

Setting the standard

A review of current processes for the
management of police discipline and
misconduct matters

December 2010

CRIME AND
MISCONDUCT
COMMISSION



QUEENSLAND

CMC vision:

That the CMC make a unique contribution to protecting Queenslanders from major crime, and promote a trustworthy public sector.

CMC mission:

To combat crime and improve public sector integrity.

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Dear Sirs

In accordance with section 69 of the *Crime and Misconduct Act 2001*, the Crime and Misconduct Commission hereby furnishes to each of you its report '*Setting the standard: a review of current processes for the management of police discipline and misconduct matters*'.

The Commission undertook this report at the request of the Attorney-General in November 2009, for the Crime and Misconduct Commission '*to conduct an independent review of current processes for the management of police discipline and misconduct matters*' pursuant to section 52(1)(c) of the *Crime and Misconduct Act 2001*.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Martin Moynihan', with a long, sweeping flourish extending to the right.

Martin Moynihan AO QC
Chairperson

FOREWORD

This is the third in a series of recent reports in which the Crime and Misconduct Commission (CMC) has drawn public attention to ethical standards and practice within the Queensland Police Service (QPS). The first of these was *Dangerous Liaisons*, published in July 2009, which reported on our investigation into allegations of police misconduct. The second was our *Review of the QPS's Palm Island Review*, published in June 2010.

Both of these reports dealt with specific allegations of inappropriate conduct by police officers. Our examination of those matters put the QPS discipline system in the spotlight, and revealed some notable deficiencies. However, it is important to note that the good conduct of the majority of police officers means that they never come within the purview of the discipline system.

This report arose out of a referral from the Attorney-General to review processes for managing police discipline and misconduct in Queensland. In one sense, this could be considered the most important of the three reports because it gives us an opportunity to consider, not simply isolated incidents, but the discipline system as a whole, which was characterised in a number of public submissions focusing on government accountability as overly complicated, inconsistent and unsatisfactory for all concerned.

In many instances, the current system works well — efficiently, effectively and fairly — when there is commitment to making it do so, and many examples of disciplinary processes undertaken by the QPS could have been used to illustrate this. However, the object of this report is to examine what is *not* working well, and the case studies chosen have been selected to illustrate the areas in which the system is vulnerable.

In this report, we have made a number of recommendations intended to significantly strengthen the police discipline system. Our aim is to ensure that it will be fair to all those who come in contact with it, whether they be serving officers or members of the public, and that it will thereby promote community confidence in the QPS.

The CMC will work with the QPS to give effect to the recommendations aimed at improving the discipline framework, policies and procedures, and to resolve the issues discussed in this report. However, the success or otherwise of the discipline system will depend on the willingness and commitment of individual officers to ensure it is administered in a way that does not lose sight of its purpose. The QPS must demonstrate the will to make the system work, as it is ultimately responsible and accountable for any failure to meet the standards expected by the community.

Martin Moynihan AO QC
Chairperson

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The Queensland Police Service, the Department of Justice and the Attorney-General, and the Department of the Premier and Cabinet all contributed resources and expertise to the project. We are especially grateful to the QPS, which established a dedicated project team, the Discipline Review Unit, to coordinate all requests and provide expert advice. Without the valuable input of all these individuals, this review would not have been possible.

LIST OF ABBREVIATIONS

AFP	Australian Federal Police
CEO	chief executive officer
CJC	Criminal Justice Commission
CLOC	Commissioner's loss of confidence
CM Act	<i>Crime and Misconduct Act 2001</i>
CMC	Crime and Misconduct Commission
CSS	Client Service System
DPP	Director of Public Prosecutions
ESC	Ethical Standards Command (QPS)
FTE	full-time equivalent
ICAC	Independent Commission Against Corruption
IRC	Industrial Relations Commission (New South Wales)
LSC	Legal Services Commission
NSWPA	New South Wales Police Association
NSWPS	New South Wales Police Service
OPI	Office of Police Integrity (Victoria)
PCMC	Parliamentary Crime and Misconduct Committee
PIC	Police Integrity Commission
PPM	professional practice manager
PSA	<i>Penalties and Sentences Act 1992</i>
PSA Act	<i>Police Service Administration Act 1990</i>
PSA Reg	Police Service Administration Regulation 1990
PSC	Public Service Commission
PSD Reg	Police Service (Discipline) Regulations 1990
PSMC	Public Sector Management Commission
QCAT	Queensland Civil and Administrative Tribunal
QPF	Queensland Police Force
QPS	Queensland Police Service
QPUE	Queensland Police Union of Employees
SDPC	Service Delivery and Performance Commission
TAC	Transfer Advisory Committee

SUMMARY

Context of the review

In August 2009, the Queensland Government published a discussion paper, *Integrity and Accountability in Queensland*, inviting public comment on the state's accountability framework. The management of police discipline and misconduct matters was a significant focus of the discussion paper, which posed two key questions relating to the conduct of public officers:

- Are the mechanisms to find unacceptable behaviour [by public officers] sufficient?
- Are the sanctions for unacceptable behaviour [by public officers] sufficient?

In response to these questions, the Queensland Government received over 100 written submissions, including a significant number expressing concerns about the current discipline processes applying to members of the Queensland Police Service (QPS).

In November 2009, the Attorney-General therefore requested the Crime and Misconduct Commission (CMC) 'to conduct an independent review of current processes for the management of Police discipline and misconduct matters', and deliver a report on the review to him by 30 June 2010.

Methodology of the review

In conducting the review, the CMC consulted about police discipline processes with QPS officers at various ranks statewide, the Queensland Police Union of Employees (QPUE), interstate police and police oversight agencies. We examined a range of documents and data relating to the QPS since the Fitzgerald Inquiry, police discipline systems more generally, and complaints against police. The review focuses on the processes applying to sworn police officers, not police recruits or civilian staff members of the QPS, in recognition of the fact that the conduct of police officers is the most critical and visible reflection of the professional standards and reputation of the QPS.

The primary object of this report is to make and justify recommendations which, if implemented appropriately, will ensure that Queensland has an effective and fair system for ensuring police accountability and integrity.

Part 1 provides the background to the review and describes its scope and methodology.

Part 2 of the report focuses on the discipline system in principle. It discusses the characteristics of a police discipline system, proposes a model system drawn from an examination of literature detailing the findings of past reviews, and looks at the organisational context, legislative framework and structure of the system currently in place in the QPS.

Part 3 discusses the QPS discipline system as it currently operates, illustrated by case studies to highlight particular issues. It examines the gap between the system in theory and its evidence in practice, and makes recommendations for improving the system and closing this gap.

The discipline system in principle

A discipline system is primarily concerned with protecting the integrity of an organisation and its ability to effectively carry out its charter, and with maintaining public confidence in its ability to do so.

Broadly speaking, police discipline systems take either a punitive or a remedial approach. The former involves formal procedures focused on sanctions designed to penalise subject officers and deter similar behaviour. A remedial system is less formal, and is aimed at improving performance through managerial strategies. Discipline systems skewed exclusively towards either of these approaches have inherent problems. In the CMC's view, the ideal is a discipline system that is not wholly defined by either, but is flexible enough to deal with a range of behaviours and desired outcomes.

There is sometimes confusion about the difference between the police discipline system and the criminal justice system. One critical difference is the reason each has for imposing 'penalties'. Under the criminal justice system, sentences are imposed with the objects of deterrence, rehabilitation and exaction of retribution on the offender on behalf of the victim and the community. However, while deterrence and rehabilitation are objectives of the discipline process, it does not involve the idea of retribution, as it is an administrative procedure related to employment.

A model police discipline system

The QPS discipline system has been examined and reviewed in a number of inquiries over the last 20 years. The 1989 report of the Fitzgerald Inquiry set the benchmark for a range of subsequent reviews into various aspects of policing in Queensland, including the police service's discipline processes and professional standing (see Appendix D). A significant volume of academic study, within Australia and internationally, and a number of highly publicised integrity inquiries and reviews have also been devoted to, or have touched on, discipline systems and processes in policing organisations.

To develop a model police discipline system as a starting point for our discussion of the current QPS system, we examined the current QPS discipline system and considered the findings and recommendations of past reviews and inquiries. This examination revealed that the essential attributes of a good discipline system are simplicity, effectiveness, transparency and strength. We then examined each of these in detail to determine their constituent features.

Simplicity

A good discipline system is as *simple* as possible. It is clear about matters of substance and process, and is no more complex and resource-intensive than is necessary to achieve its purpose.

- The system is *clear* about standards of behaviour, expectations of the organisation, and consequences of failure to comply with the rules.
- It delivers *timely* action and outcomes.
- It demonstrates a *targeted* use of resources in any particular case.

Effectiveness

An *effective* discipline system is one that achieves its intended purpose. This can be judged by the outcomes it delivers for the organisation.

- The system *improves* individual, supervisory and organisational performance, policies and systems.
- It *deters* future misconduct.
- It is capable of *protecting* the interests and reputation of the organisation.

Transparency

A discipline system is *transparent* if the validity of its processes and outcomes is self-evident.

- It is demonstrably *fair* and free of bias.
- It is *consistent*, with clearly understandable methods and logic.
- It is *accountable* for its decisions and actions.

Strength

A **strong** discipline system is sustained by organisational will and action.

- It is *supported* by an ethical leadership that promotes a robust, self-reflective and learning-focused culture.
- It is reinforced by *proactive* strategies aimed at promoting good behaviour and preventing inappropriate behaviour.
- It enables the organisation to deal *responsibly* with inappropriate conduct.

The current QPS police discipline system

The QPS police discipline system sits within a legislative framework, principally governed by the *Police Service Administration Act 1990* (PSA Act) and the *Crime and Misconduct Act 2001* (CM Act). This framework is supported by a number of internal policy documents including the *QPS Operational Procedures Manual*, the procedures for 'Discipline and Complaint Management' in the *QPS Human Resources Manual* and the *QPS Code of Conduct* (which is provided as Appendix B of this review).

The system comprises principles and rules about the appropriate standards of conduct and behaviour expected of police officers, and processes for identifying and dealing with any failure to meet the expected standards. These include a complaints management process and a disciplinary process.

Roles and responsibilities

Within the QPS, the Ethical Standards Command (ESC) manages the internal discipline process and is responsible for promoting ethical behaviour and professional practice. While all areas within ESC contribute to its core responsibility of managing the internal complaint system and promoting ethical behaviour and professional practice, the Internal Investigations Branch and Ethical Practice Branch have greater direct involvement in the discipline system. In addition, the position of professional practice manager (PPM), which reports directly to an assistant commissioner or director, oversees the handling of complaints in each region or command.

The QPS is a highly dispersed organisation where officers are required to work independently outside the confines of a traditional workplace, often with little direct supervision. They deal outside mainstream society, with marginalised and criminal elements and are required to police the borders of socially acceptable conduct. These factors contribute to the disproportionately high volume of complaints attracted by the police service, compared with the number attracted by other occupations in the public sector.

The steps in the system

When a complaint about police behaviour enters the system, it is processed through the five principal steps of assessment, inquiry, action, outcome, and review. Both the QPS and the CMC have roles and responsibilities in this process.

Chapter 4 provides a detailed overview of what happens in each of these steps, and how the system is designed to operate.

The discipline system in practice

Discussion and recommendations

Setting the standard — the QPS Code of Conduct

A code of conduct and associated rules which set standards of practice are an essential reflection of the values of an organisation and send a powerful message to employees about expected standards of behaviour. The current QPS Code of Conduct contains no explicit

statement about the values of the police service, and in the CMC's view it fails to promote the QPS as an organisation of integrity that values accountability.

Although the code defines ethical principles and obligations, it does not link them to specific standards of conduct, so the connection between principle and practice is not clearly evident. It also efficiently sets out a number of standards of behaviour for police officers, and provides some practical examples of ethical decision making, but does not explain the reasons for these requirements. As well, the code fails to adequately or accurately describe a police officer's obligation to report misconduct, or refer to their statutory obligation to do so under the PSA Act.

While the code outlines the consequences of breaching its terms, it does not indicate that a breach involving misconduct will be referred to the CMC, and that the CMC may itself choose to investigate the matter. The CMC believes that the code must clearly state that a breach of its terms may render an officer liable to disciplinary action, and potentially the imposition of a disciplinary sanction.

The code does not stipulate that a breach involving criminal conduct may render an officer liable to criminal prosecution, nor indicate how seriously any particular breach will be treated, nor give any indication of possible sanctions. In the CMC's view, the QPS should provide guidelines identifying specific disciplinary breaches and the likely sanction(s). This would send officers an unambiguous message about expected behaviour and the consequences of failing to meet these expectations. It would also ensure more consistent disciplinary outcomes and reduce the number of review and appeal proceedings.

To ensure consistently high standards and promote awareness of the values that underpin public service (such as integrity and impartiality, promotion of the public good, and accountability and transparency) the Queensland Government has decided to develop a single code of conduct for the Queensland public sector (which includes the QPS). Under this new code, it is intended that agencies prepare their own 'standard of practice' incorporating additional standards of conduct and behaviour particular to the agency. This gives the QPS an opportunity to address problems identified in its current code of conduct by developing a supplementary standard of practice and improved policies consistent with the ethics principle and values in the *Public Sector Ethics Act* and the single code of conduct.

Recommendation 1

The CMC recommends that the QPS develop a standard of practice and enhanced policies complementary to the proposed Queensland public sector code of conduct with a view to ensuring that:

- a. where inappropriate conduct is identified, it is linked to a clear ethical rationale**
- b. indicative sanctions are identified for more serious, systemic and problematic misconduct.**

Clarifying reporting obligations

The obligation on a police officer to report allegations of, or information about, suspected misconduct is a necessary condition for maintaining public confidence in the integrity of the police service. All police, including the Commissioner, have a statutory obligation to report misconduct by police under the PSA Act. The Commissioner has a further statutory obligation to report suspected misconduct under the CM Act.

However, these Acts differ in relation to the definition of misconduct, what must be reported, who is required to report, and what the officer has to know or believe before the obligation to report arises. These anomalies can result in the failure of police officers to report allegations or information about misconduct either to the CMC or to the Commissioner of Police, over-reporting, or the waste of time and resources debating whether a matter should be reported.

It is essential to the validity of the QPS integrity framework that the statutory definitions of inappropriate conduct and the statutory obligation to report it are described clearly, simply and consistently, irrespective of whether the obligation is imposed on the Commissioner of Police or a member of the QPS.

Recommendation 2

The CMC recommends that the Queensland Government amend the *Police Service Administration Act 1990* and the *Crime and Misconduct Act 2001* to ensure there is consistency in:

- a. the definitions of misconduct**
- b. the tests imposing an obligation on the Commissioner of Police and members of the police service to report misconduct by a member the QPS.**

Improving timeliness

Timeliness and the appropriate and effective use of resources are vital for maintaining public confidence in the police service. In their submissions to the Parliamentary Crime and Misconduct Committee's (PCMC) three-yearly review of the CMC in 2008, both the QPUE and QPS staff and managers consistently reported that finalisation of disciplinary matters often took far too long, with significant negative effects on service delivery and all those concerned.

Over time the CMC has improved its timeliness in assessing complaints and continues to further do so by categorising them according to the level of seriousness and risk, and extending the Commission's delegation of authority for assessing less serious, lower-risk matters to staff at an appropriate level. A complementary improvement has been achieved by allowing the QPS to deal with less serious complaints without first notifying the CMC. Although this has reduced double-handling of some complaints, this is still a problem in other areas.

There is currently significant duplication of effort at the *assessment* step of the discipline process (see Fig. 13). For example, a misconduct complaint received at a local police station must be assessed by the region in which the station is located, the ESC and the CMC. Though there is a small filtering effect as information proceeds through the process, this multi-handling compromises timeliness.

At the *action* step of the process, disagreement about the action to be taken, the predicted outcome, or the appropriate sanction causes delays, with the matter stagnating or oscillating between officers with differing views. The CMC believes that providing clear guidelines on indicative sanctions would markedly reduce time spent resolving such disagreements and bring matters to a speedier conclusion. The CMC is also of the opinion that a review of the processes, skills and resourcing of the ESC Legal and Policy Unit warrants consideration, as does the appointment of a deputy or assistant commissioner with primary responsibility for hearing and determining all disciplinary allegations involving misconduct, with breach of discipline allegations being dealt with by a senior officer at regional/command level.

At the *inquiry* step, the process splits into two or more streams of activity in an effort to improve timeliness and provide a better match of resources. This can make it difficult, if not impossible, to move between streams without retreating back to the point of departure, so that once embarked on a particular course of action, the tendency is to pursue it, even though circumstances may have changed. The casualty is timeliness; the result a misapplication of resources and poor or inappropriate outcomes. The CMC recommends a review of work flows to reduce complexity, identify choke points, and develop appropriate remedies.

Timeliness is also affected when a complaint against a police officer becomes intertwined or concurrent with a proceeding in the criminal justice system. To avoid such delays it is essential that the discipline system be able to operate independently of the criminal justice system.

The practice of officers taking extended sick leave while they are under investigation or after disciplinary proceedings have been initiated also affects the time taken to resolve disciplinary matters. In the CMC's view, measures such as allowing a subject officer to submit a written response in lieu of a formal interview, or conducting a disciplinary hearing by telephone or video link, and providing specific guidelines for pursuing the timely medical retirement of relevant officers should be considered.

Recommendation 3

The CMC recommends that the QPS, in consultation with the CMC, review the relevant policies and procedures, steps and processes in the current system for the management of police complaints and discipline with a view to:

- a. reducing the level of complexity in the system**
- b. identifying clearer and simpler work flows for managing and dealing with misconduct and other inappropriate conduct**
- c. identifying and developing strategies to address potential choke points in the system caused by inadequate resourcing**
- d. identifying and assessing work-flow risks and articulating appropriate treatments**
- e. incorporating the recommendations made in the audit report (Appendix C), and giving officers adequate training in conducting preliminary inquiries and making assessment decisions about complaints 'interwoven with court'**
- f. putting timeframes on key steps in the process, and linking these to appropriate consequences to ensure a timely conclusion of the matter.**

Improving effectiveness

In its 2008 three-yearly review of the CMC, the PCMC recognised that concerns about the principle of devolution — that action to prevent and deal with misconduct in an agency should generally happen within that agency — had perhaps the greatest potential to erode public confidence in the CMC's independence and integrity as an oversight agency. Complainants were concerned that allegations about police referred to the QPS for resolution would not be properly or independently investigated, and that any evidence of misconduct would be 'covered up'.

The CMC responded to these concerns by advising the Queensland Government that it would review its assessment criteria to ensure the appropriateness of complaints referred to a particular public sector agency, and of the level of monitoring it would conduct in relation to those matters.

However, this monitoring function lacks potency in relation to complaints of police misconduct because if the QPS fails to make appropriate investigative inquiries despite guidance and urging from the CMC, the Commission's only recourse is to assume responsibility for the matter itself. Due to resourcing and the number of complaints involved, this is not a sustainable strategy, nor does it enable the CMC to discharge its responsibility for improving the capacity of public sector organisations to deal with misconduct complaints about their own members.

Under s. 48 of the CM Act, in matters of *official misconduct* the CMC may direct the Commissioner of Police or any other public official to undertake further investigation into the matter. For an effective monitoring capability, the CMC requires a similar power of direction when monitoring QPS's management of *police misconduct* under s. 47 of the Act.

Recommendation 4

The CMC recommends that the Queensland Government amend the *Crime and Misconduct Act 2001* to enable the CMC — for the purpose of discharging its monitoring function and to ensure the police service deals with complaints of police misconduct effectively and appropriately — to require the Commissioner of Police:

- a. to report to the commission about an investigation into police misconduct in the way and at the times the commission directs; or**
- b. to undertake the further investigation into the police misconduct that the commission directs.**

The QPS's capacity to deal with misconduct is primarily invested in the ESC and the professional practice managers (PPMs) located in each region or command.

When examining the structures, resources and processes the Queensland Police Force (QPF) had for dealing with complaints against police in 1989, Fitzgerald identified as main areas of concern:

- the number of staff involved in internal investigations
- the skills of investigators and physical resources
- the need for a proactive approach to preventing and detecting police misconduct.

At that time, the ratio of staff in the Internal Investigations Section to total QPF members was 1:460. Fitzgerald noted that these officers were conducting up to 15 major investigations at any one time, and an unknown number of less serious investigations. In 2010, the ratio of Internal Investigation Branch staff to total QPS members is 1:420. Data provided by QPS indicates that the Branch is managing or monitoring up to 1500 open complaints at any one time, and also has a much broader scope than its predecessor. This indicates that the investment of resources in internal investigators has not improved significantly since the Fitzgerald Inquiry.

The role performed by the ESC is integral to the success of the police service discipline system, but it is not well resourced. A major impediment to its ability to effectively analyse risks and report complaint statistics is the capacity of the QPS Client Service System database, which is difficult and time-consuming to interrogate, and does not link with other QPS information management systems and the human resource management system.

The role of PPMs is to oversee the handling of complaints in each region and command, but they are not well supported and have no formal line of reporting to the ESC. Their position in the region or command also leaves them highly predisposed to local influences, priorities and culture, making it more difficult for the QPS to maintain consistent ethical standards and professional practice. In the CMC's view, the role might be more effective if it incorporated a more strategic approach to preventing misconduct, and was responsible for managing and investigating more serious matters and promoting ethical practice at the local level.

No discipline system, however outstanding, can be effective without the organisational will to make it so. The CMC believes that the QPS must elevate complaint management to core business, and invest in it the requisite effort and resources such positioning necessitates.

Recommendation 5

The CMC recommends that the QPS, in consultation with the CMC:

- a. review the capacity and resources, staff retention and attraction strategies of the ESC to ensure that it has an appropriate number of personnel, skills and physical resources to perform its functions, consistent with recognising those functions as core business**
- b. evaluate the effectiveness of the role of the professional practice manager to ensure it is better utilised and resourced to improve the quality, consistency and timeliness of complaint and disciplinary outcomes**
- c. develop a discipline and complaints management system capable of improving the efficiency of reporting processes, increasing research and analysis capability to create and enhance prevention strategies, and supporting the more timely, efficient and effective management of complaints.**

Streamlining disciplinary proceedings

If a discipline system is to operate effectively, the legal and regulatory framework must support an inquiry for truth.

Members of the police service are required to answer questions and provide information that would assist a disciplinary investigation; however they often express concern that this exposes them to the risk of having their statements used against them in criminal proceedings. Though this requirement is inconsistent with a person's substantive legal right not to incriminate themselves or expose themselves to risk of penalty, it has been recognised as justified in this instance to maintain the accountability and ensure the integrity of police officers.

However, legislative intervention is necessary to ensure that while the requirement to answer such questions is clear, it is also clear that any answers or information an officer supplies as a result may not be used against them in criminal proceedings, except for proceedings relating to the falsity of those answers or information, or for an offence under the CM Act.

Recommendation 6

The CMC recommends that the Queensland Government amend the *Police Service Administration Act 1990*, the *Crime and Misconduct Act 2001* and the *Queensland Civil and Administrative Tribunal Act 2009* so that the police discipline system can operate effectively by ensuring that:

- a. a member of the QPS is required to answer questions and/or provide information for the purpose of a disciplinary investigation or disciplinary proceedings, including disciplinary proceedings conducted by QCAT, on the ground that the answer to the question or provision of information may incriminate the member**
- b. if so required, any answer or information provided is not to be used in any criminal proceeding against the member who made the statement, other than if the proceeding is about**
 - the falsity or misleading nature of the answer or information given by the individual; or**
 - an offence against the CM Act.**

In disciplinary hearings, some prescribed officers do not accept unqualified admissions made by officers and instead consider all of the evidence before making formal findings. This wastes considerable time and resources. Our examination of a sample of disciplinary hearings against 80 police officers between 1 January 2008 and 31 December 2009 revealed that the prescribed officer did not accept the admissions of the subject officer in a significant number of cases. The CMC considers this an inappropriate response.

Failure to apply the civil standard of proof is another common error in disciplinary proceedings. This standard is that of 'reasonable satisfaction' not that of 'beyond a reasonable doubt' which is the standard applied in criminal cases. Our examination of the disciplinary hearings sampled in the above audit revealed that in a significant number of cases, the prescribed officer misunderstood the evidentiary standard required, or applied the incorrect standard of proof.

In the CMC's view, the purpose of the disciplinary process is also undermined by the inappropriate use of criminal justice expressions. However, adversarial language is embedded in QPS policies and procedures, and words such as 'charge', 'plea of guilty', 'plea of not guilty', 'found not guilty' and 'penalty' were commonly used in the audit sample. The CMC believes that expressions such as 'admitted', 'not admitted', 'proven' or 'not proven', 'sanction' or 'remedy' are more appropriate as they better reflect the true nature of disciplinary proceedings.

Recommendation 7

The CMC recommends that the QPS regularly review its policies, procedures, guidelines and training materials for the police disciplinary process to ensure that:

- a. prescribed officers will accept and act on admissions of misconduct by police officers**
- b. these materials accurately communicate and explain relevant legal principles**
- c. the language used reflects the proper nature and purpose of disciplinary proceedings.**

The CMC also recommends that the Queensland Government amend the *Police Service Administration Act 1990* to ensure that the language used reflects the proper nature and purpose of disciplinary proceedings.

Ensuring better outcomes

According to current QPS policies and procedures, an officer cannot be subject to the discipline system and the performance management system at the same time. This limits opportunities to use management action strategies (currently applicable only to the performance management system) once a matter has proceeded to a disciplinary hearing. However, there is no logical reason why imposition of disciplinary sanctions and use of management action strategies should be mutually exclusive. In fact, except where the sanction is dismissal, the more serious the conduct, the more reason there is to initiate measures to address it and improve future conduct.

In this review, the CMC also considered whether the six sanctions currently available under the PSD Reg are adequate. (A seventh option, 'any other discipline considered warranted' is available only where the officer presiding at the hearing is a deputy commissioner.)

One problem with the current regime is the considerable gap between the maximum fine of two penalty units (\$200), which may be imposed only by an officer at or about the rank of commissioned officer, and the next level of penalty, a pay point reduction, which may be imposed only by an officer at or about the rank of assistant commissioner. The CMC considers there is a case for reviewing the monetary value of disciplinary fines to develop an incremental regime and involve all ranks in the disciplinary process. It is also of the view that community

service has value as a disciplinary sanction and should be included in the disciplinary legislative framework as a discrete sanction.

Under section 12 of the PSD Reg, a prescribed officer may decide to suspend a sanction under certain conditions; however, the CMC is of the view that there is an inherent likelihood of this discretion being used inappropriately. Another problem is the effect of s. 12(2) of the PSD Reg which stipulates that if the subject officer successfully completes community service, counselling or other treatment required under s. 12(1), the suspended sanction is to be taken as never having been imposed. Misuse of suspended sanctions under s. 12(1), taken with the legal effect of s. 12(2) can mean, in effect, that no penalty is imposed at all, even though the breach might objectively have warranted dismissal. The CMC is of the opinion that suspension of penalty is a feature of the criminal justice system, and it is difficult to see how it is consistent with the purpose of discipline.

Recommendation 8

The CMC recommends that the Queensland Government amend the Police Service (Discipline) Regulations 1990, the Police Service Administration Act 1990, the Crime and Misconduct Act 2001 and any other Act to:

- a. ensure that a range of disciplinary sanctions, including monetary penalties and community service are available to prescribed officers consistent with the purpose of the discipline process**
- b. remove the power to suspend disciplinary sanctions**
- c. provide an indicative list of managerial strategies that prescribed officers may use in conjunction with any disciplinary sanction imposed, or in any situation, whether or not a disciplinary allegation has been proven.**

Transfer or redeployment of a staff member is a disciplinary action that may be taken against a public servant under the *Public Service Act 2008*; however, the Commissioner of Police may only transfer an officer without his or her agreement, provided it is to a position of the same rank, and at least the same salary level.

Under the Police Service Administration Regulation, the Commissioner can transfer an officer only in accordance with the current industrial agreement for police officers. Non-voluntary transfers of commissioned officers are determined by the Inspectors' Appointment Board, considered by the deputy commissioner, and finally approved by the Commissioner. Under their current enterprise bargaining agreement, the Commissioner may transfer non-commissioned officers without their agreement only for organisational restructuring, resource management, or management of staffing issues when it has been clearly demonstrated to the Transfer Advisory Committee that an officer is unable to cope in their current position. This effectively limits the Commissioner's power to transfer non-commissioned officers for managerial purposes.

Though a public servant can be transferred or redeployed as a disciplinary action under the *Public Service Act 2008*, a police officer cannot be transferred under the Police Service (Discipline) Regulations 1990, either as a sanction or as appropriate management action.

The CMC considers that the capacity of a CEO to control what is arguably the most critical asset within any organisation, its human resources, is fundamental to maintaining organisational efficiency and professional standards.

Recommendation 9

- The CMC recommends that the Queensland Government amend the:**
- a. Police Service Administration Regulation 1990, for the purpose of s. 5.2 of the *Police Service Administration Act 1990* and;**
 - b. the Police Service (Discipline) Regulations 1990 for the purpose of discipline and management action;**
- to allow the Commissioner of Police to transfer a police officer in the public interest.**

The remedial strategies that can be taken as part of management action include the option of 'apology'. Under-use of this strategy appears to have arisen from concern that full apologies may have exposed officers and the organisation to litigation.

The passing of the *Integrity Reform (Miscellaneous Amendments) Act 2010* in September 2010, which inserts a new Chapter 4, Part 1A in the *Civil Liability Act 2003*, has removed this impediment. There is therefore no longer any reason why 'apology' cannot be used as a sanction or management action.

Recommendation 10

- The CMC recommends that the Queensland Government amend the Police Service (Discipline) Regulations 1990, the *Police Service Administration Act 1990*, and the *Crime and Misconduct Act 2001* to allow a police officer to apologise to aggrieved persons in respect of his or her conduct without precluding any sanction or other management action being taken in respect of the officer's conduct.**

Commissioner's confidence

Since the mid-1990s, some Australian jurisdictions have sought to address the difficulties of removing officers promptly from the police service by introducing 'Commissioner's loss of confidence' (CLOC) provisions. New South Wales was the first state to do so. Western Australia, Victoria and Tasmania have also adopted similar provisions, but do not have as large a body of case law. As New South Wales has also had the benefit of a Royal Commission's deliberations on its CLOC measures, our discussion focuses on the experience in that jurisdiction.

A principal justification for CLOC provisions is that they empower a police commissioner to address an officer's overall conduct or performance, whereas the disciplinary and performance management systems tend to focus on rule transgressions or performance failures. Moreover, police disciplinary systems usually take a retributivist stance towards the effect of sanctions, i.e. they tend to assume that complying with the penalty wipes the slate clean and restores the officer to the state of grace he or she occupied before the disciplinary action.

In contrast, CLOC provisions enable commissioners to examine a subject officer's conduct overall when assessing their suitability to hold the 'office of constable' (the appointment which confers on an individual the special responsibilities and powers that operate beyond the workplace and the formal hours of employment), and to take action in response to cumulative behaviour.

The CMC suggests that CLOC provisions focus on the following key conditions:

- The Commissioner as an employer must have trust and confidence in officers' suitability to perform the duties of a police officer.
- The community must have trust and confidence in the integrity, competence, performance and conduct of its police officers.
- Each police officer must be a fit and proper person to hold the office of constable.

The test applied for review of CLOC decisions in New South Wales is the same as that for unfair dismissal — that is, whether the removal of the police officer from employment was ‘harsh, unjust or unreasonable’. As this test exceeds the International Labour Organisation standard, in principle, the standard of fairness demanded by the ‘harsh, unjust and unreasonable’ formulation need not be so stringent. One way of ensuring that officers are not dismissed on arbitrary or illegal grounds (e.g. unlawful discrimination) would be to adopt a general test of fairness. Under such a test, a review court would need to determine whether the employer has acted fairly, not whether it would have dismissed the employee in the circumstances. As long as the employer, acting reasonably, could have chosen to dismiss the employee for the reasons relied upon, it does not matter that another employer, faced with the same set of circumstances, might reasonably have chosen not to do so.

Given the unique nature of the loss of confidence power, the CMC is of the opinion that any review of its use should, in the first instance, be conducted by a Supreme Court judge, not by an administrative or industrial tribunal.

Recommendation 11

The CMC recommends that the Queensland Government amend the Police Service Administration Act 1990 and any other Act as necessary to:

- a. provide a basis for the dismissal of a police officer on loss of confidence grounds**
- b. provide for a fair system of review to a single judge of the Supreme Court, which recognises the functions and purpose of the police service, the special nature of the employment of a police officer and the office of constable**
- c. recognise the right of the Commissioner reasonably to determine questions concerning an officer’s suitability for employment and fitness to hold office.**

Part 1:

Background

INTRODUCTION

On 9 November 2009, the Attorney-General requested the Crime and Misconduct Commission (CMC), pursuant to its functions under section 52 of the *Crime and Misconduct Act 2001* (CM Act), ‘to conduct an independent review of current processes for the management of police discipline and misconduct matters’, and deliver a report on the review to him by 30 June 2010. The Commissioner of Police fully supported the proposal to conduct the review, and contributed significant resources and expertise to the project.

Context of the review

The CMC had identified reviewing the QPS discipline system as a priority on its research agenda in early 2009. In May 2009, the Queensland Police Union of Employees (QPUE) had also written to the CMC seeking a review of the discipline system. Among its principal concerns were the range of disciplinary sanctions available, the time taken to finalise disciplinary procedures, and the effect of this in relation to the Commissioner of Police’s power to stand down officers for the duration of disciplinary proceedings.

In August 2009, the Queensland Government published a green paper, *Integrity and Accountability in Queensland*, to enable members of the community to contribute to a discussion on how Queensland’s accountability and integrity framework could be improved and strengthened.¹ This coincided with the CMC’s public announcement of its intention to review the police discipline system.

The management of police discipline and misconduct matters was a significant focus of the discussion paper, which posed two key questions directed towards the general public sector:

- Are the mechanisms to find unacceptable behaviour [by public officers] sufficient?
- Are the sanctions for unacceptable behaviour [by public officers] sufficient?

These questions invited a consideration of both the management and investigative mechanisms that enable unacceptable behaviour to be detected, how effective the current mechanisms are in dealing with unacceptable behaviour by public officers, and whether the current processes are achieving appropriate outcomes.

In response to these questions the Queensland Government received over 100 written submissions. A significant majority of these suggested that improvements were necessary, and in particular raised concerns about the current discipline processes applying to members of the Queensland Police Service (QPS).² The nature of policing, specifically the right to use force against citizens, demands a particularly rigorous discipline process, with independent oversight. Unfortunately, the submissions suggested that this demand has translated into a convoluted process plagued by time delays, inconsistencies and a loss of credibility with many stakeholders.

1 Department of the Premier and Cabinet 2009, *Integrity and Accountability in Queensland*, Queensland Government, Brisbane.

2 Department of the Premier and Cabinet, *Integrity and Accountability Review: Consultation results*, Queensland Government, Brisbane, viewed 21 June 2010 <www.premiers.qld.gov.au/community-issues/open-transparent-gov/integrity-and-accountability-review/consultation-results/>.

The Queensland Government therefore requested the CMC to conduct a review focused on the current processes for the management of police discipline and misconduct matters, noting that:

Due to the unique power bestowed on police officers and the corresponding trust placed in them by the community to exercise these powers responsibly, it is appropriate to give separate and detailed consideration to issues of police accountability and integrity.³

Scope of the review

The QPS has three different categories of employee, each with a different process for the management of discipline and misconduct:⁴

- Police recruits are employed under the *Police Service Administration Act 1990* (PSA Act), and their employment is governed by a contract that is not subject to any award, industrial agreement or any determination or rule of an industrial authority.⁵ As this contract itself governs the grounds on which employment may be continued or terminated, the management of discipline and misconduct matters for police recruits is quite different from that for police officers.
- Staff members are public servants assigned to perform duties in the QPS. While they are subject to the directions of the Commissioner of Police, they are employed under the *Public Service Act 2008*, so the management of discipline and misconduct matters is governed by essentially the same procedures that apply to other public servants.⁶ These procedures also are quite different from those for police officers.
- Police officers are employed under the PSA Act and the framework for the management and discipline of misconduct matters for police officers is governed by the terms of the Act. Police officers are a special category of employee because they are invested with powers and are required to make an oath or affirmation of office⁷ that they will, 'without favour, affection, malice or ill-will, keep and preserve the peace, prevent offences and use their best skill and knowledge to discharge all of the duties legally imposed upon them by law'.⁸

Recognising that the conduct of police officers is the most critical and visible reflection of the professional standards and reputation of the police service, this review focuses on the processes applying to police officers, not staff members or police recruits. It also reaffirms the value of ensuring that the processes for maintaining those standards and reputation are effective. As the Bingham review noted:

The need for the [QPS] to be reviewed will be ongoing. The community expects the highest standards from its police because they have the greatest powers held by any citizen and therefore have the greatest responsibility to act honestly and lawfully.⁹

Purpose and methodology

The purpose of this review was to examine the complexities of the QPS discipline system for police officers, identify what is not working well and determine the causes of problems identified, and propose solutions. The primary object of this report is to make and justify recommendations which, if implemented appropriately, will ensure that Queensland has an effective and fair system for ensuring police accountability and integrity.

3 Department of the Premier and Cabinet 2009, *Response to Integrity and Accountability in Queensland*, Queensland Government, Brisbane.

4 *Police Service Administration Act 1990*, s. 2.2

5 *ibid.*, s. 5.11

6 *Public Service Act 2008*, s. 2.5

7 PSA Act, s. 3.3

8 *Police Service Administration Regulation 1990*, ss. 2.1–2.2

9 Queensland Police Service Review Committee & Bingham, Max Sir & Queensland Police Service 1996, *Report on the Review of the Queensland Police Service*, QPS Review Committee, Brisbane, p. 2 (hereafter referred to as the Bingham review).

The review focused largely on analysis of qualitative data, although we also undertook some quantitative analysis. However, we placed less reliance on the latter because the information was not readily available, was incomplete, or could not be benchmarked or reliably compared with similar information from other policing bodies.

In conducting the review we:

- consulted about police discipline processes with:
 - QPS officers at various ranks statewide
 - key members of interstate police and police oversight agencies
 - Queensland Police Union of Employees (QPUE)
- examined reviews of the QPS since the Fitzgerald Inquiry¹⁰
- examined relevant documents and literature in other policing jurisdictions, both in Australia and overseas
- analysed relevant CMC and QPS data.

Although we did not undertake any public consultations, we took account of the views expressed in the submissions to the Queensland Government in response to the Integrity and Accountability discussion paper, and the tenor and nature of concerns on those issues that have surfaced through the media in recent times.

Structure of the report

Part 1 provides the background to the report and details the review process.

Part 2 of the report focuses on the discipline system in principle. It discusses the characteristics of a discipline system, proposes a model system drawn from an examination of literature detailing the findings of past reviews, and looks at the organisational context, legislative framework and structure of the system currently in place in the QPS.

Part 3 discusses the QPS discipline system as it currently operates, illustrated by case studies to highlight particular issues. It examines the gap between the system in theory and in practice, and makes recommendations for improving the system and closing this gap.

¹⁰ Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct & Fitzgerald, Tony, 1989, *Report of a Commission of Inquiry pursuant to orders in Council, dated 26 May 1987, 24 June 1987, 25 August 1988, 29 June 1989*, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, Brisbane (hereafter referred to as the Fitzgerald report).

Part 2:

The discipline system in principle

CHARACTERISTICS OF A DISCIPLINE SYSTEM

The purpose of a discipline system

An organisation develops a discipline system to protect it against conduct by its members which would undermine the effective pursuit of its objectives. Such a system is simply a set of procedures by which the organisation ensures that its members adhere to its rules.

The police discipline system is primarily concerned with protecting the integrity of the QPS, its ability to effectively carry out its charter, and maintaining public confidence in its ability to do so. Justice Brennan explained this more fully in *Police Services Board v Morris and Martin*:¹¹

The effectiveness of the police in protecting the community rests heavily upon the community's confidence in the integrity of the members of the police force, upon their assiduous performance of duty, and upon the judicious exercise of their powers. Internal disciplinary authority over members of the police force is a means — the primary and usual means — of ensuring that individual police officers do not jeopardise public confidence by their conduct, nor neglect the performance of their police duty, nor abuse their powers. The purpose of police discipline is the maintenance of public confidence in the police force, of the self-esteem of police officers and of efficiency.

In the QPS, this concept of the system's principal purpose is articulated in section 3 of the Police Service (Discipline) Regulations 1990 (PSD Reg) which states that the objectives of the Regulations are:

- to provide for a system of guiding, correcting, chastising and disciplining subordinate officers
- to ensure that the appropriate standards of discipline within the QPS are maintained
 - to protect the public
 - to uphold ethical standards within the police service
 - to promote and maintain public confidence in the police service.¹²

To this end, the police discipline system comprises principles and rules about the appropriate standards of conduct and behaviour expected of police officers, and processes for identifying and dealing with any failure to meet the expected standards. These include a complaints management process, and a police disciplinary process.

Alternative approaches to discipline

In their report, *A Fair and Effective Victoria Police Discipline System*, the Victorian Office of Police Integrity (OPI) describes two different models of a discipline system, characterised by either punitive or remedial processes.¹³ Police discipline systems are typically characterised by the former — formal, prescriptive procedures focused on sanctions designed to penalise offenders and deter similar behaviour. A discipline system structured around remedial processes is less formal, and more interventionist. It is aimed at achieving its objectives and improving performance using managerial strategies, and provides for progressively more onerous

¹¹ (1985) 156 CLR 397 at 397

¹² These objectives are in part re-stated under s. 219A of the CM Act in relation to the purpose of disciplinary procedures for public officers generally.

¹³ Office of Police Integrity 2007, *A Fair and Effective Victoria Police Discipline System*, Office of Police Integrity, Melbourne, pp. 21–3.

intervention, the more serious the conduct. The focus of such an approach is on reinforcing managerial accountability.

Discipline systems skewed exclusively towards either of these approaches have inherent problems. A remedial discipline system requires some aspects of the punitive approach for dealing with the most serious forms of misconduct. On the other hand, a punitive system constrained by time-consuming, complex processes that discourage managerial responsibility and promote an adversarial relationship between supervisor and subordinate is ill-suited to dealing with less serious infringements. In the CMC's view, the ideal is a discipline system that is not wholly defined by either of these approaches but is flexible enough to deal with a range of behaviour and desired outcomes.

Discipline and criminal justice systems

There is sometimes confusion about the difference between the police discipline system and the criminal justice system.¹⁴ While the two share some features, they differ in a number of important ways, one of which is the reason for imposing 'penalties' for failure to comply with the rules.

Under the criminal justice system, *sentences* are imposed on offenders to:

- deter them and other members of the community from committing the offence in the future
- promote the rehabilitation of the offender
- exact retribution on the offender on behalf of the victim and the community.¹⁵

In a discipline system, *sanctions* are imposed to deter or rehabilitate offenders, but not to exact retribution or revenge on the individual, although this distinction can sometimes be unclear.¹⁶ For example, sanctions such as a fine or dismissal can have the effect of imposing a penalty on the individual, but this is *not* the reason for imposing them.

There are two important consequences of the difference between the systems. First, under a discipline system, the protection of an organisation's interests may justify imposing a more onerous penalty on an individual than a criminal court might impose for the same conduct.¹⁷ For example, in 2009, in response to both organisational and community concern, the Commissioner of Police recommended the following disciplinary sanctions for officers who are detected drink-driving:

- dismissal or demotion if an officer is in a police vehicle regardless of whether they are on-duty or off-duty
- demotion or reduction in pay level if an officer is off-duty and in a private vehicle
- dismissal or demotion for any second offence or conduct involving serious injury and damage (see Appendix A).

14 See *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at 144–5 and *Jattan v Chief Executive, Queensland Health* [2010] QSC 92.

15 Halsbury, Hardinge Stanley Giffard, & Butterworths (Firm) 1991, *Halsbury's laws of Australia*, Butterworths, Sydney, online service [130–17000] 'The purpose of punishment' accessed 21 June 2010, <www.lexisnexis.com.au>.

16 *New South Wales Bar Association v Evatt* (1968) 117 CLR 177 at 183–4, see also *R v NG* (2007) 1 Qd R 37 and *Quinn v Law Society of NSW* [2007] VSCA 122.

17 *Medical Board v Bayliss* (2000) 1 Qd R 598

Second, because their purpose is different, both disciplinary proceedings and criminal proceedings may be pursued against an individual for the same conduct.¹⁸ So, as demonstrated by the above example, a police officer caught drink driving is liable to have a disciplinary sanction imposed by the police service, and also to be punished in the criminal courts for the same conduct.¹⁹ It is a common misconception that this amounts to putting the individual in 'double jeopardy'. However, this is incorrect, because pursuing a matter through the discipline process is an administrative procedure that serves a purpose different from that of criminal justice proceedings. An officer subject to both processes is not being tried twice or exposed to a second 'punishment'. This is so, irrespective of the order in which the criminal and disciplinary proceedings are decided.²⁰

Lessons from the literature

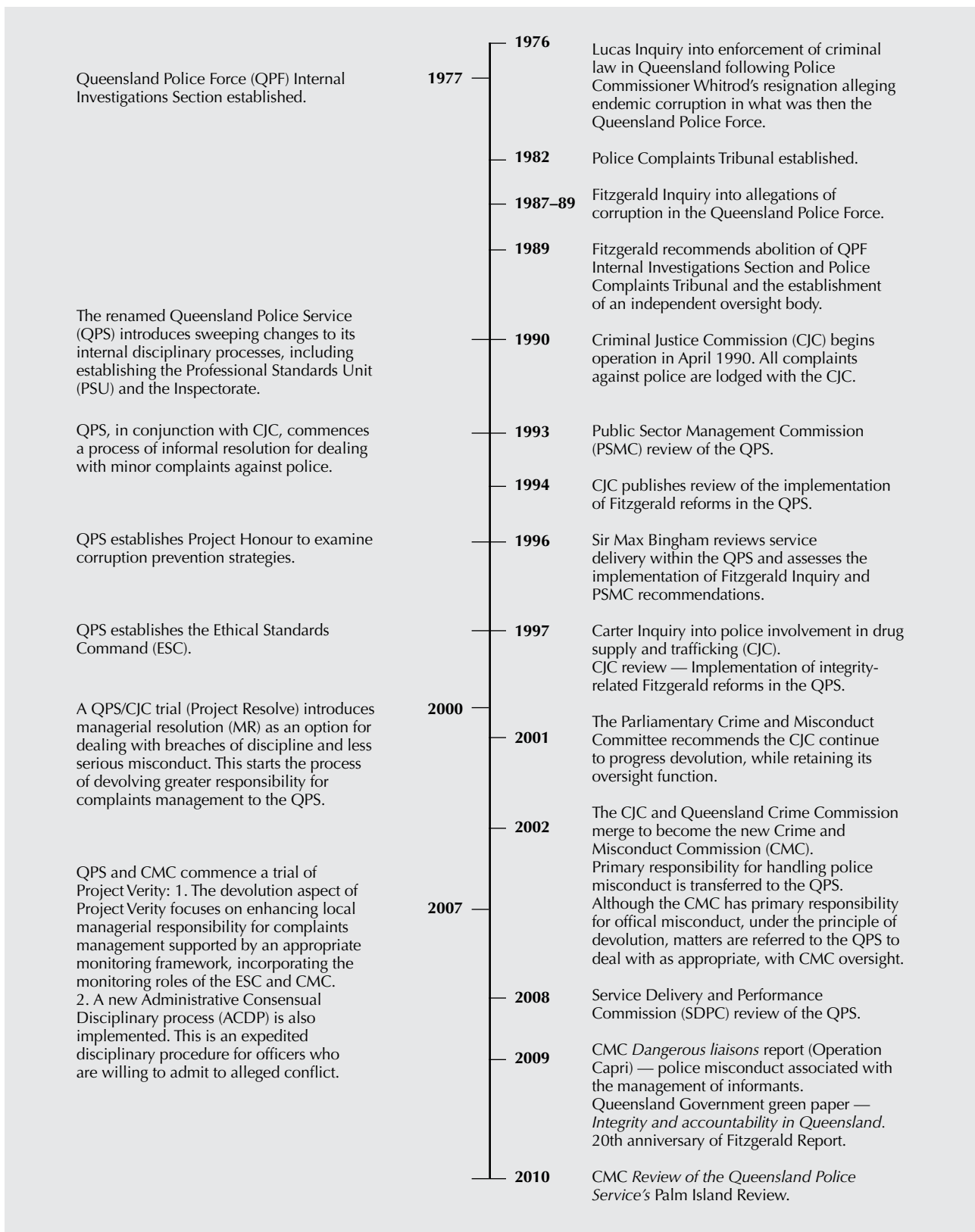
Having outlined the purposes of discipline systems in general, and some essential characteristics of police discipline systems, we move to an examination of what the literature and history of reviews of police discipline have revealed (see Appendix D). From this, we develop a model police discipline system with which to compare the current QPS system. Although this review focuses strictly on the QPS discipline process, it has drawn extensively on the lessons from these past reviews, as well as information within the public domain about discipline and integrity within policing.

18 *New South Wales Bar Association v Evatt* (1968) 117 CLR 177 at 183–4 and *Adamson v Queensland Law Society* (1990) 1 Qd R 498 at 504

19 Similarly, a police officer who, in the course of duty, has engaged in conduct that involves a breach of a criminal or regulatory law, is still liable to prosecution for that offence, even though they may have resigned from the police service before the prosecution has started or finished.

20 *Weaver v Law Society of NSW* (1979) 142 CLR 201 at 207, see also *R v NG* (2007) 1 Qd R 37

Figure 1: Stages in the development of the current QPS discipline system



Summary of significant reforms to the QPS and the reviews that have shaped them over the last 35 years. See Appendix D for a discussion of the key issues identified by the Fitzgerald Inquiry and details of the subsequent reforms implemented by the QPS and other agencies.

A MODEL POLICE DISCIPLINE SYSTEM

The QPS discipline system has been examined and reviewed in a number of inquiries over the last 20 years. The 1989 report of the Fitzgerald Inquiry set the benchmark for a range of subsequent reviews into various aspects of policing in Queensland including the police service's discipline processes and professional standing (see Fig. 1).

Previous reviews had revealed that a strong culture of integrity requires effective leadership at all levels of the organisation. The tone is set at the top and must be reinforced by appropriate policies and procedures, good role modelling, tailored training, effective supervision and early intervention to deal effectively with identified problems.

Recurring themes and persistent problems

Unfortunately, although there have been some significant improvements in the QPS discipline system since the Fitzgerald Inquiry, it is still plagued by a number of the debilitating problems identified by Fitzgerald and again in subsequent reviews (see Appendix D). These include:

- lack of consistency in the application of sanctions for comparable breaches, and across regions and functional areas
- extremely long investigation times and delays in finalising matters
- lack of balance in the system, with resources focused on reacting to complaints rather than on developing preventive strategies to deal with the causes
- an excessively legalistic and cumbersome process
- focus on punishment rather than on remedial intervention where appropriate
- the need to recognise and reward good conduct as well as deal with inappropriate conduct
- the tendency to report statistical trends rather than analyse results to determine possible causes, and propose options for addressing identified risk
- inadequate information systems unable to support effective analysis of complaint trends
- ineffective performance appraisal system characterised by a lack of objective and honest assessment and inadequate responses to poor performance
- poor management and supervision generally, exacerbated by inadequate management and leadership training at all levels
- a need for a comprehensive and integrated approach to ethics and integrity education in all aspects of QPS training
- a lack of flexibility in QPS's capacity to transfer or move members to meet operational needs or address performance or integrity concerns. Several reviews noted high levels of dissatisfaction with this aspect of the system by both managers and members
- a need to identify and rotate staff through 'high-risk' areas and target these areas for tailored integrity training.

Essential characteristics of a model system

In addition to the reviews and inquiries listed in Fig. 1, a significant volume of academic study within Australia and internationally, and a number of highly publicised integrity inquiries have also been devoted to, or have touched on discipline systems and processes in policing organisations. As in the previous Queensland inquiries and reviews, much of this literature has been problem-focused, aimed at addressing specific problem areas without necessarily considering the discipline system as a whole.

Under the terms of reference for this review, the CMC had the opportunity to consider what a good system should look like. To do so, we examined the current QPS discipline system and considered the findings and recommendations of past reviews and inquiries. Analysis of these revealed that the essential attributes of a good disciplinary system could be categorised as simplicity, effectiveness, transparency and strength.

In the following discussion, we examine each of these attributes in detail and, informed by the problems revealed in previous reviews, use them to develop a model system as a benchmark against which to examine the current QPS system (see Fig. 2).

Simplicity

A good police discipline system is as *simple* as possible. It is clear about matters of substance and process, and is no more complex and resource-intensive than is necessary to achieve its purpose.

- **The system is *clear* about standards of behaviour, expectations of the organisation, and consequences of failure to comply with the rules.**

Policies, procedures, guidelines and the code of conduct must clearly define acceptable and unacceptable conduct.²¹

The code of conduct should be more than a basis for disciplinary action, and include both aspirational and prescriptive elements. It should explain why certain conduct is inappropriate, and how this weakens the integrity of the organisation.²² The code should identify the consequences of a breach of its terms, and indicate what disciplinary breaches are likely to attract the most serious sanctions such as dismissal, demotion or pay-point reduction.²³

Guidelines to officers should also clearly identify the types of conduct that might be regarded as criminal, and those that would result in disciplinary or managerial action only.²⁴ This type of information provides the basis for determining the appropriate process and response the system should provide in particular cases.

Use of plain language in any documentation is also essential to ensure that meaning is not obscured by overly legalistic, formal language. Plain language is simple, but precise.

21 Fitzgerald report, op.cit., p. 294

22 Queensland Police Service 1996, 'Project Honour: Final Report to the Commissioner of Police on matters pertaining to ethics and organisational integrity', QPS, Brisbane, p. 53.

23 Service Delivery and Performance Commission (SDPC) 2008, *Report on the service delivery and performance management review of the Queensland Police Service*, Queensland Government, Brisbane.

24 Fitzgerald report op.cit., p. 294

Figure 2: A model police discipline system

Simple	Clear	<ul style="list-style-type: none"> Clearly defines acceptable and unacceptable conduct Explains expectations for performance and ethical behaviour Handles improper conduct according to its seriousness Identifies sanctions applicable to particular conduct
	Timely	<ul style="list-style-type: none"> Includes only necessary steps, processes and personnel Focuses on outcomes not processes Includes mechanisms to minimise delays Operates independently of other systems/processes
	Targeted	<ul style="list-style-type: none"> Links expenditure of resources and efforts with the gravity of the conduct Tailors processes/responses to address differing priorities Limits avenues of review or appeal to most serious matters
Effective	Improves	<ul style="list-style-type: none"> Supports the search for truth Enables learning Provides a broad range of managerial strategies Promotes use of managerial strategies to improve performance
	Deters	<ul style="list-style-type: none"> Is resourced to conduct effective investigations Ensures sanctions are used adequately and appropriately Disseminates information on disciplinary decisions
	Protects the organisation	<ul style="list-style-type: none"> Supports timely intervention Balances organisational and individual interests
Transparent	Fair	<ul style="list-style-type: none"> Ensures discipline processes are free of actual or perceived bias Supports independent investigation of matters when public interest or natural justice requires Applies the rules of natural justice Uses powers and processes appropriately
	Consistent	<ul style="list-style-type: none"> Applies consistent processes and rules Delivers consistent outcomes
	Accountable	<ul style="list-style-type: none"> Is strengthened by effective external oversight Is safeguarded by an appeal/review process
Strong	Supported	<ul style="list-style-type: none"> Demonstrates ethical leadership Values reporting of inappropriate behaviour
	Proactive	<ul style="list-style-type: none"> Invests resources in risk assessment Links the performance management system with early intervention attempts to deal with inappropriate behaviour Incorporates learning from disciplinary outcomes into training
	Responsible	<ul style="list-style-type: none"> Employs trained supervisors who are held accountable Incorporates strategies for continuous improvement

► **The discipline system delivers *timely* action and outcomes.**²⁵

Unnecessary complexity of the discipline system — too many procedures, too many people and a duplication of tasks — is the greatest threat to timeliness (see Fig. 7, p. 26). This complexity is the hallmark of an adversarial system where the focus of effort is on processes, not outcomes.²⁶

Practices such as allowing officers under investigation to take questionable sick or other leave, failing to address lack of cooperation from officers who are witnesses, and assigning low priority to investigating and resolving complaints cause delays in the disciplinary process. An effective discipline system must specifically recognise these risks in its policies and procedures and include mechanisms for dealing with them.

The discipline system must be able to operate independently of the criminal justice system or other civil and administrative processes, as interaction with these can cause delays. This will prevent, for example, the deferral of disciplinary action against a police officer pending the outcome of any criminal proceedings against the officer arising from or connected with the same activities.²⁷

► **The discipline system demonstrates a *targeted* use of resources in any particular case.**

For a system to be effective, the amount of effort and resources expended should be relative to the gravity of the matter under investigation. This will ensure that too much effort is not wasted in resolving minor matters, or too little effort used in dealing with more significant ones.

To facilitate this, the system needs:

- a range of strategies for dealing with matters of varying gravity
- rights of review and/or appeal balanced against the need to maintain a fair and equitable discipline system. Generally, less serious matters and those involving less important issues should involve limited rights of appeal, less formal processes and no right (or a limited right) to legal representation and oral argument.

Effectiveness

An **effective** discipline system achieves its intended purpose. Its performance can be judged by the outcomes it delivers for the organisation.

► **An effective discipline system *improves* individual, supervisory and organisational performance, policies and systems.**²⁸

Problems can be solved and behaviour corrected only if the focus of the discipline process is on finding out *what actually happened*. To support this search for truth, the regulatory framework must provide for protection from self incrimination, and the power to direct officers (including those whose conduct is in question) to cooperate and answer questions.²⁹

25 Public Sector Management Commission 1993, *Review of the Queensland Police Service*, PSMC, Brisbane, pp. 132–3; Bingham review op.cit., p. 231; SDPC 2008, op.cit.; Crime and Misconduct Commission 2008, *Enhancing Integrity in the Queensland Police Service* (Project Grinspoon) CMC, Brisbane.

26 Law Reform Commission of Western Australia 1999, *Review of the Criminal and Civil Justice System in Western Australia: Final report*, The Commission, Perth, p. 7

27 Bingham review, op. cit., p. 231

28 P Barrett & R Souwer, 'Project Resolve: Trials, tribulations and tenets on building police professionalism', paper presented at the *Governance and Justice conference: Police Reform Symposium*, 11–12 July 2001, p. 4.

29 Fitzgerald report op.cit., p. 202

Effectiveness is also compromised if the approach to decision making is over-legalistic and formal, and common sense and judgment give way to misapplication of rules that apply in criminal, not disciplinary, proceedings. Misconceptions about the relevance and reliability of evidence and the required standard of proof frustrate the search for truth.³⁰

A good discipline system learns and develops from experience. Any investigation or inquiry should include a requirement to identify learning opportunities, and procedural and/or systemic issues.³¹ Responsibility for making and enforcing disciplinary decisions should include (i) ensuring that they are implemented, and (ii) following up on the issues identified.

The system should be flexible enough to enable a decision maker to implement and impose a broad range of managerial strategies. These should include offering opportunities for personal and career development, training, and access to professional services such as counselling. There is no reason to restrict their use to the resolution of less serious matters. Unless the outcome of the discipline process is the dismissal of the subject officer, logic would dictate that the more serious the misconduct, the greater the need to combine managerial strategies with conventional sanctions — the two should not be considered mutually exclusive. Using the performance management system to monitor the effectiveness of managerial strategies would make it possible to reward behavioural improvements that translate into future good conduct.³²

► **An effective discipline system deters future misconduct.**

An officer is more likely to engage in inappropriate behaviour if there is no penalty for doing so, or a minimal risk of incurring one. Certainty of detection and certainty of consequences are key influences on deterrence.³³

To be able to detect and obtain evidence of improper conduct, the organisation must have an internal investigative capability that:

- is staffed with appropriately trained and skilled officers
- is supported by effective information and complaint management systems
- has the capacity to undertake specialist investigations into matters involving illicit conduct.³⁴

If the misconduct warrants imposition of a sanction, that sanction must have actual consequences. This is not the case, for example, when a monetary penalty is imposed with such a long time allowed for payment by instalment that it amounts to no effective penalty at all. Imposing inadequate sanctions or making inappropriate use of suspended or limited-life sanctions and transfer and 'no further action' options, undermines the purpose of the discipline process (see case study 2, p. 42).

To reinforce the message that improper behaviour will be detected, and that there will be appropriate consequences, police officers must be informed of disciplinary decisions made by the organisation. This can be done in a way that is balanced against relevant privacy concerns and is not counter to the aim of improving individual and organisational performance.³⁵

30 See discussion on 'evidentiary standard', p. 74

31 Criminal Justice Commission 1997, *Integrity in the Queensland Police Service: Implementation and impact of the Fitzgerald Inquiry reforms*, CJC, Brisbane, September.

32 Bingham review op.cit., p. 231

33 Keel, R 2005, *Rational Choice and Deterrence Theory*, Lecture notes, University of Missouri, St Louis, viewed 21 July 2010 <www.umsl.edu/~keelr/200/ratchoc.html>

34 Fitzgerald report op.cit., p. 289

35 For examples of how other professionals (e.g. lawyers) make information of this type available, see the Legal Services Commission website at <www.lsc.qld.gov.au>.

► **An effective discipline system is capable of *protecting* the interests and reputation of the organisation.**

The police service must be supported by a legislative, industrial and internal procedural framework that does not unduly hamper the capacity of the Commissioner of Police to deal swiftly with officers whose conduct undermines the professional standards and reputation of the police service.

The regulatory framework supporting the discipline system should not be skewed to favour the interests of the individual above that of preserving confidence in the integrity of the organisation.

Transparency

A discipline system is **transparent** if the validity of its processes and outcomes is self-evident.

► **A transparent discipline system is demonstrably *fair* and free of bias.**

The policies and procedures that guide conduct and decision making in the discipline process must ensure against actual and perceived bias at all stages of the process. The discipline policy must not only prescribe against partiality, but also give officers involved in investigating and resolving complaints examples of situations in which real or perceived conflicts of interest may arise, clear guidelines on how to act in such situations, and the rationale for doing so.

In some cases, it is not possible for the police service to investigate a matter and avoid actual or perceived bias. Examples include cases that involve:

- allegations of systemic misconduct in the police service
- a serious allegation against a very senior officer
- alleged bias by the police service
- a complaint about the conduct of a previous police investigation
- a lack of public confidence, at the time in question, in the ability of the QPS to deal satisfactorily with the alleged police conduct
- highly publicised incidents or ones that have attracted considerable public interest.

Such cases demonstrate the importance of having a separate oversight body such as the CMC to conduct an independent investigation, or to monitor one carried out by the QPS.³⁶

The discipline system must also include safeguards to prevent the use of investigative powers, procedures and remedial processes for inappropriate purposes. For example, it should ensure that powers of stand down, suspension and transfer are not employed as quasi-sanctions, but are used only when genuinely required to protect public confidence in the police service, or for valid operational reasons.

The processes that guide determinative actions such as making findings and assessing sanctions must also conform to the principles of natural justice. That is, they must ensure that the subject officer knows the nature of the case against them, and thus has a genuine opportunity to provide all the facts in their favour to an impartial decision maker. The standard of fairness inherent in the principle of natural justice increases with the seriousness of the issues to be determined.³⁷

There will inevitably be cases, similar to those identified above, where it will not be possible for the decision maker to be 'capable of a dispassionate inquiry and an objective judgement' in the matter.³⁸ The discipline system should therefore ensure that both parties have access to an independent arbiter or tribunal which can make relevant findings about the alleged conduct, and determine any necessary sanctions.

36 Fitzgerald report op.cit., p. 289

37 Forbes, JRS 2010, *Justice in tribunals*, 3rd edition, The Federation Press, Annandale, NSW at [7.1] p. 104

38 *ibid.* [15.11] p. 280 citing *Roylance v General Medical Council* [2000] 1 AC 311 at 318 per Lord Clyde

► **A transparent discipline system is *consistent*.**

Processes and rules must be applied consistently to ensure consistent outcomes. A lack of consistency undermines the integrity of the discipline system and the confidence of officers and the community in its ability to achieve its purpose. If its methods and logic cannot be understood, police officers cannot learn from it through observation or through its impact.

Officers involved at all levels in the discipline process must receive adequate training to ensure they understand the rules and can apply them consistently. This should include providing guidelines on indicative sanctions and information on disciplinary decisions made by QPS.

► **A transparent discipline system is *accountable*.**

The notion that a discipline system should be accountable is fundamental to the expectations of all who have a stake in its fair and efficient operation. Accountability involves ‘being answerable for decisions or actions, often to prevent the misuse of power and other forms of inappropriate behaviour’.³⁹ Ensuring that the QPS is accountable for the efficacy of its discipline system is an important function of the CMC as an oversight body. To be effective in this role, the CMC must have sufficient resources for monitoring how QPS deals with complaints about the conduct of its officers, and the requisite powers to investigate complaints itself if necessary.⁴⁰

It is also fundamental to our notion of justice that a system that allows the making of a decision to take adverse action against an individual also gives that person the right to appeal against the decision.⁴¹ However, the review or appeal process should be stringent enough to ensure that the effectiveness of the system is not frustrated by an endless cycle of frivolous or fruitless petitions.

Strength

It takes organisational will and action to sustain a **strong** discipline system.

► **A strong discipline system is *supported by an ethical leadership that promotes a self-reflective and learning-focused culture*.**

The QPS is a highly dispersed organisation where officers are required to work independently outside the confines of a traditional workplace, often with little direct supervision. They deal outside mainstream society, with marginalised and criminal elements and are required to police the borders of socially acceptable conduct. In this context, it is imperative for the QPS to reinforce ethical values and strictly define the boundaries around what is considered appropriate behaviour for a police officer and what is not.

These values are conveyed from the top level of the organisation, underlining the significance of ethical leadership for a discipline system to actually work. While education in ethical behaviour is important, it alone will not produce ethical behaviour in police officers. Leaders who do not ‘walk the talk’ and continually demonstrate ethical practice undermine the espoused values of the organisation. Because their actions speak so loudly, whatever they say cannot be heard.⁴²

The effective use of the discipline and rewards system is perhaps the most powerful way of sending messages about desirable and undesirable conduct.⁴³

39 Cameron, W (Auditor-General of Victoria) 2003, ‘Toward public value? Management and employment for outcomes’, presentation to Monash Conference: *Public Accountability: Effectiveness, Equity, Ethics*, 25 November, viewed 21 June 2010 <http://download.audit.vic.gov.au/speeches/agspeech_14.html>

40 Fitzgerald report op.cit., p. 292

41 Forbes, JRS, op.cit. at [14.1] p. 267 citing *Local Government Board v Arlidge* [1915] AC 120 at 150 per Lord Moulton

42 Trevino, LK, Hartman, LP, & Brown M 2000, ‘Moral Person and Moral Manager: How Executives Develop a Reputation for Ethical Leadership’ *California Management Review*, vol. 42, no. 4, pp. 128–42 at 131

43 *ibid*, pp. 134–5

Case study 1 exemplifies poor ethical leadership by a senior police officer who dismissed the allegations as untrue while admitting that he knew nothing about the incident.

Case study 1 (2008)

In 2008, an article appeared in the *Sunshine Coast Daily* newspaper with the following story:

Mr and Mrs H accused police of manhandling their 13-year-old son, B, after he was arrested for climbing onto the roof of Kawana Waters police station in an attempt to get a better view of the monster truck event at Stockland Park. They claimed their son received facial lacerations and a bruised thigh and knee after he was apprehended when he and his uncle, D, descended from the roof at the request of the police.

About six police then attacked B and took him to the police station. Mr H said he was forced to stay outside, but could hear his son yelling. The boy claimed that police asked him only for his name and if he had heroin or other drugs on him before they handcuffed him and threw him into a cell. He said it was only later that they asked him his age.

As police released his son about 20 minutes later, Mr H said 'I saw B's face — I asked police what had happened to him but they told me to get out'. Mr H said he was seeking legal advice, and had approached the CMC.

Police Superintendent E said he was aware that an incident had occurred, but not that allegations had been made, and that 'If they have allegations to make they should go to the CMC, the Police Ethical Standards, or a local police station'. He said there was nothing to say a juvenile could not be handcuffed, 'but police attacking a 13-year-old boy is not something that would happen.'

In this case, senior officer E had a statutory duty to report the allegations once they had come to his attention; instead, he told the reporter that if the boy's parents had a complaint about police conduct, they should go elsewhere. Such a response sends a message to the public that the police service does not care about complaints against its members, and will defend their conduct whatever the circumstances. It can also actively discourage people (including other police officers) from making complaints about police conduct.

More appropriately, without expressing an opinion about the veracity or otherwise of the allegations, senior officer E could have assured the reporter that the QPS took complaints against its members seriously and would investigate the allegations, which if true indicated conduct unacceptable in a police officer.

A culture where learning can occur develops in an environment which encourages the sharing of information. By listening to, and constructively dealing with information about negative performance, organisational leaders send a signal to members that errors and concerns can be discussed openly.⁴⁴ To create a strong discipline system, learning that arises out of disciplinary decisions must be incorporated into training programs, both as an embedded component of operational training modules and as part of ethical practice units.

The rules and processes of a good discipline system must be explicit about the obligation to report inappropriate behaviour. Fitzgerald in 1989 identified the unwritten code of silence among police that allowed misconduct to flourish and 'reduce, if not almost eliminate concern at possible apprehension and punishment ...'. Under this code of silence, police were not permitted to criticise their colleagues, particularly to anyone outside the organisation, or to cooperate in the investigations of fellow police.⁴⁵

44 Vera D & Crossan M 2004, 'Strategic Leadership and Organisational Learning' *Academy of Management Review*, vol. 29, no.2, pp. 222–40 at 228 and 231

45 Fitzgerald report, op.cit., p. 202

Ethical leadership in practice — examples from the private sector

It means ... clearly disciplining employees at all levels when they break the rules. A financial industry executive provided the following examples.

If there's a situation within the corporation of sexual harassment where [the facts are] proven and management is very quick to deal with the wrongdoer ... that's leadership. To let the rumour mill take over, to allow someone to quietly go away, to resign, is not ethical leadership. It is more difficult, but you send the message out to the organisation by very visible, fair, balanced behaviour. That's what you have to do ...

If someone has taken money, and they happen to be a 25-year employee who has taken two hundred dollars over the weekend and put it back on Monday, you have to ... fire that person. [You have to make] sure that everybody understands that Joe took two hundred dollars on Friday and got [fired] ... [they must also] be assured that I did have a fact base, and that I did act responsibly and I do care about 25-year people ...

Another financial industry executive talked about how he was socialized early in his career.

When I was signed ... to train under a tough, but fair partner of the firm ... he [said] 'there are things expected from you ... but if you ever make a transaction in a client's account that you can't justify to me was in the best interest of the customer, you're out'. Well that kind of gets your attention ...

An airline executive said,

We talk about honesty and integrity as a core value; we communicate that. But then we back it up ... someone can make a mistake. They can run into the side of an airplane with a baggage cart and put a big dent in it ... and we put our arm around them and retrain them ... If that same person were to lie to us, they don't get a second chance ... When it comes to honesty, there is no second chance.⁴⁶

To change the cultural reluctance to speak up about individual and organisational failings, supervisors and leaders must value reporting this type of information as a constructive activity, and back it up with an adequate and effective internal witness support program to ensure that officers who do so are protected against any form of retribution.⁴⁷

► **A strong discipline system is reinforced by proactive strategies aimed at promoting good behaviour and preventing inappropriate behaviour to minimise complaints.**

Bingham noted that the need for a preventative and problem-solving approach to addressing the breakdown of discipline was at least as important as reacting to inappropriate behaviour by way of formal discipline processes.⁴⁸

A discipline system can be strengthened first, by investing resources in risk assessment (e.g. the analysis of complaints data with a view to identifying officers, particular ranks, locations and types of conduct that may present higher risks). Overrepresentation in complaints statistics may also evidence 'patterns which are indicative of procedural inadequacies and management deficiencies'.⁴⁹ However, trend analysis alone will not be sufficient. In 2008, the Service Delivery and Performance Commission (SDPC) review of the QPS noted that the QPS's current reporting on discipline and ethical practice required improvement because it focused on high-level statistical trends rather than on analysis of what those trends actually revealed, the possible causes of the behaviour, and options to address the identified risks. It advocated regular monitoring and analysis of complaints data to continually inform the relevance and appropriate targeting of ethics training.⁵⁰

46 Trevino, LK, Hartman, LP & Brown, M 2000, op.cit., pp. 134-5

47 Criminal Justice Commission 1997, *Integrity in the Queensland Police Service; Implementation and impact of the Fitzgerald Inquiry reforms*, CJC, Brisbane; Queensland Police Service 2009, op.cit., p. 17

48 Bingham review op.cit., p. 234

49 *ibid*, pp. 235, 256

50 SDPC 2008 op.cit., p. 82

Second, a discipline system will be more robust if human resource management policies use the performance management system for genuine developmental purposes (e.g. by linking it to early intervention efforts to deal with inappropriate behaviour). When such a system is used only to determine eligibility for pay point progression, it tends to be treated as a formality and fails to produce reliable and consistent information about actual performance and development concerns.⁵¹ It can also be used to monitor the effect of sanctions and management strategies.

► **A strong discipline system enables the organisation to deal *responsibly* with inappropriate conduct.**

To ensure that inappropriate conduct is dealt with efficiently and effectively, it is essential to make a conscious investment in training supervisors, with a particular focus on ethical leadership principles in practice. Effective management requires that supervisors understand their responsibilities and commit to undertaking the role properly. In areas where there is a high staff turnover or a high proportion of staff relieving in supervisory positions, officers can find it difficult to make hard decisions, particularly when it comes to addressing the inappropriate behaviour of their colleagues.⁵² Their accountability must be incorporated into the framework of the discipline and performance management systems.

Conclusion

In this section, we have discussed what the CMC considers the essential attributes of a good discipline system — one that sets the standard for the organisation, and helps maintain public confidence in its ability to deal effectively with the inappropriate behaviour of its members.

In the next chapter, we look at the organisational context, legislative framework and structure of the system currently in place in the QPS.

51 PSMC report 1993, op.cit., p.119; SDPC 2008, op.cit., p.129

52 SDPC 2008, op.cit., p. 83

THE CURRENT QPS DISCIPLINE SYSTEM

Organisational context

The QPS is Queensland's primary law enforcement agency, with core responsibility for:

- preserving peace and good order in all areas of Queensland
- protecting the Queensland community
- preventing and detecting crime
- upholding the law
- administering the law fairly and efficiently
- bringing offenders to justice.

The police service consists of 10 458 police officers, 244 recruits and 4109 unsworn staff members, as at 30 June 2010.⁵³ It is headed by the Commissioner of the Police Service who 'is responsible for the efficient and proper administration, management and functioning of the police service in accordance with law.'⁵⁴

Police officers include:

- executive officers — assistant commissioners and deputy commissioners
- commissioned officers — inspectors, superintendents and chief superintendents.
These officers have law enforcement powers not available to non-commissioned officers.
- non-commissioned officers — constables, senior constables, sergeants and senior sergeants.

The QPS is a geographically dispersed organisation, with 340 police stations throughout Queensland's over 1.7 million square kilometres. As these circumstances present communication and supervisory challenges for policing purposes, the state is divided into eight regions as shown in Fig. 3.

The QPS is structured as Specialist Operations and Regional Operations, each headed by a deputy commissioner, and Resource Management, headed by a Deputy Chief Executive (see Fig. 4).

Specialists Operations includes five commands — the State Crime Operations Command, Ethical Standards Command, Operational Support Command, the CMC Police Group, and the Training and Development Command, all of which have statewide responsibilities.

Each region is headed by an assistant commissioner, with a chief superintendent as second-in-command. In regional commands such as those in the south-east corner of the state and major metropolitan areas, regional duty officers (inspectors attached to each region who report to the chief superintendent) are responsible for dealing with major issues as they arise.

⁵³ QPS Geographical Information Service, Information Resource Centre, and HR Policy and Workplace Planning 26 August 2010.

⁵⁴ *Police Service Administration Act*, s. 4.8(1)

Figure 3: Police regions in Queensland

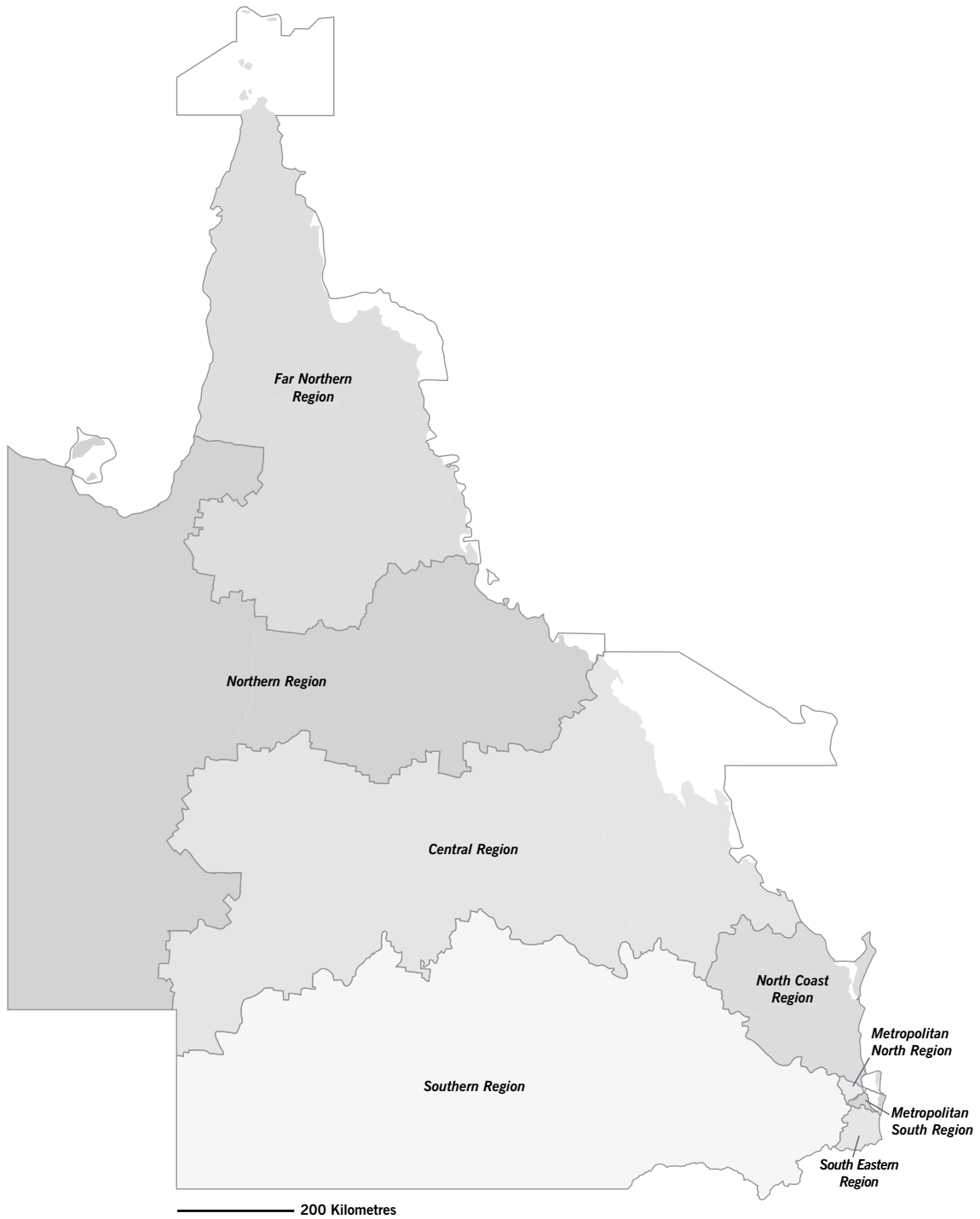
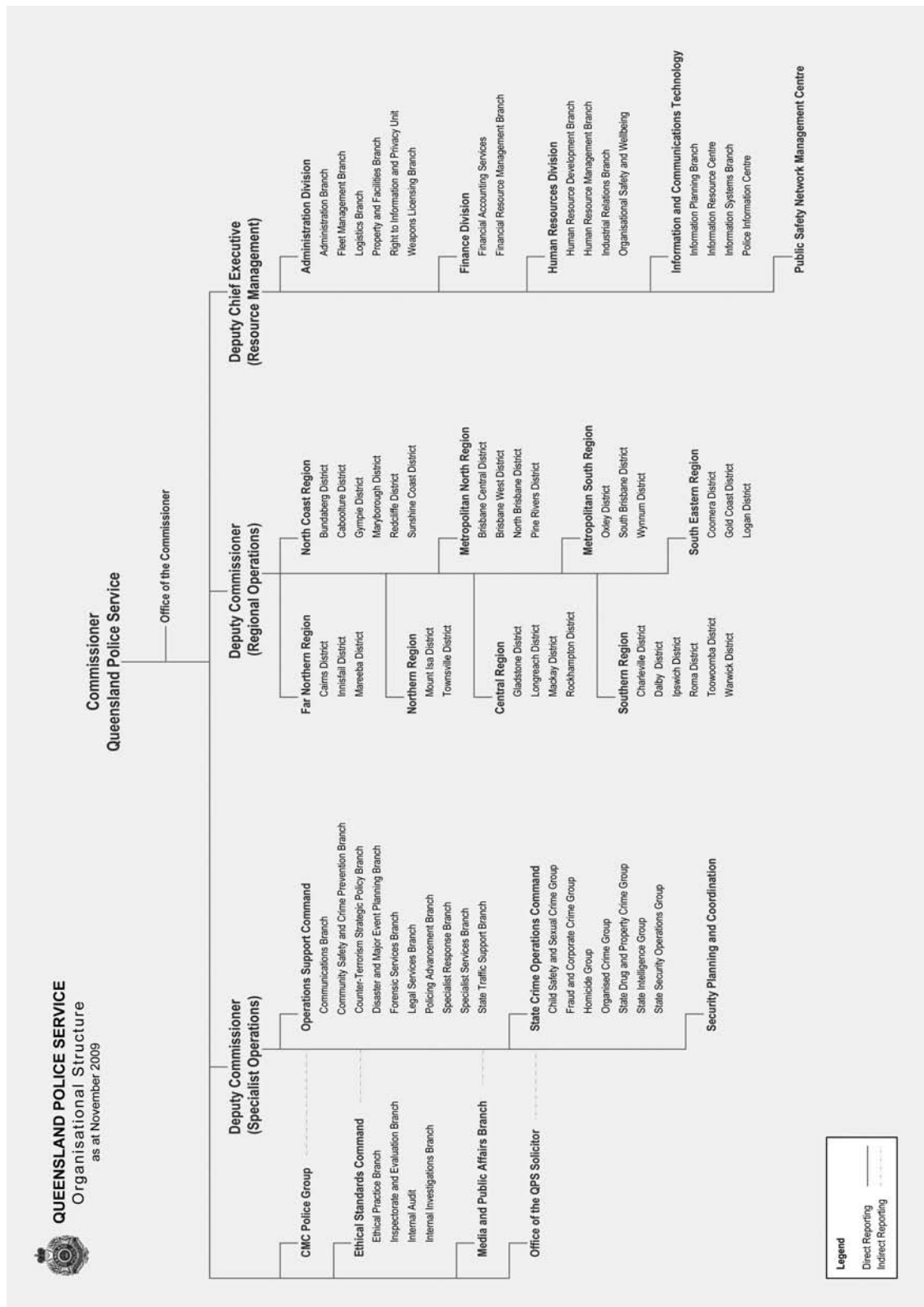


Figure 4: Queensland Police Service organisational chart



Source: QPS website <www.police.qld.gov.au>.

The regions are further geographically divided into districts under the command of district officers, most of whom are superintendents, with inspectors taking on the responsibility in some smaller districts.⁵⁵ Some districts, particularly in major metropolitan centres, also have district duty officers — senior sergeants who report to the district officer.

Divisions are the patrol areas within a district, with a station in each division. The officer in charge of a station is usually a senior sergeant, but smaller stations can be run by sergeants and senior constables. Shift supervisors at sergeant level lead teams within stations, with constables and senior constables as first response officers.

Station size and number of personnel vary greatly depending on the location. The large suburban station at The Gap (Metro North Region, Brisbane West District) is staffed by 17 police officers and one staff member. It serves an area of 61.3 sq km and a population of over 38 600 (37 451 in 2006 census).⁵⁶ By contrast, the officer-in-charge (the only officer) at Yaraka Station (Longreach District, Central Region) is responsible for a divisional area of about 3560 sq km and a population of approximately 80.⁵⁷ The discipline system has to be flexible enough to function in a range of such varying contexts.

Legislative framework

The QPS police discipline system sits within a legislative framework, principally governed by the *Police Service Administration Act 1990* and the *Crime and Misconduct Act 2001*. This framework is supported by a number of internal policy documents including the QPS *Operational Procedures Manual*,⁵⁸ the procedures for *Discipline and Complaint Management*⁵⁹ and the QPS Code of Conduct.⁶⁰

Role of the Ethical Standards Command

The ESC manages the internal discipline process within the QPS, and is responsible for promoting ethical behaviour and professional practice within the Service.

Currently, the allocated staffing level of the ESC is 75, with positions allocated as follows:

- Ethical Standards Command Office — 13
- Ethical Practice Branch — 14
- Inspectorate and Evaluation Branch — 14
- Internal Investigations Branch — 28
- Internal Audit — 5 (staff members).⁶¹

The Chief Superintendent, ESC is responsible to the assistant commissioner for the coordination of the operations of the three branches, the Legal and Policy Unit, and administrative support to the command.

While all areas within ESC contribute to its core responsibility of managing the internal complaint system and promoting ethical behaviour and professional practice, the Internal Investigations Branch and Ethical Practice Branch have greater direct involvement in the discipline system.

55 A few districts are headed by an inspector.

56 ABS Census data 2006

57 Reported population in the 2006 census was 83.

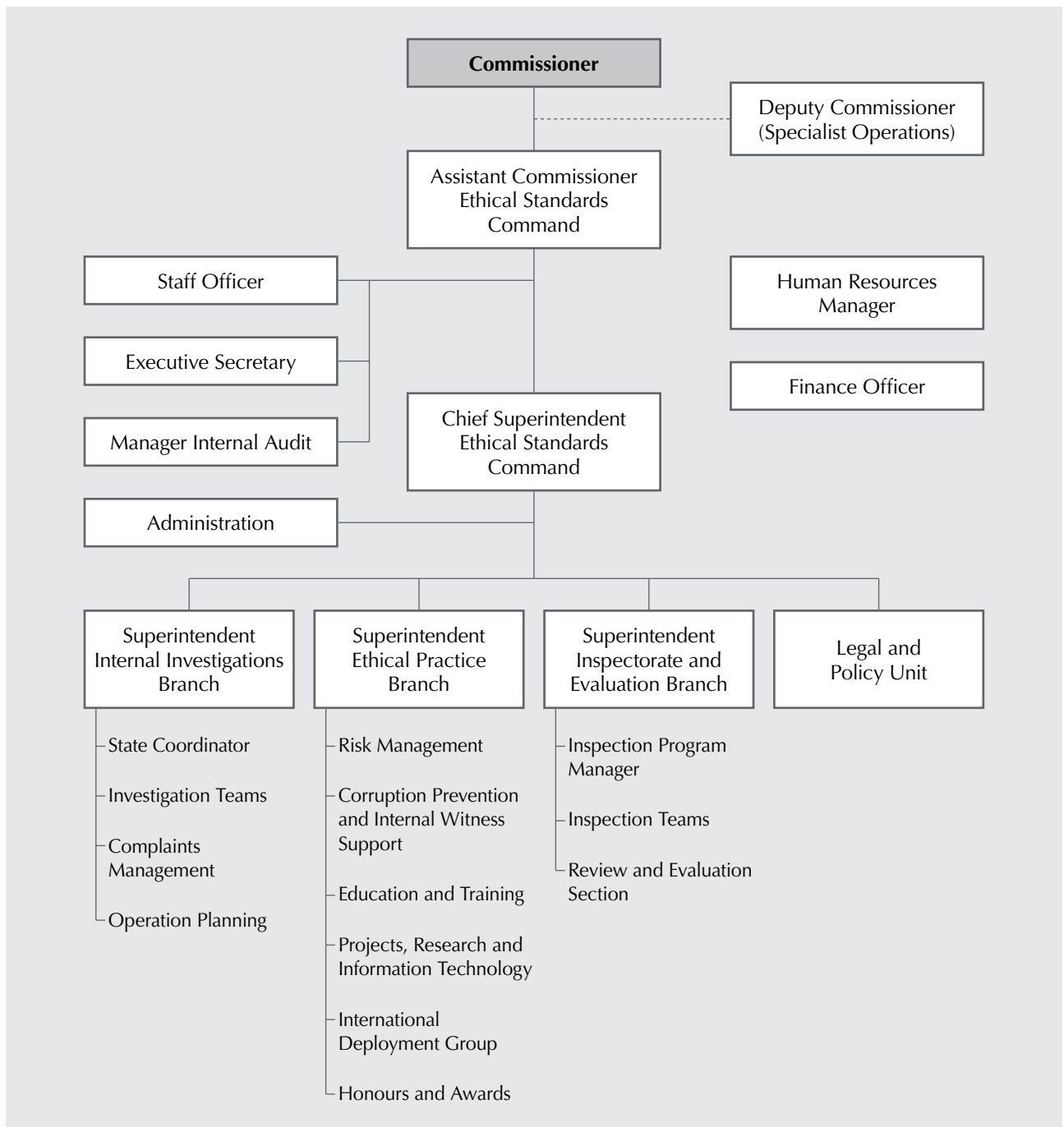
58 Queensland Police Service 2010, RTI section, viewed 29 June 2010 < www.police.qld.gov.au >.

59 QPS Human Resources Management Manual, Section 18

60 *ibid.*, Section 17 (See Appendix B of this report).

61 QPS Geographical Information Service, Information Resource Centre, and HR Policy and Workplace Planning 26 August 2010.

Figure 5: Ethical Standards Command organisational chart



ESC's responsibilities include:

- administering the police discipline system
- investigating allegations of corruption, misconduct and serious breaches of discipline, including suspected unethical conduct
- improving ethical standards for QPS employees, including the development of corporate policies, practices and strategies to prevent, minimise and discourage unethical conduct
- developing educational strategies to ensure that all employees fully understand the expected standards of ethical behaviour
- maintaining QPS members' confidence in the proper and efficient management of the discipline system.

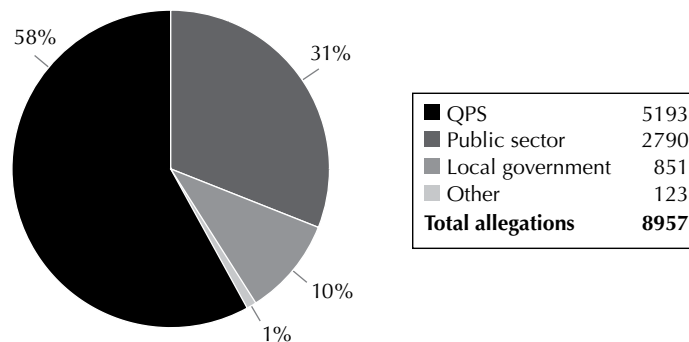
Professional practice manager

In 2002, the Service established a dedicated position, at the rank of inspector, to oversee the handling of complaints in each region and command. Re-named as professional practice manager (PPM) in 2004, the position reports directly to the relevant assistant commissioner or director and, among other things, is responsible for:

- coordinating and overseeing the resolution of complaints
- advising the assistant commissioner and other prescribed officers in relation to the discipline process
- assisting ESC to review and audit complaint matters
- overseeing significant incidents in compliance with QPS policy
- providing policy advice to the assistant commissioner on professional practice and performance matters.

The ESC and the PPMs are at the front line of a discipline system that has to deal with a high volume of complaints — a disproportionate number in comparison with other occupations in the public sector.⁶² For example, in the financial year ended June 2009, the Queensland Police Service represented only seven per cent of Queensland Public Service employees but accounted for 58 per cent of allegations of inappropriate conduct received by the CMC (see Fig. 6).⁶³

Figure 6: Allegations, by agency, received by the CMC for 2008–09⁶⁴



As with most processes for discipline in law enforcement agencies, the Queensland police discipline system is extremely complicated.⁶⁵ Fig. 7 illustrates the major processes and features of the system, while Figures 9, 10, 11 and 12 demonstrate its inner complexities.

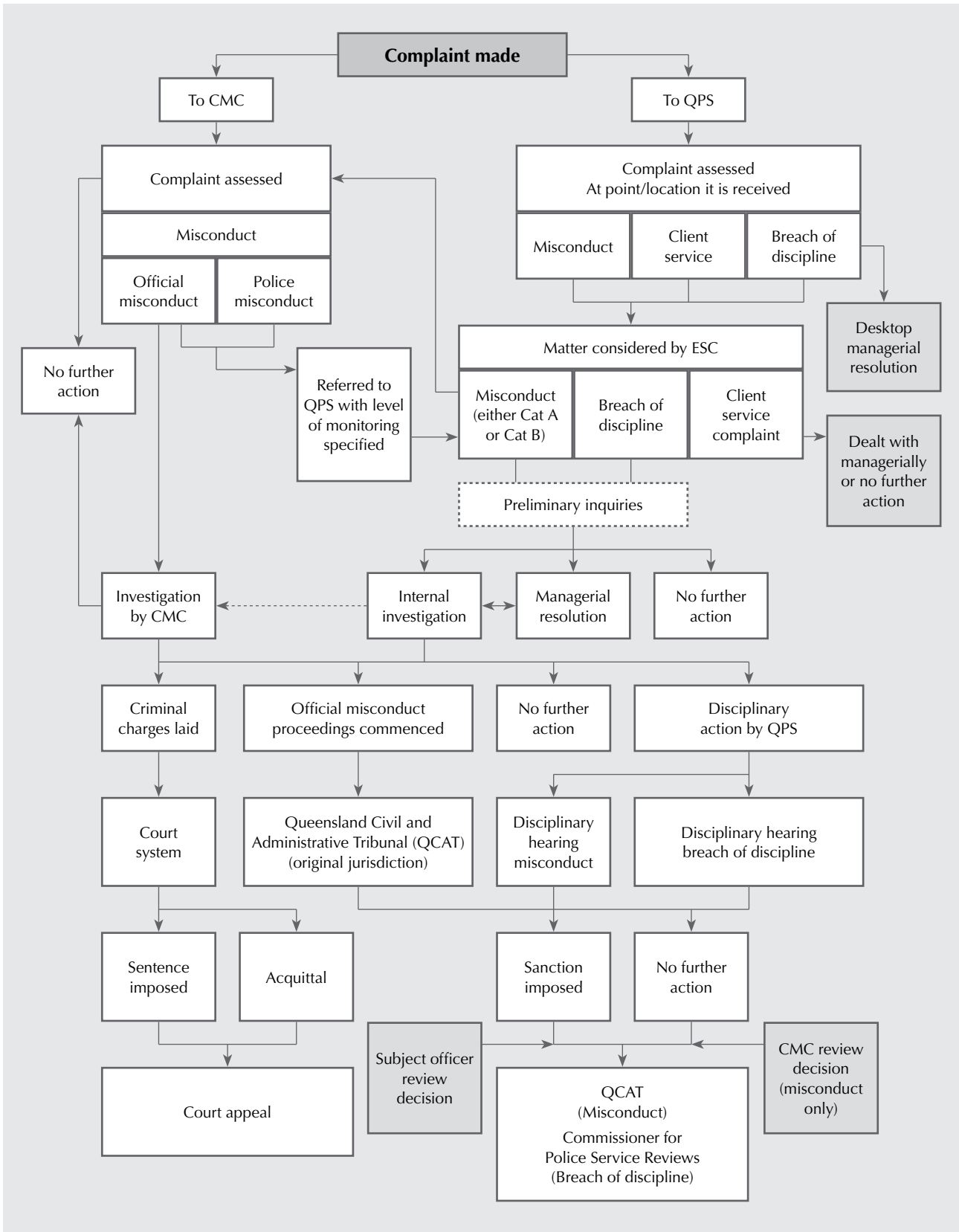
⁶² For example, Health, Community Services and Education are key service delivery agencies in Queensland (see Public Service Commission, *Queensland Public Service Workforce Characteristics 2008-2009*, p. 4 available at www.psc.qld.gov.au/library/document/catalogue/workforce-statistics/characteristics-qps.pdf).

⁶³ PSC figures for 2008–09: QPS FTEs — 13 894.43; Queensland public sector FTEs — 195 923.96 (FTEs are the sum of people working full-time award hours, so two people working part-time could account for one FTE).

⁶⁴ The CMC publishes comparative statistics on allegations received by public sector agencies in its annual reports. These figures are from the *Crime and Misconduct Commission Annual Report 2008–09*, p.25.

⁶⁵ Prenzler, T 2009, *Police corruption: preventing misconduct and maintaining integrity* CRC Press, Boca Raton, Florida. p. 83).

Figure 7: QPS discipline system



Steps in the process

In this section, we detail the major technical aspects of the system — how complaints are received, assessed, and dealt with; and the roles of the QPS and the CMC in this process.

Step 1: Assessment

A complaint about a police officer is an allegation or information about the improper or inappropriate conduct of the officer. Both the CMC and the QPS have a role in the management of these complaints, which is determined by the type of conduct in question.

Receipt of complaints

Complaints about the conduct of police officers can come to light in the following ways:

- A person may provide the information to the CMC or the QPS by telephone or some other form of direct communication.
- A member of the police service may report to the CMC or the QPS information they have become aware of in the course of their duties about the improper or inappropriate conduct of a police officer.
- The CMC or the QPS might also receive the information from other sources such as a media report.

Types of conduct

When the CMC or the QPS receives or becomes aware of a complaint, each agency first assesses the information and identifies the type of conduct involved by categorising it as:

- a. a client service complaint (e.g. 'I had a break-in at my house and the police took five hours to arrive after I telephoned')⁶⁶
- b. a breach of discipline (e.g. minor inappropriate use of internet or email)⁶⁷
- c. misconduct.⁶⁸

Misconduct is further categorised as:

- police misconduct (e.g. serious verbal abuse of a member of the public by a police officer on duty)⁶⁹
- official misconduct (e.g. a police officer trafficking in drugs).⁷⁰

Further explanations of each of these types and categories are provided in Fig. 8.

If a complaint satisfies the definition of misconduct, it cannot be a breach of discipline, and if a complaint satisfies the definition of misconduct or breach of discipline, it cannot be a client service complaint.

66 Defined in the *QPS Human Resources Management Manual*, Section 18, 'Discipline and complaint management'.

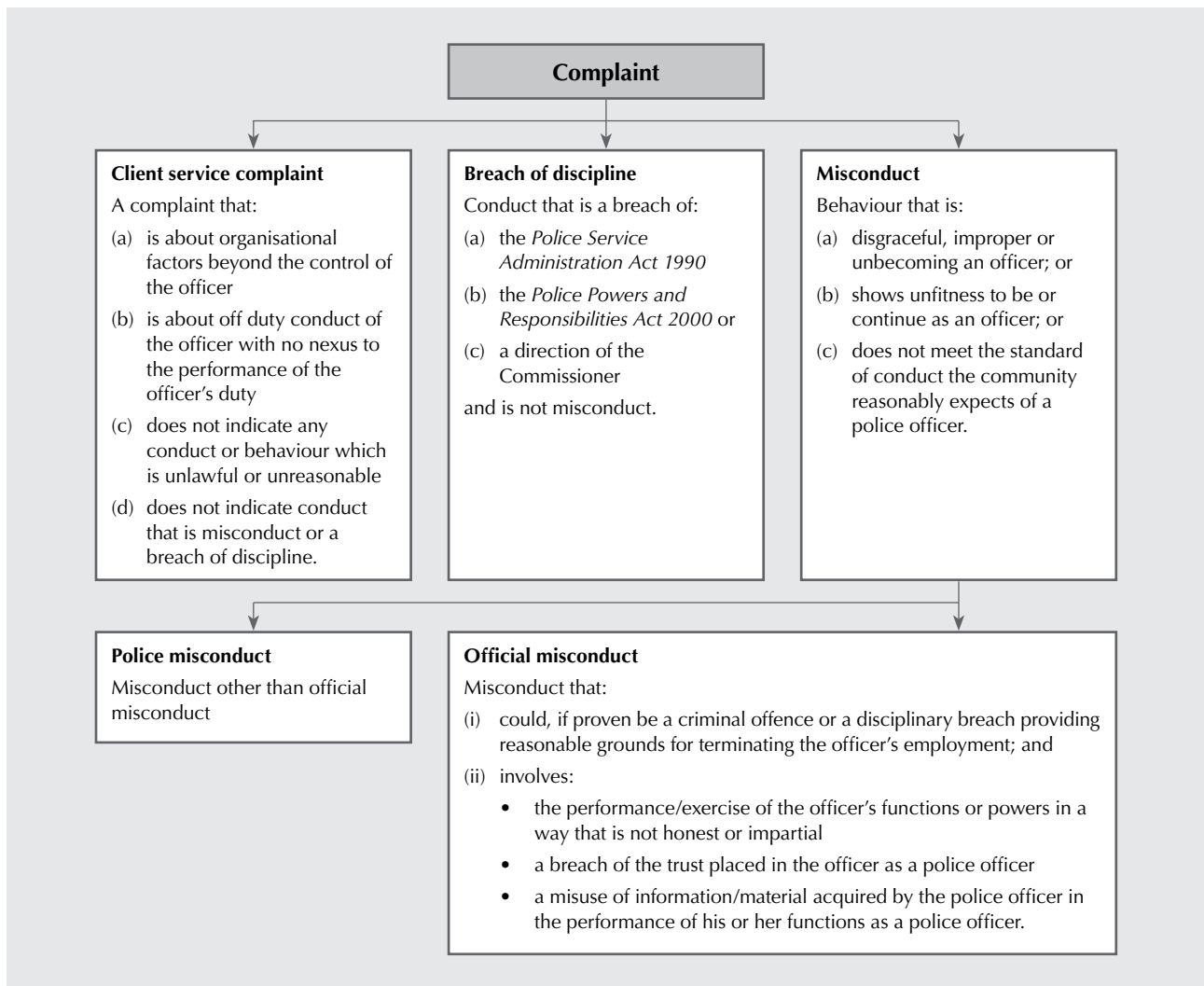
67 PSA Act s. 1.4

68 *ibid.*

69 CM Act, Sch 2

70 CM Act ss. 14, 15

Figure 8: Types of conduct dealt with by the discipline system



How the QPS assesses complaints

The QPS has sole responsibility for dealing with breaches of discipline and client service complaints. It is not required to tell the CMC when it receives a complaint about this type of conduct, and can itself decide how it will deal with it.

The QPS must notify⁷¹ the CMC of all complaints about misconduct⁷² in accordance with specified procedures. For this purpose, the CMC defines misconduct complaints as Category A (see text box following) or Category B:

- The QPS must notify the CMC of Category A complaints without delay, and must not take any other action, except to preserve life, property and evidence (unless otherwise instructed by the CMC) until the CMC has assessed the complaint.
- Category B complaints are all those that do not fall into Category A. The QPS can deal with these complaints immediately but must provide the CMC with a weekly schedule of information on them. The CMC checks QPS's categorisation, notifies them of any errors and reclassifies these complaints as Category A. The QPS must notify the CMC of how it has dealt with all Category B complaints.

71 A complaint must be referred to the CMC if there is a *reasonable suspicion* that it involves alleged conduct which could constitute police misconduct; or there is a *suspicion* that it involves or may involve alleged conduct which could constitute official misconduct.

72 CM Act, ss. 37–8. A 'complaint' includes any 'information or matter'.

Category A complaints

Category A complaints are those that involve alleged:

- corruption (s. 87) or extortion by public officers (s. 88) or abuse of office (s. 92) in Chapter 13 of the *Criminal Code Act 1899* (CC Act)
- an inappropriate association with a criminal and/or member of an outlaw motorcycle gang or other criminal group
- an attempt to pervert the course of justice (s. 140), official corruption (s. 121), perjury (s. 123), or other offence in Chapter 16 of the CC Act
- unlawful wounding (s. 232) or grievous bodily harm (s. 320) in Chapter 29 of the CC Act
- offences relating to property in Part 6 of the CC Act where the value exceeds \$5000
- an indictable offence (excluding bodily harm) carrying a maximum penalty of seven years imprisonment or more
- offences under the *Drugs Misuse Act 1986*
- victimisation (s. 7.3) under the PSA Act, or injury or detriment to witness (s. 211), or victimisation (s. 212) under the CM Act
- a failure to comply with s. 7.2 of the PSA Act
- a complaint involving an Indigenous complainant or alleged victim concerning assault in custody or failure to provide medical treatment while in custody
- an incident involving a police officer resulting in death or injury, of a description, which could amount to unlawful wounding or grievous bodily harm or destruction of or damage to property where the extent of the damage is likely to exceed \$5000; or
- a matter that is, or is likely to, be the subject of significant media attention.

How the CMC assesses complaints

When the CMC receives a complaint, it assesses the information and decides whether it relates to alleged conduct which could constitute official misconduct or police misconduct.⁷³ In deciding on the course of action, the CMC must take into account:

- the principles set out in the CM Act⁷⁴
- the circumstances of the case
- the primary responsibility of the Commissioner of Police for dealing with complaints about police misconduct⁷⁵
- its own primary responsibility for dealing with complaints about official misconduct.⁷⁶

On this basis, it will decide whether to deal with the complaint itself or refer the matter to the QPS to deal with, subject to CMC monitoring of how the QPS does so.⁷⁷ The CMC may also decide to deal with a complaint in cooperation with the QPS.⁷⁸

73 If the CMC receives a complaint about a client service matter, it either requests that the complainant notify the QPS (local station) or, if the complaint is in writing, requests the complainant to refer the correspondence to the QPS.

74 CM Act s. 34

75 *ibid.*, s. 41

76 *ibid.*, s. 45

77 CM Act ss. 47–8

78 *ibid.*, s. 46(2)(b)

Principles guiding the way the CMC performs its misconduct function (CM Act, s. 34)

Cooperation

- to the greatest extent practicable, the commission and units of public administration should work cooperatively to prevent and deal with misconduct

Capacity building

- the commission has a lead role in building the capacity of units of public administration to prevent and deal with cases of misconduct effectively and appropriately

Devolution

- subject to the cooperation and public interest principles and the capacity of the unit of public administration, action to prevent and deal with misconduct should generally happen within the subject unit

Public interest

- the commission has an overriding responsibility to promote public confidence
 - in the integrity of units of public administration; and
 - if misconduct does happen within a unit of public administration, in the way it is dealt with
- the commission should exercise its power to deal with particular cases of misconduct when it is appropriate, having primary regard to the following
 - the capacity of, and the resources available to, a unit of public administration to effectively deal with the misconduct
 - the nature and seriousness of the misconduct, particularly if there is reason to believe that misconduct is prevalent or systemic within a unit of public administration
 - any likely increase in public confidence in having the misconduct dealt with by the commission directly.

The CMC monitors the way the police service deals with misconduct by:

- issuing advisory guidelines for conducting misconduct investigations; or
- reviewing or auditing how the QPS has dealt with misconduct, in relation to either a particular complaint or a class of complaint; or
- assuming responsibility for and completing an investigation into misconduct already started by the QPS.⁷⁹

The police service must give the CMC reasonable help to review or audit an investigation, or to assume responsibility for one. If the CMC does assume responsibility, the police service must stop its investigation or any other action that might impede the new investigation, if directed to do so by the CMC.

If the complaint is about official misconduct, the CMC may also require the police service to report to it about the investigation how and when directed to do so, and/or undertake further investigation into the official misconduct as directed.

⁷⁹ *ibid.*, ss. 47–8

Step 2: Inquiry

How the QPS deals with complaints

All misconduct complaints to be dealt with by the QPS are first considered by the Assistant Commissioner, ESC to determine which of the following actions should be taken:

- *No further action* — may be taken in relation to a complaint if:⁸⁰
 - it is frivolous and vexatious, (e.g. appears to have been motivated by vindictiveness or mischievousness and has no basis)
 - it lacks substance or credibility, (e.g. is inherently implausible and there is no apparent evidence to support it)
 - dealing with it would be an unjustifiable use of resources, (e.g. if the complaint is a repetition of previously unsubstantiated allegations without any fresh information)
 - it is inextricably interwoven with charges laid against the complainant. In these circumstances further action may be appropriate after the court proceedings are concluded.
- *Managerial resolution* (See Fig. 9) — is a process focused on ‘improving the conduct of subject members and preventing recurrence of similar complaints’.⁸¹ Considerations for determining whether a matter is suitable for managerial resolution include:
 - the likelihood of achieving identified improvements in the conduct in question
 - all the circumstances giving rise to the complaint, including the nature and seriousness of the allegations
 - the complainant’s expectations
 - the subject member’s attitude and amenability to managerial resolution
 - the standard of supervision exercised over the subject member, and whether or not it contributed to the conduct in question
 - any implications for the service
 - any impact of the complaint on the workplace and community
 - whether it is an isolated incident or symptomatic of a more serious problem
 - whether it was intentional/accidental/reckless
 - the timing of the implementation
 - whether or not it can take place at the same time as an investigation of any aspect of a complaint identified as unsuitable for this type of resolution
 - any organisational factors such as prevailing policy and procedures.⁸²

When matters are being resolved in this way, a strategy is formulated in accordance with the options listed in Table 1.⁸³

If the subject officer fulfils the requirements of the strategy, QPS internal policy and procedures stipulate that the complaint will not appear adversely on their file; neither can it be used in the integrity vetting process or promotions, transfers or reviews.⁸⁴

Figures 9 and 10 describe the major steps and processes involved in managerial resolution and in conducting an internal investigation.

80 QPS *Human Resources Management Manual*, Section 18.2.2: The Assistant Commissioner, ESC, signs off misconduct complaints resolved by ‘no further action’; the Assistant Commissioner of the relevant region signs off complaints resolved as ‘breach of discipline’.

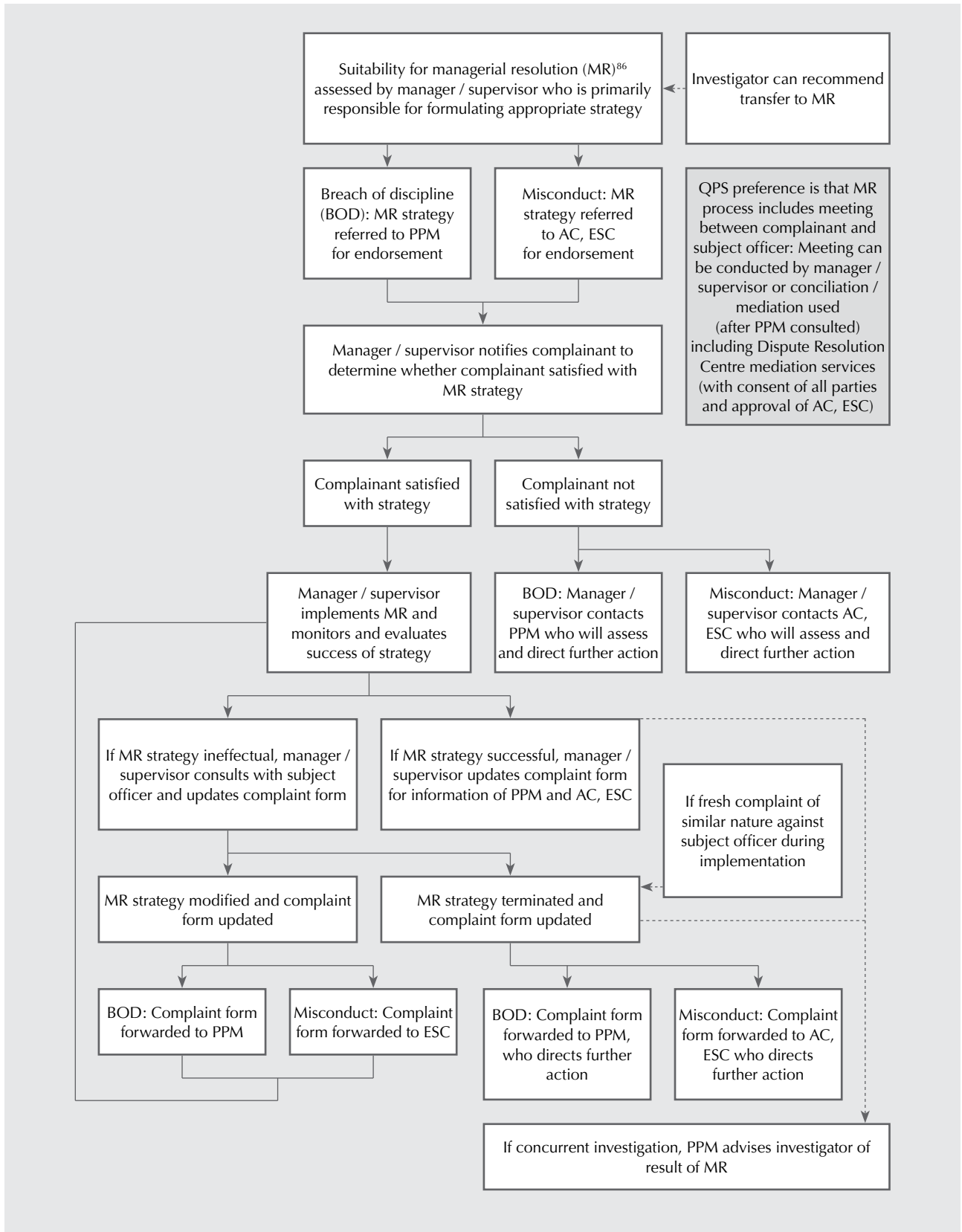
81 *ibid.*, s. 18.2.3

82 *ibid.*, s. 18.2.3.2

83 *ibid.*, s. 18.2.3.4

84 *ibid.*, s. 18.2.3.1

Figure 9: Managerial resolution



85 *ibid.*, s. 18.2.3

Table 1: Managerial resolution strategies

Personal development	Career development	Training	Professional services
Counselling	Assign to mentor	Driver training	Conciliation
Coaching	Buddy with high performer	Skills re-accreditation	Mediation
Motivation	Performance enhancement agreement	Operational skills and training/firearms	Review of management systems
Refer to welfare	Increased supervision where appropriate	Special project	Apology on behalf of Service
Human services officer — (psychologist)	Transfer to other duties (non-disciplinary)	Research	Refer to external professional training and development courses
Refer to healthy lifestyle	Restriction of duties	Distance education	
Refer to chaplaincy	Guidance	Management Development Program or Constable Development Program	
Apology	Chastise or correct (PSD Reg, r. 11)	Computer-based learning packages	
Refer to personal development training	Community service	Policy/legislation training sessions	
Access to additional duties — supervisory experience	Job rotation	Block training	
Multi-skilling	Secondment	Refer to external tertiary course	
Change shift (limited and no financial loss)		Supervisory skills training	

- *Desktop managerial resolution* — is an expedited process for breaches of discipline that are minor and unlikely to be repeated, not part of an existing course of conduct, and resolvable by managerial resolution within a short period, generally two days. Breaches of discipline dealt with in this way cannot be considered during the vetting process for promotions transfers, reviews, awards or medals.⁸⁶
- *Internal investigation*⁸⁷ is the process used when managerial resolution is inappropriate, and the investigation is required to achieve a purpose of discipline.⁸⁸

Investigating officers must be of equal or more senior rank than the subject officer, have no actual or potential conflict of interest and, where practicable, not have direct supervisory responsibility over the subject officer.⁸⁹ When interviewing the subject officer, if the investigation involves allegations of criminal offences, the investigator must first attempt a criminal record of interview. If a disciplinary interview is more appropriate, the subject officer may be directed to answer questions.⁹⁰

⁸⁶ *ibid.*, s. 18.1.6

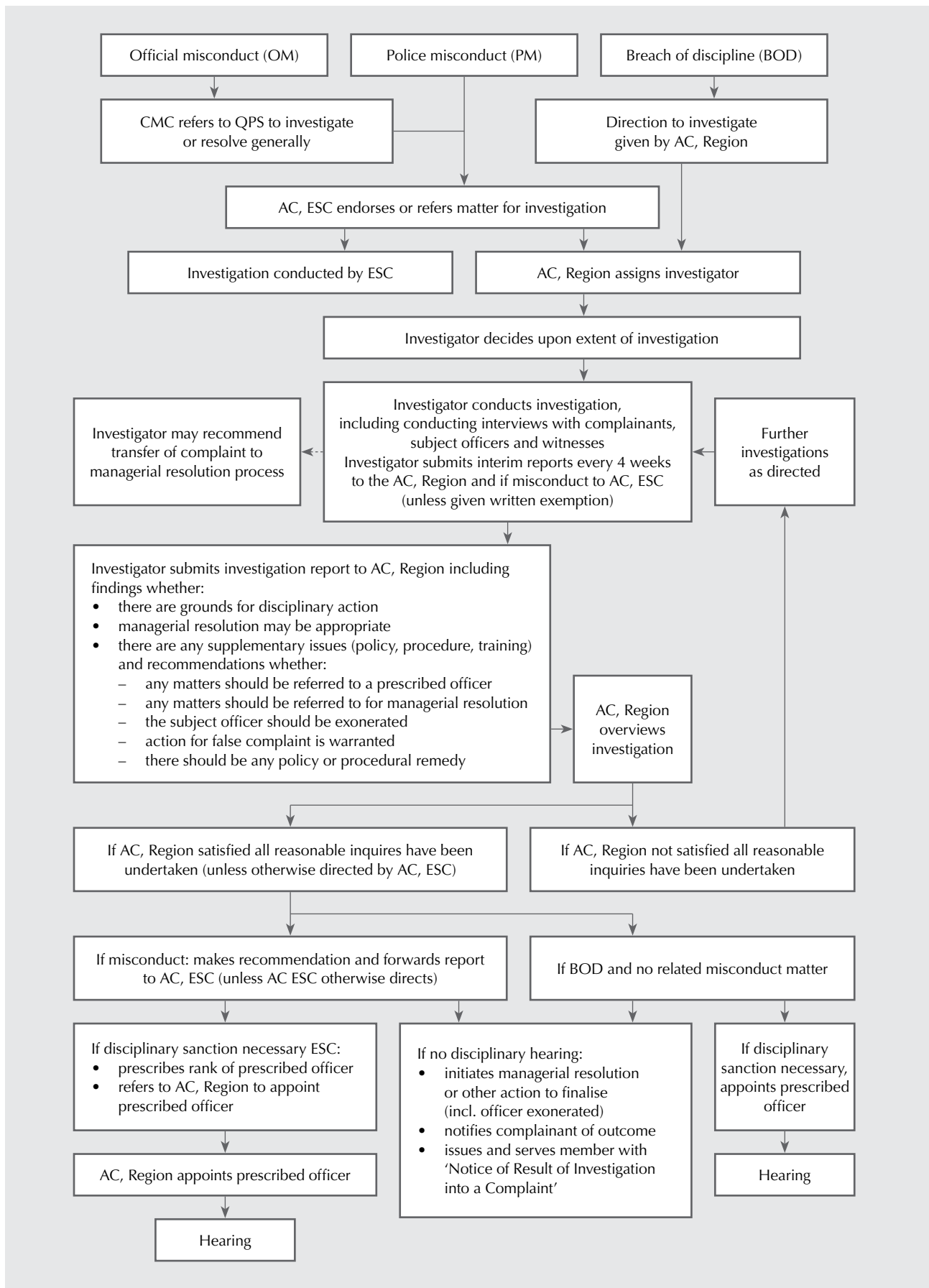
⁸⁷ *ibid.*, s. 15.18.2.14

⁸⁸ *ibid.*, s. 18.2.4

⁸⁹ *ibid.*, s. 18.2.4.1

⁹⁰ *ibid.*, ss. 18.2.3.3.3 and 18.2.4.4.9

Figure 10: Internal investigation



To help decide which is the most appropriate of these actions, the Assistant Commissioner, ESC can request that preliminary inquiries be made. If the alleged conduct is a breach of discipline, the assistant commissioner in charge of the police region where the subject officer works determines how the matter is to be dealt with. The *QPS Human Resource Management Manual* provides guidelines for determining what action should be taken, and gives directions on how to do so.⁹¹

Dealing with complaints against police officers who have resigned

A police officer involved in conduct that breaches criminal or regulatory law is liable to prosecution for that offence even if they resign from the police service before or during the prosecution.

Until recently, if an officer resigned under these circumstances, there was no basis for starting or continuing the disciplinary process because it is an administrative process connected with employment.

However, since 2009, under Part 7A of the PSA Act, the Commissioner may, in certain circumstances, make a 'disciplinary declaration' if a police officer resigns before disciplinary action is finalised. This means that an investigation and a hearing into the alleged misconduct must still be conducted, but must begin within two years of the officer's resignation.

If the outcome of the hearing is that the officer would have been liable to either dismissal or reduction of rank had they not resigned, the Commissioner can make a disciplinary declaration of this finding. This does not affect the way the officer's employment has ended, or any benefits or entitlements to which the officer is entitled.

In certain circumstances, the Queensland Civil and Administrative Tribunal (QCAT) can also hear and decide allegations of official misconduct against a police officer, regardless of their employment status (s. 219DA CM Act).

How the CMC deals with complaints

If the CMC decides that it will deal with a complaint about alleged misconduct, it conducts an investigation, as a result of which it may decide:

- to take no further action, for example because there is insufficient evidence to prove misconduct by an officer or the evidence establishes that there is no misconduct
- that there is evidence to support an offence in relation to which criminal prosecution of the subject officer should be considered.⁹² In some cases, the CMC will report on the investigation to the Director of Public Prosecutions (DPP) or other authority for the purpose of considering whether any prosecution proceedings should occur. In other cases, a police officer seconded to the CMC may commence proceedings against the subject police officer without first referring the matter to the DPP or other authority.⁹³
- that there are grounds for considering disciplinary action against the subject officer. If so, the CMC may refer the matter to the QPS for action,⁹⁴ or if it involves official misconduct, the Queensland Civil and Administrative Tribunal (QCAT).⁹⁵

91 *ibid.*, s. 18.2

92 CM Act, s. 49(2)(a)

93 The CMC has internal guidelines to determine when a matter should be referred to the DPP before a criminal prosecution is commenced.

94 CM Act, s. 49(2)(f)

95 *ibid.*, s. 50

Under the PSD Reg, the grounds on which a police officer may be liable to disciplinary action are:

- unfitness, incompetence or inefficiency in the discharge of the duties of an officer's position
- negligence, carelessness or indolence in the discharge of the duties of an officer's position
- a contravention of or failure to comply with a provision of a code of conduct or any direction, instruction or order given by or caused to be issued by the Commissioner
- a contravention of or failure to comply with a direction, instruction or order given by any superior officer or any other person who has authority over the officer concerned
- absence from duty except on leave duly granted or with reasonable cause
- misconduct
- conviction in Queensland of an indictable offence or outside Queensland of an offence which, if it had been committed in Queensland, would have been an indictable offence.⁹⁶

Step 3: Action

The Commissioner of Police has primary responsibility for taking disciplinary action against police officers; however, the CMC may initiate disciplinary proceedings in certain circumstances.⁹⁷

Disciplinary action can therefore be commenced against a subject officer in either of the following ways:

- If the CMC reports to the Commissioner of Police that it considers a complaint involves official misconduct, and there is evidence supporting a charge of a disciplinary nature of official misconduct against the subject officer, the CMC may commence proceedings in the Queensland Civil and Administrative Tribunal (QCAT) to hear and decide on the allegation.⁹⁸
- If the CMC refers a matter to the QPS, or the QPS conducts an investigation itself and the investigating officer recommends that disciplinary action be considered against an officer, an appropriately qualified officer (a prescribed officer) is appointed. This officer commences a proceeding to hear and decide a disciplinary allegation brought against the subject officer (see Fig. 11).

As the range of disciplines available to a prescribed officer depends on that officer's rank, the sanction that might be imposed on the subject officer if the grounds for discipline are proved must be considered when appointing the prescribed officer (see Table 2). The decision to appoint a prescribed officer is made by:

- the assistant commissioner of the region in which the subject officer is serving if the allegation is of a breach of discipline
- the Assistant Commissioner, ESC if the allegation is of misconduct

96 Under its prevention function, the CMC may also make recommendations to the QPS with a view to preventing misconduct (CM Act, s. 24).

97 CM Act, s. 41

98 CM Act, s. 50

Table 2: Sanctions available v rank of prescribed officer⁹⁹

Disciplinary sanctions available	Non-commissioned officer	Commissioned officer	Assistant commissioner	Commissioner or deputy commissioner
Dismissal				✓
Any other discipline considered warranted				✓
Reduction in rank / classification			✓	✓
Forfeiture or deferment of salary increment			✓	✓
Reduction in salary (without affecting rank / level)			✓	✓
Up to \$200 deduction from salary		✓	✓	✓
Caution or reprimand	✓	✓	✓	✓

Standing down or suspending a police officer

Under Part 6 of the PSA Act, the Commissioner of Police may stand down or suspend a police officer (with or without pay) at any time after a complaint has been received if the Commissioner is reasonably satisfied that:

- the officer is liable to be dealt with for official misconduct
- the officer is liable to disciplinary action
- the efficient and proper discharge of police discipline might be prejudiced if the officer's employment continues
- the officer has been charged with an indictable offence; or
- the officer is unfit for reasons of health to such an extent that they should not be subject to duties.

An officer who is suspended or stood down from duty is relieved of their powers and duties as a police officer and is not, during the period of stand down or suspension, bound by their oath of office.

An officer who is stood down must perform duties for the police service as directed by the Commissioner, but an officer who is suspended is removed from the workplace and must not re-enter it during the period of suspension.

As the power to stand down or suspend a police officer is not a disciplinary sanction, this power may be exercised at any time during the complaint management and/or discipline process.

Step 4: Outcome

Disciplinary hearing

Guidelines and rules for conducting disciplinary hearings are set out in Section 18.3 of the QPS Human Resource Management Manual. Figure 13 (p. 54) shows the major steps in the process.

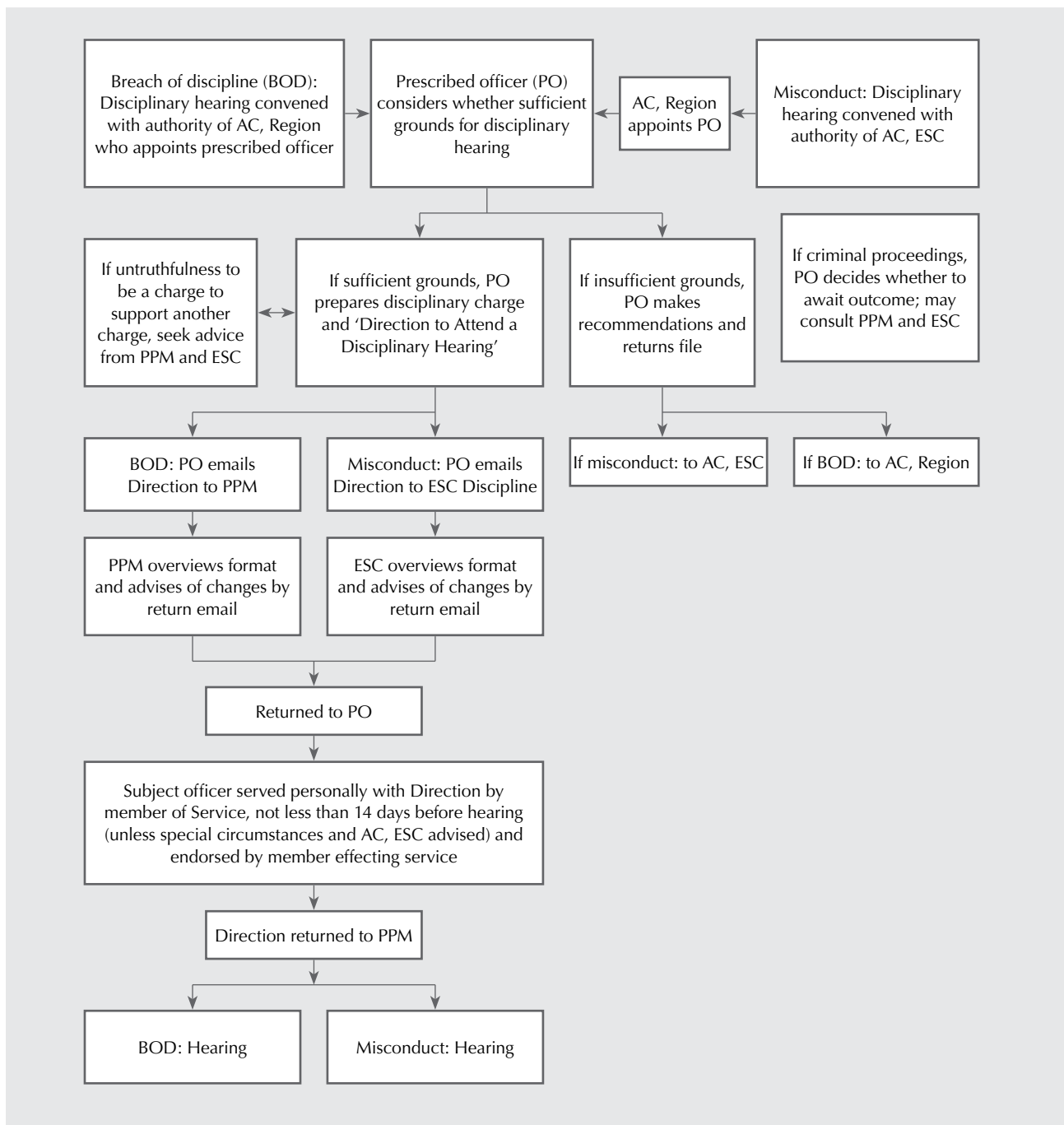
⁹⁹ *ibid.*, ss. 5–8 and ss. 10, 12.

Disciplinary sanctions

Though there are no legislative guidelines or rules for what a prescribed officer must take into account when considering an appropriate disciplinary sanction, QPS internal guidelines require the officer to consider:

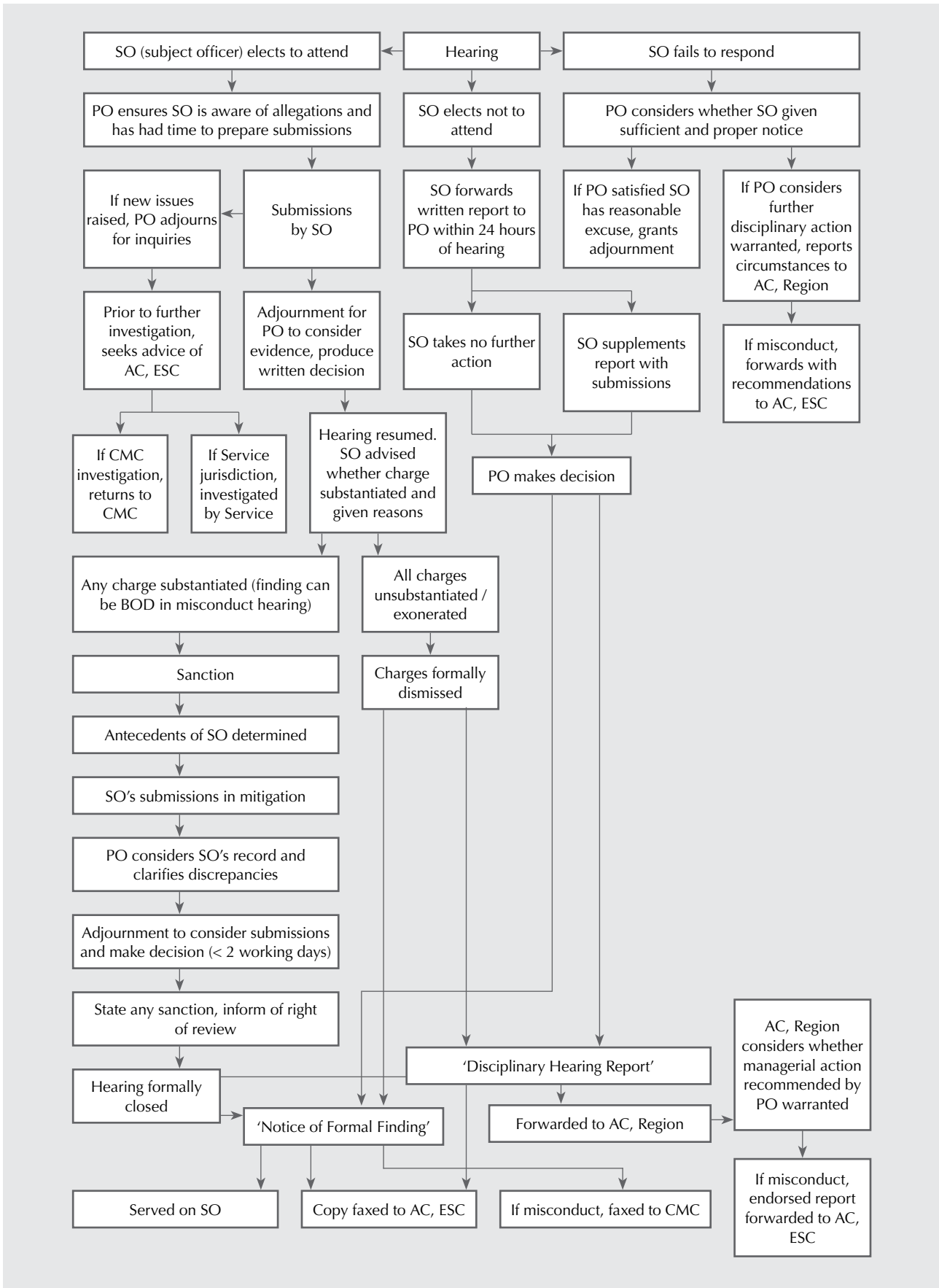
- the purpose of discipline
- the seriousness of the substantiated allegation
- circumstances in mitigation or extenuation, and circumstances of aggravation
- how recently the actions were substantiated
- prior disciplinary matters substantiated, and relevant sanctions imposed

Figure 11: Disciplinary action for misconduct or breach of discipline¹⁰⁰



¹⁰⁰ *ibid.*, s. 18.3

Figure 12: Disciplinary hearing for misconduct¹⁰¹



101 QPS Human Resources Management Manual, op. cit., s. 18.3

- efforts by the subject member to make reparation where the sanction relates to loss of or damage to QPS property
- prior good conduct and commendations or awards for good police work or other relevant awards or commendations
- length of service and experience, current rank or position
- any other matter the prescribed officer considers relevant.¹⁰²

The Regulations set out what disciplinary sanctions may be imposed if the prescribed officer is satisfied that there are grounds for disciplining the subject officer.¹⁰³

The prescribed officer may suspend the effect of a disciplinary sanction imposed on an officer, if the officer agrees to:

- perform voluntary community service; or
- undergo voluntary counselling, treatment or some other program designed to correct or rehabilitate the conduct which led to the disciplinary action.

If the officer completes these requirements, then the sanction is taken never to have been imposed. If the officer does not complete the requirements, then the sanction is to be implemented.

A sanction imposed by a non-commissioned officer on a subordinate officer must not be recorded on that officer's personal file except to indicate the necessity for further training and guidance.

Step 5: Review

In accordance with fundamental legislative principles, police officers have a 'right of review' of certain decisions made in the course of the discipline process. The nature of this right depends on the type of conduct for which the decision was made.

An officer who has been sanctioned for a 'breach of discipline', an officer who has been suspended or stood down, or a former officer in respect of whom a disciplinary declaration has been made may apply to the Commissioner for Police Service Reviews for a review of a decision taken and/or the nature of the discipline imposed.¹⁰⁴

In cases involving police misconduct or official misconduct, both a police officer and the CMC have a right of review to QCAT.¹⁰⁵ This right is available regardless of whether the conduct in question has been proven (substantiated) or not proven (unsubstantiated).

Conclusion

In this section, we have explored some of the complexities in the structure of the QPS discipline system, and the roles of the QPS and the CMC in the discipline process.

In Part 3 of the report, we examine instances of the QPS discipline system as it currently operates, using case studies to illustrate particular points. Many of these demonstrate a gap between the system in principle and its evidence in practice.

¹⁰² *ibid.*, s. 18.3.5

¹⁰³ PSD Reg, r. 10

¹⁰⁴ PSA Act s. 9.3

¹⁰⁵ CM Act s. 219G

Part 3:

The discipline system in practice

DISCUSSION AND RECOMMENDATIONS

As stated in the introduction to this report, the purpose of this review was to examine the QPS discipline system, identify what is *not* working well, determine the causes of problems identified, and propose solutions. It does not, therefore, focus on those aspects of the system that are effective, but on those that have the greatest potential to damage public confidence in the integrity of the QPS. In the CMC's view, though the discipline system may work well in many instances, it is the exceptions to the rule that test its reliability and present the greatest risk of undermining its function.

A police discipline system needs to be robust enough to deal with cases on the fringes of normal organisational activity and experience, as these are the ones that appear in newspaper headlines, attract public interest, and cast doubt on the effectiveness of the system itself.

The case studies that follow have therefore been chosen because they demonstrate the limitations and failings of the discipline system. Case study 2 (below) shows the system's vulnerability to the actions of police officers who act with complete disregard for its purpose.

Case study 2 (2004–08)

In 2004, the CMC was investigating information about an inappropriate relationship between a police officer and members of an outlaw motor cycle gang allegedly involved in trafficking drugs. The Australian Federal Police (AFP) and the QPS were also jointly investigating a conspiracy to import drugs, and the domestic trafficking of drugs in Queensland by 'R'. In September 2004, as part of that investigation, they had intercepted and arrested R's supplier 'B', and seized a quantity of drugs belonging to R.

In November 2004, the AFP provided the CMC with evidence of messages and conversations between R and a woman 'S' revealing that R was trying to find out if police had in fact arrested B and seized the drugs, or if B was lying and had simply stolen them.

On 5 November, senior constable C conducted a series of police computer checks for information about B. Shortly afterward, S told R that a police officer who had checked for her could not find any information to support B's claim that he'd been arrested. Over the next few days, S and R discussed a plan for S to lure B to her house, where R would be waiting to deal with him. S and senior constable C were also in contact during this time.

On 10 November, when senior constable C again checked the police computer for information about B, he found information about B's arrest. He was also in contact with S at this time. Later that day, S told R that B had been arrested in September in possession of R's drugs. The next day she also gave R more information about B's arrest.

The joint AFP/QPS investigation closed in December 2004 with the arrest of several persons, including R, on serious drug charges. At the same time, the CMC executed various search warrants, seized relevant evidence and interviewed witnesses, including senior constable C. Though he declined a criminal interview, when directed to answer questions for disciplinary purposes, he stated that before July 2004 he had first met S when he had gone to her address in relation to trouble involving her son. He had been there again about three times in July and September 2004 to obtain statements from her in connection with her complaints about another matter. He initially denied having anything other than a professional relationship with her, but later in the interview admitted that on one occasion she had given him oral sex, but not when he was on rostered duty.

Senior constable C claimed that after he had met S, he had found out that she was associated with an outlaw motor cycle gang, and on 5 November 2004 she had begun giving him information on a criminal identity A, and on B's drug-dealing activities. He admitted conducting the computer checks at her request because she said B had 'ripped her off for about \$8000' and she wanted to know whether he was telling the truth about his arrest. Senior constable C told her that B had not had any dealings with the police as he had claimed.

Though he initially denied having any contact with S after 6 November, he admitted it when presented with the evidence, but denied giving her information about B's arrest. However, he could not explain why he had been speaking to her at the very same time he had been conducting the computer checks. He admitted to meeting her on 10 November, but claimed this was only to show her his 'polished and shiny' new car.

The CMC investigation also revealed that senior constable C had been using two mobile phones — one registered in his own name and the other in that of a fictitious identity. He claimed he'd been using the latter to communicate with his police informants so they would not be able to find out where he lived, but S was the only informant he could identify. When it was pointed out that he had contacted S on both of his phones, his only explanation was that he must have made a mistake.

S refused to be interviewed by the CMC; however at a CMC hearing about the matter in mid-December 2005, she denied ever asking senior constable C for information about B, or that he had ever provided her with any. She also denied having given him oral sex or having anything other than a professional relationship with him.

After finalising its investigation into this and a number of associated matters, the CMC referred a brief of evidence to the QPS in July 2005 recommending it take disciplinary action against senior constable C for:

- a. engaging in sexual activity with S when she was a complainant and a witness in a matter he was investigating
- b. improperly accessing the police computer on 5 November 2004 to obtain information about B
- c. improperly accessing the police computer on 10 November 2004, and on the same day improperly giving S information about B.

On 26 August 2005, the Assistant Commissioner, ESC wrote to the CMC advising that it did not consider there was any basis to take disciplinary action against senior constable C because:

- a. he could be believed when he said that had conducted the checks on 5 and 10 November 2004 to compile an intelligence report on B
- b. he could be believed when he denied providing information to S about B on 10 November 2004
- c. he could not be believed when he admitted to having oral sex with S, because S had denied that this had occurred. Furthermore, if he had in fact had sex with S, he could be believed when he said he had not done so on rostered duty. His conduct was therefore appropriate and not likely to erode public confidence, or trust in the integrity, objectivity and impartiality of the QPS.

On 21 September 2005, the CMC replied to the Assistant Commissioner, ESC pointing out aspects of the evidence supporting the allegation of misconduct against senior constable C, and the lack of logic in some of the reasoning. The QPS subsequently commenced disciplinary proceedings against senior constable C. On 5 June 2006, the disciplinary hearing took place before the assistant commissioner for the region in which senior constable C was stationed, and all three allegations against him were proven.

Continued next page >

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- a. In relation to the allegation about senior constable C's sexual liaison with S, which he did not contest, the assistant commissioner stated:

In imposing an appropriate sanction, I have had regard to the public interest and the need to maintain proper standards and protect the reputation of the [police service]. The sanction must, therefore, reflect public disapproval of the conduct alleged in this matter. My determination must act as a deterrent to both yourself and other police officers who may aver to similar conduct ... Therefore, in determining an appropriate sanction, I have considered a number of precedents where similar incidents have occurred involving officers of similar service. Having said that, whilst I am bound to consider precedents, I believe that the sanction imposed is on the highest end of the scale.

I direct that you receive the sanction of REPRIMAND.

- b. In relation to the allegation about senior constable C's improper access to the police computer on 5 November 2005, which he contested claiming he had conducted the checks to submit an intelligence report on information provided to him by S, the assistant commissioner stated:

... I do not accept your reasoning for the contact with [S] ... It is clear your access to the police computer system on this occasion was simply to relay information back to [S].

The assistant commissioner then repeated word for word, the statements he had made in relation to the first matter and directed that senior constable C receive the sanction of 'REPRIMAND'.

- c. Senior constable C contested the allegation about improperly accessing the police computer and improperly supplying information to S about B on the same basis he'd contested the previous allegation.

In relation to this, the assistant commissioner stated that he did not accept senior constable C's explanation. In justifying the sanction imposed, he again said he had considered similar matters and was imposing a sanction 'at the highest end of the scale' which would be:

... a deduction from your salary of ... \$150 ... Payment of this amount is to occur through ... 6 ... consecutive payroll deductions ... of ... \$20 ... per fortnight ... and one final payroll deduction ... of ... \$30.

When the CMC was notified of the outcome of these disciplinary proceedings, it immediately appealed on the basis that the sanctions imposed were manifestly inadequate, and sought senior constable C's dismissal. The appeal was upheld, and senior constable C was dismissed from the police service on 18 August 2006.

In October 2006, senior constable C appealed to the Supreme Court alleging that:

- a. fresh evidence since the original hearing indicated that he had been suffering from a brain tumour at the time of his inappropriate conduct in 2004, and this had affected his judgement
- b. the CMC's action in appealing his dismissal was an abuse of process because it had not earlier intervened to prevent an assistant commissioner from hearing the disciplinary proceeding, when it would have known that an officer of this rank did not have the power to dismiss him.

Senior constable C was unsuccessful in both arguments and his appeal was dismissed on 6 June 2008. On 4 August 2008, he was unsuccessful in his application to avoid the payment of costs to the CMC for his unsuccessful appeal.

Setting the standard

A code of conduct and associated rules which set standards of practice are an essential reflection of the values of an organisation, and send a powerful message about what is expected of employees. If it is sustained by an organisational climate in which ethical actions, behaviour and decisions are valued and reinforced through continual communication and example, such a code has a significant impact on employees' ethical decision making and behaviour.¹⁰⁶

106 Rottig, D, Heischmidt, K, & Khamis, I 2005, 'The Impact of Corporate Code of Conduct and Ethical Training on Managerial Decision Making: An Exporatory Comparative Investigation Between Germany and the United States', AIB-SE (USA) Annual Meeting, Charleston, SC.

The tone from the top

The current QPS Code of Conduct (see Appendix B), which was last updated in October 2006, has no explicit statement about QPS values.¹⁰⁷ It cites externally mandated obligations such as those imposed under the *Public Sector Ethics Act 1994*, or expectations held by the community, as justification for imposing its terms on members of the police service. It fails to promote the police service as an organisation of integrity that values accountability, and explain how the standards of conduct promoted in the document are the essence of that undertaking.

In the first paragraph of the foreword, the Commissioner of Police describes the code as '... [i]n effect ... a form of protection ...' for officers. The code of conduct itself does not place any duty or personal responsibility on an officer to be familiar with, understand or preserve its provisions.

In the second paragraph, the Commissioner assures members that '...if you have done your best to abide by the provisions of this code and you have honestly and reasonably tried to act in a professional manner, you will be fully supported by the Service despite the outcome.' The ambiguity of this message (it is open to several interpretations) has the potential to undermine the expected high standards of ethical conduct and performance necessary to maintain public confidence in the QPS. Police officers have a responsibility to know the standards that are required of them, and to meet those standards. Recognising that people do make honest and reasonable mistakes from time to time, a more appropriate and balanced message in a code of conduct, rather than one of unconditional support, would be: *If you make an honest and reasonable mistake, you will be treated fairly.*

In disciplinary proceedings, police sometimes use the defence of 'honest ineptitude' or 'ignorance' to avoid disciplinary action, as case study 3 demonstrates. The functions of the police service must be carried out in a responsible, fair and efficient manner.¹⁰⁸ In this context, the notion of *good faith* is a duty, not an excuse, and the discharge of that duty will require something more than honest ineptitude.¹⁰⁹

Explaining the rationale for particular requirements

Though the QPS Code of Conduct defines the ethical principles and obligations required under the *Public Sector Ethics Act*, as it does not generally link them to any standards of conduct, the connection between principle and practice is not evident.

Where the code does set out standards of behaviour and give practical examples of ethical decision making, it does not clearly identify the rationale for the particular requirements, or explain how failure to comply with them might undermine an officer's integrity, objectivity or impartiality. For example, Section 10.7 of the code advises members that they are not to solicit or accept any gift or benefit unless it is authorised or permitted (i.e. customary hospitality or benefits of nominal value). The code suggests that if confronted with this scenario, officers might ask themselves questions such as: *Who is offering the hospitality, gift or benefit? What was the purpose of the offer? What is the timing of the offer?* However it does not explain why an officer should not solicit or accept gifts and benefits or how, or in what circumstances, this conduct might undermine their integrity. If the code of conduct does not provide guidance, or the officer does not understand under what principles to interpret the answers, there is no point in asking the suggested questions.

107 The document bears the date 6 October 2006, although the QPS website <www.police.qld.gov.au/services/reportsPublications/codeConduct/default.htm> states that it is current as of 1 March 1999.

108 PSA Act s. 2.3 (f) and s. 3.3 (Oath of Office)

109 See further Henry, M 2000, 'Statutory immunities: when is good faith honest ineptitude?', *Australian Journal of Emergency Management*, Spring, pp. 10–15.

In another example, Section 10.10 of the code states that 'Illicit drug use by QPS members is not acceptable', whereas it should make it very clear that it is a criminal offence to do so. Also, as every drug user has a supplier, entering this chain undermines an officer's integrity, impartiality and ability to carry out his or her sworn duty to prevent and detect breaches of the law and arrest offenders. The QPS Code of Conduct must make this very clear.

Case study 3 (2008–ongoing)

On 26 February 2008, D complained to the QPS that a few days earlier he had been unlawfully assaulted by a police officer and had received facial injuries as he was being put into a police van after his arrest for public nuisance and obstructing police. The QPS reported the matter to the CMC, but not until 6 May. In the CMC's view, the allegation could, if proven, amount to official misconduct by the police officer. Therefore, on 15 May 2008, it referred the matter back to the QPS for investigation, subject to CMC review of its handling of the investigation.

On 30 May, a sergeant attached to the QPS Railway Squad was appointed to investigate the matter. A magistrate who heard the charges on 23 July 2008 acquitted D, finding that his conduct had not amounted to public nuisance or obstruction, and that the subject officer's conduct, including his arrest of D, had been totally disproportionate to the circumstances. The QPS did not appeal the magistrate's decision.

On 2 November, in a report highly critical of the magistrate, the police prosecutor advised that he had counselled the subject officer over the content and standard of his brief of evidence. The investigating officer subsequently interviewed the subject officer and four other police officers about the matter. D declined to be interviewed, but instead submitted a written statement.

On 21 May 2009 the investigating officer submitted his report, which concluded that there was insufficient evidence to take any action against the subject officer because:

- despite the magistrate's findings to the contrary, the subject officer's use of force had been lawful, consistent with QPS operational procedures, and not excessive in the circumstances
- the subject officer had already been counselled by the prosecutor about the inadequacies in his brief of evidence.

The ESC overviewed this report and, on 4 November 2009, directed the investigating officer to conduct further inquiries into the nature and extent of D's facial injuries, and the identity of a possible civilian witness. The officer complied with this request but did not alter his conclusion about the complaint.

On 8 March 2010, the ESC submitted a report to the CMC advising that there was insufficient evidence to take any disciplinary action against the subject police officer in relation to the alleged assault of D because:

- the medical evidence suggested that his injuries were not as significant as he had claimed
- even if D's arrest had been unlawful, the subject officer had still acted 'in good faith'.

After reviewing QPS's investigation of this matter, the CMC advised it on 10 June 2010 that, although the subject officer's belief in the appropriateness of his conduct might be a relevant factor in determining a disciplinary sanction, his good faith (or ignorance) did not justify or excuse his behaviour in unlawfully arresting and assaulting D.

The CMC therefore recommended that the QPS take disciplinary action against the subject officer. The QPS are yet to respond to this recommendation.

Consequences of breach

In outlining the consequences of breaching its terms, in Section 4, the code says that members should be aware that any breach, without valid reason, will be dealt with under the QPS complaints management policy.¹¹⁰ It does not say that a breach involving misconduct will be referred to the CMC, which may itself choose to investigate the matter.

110 QPS Human Resources Management Manual, s. 18

The code must be clear that an officer who breaches its terms may be liable to disciplinary action and the imposition of a disciplinary sanction if the conduct is proven. However, it does not stipulate that a breach involving criminal conduct may render an officer liable to criminal prosecution, neither does it indicate how seriously any particular breach will be treated, nor identify possible disciplinary sanctions, even in a general way.

Indicative sanctions for misconduct

In their review of the Queensland Police Service in 2008, the SDPC considered the lack of information available to police officers on indicative sanctions for more serious misconduct. In its 2009 response to this review, the Queensland Government supported the SDPC's recommendation that, by 31 December 2009, the Commissioner of Police work with the CMC to make clear to officers and supervisors the types of conduct that could result in dismissal, demotion or pay point reduction. Though this has not yet been achieved, on 1 July 2009, the Commissioner of Police issued a guideline on indicative sanctions for disciplinary matters involving police officers prosecuted for drink driving offences (see Appendix A), and in July 2010 the QPS advised the CMC that development of a comparative or indicative sanctions database is well advanced.

Providing explanatory practice guidelines identifying particular disciplinary breaches and the likely sanction or range of sanctions that could result (particularly dismissal, demotion or pay point reduction) would give officers an unambiguous message about expected behaviour and the consequences of failing to meet those expectations. It would also ensure more consistent disciplinary outcomes and fewer review and appeal proceedings. These guidelines should not be too prescriptive, or they will be unable to take into account the inevitable variations and different circumstances in particular cases, but should rather indicate how particular conduct should be considered, and the consequences that result from this. (See case study 4).

The QPS also indicated to the CMC in July 2010 that it would consider whether having a case study 'library' with more comprehensive but non-identifying information detailing the circumstances of particular conduct together with aggravating and mitigating factors would help prescribed officers in making decisions on appropriate sanctions. The QPS notes that it is essential to ensure that such information is provided as a guide only, and not viewed as determinative or binding on the decision maker, as each case must be determined on its merits.

Building community confidence in QPS's ability to deal appropriately with police misconduct is one of the purposes of the disciplinary process. The police service would therefore need to take care that the library was regularly updated to keep pace with any change in community expectations of police officers and the sanctions imposed on them for failure to comply with the rules.

Case study 4 (2009)

An off-duty officer, constable A, was driving a private motor vehicle when he was intercepted by police. When breath-tested, he returned a reading of 0.235 — almost five times the legal limit. He was subsequently convicted and fined in a Magistrates Court for driving under the influence of liquor. On the basis of the available evidence and constable A's admission to the offence, the prescribed officer (a deputy commissioner) ruled that the matter had been substantiated and found that the officer's conduct was improper and amounted to misconduct.

As of 1 July 2009, indicative sanctions for officers caught drink driving are listed on a matrix and published on the QPS intranet as a Commissioner's Circular (see Appendix A). Constable A submitted that the indicative sanction for an offence such as his — off-duty and with a reading greater than 0.15 per cent — would be demotion. As this option is not available for a constable, he submitted that a reduction in pay point or a deferred increase in pay point might be appropriate in the circumstances, as dismissal would be out of line with the matrix guidelines.

The prescribed officer rejected this argument, and further argued that the other sanctions suggested by the subject officer '... have failed to deter members from committing drink driving offences despite the continual and concerted efforts of the QPS in attempting to bring around an attitudinal change. I am of the view it is time to send a very clear message that drink driving will not be tolerated by the Service and that a majority of the community finds such acts reprehensible.'

Though the prescribed officer acknowledged that constable A's forthright admission of wrongdoing, his display of remorse and reports from senior officers about his enthusiasm, commitment and good work were in his favour, he maintained that constable A's complaint record did not fully support his submission that his service record be aligned with the 'good record' mentioned in the Misconduct Tribunal decision of Coleman,¹¹¹ which led to the suspension of the sanction (a reduction in pay point). In particular, the prescribed officer noted that constable A had been involved in a previous alcohol-related incident while a recruit at the QPS Academy, where he had punched two other recruits, and was reprimanded for his conduct.

The prescribed officer stated that he considered it relevant to constable A's submission (to align his service record with the good record referred to in Coleman), and continued 'It is of concern that you were involved in an alcohol-related incident in 2006 while you were a recruit at the academy and you now appear before me in respect to another alcohol-related incident that occurred a mere two-and-a-half years later in 2009.'

The prescribed officer also emphasised that, since the Coleman matter, 'there has been a significant attitudinal shift in the community's expectations and the Service's stance in respect to offences of drink driving. Drink driving will not be tolerated.'

Having considered all the circumstances, the prescribed officer ordered that constable A be dismissed from the QPS, and ruled out suspending the sanction as neither appropriate nor warranted.

Obligation to report breaches

Apart from a brief reference in Section 9.3 advising officers that they '... should disclose fraud, corruption, misconduct and maladministration ...' of which they become aware, the QPS Code of Conduct does not adequately or accurately describe a police officer's obligation to report misconduct. In fact this obligation to report is *mandatory*, not advisory as the code suggests. The code then advises that procedures for reporting the conduct described are set out in the CM Act and the *Whistleblowers Protection Act 1994*, but fails to mention the statutory obligation on members of the police service to report misconduct under the *Police Service Administration Act 1990*.

111 Misconduct Tribunal appeal 01 of 2005

Conclusion

A strong code of conduct is the ‘... cornerstone of the proper tone from the top ...’.¹¹² It is also an:

... open disclosure of the way an organization operates ... A well-written and thoughtful code also serves as an important communication vehicle that ‘reflects the covenant that an organization has made to uphold its most important values, dealing with such matters as its commitment to employees, its standards for doing business and its relationship with the community.’¹¹³

As a result of its 2009 integrity and accountability review, which involved wide-ranging consultation,¹¹⁴ the Queensland Government has decided to develop a single code of conduct for the Queensland public sector. The aim of this code is to focus on clarity and the positive expression of public sector values, to ensure consistently high standards, enhance accessibility and achieve greater awareness of values (such as integrity and impartiality, promotion of the public good, and accountability and transparency) that underpin the public service. At the time of publishing this report, a draft of the proposed code has been prepared and released for public consultation. The period of consultation ended 31 August 2010. When finalised, this code of conduct will apply to the QPS, and replace the current document.

While the new code is designed to help identify and resolve any ethical issues that may arise, it is intended that agencies develop their own ‘standard of practice’ incorporating additional standards of conduct and behaviour particular to their agency. While a breach of the code may result in disciplinary action, agencies are to rely on their policies and procedures to clearly prescribe the expected standards of behaviour, conduct and performance.

Police officers routinely find themselves in situations not faced by members of the broader public sector, and in circumstances that present a higher risk of misconduct. The introduction of this new code and the development of a supplementary agency-specific standard of practice will give the QPS an opportunity to address the deficits identified in its current code of conduct, and will enable them to deal more specifically with issues relating to ethical decision making and professional conduct.

Recommendation 1

The CMC recommends that the QPS develop a standard of practice and enhanced policies complementary to the proposed Queensland public sector code of conduct with a view to ensuring that:

- a. where inappropriate conduct is identified, it is linked to a clear ethical rationale**
- b. indicative sanctions are identified for more serious, systemic and problematic misconduct.**

112 Pfarrer, MD, *Do Business Ethics Matter? Why a Code of Conduct is Important for the Entrepreneur*, Dingman Centre of Entrepreneurship, University of Maryland, College Park, accessed 21 June 2010, <<https://portfolio.du.edu/portfolio/getportfoliofile?uid=101369>>.

113 Ethics Resource Centre, *Why have a code of conduct?* accessed 21 June 2010, <www.ethics.org/resource/why-have-a-code-conduct>.

114 Department of the Premier and Cabinet 2009, *Integrity and Accountability in Queensland*, Queensland Government, Brisbane.

Clarifying reporting obligations

Under the PSA Act, all police (including the Commissioner) have a statutory obligation to report misconduct by police that has occurred. This obligation is a necessary condition for maintaining confidence in the integrity of the police service. The Commissioner has a further statutory obligation to report complaints about alleged misconduct under the CM Act. However, the legislation differs in relation to:

- the definition of misconduct
- what must be reported
- who must report
- what the officer has to know or believe before the obligation to report arises.

These anomalies can result in failure to report allegations or information about misconduct to the CMC or to the Commissioner of Police, over-reporting, or wasting time and resources debating whether or not a matter should be reported.

Anomalies in definitions

The CM Act defines both 'police misconduct' and 'official misconduct' and includes both in its definition of 'misconduct'. The PSA Act uses the same words to define 'misconduct' as the CM Act uses to define 'police misconduct', and refers the reader to the CM Act s. 15 for a definition of 'official misconduct' (see Table 3).

These anomalies are problematical as, under the CM Act, the Commissioner of Police¹¹⁵ has the primary responsibility for dealing with police misconduct, while the CMC has primary responsibility for dealing with official misconduct. It is therefore important to be able to clearly distinguish between the two.¹¹⁶ The distinction has further implications for the CMC's monitoring role under the provisions of the CM Act.¹¹⁷

Anomalies in obligation to report

Under the CM Act,¹¹⁸ the chief executive of a government department (including the Commissioner of Police) must notify the CMC when they '*suspect*' that a complaint, or information or matter ... involves or may involve *official misconduct*'.¹¹⁹ The suspicion held is a suspicion that the *allegation* in a complaint, information or matter may relate to misconduct, not a suspicion that *misconduct* may have actually occurred. The threshold test for reporting is low — the CMC *must* be notified about such a complaint, unless the chief executive has information which conclusively establishes that the alleged conduct could not have actually occurred (e.g. the subject officer was out of the country at the time of the alleged incident).

Under s. 37 of the CM Act, the Commissioner of Police is also required to notify the CMC of *police misconduct*, if he or she reasonably suspects that a complaint or information or matter involves police misconduct. The threshold of this reasonable suspicion test in s. 37 of the CM Act is higher than that of the mere suspicion test for *official misconduct* in s. 38 of the Act.

Under the PSA Act, a member of the police service must report to the Commissioner of Police and the CMC, misconduct about which they '*know or reasonably suspect*' or in respect of which, it can be reasonably concluded that they knew or reasonably suspected.¹²⁰

115 CM Act, s. 41(1)

116 *ibid.*, s. 45(1)

117 *ibid.*, ss. 45–7

118 *ibid.*

119 *ibid.*, s. 38 and Schedule 2

120 PSA Act, s. 7.2

Table 3: Anomalies in definitions

Term	Definition
Conduct	<p>PSA Act s. 7.2 Conduct of an officer, wherever and whenever occurring, whether the officer whose conduct is in question is on or off duty at the time the conduct occurs.</p> <p>CM Act s. 14</p> <ol style="list-style-type: none"> a. for a person, regardless of whether the person holds an appointment — conduct, or a conspiracy or attempt to engage in conduct, of or by the person that adversely affects, or could adversely affect, directly or indirectly, the honest and impartial performance of functions or exercise of powers of: <ol style="list-style-type: none"> i. a unit of public administration; or ii. any person holding an appointment; or b. for a person who holds or held an appointment — conduct, or a conspiracy or attempt to engage in conduct, of or by the person that is or involves: <ol style="list-style-type: none"> i. the performance of the person’s functions or the exercise of the person’s powers, as the holder of the appointment, in a way that is not honest or is not impartial; or ii. a breach of the trust placed in the person as the holder of the appointment; or iii. a misuse of information or material acquired in or in connection with the performance of the person’s functions as the holder of the appointment, whether the misuse is for the person’s benefit or the benefit of someone else.
Misconduct	<p>PSA Act s. 1.4 Conduct that:</p> <ol style="list-style-type: none"> a. is disgraceful, improper or unbecoming an officer; or b. shows unfitness to be or continue as an officer; or c. does not meet the standard of conduct the community reasonably expects of a police officer. <p>CM Act Sch 2 official misconduct or police misconduct.</p>
Police misconduct	<p>PSA Act Not defined.</p> <p>CM Act Sch 2 Conduct, other than official misconduct, of a police officer that:</p> <ol style="list-style-type: none"> a. is disgraceful, improper or unbecoming a police officer; or b. shows unfitness to be or continue as a police officer; or c. does not meet the standard of conduct the community reasonably expects of a police officer.
Official misconduct	<p>PSA Act Definition says see the <i>Crime and Misconduct Act 2001</i>, section 15.</p> <p>CM Act Sch 2 Conduct that could, if proved, be:</p> <ol style="list-style-type: none"> 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.

In summary, the confusing legislative provisions of the CM and the PSA Acts imposing the obligation to report on the Commissioner and members of the QPS describe the requirement in terms of:

- a ‘suspicion’ compared with a ‘reasonable suspicion’
- a complaint that ‘involves’ or ‘may involve’ conduct, compared with a complaint that ‘involves’ conduct; and
- a complaint that involves or may involve ‘allegations’ of conduct compared with a complaint that relates to ‘actual’ conduct.

Table 4: Summary of QPS reporting obligations and requirements

		Current legislative referral obligations to the CMC			Recommended referral obligations
Type of conduct		PSA Act s. 7.2	CM Act s. 37	CM Act s. 38	
		reasonable suspicion	reasonable suspicion	suspicion	suspicion
		actual conduct	allegation	allegation	allegation
			involves	involves or may involve	involves or may involve
Misconduct		Commissioner of Police (COP) Members of the police service (MPS)			COP MPS
Misconduct	Police misconduct		COP		COP MPS
	Official misconduct			COP	COP MPS

As a result of these different reporting triggers, police officers and staff may fail to notify the Commissioner of Police about complaints which he is obliged to report to the CMC. Though it is impossible to gauge the extent, if any, to which this may actually occur, the risk will always be present while the anomaly in reporting obligations continues to exist. Other government departments deal with this difference in reporting requirements in policy and procedures that put all parties under the same obligation — to report any suspicion that a complaint involves or may involve official misconduct. To date, the Commissioner of Police has not issued a similar direction to members of the QPS.

Conclusion

To ensure the validity of the QPS integrity framework, it is essential that the statutory definitions of inappropriate conduct, and the statutory obligation to report it are described clearly, simply and consistently, irrespective of whether the obligation is imposed on the Commissioner of Police or members of the QPS.

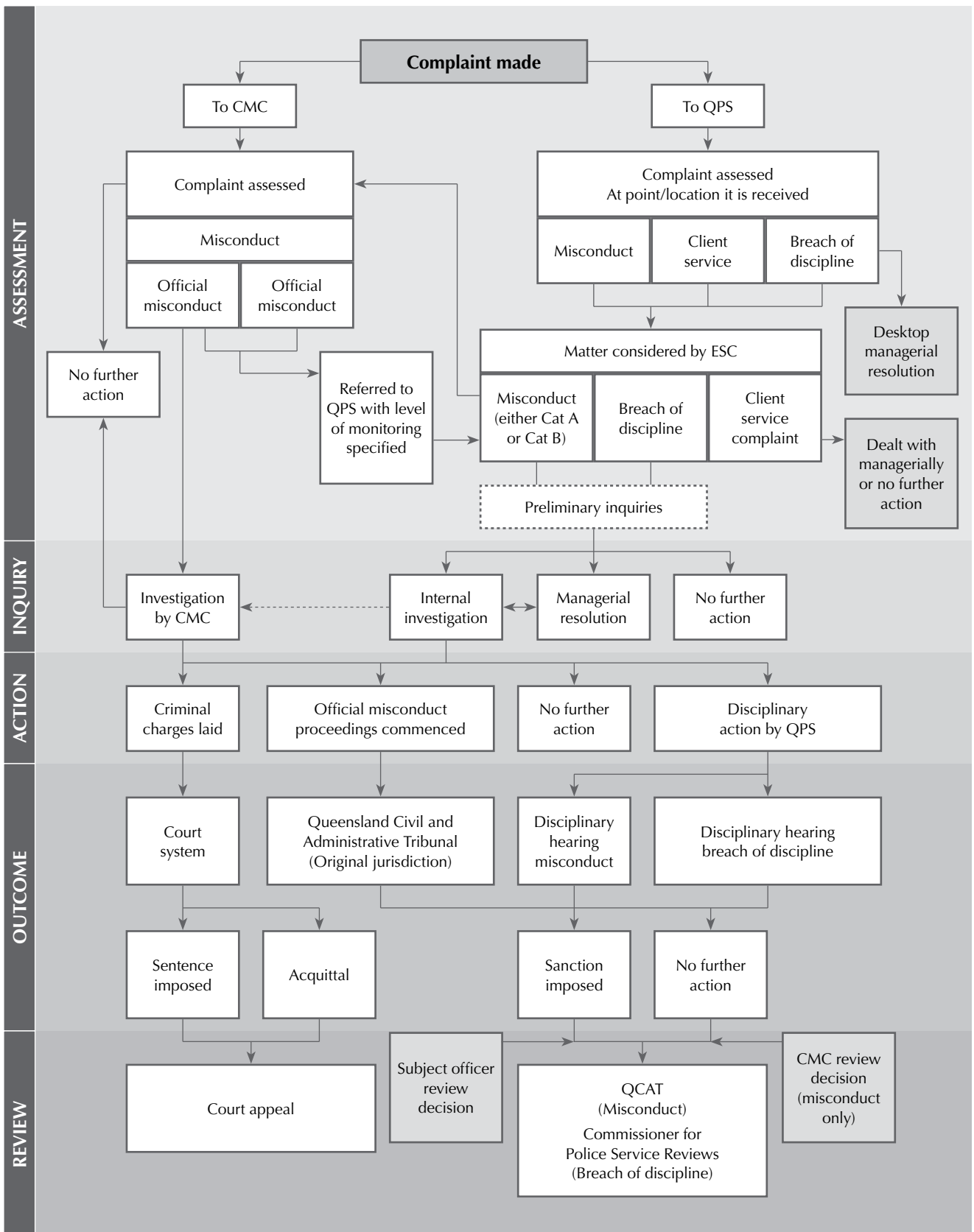
In the CMC’s view, the preferable formulation of the obligation to report inappropriate conduct is that used in s. 38 of the CM Act because this lower threshold better protects the public interest by ensuring that the CMC is notified of all relevant matters for which it has responsibility under the Act. It also protects the QPS from allegations that information about misconduct has not been appropriately considered or reported. The QPS has advised the CMC that its preferred option is that under s 7.2 of the PSA.

Recommendation 2

The CMC recommends that the Queensland Government amend the *Police Service Administration Act 1990* and the *Crime and Misconduct Act 2001* to ensure there is consistency in:

- a. the definitions of misconduct**
- b. the tests imposing an obligation on the Commissioner of Police and members of the police service to report misconduct by a member the QPS.**

Figure 13: Steps in the discipline process



Improving timeliness

Timeliness is a key challenge for the current QPS discipline system. A lengthy and resource-intensive process undermines public confidence in the police service, as does a response that is disproportionate to the gravity of the complaint. When delays mean that events overtake the process and outcomes become redundant, the purpose of the discipline system is frustrated. In these circumstances, enduring the process itself can effectively be a sanction for officers, and there is little satisfaction for complainants.

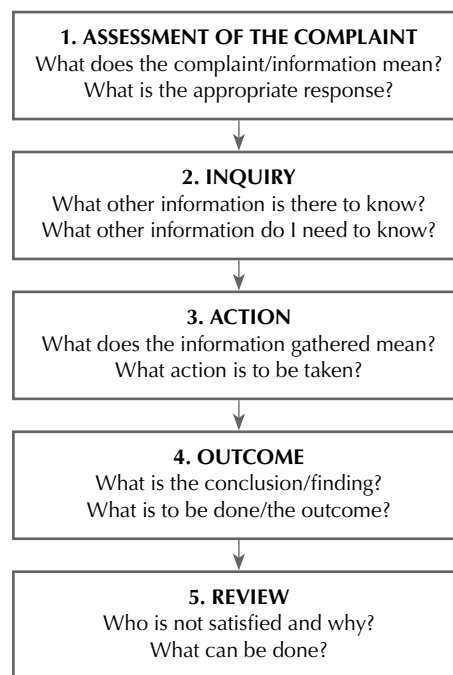
The discipline process in general

A comparison of the various police discipline systems currently operating in Australia reveals that, although there are many differences between them, they all:

- involve a minimum of five key steps from receipt of a complaint to resolution of the matter (see Fig. 13)
- split the discipline process into separate flows of activity to improve timeliness, provide a better match of resources, and produce the most appropriate outcome.¹²¹

This five-step process underlies most public sector discipline systems (including those for other Queensland public sector employees and the QPS).

Figure 14: Key questions at each step



A number of different agencies, groups and individuals, both separately and sometimes simultaneously, will have an interest in the key questions that arise in each of these five steps. However, that interest will differ, and this gives rise to three further questions to be determined at each step in the process:

- *Who should decide* the answers to the key questions to be determined at each step?
- *Who needs to know* what is decided (e.g. for supervisory, management or monitoring purposes, or in order to make the next decision)?
- *Who will do* what is decided?

121 Office of Police Integrity 2007, op.cit. Appendix E

The system becomes complex when answering these questions unnecessarily involves too many people and too many processes at too many locations. This is exemplified in the flow charts illustrating the disciplinary process in Chapter 4. It is also evident in figures 9 and 10 representing 'managerial resolution' and 'internal investigation' respectively, that responsibility for decision making is dispersed, with physical reports moving up and down chains of ranks, and back and forth between regions, commands and the ESC.

Delays at the assessment step

The processes currently involved in assessing complaints also illustrate the problem. Fig. 13 shows that if a misconduct complaint is first received at a local police station, the same assessment questions must be answered by the region in which the station is located, the ESC and the CMC. There is a small filtering effect as information proceeds through the process, however there is still a high potential for matters to fall through the cracks, and significant duplication of effort which compromises timeliness.

In their submissions to the PCMC's three-yearly review of the CMC in 2008, timeliness remained a concern to both the QPUE and the QPS. The submission from the QPS noted the adverse impact of lack of timeliness on public confidence, the importance of information sharing between the CMC and the QPS and the general need to improve communication.

Over time, the CMC has improved its timeliness in assessing complaints and continues to further do so in part by categorising complaints according to the level of seriousness and risk and, on that basis, delegating authority to assess less serious, lower risk matters to staff at an appropriate level. A similar and complementary improvement has been achieved by allowing the QPS to deal with less serious complaints (the Category B complaints referred to in Chapter 4), without first notifying the CMC.

Implementing these processes has reduced double handling of complaints to the extent that the CMC has been able to assess 85 per cent of complaints within four weeks of receiving them.¹²² However significant duplication of effort is still a problem in other areas. For example, as the QPS's Client Service System (CSS) for managing complaints, and the CMC's system (Compass) are not compatible, all complaints data received from the QPS has to be manually re-entered into Compass. Other serious inadequacies in QPS's CSS are dealt with later in this chapter.

Delays at the inquiry step

A common feature in Australian police discipline systems is that they are designed to cope with a high volume and variety (in nature and seriousness) of complaints. This is achieved by splitting the discipline process into two or more distinct streams of activity with different responses at each step in an effort to improve timeliness, use resources better, and produce the most appropriate outcome. In the QPS system, for example, the *inquiry* step can involve a full investigation by the CMC; full investigation by the QPS; or managerial resolution. Each of these options entails reasonably complex work flows.

One of the problems of splitting the process into separate flows is that it is difficult, if not impossible to move between flows without retreating back to the point of departure. This lack of horizontal flexibility means that once embarked on a particular course of action, the tendency is to pursue that course, even though circumstances have changed and the reason for originally making that choice no longer exists. The casualty is timeliness; the result a misapplication of resources and poor or inappropriate outcomes.

¹²² Submission No. 22, Crime and Misconduct Commission, p. 83 — referred to in the PCMC *Three yearly Review of the Crime and Misconduct Commission*, No. 79, April 2009, p. 33

Delays at the action step

Decision-making at the action step of the process (see Fig. 14) is another area where duplication of effort and complexity compromise timeliness. For example, as the range of sanctions that are available depends on the prescribed officer's rank, for misconduct matters, the Assistant Commissioner, ESC (advised by suitably qualified officers within the Legal and Policy Unit) must decide on the possible sanction to be imposed before nominating the level of the prescribed officer (see Table 2). When hearing the matter, the prescribed officer must then again decide what action should be taken.

Further delays can be caused by disagreement about the appropriate action to be taken or the predicted outcome, or because the prescribed officer disagrees with the assistant commissioner's initial decision or because the ESC Legal and Policy Unit, where too few people need to consider too many matters, is a natural choke point in the system. If the conduct is proven, there is often substantial disagreement on the appropriate sanction and so the matter stagnates or moves back and forth between prescribed officers with differing views on the matter. See case study 5 for a very good example of this problem.

Clear guidelines on indicative sanctions at this point in the discipline process would help resolve disagreements and improve timeliness. A review of the processes, skill sets and resourcing of the ESC Legal and Policy Unit also warrants consideration.

A further option for consideration is the appointment of a deputy or assistant commissioner with primary responsibility for hearing and determining all disciplinary allegations involving misconduct, with breach of discipline allegations dealt with by a senior officer at regional/ command level. Appointing dedicated prescribed officers in this way would potentially:

- improve timeliness by reducing the risk of disagreement about the action to be taken in a particular case
- improve the consistency and quality of outcomes.

In relation to this option, the QPS advised the CMC in July 2010 that it would welcome consideration of a trial of a centralised assistant commissioner or other senior officer position as prescribed officer to deal with some matters. The QPS said it would be willing to evaluate the trial to measure the extent to which it resulted in:

- improvements in timeliness in finalising disciplinary decisions
- consistency in disciplinary decisions
- improvements in the quality of decisions, particularly regarding the application of evidentiary standards, and the reasons for decisions and sanctions
- follow-on effects on management decisions, and improvement in the disciplinary process in general.

Case study 5 (2004–08)

On 4 August 2004, the CMC received information that a Gold Coast senior constable and an associate may have been involved in an attempt to defraud an insurer over the disappearance of the associate's luxury car, worth in excess of \$150 000.

On 12 August, CMC investigators found that information supplied by the subject officer to the insurer (on behalf of his associate) was different from what he had supplied in the official QPS crime report. It was also different from what the associate had supplied to the insurer.

In the report, the officer stated that the vehicle had been stolen from the underground car park of a Gold Coast hotel between 22 June and 16 July 2004, when the owner of the vehicle had returned from holiday, discovered the theft, and reported the matter to police. A CMC investigation revealed that the associate had fled overseas on 29 June 2004 and had not returned.

In the crime report, the subject officer did not disclose his association with the owner, nor did he tell the insurer that he was a police officer when he made the insurance claim. He told the insurer that before going overseas, the owner had given him the keys and asked him to take the car to his (the owner's) home address. He claimed that he discovered the vehicle was missing when he went to collect it from the hotel car park.

During the CMC investigation, the vehicle manufacturer advised that security incorporated into the vehicle would have made it impossible to remove it from the car park without using the car keys or towing it away. The latter was impossible because of the size of the underground car park. The hotel had received no complaints or reports of stolen vehicles at the relevant time. Neither had any staff member given any information suggesting suspicious activity at the hotel, although the subject officer's associate had stayed there before he fled the country.

After the CMC investigation had begun, the subject officer told another senior police officer that:

- his associate had been the subject of extortion by an outlaw motorcycle gang
- he (the subject officer) had the keys of the missing vehicle
- he had arranged for the locks at his associate's house to be changed
- he had removed a computer and associated equipment from the house after his associate had fled overseas.

The CMC searched the subject officer's home and found him in possession of the vehicle keys and log book. He declined to take part in a criminal interview. When interviewed for disciplinary purposes, he claimed he had put false information about his associate's movements in the crime report, and had lied to the insurance investigator because of concerns for his associate's safety. However, he could not explain how his conduct had in any way made his associate safer. Despite extensive investigations in Queensland and elsewhere, the CMC has been unable to find the vehicle.

In October 2005, the CMC conducted a final interview with the officer and, on 16 November 2005, referred the matter to the DPP to consider criminal prosecution, and to the Commissioner of Police to consider disciplinary action.

In September 2006, the DPP advised that there was insufficient evidence to consider criminal prosecution, and the QPS was subsequently informed. On 2 December 2006, the CMC requested that the QPS take disciplinary action.

- The deputy commissioner considered the matter and then referred it to the assistant commissioner responsible for the Gold Coast for action.
- The assistant commissioner then referred it back to the deputy commissioner.
- The deputy commissioner declined to hear the matter, then gave a chief superintendent the powers of an assistant commissioner and requested he deal with it.
- Finally, in May 2008, the chief superintendent disciplined the subject officer for falsifying the crime report and providing false information to the insurance company, and demoted him to constable.

At the time the disciplinary sanction was imposed, the police officer had served 29 years in the police service and had been demoted twice — once before the Fitzgerald Inquiry in 1989. In his entire career, he has not progressed past the rank of senior constable, and still serves as a uniformed constable on the Gold Coast.

Intersection with the criminal justice system

Another quite common cause of delay in investigating and dealing with complaints against police officers arises when the matter becomes intertwined with a proceeding or anticipated proceeding in the criminal justice system (see case study 6). This typically occurs in one of two ways:

- the conduct of the officer, the subject of the complaint, is also the subject of an actual or proposed criminal charge, often referred to as the ‘concurrent proceedings’ problem; or
- the matter complained of arises from an incident in which the complainant or another person has been charged with an offence — this is often referred to as the ‘interwoven with court’ impediment.

The QPS policies and procedures for disciplinary hearings currently provide:

As a general rule, criminal proceedings should proceed before disciplinary proceedings. Nevertheless, there may be exceptional cases where disciplinary proceedings should not await the outcome of criminal proceedings. This is a decision for the prescribed officer ...¹²³

As disciplinary matters therefore do not usually proceed until the criminal matter arising from the same conduct or incident has been dealt with, this can result in delays lasting years.

Case study 6 (2006–ongoing)

Between 8 March 2006 and 2 November 2007, the CMC investigated information that police officer A had been involved in attempting to pervert the course of justice in connection with the prosecution of a man for the murder of his wife in August 2005. On 14 June 2007, on the basis of information the CMC provided to the QPS, officer A was stood down from duty, pending finalisation of the CMC investigation.

On 15 November 2007, the CMC referred a brief of evidence to the DPP recommending that it consider prosecuting officer A, a second officer (B), and a criminal associate (currently serving two concurrent sentences of life imprisonment) for attempting to pervert the course of justice in relation to the murder prosecution. On the same date, the CMC referred the brief of evidence to the QPS, requesting it take disciplinary action against officers A and B in respect of the alleged conduct, and of giving false evidence on oath in the committal proceedings of the accused man in October 2006.

On 2 June 2008, the CMC referred another brief of evidence to the QPS requesting that it take disciplinary action against officer A in respect of further alleged misconduct (separate from that referred on 15 November 2007) relating to his involvement with the criminal identity. The QPS convened a disciplinary hearing in respect of this further alleged misconduct, but the proceedings were adjourned in September 2008, pending the outcome of the first matter.

On 10 November 2008, the DPP advised the CMC to commence a prosecution against officer A and officer B (who had in the meantime retired medically unfit) and the criminal associate. These proceedings commenced on 24 November 2008, and officer A and former officer B were committed for trial on a charge of attempting to pervert the course of justice on 11 May 2009. The criminal associate was discharged in relation to the offence but continues to serve his life sentences. The QPS suspended officer A from duty without pay after he was committed for trial.

After the committal proceedings, the DPP advised the CMC that an indictment against officer A and former officer B would be presented in the District Court however, the matter would be adjourned until after the accused man had been tried for murder.

In May 2010, this trial resulted in a verdict of ‘guilty’. The trial of officer A and former officer B was heard in October 2010. Both were discharged.

The disciplinary matters against officer A remain outstanding.

123 QPS Human Resources Management Manual, Section 18.3.2.3

The concurrent proceedings problem

No rule of law strictly prevents the discipline process or disciplinary proceedings from going ahead, or requires any process to stop while another proceeding arising out of substantially the same or related facts is taking place in a court, or is reasonably expected to begin.¹²⁴ However, problems that may arise when the disciplinary process is concurrent with criminal proceedings include the following:

- A police officer who is required to answer questions and provide information to assist the disciplinary investigation may be prejudiced in his/her defence in any criminal process, although this alone would not be enough to enable an officer to obtain an injunction to prevent the disciplinary process.¹²⁵
- A police officer might be prejudiced in the criminal proceedings because a prosecutor or investigator may be able to obtain a forensic advantage as the officer's cooperation can be compelled in a disciplinary process. This issue is of particular concern if the direction to cooperate with the disciplinary investigation is made after the criminal proceedings against the officer have begun, and it is alleged that the direction has been given specifically to obtain the forensic advantage.¹²⁶
- A police officer might also successfully raise the privilege against self-incrimination in a disciplinary hearing.

Recommendation 6 (p. 72) addresses these issues.¹²⁷

The 'interwoven with court' impediment

The 'interwoven with court' impediment arises from issues different from those in the 'concurrent proceedings' problem, because in this case it is not the subject police officer who is charged before the court, but the complainant. The issues in this context are too complex to be adequately dealt with here; however, in summary, there will be circumstances where the disciplinary process must be delayed because the court hearing the criminal proceeding is the most appropriate forum in which to determine the issues, and dealing with the complaint separately would not be a justifiable use of resources.

In December 2007, the CMC audited complaints assessed by the QPS as 'interwoven with court' between 1 July 2005 and 30 June 2006. That report has been reproduced as Appendix C to this report, and the issues raised are still relevant. The audit revealed the following:

- The QPS appropriately assessed a significant percentage of complaints as 'interwoven with court'.
- A number of cases contained some allegations that had been appropriately assessed as 'interwoven with court' and others that had been inappropriately assessed as such.

124 See Forbes, JRS, op.cit., p. 209, Ref [12.37] citing *Boyd v Halstead; Ex parte Halstead* [1985] 2 Qd R 249 and *Rochfort v John Fairfax & Sons Ltd* [1972] 1 NSWLR 16 at 19; *Director of Public Prosecutions for Western Australia v Mansfield (2006) 161 A Crim R 210; [2006] WASC 72*.

125 See Forbes, JRS, op.cit., p. 209–10 ref [12.37]

126 See Donaghue, S op.cit., pp. 265–82 ref [10.9]–[10.26]. Section 331 *Crime and Misconduct Act 2001* enables the CMC to undertake coercive hearings even though a witness may have already been charged in relation to the matter about which the CMC is examining them.

127 There is often a perception among police that the *issue estoppel* principle applies, that is, they believe that if a disciplinary hearing is determined before a decision is made on a criminal matter concerning the same conduct, the criminal court may be bound by findings of fact made in the disciplinary hearing and vice versa. However this is not the case. When a court makes a particular decision, a prescribed officer in a subsequent disciplinary hearing must accept the *fact* that it has done so. This is relevant for example, where a conviction itself provides grounds for disciplinary action; however the officer must still determine the matters of fact in relation to the conduct on the basis of evidence before him or her. Refer Forbes, JRS, op. cit., pp. 228–32 [12.67]–[12.73].

- A number of cases could have been assessed as requiring ‘no further action’ because the complaint simply did not raise a suspicion of misconduct (e.g. CCTV footage established that the alleged conduct had not occurred).
- Some allegations were assessed as ‘interwoven with court’ when the circumstances of the alleged conduct were clearly not the same as, or could be separated from, the circumstances relied upon in the criminal charge against the complaint. These allegations should have been dealt with differently (e.g. investigated by the QPS).
- In some cases, inappropriate inquiries conducted before an assessment decision was made indicated an apparent lack of understanding of the nature and purpose of preliminary enquiries. Many inquiries categorised as ‘preliminary’ in fact amounted to an investigation of the complaint.
- In cases assessed as ‘interwoven with court’, no follow-up action was undertaken when the court proceedings concluded.

As a result of these findings, the CMC made a number of key recommendations to the QPS including that it:

- a. review its policy and procedure for complaints management to incorporate the recommendations¹²⁸
- b. ensure that it adequately trains officers on how to conduct preliminary inquiries and correctly assess when a complaint is ‘interwoven with court’.

To date, the QPS has not fully incorporated these recommendations in its complaints management procedures.

Absence on extended sick leave

Another issue that tends to delay the resolution of complaints is that of officers taking extended sick leave while under investigation or after disciplinary proceedings have been initiated. This problem is one that concerns policing agencies generally, and is not unique to the QPS.¹²⁹ It is particularly effective in disrupting the disciplinary process because, unlike employees in other occupations, under their enterprise bargaining agreement each police officer contributes annually to a bank of sick leave that is available to other officers when they run out of their own.¹³⁰ Under this arrangement, officers can remain on sick leave for considerable periods.

The current QPS complaint management policy on the effect of extended sick leave on the complaints management process is expressed in the following terms:

From time to time during an internal investigation, disciplinary hearing or other attempt to resolve or finalise a complaint, a subject member may be on extended sick leave. This may frustrate attempts by the Service to resolve or finalise a complaint. The Assistant Commissioner, ESC is to be consulted before any action is taken to resolve or finalise a complaint that involves a subject member on extended sick leave.¹³¹

However, a more proactive approach is needed because the current policy does not require positive action by anyone responsible for dealing with and resolving the complaint.

128 Appendix C pp. 4–6 of that report

129 Office of Police Integrity, *op.cit.*, pp. 34–6

130 *Police Service Administration Act 1990*, s.7.4(2), and *Queensland Police Service EB5 agreement 2007* accessed 29 June 2010 <www.qirc.qld.gov.au/resources/pdf/certified_agreements/cert_agreements/2007/ca62_2007.pdf>.

131 QPS Human Resources Management Manual, Section 18

In the United Kingdom, the issue has been addressed in the following ways:

- Subject to the police officer's capacity, provision is made for the officer to submit a written response in lieu of a formal interview. For this purpose an investigator may send the subject officer a list of questions he/she is required to answer.¹³²
- A disciplinary hearing may be convened in the absence of the subject police officer or by telephone or video link. In such cases, the officer may be represented by another officer or in serious matters, by a legal representative.¹³³
- If the officer has been detained in prison or another institution by order of a court, there is no requirement for the officer to attend the hearing in person.¹³⁴
- Time limits are imposed on steps in the disciplinary process, with provision for extensions to be granted by the appropriate authority (usually the chief police officer) on application by the officer seeking the extension. Those time limits have consequences, as they would in any other administrative process, which enable a party to bring the matter to conclusion.

In addition to measures like those above, specific guidelines for pursuing the timely medical retirement of officers should be considered for cases where an officer's medical condition means they lack capacity to respond to disciplinary allegations, or are unfit to perform the duties of a police officer and are unlikely ever to be so.

The imposition of time limits

The timely finalisation of each step in the disciplinary process is a key objective, but any time limits imposed must be realistic and fair to all parties. As multiple, complicated, and/or serious allegations will necessarily take longer to deal with than simple infringements, and other circumstances may reasonably delay any step in the disciplinary process, establishing strict and arbitrary timeframes is likely to result in inappropriate or unfair outcomes. However, establishing timeliness targets against suitable benchmarks can establish expected timeframes without the adverse consequences associated with strict time frames. These targets should be incorporated in organisational, regional/command level and, where appropriate, individual performance assessments and reporting.

For a number of years now the CMC has set benchmarks for its *assessment* and *inquiry* steps with targets requiring:

- assessment of 85 per cent of complaints within four weeks
- investigation of 80 per cent of misconduct matters completed within twelve months.¹³⁵

The CMC's performance against these benchmarks is reported quarterly to its oversight body, the PCMC, and also in its annual report. Performance is also monitored at business unit level and through individual performance plans for relevant senior officers.

Were benchmarking for timeliness to be extended to the QPS discipline system, targets would also need to be set for the *action* and *outcome* steps. Benchmarks and targets would also need to be considered according to the nature of the complaint. For example, a complaint alleging a breach of discipline would be expected to be dealt with more expeditiously than one involving an allegation of misconduct. Special timeliness benchmarks and targets would also need to be considered for particular types of misconduct such as drink driving offences which are generally first dealt with expeditiously and conclusively by a court.

132 Home Office 2008, *Home Office Guidance: Police Officer Misconduct, Unsatisfactory Performance and Attendance Management Procedures*, Paragraphs 2.122–2.123, Version 1.1, 1 December 2008, UK Government, accessed 29 June 2010, <www.homeoffice.gov.uk>.

133 *ibid.*, at paragraph 2.186

134 *ibid.*, at paragraph 2.187

135 Crime and Misconduct Commission, *Annual reports, CMC*, Brisbane, viewed 29 July, <www.cmc.qld.gov.au>.

Conclusion

In June 2008 the SDPC concluded:

While significant enhancements have been made to the discipline process within the QPS since [previous reviews of the system]¹³⁶ some of the same issues have been raised again to this review. The Review Team was consistently informed by staff and managers that disciplinary matters often took far too long before they were finalised and consequently this had a significant effect on both service delivery, the member being investigated and their managers. The QPS has advised the Review that depending on the severity of the allegation, the disciplinary hearing process can take anywhere from one year to three years to reach finalisation stage.¹³⁷

Timeliness continues, as this review demonstrates, to remain an issue that significantly compromises the effectiveness of the police discipline system.

Recommendation 3

The CMC recommends that the QPS, in consultation with the CMC, review the relevant policies and procedures, steps and processes in the current system for the management of police complaints and discipline with a view to:

- a. reducing the level of complexity in the system**
- b. identifying clearer and simpler work flows for managing and dealing with misconduct and other inappropriate conduct**
- c. identifying and developing strategies to address potential choke points in the system caused by inadequate resourcing**
- d. identifying and assessing work-flow risks and articulating appropriate treatments**
- e. incorporating the recommendations made in the audit report (Appendix C) and giving officers adequate training in conducting preliminary inquiries and making assessment decisions about complaints 'interwoven with court'**
- f. putting timeframes on key steps in the process and linking these to appropriate consequences to ensure a timely conclusion of the matter.**

Improving effectiveness

Although its role has a different nature and perspective, the CMC shares responsibility with the QPS for ensuring that the police discipline system works effectively. In this section we discuss particular issues that affect the way the CMC and the QPS discharge their different responsibilities.

The CMC's role

The CMC largely discharges its responsibility for ensuring public confidence in the police discipline system through its investigative and monitoring functions. How the CM Act requires it to do this is detailed below.

136 SDPC 2008, op. cit., p. 81, citing the Fitzgerald report op.cit., 1989, PSMC 1993, op.cit. and the Bingham review op.cit., 1996.

137 SDPC 2008, op.cit. p. 82

How the CMC performs its monitoring role under the CM Act

S. 47 Commission's monitoring role for police misconduct

1. The commission may, having regard to the principles stated in section 34—
 - a. issue advisory guidelines for the conduct of investigations by the commissioner of police into police misconduct; or
 - b. review or audit the way the commissioner of police has dealt with police misconduct, in relation to either a particular complaint or a class of complaint; or
 - c. assume responsibility for and complete an investigation by the commissioner of police into police misconduct.
2. The commissioner of police must give the commission reasonable help to undertake a review or audit or to assume responsibility for an investigation.
3. If the commission assumes responsibility for an investigation, the commissioner of police must stop his or her investigation or any other action that may impede the investigation if directed to do so by the commission.
4. In this section—complaint, about police misconduct, includes information or matter involving police misconduct.

S. 48 Commission's monitoring role for official misconduct

1. The commission may, having regard to the principles stated in section 34—
 - a. issue advisory guidelines for the conduct of investigations by public officials into official misconduct; or
 - b. review or audit the way a public official has dealt with official misconduct, in relation to either a particular complaint or a class of complaint; or
 - c. require a public official—
 - i. to report to the commission about an investigation into official misconduct in the way and at the times the commission directs; or
 - ii. to undertake the further investigation into the official misconduct that the commission directs; or
 - d. assume responsibility for and complete an investigation by a public official into official misconduct.

In recent times, much criticism of how the CMC performs its monitoring role has focused on the principle of devolution which is one of four principles the CMC must take into account when carrying out its misconduct function — it is not an output or outcome of this function. This principle informs the way the CMC discharges its responsibilities, not how the QPS discharges its own. It does not, in fact, apply to the way the QPS deals with complaints.

It operates on the basis that:

... subject to the cooperation and public interest principles and the capacity of the unit of public administration, action to prevent and deal with misconduct in a unit of public administration should generally happen within the unit.¹³⁸

However, the CMC has an overriding responsibility to maintain public confidence in the public sector. This may be adversely affected if (depending on the nature and seriousness of the matters involved) an agency deals with complaints about the conduct of its own members. In such cases the principle of public interest as delineated in the CM act dictates that the CMC should investigate.

138 CM Act, s. 34

The underlying rationale of the devolution principle is that public confidence in an agency is increased when the public can see, and the agency can demonstrate that it can deal effectively and appropriately with the misconduct of its own members. Maintenance of a strong culture of integrity in the workplace also depends on managers and supervisors being responsible and accountable for dealing with the inappropriate conduct and behaviour of their staff. However, this duty is primarily satisfied through performance management not complaints management. Although complaints in the disciplinary system can be symptoms of irresponsible management, the disciplinary system should not be the primary means of encouraging managerial responsibility.

To the public, the QPS is a single entity. Its confidence in the Service does not increase when responsibility for dealing with complaints of police misconduct is 'devolved' to the region, district or station where the subject officer is located — in fact, it actually decreases when this responsibility is given to those closest to the officer or the officer's work unit. Conversely, public confidence increases the more independently this responsibility is discharged, and the more distant the person discharging it is from the subject officer.

An officer's conduct becoming the subject of a misconduct complaint may be evidence that QPS's management and supervisory system has failed. In such cases, public confidence in the integrity of the Service and the effectiveness of its discipline system will depend on transparent and impartial resolution of the complaint. This does not mean that management action is an inappropriate discipline outcome, but that the public interest, as well as the organisational and individual interests must be reflected in the way the matter is resolved.

In its most recent three-yearly review of the CMC, the PCMC recognised that concerns about how the CMC devolves complaints:

... are validly held ... and ... devolution is an aspect of the Commission's function that has perhaps the greatest potential to erode public confidence in the independence and integrity of the Commission as an oversight agency ...

... Various complaints to the Committee have raised concerns about the Commission's devolution of their complaint back to the agency complained of, including concerns that the matter will not be properly or independently investigated, that any evidence of misconduct found will be 'covered up', or that the seriousness of their concerns has not been fully appreciated by the Commission. The Committee acknowledges that even where there is no objective evidence that anything other than a full and thorough investigation was done by the agency, the perception of a biased process or outcome, or 'Caesar judging Caesar' will often remain. It is that perception that can operate to erode public confidence in the CMC.¹³⁹

Essentially, the concern is that the CMC does not give sufficient weight to an agency's capacity to deal effectively and appropriately with complaints referred to it. Case study 7 exemplifies the validity of these concerns.

139 Parliamentary Crime and Misconduct Committee 2009, *Report No 79: Three Yearly Review of the Crime and Misconduct Commission*, PCMC, Brisbane pp. 29–30

Case study 7 (2008–ongoing)

In July 2008, X complained to the CMC about the conduct of several police officers who had executed a warrant at his home three years earlier. The most serious of X's nine allegations was against police officer (A) who he claimed had assaulted him twice at the police station after his arrest, but before he was taken to the watch house.

Officer A (a detective sergeant with 20 years experience) had an extensive complaint history of more than 28 matters dating back to 1995, including twelve allegations of assault, four of excessive force and five of intimidation or harassment. Each of these had either been investigated and found to be unsubstantiated, or had not been investigated on the basis that the matter was 'interwoven with court'.

Shortly after receiving the complaint, the CMC advised X by letter that it had referred the matter to the QPS for investigation, but would monitor this and, before the matter was finalised, review any decisions made by QPS.

In August 2008, X notified the CMC of his change of address and contact details. The CMC immediately passed this information to the QPS; however it noted that by late September 2008, the QPS had still not appointed an investigating officer. The QPS then 'devolved' investigation of the matter to the region where the conduct had allegedly occurred. The regional professional practice manager allocated the matter to a uniformed sergeant (at the same rank as officer A but with no specialist investigation experience) at another police station in the district.

The investigation progressed, but the CMC noted that the investigating officer had requested an extension in November 2008 because rostering and special duties had interfered with his ability to complete the matter. The CMC attempted to contact him twice in December and once in early January without success, then discovered that he was on leave until the end of January 2009.

In early February 2009 the CMC noted that the investigator had submitted a draft report exonerating all subject officers involved in the alleged assault, and recommending that no action be taken against any of them regarding the remaining allegations. However, the report did note some minor procedural deficiencies, and the seizure of an item of property from the complainant, which should have been returned to him. The investigating officer recommended that one officer, a senior constable, receive managerial guidance in relation to these matters.

In March 2009, the district officer, then the professional practice manager overviewed the matter, followed by the ESC in April 2009. At this time, the CMC requested a copy of the draft report because it had received information from a witness who had allegedly seen the assault. Noting that the investigating officer had interviewed *neither the complainant nor the witness* in the course of the investigation, the CMC decided to monitor the matter closely. Though the ESC referred the matter back to the investigating officer requesting further action, *it did not identify this failure to interview relevant witnesses*.

At the end of July 2009, the CMC asked the QPS for a final report on the matter, and repeated this request several times between October and the end of November 2009. During this time, the ESC had reviewed the matter again, and referred it back to the investigating officer for further action, but the CMC noted that this still did not include a request to interview the complainant and the witness.

In December 2009, the CMC advised the QPS that it was assuming responsibility for the investigation and requested it provide all relevant material gathered to date. Though some material was provided promptly, the CMC did not receive all the material until mid-March 2010. It expects to conclude the investigation shortly.

The CMC has responded to these concerns by advising the Queensland Government that it will review its complaints assessment criteria. In doing so, it will give full effect to the public interest principle when deciding which matters to refer to public sector agencies for resolution, and the appropriate level of monitoring required for those matters.¹⁴⁰

140 Queensland Government 2009, *Response to the 7th Parliamentary Crime and Misconduct Committee Report No. 79 April 2009 Three Yearly Review of the Crime and Misconduct Commission*, Queensland Government Brisbane, p. 3.

However, the CMC's monitoring function lacks potency because, in cases involving police misconduct, the Commission can only advise and encourage the QPS to deal with a matter appropriately, it cannot direct it to take a particular course of action. If the QPS's response is unsatisfactory, the only course open to the CMC is to assume responsibility for the matter itself, as illustrated by Case study 8. This is not always the most appropriate way of ensuring public confidence in the police discipline system; neither is it a universal remedy or sustainable long-term strategy as it militates against another of the CMC's responsibilities which is to build 'the capacity of units of public administration to prevent and deal with cases of misconduct effectively and appropriately ... themselves'.¹⁴¹

Under s. 40 of the CM Act, the CMC can give the Commissioner of Police a direction on how and when QPS must notify it of complaints. Under s. 48 of the Act, in matters of *official misconduct* it may direct the Commissioner or any other police officer to investigate a matter further. However, it does not have a similar power when monitoring matters involving *police misconduct*. Therefore, to give effect and purpose to its monitoring responsibility, the CMC requires a power of direction under ss. 47 of the CM Act, similar to the power it has under s. 48 to enable it to ensure that QPS conducts investigations, and deals with misconduct effectively and appropriately.

Recommendation 4

The CMC recommends that the Queensland Government amend the *Crime and Misconduct Act 2001* to enable the CMC — for the purpose of discharging its monitoring function and to ensure the police service deals with complaints of police misconduct effectively and appropriately — to require the Commissioner of Police:

- a. to report to the commission about an investigation into police misconduct in the way and at the times the commission directs; or**
- b. to undertake the further investigation into the police misconduct that the commission directs.**

The QPS's role

The QPS's capacity to deal with misconduct is concentrated in two main areas: the ESC and the professional practice managers (PPMs) located in each region or command (see p. 21). The ESC with its broad range of functions is a relatively recent addition as a command within the QPS.

Before the Fitzgerald Inquiry in 1989, the investment of the then Queensland Police Force in professional standards was focused in its Internal Investigations Section and the Inspectorate, both of which reported directly to the Commissioner. The Inspectorate was responsible for monitoring police service operations to ensure efficiency and compliance with procedures. Complaints against police were referred to the Internal Investigations Section which dealt with some of them. The superintendent in charge of the section referred the others to the relevant police region for resolution.¹⁴²

In 1989, Fitzgerald found the Internal Investigations Section so ineffectual in scope, so under-resourced and under-skilled, and so lacking in motivation that he recommended it be abolished and replaced with a new Commission (which became the Criminal Justice Commission) with jurisdiction for investigating all complaints against police.¹⁴³

141 CM Act, s. 34

142 Fitzgerald report op.cit., pp. 267 and 289.

143 Fitzgerald report op.cit., p. 289

After the Fitzgerald Inquiry, the police service continued to maintain a Professional Standards Unit for conducting internal investigations, although the vast bulk of those involving alleged misconduct were taken over by the Misconduct Division of the former Criminal Justice Commission.

The present-day ESC was established in 1997 under the control of an assistant commissioner (see Fig. 5, ESC organisational chart). The command assumed the functions of the Professional Standards Unit (renamed the Internal Investigation Branch), and of the Inspectorate, (now the Inspectorate and Evaluation Branch). A new Ethical Practice Branch was also established. The primary driver for the new command was 'to facilitate a more proactive approach to the prevention and detection of police misconduct.'¹⁴⁴

In 1998 the ESC established an Internal Witness Support Unit to guide and support members reporting the misconduct of another member of the QPS. The unit currently helps over 100 police officers and staff annually, with 10–20 members formally placed in the Internal Witness Support Program. The QPS recently reviewed the program and plans to introduce a range of initiatives to 'better align QPS policies towards best practice' over the coming year.¹⁴⁵

In 1989, when examining what structures, resources and processes the QPF had for dealing with complaints against police, Fitzgerald identified three main areas of concern:

1. The level of human resources invested in internal investigations

In 1989, the Internal Investigations Section was staffed by 11 officers, consisting of 1 superintendent and 7 detective inspectors, aided by 3 uniformed officers who performed only clerical duties. As there were 5085 police members at the time, this was a ratio of 1:460.¹⁴⁶ Fitzgerald noted that these officers were conducting up to 15 major investigations at any one time. The number of less serious investigations they were managing is unknown.

The current strength of the Internal Investigation Branch is 34 staff, consisting of 1 superintendent, 11 inspectors (most of whom are not detectives), 9 staff (including three sworn officers involved in administrative duties), and 13 non-commissioned officers (mostly senior sergeants). As of 30 June 2009, there were 14259 members of QPS, making the ratio 1:420. This is not a significant increase in internal investigation resources since the Fitzgerald Inquiry. Data provided by QPS indicates that the branch is managing or monitoring up to 1500 open complaints at any one time.

The Internal Investigation Branch has a much broader scope than its predecessor of twenty years ago and is currently responsible for:

- investigating those allegations of suspected criminal conduct and serious misconduct by members of the service that the CMC does not investigate
- overseeing and providing advice to the Assistant Commissioner, ESC on the resolution of complaints service-wide to achieve acceptable timeframes and appropriate outcomes
- overseeing, and in selected cases, investigating specific police-related incidents¹⁴⁷
- investigating all deaths in police custody on behalf of the State Coroner (although this role is presently being reviewed)
- investigating other matters as directed by the Commissioner, Deputy Chief Executive, Specialist Operations, or the Assistant Commissioner, ESC.

144 Queensland Police Service, Intranet – ESC History.

145 Queensland Police Service 2009, op.cit., p. 17

146 Fitzgerald report op.cit., p.226

147 Identified in QPS *Operations Procedures Manual*, Section 1.7

2. Investigator skills and physical resources

Pre-Fitzgerald, the Internal Investigations Branch was largely staffed by very senior detectives. Today, though attracting senior and experienced detectives with a range of specialist skills is essential to a maintaining a strong investigative capacity, attracting plainclothes officers with current and relevant skills remains a challenge.

In 1989 Fitzgerald noted with concern that:

... some of the inspectors do not have their own office. There are no interview rooms in the section's premises, which are generally inadequate. The Section has no surveillance or covert operational capabilities. It has a few tape recorders and only one still camera ...¹⁴⁸

More than 20 years on, the Internal Investigations Branch still has no surveillance capacity, no covert operational capabilities and few other physical resources with which to discharge its responsibilities.

3. Proactivity

In 1989, Fitzgerald reported that:

... [a]ll investigations by the Internal Investigations Section have been ad hoc and reactive. No attempt has been made to analyse the major sources of complaints, types of complainants, categories of complaints or whether a greater incidence of complaints is received about members of particular units.¹⁴⁹

Today's ESC has come some way from the picture described by Fitzgerald in 1989. Its Ethical Practice Branch is involved in risk management profiling, risk analysis and intelligence activities to inform professional practice. In its review of the police service, the SDPC reported in June 2008 that the ESC used data from its Client Service System (CSS) database to monitor and report complaint statistics, but was concerned that their reporting of data focused on 'statistical trends rather than providing an analysis of what the trends are showing'.¹⁵⁰

One of the difficulties for the ESC is that the CSS does not support these proactive strategies well because it is difficult and time-consuming to interrogate, and does not facilitate the case management of complaints. Earlier this year, QPS initiated the Discipline and Complaints Management System (DCMS) project (which has a budget allocation of \$253 000) to examine and develop a business case for replacing the CSS with a system capable of providing increased efficiency of reporting processes, increased research and analysis capability to support the development of better prevention strategies, and more timely, efficient and effective management of complaints. The CMC has senior representation on the DCMS Project Board.

An important requirement of the new system will be the capacity to integrate or link with other key police service information management systems such as Queensland Police Reporting and Information Management Exchange (QPRIME) and the Human Resource system. The business elements to be incorporated in the system scoping include the CMC's requirements, the core processes of the ESC and the requirements of the Internal Witness Support Program. It is expected that the business case will be completed by September 2010.

148 Fitzgerald report op.cit., p. 289

149 *ibid.*

150 SDPC 2008, op.cit., p.80

The role of professional practice managers

In 2002, the police service established a dedicated position, at the rank of inspector, to oversee the handling of complaints in each region and command. Renamed as professional practice manager (PPM) in 2004, the position reports directly to the relevant assistant commissioner for the region or command. Though not clearly articulated in QPS policies and procedures, the key responsibilities of the role appear to be:

- coordinating and overseeing the resolution of complaints within the region/command
- advising the assistant commissioner and other prescribed officers in relation to the discipline process
- helping the ESC review and audit complaint matters
- overseeing significant incidents in compliance with QPS policy
- advising the assistant commissioner on professional practice and performance matters.

Despite the specialised nature of the position, PPMs are recruited according to a generic position description for inspectors. Alternatively, an assistant commissioner might move an existing inspector for a region or command to the role. Although PPMs are required to give the assistant commissioner specialist advice on ethical practice, complaint management and discipline issues, there is little evidence that those appointed to the role have relevant and demonstrated expertise beforehand, or of how they are to acquire it.

Though the ESC provides some support to the PPMs through a dedicated inspector position of PPM coordinator, the responsibilities of this role are not clearly defined in any service policy or procedure; neither is there any formal line of reporting from the PPM to the ESC. This leaves the PPM remote from the lines of support, access to information, systems and advice that might be more readily available through a formal relationship. As the PPM also comes within the regional/command framework, the position is also highly predisposed to local influences, priorities and culture. This can only make it more difficult for the QPS to maintain consistent ethical standards and professional practice and to consistently apply complaint management and discipline policies and procedures.

The role of the PPM might be more effective if it incorporated a more strategic approach to preventing misconduct and managing complaints, and/or was responsible for conducting local investigations that are likely, if proven, to warrant imposition of a disciplinary sanction. While this might entail additional administrative and senior investigative support, such an expanded role would address two significant problems demonstrated by case study 8.

The case study illustrates a propensity of the QPS at regional/command level (observed by the CMC) to inappropriately allocate misconduct investigations to ill-qualified officers, with little or no investigative experience. These officers are required to investigate reasonably serious allegations against peers with superior specialist investigation skills and experience. In effect, a uniform sergeant may be required to investigate a seasoned detective sergeant, and may even be required to investigate whether this officer's senior sergeant may have been deficient in supervising the subject officer — clearly an inappropriate situation.

The case study also highlights the low priority sometimes given at regional/command level to managing complaints and conducting investigations into alleged misconduct. A police officer tasked with investigating a complaint cannot possibly do so effectively without sufficient time, resources and access to specialist advice and support.

Conclusion

In response to the Queensland Government's 2009 green paper on integrity and accountability, the QPS submitted:

The [ESC] ... is a dedicated, well-resourced component of the QPS led by an assistant commissioner. The command is tasked solely with managing the internal complaint system; developing and maintaining ethical and professional standards/policies; promoting ethical behaviour, discipline and professional practices; and educating staff members regarding their ethical and professional obligations. The ESC is supported by a strong partnership with the CMC and a network of internal Professional Practice Managers across each of the regions/commands.¹⁵¹

The role performed by the ESC is integral to the success of the QPS discipline system, but the CMC disagrees with the assertion that it is well resourced. Additionally, the role of the PPM could be better supported and could include responsibility for managing and investigating more serious matters, and engaging in and promoting ethical practice at the local level.

As no discipline system can be effective without the organisational will to make it do so, the QPS must elevate complaints management to core business, and focus on it the effort and resources such positioning necessitates.

Recommendation 5

The CMC recommends that the QPS, in consultation with the CMC:

- a. review the capacity and resources, staff retention and attraction strategies of the ESC to ensure that it has an appropriate number of personnel, skills and physical resources to perform its functions, consistent with recognising those functions as core business**
- b. evaluate the effectiveness of the role of the professional practice manager to ensure it is better utilised and resourced to improve the quality, consistency and timeliness of complaint and disciplinary outcomes**
- c. develop a discipline and complaints management system capable of improving the efficiency of reporting processes, increasing research and analysis capability to create and enhance prevention strategies, and supporting the more timely, efficient and effective management of complaints.**

Disciplinary proceedings

To deter inappropriate conduct, improve organisational and individual performance, and protect the QPS from loss of public confidence, those responsible for making disciplinary decisions must genuinely strive to find out what happened. If the discipline system is to operate effectively, its legal and regulatory framework must support this inquiry for truth. Factors militating against finding out 'what actually happened' are:

- claim of self-incrimination privilege
- failure to accept unqualified admissions
- application of the wrong evidentiary standard
- inappropriate use of criminal justice expressions.

151 Queensland Police Service 2009, op.cit., p.11

Claim of self-incrimination privilege

The privilege against self-incrimination arose historically from the need to ensure that authorities did not employ oppressive methods to obtain evidence from people and use it against them to prove their guilt.¹⁵² QPS members may claim this privilege in the course of:

- disciplinary proceedings conducted by the QPS
- coercive hearings conducted by the CMC
- proceedings conducted by the QCAT.

Under the authority vested in him by the PSA Act¹⁵³ the Commissioner of Police has directed all members to ‘truthfully, completely and promptly answer all questions directed to them, and not to withhold information relating to, or otherwise deliberately frustrate or delay, a discipline investigation’.¹⁵⁴ A member of the police service may also be liable to disciplinary action for failure to comply with the requirement.¹⁵⁵

Though this requirement is inconsistent with a person’s substantive legal right not to incriminate themselves or expose themselves to risk of penalty,¹⁵⁶ it has been recognised that it is justified because of the requirement to maintain the accountability and ensure the integrity of police officers. According to Tony Fitzgerald:

A police officer is not in the same position as an ordinary citizen. He is bound to uphold the law and actively to enforce it. He is employed by the community to do that task. It is essential for public confidence in the Police Force that reasonable criticism of or concern about police performance be addressed and met by full explanation. A police officer’s obstinate silence is an unacceptable impediment to that.¹⁵⁷

Although police officers routinely comply with the direction, they often raise the concern that this requirement to answer questions in a disciplinary investigation exposes them to the risk of having their statements used against them in criminal proceedings. They therefore routinely seek to invoke the protection of the self-incrimination privilege by stating on the record that their compliance is being obtained under duress.

It is not clear whether the provisions of the PSA Act under which the Commissioner’s direction has been issued, are sufficient to abrogate the privilege. If they are not, this would make it lawful for an officer to refuse to comply with the direction.¹⁵⁸

Under the current provisions of the CM Act, where the CMC is conducting an investigation into a police officer’s alleged misconduct, evidence given by a witness at a CMC hearing under direction, or information provided under notice following a claim of self-incrimination privilege cannot be used against that witness in disciplinary proceedings.

In addition, in proceedings taken before QCAT in its original jurisdiction as a result of a disciplinary investigation, members of the QPS may refuse to give evidence on the ground that the answer to the question or information provided may incriminate them.

152 *ibid.*, p. 2

153 PSA Act, ss. 2.5 and 4.9(1)

154 QPS Human Resources Management Manual, Section 18.3.14.10

155 QPS Human Resources Management Manual, Section 18.3.14.10.2

156 Donaghue, S 2001, *Royal Commissions and Permanent Commissions of Inquiry* Butterworths, Sydney, at para 9.7

157 Fitzgerald report op.cit., p. 294

158 Queensland Law Reform Commission 2004, ‘The abrogation of the privilege against self-incrimination’, *Report No 59*, December, citing at p. 70 *Comptroller-General of Customs v Disciplinary Appeal Committee and Day* (1992) 35 FCR 466.

The CMC suggests that the legislation be amended to provide that:

- a witness is not excused on this ground from the requirement to answer questions or provide information in disciplinary investigations and proceedings, including any proceedings before QCAT
- information provided in such a situation cannot be used in a criminal proceeding against the member, except in specific circumstances.

Recommendation 6

The CMC recommends that the Queensland Government amend the *Police Service Administration Act 1990*, the *Crime and Misconduct Act 2001*, and the *Queensland Civil and Administrative Tribunal Act 2009* so that the police discipline system can operate effectively by ensuring that:

- a. a member of the QPS is required to answer questions and/or provide information for the purpose of a disciplinary investigation or disciplinary proceedings, including disciplinary proceedings conducted by QCAT, on the ground that the answer to the question or provision of information may incriminate the member**
- b. if so required, any answer or information provided is not to be used in any criminal proceeding against the member who made the statement, other than if the proceeding is about**
 - **the falsity or misleading nature of the answer or information given by the individual; or**
 - **an offence against the CM Act.**

Failure to accept unqualified admissions by officers

Unqualified admissions in criminal, civil or administrative proceedings usually resolve issues about liability, and expedite the proceedings because the courts or tribunals then only have to decide on the appropriate outcome (a remedy, sentence or sanction as the case may be). As the majority of police officers involved in disciplinary investigations or proceedings have ready access to legal advice through their union, when they make admissions they have generally been fully informed of the likely consequences.

As part of its monitoring role, the CMC regularly audits how the QPS performs one or more of its functions in dealing with complaints of improper conduct.¹⁵⁹ One recent audit focused on how the QPS conducted a sample of disciplinary hearings against 80 police officers (the subject police officers) between 1 January 2008 and 31 December 2009. The audit revealed issues about the rules applying to the disciplinary process, and how they are implemented to impede or undermine the fairness and purpose of the proceedings. In 32 of the cases examined, the subject officers made admissions of some kind. One admitted some of the allegations against him but contested the remainder. Two officers admitted the allegations, but one claimed his conduct was justified, and the other claimed his conduct only amounted to a breach of discipline. The other 29 subject officers did not qualify their admissions in any way (i.e. they admitted the alleged conduct completely).

However, for no apparent reason, the prescribed officers convening the hearings in more than 25 per cent of cases in the audit sample *did not accept* the unqualified admissions of the subject officers. Instead, they considered all or most of the evidence before them before formally finding that the alleged conduct was in fact misconduct, and that it had been proven. The time taken to conduct this exercise must have been considerable because in each case,

¹⁵⁹ CM Act, s. 47(1)(b)

the prescribed officer invariably recounted having read hundreds, and in some cases, thousands of pages of evidentiary material.

The few cases where prescribed officers accepted unqualified admissions to resolve issues of liability were mainly cases where the subject officer had already been convicted in a court of the matter that was the subject of the disciplinary hearing.

Application of the wrong evidentiary standard

The evidentiary standard in disciplinary proceedings is the civil standard — that is, the prescribed officer must be *reasonably satisfied* that the alleged conduct actually occurred. The standard of proof is therefore one of ‘reasonable satisfaction’ rather than ‘beyond a reasonable doubt’, which is the standard of proof that must be applied in criminal cases.

QPS policies and procedures dealing with disciplinary hearings describe the standard of proof in the following terms:

The standard of proof in disciplinary proceedings is proof to the reasonable satisfaction of the prescribed officer having regard to:

- i. the seriousness of the allegations;
- ii. the inherent likelihood (or improbability) of the occurrence alleged; and
- iii. the severity of the consequences (which may follow if the charge is proven).

‘Reasonable satisfaction’ is a variable standard of proof that must be commensurate with the issues involved. The more serious the issues, the higher degree of satisfaction that is required, the lowest being the ‘balance of probabilities’ and the highest ‘beyond reasonable doubt’.¹⁶⁰

These words are said to derive from the judgement of Dixon J in a 1938 High Court case known as *Briginshaw v Briginshaw*.¹⁶¹ However, the guideline does not accurately represent what Dixon J said about the civil standard of proof, or what has since become known as the Briginshaw principle. In *Briginshaw v Briginshaw*, Dixon J explained the principle in these terms:

... Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved.

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters ‘reasonable satisfaction’ should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency ...¹⁶²

In disciplinary matters, the standard of proof required does not slide between the ‘balance of probabilities’ and ‘beyond a reasonable doubt’ but remains one of ‘reasonable satisfaction’. For matters involving more serious allegations and consequences, the presiding officer must base this ‘reasonable satisfaction’ on more reliable and cogent evidence.

In the audit sample, the prescribed officers referred to up to eight different understandings of the Briginshaw principle. Many also confused the evidentiary standard with the probative value (or quality) of the evidence required to prove the facts in issue. Though the misunderstanding or

160 QPS Human Resources Management Manual, s. 18.3.2.5

161 (1938) 60 CLR 336

162 (1938) 60 CLR 336–7

confusion invariably favoured the subject police officer, in most of these matters the allegations were found to be proven. However, in three matters the elevated standard of proof led to a finding of 'not proven'. In two of those cases, the prescribed officer expressly and incorrectly applied the criminal standard of proof. In one of those cases the prescribed officer purported to apply the Briginshaw principle, but in the next breath agreed that the standard of proof must be the criminal standard. (See case study 8.) In only two cases did the prescribed officer (the same one in each case) state and apply the correct standard of proof.

One concerning consequence of the misunderstanding of the Briginshaw principle is a tendency by presiding officers, without any change to the alleged facts, to either downgrade the allegation from one of misconduct to one of breach of discipline, or to find the misconduct allegation has not been substantiated. They then issue a notice to the subject officer requiring that they receive managerial guidance for their involvement in the very same conduct. This is effectively saying to the subject officer, *'You didn't act inappropriately because I'm not reasonably satisfied you did, but don't you ever do it again!'*

This confusion and misunderstanding about the evidentiary standard not only produces perverse outcomes, but also undermines the objectives of the disciplinary process and confidence in the QPS and its senior officers.

Case study 8 (2008–10)

A mother complained that her 15-year-old son had been punched and repeatedly beaten by two police officers while he was handcuffed and held down by another police officer.

The investigation of the assault/excessive force allegations resulted in one of the officers, a constable, being charged with misconduct. It was alleged that his conduct was improper in that he used excessive force, in particular, that he punched and kicked the youth.

In February 2008, an assistant commissioner acting with the authority of the deputy commissioner conducted a disciplinary hearing in relation to the charge of misconduct. In other words, the assistant commissioner had the power to dismiss the officer if the charge was proven.

In the written findings and reasons, the assistant commissioner acknowledged the seriousness of the matter and specifically stated that he had applied the Briginshaw test. However, in the very next paragraph he said, 'I concur with your (the constable's) submission that the charges are commensurate with criminal charges and therefore the standard of proof must be to the criminal standard', and found the matter unsubstantiated.

On appeal, the Misconduct Tribunal found that by applying the criminal standard of proof instead of that applicable to disciplinary proceedings, the assistant commissioner had been in error in making his decision.

Inappropriate use of criminal justice expressions

Although disciplinary proceedings are administrative and not criminal, the QPS policies and procedures for the disciplinary process are written in adversarial language, and include numerous criminal justice expressions such as 'charge', 'plea of guilty', 'plea of not guilty', 'found not guilty' and 'penalty'. The CMC notes that Part 7A of the PSA Act includes the phrase 'guilty of misconduct', which may explain why this type of language has found its way into QPS policies and procedures.

These words have no proper place or application in a disciplinary process as they do not properly reflect its administrative nature and purpose. They should be replaced with more appropriate expressions such as 'admitted', 'not admitted', 'proven' or 'not proven', 'sanction' or 'remedy', as the continued use of inappropriate language serves only to undermine the purpose of the process.

Recommendation 7

The CMC recommends that the QPS regularly review its policies, procedures, guidelines and training materials for the police disciplinary process to ensure that:

- a. prescribed officers will accept and act on admissions of misconduct by police officers**
- b. these materials accurately communicate and explain relevant legal principles**
- c. the language used reflects the proper nature and purpose of disciplinary proceedings.**

The CMC also recommends that the Queensland Government amend the *Police Service Administration Act 1990* to ensure that the language used reflects the proper nature and purpose of disciplinary proceedings.

Ensuring better outcomes

Combining disciplinary sanctions and remedial action

Policies and procedures for managing the performance of police officers are approved under the authority conferred on the Commissioner of Police under s. 4.8 of the PSA Act, which makes the Commissioner responsible for the efficient and proper administration, management and functioning of the police service. Section 7 of the Act and the PSD Reg deal with the policies and procedures for disciplinary action.

The discipline system currently operates quite separately from the performance management system and an officer cannot be subject to both at any one time. However, outside both systems, a more senior officer always has the right to chastise or correct a subordinate officer for inappropriate conduct.¹⁶³

Management action to improve performance

Remedial or management action may be taken with a view to improving a police officer's performance under a management action plan developed within the guidelines of the police service diminished work performance policy. Under a management action plan, any viable remedial action may be agreed between supervisor and subordinate, including:

- on or off the job training
- referral or guidance as to the availability of professional counselling services
- provision of the physical, information or supervisory resources required for performance of duties
- improved communication processes between member and supervisor and the member or changing the level of supervision job redesign to improve procedures or systems.

Queensland Police Service Human Resources Manual, Section 13.3.14.4

Once a matter has been captured by the discipline process and has proceeded to the disciplinary hearing stage, management action strategies can be used only if:

- the conduct is proven, and a sanction has been imposed but suspended¹⁶⁴

163 PSD Reg, r. 11

164 *ibid.* r. 12

- it is recognised early in the disciplinary process that a complaint of misconduct was triggered by a subject officer's poor work performance or inappropriate response to a situation; or
- the conduct is not proven *outside* the discipline hearing process.¹⁶⁵

If performance has deteriorated to a level that warrants disciplinary action, all management action must cease before any disciplinary action can begin, even disciplinary action for unrelated conduct.

In such circumstances, the prescribed officer may report to the subject officer's relevant assistant commissioner, identifying performance deficiencies and suggesting possible remedial action.

An officer presiding in a disciplinary hearing is not required to consider, and has very limited ability to address, management and systemic issues arising from the disciplinary matter at the time of the hearing. The officer does not consider:

- whether a subject officer's conduct requires management action over time to improve performance, as well as a sanction
- whether management action to improve performance is more appropriate than imposing a sanction for misconduct
- organisational learning and improvements, or the adequacy of systems and resources.

There is no logical reason why management action and disciplinary proceedings need be mutually exclusive outcomes of the discipline process. Except where the ultimate sanction of dismissal is imposed, it would seem that the more serious the conduct, the more the subject officer's performance would benefit from management action.

Use of remedial strategies should not be considered a disciplinary sanction or penalty. Instead, individual improvement and development of the subject officer is the dominant consideration. The purpose of imposing disciplinary sanctions is quite different, for although they may also have a remedial benefit, organisational and public interest are dominant considerations.

Management action is '*in keeping with encouraging managerial responsibility, leadership and an even handed approach*' and should be discretely recognised in the legislative and regulatory framework of the discipline system.¹⁶⁶

Management actions should always be considered and if necessary implemented, whether or not misconduct is proved, to improve individual performance and organisational learning. When imposed via the discipline system, they should be recorded, linked and monitored through the performance management system, where any failure to comply with them can be adequately addressed.

Increasing the range of disciplinary sanctions

The six specific disciplinary sanctions that may currently be imposed under the Police Discipline Regulation in Queensland are set out in Table 2 (p. 37). The seventh option 'any other discipline considered warranted' is available only if the officer presiding at the hearing is a deputy commissioner.

The Office of Police Integrity in Victoria (OPI) suggested that the number of sanctions available should be reduced in favour of a two-part disciplinary model — the first a simple punitive process for use where remedial action has failed, or is inappropriate, and the only sanction available is dismissal — and the second a wide range of remedial actions for dealing with all other inappropriate conduct.¹⁶⁷ The rationale is explained as follows:

165 *ibid.* r. 12

166 Bingham review *op.cit.*, p. 248

167 Office of Police Integrity, *op.cit.*, p. 51

... Little benefit is seen to flow from intermediate penalties such as fining or demotion. While they can potentially give rise to much damage to the workplace through disgruntled employees, they do little to remedy poor conduct in the long term. This 'no middle ground' position is a divergence from the standards of most other employment arrangements ... which provide a process for non-termination penalties for misconduct.¹⁶⁸

Police employment is not like any other. It carries with it special obligations to the Government and the community, particularly in the light of the powers that are exercised ... Normally, if there is evidence of misconduct that could support a reduction in rank, grade or seniority or a deferral in a salary increment, there would at least be firm grounds for a consideration of employment suitability.¹⁶⁹

In 2006, The Australian Federal Police employed a similar two-part discipline model, and are currently the only Australian policing organisation with such a regime in use.¹⁷⁰ Similar reform has also been recommended after reviews of the Victorian¹⁷¹ and Western Australian¹⁷² police discipline systems. However, while this approach of dismissal or management action is attractive, the CMC believes that it tends to over-simplify the issues, as there will be instances where a matter cannot be dealt with using management action alone, but does not warrant a sanction of dismissal (e.g. where the inappropriate conduct occurred in a private capacity).

Disciplinary sanctions are imposed as a deterrent, and to maintain public confidence in the police service. These objectives can only be fully met when information about disciplinary actions taken is made available within the QPS, and to the general public. While it is not the CMC's view that information such as individual management action plans and performance measures belongs in the public domain, it is of the opinion that the public is entitled to information indicating that the police service is accountable for the behaviour of its officers, and that proven improper conduct results in suitable sanctions. On this basis, it is appropriate to consider whether the current range of disciplinary sanctions for Queensland police officers is adequate.

Monetary penalties

One problem with the current sanction regime is the considerable gap between the maximum fine of two penalty units (\$200) which can be imposed by a commissioned officer, and the next level of penalty, a pay point reduction, which can only be imposed by an officer at or about the rank of assistant commissioner (see Table 2).

Depending on the rank of the officer being disciplined, a single pay point reduction can be up to \$2500.¹⁷³ For an officer near the bottom of his/her pay scale, the compounding effect by the time they are at the top of the pay scale can be a financial penalty in excess of \$10000.

In the CMC's view, this indicates there is a case for reviewing the monetary value of disciplinary fines with a view to instituting an incremental regime and involving all ranks of commissioned officers in the disciplinary process. The CMC suggests the following range of fines and the rank of the officers who can impose them:

168 *ibid.*, p. 52

169 *ibid.*, p. 52 quoting from Fisher, WK & Australian Federal Police 2003, *A review of professional standards in the Australian Federal Police*, AFP, Canberra, pp. 69–70.

170 Introduced via amendments to the *Australian Federal Police Act 1979* under the *Law Enforcement (AFP Professional Standards and Related Measures) Act 2006* taking up the Fisher recommendations.

171 Office of Police Integrity, *op.cit.*

172 Royal Commission into Whether There Has Been Any Corrupt or Criminal Conduct by Western Australian Police Officers & Kennedy, G A 2002, *Royal Commission into whether there has been corrupt or criminal conduct by any Western Australian police officer [electronic resource]* Police Royal Commission, Perth, W.A.(Kennedy Report)

173 Before tax, based on QPS pay rates (including operational shift allowance) as at 1 July 2009.

- inspector — up to five penalty units (\$500)
- superintendent — up to 15 penalty units (\$1500)
- chief superintendent — up to 25 penalty units (\$2500)

Another issue that arises with the imposition of fines is the tendency of prescribed officers to allow subject officers an excessive amount of time to pay them, as evidenced in case study 2 (pp. 42–4) where the subject officer was allowed seven fortnights to pay a fine of \$150.

Decisions of this type mean the sanction has no deterrent effect, and undermines rather than builds public confidence in the police service's ability to discipline its officers.

Suspension of sanctions

Suspension of penalty is a feature of the criminal justice system, where this power is available under the *Penalties and Sentences Act 1992* (PSA) only when the sentence is one of imprisonment. This is very different from even the most serious sanction available in a discipline system, which is dismissal. However, under certain conditions specified in s.12 of the PSD Reg, a prescribed officer may suspend a disciplinary sanction as indicated below. No other police jurisdiction in Australia has a similar power.

Police Service (Discipline) Regulations 1990

r. 12: Sanction may be suspended in certain cases

1. Where a prescribed officer imposes any disciplinary sanction under these regulations, the officer may suspend the effect of the disciplinary sanction subject to the officer upon whom the disciplinary sanction is being imposed agreeing to

- perform voluntary community service; or
- undergo voluntary counselling, treatment or some other program designed to correct or rehabilitate;

designated by the prescribed officer and which is relevant to the act or omission which led to the disciplinary action being taken.

2. Where an officer who has made an agreement pursuant to sub regulation (1)

- successfully completes the voluntary community service or counselling, the disciplinary sanction is rescinded and it is to be taken that the sanction was never imposed;
- fails to successfully complete the voluntary community service or counselling, the disciplinary sanction is to be implemented.

The CMC considers the use of suspended sanctions in the QPS discipline system problematic as it removes the deterrent effect of the sanction and undermines public confidence in the system and the QPS. This is particularly so when suspending a dismissal sanction enables a demonstrably unsuitable officer to remain in the police service.

One of the principal problems associated with the power to suspend disciplinary sanctions is the likelihood of the misapplication and inappropriate use of this power. In his 1996 review, Bingham noted an over-reliance on the suspension of sanctions against police officers,¹⁷⁴ while in 1997, Carter QC also found their misuse widespread.¹⁷⁵

Another problem is the effect of r. 12(2) of the PSD Reg. which stipulates that if the subject officer successfully completes the community service, counselling or other treatment required under r. 12(1), the suspended sanction is to be taken as never having been imposed.

¹⁷⁴ Bingham review, op.cit., p.245

¹⁷⁵ Criminal Justice Commission 1997, *Police and drugs: a report of an investigation of cases involving Queensland police officers* (Carter Report), CJC, Brisbane.

Carter QC found that the legal effect of this, combined with the widespread misuse of suspended sanctions means that subject officers pay, in fact, no penalty in respect of most disciplinary sanctions imposed, even though the breach might objectively have warranted dismissal.¹⁷⁶

The often cited case of Belinda Morier exemplifies these problems. Police officer Morier was charged in 2002 and pleaded guilty in the Magistrates Court to attempted fraud on her employer, the QPS. She had fabricated a receipt for accommodation expenses and fraudulently presented the receipt in an attempt to obtain a \$500 reimbursement. The magistrate placed her on a \$1500 bond to be of good behaviour for one year, but ordered that her conviction not be recorded. Morier was subsequently dismissed from the police service by the deputy commissioner; however, when she appealed to the Misconduct Tribunal, it found that the deputy commissioner had failed to take adequate account of her remorse, her otherwise unblemished record, and the fact that her behaviour was considered out of character. The Tribunal suspended the dismissal sanction on condition that Morier be of good behaviour for one year.

Figure 15: *Sunday Mail* article 8 April 2007

Rogue cop 'lenience'

CMC outraged over lies

By DAVID MURRAY

A POLICE officer was allowed to stay in the service despite failing to stop at a traffic accident and repeatedly lying to her insurers and investigators.

Constable Sonia Thomsen was given only a small fine after a damning internal disciplinary hearing found her to be dishonest.

The Crime and Misconduct Commission was so outraged by the lenient penalty that it lodged a rare Supreme Court appeal last month.

The commission wants Constable Thomsen sacked for "serious, persistent and protracted" lying.

In a separate case, a policewoman remains in the service despite fraudulently claiming \$500 in accommodation expenses she wasn't entitled to.

Constable Belinda Morier was given a lifeline on the grounds of her remorse, admissions and otherwise unblemished service.

But Constable Morier, who is working at Broadbeach station on the Gold Coast, is under investigation again for allegedly claiming overtime for traffic duties she did not perform.

A CMC spokesman confirmed a new complaint against Constable Morier had been referred to the police service for investigation in January.

Police Commissioner Bob Atkinson declined to say whether the officers had been treated too leniently.

Misconduct Tribunal documents obtained by *The Sunday Mail* say an off-duty Constable Thomsen was involved in a traffic accident while driving "without due care and attention" at Sherwood in Brisbane on November 10, 2003.

She failed to stop and later falsely told her insurer the accident involved an unidentified white vehicle, that there were no witnesses and that she had not drunk alcohol in the previous 12 hours, the documents say.

At a disciplinary hearing in August, Acting Commissioner Dick Conder said a charge of untruthfulness struck at the core of policing.

Mr Conder found Constable Thomsen guilty of misconduct and sacked her, but suspended the dismissal on condition of her future good behaviour and fined her \$225.

The CMC lost an appeal to the Misconduct Tribunal, leading to the new Supreme Court action.

A police spokeswoman said it would be inappropriate to discuss cases with ongoing proceedings.

Neither officer could be contacted.

176 *ibid.*

The CMC finds it difficult to see how this case was an appropriate use of r. 12(1) given that the requirement to 'be of good behaviour' could not possibly fit the description of an agreement to undertake either 'voluntary counselling, treatment or some other program designed to correct or rehabilitate'. The CMC also questions how a suspended sanction could have any deterrent effect or be considered punitive in any way, and argues that in effect, Morier received no sanction at all because as a police officer she was duty bound to 'be of good behaviour' *at all times*, not just for one year — conduct the public was entitled to expect of her.

In 2007, Morier again came to the attention of the CMC after she attempted to fraudulently submit a false overtime claim for hours of service she did not in fact work. Her conduct caught the attention of the news media and was reported in the *Sunday Mail* on 8 April 2007 (see Fig. 15). Morier resigned from the police service a few days later on 15 April 2007. However, her case continues to be cited in misconduct appeals — most recently in March 2010 in the QCAT — as *an example of an appropriate use* of the suspended sanction discretion.¹⁷⁷

A further problem arises in relation to determining the appropriate number of hours of community service to impose when suspending a sanction. QPS policies and procedures suggest that a presiding officer may use the PSA to assess this when the sanction involves a monetary penalty. For example, one penalty under the PSA is currently \$100¹⁷⁸ which equates to not more than five hours community service.¹⁷⁹ (Under the Act, community service orders against a defendant must not total more than 240 hours.)¹⁸⁰ However, the Act provides no guidance on the number of hours of community service that equate to a non-monetary penalty (e.g. a reprimand) or to one with a non-definable financial disadvantage (e.g. dismissal).

An argument for retaining the power to suspend sanctions is that it allows mitigating factors such as an officer's personal circumstances, level of remorse or previous good conduct to be taken into account. However, these factors can be taken into account by simply imposing in the first instance a sanction that reflects the circumstances and merits of the individual case.

While the CMC believes that the power to suspend disciplinary sanctions should be removed, it is in favour of including the community service sanction (currently available only in conjunction with a suspended sanction) as a discrete sanction in the disciplinary legislative framework, with some provision made for failure to comply.

Recommendation 8

The CMC recommends that the Queensland Government amend the Police Service (Discipline) Regulations 1990, the Police Service Administration Act 1990, the Crime and Misconduct Act 2001 and any other Act to:

- a. ensure that a range of disciplinary sanctions, including monetary penalties and community service are available to prescribed officers, consistent with the purpose of the discipline process**
- b. remove the power to suspend disciplinary sanctions**
- c. provide an indicative list of managerial strategies that prescribed officers may use in conjunction with any disciplinary sanction imposed, or in any situation, whether or not a disciplinary allegation has been proven.**

177 *O'Keefee v Rynders* [2010] QCAT 109 P. Richards

178 PSA Act, s. 5

179 *ibid.* s. 59

180 *ibid.* s. 107. Note that although the QPS Human Resources Management Manual relies on the PSA Act, it is inconsistent with the Act as it provides that every \$75 of a suspended fine is equivalent to 10 hours community service.

The transfer power

The capacity of a CEO to control what is arguably the most critical asset within any organisation, its human resources, is fundamental for maintaining organisational efficiency and professional standards.

The Commissioner of Police may transfer an officer without their agreement, provided the officer is transferred to a position of the same rank and at least the same salary level.¹⁸¹ An officer who objects to the transfer decision may have it reconsidered, either by submitting a written objection to the Commissioner¹⁸² and/or initiating a formal review process under the Act.¹⁸³ They are not required to transfer before the objection or review process has concluded.

Under r. 42A of the Police Service Administration Regulation, the only basis on which the Commissioner can transfer an officer is in accordance with the current industrial agreement/award for police officers. Non-voluntary transfers of commissioned officers are presently determined by the Inspectors' Appointments Board, and must be considered by the deputy commissioner, and given final approval by the Commissioner.

Under their current enterprise bargaining agreement, the Commissioner may transfer a *non-commissioned* officer without their agreement only for the purpose of:

- *organisational restructuring* when, to meet service delivery requirements, the service closes or opens a station, section or establishment; increases or decreases the staffing levels of a station, section or establishment, or reclassifies positions
- *resource management*, for example when there is a breakdown in personal relationships between officers, or an officer and the local community; or when, after normal recruitment processes no officer can be found to voluntarily fill a vacancy which, if left unfilled leave staff numbers below a safe operational level
- *management of staffing issues* when it has been clearly demonstrated to the Transfer Advisory Committee that, despite all fair and reasonable assistance, an officer is unable to cope in their current position.

The enterprise bargaining agreement requires that all transfers, including those initiated for the above reasons, be referred to the Transfer Advisory Committee, which consists of representatives of members of the QPS and the QPUE. The committee's role is to advise the Commissioner on all transfer applications, including those initiated by the Commissioner or an executive officer. As the committee undertakes to process applications within 28 days of receipt, and provide advice within a further 30 days, transfer decisions can routinely take two months, not including time for appeals and reviews.

The enterprise bargaining agreement provides that, notwithstanding any advice of the Transfer Advisory Committee, the Commissioner of Police has the final authority to make decisions on any transfer application, but must ensure that the decision is within the terms of the agreement. A consequence of this appears to be that the Commissioner cannot transfer an officer for *management of staffing issues*, unless the Advisory Committee is satisfied. This effectively limits the Commissioner's power to transfer non-commissioned officers for managerial purposes.

181 PSA Act s.5.2 (1)

182 *ibid.*, s. 5.13A

183 *ibid.*, s. 9.3

There is no basis on which the Commissioner can transfer or redeploy an officer in the public interest, (e.g. pending the outcome of a disciplinary process where, to have the officer continue in the position would erode public confidence in the police service). An example might be where an officer with access to particularly sensitive operational information is alleged to have improperly accessed or used that information. In such circumstances, pending the investigation, it would be in the public interest to transfer the officer to a position where they would not have access to the information.¹⁸⁴ However, though a police officer cannot be transferred under the PSD Reg, either as a sanction or as appropriate management action, a public servant may be transferred or redeployed as a disciplinary action under the *Public Service Act 2008*.

Public Service Act 2008

s. 188 Disciplinary action that may be taken against a public service officer

1. In disciplining a public service officer, the officer's chief executive may take the action, or order the action be taken, (disciplinary action) that the chief executive considers reasonable in the circumstances.

Examples of disciplinary action

- termination of employment
- reduction of classification level and a consequential change of duties
- transfer or redeployment to other public service employment
- forfeiture or deferment of a remuneration increment or increase
- reduction of remuneration level
- imposition of a monetary penalty
- if a penalty is imposed, a direction that the amount of the penalty be deducted from the officer's periodic remuneration payments
- a reprimand

A cautionary note about the use of the transfer power is that it can be used simply to move problems, rather than to deal with them, so that the transferred officer simply perpetuates negative conduct and problematic behaviour in a new environment. Nevertheless, there are occasions, such as those already indicated, where the use of the power is necessary and warranted.

Recommendation 9

The CMC recommends that the Queensland Government amend the:

a. Police Service Administration Regulation 1990, for the purpose of s. 5.2 of the *Police Service Administration Act 1990* and;

b. the *Police Service (Discipline) Regulations 1990* for the purpose of discipline and management action;

to allow the Commissioner of Police to transfer a police officer in the public interest.

¹⁸⁴ The Commissioner has limited power, in effect, to temporarily redeploy. Section 6.1 of the PSA Act gives the Commissioner the power on reasonable grounds to 'stand down' an officer from duty and direct the officer to perform such duties as the Commissioner thinks fit if the officer is liable to be dealt with for official misconduct or disciplinary action under s. 7.4.

Apology

Though 'apology' is available as a remedial strategy as part of management action, it has been under-utilised.¹⁸⁵ The impediment to its use appears to have been concern that full apologies may have exposed officers and the organisation to litigation.

In a submission to the Queensland Government concerning issues raised in the *Integrity and Accountability* green paper, the Queensland Ombudsman commented that:

Giving an apology and the acknowledgement that things have gone wrong can have a powerful effect for both parties and can go a long way to repairing the relationship between a complainant and an agency, and to restoring the agency's reputation in the eyes of the affected party.¹⁸⁶

In its submission, the CMC supported a recommendation by the Queensland Ombudsman to amend the *Civil Liability Act 2003* to provide protection for an apology, even though it may contain an admission on the part of a person and/or organisation. The Legal, Constitutional and Administrative Review Committee made a similar proposal in 2008.¹⁸⁷

In its response to the green paper, the Queensland Government indicated it would take necessary action by mid-2010 to allow government departments to issue apologies without the communication being taken as admission of legal liability. This initiative was explained in the following terms:

When government actions may have resulted in harm or concern to a person, it is important that the government responds appropriately, treating that person with respect and dignity. There are concerns that an apology may be construed as an admission of legal liability, leaving the state exposed to action through the courts ...

The government will therefore introduce legislation similar to other jurisdictions that will allow government departments to issue apologies to members of the public without these communications being taken as admissions of legal liability. This ... will assist people and organisations to respond appropriately and effectively to situations where government actions may have caused harm and ensure the responsible officers take responsibility for their actions.

These amendments will not diminish the right of citizens to take legal action against the government if they choose to do so but will provide another option for dealing with these situations.¹⁸⁸

The *Integrity Reform (Miscellaneous Amendments) Bill 2010* was introduced into the Queensland Parliament on 3 August 2010. Clause 18 of the Bill proposed the insertion of a new Chapter 4, part 1A in the *Civil Liability Act 2003* to achieve this purpose.

The passing of the *Integrity Reform (Miscellaneous Amendments) Act 2010* in September 2010, which inserts a new Chapter 4, Part 1A in the *Civil Liability Act 2003*, has removed this impediment. There is therefore no longer any reason why 'apology' cannot be used as a sanction or management action.

185 QPS Human Resources Management Manual, Section 18

186 Queensland Ombudsman 2009, *Response to Integrity and Accountability in Queensland*, Queensland Ombudsman, Brisbane, p. 12

187 Legal, Constitutional and Administrative Review Committee 2005, *The accessibility of administrative justice*, Discussion paper prepared for the Queensland Parliament, Brisbane.

188 Department of the Premier and Cabinet 2009, *Response to Integrity and Accountability in Queensland*, Queensland Government, Brisbane, p. 10

Recommendation 10

The CMC recommends that the Queensland Government amend the Police Service (Discipline) Regulations 1990, the Police Service Administration Act 1990, the Crime and Misconduct Act 2001 to allow a police officer to apologise to aggrieved persons in respect of his or her conduct without precluding any sanction or other management action being taken in respect of the officer's conduct.

Commissioner's confidence

Since the mid-1990s, some Australian jurisdictions have sought to address the difficulties of removing officers promptly from the police service by introducing 'Commissioner's loss of confidence' (CLOC) provisions.¹⁸⁹ New South Wales was the first state to allow its Commissioner of Police to expel officers in whom the Commissioner had lost confidence, without engaging in a protracted disciplinary process.

Western Australia, Victoria and Tasmania have also adopted similar provisions, but those jurisdictions do not have as large a body of case law examining the key components of their schemes, and those cases that do exist, do not substantially add to the issues identified in New South Wales.¹⁹⁰ New South Wales has also had the benefit of a Royal Commission's deliberations on both the rationale and form of the state's CLOC measures. The following discussion therefore focuses on the experience in that jurisdiction. That having been said, Victoria's Police Minister provided one of the most succinct justifications for a CLOC provision during a parliamentary debate in 1999 when he said that his Police Commissioner could 'hardly be held accountable for the ... lack of integrity within the service, if it is acknowledged that there are unethical police and he cannot rid the service of them'.¹⁹¹

The Royal Commission into the New South Wales Police Service: Interim Report

The Royal Commission into the New South Wales Police Service (NSWPS) was the catalyst for the state's adoption of a CLOC mechanism.¹⁹² The Royal Commission, chaired by the Honourable Justice James Wood, operated between 1995 and 1997 investigating and reporting on systemic and entrenched corruption within the NSWPS. When it examined the existing disciplinary system within the Service, the Commission found highly unsatisfactory processes that 'seem[ed] designed to thwart any attempt to remove anyone, even those convicted of criminal offences'.¹⁹³

189 The *Australian Federal Police Act 1979* had been amended in July 1996 to include a provision requiring the Commissioner, when he or she believed it to be the case, to make a declaration to the effect that a person retired because of his or her conduct or behaviour had engaged in serious misconduct which was having, or was likely to have, a damaging effect on the professional self-respect or morale of some or all of the members or staff, or on the reputation of the Australian Federal Police: see s. 6 of the *Australian Federal Police Amendment Act 1996*, which inserted s. 26F. That provision was repealed in 2000 and replaced by what is now s. 40K of the 1979 Act. Section 40K is very similar to its predecessor but applies to terminations of employment of AFP employees by the Commissioner, not just retirements.

190 Indeed, Tasmania has no case law at all concerning its provisions (ss. 30–31 of the *Police Service Act 2003*), which suggests that its Commissioner has not used his powers, or that no police officer has challenged expulsion under those powers.

191 Victoria Parliament *Hansard*, Police and Emergency Services Minister W McGrath, 22 April 1999

192 See Royal Commission into the New South Wales Police Service, Interim Report (1996a); Interim Report: Immediate Measures for the Reform of the Police Service of New South Wales (also known as the Second Interim Report) (1996b); and Final Report (1997), Royal Commission, Sydney.

193 New South Wales Parliament *Hansard*, Police Minister P Whelan, 13 November 1996, p. 5912.

Its *Interim Report: Immediate Measures for the Reform of the Police Service of New Wales* regarded the existence of a CLOC as 'absolutely integral to proper management' in the police service.¹⁹⁴ The Commission asserted that the power 'should be as broad and as discretionary as the title suggests', and that its exercise should be subject to review based on administrative law principles but not to an appeal before a tribunal or the Industrial Relations Commission (IRC)(although it would later change its view on this matter).¹⁹⁵ Moreover, the exercise of the power would not require a finding of guilt in relation to a criminal offence or a disciplinary matter; instead,

such a procedure needs to be understood as a managerial and not a disciplinary procedure. It is founded upon the premise that the Police Commissioner has come to lack confidence in the member, which lack of confidence has not been dispelled after the officer, having been given notice of the circumstances brought to the attention of the Commissioner, has had a reasonable opportunity of answering them.¹⁹⁶

According to the Royal Commission, the rationale for a CLOC also encompassed:

- the community's expectation of high standards in its police officers
- the principle that the Police Commissioner is entitled to expect that members of the Service will perform to a high standard of integrity and competence, and should not be expected to retain any person in whom [s]he has lost confidence
- the fact that the continued retention of those members who do not enjoy the Commissioner's confidence is a canker within the Service, and a focus of disaffection and corruption.¹⁹⁷

The Royal Commission was insistent that the introduction of a CLOC provision was the most effective way of curtailing a tradition within the NSWPS of 'blind loyalty to colleagues irrespective of their honesty, competence or application'.¹⁹⁸

The Commission also believed that 'proper management decisions' were the only legitimate basis for the Commissioner's decision regarding loss of confidence; hence, any review of that decision should be guided by administrative law principles, rather than be a rehearing of the merits of the decision.¹⁹⁹ This form of review was also regarded as desirable because of:

- the desirability of uniformity, certainty and prompt resolution of these cases
- the need for special standards of integrity and commitment on the part of the police, which are not necessarily expected in other forms of employment
- the need for special understanding of the job of policing, and for acceptable work practices.²⁰⁰

194 Royal Commission into the New South Wales Police Service, *op.cit.*, 1996b, para 4.1

195 *ibid.*, 1996b, para 4.2

196 *ibid.*, 1996b, para 4.3

197 *ibid.*, 1996b, para 4.4

198 *ibid.*, 1996b, para 4.8

199 The power of courts and tribunals to review administrative decisions is governed by the 'Wednesbury principles', derived from the English Court of Appeal case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1KB 223. In the case, Lord Greene MR summarised the circumstances in which the court or tribunal could intervene as limited to where (i) the decision-maker acting under a statutory power took into account factors that ought not to have been taken into account; or (ii) failed to take into account factors that should have been taken into account; or (iii) reached a decision that no reasonable decision-maker could ever have reached. The principles have been affirmed in Australian cases such as *Kruger v The Commonwealth* (1997) 190 CLR 1.

200 Royal Commission into the New South Wales Police Service, *op. cit.*, 1996b, para 5.1

Though the Royal Commission was equally insistent that the new power of removal of officers would be open, fair and accountable, it regarded as essential the need to expel ‘as quickly as possible, but with due process, those members who are not prepared to meet the required standards of ethical conduct and professional performance’.²⁰¹ In consequence, the Commission rejected any process that would introduce ‘a considerable measure of flexibility and discretion’ or ‘turn ... upon the broad notion of unfairness’.²⁰²

In conclusion, the Royal Commission favoured a CLOC provision that would allow a member of the police service to be informed of the matters of concern to the Police Commissioner, provide the member with a proper opportunity to respond to those concerns, and permit the review of the exercise of the Commissioner’s power on any or all of the following grounds:

- a failure to comply with the rules of natural justice
- a failure to observe the procedures prescribed
- an error of law
- an absence of evidence or other material to justify the decision
- a decision induced or effected by fraud
- an exercise of the power that was improper, for example, because
 - an irrelevant consideration was taken into account
 - a relevant decision was not taken into account
 - the power was exercised for a purposes other than its true purpose
 - the power was exercised in bad faith
 - the exercise of the power was so unreasonable that no reasonable person could have so exercised it.²⁰³

CLOC provisions in New South Wales and the influence of the Royal Commission

Several versions of the CLOC process have operated in New South Wales. Before the Royal Commission was established, the *Police Service Act 1990* provided for the creation of regulations relating to the discipline of police officers, including the imposition by the Police Commissioner of the penalty of dismissal for non-commissioned officers.²⁰⁴ That potential power was *not* couched in terms of a loss of the Commissioner’s confidence in the dismissed officer.

In 1995, and in response to the Royal Commission’s exposure of widespread crime and corruption within the NSWPS, the *Police Service Amendment Act 1995* inserted a new Division 1A in the 1990 Act, ‘Dismissal and resignation of police officers — Police Royal Commission’. Under this, a police officer could be dismissed if the Commissioner had formed the opinion, based on information arising from the Royal Commission, that the officer: (a) had engaged in corrupt or any other conduct constituting an indictable offence; and (b) was no longer a *fit and proper person* to hold a position within the Police Service.²⁰⁵ The Commissioner was required to notify the officer of the grounds for this opinion, and to give the officer an opportunity to respond in writing within 21 days. The Commissioner was obliged to consider this submission when making a decision.²⁰⁶

201 *ibid.*, para 5.6

202 *ibid.*, para 5.6

203 *ibid.*, para 5.7

204 *Police Service Act 1990* (NSW), s. 97(1)(a).

205 See the *Police Service Amendment Act 1995*, s. 3 (inserting s. 181B(1) in the *Police Service Act 1990*).

206 *Police Service Amendment Act 1995*, s. 181B(3).

A right of appeal lay to the Industrial Relations Commission of New South Wales (IRC) under unfair dismissal provisions.²⁰⁷ This and subsequent removal powers placed the onus on the officer liable to expulsion to establish that his or her removal would be (or was) inappropriate. That burden has not proved insurmountable. For example, in *Police Association of New South Wales and the New South Wales Police Service* [1998] NSWIRComm 160, the full bench of the IRC held that an officer dismissed on the basis of evidence taken before the Royal Commission that he had received corrupt payments, received stolen goods, and organised the theft of a truckload of stolen goods was dismissed unfairly because the Acting Commissioner of Police, in forming his opinion under s. 181B, had not considered evidence submitted to the Royal Commission by the subject officer.

In 1996, New South Wales introduced its first explicit loss of confidence provision.²⁰⁸ This scheme empowered the Police Commissioner to remove an officer in respect of whom he or she lacked confidence in the officer's suitability to continue as a police officer, in the light of the officer's *competence, integrity, performance or conduct*. The emphasis of the previous provision on information obtained from the Royal Commission was removed. The right of the dismissed officer to appeal to the IRC under unfair dismissal provisions was abolished; instead, the Supreme Court was given jurisdiction to review the Police Commissioner's decision in accordance with the principles of administrative law. This scheme was a short-lived response on the part of the NSW Government to the Royal Commission's Interim Report (discussed above).

After publication of the Royal Commission's Final Report in May 1997, New South Wales amended its loss of confidence scheme to reintroduce a review role for the IRC.²⁰⁹ The revised scheme included a provision allowing a police officer removed from the Police Service to apply to the IRC for a review of the order on the ground that the removal was '*harsh, unreasonable or unjust*'.²¹⁰ While the 1997 amendments specifically preserved the jurisdiction of the Supreme Court to review administrative action, there is no doubt that the 1997 changes ran contrary to the views expressed by the Royal Commission in its second 1996 Interim Report.²¹¹ The reasons for this change are evident in its Final Report.

The Royal Commission into the New South Wales Police Service: Final Report

In its Final Report, the Royal Commission explained how the recently enacted loss of confidence measure had been operating: for example, how it could be *initiated* by any one of a number of people internal to the NSWPS (e.g. a local commander; the Executive Director, Human Resources and Development) and external to it (e.g. the Police Integrity Commission (PIC); the NSW Ombudsman; the NSW Crime Commission; and the Independent Commission Against Corruption (ICAC)).²¹² Additionally, the Commission made a number of points about the managerial nature of the power and its relationship to the criminal process; for example:

The power is exercisable where, after duly informing himself, the Commissioner has lost confidence in a member, and that might be the case irrespective of the fact of acquittal at in a criminal trial, which might fail for all kinds of reasons, including a perverse verdict, the unavailability of a key witness, exclusion of critical evidence on technical grounds, and the like. In some cases it be might be appropriate to exercise the power of suspension, and to defer the decision for dismissal, but ... [ultimately] it would not be constrained by a 'not guilty' verdict.²¹³

207 *ibid.*, s. 181B(5)

208 See the *Police Legislation Further Amendment Act 1996*, s. 60 (inserting s. 181D in the *Police Service Act 1990*).

209 See the *Police Service Amendment Act 1997*, s. 3 (inserting Divisions 1C & 1D in the *Police Service Act 1990*).

210 *Police Service Act 1990*, s. 181E(1)

211 *ibid.*, s. 181D (7A)

212 Royal Commission into the New South Wales Police Service 1997, *op.cit.*, para 4.9

213 *ibid.*, para 4.87

Not only did a CLOC process not turn upon a criminal conviction, it was not itself a *trial process*: thus, the Royal Commission quoted with approval a statement of a judge in the New South Wales IRC that ‘any manager dealing with a potentially unsuitable employee will almost be at least partly relying on hearsay forming part of his reasons for decision. The role of the employer is to manage, not to conduct a trial.’²¹⁴

In addition, the Royal Commission expressed the view that because the exercise of the Commissioner’s confidence provision was unrelated to the criminal process, ‘the officer removed should be able to leave with dignity, taking such entitlements as have accrued during his or her service’.²¹⁵

It was, however, the issue of the *review* of the Commissioner’s loss of confidence provisions that required the most extensive deliberation on the part of the Royal Commission in its discussion of this power. Regarding the review of managerial decisions in general, the Royal Commission stated:

Any procedure ... needs to take into account that:

- such action is taken in the course of the effective administration of an organisation, and cannot depend upon, or be confined to matters that are capable of proof by legally admissible evidence
- where review is permitted, it should involve more than the second-guessing of the original decision-maker and permit intervention only where good reason exists.²¹⁶

As for the review specifically of the loss of confidence provision, the Royal Commission had no doubt that the loss of employment meant that a right to review was necessary; however it acknowledged that the form of, and forum for, such a review was more contentious.²¹⁷

The Royal Commission’s Final Report revealed that the NSW Police Association (NSWPA) strongly opposed the Commission’s earlier proposal to allow only the Supreme Court to review a CLOC decision rather than allowing the IRC to re-hear the merits of the decision. The NSWPA ‘insisted that nothing short of the ordinary unfair dismissal processes under the *Industrial Relations Act 1996* ... would suffice’.²¹⁸

The Royal Commission rejected the NSWPA’s demand for the following reasons:

[We are] convinced that any appeal process to review a decision to remove for want of Commissioner’s confidence, must be crafted to accommodate the special nature of the power to remove. It is not appropriate to simply transpose appeal procedures designed to accommodate the review of dismissal decisions in general employment, which do not depend on the retention of the Commissioner’s confidence in an employee vested with far-reaching powers, nor follow a carefully constructed internal mechanism designed to ensure the fairness and correctness of the original decision.²¹⁹

214 Per Fisher P in *Biggs v NSW Police Service*, unreported, Industrial Relations Commission of New South Wales, 26 November 1996. The Biggs dismissal would later be the subject of proceedings in *Police Association of New South Wales and the New South Wales Police Service* [1998] NSWIRComm 160, discussed above.

215 Royal Commission into the New South Wales Police Service 1997, op.cit., para 4.97

216 *ibid.*, para 4.106

217 *ibid.*, para 4.120

218 *ibid.*, para 4.122

219 *ibid.*, para 4.132

Nevertheless, the Commission, in recognition of concern about the 1996 CLOC scheme, considered several possible reforms before deciding that the jurisdiction to review could be extended to the IRC (without removing the Supreme Court's jurisdiction), provided that the review conducted by the IRC was not a full re-hearing on the merits of the case. Although the Commission proceeded on the assumption that the review body would be the IRC, it considered that any appropriate tribunal or court could be chosen or created to conduct the review. According to the Commission, the review body should ensure a number of things including that:

- what is reviewed is *whether the Police Commissioner's decision was valid*; that is, was it sound, defensible and well-founded
- the appellant retains the onus of establishing that the decision of the Commissioner that [s] he longer held confidence in the appellant was invalid
- the dismissal remains in force pending determination of the review;
- the proceedings are conducted with as little formality and technicality as possible, and without being bound by the rules of evidence.²²⁰

On the subject of reinstatement or re-employment, the Royal Commission envisioned the review tribunal making such orders only where it was satisfied that (a) a fair and reasonable Police Commissioner should, in all the circumstances, retain confidence in the appellant; and (b) it was not contrary to the interests of the police service or the community, or impracticable, in all the circumstances of the case, for the appellant to be reinstated or re-employed as a police officer.²²¹

The Commission concluded its discussion of the principles that should underpin the review of CLOC decisions by reiterating that the conventional unfair dismissal process was inappropriate because:

- it is too broad in its scope, involving a full re-hearing of the merits of the dismissal
- the notion of industrial fairness applicable to unfair dismissal claims is narrower than the range of interests of the police service and the community that a CLOC removal seeks to protect
- non-police personnel are not subject to a CLOC provision
- the work of police officers is different from that of other employees, and police have far greater powers and privileges. High standards of trust and integrity are therefore required of them, with a higher degree of accountability
- those who work outside the police service generally do not have the safeguard of a preliminary inquiry of the type that precedes the Commissioner's decision to dismiss.²²²

The legislative response to the Final Report enshrined provisions that exist today in New South Wales. When he introduced it in Parliament, the Police Minister described the 1997 amended CLOC scheme as 'the cornerstone on which the new police service will be built'.²²³

220 The relevant principles are discussed by the Full Commission of the IRC in *Big W Discount Stores and Donato, Anthony* [1994] NSWIRComm 144: appeals are to be confined to correcting errors of law and/or fact and to call for fresh evidence only to avoid a miscarriage of justice, because of some omission or error of the primary tribunal; *ibid.*, para 4.137

221 See *ibid.*, para 4.138

222 See *ibid.*, paras 4.140; 4.143

223 New South Wales Parliament *Hansard*, Police Minister P Whelan, 13 November 1996, p. 5912.

Summary of the current CLOC provisions in New South Wales

The CLOC scheme currently in operation is contained principally in sections 181D (the Police Commissioner's power), 181E (the review in general) and 181F (proceedings on review) of the (now renamed) *Police Act 1990*. The essence of the power and its review mechanism may be summarised as follows:

- The Commissioner may, by written order, remove a police officer from the NSW Police Force if the Commissioner does not have confidence in the officer's suitability to continue as a police officer, having regard to the officer's *competence, integrity, performance or conduct*.
- Before making a removal order, the Commissioner must:
 - give the officer a notice setting out the grounds for his or her lack of confidence in the officer's suitability to continue within the Force
 - allow the officer a minimum of 21 days in which to make written submissions to the Commissioner in relation to the proposed action
 - consider any written submissions received from the officer during that period.
- The removal order must set out the reasons for which the Commissioner has decided to remove the officer from the Force.
- The removal takes effect when the order is made.
- The Commissioner may vary or revoke any removal order in force.
- Removal of a police officer under this provision has the same effect as if the officer had resigned or, if 55 or older, had retired from the Force (thus preserving accrued benefits).
- The Commissioner may take action under this provision despite any other action to remove or dismiss the officer under some other section of the Act.
- Apart from the Supreme Court's jurisdiction to review administrative action, only the IRC has the power to review or consider a Commissioner's decision or order under this provision.
- A police officer who is removed from the Force under the CLOC provision may apply to the IRC for a review on the ground that the removal is *harsh, unreasonable or unjust*.
- Such an application does *not* stay the operation of the removal order.
- Except to the extent to which regulations may otherwise provide, the Commissioner is under a duty to make available to the applicant all documents and other material relied upon in deciding that he or she does not have confidence in the applicant's suitability to continue as a police officer.
- When it conducts a review of a CLOC removal, the IRC must consider:
 - the Police Commissioner's reasons for the decision to remove the officer
 - the case presented by the applicant as to why the removal was harsh, unreasonable or unjust
 - the case presented by the Police Commissioner in response to the applicant's case
- In making its decision, the IRC must have regard to (a) the interests of the applicant, and (b) the public interest (which includes the interest of maintaining the integrity of the NSW Police Force, and the fact that the Police Commissioner made the order pursuant to s. 181D, i.e. because the latter did not have confidence in the applicant's suitability to continue as a police officer, given the officer's competence, integrity, performance or conduct). Note that the fact that the IRC must have regard to (a) and (b) does not limit the matters to which the IRC is otherwise required or permitted to have regard in making its decision
- Finally, the onus is always on the applicant to establish that his or her removal from the Force was harsh, unreasonable or unjust.

How the NSW provisions have been operating

Two reviews of the CLOC measures have been published. In 1999, the NSW Ombudsman produced a special report to Parliament, *Loss of Commissioner's Confidence*.²²⁴ In May 1998, the organisation had recognised as a key issue the need to identify 'what standards should be applied in determining the level of misconduct by a police officer sufficient to warrant the removal of the officer from the Police Service'.²²⁵ (Of course, misconduct is not the only criterion that can trigger the consideration of a CLOC removal, but it is likely to be the one most commonly invoked).

The Report consists of details of the Police Commissioner's Process Guidelines, statistics relating to the operation of the process between its introduction in December 1996 and February 1999, and a case study (case study 9 outlined below) of an unnamed senior constable who had been considered for removal under CLOC provisions in 1998, but instead was issued with a performance warning notice.

The Ombudsman concluded that the case study indicated 'that the Service is still struggling to come to terms with ... [the] difficult threshold issue' earlier identified as problematic. In addition, the Ombudsman regarded the case study as 'demonstrat[ing] serious and on-going problems in the area of police internal investigations — both in terms of delay and in the Service's failure to sufficiently investigate key evidentiary issues'.²²⁶

Case study 9 (1996)

Senior constable X was convicted in 1996 of the offence of stalking and intimidation to cause fear to a former girlfriend, and placed on a six-month good behaviour bond by the court. The police investigation of X's conduct also discovered that he had left his patrol while on duty to spy on his former girlfriend's premises from a police vehicle, and that he had unlawfully accessed details of her criminal record on a police computer.

Later in 1996, X was recommended for admonishment by his district commander for making inappropriate sexual advances to a minor, and an investigation revealed that, while on suspension for earlier misconduct, X had attempted improperly to obtain, on behalf of a friend, a police brief of evidence for a court matter. At this point the local area commander recommended that X be removed from the service. (Under NSWPS guidelines, X would have been automatically nominated for consideration for expulsion on being charged with a criminal offence).

Though aware of all of X's abovementioned conduct when considering a CLOC termination, the Police Commissioner decided to give X another chance. The Commissioner had not been notified of X's history of misconduct prior to 1996, because of a direction (issued by the Commissioner himself) 'that matters which are historical in nature or which have been previously dealt with by the Service will not be taken into account'.²²⁷ In fact, evidence of X's deficiencies had first become apparent to NSWPS in 1990 when he had become involved in a brawl at a club, but he had escaped any charges. In 1992, he had been fined \$1000 for departmental misconduct stemming from a sexual relationship with a drug offender whom he had arrested. Also in 1992, he had been fined \$2000 in respect of two departmental charges for accessing and disclosing confidential police information without authority. In 1994, he was admonished for harassing an internal witness who had reported his improper relationship. In 1993, X had placed registration plates from another vehicle onto his own uninsured and unregistered car, and had received summonses for the three offences stemming from this act.

Continued next page >

224 Moss, I & New South Wales Office of the Ombudsman 1999, *Loss of Commissioner's confidence: a special report to Parliament under section 31 of the Ombudsman Act*, NSW Ombudsman, Sydney

225 *ibid.*, p. 6

226 *ibid.*

227 Moss, I & New South Wales Office of the Ombudsman 1999, *op.cit.*, quoting Ryan, p. 11

> Continued from previous page

The Ombudsman urged the NSWPS to ensure that overly-restrictive limits were not placed on information that could be put before the Commissioner as part of the CLOC process. More specifically, the Ombudsman recommended that the Commissioner should always consider officers' prior complaints histories, if relevant.

The Ombudsman noted that the NSWPS's investigations into complaints against X exceeded a statutory time limit by almost two years; that the various allegations against X were dealt with piecemeal, without a coordinated investigative strategy; and that the 'poorly handled and tardy' NSWPS internal investigations were not confined to X's case.²²⁸

The CLOC statistics compiled by the NSW Ombudsman for the period December 1996 and February 1999 are informative:

- 465 NSWPS officers were nominated for possible removal from the Service
- 69 resigned during that process
- 71 officers were issued with performance warning notices without the process proceeding to the issue of a s. 181D notice (setting out the grounds on which the Commissioner lacks confidence in the officer's suitability to continue as a police officer)
- 90 officers were issued with s. 181D notices
- Of those 90 officers
 - 20 were removed from the service on the Commissioner's order
 - 17 resigned
 - 40 were served with performance warning notices
 - In 12 cases, the Commissioner decided not to make a removal order or to issue a performance warning notice.²²⁹

In its recent publication, *Some Reflections on the Police Complaints System* (2010), the NSW Ombudsman reported that of approximately 28 000 management actions taken by the New South Wales Police Force during the 2008–09 financial year, in respect of about 5300 complaints received, three per cent involved a nomination for loss of the Commissioner's confidence. Thus, roughly 840 nominations occurred in 2008–09, compared with just over half that number in the longer December 1996 – February 1999 period. In the absence of any evidence indicating that the conduct of NSW police officers has deteriorated markedly since the 1990s, these figures suggest a greater willingness on the part of NSWPF to use its CLOC provisions during recent years.

More recently, ICAC recommended that the NSW premier introduce an amendment to the state's *Public Sector Employment and Management Act 2002* and other relevant legislation to give the Commissioner of Corrective Services non-reviewable powers to remove custodial corrections officers on the basis of a loss of confidence in their suitability to continue as a corrections officer.²³⁰ If the powers proposed are truly non-reviewable, they will be at odds with the Wood Royal Commission's view that a power of termination of employment requires that there be a right of review.²³¹

228 *ibid.*, p.13

229 *ibid.*, p.27; The fate of one officer appears to have been unknown.

230 See 'ICAC finds corrupt conduct against Corrective Services Officer', 27 July 2010, <www.icac.nsw.gov.au/investigations/current-investigations/article/3694>, accessed 26 August 2010.

231 Royal Commission into the New South Wales Police Service 1997, *op.cit.*, para 4.120

In his academic study of the operation of the CLOC provisions in NSW, Warburton notes that the principal objectives of the CLOC process are to facilitate the speedy removal of officers who fail to meet professional standards of integrity, competence and behaviour; and to afford protection from injustice (in the form of a right to review) to those subject to the Commissioner's discretionary power.²³²

Warburton expresses doubt that the CLOC process has been meeting its first objective to work expeditiously. In particular, he cites cases indicating that there may be considerable delays between officers first being recommended for removal and when they are actually expelled from the Service. For example, in *Miller v Commissioner of Police* [2003] EOC 93-257, an internal investigation began in August 2000 into allegations that a senior sergeant had sexually harassed a probationary constable on several occasions. Miller was not served with a s. 181D notice until late August 2001, and removed in November that year. In the meantime, he had moved to another police station and had worked without problem. In *Giardini v Commissioner of Police* [2001] NSWIRComm 333, a detective senior constable introduced to, and distributed a large amount of pornography on the Police Service Memo System. Boland J found it 'quite extraordinary' that 12 months elapsed between the time of the first complaint against Giardini about his inappropriate use of the Memo System, and the time of his removal. In the interim, Giardini had performed his full duties, at times as an acting sergeant, and had also been seconded to sensitive VIP protection duties. It took five months for action to be taken on the recommendation for removal.

Warburton refers to the NSW Ombudsman's 1999 report as offering an explanation for such delays, viz. 'serious and ongoing problems in the area of police internal investigations'.²³³ He recommends that the Commissioner be allowed only a short timeframe in which to exercise his or her removal power after receiving a recommendation for removal. If the Commissioner fails to exercise the power within this period, Warburton argues that he or she should have to provide an adequate, written explanation, which could be taken into account on review.²³⁴

In contrast to the NSW CLOC scheme's shortcomings regarding timeliness, Warburton concludes that the objective of fairness for those considered for removal from the force 'has been more fully met'.²³⁵ He considers that the IRC has developed 'robust and far-reaching principles of review capable of ensuring fair treatment for police officers...without sacrificing the public interest in maintaining high professional standards in NSW Police'.²³⁶ See Appendix E for some of the review cases under NSW's CLOC scheme which illustrate Warburton's conclusion.

Justification for CLOC provisions in Queensland

A principal justification for CLOC provisions is that they empower a police commissioner to address the totality of an officer's conduct or performance, whereas the disciplinary and performance management systems tend to focus on rule transgressions or performance failures. Moreover, police disciplinary systems usually take a retributivist stance towards the effect of sanctions, i.e. they tend to assume that complying with the penalty annuls the rule-breaking, wipes the slate clean, and restores the officer to the state of grace he or she occupied before the disciplinary process took place. (See the discussion on the effect of suspension of sanctions on p. 78.)

232 Warburton, G 2004, 'Reviewing the Exercise of Discretionary Power by the Commissioner of Police to Remove Police Officers from the New South Wales Police Service: Modifying the Industrial standard for Review', *Australian Journal of Labour Law*, vol. 17, no. 1, pp. 1-17, Butterworths, Sydney.

233 Moss, I & New South Wales Office of the Ombudsman 1999, op.cit., p. 6

234 Warburton, G 2004, op.cit., p. 16

235 *ibid.*

236 *ibid.*; Cf. the view expressed in Chan, J & Dixon D 2007, 'The politics of police reform: ten years after the Royal Commission in the New South Wales Police Service', *Criminology & Criminal Justice*, vol. 7, no. 4, p. 455.

In contrast, CLOC provisions enable commissioners to take a more comprehensive view of a subject officer's conduct to assess their overall suitability to perform the duties or hold the office of constable, and to take action in response to cumulative behaviour. These provisions are therefore likely to act as a deterrent by conveying the message that inappropriate conduct on or off duty, and/or poor work performance (possibly extending over a considerable time) may be viewed as a whole as justifying an officer's removal from the Service. This is the case notwithstanding any earlier management action taken against the officer (i.e. CLOC deliberations do not generally treat prior transgressions or failings as if they never happened). During a debate in the Victorian Parliament in 1999 on the introduction of loss of confidence powers, members noted that:

A police officer may be subject to a disciplinary tribunal hearing and beat the charge, and continue on duty, and two years later may be subjected to an entirely different charge and beat that, and keep going. That may happen eight times over 12 years. The chief commissioner might decide the general pattern of conduct is a sufficient basis for the use of the legislation.²³⁷

Similarly:

Say a member of the police force is reported by a member of the public for carrying out a bashing in ... [Melbourne] and the matter is heard under the normal disciplinary powers and is dismissed. Say that a couple of years later in another part of Victoria ... the police officer is involved in a similar incident and the matter is again dismissed. A pattern of behaviour like that can build up over a period of years. After that police officer had been involved in seven or eight alleged bashings it would be reasonable for the chief commissioner to consider the police officer's overall pattern of behaviour when deciding on the desirability of his remaining in the force, instead of considering the rights and wrongs of each individual instance ... [T]hat fellow would have built up the sort of reputation that would bring any police force into disrepute. His colleagues would know about it, and that is one of the things the police commissioner could take into account.²³⁸

While these examples both describe scenarios in which the officer escapes adverse disciplinary findings, this need not be the case. Moreover, there is no reason why a combination of conduct and performance matters could not be considered in their totality as justifying a commissioner's loss of confidence in an officer. The last point is illustrated by the NSW case of Reid-Frost and Commissioner of Police (No 2) [2010] NSWIRComm 86 (see Appendix E), in which the removal of a detective senior constable who had 'demonstrated an unwillingness to conform to standards of conduct and performance required in a disciplined force' was held on review to have been an appropriate use of the CLOC provisions.

Three key conditions must be present for the police service to perform its functions effectively. The CMC suggests that the absence of any of these conditions would render an officer's employment as a police officer unviable and be the basis for his or her dismissal.

- a. *The Commissioner as an employer must have trust and confidence in officers' suitability to perform the duties of a police officer.*

It has long been recognised that mutual trust and confidence between employer and employee are essential if employment is to be viable and productive. At common law, this principle underlies the essential obligations of the employment relationship. For example an employee is obliged to be honest with his or her employer, to comply with lawful and reasonable directions, and to exercise care and skill in performing duties. An employer is obliged to provide a healthy and safe working environment and not to unreasonably destroy the necessary relationship of trust and confidence.

237 Victoria Parliament *Hansard*, P Ryan, 13 May 1999, p. 1031

238 Victoria Parliament *Hansard*, E Smith, 13 May 1999, p. 1037

The employment of QPS officers is governed by legislation which primarily delineates the terms of the employment relationship and the way grievances are to be resolved. Nevertheless, mutual trust and confidence between employer and employee remain important in determining specific issues. In this respect, the Commissioner's confidence in his or her officers is central to the viability of their employment.

The case of *Hussein v Westpac Banking Corporation* demonstrates this point.²³⁹ Hussein was an employee of the Westpac Bank who had been convicted of fraud but not in connection with his employment. In dismissing his appeal alleging unfair dismissal Staindl JR stated:

In these circumstances it is apparent that the applicant had a position of responsibility and trust. The [bank] was entitled to expect that a person in his position be trustworthy. It needed to be able to rely on his honesty in carrying out his duties. Because of the applicant's conduct the [bank] no longer had that trust and could not rely on the applicant's honesty ... If the fact of his conviction became publicly known it could have damaged the [bank's] reputation within the area. Banks and other financial institutions rely on the public having trust in them. This trust could be undermined if employees in positions such as those of the application were known to be dishonest ...

b. The community must have trust and confidence in the integrity, competence, performance and conduct of its police officers.

Good relations between police and the community — not police powers — are widely regarded as the most important factor in the ability of the Service to effectively detect and solve crime.

... the prime determinate of success is information immediately provided by members of the public (usually victims) to patrol officers or detectives ... If adequate information is provided to pinpoint the culprit fairly accurately, the crime will be resolved, if not it is almost certain not to be. This is the conclusion of all relevant studies.²⁴⁰

It follows that community trust and confidence in the integrity, competence and diligence of officers in the performance of their duty is essential for this flow of information and cooperation. The potential loss of this trust and confidence is therefore a relevant basis on which to consider terminating the employment of a subject officer.

c. Each police officer must be a fit and proper person to hold the office of constable.

The employment of a police officer is attached to an appointment known as the 'office of constable', which confers on the individual special responsibilities and powers that operate beyond the workplace and the formal hours of employment. The independent nature and status of this office is distinguished from the normal employee/employer relationship because these powers:

are not delegated ... by superior authority. Powers are said to be given to an officer as a constable, not as a member of a police force: in essence a police force is neither more or less than a number of individual constables, whose status derives from the common law, organised together in the interests of efficiency.²⁴¹

In Queensland, this concept of the police service as a collective of individual officers is reflected in the *Police Service Administration Act 1990*. Organisation and control over the collective and its effectiveness is maintained through the authority of the Commissioner, whose directions and requirements they are generally bound to follow.

239 (1995) 59 IR 103

240 Dixon, D 1997, *Law in Policing Legal Regulation and Police Practices*, Clarendon Press, Oxford, p. 83 citing Reiner, R 1992, *The Politics of the Police*, Harvester Wheatsheaf, Hemel Hempstead, p. 151.

241 *ibid.*, citing, *Report of the Royal Commission on Police Powers and Procedure*, Cmd. 3297 HMSO, London 1929, p. 15

The distinctive nature of a police officer's employment is important when determining whether a subject officer should remain in the Service, as his or her fitness for the 'office of constable' must be taken into account. The usual tests for unfair dismissal in the context of Australian employment law are not well suited to addressing this. The problem is discussed further below.

The basis for review of CLOC decisions

The test applied for review of CLOC decisions in New South Wales is the same as that for unfair dismissal — that is, whether the removal of the police officer from employment was 'harsh, unjust or unreasonable'. It could be argued that in the interests of ensuring that police officers considered for removal are treated fairly, this test is unnecessarily broad. More specifically, it is arguable that the criterion of 'harshness' attaches too much importance to the impact of removal on a subject officer because:

- the purpose of a CLOC removal is to facilitate the managerial obligation of maintaining the integrity of the police service
- most employees, whether police officers or not, are likely to regard an unwanted termination of their employment as harsh, and therefore seek its review.

As the current test for unfair dismissal in NSW exceeds the International Labour Organisation (ILO) standard, in principle, the standard of fairness demanded by the 'harsh, unjust and unreasonable' formulation need not be so stringent. The relevant provision of the ILO's C158 Termination of Employment Convention 1982, which Australia ratified in 1993, requires only that there be a valid reason for dismissal:

Article 4: The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

However, a valid reason for the removal of a police officer (one connected with the officer's capacity or conduct, or based on operational requirements) may nevertheless fail to meet the NSW criteria, and in particular, be considered harsh, given its effect on the person removed. One way of ensuring that officers are not dismissed on arbitrary or illegal grounds (e.g. unlawful discrimination) would be to adopt a general test of fairness of the type used in England and Wales. Under that jurisdiction's *Employment Rights Act 1996* (ERA), once an employer has demonstrated (i) the reason for the dismissal, and (ii) that this is a reason permitted under the ERA (i.e. is related to capability or qualifications, conduct, redundancy, contravention of a legal duty or restriction, or was for some other substantial reason), the tribunal's determination of whether the dismissal is fair or unfair (having regard to the reason shown by the employer):

- a. depends on whether in the circumstances (having regard to the size and administrative resources of the employer) the employer acted reasonably in treating it as a sufficient reason for dismissing the employee; and
- b. shall be determined in accordance with equity and the substantial merits of the case. (s. 98(4))

Significantly, the function of an employment tribunal under these provisions is to determine whether the employer has acted fairly; not to ask whether *it* would have dismissed the employee in the circumstances. Moreover, the courts have developed a 'range of reasonable responses' approach to the consideration of fairness, whereby leeway is afforded to the employer in his or her response to the problem giving rise to the dismissal — as long as the employer, acting reasonably, *could* have chosen to dismiss the employee for the reasons relied upon, it does not matter that another employer, faced with the same set of circumstances, might reasonably have chosen not to do so.

If such a test of fairness were adopted as the basis for reviewing a CLOC removal in Queensland, the Commissioner of Police would already have notified the subject officer of the reasons for the dismissal in time for the officer to respond to them. The Commissioner's reason(s) for loss of confidence in an officer are extremely likely to relate to that officer's capability or conduct. Performance that fell outside these two categories would be captured by the residual 'some other substantial reason' category of permissible reasons. The review body would then have to decide only if the Commissioner had acted reasonably in removing the officer from the service for the reasons established. There would be no consideration of harshness or of matters arising after the dismissal — issues that have played a role in the outcome of several reviews or appeals in NSW (see Appendix E).

Recommendation 11

The CMC recommends that the Queensland Government amend the *Police Service Administration Act 1990* and any other Act as necessary to:

- a. provide a basis for the dismissal of a police officer on loss of confidence grounds**
- b. provide for a fair system of review to a single judge of the Supreme Court, which recognises the functions and purpose of the police service, the special nature of the employment of a police officer and the office of constable**
- c. recognise the right of the Commissioner reasonably to determine questions concerning an officer's suitability for employment and fitness to hold office.**

CONCLUSION

In conclusion, this review has identified a number of key areas for legislative, policy and procedural improvement that the CMC believes will make a significant difference to the effectiveness of the QPS discipline system. However, those improvements are not a panacea. The model police discipline system, developed in this report, demonstrates the importance of all its elements to the success of the whole.

A good legislative, policy, and procedural framework is an essential foundation for a strong discipline system, but it is not enough to ensure better outcomes. These can only be achieved when there is a union of strategy and organisational and individual will.

There is no doubt that disciplinary proceedings may be complex, and making decisions can be difficult. However, the outcomes of the case studies in this report raise the question: are they the result of systemic and procedural deficiencies in the existing disciplinary processes, or are they evidence of a lack of capacity or will on the part of those charged with responsibility for managing the system? The CMC will continue to closely monitor how those dealing with the discipline of members of the QPS discharge their responsibility. If the disciplinary system is to work in the best interests of the QPS and the community of Queensland, ultimately those officers must be demonstrably committed to achieving its purposes.

For a number of years now, community confidence and satisfaction, professional standards and ethical practice have been key targets of the QPS's corporate strategy, and professional and ethical conduct has been identified most recently as a fundamental criterion of service delivery support. The challenge for the QPS now is to translate these aspirations into action and outcomes.

Complaints management must be core business in the QPS, because public confidence in the police service is not merely important, it is central to its capacity to do its job.

APPENDIX A:

Commissioner's circular

The contents of this Commissioner's Circular commence on 1 July 2009.

Circular No. 02/2009
30/06/2009

INDICATIVE SANCTIONS FOR DISCIPLINARY MATTERS INVOLVING POLICE OFFICERS PROSECUTED FOR DRINK DRIVING OFFENCES

The Service has a clear responsibility to set standards of behaviour and conduct for its members in order to maintain public confidence and respect. Prior to 1 July 2009, the range of sanctions (usually a reprimand or a caution) for disciplinary matters involving drink driving did not appear to adequately address this important issue, nor did seem to act as an effective deterrent.

Consequently, the Service has revised the range of potential sanctions applied for disciplinary matters in circumstances where the officer has been, or could potentially be charged with a drink driving offence under s. 79 *Transport Operations (Road Use Management) Act 1995* or similar legislation in another jurisdiction.

A matrix (attached) outlining indicative sanctions for a disciplinary matter involving an officer for an incident of drink driving was approved by the Board of Management for implementation from 1 July 2009.

Indicative sanctions listed on the matrix as applying to a 'second offence' or 'serious injury and damage' should be interpreted as circumstances of aggravation where an officer has previously been detected drink driving or has been involved in a traffic incident resulting in serious injury to any person or substantial property damage.

The Service provides a number of functions and programs including education, support and treatment for members on the responsible use of alcohol and for those who require assistance for alcohol misuse.

POLICY

A decision maker in a disciplinary proceeding where the subject member has committed or apparently committed a drink driving offence is to take into consideration the matrix outlining the indicative sanctions for drink driving offences prior to making their decision with respect to penalty or sanction.

The decision maker will also have regard for all the circumstances of the individual case before implementing any such penalty or sanction.

ORDER

This policy is to commence from 1 July 2009.

Assistant Commissioners, Directors, Commissioned Officers and Officers in charge are to note the contents of this circular and bring them to the notice of all members under their control.

POLICY

The contents of this circular will be incorporated into Chapter 18 Human Resource Management Manual in due course.

**IAN STEWART
DEPUTY COMMISSIONER
(SPECIALIST OPERATIONS)**

APPENDIX B: QPS Code of Conduct

SECTION 17.1 – CODE OF CONDUCT

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SECTION 17.1 – CODE OF CONDUCT

FOREWORD

This code has been developed to ensure that all members have a clear understanding of the standards of conduct expected whilst employed in the Service. In effect, the code is a form of protection for all members as it helps us to understand what we are responsible for as public officials and to determine what is to be done when faced with ethical or conduct issues.

Members should be mindful that adverse outcomes can arise where they are making decisions involving ethical issues and even when acting in a proper manner. However, I assure you that if you have done your best to abide by the provisions of this code and you have honestly and reasonably tried to act in a professional manner, you will be fully supported by the Service despite the outcome.

The success of this code of conduct will be evidenced in the level of public confidence and trust held by members of the community in relation to the Queensland Police Service and its members.

In achieving this success, I recognise the need for strong positive leadership and the necessity for clear standards of conduct to be developed, adopted and ingrained into the corporate spirit of the Service.

I assure all members, that I and senior management of the Service will do everything in our power to meet these standards personally and we encourage you to do the same.

We are confident that our trust in you is well placed and we are determined to be worthy of your trust.

Many members of the Service, representing a wide variety of points of view were involved in the writing of this code. I wish to personally thank all staff who participated in and contributed to the development process.

The implementation of this code of conduct for all members of the Queensland Police Service has my full support and approval.

R ATKINSON
COMMISSIONER

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SECTION 17.1 – CODE OF CONDUCT

1. Introduction

The Queensland Government has committed itself to the achievement of high ethical standards for all public officials. This commitment has been reinforced by the development and introduction of the *Public Sector Ethics Act 1994*.

This Act identifies core public sector values that are held to be central to good public administration. The Act also complements both the *Whistleblowers Protection Act 1994* and the *Crime and Misconduct Act 2001* by placing obligations on public officials to expose fraud, corruption, misconduct and maladministration of which they are aware.

The structure of the code of conduct developed under this process includes:

- Sections 1 to 9 - Introduction - (including general information, the ethics principles and obligations);
- Section 10 - Standards of Conduct - (for application to all members of the Service); and
- Sections 11, 12 and Appendix - (including conclusion, references, definitions, Service specific examples, and the QPS Statement of Ethics).

If you should have any questions relating to this code or your ethical obligations you should discuss them with your supervisor or manager.

2. Purpose and Scope

The purpose of this code of conduct is to provide all members of the Queensland Police Service with a set of guiding principles and standards to assist them determine acceptable standards of conduct.

- **This code is intended to be used by members of the Service in determining what is right and proper in their actions.**

This code outlines the "Standards of Conduct" that apply to all members of the Service.

All members of the Service are "Public Officials" as defined in the *Public Sector Ethics Act* and are employed at public expense for the benefit of the community. As such, in the delivery of policing services to the community, the Service and its members must strive to achieve the highest standards of conduct and accountability. In the provision of these policing services, the public are entitled to expect that all members will:

- conduct themselves and discharge their responsibilities with professionalism and integrity;
- observe fairness and equity in their official dealings with the public and other public sector staff;

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- comply with, and be seen to act within the spirit and letter of the law; and
- act in the public interest and give priority to official duties and obligations.

To assist in the attainment of these expectations, it is essential that members of the Service have a clear understanding of their role as "Public Officials" and of the standards expected of them whilst employed in the public sector.

Whilst it is not possible to provide a comprehensive set of rules that outline how members should behave in every conceivable circumstance, this code seeks to:

- inform all members of the Service of the standards of conduct expected of them, consistent with the ethics obligations outlined in the *Public Sector Ethics Act*;
- ensure that embarrassment is not brought upon the Service or its membership because of a lack of understanding of the Service's standards of conduct; and
- promote a positive image of the Queensland Police Service and its members.

At all times under the provisions of this code members are expected to conduct themselves in a manner that does not discredit:

- the individual member, having regard to their official position held within the Service; or
- the reputation of the Queensland Police Service.

The absence of any specific reference by the code in relation to any act or omission that tends to bring discredit upon the Service or its members does not mean that such an act or omission is condoned or permitted.

3. Application of the Code

This code has been established pursuant to s. 4.9 of the *Police Service Administration Act 1990* in satisfaction of s. 15 of the *Public Sector Ethics Act*. The provisions of this code apply to all members of the Service defined in s. 2.2 of the *Police Service Administration Act 1990*.

In the performance of their official functions, special constables appointed to hold office in Queensland are required to observe the provisions of this code as a condition of appointment.

Where the Service engages volunteers and they are required to perform functions or control resources on behalf of the Service, they will be expected to observe the provisions of this code.

This code replaces the following documents:

- the Queensland Police Service Code of Conduct;

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- the Executive Officers' Code of Conduct; and
- the Code of Conduct for Officers of the Queensland Public Service.

4. Breaches of Standards of Conduct

All members are to familiarise themselves with this code and ensure that its provisions are observed. Members should be aware that failure to comply with standards of conduct outlined in the code, without valid reason, will be addressed in accordance with the contents of s. 18: 'Complaint Management' of the Human Resource Management Manual.

Members requiring advice or assistance concerning their obligations under this code should seek assistance from supervisors, managers, internal support areas, professional associations or unions. Members should also refer to relevant provisions of the *Police Service Administration Act 1990*, the *Public Service Act 1996* and s. 18: 'Complaint Management' of the Human Resource Management Manual.

5. An Explanation of Ethics

Ethics are the rules or standards of conduct any society imposes in respect of the rights and interests of its members recognising the fundamental moral principles that underpin every decision and action a member of that society may make. In the work environment these principles can be used to provide guidance in situations where no specific rules are in place, or where matters are unclear. They help determine what is right and proper in our actions.

6. Other Professional Codes

The Service acknowledges that codes of professional ethics exist for many established professions (e.g. Medical Practitioners, Psychologists) and that the existence of these codes may lead to ethical conflicts or dilemmas for members who are employed by the Service in their professional capacity.

Codes applicable to professionals or individual classes of members employed by the Service should be read in conjunction with this code. Where any conflict does arise involving professional ethics standards and the provisions of this code, the Service's right to determine what is to be done in any resolution process should be recognised by the affected member and their professional body.

Individuals or professionals placed in this position are encouraged to raise and discuss their concerns within the Service. Where such a conflict does occur, the professional body of the affected member should be involved in any resolution process to ensure that the justification of the profession's ethical standards does not rest solely with the individual professional.

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7. Determination of Conduct

Determining whether a member's conduct, **whether on or off duty**, is right and proper in terms of this code requires examination of:

- the nature of the conduct exhibited; and
- the context in which the conduct takes place.

Within this framework, appropriateness of conduct is then determined with reference to the expectations of the Service, the wider community and the provisions of this code.

Members assessing the appropriateness of their conduct, or the conduct of other members, against the provisions of this code should apply the **SELF** test:

- would your decision withstand **Scrutiny** by the community or the Service?
- will your decision **Ensure** compliance with your Oath of Service, this Code of Conduct and Service policy?
- is your decision **Lawful**? does it comply with all laws, regulations and rules?
- is your decision **Fair** to the community, your family and colleagues and others?

Where the conduct of a member, **whether on or off duty**, does not satisfy the provisions of the **SELF** test or it will otherwise adversely reflect on the Service, it will be deemed by the Service as inappropriate under the provisions of this code.

The Service expects that members, in fulfilling their obligations under this code, will not only meet minimum standards of conduct required, but will strive to, and encourage others under their supervision to achieve the highest standards of conduct possible.

8. Ethics Principles

This code of conduct is based on the following ethics principles as stated in the *Public Sector Ethics Act*:

- Respect for the law and the system of government;
- Respect for persons;
- Integrity;
- Diligence; and
- Economy and efficiency.

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9. Ethics Obligations

This section outlines the ethics obligations as stated in the *Public Sector Ethics Act*.

9.1 Obligation: Respect for the Law and System of Government

A public official should uphold the laws of the State and the Commonwealth and carry out official public sector decisions and policies faithfully and impartially.

This obligation does not detract from an appointed public official's duty to act independently of government if the official's independence is required by legislation or government policy, or is a customary feature of the official's work (e.g. Judges, Royal Commissioners).

9.2 Obligation: Respect for Persons

A public official should treat members of the public and other public officials honestly and fairly, and with proper regard for their rights and obligations.

A public official is to act responsively in performing official duties.

9.3 Obligation: Integrity

In recognition that public office involves a public trust, a public official should seek to maintain and enhance public confidence in the integrity of public administration and advance the common good of the community the official serves. Having regard to that obligation, a public official:

- should not improperly use his or her official powers or position, or allow them to be improperly used;
- should ensure that any conflict that may arise between the official's personal interests and official duties is resolved in favour of the public interest; and
- should disclose fraud, corruption, misconduct and maladministration of which the official becomes aware. (Procedures for doing this are set out in the *Crime and Misconduct Act 2001* and the *Whistleblowers Protection Act*).

9.4 Obligation: Diligence

In the performance of official duties, public officials should exercise proper diligence, care and attention. Officials should seek to achieve high standards of public administration.

9.5 Obligation: Economy and Efficiency

In performing their official duties, public officials should ensure that public resources are not wasted, abused, or used improperly or extravagantly.

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10. Standards of Conduct

The following standards are derived from the ethics principles and obligations as outlined in sections 8 and 9 of this code. They apply directly to all members of the Service and are the standards that will be used by the Service when determining appropriateness of a member's conduct against the provisions of this code.

10.1 Responsibility to Community, Government and the Law

Members are to act in good faith, in accordance with both the spirit and the letter of the law and in the best interests of the community of Queensland.

While acknowledging the need for adherence to the principles of responsible parliamentary government and the need for police operational decisions to be free, and be seen to be free from undue or improper political considerations, all members of the Service have responsibilities towards the government of the day and are to:

- (i) ensure political neutrality in all policing decisions and implement Government policy and Ministerial directions impartially, regardless of which political party or parties are in office; and
- (ii) when requested or directed, provide advice, through the Commissioner, to the Minister and Government, in a comprehensive, accurate and timely manner.

10.2 Public Comment

The Service acknowledges that members have a right to make public comment and enter into public debate on political, community and social issues in a private capacity. Where a public comment is made in a private capacity members are to ensure that it is clearly identified as not being an official comment or made in an official capacity. There are circumstances where public comment or debate by members is **not acceptable**. These include circumstances where:

- (i) a public comment made in a private capacity may give rise to a public perception that it is in some way an official comment of the Government or the Service;
- (ii) a member is directly involved in advising on or directing the implementation or administration of government policy, and the public comment would compromise the member's ability to do so;
- (iii) a public comment amounts to improper criticism of the Government or the Service;
- (iv) an official public comment is inconsistent with the Service's corporate policy or direction, or gives rise to the perception that the member is in disagreement with the Service's corporate policy or direction; or
- (v) a public comment amounts to an unwarranted personal attack on the character or integrity of another member or person.

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Where members are in any doubt as to the propriety of a proposed public comment they should consult their supervisor, and observe any directions issued by the Commissioner governing public comment and political activity.

10.3 Political Activity

Members have the same right as any other citizen to freedom of political views and association. However, any political activity by members is to be conducted in a private capacity. **It is essential that members clearly separate any official action or views from any political action or views.** Members may only engage in private political activity or comment outside the course of official duty and are to ensure that no conflict of interests arise between such activity or comment and their official duties. Where a member enters into any agreement with a political party during the course of or prior to an election campaign that has the potential to compromise the independence of the Police Service they must report the matter immediately to the Commissioner.

Examples of permissible conduct under this section are:

- (i) expressing opinions on political subjects and candidates in a private capacity;
- (ii) displaying political advertising (except in situations that are connected to official duties, i.e. advertising must not be displayed whilst on duty or on Queensland Police Service property); and
- (iii) signing a political petition in a private capacity.

Members of the Service contesting federal, state or local government elections are to comply with the relevant provisions of s. 25.1: 'Members Contesting Elections' of the Human Resource Management Manual.

10.4 Union Representatives and Public Comment

The Service recognises the responsibilities of members elected as workplace representatives or officials of trade unions and professional associations. Such representatives or officials need not seek permission from the Service before expressing publicly their union's or association's views. However, any such representative or official is to ensure that such comments are clearly made and identified as the views of their union or association and are made in their official capacity as a representative or official of that union or association.

10.5 Lawful Directions

Members are to obey any lawful direction, instruction or order given by any member or person authorised by law to do so.

Members in satisfying their obligations under this section are to comply with the provisions on lawful directions as outlined in s. 17.2: 'Procedural Guidelines for Professional Conduct' of the Human Resource Management Manual.

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10.6 Conflict of Interests

Members of the Service are expected to perform their duties in such a manner that public confidence and trust in the integrity, objectivity and impartiality of the Queensland Police Service and its members is preserved.

In satisfaction of this objective members are to arrange their private affairs in a manner that will prevent any actual or apparent conflict of interests from arising wherever foreseeable. Further, members are to ensure as far as practicable there is no conflict between their personal interests and the impartial fulfilment of their official duties and responsibilities.

Members are to avoid both actual or apparent conflicts of interests in all matters relating to their employment with the Service. However, members are not to be subject to unreasonable restrictions on their private activities purely as a result of their employment with the Service. Where a conflict of interests does arise between the private interests of a member and the official duties or responsibilities of that member, the member is to disclose details of the conflict to their supervising Executive Officer. All conflict of interests relating to a member's employment with the Service will be resolved in favour of the Service and the public interest.

Members in satisfying their obligations under this section are to comply with the provisions on outside employment as outlined in s. 17.2: 'Procedural Guidelines for Professional Conduct' of the Human Resource Management Manual. Section 17.2 outlines the processes to be followed in dealing with the range of potential conflicts of interests that may confront members.

10.7 Gifts and Benefits

In their official capacity as a member of the Service, members are not to solicit any personal or other benefit, except where the solicitation is authorised by the Service (e.g. legitimate pursuit of donations or sponsorship in accordance with Service policy).

In their official capacity as a member of the Service, members are not to accept any personal or other benefit, unless authorised/permitted by the Service (e.g. customary hospitality and benefits of nominal value).

The Service recognises that there will be instances where members will be offered benefits and that under certain circumstances it will be appropriate for members to accept them. However, members are to avoid all situations in which the acceptance of any benefit could create an actual or apparent conflict of interests with their official duties. As a general principle, members are not to accept any benefit extended to them other than incidental gifts, customary hospitality or benefits of a nominal value. When offered customary hospitality, incidental gifts or benefits of nominal value, members will need to decide whether to accept the offer.

Members are to consider the following when making this decision:

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- (i) who is offering the hospitality, gift or benefit?
- (ii) what is the purpose of the offer?
- (iii) what is the timing of the offer?
- (iv) does the value of the hospitality or benefit exceed nominal value?
- (v) is the offer likely to be regular or repetitive?
- (vi) is it consistent with other Service policy?
- (vii) could the acceptance compromise you, another person or the Service?
- (viii) could the acceptance stand public scrutiny?

If in the consideration of points (i) to (viii) of this section there is any doubt about the intention or integrity of the source making an offer, members are to reject the offer.

Where the value of the offer exceeds nominal value and to refuse the hospitality or benefit may cause offence, the offer should be accepted and immediately dealt with in compliance with the provisions on gifts and benefits as outlined in s. 17.2: 'Procedural Guidelines for Professional Conduct' of the Human Resource Management Manual.

10.8 Personal Conduct

At all times, members are to act and be seen to act properly and in accordance with both the spirit and the letter of the law and the terms of this code of conduct. Members are not to act in a manner which will adversely reflect on the service generally or on themselves as members of the Service.

10.9 Outside Employment

Members may not engage in any employment outside the Queensland Police Service whilst on leave or otherwise if such employment:

- (i) interferes with the effectiveness of the performance of their duties;
- (ii) creates or appears to create a conflict of interest; or
- (iii) reflects adversely on the Service.

Members in satisfying their obligations under this section are to comply with the provisions on outside employment as outlined in s. 17.2: 'Procedural Guidelines for Professional Conduct' of the Human Resource Management Manual.

10.10 Use of Alcohol and Drugs

Illicit drug use by QPS members is not acceptable.

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Members are to ensure that the consumption of alcohol or other licit drugs does not adversely affect the performance of their official duties. Licit drugs include prescription and over the counter medications.

Members of the Service are not to:

- (i) consume alcohol while on duty or during meal breaks except where related to the member's official duties and subject to a superior member's approval and conditions; or
- (ii) consume alcohol or other licit drugs when a requirement to go on duty is reasonably foreseeable and imminent where such consumption will:
 - (a) adversely affect ability to conduct official duties;
 - (b) result in unsatisfactory work performance; or
 - (c) affect the safety of others.

In satisfying their obligations under this section, members are to comply with the provisions on the consumption of alcohol and drugs as outlined in s.17.2: 'Procedural Guidelines for Professional Conduct' and s.21.14: 'Alcohol and Drug Policy and Procedures' of this Manual.

10.11 Influence to Secure Advantage

Members shall not use the influence of their official powers or position, or the influence of any other person to obtain improperly, any appointment, promotion, advancement, transfer, decision or other advantage, either personally or on behalf of another.

10.12 Improper Use of Information and Communication Technology (ICT)

All Queensland government agencies are guided by the Cabinet-endorsed 'Use of the Internet and Electronic Mail Policy' and Information Standard 38. The Service's policy regarding the misuse of ICT facilities and devices is primarily contained in the Information Management Manual. Anyone found to have misused ICT devices or facilities potentially faces a range of penalties, including dismissal. Any possible misuse or breach of Service ICT policy will be dealt with on a case-by-case basis.

10.13 Improper Access or Use of QPS Information

In the performance of official duties, members of the Service are granted lawful access to many sources of information, confidential or otherwise. With this access comes a requisite level of accountability and trust that the information will only be used for official purposes. It is the view of the Service that there is no excuse for members to betray the public trust by making any unauthorised, improper or unlawful access or use of any official or confidential information available to them in the performance of their duties.

When dealing with official or confidential information of the Service, members are not to access, use or release information without an official purpose related to the performance of their duties.

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Where any member breaches this provision they must expect that the Service will institute appropriate disciplinary or criminal proceedings. Members need to be aware that this type of activity is viewed by the Service as misconduct and any members who breach the provisions of this section will be dealt with accordingly.

Members requiring further information or assistance when dealing with official or confidential information should refer to and comply with relevant provisions of the following legislation and documents:

- Sections 10.1 and 10.2 of the *Police Service Administration Act 1990*;
- the *Freedom of Information Act 1992*;
- the Queensland Police Service Statement of Affairs; and
- Chapter 1 of the Operational Procedures Manual.

10.14 Intellectual Property and Copyright

Members of the Service are to comply with all legislation, Service policies and procedures covering intellectual property and copyright. A member will breach the provisions of this code where they fail to comply with any such legislation, policy or procedures.

Members in satisfying their obligations under this section are to comply with the provisions on intellectual property and copyright as outlined in s. 17.2: 'Procedural Guidelines for Professional Conduct' of the Human Resource Management Manual.

10.15 Performance of Official Duties

In the performance of official duties members are to:

- (i) demonstrate high standards of professional integrity and honesty;
- (ii) apply themselves to the efficient and effective achievement of the functions of the Queensland Police Service;
- (iii) perform any duties associated with their position diligently and to the best of their ability, in a manner that bears the closest public scrutiny and meets all legislative, Government and Service standards;
- (iv) set and maintain standards of leadership that are consistent with corporate goals and policies, and be seen at all times to act in support of those corporate goals and policies;
- (v) promote and encourage members of the Service under their supervision to exercise high standards of personal and professional conduct;
- (vi) act with fairness and reasonable compassion;
- (vii) provide conscientious, effective, efficient and courteous service to all those with whom they have official dealings. In particular, members are to be sensitive to the special circumstances and needs surrounding victims of crime;
- (viii) while members will put family responsibilities first, duty to the people of Queensland will always be given priority over the other private interests of members;

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- (ix) perform their duties impartially and in the best interests of the community of Queensland, without fear or favour;
- (x) act in good faith; and
- (xi) actively contribute to the achievement of the Service's corporate goals.

10.16 Conduct Toward Members and Other Persons

In the course of their duties, and in particular when exercising discretionary powers, members are to:

- (i) treat all persons with respect and dignity and in a reasonable, equitable and fair manner;
- (ii) not intimidate, engage in sexual or other forms of harassment, unlawfully discriminate or otherwise abuse any person;
- (iii) observe merit in recruitment, promotion and other selection processes;
- (iv) safeguard privacy and confidentiality of matters of a personal nature relating to other members of the Service;
- (v) adhere to the principles of natural justice;
- (vi) adhere to management principles and practices which foster the rights, and well being of members and encourage access to employee assistance and development schemes;
- (vii) ensure subordinates are set equitable and fair workloads;
- (viii) not inappropriately distract other members of the Service from carrying out their duties;
- (ix) not allow personal relationships to adversely affect their work performance or that of other members; and
- (x) not induce other members to breach this code.

10.17 Resources, Economy and Efficiency

In the performance of official duties members are to:

- (i) use or manage both human and material resources efficiently and effectively for the benefit of the public of Queensland;
- (ii) conserve and safeguard public assets;
- (iii) budget honestly;
- (iv) not misuse Service equipment or vehicles; and
- (v) respect the environment by engaging in environmentally friendly work practices.

Members are not to (directly or indirectly) make improper use of, or allow the improper use of, property, equipment and facilities of any kind belonging to or leased by the

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Commissioner. Members are not to use any such property, equipment, or facilities for any purpose which has not been authorised by the Service.

Members are to ensure that all facilities, physical resources and other property belonging to the Commissioner are given due care and maintenance. Members in satisfying their obligations under this section are to comply with the provisions of s. 17.2.4.8: 'Service Property - Due Care, Maintenance and Security' of the Human Resource Management Manual.

Members are to avoid waste, abuse of, or extravagant use of Service resources.

11. Conclusion

This code of conduct has been developed to outline the ethics principles, associated obligations and standards of conduct that apply to all members of the Service. For the code to be ultimately viewed by the Service and the community as an effective document, members need to view and utilise it in line with the following statement:

- **This code is intended to be used by members of the Service in determining what is right and proper in their actions.**

12. References

The code has been established pursuant to the following authorities:

- *Public Sector Ethics Act 1994*;
- *Police Service Administration Act 1990*; and
- *Public Service Act 1996*.

The following documents should be read in conjunction with the code:

- *Anti-Discrimination Act 1991*; and
- *Workplace Health and Safety Act 1995*.

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Appendix A

Definitions

For the purposes of this code of conduct the following definitions apply:

1. Apparent Conflict of Interests

An apparent conflict of interests exists when it appears that a member's private interests could interfere with the proper performance of their official duties.

2. Actual Conflict of Interests

An actual conflict of interests exists when a reasonable person, in possession of the relevant facts, would conclude that the member's private interests are interfering with the proper performance of their official duties.

3. Benefit

A benefit includes gift, gratuity, remuneration, allowance, fee subsidy, consideration, free service or entertainment other than as provided for as part of a member's terms and conditions of employment.

4. Improper

Improper means anything that is not in accordance with propriety of behaviour or conduct suitable for a particular purpose, person or occasion.

5. Maladministration

Maladministration is administrative action that is unlawful, arbitrary, unjust, oppressive, improperly discriminatory or taken for an improper purpose.

6. Member

Member means all employees of the Queensland Police Service. The term refers to and includes all persons defined in s. 2.2 of the *Police Service Administration Act 1990*.

7. Natural Justice

Natural Justice (or Procedural Fairness) is concerned with ensuring that a fair decision is reached by an objective decision maker. It requires that two rules be observed:

- The **hearing rule**, which states that a person or body deciding a particular matter must give the affected person the opportunity to present their case and have that material considered before any decision is made.

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- The **rule against bias**, which states that a decision maker should have no personal interest in the matter to be decided, have no bias as to the outcome and act in good faith throughout the process.

8. Outside Employment

Outside employment means any type of employment for which a benefit may be received exclusive of the Queensland Police Service.

9. Public Interest Disclosure

Public Interest Disclosure has the meaning assigned to it in the *Whistleblowers Protection Act 1994*.

10. Public Official

Public official means any officer or employee of a public sector entity as defined in the *Public Sector Ethics Act 1994*.

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Appendix B

Examples of Ethical Decision Making Processes

The following examples provide a range of resolutions and dilemmas likely to be encountered by members during their employment with the Service. They do not purport to provide definitive answers, but rather illustrate the range of considerations often involved in ethical decision making processes. Members should be aware that any situation has innumerable influencing factors that impact on any decision making process and that the resolutions in these examples may not translate directly to situations arising in the work environment.

Situation - Implementing Service Policy

The Minister has approved the introduction of a Police Beat Shop Front at the local shopping centre. You do not wish to support or participate in the initiative.

Discussion

Public Officials should accept that the Government has an obligation to determine general policy, as does the Service to implement that policy. A member who has concerns about the effectiveness of any policy, practice or procedure, has not only a right, but an obligation to raise those concerns with the Service. No member will be disadvantaged for doing so, provided that those objections are raised in an appropriate internal forum and in a manner appropriate to the issue. Once policy is determined however, each member is obliged to comply with, and to do all that is possible within their area of influence to give effect to that policy.

Members should also consider that the obligation to support decided policy goes further than simply complying with the strict letter of instructions. Members will often be in a position to influence the effectiveness of policies or initiatives. This might include, for example, decisions on rosters, the selection of staff for particular tasks, or even in exercising personal influence over members. A member who makes decisions or takes actions that has the effect of impairing a policy initiative may be in breach of this code.

Resolution

In this instance, the member is free to propose an argument as to why a particular shop front should not proceed or should be closed, provided that any submissions are made internally through the appropriate channels. Once a decision has been made, however, it is incumbent on the member to support whatever policy has been put in place.

* * * * *

Situation - Public Comment

A police officer in uniform makes the following personal comment to a reporter while at the scene of a fatal traffic accident at a busy intersection. "These red light cameras do not work, I attend accidents here regularly and the cameras have not reduced the number of accidents or deaths - the Government and the Service are wasting their money."

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Discussion

The community is entitled to expect that members are publicly committed to, rather than in conflict with the policies and overall direction of the Service and the Government. Except where prescribed by Service policy, the code seeks to ensure members make official comments that are factual and placed within an appropriate policing context.

In this case the member has made personal comments while on duty which are not supportive of the red light camera program, either without having sufficient knowledge of, or ignoring overall program success throughout the State.

Members whilst on duty or acting in an official capacity are to ensure that they do not publicly convey their personal views where such views are, or would reasonably be construed as, contrary to or critical of those of the Service or the Government.

In all other circumstances members are to ensure that any public comments are made clearly in a private capacity. This could be achieved for example, by prefacing a public comment with a disclaimer which clearly identifies the remark as being a comment made in a private capacity.

Resolution

In the situation as outlined, the member has acted inappropriately by providing comment while on duty that amounts to improper criticism of the Government and the Service. The comment also gives rise to the perception that the member is in disagreement with Service policy and direction. Members who disagree with Service or Government policy or strategies are to either raise their concerns through Service reporting/grievance mechanisms or through their relevant Union/Professional Association. An appropriate course of action for the officer in the above situation would have been to either refrain from comment or alternatively, make a comment supportive of the overall program.

* * * * *

Situation - Comply with Lawful Directions

A supervisor issues a direction to a member of the Service. The member forms an opinion that the direction issued is manifestly unlawful and immediately raises their concern with the supervisor. The supervisor considers the issues raised and explains their understanding of the law on the matter to the member. The supervisor then reissues the initial direction.

Discussion

The Service recognises a member's right to question directions under certain circumstances. However, of equal importance to the efficient and effective functioning of the Service is the obligation of members to comply with lawful directions. This obligation should never be taken lightly by members as policing agencies provide specific and unique services vital to the well being of members of the community and the maintenance of a peaceful, ordered and lawful society.

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This code seeks to strike a balance between a member's rights and obligations in respect of compliance with directions. Members should be fully aware that they may be required to justify decisions and actions where they question any direction, and further, that they are likely to be subject to investigation should they elect not to comply. **For this reason, a member should only consider non-compliance where absolutely certain a direction is unlawful** and then only after the issuing member has been given the opportunity to reconsider the direction. Although very few situations of this nature should arise it is expected that where they do, it will be resolved by immediate discussion between the members involved, or where operationally convenient by seeking further advice and/or direction. Members should also be mindful of and maintain public confidence in the Service and its members.

Resolution

In the situation above, accepting that the direction is lawful, both the supervisor and the member have acted appropriately. There is unlikely to be sufficient justification for the member electing not to comply with the direction. Alternately, if on considering the matters raised by the member, the supervisor affirms that the direction is unlawful, the supervisor should rescind the direction. There may be situations where a supervisor considers matters raised by a member and persists with the original direction. Where a member remains certain that the direction is unlawful the member's concerns should be immediately raised with the supervisor before refusing to comply with the direction. Members of the Service are not to comply with directions, instructions or orders that are unlawful. The resolution of matters raised in this situation may result in conflict between members. Members in this situation are to be mindful of their obligations to respect persons under this code and the need to maintain professional standards of conduct.

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Situation - Performance Management

A supervisor and a subordinate have a number of personal altercations in the course of a year. The subordinate's work is otherwise acceptable, however the member and supervisor continue to disagree over a range of professional and private matters. It is generally known by staff at the establishment that the two members do not get on. The subordinate makes application to attend a training course and in endorsing the application the supervisor states that the member is not a suitable candidate recommending against their attendance without providing reasons for their comments.

Discussion

Members of the Service often make decisions which impact directly on others and as such, are expected to treat all other employees with respect and dignity. To this end, any decision about another person should be made in good faith and using only valid criteria. Any assessment of another member should always be made on the basis of merit. Members should be aware that where a poor personal relationship becomes common knowledge among staff, a perception may arise that a decision has been taken on unfair grounds even when this is not the case. Members should also be aware that their decisions relating to other persons may be subject to review under the *Judicial Review Act 1991*.

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Resolution

In the example given, any decision made by the supervisor is likely to be open to criticism. In that light, the decision maker should ensure that they are in a position to provide reasons when making the decision, or conversely, more appropriately pass the decision on to another supervisor to make.

Alternatively, had the supervisor been in receipt of information to justify their comments and decision, it would be within their rights to oppose the application.

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Situation - Personal Conflicts

A member who is appointed as a Superintendent of Traffic receives an application from a local football club for an exemption permit under the *Traffic Act 1949* to conduct a temporary roadside stall. The member is aware that police have attended disturbances at the football club on a number of occasions in the past year. The member refuses the permit, and tells the president of the club that when they 'clean up their act' the permit might be reconsidered.

Discussion

Rules of natural justice (or procedural fairness) are intended to ensure that a decision maker only takes into account information that is relevant to the decision being made. Members making decisions are to ensure that personal feelings and bias play no part in the process. The aim of the member in this example is intended to force the club to take more responsibility for the conduct of its premises. While this is in itself commendable, it is inappropriate for the member to take into account an irrelevant consideration when exercising a discretionary power.

Resolution

In this example the member has taken into account information that is irrelevant to the decision being made. The decision by the member has not been made in line with the rules of natural justice (or procedural fairness) and is in breach of the provisions of this code. Members should refer to s. 10.15 (v) and the definition of Natural Justice as outlined in the code of conduct.

* * * * *

Situation - Conflict of Interests

A police officer is directed to investigate an offence for which a close relative has been nominated as a suspect.

Discussion

Any situation where an officer investigates a matter involving a friend or relative may give rise to a perception of a conflict of interests. This is not to say that it will always be improper for a member to deal with any matter involving a friend or family member. The potential for a conflict of interests must be determined on the individual circumstances of

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each matter. This will involve determining the seriousness of the matter and any possible outcomes.

For example, the taking of a crime report from a relative is unlikely to raise any adverse comment, particularly if the offence is a minor one and the complainant does not intend to lodge an insurance claim in relation to the matter. In this case a member would not be expected to declare their personal interest. On the other hand, if a member has been tasked with investigating an arson at premises owned by a relative, the member would be expected to report that interest to their supervisor. In all cases, it would become a matter for the supervisor to decide whether the member should continue with the job. In making such a decision other factors such as the availability of other staff and the urgency of the matter will also be deciding factors.

Resolution

In the example provided, the officer should clearly identify their position and relationship to the suspect to their supervisor and seek a direction. The supervisor should consider all issues raised and make every attempt to have another officer investigate the matter where operationally convenient. The supervisor in this instance needs to consider any actual or apparent conflict of interests and the effect that this may have on the efficient and effective discharge of law enforcement obligations and the proper administration of justice.

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Situation - Giving Priority to Official Duty

A member has returned to work early from paternity leave. The member's child is now six months old. Whilst working a weekend night shift, the member is informed that their child is ill and has been admitted to hospital. The member approaches the officer in charge and requests to finish early to permit attendance at the hospital. The station is already short-staffed for that shift and the workload is high.

Discussion

Under s. 2 of the code members are expected to act in the public interest and give priority to their official duties and obligations. The Service recognises that there will be circumstances where family responsibilities or commitments are to be given priority over official duties. However, each case will need to be assessed on an individual basis in order to determine where that priority shall lie.

For example, the officer in charge in the above scenario needs to take into consideration matters such as station and individual work loads, service delivery, available staff, leave entitlements, duration of shift remaining and the effectiveness of the member concerned. Where the officer in charge forms the opinion that the member could be released from duty to attend to their family responsibilities without detriment to the Service and the community, the member should be granted leave of absence at the earliest opportunity. Alternatively, where the officer in charge determines that the member cannot be released from duty (e.g. the member is involved in an emergent or foreseeable situation involving the safety of others) the member should accept the decision and give priority to official duty until released by the supervisor.

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Resolution

As indicated in the discussion above, the Service recognises that there will be circumstances where family responsibilities or commitments are to be given priority over official duties. The Service and its members will make all reasonable effort to ensure that where other members are faced with emergent or pressing family responsibilities, they are afforded appropriate and timely support, especially where those responsibilities outweigh the member's official duties and obligations. In the situation as stated, this would be situational (e.g. the child's condition, the safety of others, the effectiveness of the member under the circumstances) and any number of resolutions could be afforded dependant on the information and circumstances available at the time.

* * * * *

Situation - Use of Official Information

A member of the public contacts their local police station and requests information about a vehicle they intend to purchase. The person wants to know who the registered owner is, and if the vehicle is stolen. The member advises the person that the vehicle is not recorded as being stolen. The member declines to provide personal details of the registered owner of the vehicle.

Discussion

The practice of information being held by governments about its citizens is an issue that is highly contentious, and one that evokes very passionate debates. For this reason the integrity of police information systems must be uppermost in the minds of members who access this type of information. Members of the Service are granted access to information systems for official purposes and access to this information for unofficial purposes is strictly prohibited. Members are to be aware that inappropriate access or use of official information is in breach of Service policy and has the potential to attract severe criticism of the Service.

There is no objection to members accessing information that they genuinely require as part of their official duties. It must be stressed however, that access to information does not automatically entitle a member to access information at will without an official purpose.

Resolution

In this example the member has acted appropriately. The information provided to the person in this instance is information that would normally be made available to members of the public. Had the member gone one step further and supplied the personal details of the owner of the vehicle they would have clearly been in breach of Service policy covering the release of information (see s. 1.10 of the Operational Procedures Manual). Members of the Service need to be well aware of their responsibilities and obligations about the handling and release of information held by the Service. Where members are unsure of their responsibilities and obligations in this area they should seek advice from their supervisor before releasing any Service information.

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Situation - Acceptance of Benefits

A member of the Service is involved in the letting of a contract in a tender process. Before the contract is awarded the member is invited to attend a football match as a guest in the corporate box of one of the tendering companies. The Managing Director indicates that the invitation is not intended to influence the contract decision. The member accepts the invitation.

Discussion

An important criterion to be used in determining suitable conduct in matters of this nature, is the likely effect that the conduct may have on a reasonable by-stander. If a member accepts a free cup of coffee from a trader in the early hours of the morning, such an action could be seen as customary and nominal hospitality. However, if the officer solicited the benefit, acceptance of it becomes inappropriate, as does acceptance of any benefit on a continuing basis.

Resolution

In this case the member has acted inappropriately. Regardless of what the intention of the Managing Director is, the member's actions may lead to a public perception that acceptance of the hospitality will have a bearing on the outcome of the tendering process. The appropriate action for the member in this instance would have been to decline the invitation.

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Situation - Safety Obligation

An investigating officer returns to the scene of an arson with an offender to clarify their version of an offence. The investigating officer wears safety equipment while re-entering the scene but does not offer or supply any such protective equipment to the offender.

Discussion

Members of the Service are required to comply with the duty of care provisions of all legislation relevant to the safety and well-being of others. This is particularly so where members of the public or other staff are under a member's control or care in the workplace. That duty of care also extends to suspects for offences and all persons in the control, custody or care of members of the Service.

Resolution

In the situation above, even if the protective equipment was not readily available the actions of the investigating officer are not in compliance with the requirements of the *Workplace Health and Safety Act 1995*. Under the application of this code and the diligence principle, members are expected to conduct their duties in a manner that meets all legislative, Government and Service standards. The member in this example has not met the required standards either under the legislation or this code.

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Situation - Work Allocation

The officer in charge of an establishment has allocated a range of tasks that normally fall within their area of responsibility to subordinate staff. One subordinate with limited experience in the Service has been allocated the task of managing the station budget. The member approaches the officer in charge and protests on the grounds that budget management should be the responsibility of someone with appropriate experience and skills. Further, that they do not possess any training or experience in such matters. The member does not feel that they are capable of performing the tasks involved in the budget process without further training. The officer in charge insists that the member undertake the task and refuses to assist the member with training.

Discussion

The equitable allocation of tasks and responsibilities to subordinates is a one of the more difficult jobs of supervisors. It is acceptable and even desirable to detail greater responsibility to subordinates for the purpose of providing experience in supervisory and management tasks where it is appropriate to do so. There are, however, a wide range of factors that need to be taken into account in taking such action. This includes the ability of the member to successfully complete the task, taking into account their individual training and skills, the resources available, the normal workload of the member and whether or not it is appropriate to detail the task to that member.

Resolution

In the example given, the subject member has limited experience within the Service and has indicated that they do not possess the skills or abilities to perform the duties of the task allotted. Further, the member does not believe that the task allocation is appropriate to their knowledge, abilities or skills. The decision of the officer in charge to persist with the allocation of the task to the member without supplying appropriate training and support would not be appropriate. Alternatively, had the subordinate possessed the necessary knowledge, skills and abilities to perform the task, together with the necessary support, resources and time, the allocation of the task could only be viewed as acceptable and appropriate to both the member and the Service.

Situation - Use of Service Property for Private Purposes

A member takes a Service laptop computer home and uses it for a purely private purpose.

Discussion

The issue of members using Service equipment or resources for private purposes is one that is difficult to resolve in practice. Whether it is appropriate to use Service equipment or resources for private purposes is dependent on the circumstances of each case and the nature of the equipment or resources used.

It is unlikely that the use of any Service consumable for private purposes would be deemed appropriate. For example, the use of Service paper to print personal correspondence or the taking home of Service issue sun cream for use on holidays would be deemed inappropriate.

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In the case of non-consumable items, the test of appropriateness will also be a product of the circumstances. For example, a member who has been granted the use of a Service vehicle to permit travel for court appearance the next day, uses the vehicle during the evening to take the family shopping. The member in this instance would be in breach of the provisions of the code under the economy and efficiency principle. However, had the member used the Service vehicle (e.g. to take a family member to hospital in the absence of ready access to personal transport) it is unlikely that the member would be subject to a breach of the code under this principle.

Resolution

It is clearly impossible to provide a definitive list of allowable and inappropriate private uses of Service equipment or resources. Whether the use is acceptable or not must be determined on the circumstances of each individual case. While an answer will be obvious in the majority of cases, where there is any doubt the final test must be one of reasonableness. This test might be applied by asking whether a reasonable member of the public would consider the use of the resources or equipment appropriate.

The actions of the member in the example are not appropriate and would represent a breach of the provisions of the code.

* * * * *

SECTION 17.1 – CODE OF CONDUCT

Appendix C

Statement of Ethics

As a member of the Queensland Police Service I have a duty to:

- Protect life and property;
- Preserve the peace;
- Prevent offences;
- Detect and apprehend offenders; and
- Help those in need of assistance.

At all times,

I will carry out my duties without fear or favour, malice or ill will;

I will act honestly and with the utmost integrity;

I will make every effort to respect and uphold the rights of all people in the community regardless of race, social status or religion;

I will strive for excellence and endeavour to improve my knowledge and professionalism;

I will keep confidential all matters which I may learn in my official capacity except as necessary in the course of my duties;

I will practice self-discipline in word and deed both on and off duty;

I will resist the temptation to participate in any activity which is improper or which can be construed as being improper;

I will not misuse my office for personal gain;

I will accept responsibility for my own actions and for acts which I may order;

I accept the desirability of these ethics as an integral part of my personal and professional life.

6 OCTOBER 2006

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APPENDIX C: Complaints assessed by the Queensland Police Service as ‘interwoven with court’

Complaints assessed by the Queensland Police Service as ‘interwoven with court’

A CMC audit of complaints assessed as ‘interwoven with court’
by the QPS during the period 1 July 2005 to 30 June 2006

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CMC Audit of the QPS’s Assessment of Complaints as Interwoven with Court

December 2007 1

CMC vision:

To be a powerful agent for protecting Queenslanders from major crime and promoting a trustworthy public sector.

CMC mission:

To combat crime and improve public sector integrity.

Abbreviations and Explanatory Note

QPS	Queensland Police Service
ESC	Ethical Standards Command
Region	includes Command

Complainant means the person who has made a complaint about misconduct on the part of a police officer

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PURPOSE OF THIS REPORT

The purpose of this report is to document the findings of a CMC audit of complaints of misconduct dealt with by the QPS in which the assessment decision has been made not to take any action because the matter is 'interwoven with court'.

Specifically it concerns those cases in which it is considered by the QPS that the circumstances giving rise to the complaint are inextricably interwoven¹ with circumstances of a charge brought against the complainant arising out of the same incident, and the matter is appropriately dealt with by the criminal court proceedings in the first instance ('interwoven with court').

This focus of the audit is whether the QPS assessment decision in these cases was appropriate.

INTRODUCTION

Under the *Crime and Misconduct Act 2001* (Act), the misconduct functions of the CMC are to raise the standards of integrity and conduct in units of public administration, including the QPS, and to ensure that complaints about, or information or matters ['complaints'] involving, 'misconduct' are dealt with appropriately.

Pursuant to sections 42 and 43 of the Act the Police Commissioner must deal with² a complaint in the way the Commissioner considers most appropriate, subject to the CMC's monitoring role.

If the Police Commissioner is satisfied that dealing with a complaint would be an unjustifiable use of resources; the Commissioner may take no action or discontinue action taken to deal with the complaint³.

The CMC has a monitoring role, amongst other things, to review or audit the way in which agencies (including the QPS) have deal with a complaint or class of complaint that may involve 'misconduct'.

Many complaints against police contain allegations, for example of assault or use of excessive force, which arise from an incident that has also resulted in the police charging the complainant with a criminal offence such as assault or obstruct police. In some, but not all, of these cases the circumstances of the alleged police conduct are the same as, or impossible to disentangle from, the circumstances which are relied upon in the criminal charge brought by the police against the complainant. In those circumstances it is considered that the court hearing the criminal proceedings is the appropriate forum to determine the facts at issue, either based on evidence given under oath or upon a plea of guilty⁴.

¹ 'inextricably interwoven', in these circumstances, means 'impossible to disentangle'

² For definition of 'deal with' see Schedule 2 of the Act

³ Section 42(3) of the Act

⁴ Such a matter is considered appropriate for the court to determine unless there is information to suggest that the criminal charge has been laid improperly by the police, for example, in an endeavour to cover up their inappropriate behaviour. In such cases, there may be an investigation of the complaint about the police conduct, including the bringing of the circumstances of the charges. In some instances such an investigation may lead to the withdrawal of the criminal charge against the complainant and disciplinary and / or criminal charges against the police involved.

Because these cases represent a significant proportion of complaints against police, the CMC has conducted this audit to ensure that the QPS is appropriately making the assessment decision that some of them are 'interwoven with court'.

This is to ensure that the assessment decisions are transparent and justifiable and that there can be public confidence in the integrity of the manner in which the Police Service deals with complaints.

KEY FINDINGS AND RECOMMENDATIONS

Key findings

After considering how each complaint in the audit sample was assessed, we reached the following conclusions.

- A significant percentage of complaints were appropriately assessed by the QPS as 'interwoven with court'.
- A number of cases contained some allegations that had been appropriately assessed as 'interwoven with court', but also contained allegations that had been inappropriately assessed.
- In a number of cases in the sample an assessment decision not to take any action in relation to the complaint could have been made because the complaint simply did not raise a suspicion of misconduct – for example accessing CCTV footage established that the alleged conduct did not occur.
- Some allegations were assessed as 'interwoven with court' when the circumstances of the alleged conduct of the police were clearly not the same as, or could be separated from, the circumstances relied upon in the criminal charge against the complaint. The allegation should have been dealt with in another manner, such as by way of investigation by the QPS.
- There is an apparent lack of understanding about the nature and purpose of preliminary inquiries prior to making an assessment decision; and in some cases, inappropriate inquiries have been made. Many inquiries categorised as 'preliminary inquiries' in some of the sample complaints in fact amount to an investigation of the complaint.
- In those cases in which the assessment decision was 'interwoven with court', follow-up action was not undertaken upon the conclusion of the relevant court proceedings.

Recommendations

We make the following recommendations to assist the QPS to make the assessment decision that a matter is interwoven with court in appropriate cases.

1. The QPS should:
 1. adopt, and insert in Section 18 [Complaints Management] of the QPS Human Resource Management Manual guidelines for, and
 2. ensure that adequate training is provided about:
 - i. conducting preliminary inquiries, and
 - ii. making the assessment decision that a complaint is 'interwoven with court'
- based on the following recommendations.

CMC Audit of the QPS's Assessment of Complaints as Interwoven with Court

December 2007 4

2. Preliminary inquiries are those inquiries that should be made for the purpose of ascertaining the nature, extent and scope of, and the circumstances surrounding, any actual conduct that may have given rise to the complaint, to assist in determining the most appropriate way to deal with the complaint. Once these things are established, any further inquiries in effect amount to an investigation of the complaint.
3. An assessment decision that a complaint may be dealt with as 'interwoven with court' should only be made in cases in which the circumstances of the alleged police conduct are the same as, or impossible to disentangle from, the circumstances which are relied upon to determine the facts at issue that will establish the elements of the criminal charge brought by the police against the complainant.
4. The appropriate preliminary inquiries in a case which appears as though it may be interwoven with court are as follows.
 1. Access available QPS records (such as CRISP, QP9) to ascertain if any criminal charge has been brought against the complainant arising out of the same incident that has given rise to the complainant's allegations.
 2. If such is the case, ascertain from those QPS records whether the circumstances of the alleged police conduct are the same as, or impossible to disentangle from, the circumstances which are relied upon in the criminal charge brought by the police.
 3. Access any CCTV or other visual recording of the alleged incident
 4. Speak with any independent witness nominated by the complainant.
 - 4.1 If:
 - the circumstances are interwoven, and
 - there is irrefutable evidence obtained as a result of preliminary inquiries (such as access to CCTV recording) that an allegation cannot be substantiated,

the matter should be finalised as 'not substantiated', rather than as 'interwoven with court'.
 - 4.2 If:
 - the circumstances are interwoven, and
 - there is no visual recording of the incident and / or no independent witness or any visual recording or any independent witness does not assist in determining what occurred ,

no further preliminary inquiries should be conducted and the complaint should be assessed as interwoven with court.
 - 4.3 If information provided by any independent witness nominated by the complainant suggests that the circumstances relied upon by the police are false and / or the criminal charge against the complainant has been laid improperly by the police, for example, in an endeavour to cover up their inappropriate behaviour, there should be an investigation of the complaint about the police conduct, including the circumstances of bringing the charges.

In some instances such an investigation may lead to the withdrawal of the criminal charge against the complainant and disciplinary and / or criminal charges against the police involved.

4.4 If preliminary inquiries establish that the complaint is not interwoven with court, the matter may then be investigated or otherwise dealt as considered appropriate.

5. If a complaint is interwoven with court and the complainant is acquitted of the charges and / or the court makes adverse comments or findings against the police officers involved in the incident which gave rise to the complaint of misconduct, the police prosecutor should report the comments or findings to the ESC. [It is noted that failed prosecutions are considered by a special committee.]

This requirement to notify the ESC should be contained in the Police Prosecutors Handbook.

6. Where a complaint is assessed as 'interwoven with court', the complainant should be sent an appropriate letter of advice pursuant to section 42(7) of the *Crime and Misconduct Act 2001*, explaining the reasons for not taking any action in relation to the complaint pending the conclusion of the court proceedings⁵. This letter should outline the process, including the obligation placed upon the police prosecutor, and also clearly inform the complainant of their right to re-enliven their complaint following the criminal proceedings should:
1. the complainant be acquitted,
 2. any adverse comments or findings be made by the court about the conduct of the police, or,
 3. the issues arising from the complaint not resolved.
7. If the complainant is not the person who has been charged with the criminal offence but is, for example, a relative of the 'victim' of the alleged police conduct or a by-stander, then it may be that the complaint should be dealt with other than as 'interwoven with court' It may well be that the third party's concerns can be resolved, for example, by an explanation of what has occurred and the basis for the criminal charge, thereby rectifying a misunderstanding.

⁵ The letter should point out the facts relied upon by the complainant that are the same as, or unable to be disentangled from, relied upon to support the criminal charge.

BACKGROUND INFORMATION

Legislation

Under the *Crime and Misconduct Act 2001* (Act), the misconduct functions of the CMC are to raise the standards of integrity and conduct in units of public administration, including the QPS, and to ensure that complaints about, or information or matters [‘complaints’] involving, ‘misconduct’ are dealt with appropriately.

Pursuant to section 42 of the Act:

- (1) The commissioner of police must expeditiously assess complaints, or information or matter (also a **complaint**) made or notified to, or otherwise coming to the attention of, the commissioner of police.
- (2) The commissioner of police must deal with a complaint about police misconduct in the way the commissioner of police considers most appropriate, subject to the commission’s monitoring role.
- (3) If the commissioner of police is satisfied that—
 - (a) a complaint—
 - (i) is frivolous or vexatious; or
 - (ii) lacks substance or credibility; or
 - (b) dealing with the complaint would be an unjustifiable use of resources;the commissioner of police may take no action or discontinue action taken to deal with the complaint.
- (4) The commissioner of police may, in an appropriate case, ask the commission to deal with a complaint about police misconduct or to deal with the complaint in cooperation with the commissioner of police.
- (5) If the commission refers a complaint about official misconduct to the commissioner of police to be dealt with, the commissioner of police must deal with the complaint in the way the commissioner of police considers most appropriate, subject to the commission’s monitoring role.
- (6) Without limiting how the commissioner of police may deal with a complaint about official misconduct, the commissioner of police may ask the commission to deal with the complaint in cooperation with the commissioner of police.

Under section 47(1)(b) and 48(1)(b), the CMC has a monitoring role to review or audit the way in which the Police Commissioner has dealt with a complaint or class of complaint that may involve ‘misconduct’.

QPS process

The Assistant Commissioner, Ethical Standards Command [ESC] has the delegated authority of the Police Commissioner to make the assessment decision about how to deal with a complaint.

Recommendations about how to deal with complaints received directly by the QPS are made by commissioned officers in the relevant Region in which the complaint is received. These recommendations are considered by officers in the ESC on behalf of the Assistant Commissioner. Complaints received directly by the CMC are referred to the ESC on behalf of the Police Commissioner.

Assessment process

The purpose of making preliminary inquiries is to ascertain the nature, extent and scope of, and the circumstances surrounding, any actual conduct that may have given rise to the complaint, to assist in determining the most appropriate way to deal with the complaint.

The assessing officer may have regard not only to documents and records currently in the possession of the QPS, for example, CRISP records, QP9s, audio or visual recordings, and may, in appropriate circumstances (see below for interwoven with court matters), make broader inquiries such as interviewing an independent witness.

Such preliminary inquiries may be sufficient to determine the final outcome of the complaint where, for example, a CCTV recording shows that the conduct alleged simply did not occur.

Assessment decision – ‘interwoven with court’

Many complaints against police contain allegations⁶, for example of assault or use of excessive force, which arise from an incident that has also resulted in the police charging the complainant with a criminal offence such as assault or obstruct police.

In some, but not all, of these cases the circumstances of the alleged police conduct are the same as, or impossible to disentangle from, the circumstances which are relied upon to establish the elements of the criminal charge brought by the police against the complainant.

The CMC agrees with the view that – subject to the preliminary inquiries mentioned below - in these circumstances it is appropriate for the QPS not to take any action in relation to the complaint in the first instance as the court hearing the criminal proceedings is the appropriate forum to determine the facts at issue, either based on evidence given under oath or upon a plea of guilty.

The appropriate preliminary inquiries in a case which appears as though the allegations may be interwoven with court are as follows.

1. Access available QPS records (such as CRISP, QP9) to ascertain if any criminal charge has been brought against the complainant arising out of the same incident that has given rise to the complainant's allegations.
2. If such is the case, ascertain from those QPS records whether the circumstances of the alleged police conduct are the same as, or impossible to disentangle from, the circumstances which are relied upon in the criminal charge brought by the police.
3. Access any CCTV or other visual recording of the alleged incident.
4. Speak with any independent witness nominated by the complainant.

If:

- the circumstances are interwoven, and

⁶ A complaint may contain a number of discrete allegations - ie claims, accusations, assertions. For example a complainant may complain that they were assaulted by police and that the police also failed to provide them with medical attention whilst they were retained in custody. At the outset, on the receipt of a complaint the discrete allegations need to be distilled.

- there is irrefutable evidence obtained as a result of preliminary inquiries (such as access to CCTV recording) that an allegation cannot be substantiated,

the matter should be finalised as 'not substantiated', rather than as 'interwoven with court'.

If:

- the circumstances are interwoven, and
- there is no visual recording of the incident and / or no independent witness or any visual recording or any independent witness does not assist in determining what occurred ,

no further preliminary inquiries should be conducted and the complaint should be assessed as interwoven with court.

If information provided by any independent witness nominated by the complainant suggests that the circumstances relied upon by the police are false and/or the criminal charge against the complainant has been laid improperly by the police, for example, in an endeavour to cover up their inappropriate behaviour, there should be an investigation of the complaint about the police conduct, including the circumstances of bringing the charges.

Similar considerations do not apply to independent prosecution witnesses. Their evidence against the complainant is appropriately for the court to hear under oath.

In some instances such an investigation may lead to the withdrawal of the criminal charge against the complainant and disciplinary and / or criminal charges against the police involved.

Of course, if preliminary inquiries establish that the complaint is not interwoven with court, the matter may then be investigated or otherwise dealt as considered appropriate.

If the circumstances of the complaint are not the same as, or are able to be separated from, those that support the criminal charge, even though they may arise out of the same incident, then the court will not be in a position to determine the facts at issue relevant to the complaint. Other action should be taken by the QPS to deal with the complaint.

For example, the following matter would be one appropriately assessed as 'interwoven with court':

The complainant alleges that, while attempting to leave a night club, a police officer assaulted him by throwing him to the ground on the footpath outside the club and punching him twice to the body. The complainant is, however, charged with obstruct police. The circumstances relied upon are that the complainant, who had been lawfully detained by police at the door of the night club, pushed the police officer in an attempt to escape from custody resulting in the police officer and the complainant falling to the ground on the footpath outside the club and a struggle ensued in which the police officer used closed hand tactics to the body of the complainant to gain control of the situation and enable him to handcuff the complainant.

The following allegation of assault / excessive force would not be interwoven with court as the circumstances of that allegation are not the same as those to be relied upon for the charge:

The complainant alleges that, when she was arrested, the police officer poked her in the chest, spun her arm above her head and forced her wrist backwards, causing her pain. The police allege that the complainant was clearly warned to move on twice but failed to do so and was arrested for contravening a direction or requirement. The circumstances of the alleged

excessive force are not the same as those that would be relied upon to establish the elements of the criminal charge, and need not be dealt with by the court hearing the charge.

The following allegation would also clearly not be a matter for court as the alleged conduct of the police officer would clearly not be considered as part of the criminal charge:

The complainant says that, after a struggle outside the night club, as a result of which he was arrested for obstruct police, when taken to the police car he was assaulted by the officer who deliberately rammed his head into the door rim of the vehicle.

It appears that from time to time complaints such as the last two referred to above are assessed as interwoven with court, because it is considered that:

- that the complainant will raise the alleged conduct during the court proceedings and the facts at issue will be dealt with and / or
- an assessment can be made about the credibility and reliability of the evidence of the complainant and other witnesses based on the findings and any comments of the court.

However, because the circumstances of the alleged conduct in these cases are not interwoven with the elements of the offence, in the vast majority of cases, the court will not hear any evidence in relation to the relevant facts at issue and will not be in a position to make any findings or comments in relation to the alleged police conduct; particularly if the complainant pleads guilty to the charge.

Outcomes of 'interwoven with court' proceedings

A finding of guilt in relation to the criminal charge brought against the complainant/accused, in effect, usually means that the complaint against the police cannot be substantiated. However, in some cases the presiding judicial officer may make adverse findings or comments about the conduct of the police. Such findings are relevant to the manner in which the complaint against police may be

Of course, if:

- the complainant is acquitted,
 - any adverse comments or findings be made by the court about the conduct of the police, and / or.
 - the issues arising from the complaint not resolved,
- then further consideration should be given about the appropriate action to resolve the complainant's concerns. The matter may warrant investigation or other form of management action.

The police prosecutor should report any of the above circumstances to the ESC in a timely manner, notwithstanding the failed prosecutions process.

Advice to complainant

In any event if a matter is assessed as interwoven with court, it is important that the complainant is sent an appropriate letter of advice pursuant to section 42(7) of the *Crime and Misconduct Act 2001*, explaining the reasons for not taking any action in relation to the complaint pending the conclusion of the court proceedings⁷. This letter should outline the process, including the obligation placed upon the police prosecutor, and also clearly inform the complainant of their right to re-enliven their complaint following the criminal proceedings should:

- the complainant be acquitted,

⁷ The letter should point out the facts relied upon by the complainant that are the same as, or unable to be disentangled from, relied upon to support the criminal charge.

- any adverse comments or findings be made by the court about the conduct of the police, or.
- the issues arising from the complaint not resolved.

Determining whether a complaint is 'interwoven with court' must be done on a case-by-case basis and is very much dependent upon the nature of the alleged conduct and the criminal charge and circumstances of each case. No general hard and fast rule can be made about the application of the assessment decision of 'interwoven with court' – eg that it applies to all allegations of a certain type.

Accordingly, the reasons why the CMC formed the view that certain complaints were not 'interwoven with court' did not relate in any consistent way to the type of allegations concerned. Other issues with the assessments are discussed below.

METHODOLOGY

The CMC's Police Program

To carry out its monitoring and capacity development roles, the Complaints Services Police Program is staffed by experienced legal officers, Queensland police officers, civilian investigators and complaints officers.

Audits of complaints dealt with by the QPS are conducted by members of the Police Program.

The purpose of the audit

The purpose of the audit is to determine whether the QPS is making the assessment decision not to take any action because the matter is 'interwoven with court' in appropriate cases.

Selection of audit sample

During the nominated period - 1 July 2005 to 30 June 2006- a total of 183 complaints were assessed as 'interwoven with court' by the QPS.

We selected a random sample of 62 cases (approximately one in three). In some of these cases, both the relevant Region and the ESC assessed the complaint as 'interwoven with court', in others cases it was only one of them that did so.

This sample consisted of selected matters from each of the Regions:

- Far Northern Region
- Northern Region
- Central Region
- Southern Region
- North Coast Region
- Metropolitan North Region
- Metropolitan South Region
- South-eastern Region

- Operations Support Command
- State Crime Operations Command
- Ethical Standards Command.

The QPS provided the relevant files for the audit, as well as providing additional information as and when requested by the CMC.

Auditors

The auditor comprised a legal officer who reviewed each of the 62 files. The auditor's findings were also overviewed by other CMC legal officers.

THE AUDIT

This section of the report details the findings of the audit, and summarises relevant information.

Findings

This section sets out the audit findings in relation to the Regional and the ESC assessments.

How well are the QPS Regions appropriately recommending that complaints be dealt with as 'interwoven with court'?

Of the matters in which it was recommended by the Regions that the allegations be dealt with as being interwoven with court proceedings, the CMC agreed with 88.68 per cent.

How well is the ESC appropriately making the decision that complaints be dealt with as 'interwoven with court'?

Of the matters where the ESC made the assessment decision 'interwoven with court', the CMC agreed with 83.87 per cent.

How well is the ESC monitoring the Regions?

Of the 62 audited cases, the ESC agreed with the Regions' recommendations in 94.34 per cent of the matters.

In the 5.66 per cent of the matters in which the Region did not identify the complaint as being 'interwoven with court' but the ESC did, it was usually the case that the matter was identified by the Region as being both 'interwoven with court' and 'unsubstantiated' (due to preliminary inquiries). The Regions recommended that the complaints be assessed as 'unsubstantiated', but they were assessed by the ESC as 'interwoven with court'.

How well are the individual regions appropriately making the decision that complaints be dealt with as 'interwoven with court'?

Due to the limited number of files audited, there was insufficient data to formulate statistically significant results statistics in relation to the decisions made by individual Regions⁸.

How well are different allegations within a complaint being assessed as 'interwoven with court' ?

The majority of the complaints assessed as being interwoven with court concern similar allegations, and we found that the type of allegation is not a significant indicator of the likelihood of an appropriate assessment decision.

In this section, we refer to the individual allegations, rather than entire matters. Most complaints involved more than one allegation, and in some of these cases we agreed with the assessment of some allegations, but not others.

We disagree with the assessment of 'interwoven with court' in relation to a number of allegations [24 allegations arising from 11 separate files] about assault or excessive force, treatment in custody, arrests or searches, and demeanour and attitude.

Analysis

Overall

Though the QPS has generally appropriately assessed the complaints in the sample, the audit did indicate a number of issues that warrant attention.

Unsubstantiated Matters

Most of the complaints considered by the CMC as inappropriately assessed were on the basis that they were finalised as being 'interwoven with court' when they were in fact able to be finalised as 'unsubstantiated'. Although technically 'interwoven', these matters were such that only initial inquiries were required in order to conclusively disprove the allegation/s.

To make an assessment decision that a complaint is interwoven with court leaves open the possibility that it may be re-enlivened depending upon the outcome of the criminal proceedings and any adverse findings or comments of the court.

If a complaint can be finalised as unsubstantiated on the basis of irrefutable evidence, such as CCTV footage or paper evidence, no further action is required in relation to the complaint, either before or after the court proceedings⁹.

Example: APRS file number: 2005/01887

The complainant was arrested for contravening a direction or requirement. She

⁸ Of the 62 matters audited (and randomly selected from each region or command) it is expected that an average of 6 matters would have been selected from each (other than the ESC). This is not a satisfactory basis to determine whether an individual region or command was correctly identifying matters 'interwoven with court'.

⁹ This would not apply if a determination has to be made about whether or not the level of force utilised was justified in the circumstances – such a determination would normally require some level of investigation.

alleged that, during her arrest, the subject officer poked her in the chest, spun her arm above her head and forced her wrist backwards, causing her pain. Although related, the circumstances of the alleged police conduct are not clearly interwoven with the circumstances of her arrest, because it would not be necessary to decide whether the force used in the arrest was excessive in establishing the elements of the offence of contravening a direction or requirement. In any event the Compass Summary Report indicated that surveillance tapes for the incident outside the nightclub clearly showed the concerned party acting uncooperatively and resisting arrest, and there was no evidence of the conduct which she alleges. The complaint could therefore have been finalised on the basis that it was 'unsubstantiated'.

Example: QPS file number: 2005/00275

The complainant was arrested for public nuisance. He made allegations that during the arrest the handcuffs were applied too tightly and further, that when he was removed from the police vehicle at the watch-house, he was pushed into a wall and laughed at by the police officers.

Watch-house CC TV footage clearly depicts the watch-house allegations to be untrue and they were correctly finalised as 'unsubstantiated'.

The allegation in relation to the forcible application of handcuffs, however, could not be finalised as 'unsubstantiated'. It also was not an allegation that should have been assessed as 'interwoven with court', as the circumstances relevant to the appropriateness of the force used during the arrest were not the same as those relied upon to establish the criminal charge of public nuisance.

Matters that are not interwoven with court proceedings

Some of the matters that were identified by the CMC as being inappropriately assessed as 'interwoven with court' were matters where the circumstances of the complaint had no bearing on the criminal offence with which the complainant had been charged.

Example: QPS file number: 2005/01938

The complainant was arrested by police in relation to outstanding warrants for stalking and breaching domestic violence orders. He was formally interviewed by police in relation to the offences and refused to answer any questions. The complainant alleged the subject officer assaulted him and used obscene language after the interview was concluded.

The allegations were finalised on the basis of being 'interwoven with court'. However, the circumstances surrounding the treatment of the concerned party at the police station at that time had no relevance to and no bearing on the charges of stalking and breaching domestic violence orders. This is especially so due to the fact that the concerned party did not make any admissions; therefore the contents or admissibility of the record of interview would not be relevant to the criminal proceedings.

Example: QPS file number: 2005/02487

The complainant was arrested for suspected prostitution and eventually charged

with obstructing police (she was never charged with prostitution offences). She made a number of allegations against the two police officers who arrested her, which were correctly identified as being interwoven with court proceedings.

However, a fourth allegation was made against a separate police officer who later completed the relevant paperwork at the police station. The complainant alleged that the officer filled in her occupation as 'prostitute' even though she vehemently denied being a prostitute. This allegation did not require any investigation as it was clear on the paperwork that the officer did in fact list her occupation as 'prostitute'. This was a matter that could have been dealt with separately to the court proceedings. It is also very unlikely to have been raised as relevant to the court proceedings for the obstructing police charge.

Example: QPS file number: 2005/00272

The complainant in this complaint about police was also the complainant in a grievous bodily harm matter. The allegations against police were based around claims of police inaction, discrimination and inappropriate comments made by police officers.

A number of the allegations were finalised on the basis that they were 'interwoven with court' as the complainant had commenced a discrimination hearing against the QPS and a conciliation meeting with the Anti-Discrimination Council of Queensland had been arranged.

The separate discrimination proceedings commenced by the complainant are not criminal proceedings. The matter should have been left open pending the outcome of the discrimination proceedings or otherwise dealt with in parallel with the proceedings – it should not have been finalised because of them.

Preliminary inquiries

The purpose of making preliminary inquiries is to ascertain the nature, extent and scope of, and the circumstances surrounding, any actual conduct that may have given rise to the complaint, to assist in determining the most appropriate way to deal with the complaint.

It is concerning that a number of the files included in the audit indicated that substantial 'preliminary inquiries' were conducted in relation to matters that were assessed as being 'interwoven with court'.

On some occasions, the subject officers, concerned party and/or witnesses were interviewed about the allegation prior to the matter being finalised.

This may be inappropriate if the matter is to be dealt with by the court in the first instance, because these people may be required to give evidence at subsequent criminal proceedings, and the information given to them and supplied by them in the interview could affect the outcome of the judicial proceeding.

The appropriate preliminary inquiries in such a case are as discussed above.

Example: QPS file number: 2005/01892

This case appears to be an example of inappropriate preliminary inquiries'.

The complainant was restrained and forcibly removed from a shopping centre by police. She was subsequently charged with assaulting and obstructing police. She alleged that, during the arrest, the subject officers punched her in the face, broke her nose, slammed her on the ground numerous times and otherwise assaulted

her.

The Compass Summary Report indicates that the 'preliminary investigations' involved the following: speaking to the administrative officer at the police beat who observed the incident; 'informally interviewing' one of the subject officers and interviewing an independent witness who was working in the shopping centre at the time.

The allegations surround the circumstances of the arrest of the concerned party and appear to be interwoven with the charges of assaulting and obstructing police for which she was due to face court.

In those circumstances, it was not appropriate to interview police witnesses and a prosecution witness.

Follow-up actions

One of the complaints finalised as 'interwoven' did not in fact proceed to court, due to no evidence being offered by the prosecution.

In two other cases, the complainant had contacted the QPS to advise that they wished to enliven their complaint following the court proceedings. The Compass Summary Reports showed that nothing further had been done in relation to these files.

More concerning is the fact that one of the audited files showed a court decision in favour of the concerned party that was not followed up.

Example: QPS file number: 2005/01294

The complainant made the following allegations in relation to the subject officers: unlawful arrest, assault and excessive force. An independent witness had also contacted the CMC and made a complaint about police actions with respect to the same incident. The complainant was charged with being a public nuisance, assaulting police and obstructing police. As the circumstances surrounding the charges were the same circumstances surrounding his allegations, the matter was correctly identified as being interwoven with court.

However, the matter proceeded to a summary hearing where all of the charges against the complainant were dismissed. He was also awarded \$4,110 in costs, which indicates the presiding Magistrate found very strongly in his favour.

It is therefore concerning that the matter was not brought to the attention of the QPS or the CMC for the allegations to be enlivened and the conduct of the subject officers investigated.

When the court proceedings have already been dealt with

One matter was finalised on the basis that the allegations were 'interwoven with court', when the court proceedings had, in fact, already concluded at the time the file was finalised.

In file number 2005/01459, the Compass Summary Report indicated that the concerned party had already attended court and pleaded guilty. There was therefore no basis for finalising the matter as 'interwoven with court'.

Letters to complainants

It is also important to comment on the letters that are being sent by the QPS to the complainant informing them of the assessment decision and the reasons for that decision, and options available to them.

In the audit, regard was had to the pro-forma letter used by the Regions and the pro-forma letter used by the ESC.

The pro-forma letter from the ESC only indicates that a complainant can enliven their complaint if adverse comments are made by the court.

Appendix A: Tables

<u>Would the CMC have categorised the matter as 'interwoven with court'?</u>	<u>Files</u>	<u>Per cent</u>
Yes - all allegations	51	82.26
No - some allegations	4	6.45
No - no allegations	7	11.29
Total	62	100.00

<u>Did the ESC agree with the assessment of the region?</u>	<u>Files</u>	<u>Per cent</u>
Yes – both said interwoven	49	92.45
Yes – both said not interwoven	1	1.89
No – region said no, ESC said yes (Matters where region not involved)	3 (9)	5.66
Total	62	100.00

<u>Did the CMC agree with the region?</u>	<u>Files</u>	<u>Per cent</u>
Yes - both said interwoven	43	81.13
Yes - both said not interwoven	4	7.55
No - region said yes, CMC said no	3	5.66
No - region said yes, CMC said no to some (Matters where region not involved)	3 (9)	5.66
Total	62	100.00

<u>Did the CMC agree with the ESC?</u>	<u>Files</u>	<u>Per cent</u>
Yes - both said interwoven	51	82.26
Yes - both said not interwoven	1	1.61
No - ESC said yes, CMC said no	6	9.68
No - ESC said yes, CMC said no to some	4	6.45
Total	62	100.00

<u>Did the CMC disagree with either the region or the ESC?</u>	<u>Files</u>	<u>Per cent</u>
No - agreed with both (or region not involved)	52	83.87
Yes - disagreed with one or both	10	16.13
Total	62	100.00

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APPENDIX D: Reviews and inquiries that have influenced the QPS discipline system

To understand the context in which the current QPS discipline system has developed, it is important to examine previous reviews and inquiries that have influenced it. Arguably, Queensland's 1987 *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (the Fitzgerald Inquiry) represents one of the most pervasive and enduring influences on modern policing in Queensland and in Australia. The resulting 1989 *Report of a Commission of Inquiry Pursuant to Orders in Council* (the Fitzgerald report) not only highlighted the damage associated with misconduct within our public institutions and law enforcement agencies, but also provided a detailed blueprint for structural reform within the then Queensland Police Force (QPF) and the broader Queensland public sector. This landmark report remains one of the most comprehensive and referenced documents on police and public sector accountability, and sets the benchmark for a range of other reviews into various aspects of policing and the QPS, including assessment of its discipline processes and professional standing.

The Fitzgerald Inquiry 1987

The Fitzgerald Inquiry was scathing about the system for dealing with police misconduct in Queensland at the time. The Inquiry concluded that:

... the complaints and discipline system was inefficient and ineffective in detecting and preventing unethical behaviour and ... there was a clear lack of commitment within the QPS to properly investigate complaints of police misconduct.²⁴²

The Inquiry identified a wide range of issues with the QPF and the broader political environment in which it operated. Fitzgerald described the QPF as 'debilitated by misconduct, inefficiency incompetence and deficient leadership'. Further, officers were characterised by a 'lack of discipline, cynicism, disinterest, frustration, anger and low self-esteem.'²⁴³

The Inquiry focused on five key themes relating to police integrity:

- inadequate external scrutiny and oversight of the investigation of misconduct
- the existence of a strong 'code of silence' among police
- inappropriate rules and procedures for reporting and investigating misconduct
- closed recruitment policies
- poor management and supervision.²⁴⁴

242 Criminal Justice Commission 1997, *Integrity in the Queensland Police Service: implementation and impact of the Fitzgerald Inquiry reforms*, CJC, Brisbane, p. 2

243 Fitzgerald report op.cit., p. 200

244 CJC 1997, op.cit., pp. 2–3

External oversight

Responsibility for receiving and investigating complaints against police rested at the time with the Police Complaints Tribunal. The Inquiry criticised its limited power, structural deficiencies (composition and methods of appointment) and the way police manipulated investigations to cover up cases of corruption. The Tribunal had no power of determination and could only make recommendations to the Police Minister who would then decide what action was to be taken. Furthermore, it did not have the power to discipline or prosecute, or to investigate complaints lodged directly with the QPF. Fitzgerald noted that the Tribunal was 'met with obstruction and non-cooperation from the Police Force', 'its recommendations [were] ignored or diluted' and it had 'the effect of masking rather than dealing with police misconduct'.²⁴⁵ Consequently, despite well-meaning efforts, it was 'ineradicably tarnished with a deservedly poor reputation'.²⁴⁶

Code of silence

The old regulations governing standards of conduct (Police Rules) required police to report *knowledge of*, not *suspicion or allegations of* police misconduct. Regardless of this, the Inquiry identified an unwritten police code which had allowed misconduct to flourish and 'reduce, if not almost eliminate concern at possible apprehension and punishment as a deterrent to police misconduct'.²⁴⁷ Under the code, police were not permitted to criticise their colleagues, particularly to anyone outside the organisation, or to cooperate in investigations of fellow police. Officers who did make a complaint received little or no support from the organisation. Furthermore, once a complaint had been made, the Police Rules governing how it was dealt with were weighted heavily in favour of the subject officer. This set up a full adversarial process with the officer protected by privilege against self-incrimination.

Fitzgerald determined that the Police Rules were unclear, poorly defined, provided little guidance on the relative importance of different activities or conduct, and did not distinguish between types of conduct to be regarded as disciplinary or criminal. Furthermore, he considered that a separate plain language code of conduct, enforced by disciplinary provisions, was needed to supplement the ordinary law.²⁴⁸

Internal investigations

The police Internal Investigations Section was described as 'woefully inadequate, hampered by a lack of staff and resources and crude techniques'.²⁴⁹ Before 1987, there was no requirement for all complaints or conduct issues to be referred to the section. It had no capacity to carry out surveillance of other police, there were no standard operating procedures for the investigation of suspected police, and the section was severely under-resourced. Each investigator routinely had responsibility for about 15 major investigations at a time, with each investigation taking two to three months. The majority of investigations resulted in no charges of any sort (departmental or criminal) because of 'insufficient evidence,' despite the fact that similar evidence would be used to support criminal prosecution of civilian suspects. In fact, Fitzgerald commented on 'the stark contrast' in the way accused police and civilian suspects were treated.²⁵⁰ The Inquiry also criticised the fact that all investigations were ad hoc and reactive with no effort directed at analysing trends or preventing misconduct. There had been no attempt to 'analyse the major sources of complaints, types of complainants, categories of complaints or whether a greater

245 Fitzgerald report op.cit., p. 290

246 *ibid.*, p. 292

247 *ibid.*, p. 202

248 *ibid.*, p. 294

249 *ibid.*, p. 289

250 *ibid.*, p. 289

incidence of complaints is received about members of particular units.²⁵¹ Overall, the section 'lacked commitment and will, and demonstrated no initiative to detect serious crime'.²⁵²

Recruitment and selection

Fitzgerald described the Force's recruitment and selection practices as 'subjective and restrictive'.²⁵³ Most police recruits were young and inexperienced; there was no performance appraisal system; and promotion within the Force was based primarily on seniority rather than merit. The lack of diversity in recruitment and the exclusive reliance on internal promotion promoted insularity and resistance to external scrutiny.

Management and supervision

The Inquiry identified a wide range of deficiencies in the management of the Force. Some related broadly to philosophy and style, while others were more specific. The Force was centralised and hierarchical, with an inflexible management style characterised by authoritarian command and control practices. Information and administrative systems were inadequate, procedures and guidelines were inappropriate, and training for supervisors and managers was insufficient. These deficiencies 'enabled misconduct to be hidden from scrutiny and allowed officers to be unaccountable for their actions'.²⁵⁴

Fitzgerald argued that,

Supervisors also play an active role in the discipline process. If misconduct is to be controlled, compliance with expected standards of conduct and performance by individual officers must be monitored and controlled. Supervisors must ensure staff are fully informed of required performance standards, reinforce those standards regularly and deal with minor breaches of conduct and shortfalls in performance in a timely and consistent manner.²⁵⁵

The Inquiry also noted that the transfer system had been 'abused to punish troublemakers'.²⁵⁶ In some cases, officers who would not comply with the demands of superiors were transferred to create vacancies in particular areas such as the Licensing Branch, so these could be filled by a person favoured by a senior officer.

General recommendations

The Inquiry reported in 1989, recommending a range of reforms to restore public confidence, the administration of the criminal justice system, government and the electoral process. In all, over 100 general recommendations were grouped under three main categories: the establishment of the Criminal Justice Commission to oversee police integrity; reforms to the Queensland Police Force; and the establishment of the Electoral and Administrative Review Commission.

The Inquiry recommended a complete reorganisation and restructure of the Queensland Police Force. Key discipline and integrity-related recommendations included:

- restructuring and decentralising the Force by moving to a regional model of policing with greater management autonomy at regional level
- developing a proactive community policing model, emphasising crime prevention and community involvement

251 *ibid.*

252 *ibid.*

253 *ibid.*, p. 364

254 CJC 1997, *op.cit.*, p. 3

255 Fitzgerald report *op.cit.*, p. 266

256 *ibid.*, p. 365

- flattening rank structures, clarifying lines of communication and specifying responsibility and accountability
- restoring the police inspectorate to internally monitor operations, procedures, performance and standards
- employing suitably qualified civilian staff in positions not requiring police powers, skills or experience (civilianisation) to free up trained police for operational duties and break up the closed culture among police
- deploying human resources according to rational criteria
- introducing merit-based promotion, supported by an effective performance appraisal system
- establishing a formal process for determining transfers (at regional level) and abolishing the right to appeal a transfer decision
- abolishing special squads and establishing a task force command to deal with investigations which could not be managed at a regional level
- comprehensively reviewing and reorganising police information systems.
- establishing a formal system for registering informants
- overhauling the selection and training of police recruits, including introducing lateral recruitment, and term and contract appointments
- improving training throughout an officer's career, with greater emphasis on management and supervision skills
- rotating officers through sensitive or 'high risk' areas on a three- to five-year basis
- establishing an employee assistance service to provide confidential counselling for members and their families
- reviewing and modernising the Police Act.²⁵⁷

Discipline-related recommendations

Integrity-related reforms fell into two broad categories: those aimed at improving the processing, investigation and monitoring of complaints, and those directed at changing the organisational climate of the QPF to promote proper conduct and reduce the tolerance of misconduct.²⁵⁸

Specific discipline recommendations included:

- requiring that members report all misconduct or suspected misconduct, other than of a purely disciplinary significance (breaches of discipline) to the CJC on a confidential basis
- introducing discretionary stand-down provisions for officers under investigation
- implementing adequate procedures to protect officers who make reports against other police from any form of retribution
- replacing the adversarial system of dealing with complaints and disciplinary investigations with an inquisitorial process where the 'rules of evidence' need not apply and there is no protection against self-incrimination
- requiring subject officers and other police able to provide relevant information to answer questions and provide information
- empowering investigating officers to determine whether a disciplinary offence has been committed, and to administer summary punishment
- establishing the Misconduct Tribunal as an appeal mechanism for officers aggrieved at a disciplinary determination or penalty

257 *ibid.*, pp. 380–4.

258 CJC 1997, *op.cit.*, p. 3

- ensuring that disciplinary procedures and administrative action be enforced independently of any other criminal or civil considerations (i.e. that recommended disciplinary action not be deferred pending the outcome of any criminal proceedings arising from or connected with the same activities)
- empowering regional commanders to dismiss vexatious or mischievous complaints against police, provided they are recorded and reported to the CJC
- ensuring that complainants be advised of any action taken and the outcome of the complaint.²⁵⁹

The new oversight body

Fitzgerald also proposed the creation of the Criminal Justice Commission (CJC) as an independent oversight organisation with the power to investigate, determine and monitor complaints about the QPF. The role of the CJC extended not only beyond that of its predecessor, but also beyond the scope of any existing oversight body in Australia. In addition to investigating police complaints, the CJC was responsible for overseeing other areas of reform within the QPF, and making policy directives based on findings from its research and investigation sections.

Compared with the old Police Complaints Tribunal the CJC was well-resourced to fulfil these responsibilities, and had the capacity to conduct its own proactive investigations, supported by coercive investigative powers. Fitzgerald had also recommended that QPF officers be seconded to the CJC to be involved in investigating complaints about police because of their knowledge of police practices and attitudes. The seconded police worked under the supervision of civilian and were answerable to the CJC rather than the QPS.

Public Sector Management Commission Review (1993)

The Public Sector Management Commission (PSMC) conducted the first major post-Fitzgerald review in 1993.²⁶⁰ The Commission examined the structure, operations and management of the QPS as part of a broader program of public sector reviews. However, it was inevitable that the review would also assess the implementation and early impact of the Fitzgerald recommendations. Overall, the review identified considerable progress, particularly in the areas of ‘recruitment, training, community relations and regionalisation of decision-making’.²⁶¹

Importantly, the PSMC found that the QPS and the CJC had implemented most of the discipline-related recommendations, and that the discipline process had evolved from one that ‘was completely discredited, to one that is now structured and effective’.²⁶² However, there were a number of problems with the new discipline system, primarily with the internal investigation process. The PSMC found that:

- investigation times for some matters were excessive
- extensive investigation of minor matters consumed significant resources
- there was a lack of consistency in the application of penalties
- there was no real focus on prevention, education or other remedial outcomes for even minor matters; rather full investigation and punishment represented normal practice.²⁶³

The Commission acknowledged the value of the new informal resolution and mediation processes and encouraged the Service to continue to develop other such disciplinary options. The PSMC also recommended that the QPS:

259 Fitzgerald report 1989, op. cit., pp. 293–8, 387–388)

260 Public Sector Management Commission 1993, *Review of the Queensland Police Service*, PSMC, Brisbane

261 *ibid.*, p. 1

262 *ibid.*, p. 131

263 *ibid.*, pp.132–3

- develop information systems to improve reporting and provide comprehensive and up-to-date statistical data on complaints and discipline to support the identification of trends and the implementation of training and prevention strategies
- regularly review policy and procedural matters to ensure continued development of the system and consistency in the application of disciplinary procedures and outcomes across regions
- devolve greater responsibility for dealing with issues to local level (region, district and division) with appropriate oversight by the Professional Standards Unit.

Importantly, the PSMC also recommended that the CJC start to devolve greater responsibility for dealing with complaints and discipline back to the QPS as the Service continued to mature, with appropriate monitoring by the CJC. At that time, the QPS dealt mainly with minor disciplinary matters, while more serious matters remained the responsibility of the CJC.

Commenting on a number of other issues relevant to the broader integrity system, the Commission found that:

- the new Performance Planning and Assessment (PPA) system was being used only to determine eligibility for pay point progression and not for human resource development.
- the Service needed to investigate and address legislative and industrial restrictions on the lateral movement (transfer) of staff, and QPS's continued practice of allowing reviews of transfers
- the Service's education and training focus and funding had swung almost entirely to the pre-service (recruit) component at the expense of in-service training and professional development
- front-line supervisors received no management training and development, and there was little such training for middle managers.

Bingham Review 1996

In March 1996, the Police Minister appointed a committee headed by Sir Max Bingham QC with a broad mandate to review QPS service delivery and assess the implementation of the Fitzgerald Inquiry recommendations.²⁶⁴

The discipline system

The review committee acknowledged a number of important changes to the QPS discipline system since the Fitzgerald Inquiry, but noted ongoing problems in a number of areas. The primary areas of concern were lengthy delays, inconsistent sanctions, and the 'over-zealous pursuit' of minor matters.²⁶⁵ The committee also expressed concern about:

- the overuse of suspended sanctions.
- the attachment of a limited life to (or expungement of) disciplinary sanctions.
- the use of management-initiated transfers as an informal disciplinary mechanism.
- continuing confusion about 'double jeopardy' as it relates to the charging of police with a criminal offence and a disciplinary offence arising from the same facts.
- dissatisfaction by officers with inconsistencies in the application of disciplinary sanctions, particularly regarding sanctions for comparable breaches.
- increased use of 'no further action' as an alternative to informal resolution in some regions.

²⁶⁴ Queensland Police Service Review Committee & Bingham, Max Sir & Queensland Police Service 1996, *Report on the Review of the Queensland Police Service*, QPS Review Committee, Brisbane.

²⁶⁵ *ibid.*, p. 231

Among other things the committee recommended:

- widening the use of informal resolution, supported by greater monitoring by ESC.
- the establishment of guidelines on the appropriate use of ‘no further action’.
- amending s. 4(2) of the to permit a prescribed officer to provide advice or guidance (a remedial approach) instead of necessarily imposing a disciplinary sanction
- that correction by way of guidance as a management initiative not be open to review²⁶⁶
- the inclusion of ethics education as a core component in all police education and training
- broadening the range of sanctions that superintendents and chief superintendents can impose so they can hear and determine a wider range of matters.

The committee rejected suggestions that fewer officers should be eligible to conduct disciplinary hearings, arguing strongly that ‘responsibility for discipline is an inherent part of the managerial role.’²⁶⁷ Bingham also noted that ‘an effective discipline system not only punishes wrong behaviour but also encourages and rewards good conduct’ recommending the introduction of a system to recognise commendable conduct by officers.²⁶⁸

Importantly, the committee focused considerable attention on the need for a preventive and problem-solving approach to discipline, arguing that the development of strategies to minimise complaints was at least as important as the reactive approach to administering disciplinary matters.²⁶⁹ It noted that the QPS relied primarily on trends in reported complaints to gauge the integrity of its officers. Consequently, the Service needed to develop systems to ‘[identify] people, systems, and conduct overrepresented in complaints statistics’ and ‘patterns which are indicative of procedural inadequacies and management deficiencies’.²⁷⁰ This was the first step to determining how to address identified problems and prevent them recurring.

Bingham also commented on the perception among police that there were a large number of false complaints. While acknowledging that a small proportion of complainants lodge ‘vexatious’ complaints with the intention of causing trouble for the subject officer, the committee noted that complaints were not ‘false’ simply because they were found not to be substantiated. Rather, to some extent, this reflected the inherent difficulty of obtaining sufficient evidence to prove allegations to the required legal standard. The committee reinforced the need for a problem-solving approach, recommending that ‘measures aimed at reducing complaint numbers should focus ... on the majority of complaints which apparently have some substance, to identify recurrent themes’.²⁷¹

Finally, the committee concluded that despite significant gains, the integrity system ‘was not yet sufficiently developed to enable the broadening of the QPS’s internal disciplinary jurisdiction’.²⁷²

Its overall conclusion was that:

the discipline system should not be used arbitrarily; penalties should be consistent, they should not be excessive, and should not be used to punish genuine mistakes. However the system should ensure that unacceptable behaviour is punished, and in serious cases, determine whether a police officer is a fit and proper person to remain in the QPS.²⁷³

266 Police Discipline Regulation, r. 11

267 *ibid.*, p. 244

268 *ibid.*, p. 231

269 *ibid.*, p. 234

270 *ibid.*, p. 235, 256

271 *ibid.*, p. 252

272 *ibid.*, p. 240

273 *ibid.*, p. 11

Other relevant issues

More broadly the committee criticised the performance, planning and assessment system noting that both officers and supervisors 'treat the process in a cursory fashion' and that it failed to provide 'reliable and consistent information' for promotional purposes.²⁷⁴ Furthermore, linking the system to pay point progression contributed to supervisors' reluctance to document poor performance.

On a positive note, Bingham acknowledged the development of the new Management Development Program for officers aspiring to positions in middle management (at sergeant, senior sergeant and inspector rank).

Other relevant recommendations included:

- developing a clear rotation policy for officers in 'high risk' locations and units.
- overhauling the new Performance Planning and Assessment system, including ensuring that it became an integral part of the promotion system.
- improving risk management policies and procedures and training for managers.

CJC reviews of the implementation of Fitzgerald recommendations

In late 1991, the Parliamentary Criminal Justice Committee (PCJC) recommended that the CJC conduct a review of the implementation of the Fitzgerald Inquiry recommendations as they related to the QPS. In response, the CJC published three separate reports:

- *Recruitment and education in the Queensland Police Service: A review* (1993)
- *Implementation of reform within the Queensland Police Service: The response of the Queensland Police Service to the Fitzgerald Inquiry recommendations* (1994)
- *Integrity in the Queensland Police Service: Implementation and impact of the Fitzgerald Inquiry reforms* (1997).

The 1993 review of recruitment and education found that the reform focus had been at the expense of in-service training. It noted that there was no systematic method in place for determining who needed what training, that training needs were not linked to the PPA process, and that there was a general lack of recognition within the QPS of the priority of education and training.

The focus of the 1994 report was on those recommendations which did not relate directly to internal discipline and complaints. Rather, the review evaluated the extent to which the QPS had moved towards the organisational model envisaged by the Fitzgerald Inquiry with a focus on the key areas of:

- regionalisation
- community policing
- management of the allocation of police
- civilianisation
- transfers and promotions
- establishment of a task force arrangement (State Crime Operations Command)
- management of information services
- management structures and processes.

²⁷⁴ *ibid.*, p. 119

Overall, the CJC found that there had been significant progress and the QPS had become 'a substantially more accountable, open and professional organisation'.²⁷⁵ However, the review identified a number of key areas requiring further reform including continuing problems and dissatisfaction with the transfer system, and the need to recognise the critical role of middle managers within the organisation by providing appropriate training, resources, support and feedback.

In 1997 the CJC published the second review which focused on the Fitzgerald recommendations directed towards improving the police complaints and discipline process and enhancing integrity in the Service.²⁷⁶ The Commission recognised the following significant improvements:

- the ability to deal with minor errors managerially (informal resolution) rather than diverting them to the complaints system
- the development of strategies to identify officers with lengthy complaint histories
- a requirement for investigators to incorporate suggestions for remedial action in their reports where appropriate
- the development of ethics education components in some training programs
- plans to improve training for middle managers through the new Management Development Program (although this was not compulsory for officers not seeking promotion)
- the then imminent establishment of the ESC to facilitate a more proactive approach to preventing and detecting police misconduct
- evidence of an overall improvement in standards of police behaviour, and increased public confidence in the QPS.

However, the CJC also made a number of recommendations for continuing reform including:

- developing a 'comprehensive, integrated approach to ethics education in all aspects of QPS training'
- improving training and development for supervisors and managers, including field training officers
- ensuring appropriate action is taken when profiling identifies 'problem' officers or work units
- improving organisational support for members who report misconduct
- regular rotation of staff, particularly in 'high risk' areas to prevent complacency and reduce opportunities for police to develop and maintain corrupt associations.

In 2001, the Commission published *Integrity in the Queensland Police Service: QPS reform update*. In this report, the CJC reiterated that overall standards of behaviour in the QPS had improved in the previous decade, although instances of drug-related corruption and authorised release of confidential information had prompted further CJC reviews.²⁷⁷ The report again highlighted the need for improved standards of management and supervision within the QPS; and for managers to be able to access appropriate training for staff to support the new range of managerial strategies for resolving complaints (Project Resolve).

275 Criminal Justice Commission 1994, *Implementation of reform within the Queensland Police Service: The response of the Queensland Police Service to the Fitzgerald Inquiry recommendations*, CJC, Brisbane, p. 210

276 Criminal Justice Commission 1997, *Integrity in the Queensland Police Service: Implementation and impact of the Fitzgerald Inquiry reforms*, CJC, Brisbane.

277 In late 1996, the CJC established the Carter Inquiry into police misconduct in the illicit drug trade. In 2000, it published *Protecting confidential information* — the findings of an investigation into the unauthorised use and disclosure of confidential police information.

Service Delivery and Performance Commission Review (2008)

In 2008, the Service Delivery and Performance Commission (SDPC) conducted the next major external review of the QPS as part of a broader program of public sector reviews.

Consistent with the findings of previous reviews, the SDPC noted an overall improvement in ethical practice and professionalism in the QPS in the years since the Fitzgerald Inquiry, as evidenced by the staged devolution of complaint handling from the CMC to the QPS. However, the Commission also noted stakeholders' concerns about the risk of slippage in professional and ethical standards. The sergeant and senior sergeant levels were identified as a particular risk because of their influence on culture and performance at operational level, and because most officers at this level did not have first-hand experience of the effect of corruption, as they had not been in the Service at the time of the Fitzgerald Inquiry.²⁷⁸

QPS members again identified the time taken to finalise disciplinary matters as their most significant concern. With matters resulting in disciplinary hearings taking one to three years to finalise, the Commission noted the detrimental effect of such delays on the officer concerned, their managers, and on service delivery. It recommended that the timeliness of investigations by region, command or functional area be reported regularly to the Senior Executive Conference.

The SDPC recommended that the QPS work with the CMC to provide clarity for officers and supervisors about disciplinary matters which could result in sanctions of dismissal, demotion or pay point reduction.

The Commission was also critical of the way the reporting of discipline and ethical practice focused on high-level statistical trends rather than on analysis of the trends, possible causes, and ways of dealing with identified risks. It noted that the results of regular monitoring and analysis of data should continually inform the Service's ethics training, and that this training should be reviewed to ensure it remained relevant and targeted appropriately throughout an officer's career.

On a positive note, the review commended the cooperative efforts of the QPS and CMC to devolve greater responsibility for managing conduct and dealing with complaints to local managers (Project Verity).

Role of effective supervision

The Commission argued strongly that effective supervision is essential to good practice and performance.²⁷⁹ In locating this discussion in the accountability chapter, the SDPC recognised the importance of good supervision on encouraging professional and ethical practice. It identified two key pressure points — the ranks of sergeant and senior sergeant, and field training officers.

The SDPC noted that as many field training officers are relatively junior and inexperienced, some may not be suited to a mentoring role. It commented that the rank of sergeant 'is generally the first rank where the officer takes on a true supervisory role ... [where] it is necessary to take on the full role of leader, mentor and manager as opposed to team member'.²⁸⁰ It further noted that the large number of officers relieving in supervisory positions detracts from their ability to make hard decisions, particularly those relating to disciplinary matters.

278 SDPC 2008, op.cit., p. 78

279 *ibid.*, p. 83

280 *ibid.*

The Commission recommended that the QPS review its management development programs to ensure they focus sufficiently on effective leadership, and the role of supervision in assessing and managing performance and preventing or identifying early any ethical slippage.²⁸¹ Increased training and mentoring in ethical standards was identified as a priority for first-line supervisors, sergeants, senior sergeants and field training officers.

Other issues

More broadly, the SDPC noted that the performance management system was not used for meaningful performance monitoring or development purposes, and recommended that the Service make a 'substantive effort ... to change the culture within the QPS regarding individual performance measurement'.²⁸²

The inability of managers to transfer and move police officers to meet operational need was a persistent issue, and the review noted that QPS needed a more flexible approach to managing transfers.

Project Grinspoon 2008

In 2006–07, the CMC conducted a confidential strategic assessment of misconduct in one police district to obtain information on existing and potential misconduct issues within the QPS. The assessment (Project Castella) identified a range of inappropriate behaviours within the Service. The CMC therefore worked with the QPS to develop broad-ranging remedial and preventive strategies to reduce the opportunities for, and incidence of, misconduct throughout the Service (Project Grinspoon). Although it was also confidential, the Project Grinspoon report was leaked to the media early in 2010.²⁸³ On 10 February 2010, the Police Minister tabled in Parliament a QPS implementation report on the recommendations arising from Project Grinspoon. As the recommendations are now a matter of public record, we have included relevant comment on them in this review as they highlight a number of persistent issues relating to performance, integrity and the discipline system.

The CMC made 36 recommendations framed around seven priority areas:

- management and supervision
- performance management and the discipline system
- ethics and integrity education and training
- inappropriate associations
- human source management
- supply and inappropriate use of confidential police information
- alcohol and drug use

These areas were prioritised on the significance of the identified misconduct risks and effects, the extent to which the QPS had already implemented relevant strategies, and the potential benefits of effective preventive and remedial strategies.

The Commission commented on a range of managerial concerns, including:

- a lack of effective supervision in some areas, particularly at middle management level (sergeants, senior sergeants and inspectors), highlighting the need for the QPS to make effective management, particularly supervision, a priority at all levels and in all areas of the organisation

281 *ibid.*, p. 84

282 *ibid.*, p. 129

283 Crime and Misconduct Commission 2008, *Enhancing Integrity in the Queensland Police Service* (Project Grinspoon), CMC, Brisbane.

- the difficulty experienced by officers in managing the transition into supervisory and managerial roles
- the lack of objective and honest performance appraisals by supervisors.

The assessment highlighted systemic factors that inhibit an effective managerial response to any problems that arise in the behaviour or performance of QPS members. Of particular concern were:

- a lack of flexibility in the capacity of the QPS to redeploy members in response to performance or conduct issues
- constraints on the ability of the Commissioner of Police to terminate the employment of a member on the basis of performance or conduct
- excessively legalistic, slow and cumbersome disciplinary processes.

Project Grinspoon also recommended that the QPS and CMC examine options for:

- further streamlining disciplinary processes to facilitate more timely and appropriate disciplinary outcomes
- streamlining the dismissal process available to the Commissioner of Police
- streamlining and simplifying the existing range of review and appeal rights for members in the case of managerial action, including dismissal, disciplinary processes and transfer.

The CMC further argued that the Commissioner of Police needed:

the flexibility to deal with integrity and performance-related problems in the most appropriate manner. The Commissioner must have a range of possible options, from remedial strategies through to the imposition of sanctions, transfer or dismissal.²⁸⁴

Consequently, the Commission also recommended that the QPS review the management-initiated transfer process with a view to enhancing the capacity of the Service to transfer a member, in appropriate circumstances, on the basis of integrity or performance concerns.

The CMC recognised the importance of supervisors and managers acting early to identify officers engaging in inappropriate or high-risk conduct, or exhibiting other performance problems, and to intervene. It noted that the QPS had only a basic 'early warning system', which largely used complaint profiling by the ESC. The Commission recommended that the QPS examine options in the short, medium and longer term for developing an effective early intervention system using a broad range of human resource and operational data.

The need for better management and leadership training at all levels of the QPS was also identified. Because there had not been a comprehensive review of ethics and integrity training since the 1996 Project Honour report, the Commission also recommended that the QPS conduct such a review to enable the agencies to identify any gaps. It further recommended that the QPS, in consultation with the CMC, identify those groups or classes of members, or areas of responsibility that might represent a higher integrity risk with a view to targeting specific ethics training.

²⁸⁴ Project Grinspoon report, p. 26

APPENDIX E:

Case studies on the NSW Commissioner's loss of confidence provisions

Under the *Police Act 1990* (NSW):

- the applicant has at all times the burden of establishing that his or her removal from the Force is harsh, unreasonable or unjust²⁸⁵
- the Industrial Relations Commission (IRC) must consider the interests of the applicant and the public interest (which includes the interest of maintaining the integrity of the NSW Police Force (NSWPF)).²⁸⁶

In the *Giardini* case, (see p. 118), the applicant's review of the removal order made against him was successful and his reinstatement ordered. The following are some of Bolam J's reasons for his finding in favour of Giardiani (G):

- Evidence of character and work performance indicated that G was a 'keen, dedicated, honest officer who carried out his tasks in a professional manner, and who had been commended and complimented several times during his career'. In addition, there was no reason to believe that if he were reinstated, 'he would be anything other than a good police officer.'
- During the 'inordinate' delay in the handling of his expulsion, G continued to work 'in a most commendable manner'. He performed his full duties for several months, despite his recommendation as a candidate for removal. At best, he was left in a state of uncertainty about his future for an 'unreasonable time'; at worst, by the time he was assigned to sensitive security duties, he was 'entitled to believe that no further disciplinary action would be taken against him.'
- A total of 471 officers, of ranks up to inspector, were found to have received or disseminated pornography over the Memo System. Only nine of these were referred for action under s. 181D, and three were removed. Hence, 'there was no proper basis for removing the applicant ... when many other officers, including more senior officers, had been involved in the same conduct ... and/or were aware of the applicant's conduct and took no action to stop [it] ... yet were not removed from the Service.'
- G was not the only officer to introduce (as distinct from disseminate) pornography to the Memo system.
- 'There was such a marked inconsistency in the treatment of the applicant compared to that of the other officers who were engaged in the same conduct ... that his removal was manifestly unjust'
- G had not been fully informed of the nature and extent of the conduct of other officers, nor had he been put on notice regarding the potential significance of warnings allegedly given by senior police officers about his inappropriate use of the Memo System.
- G's removal was harsh in its consequences for his personal and economic situation. (This included the facts that he was supporting three children, had received commendations as a police officer, had completed a Bachelor of Policing – Investigation degree, and had been promoted to detective senior constable.)

285 *Police Act 1990* (NSW), s. 181F(2)

286 *ibid.* s.181F(3)

While agreeing that the introduction and transmission of pornographic material over an internal electronic mail system was completely unacceptable, in weighing up G's interest and the public interest, for the above reasons Bolam considered that G's removal from the Police Service was harsh, unreasonable and unjust. He found that G should be reinstated to his former position on terms no less favourable than those that would apply if he had not been removed from the Service.²⁸⁷

In *Van Huisstede and the Commissioner of Police* [2000] NSWIRComm 97, a former senior constable sought a review of his Commissioner's loss of confidence (CLOC) removal from the NSWPS. An internal police investigation had found that he had induced two girls in custody in a police station to participate in acts of child prostitution, on himself and another police officer, in return for food. Departmental proceedings against Van Huisstede (VH) were postponed until after his criminal trial for the offences. There were inconsistencies in the evidence given by the girls, and VH was acquitted at trial; nevertheless, he was later expelled from the Service. The criminal trial attracted adverse publicity.

At the review before the IRC, VH contended that his expulsion was harsh, unreasonable and unjust, for procedural and substantive reasons. The former included:

- the claim that the Commissioner had failed to consider relevant material, and in particular, evidence in the criminal proceedings that was favourable to VH
- the assertion that the Commissioner's decision to remove VH was not guided solely by the 'rules of reason and justice' but, instead, by the Commissioner's concern with the publicity surrounding the trial and community concerns regarding the allegations against VH²⁸⁸
- the claim the Commissioner had failed to take into consideration VH's written submission (under s. 181D(3)(c)) because he had delegated the duty to someone else
- the delay involved in the CLOC process — the notice setting out the Commissioner's grounds for his lack of confidence in VH was signed in February 1998 but the removal order was not signed until January 1999

VH claimed that substantive unfairness lay in, among other things, the fact that he was not guilty of the misconduct on which his removal was based, and that his removal from the Service was harsh in relation to his personal, social and economic circumstances.

Counsel for the Commissioner's arguments included:

- the requirement for the IRC to consider the interests of the applicant and of the public (including maintaining the integrity of the NSWPF) when making its decision meant that it had to balance competing interests. Given the publicity and community concern generated by this case, the need to maintain the reputation of the Service was particularly appropriate, and there was no basis for attributing more importance to the applicant's interests than to those of the public.
- there was no evidence that the Police Commissioner had failed to consider VH's written submissions
- there was no evidence that any delay on the part of the Commissioner had prejudiced VH's case
- VH's acquittal did not mean that the Commissioner was not entitled to the opinion that he had lost confidence in VH's suitability as a police officer

²⁸⁷ *Giardini v Commissioner of Police* [2001] NSWIRComm 333, paras. 224–6

²⁸⁸ As per Kitto J in *R v Anderson; ex parte IPEC-Air Pty Limited* (1965) 113 CLR 177, at p. 189: 'a discretion allowed by statute to the holder of an office is intended to be exercised according to the rules of reason and justice, not according to private opinion; according to law and not humour, and within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself.'

Walton J, Vice President of the IRC, examined the CLOC provisions in the 1990 Act and concluded that the legislative scheme:

involved a review of the decision and orders of the Commissioner as a merit review, although in a situation where appropriate caution must be exercised in the light of the important public interest considerations involved and the process which preceded the Commission's review proceedings (that is, the process giving rise to and the fact of the decision made by the Commissioner). (para. 220)

His Honour concluded that the Commissioner's decision to remove VH was harsh, unreasonable and unjust for the following reasons:

- The Commissioner's decision and its supporting reasons were based on a 'fundamentally inadequate' assessment of the available information. The Commissioner had stated in support of his decision to expel VH that he tended to believe the allegations against VH rather than the latter's account and denials. However, the Commissioner did not have before him enough information properly to arrive at that conclusion — he did not have the substance of the allegations before him (e.g. he did not have any record of the criminal proceedings, which contained statements of the magistrate that raised concerns about the veracity of the evidence against VH, and evidence at the District Court trial that corroborated VH's account). These should have alerted the Commissioner of the need to make further inquiries and analysis.
- Partially relying on considerations of publicity and community outrage as a reason for his decision revealed a failure on the part of the Commissioner to comply with the requirement of s. 181D(3)(a) to give notice of the grounds on which he lacked confidence in the officer. The Commissioner should have raised all considerations he relied on with VH before making the order under s. 181D. Moreover, Counsel for the Commissioner conceded that it was inappropriate to take mere 'public agitation' into account when assessing whether or not there was an effect on public confidence. More fundamentally, considerations of publicity or community concern 'are foreign to the determination the Commissioner was required to make, namely whether he had confidence in the suitability of the applicant to continue as a police officer'.²⁸⁹ (Hence, the fact that the IRC must have regard to the 'public interest' does not mean that the Police Commissioner, as part of the CLOC process, can pay regard to public concern about a particular police matter).
- These procedural defects were sufficient in themselves to render VH's removal harsh, unreasonable and unjust. (Thus, procedural unfairness on its own is sufficient to undermine a CLOC removal, but not every procedural deficiency will be serious enough to amount to unfairness).
- In terms of alleged substantive unfairness, Walton J expressed satisfaction that VH had established, upon the balance of probabilities, that he did not engage in the conduct specified in the s. 181D(3)(a) notice or in the Police Commissioner's reasons for the decision to remove VH.

Walton J ordered reinstatement.

In *Commissioner of Police v Dobbie* [2006] NSWIRCOMM 285 the Commissioner of Police sought to appeal against an earlier IRC decision to reinstate Constable Dobbie (D) who had been removed under s. 181 from the NSWPF in 2005. In June 2000, while still a probationary constable, D had been involved in an off-duty motor accident while over the legal alcohol limit. At court he was convicted of drink-driving (with a mid-range concentration of alcohol), fined \$1000 and suspended from driving for 12 months. The Force considered dismissing

289 *Van Huisstede and the Commissioner of Police* [2000] NSWIRComm 97, para 232

him under its disciplinary proceedings but his senior officers did not support the idea.²⁹⁰ Instead, D was placed on a remedial performance program and required to receive drug and alcohol counselling.

In May 2004, while off-duty and severely intoxicated, D drove onto the wrong side of the road, collided with parked vehicles and a shopfront, reversed onto the correct side of the road, collided with another shopfront, and then left the scene of the accident. He was apprehended shortly afterwards. In April 2005, he was sentenced to 200 hours community service and disqualified from driving for three years. In May 2005, the Commissioner of Police notified D that he was considering his suitability to remain in the Force. D made written submissions in July 2005, in which he conceded the gravity of his conduct, apologised and expressed remorse, stated that the 2004 incident had been a reaction to a friend's suicide, and that he had received counselling for both grief and alcohol abuse. D also expressed confidence that that he had surmounted his problems and was highly motivated to remain in the Force. He had also lost the value of his car and had been ordered to pay more than \$25 000 in compensation for the damage caused during the May 2004 incident.

The Commissioner removed D from the Force in late July 2005. The Commissioner's statement of reasons acknowledged D's remorse, testimonials from D's family and friends, the mitigating circumstances of D's friend's suicide, and D's financial loss but also pointed to:

- the damage to property caused during the May 2004 episode
- the high concentration of alcohol in D's blood during that incident
- the fact that D had fled the scene of the accident
- D's prior drink-driving offence of June 2000
- D's apparent disregard for the management action taken in response to the June 2000 offence.

The Commissioner concluded

I believe the community has to expect that members of the NSW Police will not behave in this way ... I want you to clearly understand that I expect an appropriate standard of behaviour from all police officers at all times ... I can see no reason that would provide me with any basis not to lose my confidence in your suitability to remain a police officer.²⁹¹ (para. 15)

At first instance at the IRC, Marks J had to consider D's contention that his removal had been harsh, unreasonable or unjust. His Honour acknowledged that the Police Commissioner had taken into account D's drug and alcohol counselling but pointed out that the Commissioner could not have taken account of something that had occurred subsequently at the IRC hearing: D had given the undertaking that, if reinstated by the NSWPF, he would never consume alcohol again while he remained with the Force. D also argued that the IRC was not merely entitled to take account of relevant matters occurring after an applicant's removal, but was obliged to do so.

²⁹⁰ Note that the police services of other jurisdictions have similar disciplinary powers. For example, in Queensland, a police officer who commits a drink-driving offence may be disciplined and dismissed under s. 7.4 of the *Police Service Administration Act 1990*, and Regulations 5 and 9(1)(s) of the *Police Service (Discipline) Regulations 1990*. See *Compton v Deputy Commissioner Ian Stewart Queensland Police Service* [2010] QCAT 384 for a successful appeal by a police officer against his dismissal from the Service.

²⁹¹ *Commissioner of Police v Dobbie* [2006] NSWIRCOMM 285, para. 15

Marks J noted that D's problems lay his excessive drinking. His Honour stated that, if it were not for the fact that D had given the undertaking not to drink again, he (the judge) would have no hesitation in upholding the Commissioner's decision to expel D. However, in the light of D's undertaking, and assuming that the undertaking could somehow be enforced, Marks J was prepared, with some hesitation, to find D's removal to be harsh, taking into account both D's interests and the public interest, including the maintenance of integrity of the NSWPF. His Honour did, however, stress that his conclusion was motivated solely by D's undertaking, and was 'not intended in any way to infer that the decision of the Commissioner to remove the applicant ... was, at the time that it was made and in the circumstances in which it was made, harsh' (cited at para. 5).

Marks J ordered D's reinstatement subject to a number of conditions, including D's entering into a deed whereby he promised to refrain completely from alcohol, submit to breath and other tests administered when the Commissioner deemed appropriate, and submit to other supervision, training and counselling as required by the Commissioner to ensure that the deed's promises were being kept.

The Police Commissioner sought leave to appeal to the Full Bench of the IRC against the decision of Marks J, which was granted, despite a recent refusal by the majority of the Full Bench to grant leave in another case in which a conditional reinstatement had been ordered at first instance (*Commissioner of Police v Evans* [2006] NSWIRCOMM 170).²⁹² In *Dobbie*, the Full Bench, while conceding that leave to appeal against IRC decisions should not be granted lightly, felt that the conditions attaching to the reinstatement order were extraordinary, and raised the important issue of whether an appropriate balance had been struck between the competing interests of the officer and the public. It considered that these issues should be considered at an appellate level.

Counsel for the Police Commissioner argued that (i) Marks J was wrong to consider D's undertaking not to drink again if reinstated — the circumstances of what did happen, not what was proposed to happen should have been weighed up by the judge; (ii) Marks J had no power to impose conditions attaching to D's reinstatement; (iii) alternatively, even if his Honour did have the power to impose such conditions, he had erred in his exercising his discretion to seek to impose them; and (iv) in any event, in all the circumstances, Marks J had erred in holding that D's removal was harsh: D had already been given a second chance and did not deserve a third.

The Full Bench of the IRC held the following:

- As an earlier decision of the Full Bench in *Hosemans v Commissioner of Police* (No 2) 2004 138 IR 159 had established that the IRC's task when reviewing a removal order made under s. 181D was to make a fresh and independent decision based on all of the material before it — not just the material at the Police Commissioner's disposal at the time the decision was made to remove the officer — Marks J had not erred in considering D's undertaking (just as it would not be wrong to consider the later conduct of all applicants after the decision to remove them had been made, as having a bearing on whether the removal was harsh, unreasonable or unjust: the IRC must consider the *entirety* of cases). The Commissioner could have objected at first instance to D's offering the undertaking without notice, but did not do so, nor did he request to have D cross-examined on the undertaking. Hence, Marks J did not err in law in receiving and considering the undertaking.

²⁹² In *Evans*, the off-duty police officer had been involved in a drunken assault on a civilian, and was ordered to be allowed to return at a lower rank, have his performance appraised for six months, and if satisfactory, then be reinstated at his previous, higher rank. Schmidt J, dissenting, wished to allow the Commissioner's appeal against the reinstatement, arguing that the public interest in CLOC cases was more important than other factors when determining whether a removal under s. 181D was harsh, unreasonable and unjust. Moreover, it was implicit in her Honour's judgment that a Commissioner's CLOC decision will be in the public interest, and any departure from that decision will need to be justified. The majority of the Full Bench rejected this approach, and pointed to earlier dismissals by the Full Bench of similar arguments in *Little v Commissioner of Police* (No 2) [2002] 112 IR 212, and *Hosemans v Commissioner of Police* (2004) 138 IR 57.

- The conditions that Marks J attached to D's reinstatement were not in excess of his powers: the IRC had a general discretion to determine appropriate relief where a dismissal has been found to be harsh, unreasonable or unjust.²⁹³
- In the alternative, Marks J had not erred in law in seeking to impose the conditions on D's reinstatement.
- In support of the assertion that Marks J was wrong on the merits of his decision that the removal of the applicant was harsh, Counsel for the Commissioner pointed to the two drink-driving offences, stressed the serious nature of the second one, and argued that D did not deserve a third chance, particularly as it was necessary for the IRC to consider the maintenance of the integrity of the NSWPF:

Not only was ... [D] obliged as a citizen of New South Wales to abide by the law, but also as a sworn police officer he was charged by his oath of office, the *Police Act*, the Police Regulation, the Crown Employees (Police Officers) Award, and the New south Wales Police Code of Conduct and Ethics to abide by the laws that he breached. These duties ... weighed more heavily upon ... [D] given his previous conviction and clemency shown to him then ... [Moreover], every anti-drink-driving publicity campaign run by the NSW Police was diminished by the reinstatement of ... [D], and in that way the maintenance of the integrity of NSW Police was damaged.²⁹⁴

However, there was no doubt that Marks J was aware of the seriousness of D's offence, and presumably understood the implications of D's reinstatement for the maintenance of the integrity of the NSWPF. He was required to have regard for these matters as well as D's interests. He decided, on balance, that the removal was harsh. The Full Bench could not interfere with that conclusion in the absence of any evidence that Marks J got the facts wrong or reached a perverse conclusion:

Whilst an appellate court or tribunal is duty bound to reverse conclusions based on a trial judge's views of fact when those views of fact are plainly wrong, an appellate court or tribunal is equally duty bound not to reverse such decisions of a trial judge merely because the appellate court or tribunal itself takes a view different from that of the trial judge of the findings that should have been made ... Given that his Honour had regard to all of the matters that he was required to under s. 181F(1)(3), that he did not mistake the facts and that his conclusions based on the facts were reasonably open on the evidence, we are unable to see how his Honour erred in the exercise of his discretion and thus how this Full Bench may intervene to review his Honour's decision on appeal.²⁹⁵

The Commissioner's appeal was therefore dismissed, and D was ordered to be reinstated on conditions set out by the Full Bench, including a ban on D consuming alcohol while with the Force, and D submitting to testing for alcohol while on duty.²⁹⁶

Of course, not all police officers' challenges to their removal under CLOC provisions are successful. For example, in *Johnston v Commissioner of Police* [2007] NSWIRComm 293, an officer who had been removed from the Force after, among other things, illegally causing access to the police computer system on five occasions, lying about the reason for accessing the system, and engaging in the stalking/intimidation of a civilian, lost his review of the Commissioner's order to expel him, and lost his appeal to the Full Bench against the first instance decision.

²⁹³ Under s. 89 of the *Industrial Relations Act 1996*.

²⁹⁴ *Commissioner of Police v Dobbie* [2006] NSWIRCOMM 285, para. 64

²⁹⁵ *ibid.* paras. 68–9

²⁹⁶ The Full Bench modified the conditions imposed at first instance by Marks J, so that D could not be tested for alcohol while he was off duty, in recognition of the Police Commissioner's concerns regarding the invasion of D's privacy.

Johnston (J) was convicted at a local court of two computer access charges but acquitted of stalking/intimidation. He had been the subject of management action (involving deferral of a pay increment) for his untruthfulness, and had been placed on a contract management plan which included a warning about the consequences of future unauthorised access to the computer system. Despite this, he later caused two further illegal accesses by junior officers on his behalf. Although there were mitigating factors in his favour (e.g. satisfactory service, a depressive illness, remorse and contrition, dire financial circumstances), Backman J weighed up J's interests against the public interest and decided that his removal was not harsh, unreasonable nor unjust.

The Full Bench concluded that there was no appealable error in her Honour's judgment.

In *Toshack v Commissioner of Police* [2009] NSWIRComm 32, Senior Constable Toshack (T) was removed from the NSWPF in 2007 for loss of Commissioner's confidence. To conceal the fact that he had put the wrong hearing date on a subpoena for the complainant to attend and give evidence, T had deliberately lied to a police prosecutor about why a complainant was unable to attend court on a particular day. The police prosecutor unsuccessfully requested an adjournment of the case by unknowingly repeating T's lie to the presiding magistrate, who dismissed the charges in the case. Despite being repeatedly requested to do so, T had also failed to provide a victim statement by the complainant for use in court proceedings, and had failed the complainant by not keeping him informed during the investigation, and by seeking to withdraw the complainant's apprehended violence order application without first consulting him.

At first instance, Marks J, while impressed by the substantial evidence given in support of T by his fellow officers, and acknowledging T's expression of remorse and the fact that he had suffered financial loss as a result of his removal, noted that any employee removed from employment is likely to suffer financial and personal problems, and that such adverse consequences have to be carefully balanced against the public interest. Marks J found that T's conduct in relation to the local court proceedings brought discredit on the NSWPF, and on balance, did not believe that T's removal was harsh, unreasonable or unjust.

The Full Bench of the IRC could find no basis to interfere with the Police Commissioner's decision to expel T, and dismissed his appeal.

Finally, in *Reid-Frost and Commissioner of Police (No 2)* [2010] NSWIRComm 86, Detective Senior Constable Reid-Frost (R-F) had been removed from the NSWPF in 2008 after more than a decade of service. The Commissioner's notice set out two grounds on which he lacked confidence in R-F's suitability as a police officer: (i) R-F's 'failure to demonstrate the standards of performance, conduct, integrity and competency expected of a police officer, and failure to meet the requirements of the Remedial Performance Plan and Commissioner's Warning Notice'; and (ii) unauthorised secondary employment.²⁹⁷

R-F's conduct and performance had been considered unacceptable for a considerable period of time. In 2004, problems were identified with her performance — particularly her record-keeping, case management, teamwork and criminal investigation. In November 2004, R-F was issued with a Commander's Warning Notice, which made it clear that continued unsatisfactory conduct and/or performance could lead to further management action, including removal under s. 181D. In January 2005, she was placed on a Remedial Performance Program, which she refused to sign. Her performance failed to improve between 2005 and 2007; in fact, it was accompanied by a 'pattern of inappropriate and unprofessional behaviour and conduct' indicating that R-F found it difficult to accept criticism or advice.²⁹⁸ In June and July 2007, R-F worked as a credit controller for another employer without the NSWPF's authorisation.

297 *Reid-Frost and Commissioner of Police (No 2)* [2010] NSWIRComm 86, para. 12

298 *ibid.* para.13

Bolam J, President of the IRC, held that R-F's removal was not harsh, unjust or unreasonable, and that R-F was unsuitable to continue as a police officer. He concluded:

There were reasonable grounds for placing the applicant on a Remedial Performance Program. The applicant strongly resented that placement. The applicant demonstrated an unwillingness to conform to standards of conduct and performance required in a disciplined force. Her attitude, particularly toward superior officers, was unacceptable ... [R-F] consistently refused to accept or acknowledge, over a lengthy period, that she was in any way at fault or deficient in her performance, conduct or behaviour; the applicant failed, culpably, to recognise her shortcomings and, therefore, took no corrective action. In weighing in the balance the competing interests, I have been acutely conscious of the fact that ... [R-F] is a person who is 60 years of age and has served in the Police Force for 13 years ... But considered overall, the evidence regarding the applicant's conduct (including her attitude) and her performance ... left me with me no alternative other than to conclude that the applicant is unsuitable to continue as a police officer. The Police Commissioner should not be obliged to continue to accommodate an officer who resists authority, is unable to accept advice or criticism without resorting to an exaggerated emotional response, is disruptive in the workplace and is not able to attain consistently a reasonable standard of performance.²⁹⁹

R-F's application was dismissed.

299 *ibid.* paras. 155–8

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