration' is defined in the *Criminal Justice Act 1989* (CJ Act) and includes government departments, public sector agencies, local government entities, and government-owned corporations.

- Can this obligation be modified or regulated?
- What action may a UPA take after becoming aware of possible official misconduct and while a matter is under investigation?
- Is there anything a UPA can do to protect itself from harmful delays in the completion of an investigation?
- How does the Complaints Section<sup>2</sup> of the CJC assess and review matters referred to it?
- What are the alternative courses of action the CJC may take after an investigation?
- What can a UPA and the CJC do to help each other?
- What protections are there for whistleblowers?
- How should a UPA treat recommendations made by the CJC?
- What can the CJC do to help a UPA avoid, prevent or recover from misconduct?

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<sup>2</sup> See appendix A for a diagram of the CJC's Complaints Section.

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# 1 Functions and responsibilities

## 1.1 Functions and responsibilities of the CJC

- 1.1.1 The CJ Act<sup>3</sup> gives the CJC the power to investigate and, where appropriate, institute disciplinary action against office holders in UPAs<sup>4</sup> for workplace or work-related conduct that amounts to ‘official misconduct’. (See appendix B for the definition of official misconduct.) The CJC also has the power to refer matters to the DPP or other prosecuting authority to consider commencing criminal proceedings.
- 1.1.2 The CJC also helps UPAs to detect and prevent official misconduct. It does this through its investigations, education programs and regular liaison.

## 1.2 Responsibilities of CEOs

- 1.2.1 Section 51(2) of the *Public Service Act 1996* gives the CEO of a **government department** the responsibility for disciplining departmental employees. Grounds for disciplinary action against a ‘public service officer’ are set out in section 87 of the Act and include ‘misconduct’. (See appendix B for the definition of ‘misconduct’.)
- 1.2.2 Likewise, a CEO of a **government entity that is governed by specific legislation** is responsible for disciplining the entity’s employees.
- 1.2.3 The General Manager and permanent heads of department of the **Brisbane City Council** are responsible for disciplining Council employees. Grounds for disciplinary action against a Council employee are set out in section 36 of the *City Service Ordinance 1972* and including conduct tantamount to misconduct. (See appendix B.)
- 1.2.4 Section 736 of the *Local Government Act 1993* gives a **local government** or its CEO (whichever is the appointer) the responsibility for disciplining employees. Grounds for disciplinary action against a local government employee are set out in the Act and include ‘misconduct’. (See appendix B.)

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<sup>3</sup> See subsections 23(f), 29(3), 31, 32, 33, 38, 39 of the CJ Act and the *Misconduct Tribunals Act 1997*.

<sup>4</sup> While the disciplinary regime under the *Public Service Act 1996* only covers ‘public service officers’, the disciplinary regime under the CJ Act covers all public sector employees, including ‘general employees’ and ‘temporary employees’, who fall within the description of a person holding an appointment in a unit of public administration. See section 3 of the CJ Act.

## 2 Overlap of jurisdictions

### 2.1 Distinction between 'official misconduct' and 'misconduct'

2.1.1 The distinction between official misconduct and misconduct is not always clear. Particular conduct by a UPA office holder, including certain criminal conduct, may fall within the definition of both.

Any inappropriate conduct of a UPA office holder that:

- (i) is related to the performance of his or her duties, *and*
- (ii) amounts to a criminal offence or would reasonably warrant dismissal

should be regarded as official misconduct.

Often an allegation that could constitute official misconduct appears to be about something quite minor, such as a teacher pushing a student or an employee pilfering \$10 from the petty cash tin. The CJ Act requires that allegations of these types be referred to the CJC, because they are allegations of criminal conduct involving the subject officer's duties, and therefore allegations of official misconduct. However, such minor allegations would most likely be immediately referred back to the UPA for any action that the CEO considered warranted.

On the other hand, conduct that relates to an officer's duties but that does not amount to criminal conduct must be quite serious before it can constitute official misconduct.

Examples of more serious **official misconduct** include:

- a public servant cheating on travel allowances
- a residential care officer assaulting a client
- a purchasing officer of a government department accepting 'kickbacks' in the tendering process
- a teacher assaulting a student in his or her care causing injury.

Examples of **misconduct** include:

- using the Internet for personal amusement
- insulting or swearing at clients or customers
- sexual harassment of a non-criminal nature
- a teacher who, while acting as a scout master, abuses children in his or her care.

(The first three examples would not constitute official misconduct because they are probably not serious enough to warrant dismissal. The last example does not relate to the teacher's official duties and so could not amount to official misconduct; but, as the conduct may reflect adversely on the department, it could amount to misconduct.)

2.1.2 Categories of conduct in sections 16 to 20 of the *Whistleblowers Protection Act 1994* (WP Act), which can be the subject of a public interest disclosure under that Act, may amount to official misconduct.

### 2.2 Concurrent jurisdictions

2.2.1 Because a single act can at the one time amount to misconduct, a criminal offence and official misconduct, it is possible that the UPA, the QPS, and the CJC may all need to be involved.

- 2.2.2 It has been suggested that concurrent investigations may be the answer to concerns over the delays that involvement of external agencies may cause in implementing internal reform or discipline. However, concurrent investigations could lead to costly and wasteful duplication of effort and resources, and — by one investigation cutting across another — could damage the integrity and confidentiality of all investigations.
- 2.2.3 For these reasons, the CJC, which has ultimate responsibility for the investigation of official misconduct and for instituting disciplinary action for official misconduct, requires that UPAs take no action on a matter that must be referred to the CJC until receiving advice from the CJC.
- 2.2.4 It should be noted that when a matter is not particularly serious or sensitive or the evidence is clear and straightforward, a formal CJC investigation may not be necessary, even if the matter constitutes official misconduct. In these instances, the CJC will advise the UPA without delay, allowing the UPA to take immediate action.<sup>5</sup>
- 2.2.5 When a matter is referred back to a UPA for action and the conduct constitutes both a criminal offence and misconduct, the UPA may take such disciplinary action as it considers appropriate, having regard to any criminal investigation or charges that may be pending.
- 2.2.6 Of course, there will be times when the CJC may need either to make certain initial inquiries or to await the outcome of a QPS investigation and any court proceedings before determining whether any action by the CJC in relation to the matter is warranted.
- 2.2.7 Although concurrent investigations are not advisable, UPAs do not have to wait to receive a final determination from the CJC on a particular case before dealing with *systemic* management or administrative issues, or *peripheral* disciplinary matters, raised by the case. However, they should first confer with the CJC to ensure the proposed action does not jeopardise a current investigation (see also section 5 of this protocol).

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<sup>5</sup> In some cases, the CJC will require to review the action taken by a UPA (see section 7.1 of this protocol).

## 3 Referral of matters to the CJC

### 3.1 Obligation to refer under the CJ Act

- 3.1.1 If a CEO of a UPA suspects official misconduct, he or she **must immediately** refer the matter to the Complaints Section of the CJC in writing, unless otherwise indicated in this protocol.<sup>6</sup> This obligation is unaffected by qualifications imposed by the WP Act.<sup>7</sup>
- 3.1.2 Where a ‘complaint’ results in a number of matters coming to the attention of the CEO, only one of which must be referred to the CJC, the CJC would appreciate being told about the other matters to ensure that any action the UPA may take will not interfere with any action contemplated by the CJC. Otherwise, the UPA may proceed to take such action in relation to those other matters as it considers necessary.
- 3.1.3 As mentioned, the CEO of a UPA has the duty to report suspected official misconduct. In the CJC’s view, this implies a duty that each CEO establish appropriate internal reporting mechanisms so that instances of official misconduct suspected by or brought to the attention of employees are in turn referred for the CEO’s consideration. The CJC will assist CEOs to develop appropriate procedures.

### 3.2 The referral threshold

- 3.2.1 To help CEOs determine when a matter must be referred to the CJC, the CJC has established a ‘referral threshold’.<sup>8</sup> (See appendix D for a flowchart.)
- 3.2.2 The threshold may be broadly stated as follows:  
Where the CEO is in possession of information that provides a basis on which to suspect official misconduct may have occurred.

### 3.3 Modification of requirement to refer<sup>9</sup>

- 3.3.1 The CJ Act gives the CJC the authority to regulate or modify the reporting requirements imposed upon a CEO.<sup>10</sup>
- 3.3.2 If a CEO seeks regulation or modification, he or she may ask the CJC to issue guidelines. Before complying with such a request, or itself instigating guidelines, the CJC will consult with the CEO.

### 3.4 Action by a UPA relating to a referral

- 3.4.1 To preserve the confidentiality of a matter and ensure that the integrity of any future investigation is not compromised, it is important that UPAs follow certain procedures when referring matters to the CJC.

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<sup>6</sup> See subsection 37(2) of the CJ Act. The section refers to the ‘principal officer ... in a unit of public administration’. See definition of ‘principal officer’ in section 3. The requirement to refer matters involving suspected official misconduct does not affect the obligations of such organisations as the Health Rights Commission to itself investigate the matter.

<sup>7</sup> Section 28 of the WP Act provides that a UPA must not refer a public interest disclosure to another UPA when there is an unacceptable risk of reprisal. However, subsection 28(6) of the WP Act provides that section 28 does not affect another law under which a UPA must refer a report, complaint, information or evidence to another UPA. The example given actually refers to the duty of a principal officer under subsection 37(2) of the CJ Act to refer suspected official misconduct to the CJC and states that this duty is not affected by section 28.

<sup>8</sup> The referral threshold deals only with those matters involving conduct of a public service employee. It should be noted that the conduct in question, which could amount to official misconduct, may be conduct of a member of the public — for example, where a director of a company tendering for work offers a ‘kickback’ to the public service officer who is responsible for choosing the supplier.

<sup>9</sup> See appendix C for an example of reporting guidelines.

<sup>10</sup> See subsection 37(5) of the CJ Act.

- 3.4.2 As a general rule, when a UPA becomes aware of suspected official misconduct, it should take no action (apart from immediately notifying the CJC and making any necessary preliminary inquiries to clarify whether the matter is one that should be referred to the CJC) before receiving advice from the CJC of its initial assessment of the matter (see also section 4 of this protocol).
- 3.4.3 In cases where the UPA needs to take initial steps to:
- preserve evidence or obtain evidence that would not otherwise be available
  - deal with an immediate threat to the safety or welfare of a complainant/whistleblower, potential witness or other member of staff
  - discharge some other obligation under the WP Act
- it should notify the CJC by telephone of the matter immediately.
- 3.4.4 If preliminary inquiries or other steps are unavoidable, the UPA should take care to ensure that the confidentiality or integrity of any later investigation or disciplinary action is not compromised.
- 3.4.5 When a UPA refers a matter to the CJC, it should first confer with the CJC before suspending or transferring the employee under suspicion, if this action would mean informing the employee of the allegations. It is possible that disclosure of the allegations to the employee may compromise a future investigation. Natural justice does not require the subject of an allegation to be advised that the allegation has been referred to the CJC.
- 3.4.6 If the UPA is uncertain as to whether preliminary inquiries or other steps are in order or whether a matter must be referred to the CJC, it should seek advice from the CJC's Complaints Section.<sup>11</sup>
- 3.4.7 Information about suspected official misconduct by a public sector employee that is referred to the CJC is likely to be a public interest disclosure under the WP Act. This means that it is unlawful for any detriment to come to any person because of the disclosure — that is, for the whistleblower to be demoted or overlooked for promotion, transferred to an undesirable location, harassed in any way, or dismissed.
- 3.4.8 When referring a matter to the CJC, the UPA should ensure that all relevant information is included to enable the CJC to assess the appropriate action to be taken.<sup>12</sup>

## 3.5 Matters referred to both the CJC and the QPS

- 3.5.1 Once a CEO becomes aware that the UPA has suffered a loss that may be the result of a criminal offence, the officer is obliged under subsection 42(2) of the *Financial Management Standard 1997* to refer the matter to the QPS and to the Auditor-General. If the CEO suspects that the offence may also involve official misconduct, then the officer must as well report the matter to the CJC.
- 3.5.2 When a matter needs to be referred to both the QPS and the CJC, it would avoid any difficulties arising from overlapping jurisdictions if the UPA notified the CJC and the QPS at the same time.
- 3.5.3 At the time of referring the matter to the CJC, the UPA should let the CJC know if the matter has also been referred to the QPS and, if possible, include the name of the investigating officer at the QPS and the QPS Crime Reporting Information System for Police (CRISP) number.

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<sup>11</sup> Principal Complaints Officer, Deputy Chief Officer (Assessments), or Chief Officer.

<sup>12</sup> See 9.5 'Information to facilitate the process'.

## 4 Initial assessment by the CJC

### 4.1 Upon receipt

4.1.1 Usually within two working days of the Complaints Section receiving a referral from a UPA,<sup>13</sup> or a complaint or information from any other source about the conduct of an office holder, it will:

- assess the information to determine whether the CJC has jurisdiction and, if so, the appropriate course of action, and
- inform the relevant UPA of its determination.

If more information is required from the UPA or any other source before a matter may be properly assessed, the Complaints Section will immediately request it. This may result in a delay in the CJC reaching a determination.

Also, in cases where the material supporting the referral or complaint is extensive and requires consideration by a legal officer for advice, it may take longer than usual for the Commission to make a determination.

4.1.2 If the Complaints Section is advised that the referral is of particular urgency, and all relevant material is available, the matter will be dealt with straightaway. However, the complexity of the matter will dictate the time it will take to reach a determination.

4.1.3 The CJC will tell the relevant UPA of all complaints received from any source affecting one of the UPA's office holders, unless to do so could breach confidentiality or compromise an investigation, or the UPA has made it clear to the CJC that it does not require such information.

### 4.2 After assessment

4.2.1 After assessing the information, the CJC may decide that the alleged conduct:

- (a) requires no further action by it or the UPA; or
- (b) could amount to misconduct and the UPA may take such action as it considers appropriate; or
- (c) could amount to official misconduct but does not warrant investigation or review by the CJC and the UPA may take such action as it considers appropriate; or
- (d) could amount to official misconduct and should be referred to the relevant UPA for investigation and review by the CJC before any disciplinary action is taken; or
- (e) could amount to a criminal offence and official misconduct and should be investigated by the QPS and then reviewed by the CJC; or
- (f) could amount to a criminal offence and official misconduct and should be investigated by the QPS but does not warrant review by the CJC; or
- (g) could amount to official misconduct and should be investigated by the CJC; or
- (h) should be investigated by another agency, e.g. Ombudsman, Health Rights Commission.

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<sup>13</sup> Provided that all relevant and necessary information has been included.

4.2.2 As indicated in 2.1.1, unless the matter referred to the CJC is a significant case of official misconduct, the CJC will most likely refer the matter back to the UPA for action. Again, the CJC will not require to review the UPA's investigation or disciplinary action unless the official misconduct is significant. A matter is deemed 'significant' if it:

- is serious
- involves impropriety at high levels
- involves sensitive issues, or
- has some public-sector-wide implication.
- is indicative of more serious official misconduct
- is widespread.

## 5 Referral to a UPA for action

### 5.1 Misconduct or official misconduct — for such action as considered necessary

- 5.1.1 If the Chief Officer, Complaints considers a matter does not amount to official misconduct but may call for disciplinary action, or could amount to official misconduct but is not sufficiently serious to warrant referral to a Misconduct Tribunal, the Chief Officer will refer it to the principal officer of the UPA for such action as the latter considers necessary.<sup>14</sup>

### 5.2 Official misconduct — for investigation or disciplinary action, or both, and CJC review

- 5.2.1 The Chief Officer may decide that, although the conduct could amount to official misconduct, it does not warrant investigation by the CJC but may be better investigated by the relevant UPA. In referring the matter, the CJC may give direction on how to conduct the investigation and seek to review the investigation.<sup>15</sup>
- 5.2.2 In some cases, the letter of referral will advise that the CJC does not wish to be further involved in the matter. In those cases, the UPA should finalise the matter in accordance with its internal procedures. There is no need to inform the CJC of the outcome.
- 5.2.3 In those cases in which the CJC has indicated it wishes to review the investigation, a UPA shall report to the CJC, every six weeks or as otherwise required by the letter of referral, on the progress of the investigation. No disciplinary action shall be taken by the UPA pending the review by the CJC unless the CJC otherwise approves.
- 5.2.4 Upon review, the CJC may also decide that, although the conduct of the employee could amount to official misconduct, it is not serious enough to warrant proceedings before a Misconduct Tribunal, or that the forensic processes of a Tribunal are not required to resolve the matter, but may be better handled by the internal disciplinary process of the relevant UPA.<sup>16</sup>
- 5.2.5 When the CJC refers a matter that could constitute official misconduct to the relevant UPA, in accordance with the provisions of the CJ Act and the *Misconduct Tribunal Act 1997*, it retains responsibility for overseeing the action taken. The CJC also seeks to maintain accurate and useful data about the disciplinary system within the public sector. Accordingly, the CJC requires the UPA to tell the CJC the outcome of any action taken on the matter.

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<sup>14</sup> See subsection 38(4) of the CJ Act.

<sup>15</sup> See subsection 37(6) of the CJ Act.

<sup>16</sup> See subsections 38(4) of the CJ Act.

## 6 Investigations by the CJC

### 6.1 Time frame for investigation

- 6.1.1 Taking into account the advice given by the UPA at the time of referral, including the seriousness and complexity of the matter and any other relevant factors (such as the number and availability of witnesses), the CJC will advise the UPA of the time frame within which it expects to complete the various stages of its investigation. The time frame may be revised during the course of an investigation as circumstances demand.
- 6.1.2 If the UPA has concerns about the time frame, it may raise these concerns with the CJC, which, if possible, will modify the time frame within existing constraints.

### 6.2 Case management

- 6.2.1 The CJC has developed an enhanced case-management system for the investigation of complaints.
- 6.2.2 A case manager will be appointed for each investigation. A UPA will be given the name of the case manager handling its particular matter. The case manager will be available to the UPA to discuss the matter, and may be contacted informally by telephone.
- 6.2.3 The CJC will give the UPA a written progress report on each investigation every six weeks, or such other time frame as agreed.

### 6.3 Outcome of CJC investigation

- 6.3.1 When the CJC completes an investigation, it may decide that the alleged conduct requires:
- (a) no further action by it or the UPA; or
  - (b) a managerial response by the UPA rather than disciplinary action of a particular employee; or
  - (c) internal disciplinary action by the UPA; or
  - (d) disciplinary action for misconduct, and refer the matter back to the UPA for such action as the UPA considers appropriate;<sup>17</sup> or
  - (e) disciplinary action for official misconduct before a Misconduct Tribunal;
  - (f) prosecution, and refer the matter to the Director of Public Prosecutions, or other appropriate prosecuting authority.<sup>18</sup>
- 6.3.2 During the course of a CJC investigation other allegations of inappropriate conduct may be revealed which can be dealt with either in the above fashion or be referred back to the UPA for investigation and/or disciplinary action.
- 6.3.3 The CJC shall inform the relevant UPA promptly of its decision.

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<sup>17</sup> The CJC acknowledges that when a matter is referred back to the UPA, the unit may need to take further steps within its internal disciplinary process to ensure the subject officer receives natural justice, rather than simply relying on the CJC investigation.

<sup>18</sup> Sometimes more than one of these outcomes may occur in the one matter.

## 7 CJC review process

### 7.1 Review of matters investigated by UPAs

- 7.1.1 Usually within 21 days of receipt of an investigation report, the Complaints Section will review the matter and advise the UPA of its determination. If the matter is particularly urgent, the UPA should inform the CJC of this and the CJC will attempt to accommodate these concerns.
- 7.1.2 The review of such an investigation may result in the CJC determining that:
- (a) no further action is required by the CJC or the relevant UPA; or
  - (b) the matter does not amount to official misconduct or misconduct but reveals a systemic problem and may be referred back to the relevant UPA for a managerial response;
  - (c) the matter amounts to misconduct or official misconduct which does not warrant proceedings before a Misconduct Tribunal and may be referred back to the relevant UPA for such disciplinary or managerial action as it considers appropriate; or
  - (d) further investigation by the CJC or the relevant UPA is required (see 6.1 and 8.2); or
  - (e) a charge of official misconduct should be initiated; or
  - (f) the matter should be referred to the DPP or other prosecuting authority (see 7.2).

### 7.2 Review of matters investigated by the QPS

- 7.2.1 Where a matter is being investigated by the QPS the CJC may have to await the outcome of the QPS investigation and any subsequent court proceedings before deciding whether the matter should go to a Misconduct Tribunal or back to the UPA for internal disciplinary action.
- 7.2.2 However, from time to time, the CJC will review interim investigation reports of QPS investigations to identify as early as possible those matters that do not warrant any further action by the CJC or proceedings before a Misconduct Tribunal and may be referred at once to the relevant UPA for determination.
- 7.2.3 Upon receiving a final QPS investigation report, or advice of the outcome of court proceedings, the Complaints Section will, within 21 days of receipt, review the matter to decide on the best course of action and advise the relevant UPA. Such review may result in the CJC determining that:
- (a) no further action is required by the CJC or the UPA; or
  - (b) there is insufficient evidence to substantiate official misconduct or misconduct but the investigation reveals a systemic problem and should be referred back to the relevant UPA for a managerial response;
  - (c) the matter involves misconduct or other cause for taking disciplinary action and should be referred back to the UPA for such disciplinary or managerial action as it considers appropriate; or
  - (d) the matter could amount to official misconduct but should be referred back to the UPA for consideration of disciplinary or managerial action by the UPA; or
  - (e) further investigation by the CJC, the QPS or the UPA is required; or
  - (f) a charge of official misconduct should be initiated before a Misconduct Tribunal.

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## **8 Action a CEO may take during a CJC/QPS investigation**

### 8.1 Systemic management or administrative issues

8.1.1 As stated in 2.2.7, a UPA does not have to wait until it receives a final determination from the CJC (either upon initial assessment or following a CJC investigation or review of a QPS investigation) about the alleged misconduct of an employee before it can deal with any systemic management or administrative problem that has been revealed by the complaint.

8.1.2 However, to ensure such action does not cut across an investigative strategy, the UPA should let the CJC know its intentions.

### 8.2 Peripheral disciplinary issues

8.2.1 If a UPA considers that there are other minor disciplinary issues

- directly or indirectly related to a matter referred to the CJC, or
- otherwise concerning the officer, the subject of the matter referred to the CJC

that could be dealt with internally, it should confer with the CJC to ensure that the main investigation (or any subsequent criminal prosecution, or any future disciplinary action that the CJC may wish to take or recommend) is not compromised.

8.2.2 If the action contemplated by the CJC will not be compromised, the UPA can proceed with the internal disciplinary action, keeping the CJC informed of the outcome because it could affect a CJC investigation (e.g. if the UPA dismisses the subject officer).

## 9 Other referral and investigation issues

### 9.1 Reporting arrangements

- 9.1.1 Where the CJC's investigation stems from information provided by a UPA, any report provided by the CJC to a UPA will be consistent with any request made under section 32 of the WP Act by a UPA or its office holders who report suspected official misconduct.<sup>19</sup>

### 9.2 Provision of investigation report

- 9.2.1 When the CJC refers a matter to a UPA, it will provide the unit with a copy of the CJC's investigation report or the QPS's investigation report, if any, for the purpose of assisting the UPA to consider and, if necessary, take the appropriate action. As the report is provided on a confidential basis, if it becomes the subject of any Freedom of Information application, subpoena, other coercive power, or other request for disclosure, the UPA should confer with the CJC before releasing the report.

### 9.3 Review of suspension or transfer of employee

- 9.3.1 If during an ongoing CJC, QPS or UPA investigation to be reviewed by the CJC, a UPA needs to reconsider the position of the employee under investigation (e.g. review the terms of any suspension or transfer), the UPA should confer with the CJC.<sup>20</sup>
- 9.3.2 Based upon the information available at that stage of the investigation, the CJC will promptly either:
- (a) advise the UPA that it has no objection to the UPA taking such action (disciplinary or managerial) as is considered appropriate — but only after deciding that the matter will not need to go before a Misconduct Tribunal; or
  - (b) where the CJC is the investigating agency, provide a detailed interim report to assist the CEO to consider whether the suspension or transfer remains justified, and decide on any necessary further action.

### 9.4 Delays in completion

- 9.4.1 If, for any reason, a UPA considers that its position, or that of a work unit or an employee or victim, may be prejudiced by a delay in completing an investigation, it should let the CJC know at once.
- 9.4.2 Based upon the information then available, the CJC will promptly:
- (a) refer the matter back to the relevant UPA for such action (disciplinary or managerial) as is considered appropriate — but only after deciding that the matter will not need to go before a Misconduct Tribunal; or
  - (b) advise the UPA of when its final determination will be made and give the UPA a detailed interim report to assist the CEO to take such action as is necessary to protect the interests of all concerned (e.g. the UPA, the work unit, the employee, the victim).

In any case, the CJC may also provide advice on any proposed managerial action to minimise the prejudicial impact of the investigation on the functioning of the workplace.

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<sup>19</sup> Section 32 means that, if requested by a UPA, the CJC must give the UPA 'reasonable information about action taken' in relation to a public interest disclosure reported by the UPA.

<sup>20</sup> Includes an investigation by the CJC or the QPS or by a department or local government where the CJC has referred the matter for investigation only and subsequent referral back to the CJC.

#### 9.4.3 If:

- after an investigation, the CJC is to refer a matter to the Director of Public Prosecutions or other prosecuting authority, or
- the CJC is itself to proceed with a further investigation upon receiving a final investigation report from the QPS or a UPA,

the CJC will confer with the UPA to see what concerns, if any, arise from any further delays, and respond to those concerns.

### 9.5 Information to facilitate the process

9.5.1 To help the CJC set priorities, UPAs should keep the CJC informed about the status of the employee under investigation<sup>21</sup> — that is, whether the employee has been suspended with or without pay or has been transferred or resigned, or whether industrial action is pending or has commenced (and, if so, the stage such action has reached). If a UPA employee under investigation resigns or is dismissed for other reasons, the relevant UPA should tell the CJC at once.

9.5.2 Each UPA shall ensure that the CJC has a copy of the UPA's:

- current internal policy/guidelines for the referral internally to the CEO, and externally to the CJC, of suspected official misconduct, (which may form part of a broader organisational policy on whistleblowing)
- current internal discipline policy/guidelines
- Code of Conduct under the provisions of the *Public Sector Ethics Act*, if any
- procedures for the protection of whistleblowers in accordance with section 44 of the WP Act.

9.5.3 Upon request, the CJC shall help a UPA develop or modify its internal policies or guidelines relating to the referral of suspected official misconduct or to the disciplinary process.

9.5.4 A UPA may seek from the CJC any information that it needs to manage and administer its internal disciplinary process more effectively. As far as practicable and without breaking confidentiality obligations, the CJC will give such information.

9.5.5 The CJC may seek from a UPA such information as it may need to assist the CJC's initial assessment, investigation, or review, including:

- the full name, position and work location of the subject officer
- whether the subject officer is suspended or transferred pending the outcome of an investigation
- full details of the allegations
- any known available evidence or source or potential source of evidence
- what preliminary steps, if any, have been taken by the UPA
- the urgency and/or sensitivity of the matter from the UPA's point of view
- the names of other parties affected by the matter.

9.5.6 When practicable, the CJC will from time to time disseminate to each UPA a schedule profiling the types of matters relevant to the UPA.

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<sup>21</sup> This requirement does not relate to matters referred to the CJC under guidelines issued pursuant to section 37(5) of the CJ Act.

## 10 General issues

### 10.1 Communication

- 10.1.1 UPAs naturally wish the CJC to handle their complaints speedily and well. For this to happen, they must ensure that the CJC is given all relevant information and kept informed of any further developments. Likewise, the CJC must keep the UPAs informed of the progress of its investigation, not merely the outcome. In some cases, the CJC may confer with relevant officers within the UPA concerning appropriate investigative strategies.
- 10.1.2 Communication between the two bodies does not always need to be in writing — informal telephone calls may be all that is required at the time with confirmation later in writing, where necessary. Many a potential crisis can be resolved quickly over the phone.

### 10.2 Whistleblowers

- 10.2.1 In dealing with any matter referred to the CJC, both the CJC and the relevant UPA will take into account the provisions of the WP Act and the CJ Act for the protection of whistleblowers. A UPA must establish reasonable procedures to protect its officers from reprisals arising as a result of a public officer reporting suspected official misconduct.<sup>22</sup> A UPA and the CJC must maintain the confidentiality of a report of suspected official misconduct, except as permitted by the WP Act or CJ Act.<sup>23</sup>
- 10.2.2 Also, the CJC will have regard to the provisions of the CJ Act concerning the protection of persons from intimidation, harassment, prejudice to personal safety or career, or other victimisation as a result of having given evidence, or information, to the CJC.<sup>24</sup>
- 10.2.3 The UPA and the CJC must maintain statistical records of public interest disclosures made in accordance with the WP Act.<sup>25</sup> Where it is clear to the CJC that a report of suspected official misconduct has been made within a UPA and afterwards referred to the CJC, the CJC shall assume that the UPA has statistically recorded the report as a public interest disclosure and will not duplicate this record. The CJC shall statistically record reports of suspected official misconduct as public interest disclosures when it is clear to the CJC that the report has been made directly to the CJC by a public officer.
- 10.2.4 If an organisational problem experienced by a whistleblower (because of a public interest disclosure) is found by the CJC not to involve conduct within its investigative jurisdiction, the CJC — with the consent of the whistleblower — will let the relevant UPA know the nature of the problem and offer a resolution.

### 10.3 Procedural recommendations made by the CJC<sup>26</sup>

- 10.3.1 The CJC may make procedural recommendations to a UPA arising from any matter considered by the Complaints Section or the Official Misconduct Division. Any recommendation shall be in writing and will clearly outline the terms of the recommendation and identify the problem that the recommendation is intended to address.

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<sup>22</sup> See section 44 of the WP Act.

<sup>23</sup> See section 55 of the WP Act.

<sup>24</sup> See sections 103–104, 130–131 of the CJ Act.

<sup>25</sup> See sections 29 and 30 of the WP Act.

<sup>26</sup> See sections 29(3) and 23(l) of the CJ Act.

10.3.2 A UPA shall consider every recommendation made to it by the CJC and, if it has any concerns, discuss them with the CJC before deciding whether to implement the recommendation. The UPA shall inform the CJC in writing of its response to all recommendations.

10.3.3 A recommendation that has been implemented by a UPA will be followed up by the CJC after an agreed time has elapsed, or sooner if the UPA is agreeable, to see whether it has been effective in addressing the problem identified or requires modification or revocation.

## 10.4 Corruption prevention

10.4.1 As a result of a matter being considered by the CJC, the CJC may invite a UPA to seek the assistance of its Research and Prevention Division, which provides risk assessments and management reviews.

10.4.2 To aid in the detection and prevention of official misconduct, the CJC shall, from time to time, give the UPAs that are parties to this protocol information and advice on issues relevant to complaints against UPA office holders, at a departmental, agency and local government level and generally across the public sector.

10.4.3 The parties to this protocol shall work together to develop strategies to meet the identified areas of concern.

10.4.4 The parties shall meet every six months, or as otherwise requested by the parties, to discuss matters of concern and other issues relevant to the disciplinary process.

## 10.5 Audit role

10.5.1 To improve the management of the disciplinary process, the CJC shall, as soon as practicable after the commencement of this protocol, develop a proposal to re-focus and enhance its review function through a new audit strategy.

10.5.2 All the parties to this protocol will be consulted during the development of the proposal.

## 10.6 CJC Liaison Officer

10.6.1 To simplify communication between UPAs and the CJC, each UPA shall ensure that:

- an officer undertakes the role of ‘CJC Liaison Officer’, and
- the appointed ‘CJC Liaison Officer’ is kept informed of all matters referred to the CJC.

## 10.7 Right of appeal against a CJC determination

10.7.1 There is no formal avenue of appeal by a UPA against a CJC determination on the appropriate action to be taken in respect of a complaint, other than referral of any concerns to the PCJC.<sup>27</sup> However, referrals by the CJC to a UPA for internal disciplinary action are recommendations only.

10.7.2 Section 34 of the CJ Act provides for judicial review of the activities of the Official Misconduct Division by a person who claims that an investigation is being conducted unfairly or a complaint does not warrant an investigation.

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<sup>27</sup> The role of the PCJC is outlined in Part 4 of the CJ Act.

## 10.8 Modification of provisions of protocol

### 10.8.1 **Public-sector-wide amendments**

If a UPA seeks an amendment to the provisions of this protocol that may affect other parties, it should notify the CJC in writing. The CJC will consider the proposed amendment and, if necessary, circulate it to all other parties for comment. Similarly, if the CJC wishes to make an amendment it will circulate the proposal to all parties for comment.

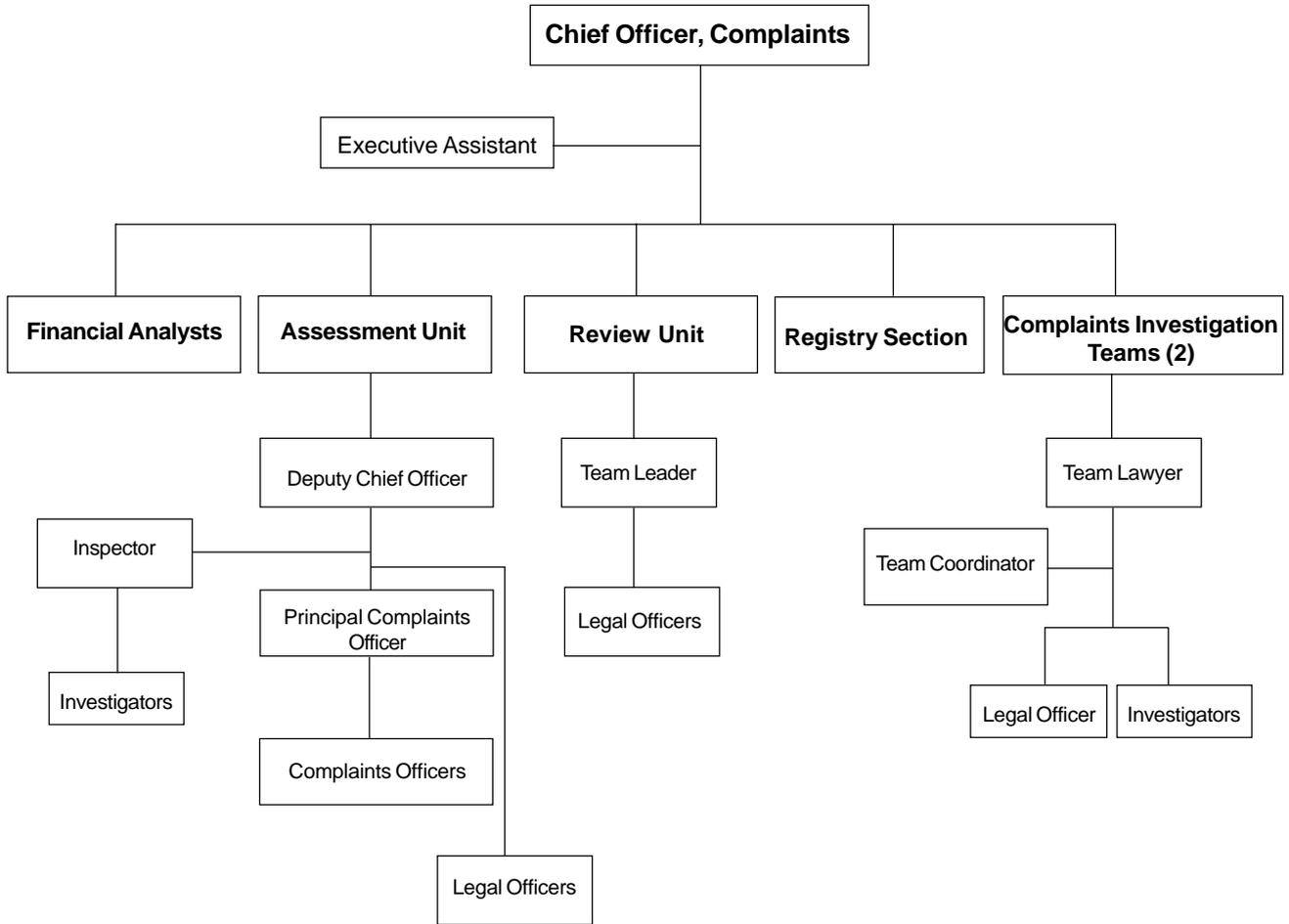
The CJC will provide an opportunity for all interested parties to comment on the proposal and, if necessary, will hold a meeting to discuss any issues arising from the amendment.

If the majority of the parties to this protocol agree, the protocol will be amended as proposed.

### 10.8.2 **UPA-specific amendments**

If a UPA seeks an amendment specific to its own situation, then it should notify the CJC, which will discuss the matter with the UPA and come to an agreement.

## Appendix A: The Complaints Section



## Appendix B: Definitions

### Official misconduct

‘**Official misconduct**’ is defined in section 32(1) of the *Criminal Justice Act 1989* as conduct that:

- directly or indirectly adversely affects or could adversely affect the honest and impartial discharge of official/public functions or responsibilities (whether or not the person engaging in the conduct is a public service employee or local government employee); or
- constitutes or involves the discharge of functions or responsibilities in a manner which is not honest or impartial; or
- constitutes a breach of the trust placed in an individual employee by reason of his or her position; or
- involves a misuse of official information

and which constitutes or could constitute:

- a criminal offence; or
- a disciplinary breach that provides reasonable grounds for termination of the employee’s employment.

### Misconduct

‘**Misconduct**’ is defined in section 87(2) of the *Public Service Act 1996* as:

- disgraceful or improper conduct in an official capacity; or
- disgraceful or improper conduct in a private capacity where that conduct reflects seriously and adversely on the public service.

Section 4 of the *Local Government Act 1993* defines ‘**misconduct**’ as:

- disgraceful or improper conduct that shows unfitness to be or to continue as a local government employee; or
- behaviour that does not satisfy a standard of behaviour generally expected of local government employees; or a contravention of a provision of the *Local Government Act* or another Act setting out what the employee must or must not do (whether or not the Act provides for a penalty for contravening the provision.)

Section 36 of the *City Service Ordinance 1972* states that a ground for discipline includes:

- disgraceful or improper conduct or any act or conduct showing the unfitness of the employee to continue in the service of the Council.

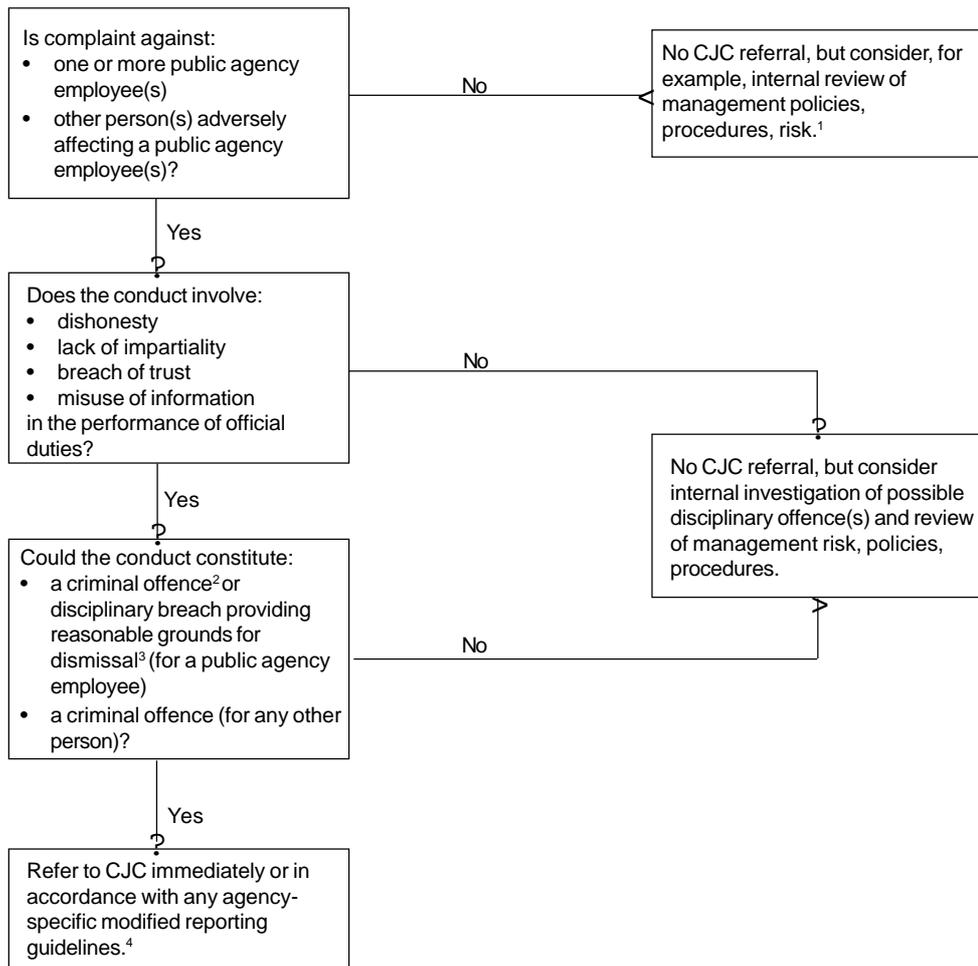
## Appendix C: Reporting Guidelines

Guidelines issued by the CJC to the Director-General of the Department pursuant to the *Criminal Justice Act 1989*

Pursuant to s. 2.38(5) of the *Criminal Justice Act 1989* (the Act), the Criminal Justice Commission (CJC) hereby issues the following guidelines to regulate and modify the duty imposed upon the Director-General of the Department by s. 2.28(2)(b) of the Act to refer to the Complaints Section of the CJC all matters the Director-General suspects involve or may involve official misconduct, within the meaning of the Act.

- (1) Where a complaint containing an allegation of assault only which could amount to official misconduct is made against an officer of the Department, the Director-General need not refer the complaint immediately to the Complaints Section if **all** of the following criteria are satisfied:
  - (a) the facts surrounding the incident are reasonably clear and the seriousness of the incident can be accurately ascertained;
  - (b) there is no evidence of injury/sexual contact or likelihood of further injury or danger to the child or other children;
  - (c) the victim or, where the victim is a child, the parents/guardian of the victim do/does not wish the matter to be referred to the CJC or to the Police Service for investigation;
  - (d) the Director-General is not aware of any previous complaint of assault made against the officer in which it was alleged an injury was caused to a student.
- (2) Where the Director-General, acting pursuant to guideline (1) does not immediately refer a matter to the Complaints Section, the Director-General shall take appropriate action to investigate or otherwise deal with the complaint and shall advise the Commission of the action taken.
- (3)(a) The Director-General shall provide to the Complaints Section, on a monthly basis, a schedule listing all complaints made in the preceding month which could amount to official misconduct and which, pursuant to guideline (1), were not immediately referred to the Complaints Section.
  - (b) The schedule shall contain the following details in respect of each complaint:
    - the complainant's name
    - the name of the alleged victim if he or she is not the complainant
    - the age of the alleged victim
    - the name of the officer the subject of the complaint
    - the position held by that officer
    - a precis of the complaint
    - the action taken by the Department
    - any further action proposed by the Department
- (4) The Director-General must not take any disciplinary proceedings for an alleged assault by an officer where the available evidence shows that:
  - (a) a prima facie case of official misconduct exists; and
  - (b) the matter is more serious than when assessed pursuant to guideline (1) without the prior approval of the Chairman of the CJC.

## Appendix D: Referral Threshold



### Notes:

1. Public agency should *not* conduct a preliminary inquiry if it could reasonably be expected to alert the subject employee(s) or otherwise compromise a subsequent investigation.
2. For example, theft, misappropriation, fraud, forge, utter, bribery, official corruption, assault, arson, public agency employee having a private interest in a contract with the agency, false claim by agency employee, receipt of secret commission, reprisal for a public interest disclosure (s. 41 of WP Act).
3. For example, serious (not minor) conflict of interest, serious (not minor) failure to perform official duties.
4. In addition to satisfying the threshold criteria, there may be a range of other considerations which the CJC should be made aware of upon referral, for example:
  - any particular sensitivity attaching to the matter
  - impact on another public agency or jurisdiction
  - referral to another agency, e.g. QPS, Audit Office
  - possible relationship with other known CJC investigations or areas of interest
  - complaint is considered false, frivolous or vexatious
  - is complainant a whistleblower (i.e. has the person made a public interest disclosure)? Is there a fear or likelihood of reprisal?