

**REPORT ON THE OPERATION OF THE
*CORRUPTION, CRIME AND MISCONDUCT ACT 2003:***

**CAN THE COMMISSION DECLINE TO FORM AN
OPINION THAT SERIOUS MISCONDUCT HAS
OCCURRED DESPITE THE DEFINITION BEING MET?**

Sections 199 and 201 of the *Corruption, Crime and Misconduct Act 2003* (WA)

2 March 2023

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1. EXECUTIVE SUMMARY

This report is made pursuant to my functions in sections 195(1)(aa) and 195(1)(e) of the *Corruption, Crime and Misconduct Act 2003* (WA) (CCM Act) to audit the operation of the Act and to report and make recommendations to either House of Parliament and to the Joint Standing Committee on the Corruption and Crime Commission (JSCCCC).

The purpose of this report is to advise the Parliament of a disagreement between the Corruption and Crime Commission (Commission) and my office, concerning the nature of the Commission's power to form opinions as to serious misconduct. Specifically, I am of the view that where it is clear that a public officer has engaged in conduct that meets the definition of serious misconduct in the CCM Act, it is not open to the Commission to decline to form an opinion that serious misconduct has taken place. The Commission takes the view that its ability to form an opinion in these circumstances is discretionary in nature.

I became aware of this issue upon receiving a complaint which required me to assess the effectiveness and appropriateness of the Commission's procedures pursuant to section 195(1)(c) of the CCM Act. The complaint, which is briefly discussed on pages 5 and 6 of this report, originated in an incident between a police officer and a member of the public that had a number of consequences, including a finding that the police officer had acted unlawfully. I do not consider it necessary to identify any of the individuals involved.

When this matter came before the Commission, it concluded that although the police officer's actions had been unlawful, there had been no serious misconduct on his part. In my view, that conclusion was not open to the Commission to make given the CCM Act's definitions of 'reviewable police action', 'police misconduct' and 'serious misconduct'. These definitions interact with each other to produce the clear result that any action taken by a police officer that is contrary to law will constitute serious misconduct.

In circumstances where a police officer is found to have acted contrary to law, therefore, it seems to me evident that the intent of the CCM Act is that an opinion of serious misconduct must follow. The Commission takes a different view, namely, that it is not bound to form an opinion of serious misconduct despite a public officer's actions meeting the relevant definition.

The Commissioner and I have discussed this issue but remain of opposing views. Given the obvious desirability of certainty in this matter, it seems to me that it would be appropriate to amend the CCM Act in the interests of clarity. I therefore draw this issue to the Parliament's attention.

2. SERIOUS MISCONDUCT AND POLICE MISCONDUCT

First, it is necessary to outline the statutory framework that underpins my analysis. One of the Commission's major functions is its ability to receive, deal with and investigate allegations of what is termed 'serious misconduct'. Section 3 of the CCM Act defines this as either (a) misconduct of a kind described in section 4(a), (b) or (c) of the Act by

a public officer, or (b) police misconduct. The first part of this definition is narrow, being confined to instances where:

- a public officer corruptly acts or corruptly fails to act in the performance of the public officer's office or employment; or
- a public officer corruptly takes advantage of the public officer's office or employment as a public officer to obtain a benefit for himself or herself or for another person or to detriment another person; or
- a public officer, while acting or purporting to act in his or her official capacity, commits an offence punishable by two or more years' imprisonment.

This is a high bar: it requires that the public officer in question has acted corruptly or committed criminal offences. There must, therefore, be something more than human error, incompetence, negligence, unreasonable behaviour or unprofessional conduct before the Commission will form an opinion of serious misconduct.

A different standard applies where it comes to police officers. As noted above, the CCM Act also provides that all police misconduct will also constitute serious misconduct. This gives the Commission a much broader scope to scrutinise the conduct of police officers than it has with respect to other public officers, reflecting, I think, the nature of the powers entrusted to police.

Thus, although the CCM Act differentiates between 'serious misconduct' as defined in sections 4(a)-(c) and 'minor misconduct' defined in sections 4(d) (i)-(vi), *all* misconduct engaged in by a police officer will constitute serious misconduct.

In addition, the CCM Act provides that 'police misconduct' includes 'reviewable police action' which section 3 defines as 'any action taken by a member of the Police Force, an employee of the Police Department or a person seconded to perform functions and services for, or duties in the service of, the Police Department that —

- a) is contrary to law; or
- b) is unreasonable, unjust, oppressive or improperly discriminatory; or
- c) is in accordance with a rule of law, or a provision of an enactment or a practice, that is or may be unreasonable, unjust, oppressive or improperly discriminatory; or
- d) is taken in the exercise of a power or a discretion, and is so taken for an improper purpose or on irrelevant grounds, or on the taking into account of irrelevant considerations; or
- e) is a decision that is made in the exercise of a power or a discretion and the reasons for the decision are not, but should be, given'

In the case of police officers, therefore, the Commission's scrutiny is not limited to corrupt or criminal conduct. The Commission is explicitly empowered to receive and act upon allegations about conduct by police that is said to be discriminatory, unreasonable, or motivated by an improper purpose.

It will be apparent from the excerpts of the CCM Act cited above that these definitions form a series of concentric circles, with 'reviewable police action' at the centre. This

structure means that anything that constitutes reviewable police action will necessarily be police misconduct and will also be serious misconduct.

3. THE FACTUAL CIRCUMSTANCES

In August of 2022, my office received a complaint which related to an incident between a male police officer (the officer) and a woman (the complainant) that took place on 5 March 2020, at around 9:30pm.

The officer, who was on duty, noticed that the complainant was cycling without a helmet and asked her whether she had any identification on her person. The complainant said that she did not and attempted to leave, whereupon the officer sought to detain her. The complainant resisted the officer's attempts to do so, and the situation rapidly escalated into a physical struggle.

Matters intensified when the officer's dog became involved. At trial,¹ the officer gave evidence that he had not deliberately released his dog and that during the struggle between him and the complainant, she must have accidentally activated the relevant button on his vest that opened the emergency hatch in his police vehicle. The officer told the court that police dogs are trained to engage when the hatch is released but that he initially held the dog back. When the complainant continued to resist, the officer testified that he gave her a 'final warning' before letting go of the dog's collar. The dog then bit the complainant on her left arm, causing her significant injuries which led to her hospitalisation.

The complainant was charged with assaulting and obstructing the officer. She did not give evidence at her trial, but her legal representatives have advised that following this incident she has been left with scars, an occasional loss of feeling in her left arm, and a lasting wariness of dogs.

In October 2020 the complainant was acquitted of assaulting and obstructing the officer on the basis that he had failed to correctly seek her details as required by section 16 of the *Criminal Investigation (Identifying People) Act 2002* (CIIP Act).

By way of explanation, section 16(2) of the CIIP Act provides that if an officer reasonably suspects that a person whose personal details are unknown has committed or is committing or is about to commit an offence, or may be able to assist in the investigation of an offence or a suspected offence, the officer may request the person's personal details. 'Personal details' are defined to include the person's full name, date of birth, usual address, and current address.

Section 16(4C) of the CIIP Act provides that if an officer makes a request to a person under this section, the officer may detain the person for a reasonable period for the purpose of the person's compliance. Section 16(6) provides that failure to comply with such a request without a reasonable excuse is an offence punishable by twelve months' imprisonment.

¹ *WA Police v W MC/CRIM/AR/2782/2020*

In this instance, the officer had not in fact requested the complainant's personal details. Instead, he had asked whether she had any identification on her. As there had been no request pursuant to section 16(2) of the CIIP Act, her failure to provide her personal details was not an offence and he had no lawful authority to detain her. Moreover, in the absence of such authority, Magistrate Malley found that the officer had unlawfully assaulted the complainant. Accordingly, the Magistrate found that the complainant was 'entitled to resist as she did' and her resistance was 'not excessive or unreasonable in all the circumstances'.

In providing reasons for his decision the Magistrate cited *Kelly v Dann* (1992) 8 WAR. That case concerned an unlawful arrest in respect of which, the Supreme Court found, the relevant police officer 'subjectively but misguidedly believed that what he was doing was entirely proper and warranted by the circumstances'.² The court observed that the officer's 'perception of what he was entitled to do and should do in regard to the arrest and detention of the respondent was fundamentally flawed'. In short, his intent was entirely irrelevant in determining whether his actions had been unlawful.

Similarly, in this instance, the officer had apparently been operating on the premise that he had requested the complainant's details pursuant to the CIIP Act, the complainant had failed to provide them, and that he was therefore authorised to detain her. That premise was found to have been incorrect, and the officer's actions were therefore unlawful.

4. COMPLAINT TO THE COMMISSION

Following this decision, the complainant made formal complaints through her lawyers to both WA Police and the Commission, alleging that the officer acted contrary to law and therefore engaged in serious misconduct; failed to comply with sections 16 and 17 of the *Criminal Investigation Act 2006* in deploying his police dog; and used excessive force against the complainant.

Two separate investigations were carried out: one by the Internal Affairs Unit (IAU) within WA Police and one by the Commission.

On 27 May 2022, the Commission wrote to the complainant's lawyers to advise that it had concluded its investigation. The letter acknowledged that there had been a breach of the CIIP Act and that the circumstances of the matter and the complainant's injuries were regrettable. The Commission advised, however, that on the basis of all the evidence it had gathered and scrutinised, it had concluded that the officer had not engaged in any act that constituted serious misconduct under the CCM Act. That is, despite the Commission acknowledging that the officer had acted unlawfully, it found that his actions did not amount to serious misconduct as prescribed in sub-paragraph (a) of the definition of 'reviewable police action' (discussed on page 4).

The IAU also wrote to the complainant's lawyers. In its letter, dated 22 June 2022, it advised that although there was 'prima facie evidence that the officer's conduct was unlawful' it had been determined that it was appropriate to deal with the matter managerially rather than to prosecute the officer.

² *Kelly v Dann* (1992) 8 WAR per Ipp J at 234.

The complainant's lawyers requested that I review the Commission's procedures. In their letter they suggested that it was both 'illogical' and 'extremely confusing' that WA Police had concluded that the officer's actions were unlawful while the Commission had determined that those same actions did not constitute serious misconduct under the CCM Act.

On receiving this correspondence, I requested access to the Commission's file on the matter so that I could assess the procedures it had used in this instance. The file demonstrated that the Commission's investigation had considered systemic issues including the training provided to police in the requirements of the CIIP Act and the way in which police dogs were deployed. The investigation had apparently led to improvements being made, such as changes to the emergency hatch release mechanisms on police vehicles to avoid accidental deployment of police dogs, and the Commission had encouraged WA Police to reconsider the practice of sending Canine Unit officers on patrol with a dog but no partner.

I pause at this juncture to note that in recent years serious concerns have been raised about injuries caused by police dogs in Western Australia. In 2020, the JSCCC conducted an inquiry into the Commission's oversight of excessive use of force allegations against officers employed by WA Police. The resulting report recommended, among other things, that the Commission undertake an audit of dog bite incidents to determine whether the use of force was justified and adequately reported by the WA Police Force.³

The Commission completed a thematic review of the serious misconduct risks associated with the deployment of police dogs and tabled a report on the matter in May 2022.⁴ The report recommended that WA Police develop and implement Canine Unit policy, procedure and/or guidelines and undertake further analysis of police dog use. The Commission is to review the WA Police response to these recommendations in May of this year.

The deployment of police dogs in Western Australia is thus a matter of public importance, and I have also had occasion to consider it as a result of complaints made to my office. Nonetheless, that broader issue is not the focus of the present report.

5. ASSESSMENT OF THE COMMISSION'S PROCEDURES

The Commission used its examination power in investigating the complaint. This allowed the Commission to test the officer's evidence as to his state of mind during the encounter with the complainant.

The Commission concluded that although the officer had breached the CIIP Act, his conduct had not been malicious. That is, he had been acting mistakenly but in good faith. I have no basis to dispute these assessments, but I remain of the view that they had no bearing at all on the question of whether the officer's actions constituted serious misconduct. This is because none of the sections of the CCM Act dealing with conduct which is contrary to law contain any reference to an officer's intent.

³ *If not the CCC...then where? An examination of the Corruption and Crime Commission's oversight of excessive use of force allegations against members of the WA Police Force*, Recommendation 9, page 72.

⁴ Corruption and Crime Commission, *A Report on the Deployment of Police Dogs*, 11 May 2022.

This is not to say that an officer's own state of mind will never be relevant to the question whether they have engaged in police misconduct and, therefore, in serious misconduct. On many occasions this will be a relevant consideration. In particular, paragraphs (b) to (d) in the definition of reviewable police action implicitly invoke the question of intent. An officer's subjective intent will be relevant in determining for instance, whether his actions were improperly discriminatory or taken for an improper purpose or on irrelevant grounds. An allegation of reviewable police action on any of those bases would necessarily require consideration of an officer's state of mind.

However, this is not the case where an officer's action was simply unlawful. That is an objective matter capable of being settled with absolute certainty, without any reference to a person's intent. The phrase 'contrary to law' may fairly be criticised for its excessive breadth, but here there was no debate about the unlawfulness of the officer's actions. There was not only a binding court decision, but also universal agreement on the matter between the police, the Commission and my office.

Indeed, the investigation conducted by the IAU concluded that prima facie evidence existed for an offence of illegal wounding contrary to section 301(1) of the *Criminal Code*, although it also determined that it was appropriate in the circumstances not to prosecute the officer.

On the plain words of the CCM Act any unlawful action by a police officer will be serious misconduct. To some, this may seem a harsh conclusion, particularly in view of the often very difficult work undertaken by police, but this outcome flows logically from the CCM Act. It must therefore be taken to have been the intention of the legislature. Whether it is a just or appropriate outcome is a policy question for the Parliament to determine.

It must also be borne in mind that an opinion that a public officer has engaged in serious misconduct under the CCM Act is very different from, and not analogous to, a court's verdict of guilty. Section 217A(3) of the CCM Act explicitly provides that:

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

There is no predetermined consequence of an opinion of serious misconduct in relation to a public officer. It does not mean that the individual concerned must be dismissed or otherwise disciplined; that is a matter for their employer to determine having considered all the relevant circumstances. In this instance, the officer was found to have committed multiple breaches of the WA Police Force Code of Conduct and the WA Police Use of Force Policy and was issued with a Managerial Notice.

I accept that regardless of the legal niceties, there may be an inherent stigma in being the subject of an opinion of serious misconduct, even where this is not made public. Nevertheless, the prospect of reputational damage does not provide a basis for construing the CCM Act to produce an outcome contrary to its terms.

6. OPINIONS OF SERIOUS MISCONDUCT

I wrote to the Commission to request that it reconsider the matter given the irrelevancy of the officer's state of mind to the question at hand. On 15 November 2022, the Commission advised that although the matter had been reconsidered, its position remained the same.

In its letter, the Commission outlined its view that it had a discretion as to whether to form an opinion of serious misconduct and was not bound to do so simply because the officer's conduct had been unlawful. The Commission observed that section 22(1) of the CCM Act provided that it '*may...form opinions as to whether serious misconduct has occurred*'.

Significantly, whilst it quoted the italicised words above, the Commission omitted to refer to the preceding words of section 22(1). The whole of that section reads as follows:

Regardless of whether or not there has been an allegation of serious misconduct, the Commission may make assessments and form opinions as to whether serious misconduct —

- (a) has or may have occurred; or
- (b) is or may be occurring; or
- (c) is or may be about to occur; or
- (d) is likely to occur.

Once section 22(1) is viewed in full, it becomes evident that the word 'may' does no more than confer on the Commission a right to make assessments and form opinions, *regardless of whether it has received an allegation of serious misconduct*.

With respect to the Commission, that is the sole function of section 22(1). That being the case, it cannot follow that, by reason of its use of 'may', this section also affords the Commission the ability in every situation to make assessments and form opinions irrespective of whether the definition of serious misconduct is met.

As is clear from the text of section 22(1), nowhere does it state or even suggest that it empowers the Commission to ignore the definition in section 3 of the CCM Act. Once the definition is met an opinion of serious misconduct must follow, otherwise the definition would serve no practical purpose. In my view that cannot have been the Parliament's intention.

On 22 November 2022 I responded to the Commission. In my letter, I restated my view that on the facts of the complaint, it had not been open to the Commission to conclude that the officer had not engaged in serious misconduct, but advised that I did not propose to re-agitate the matter as it was evidently one on which we were some distance apart. That distance has since been confirmed in discussions between us in December 2022 and in the further exchange of letters summarised below.

7. REPRESENTATIONS PURSUANT TO SECTION 200

Section 200 of the CCM Act provides that before reporting any matters adverse to a person or body, I must give them a reasonable opportunity to make representations to me concerning those matters. Although I did not consider that this report was adverse to WA Police or to the Commission, I sent it to both of those parties in draft form prior to tabling it with the JSCCCC and invited them to make representations to me.

In his response, the Commissioner of Police advised that in his view this is a matter best determined between my office and the Commission. He therefore declined to offer any observations on the issues raised.

Insofar as the Commission is concerned, it suggested that I had misunderstood its position. Its letter said that it was 'in entire agreement' that 'any action by a police officer contrary to law is police misconduct, further defined as serious misconduct'.

The Commission concluded that the 'sole point of apparent difference' between its position and my own was that I consider (which I do) that when the Commission makes a finding of police misconduct, an opinion of serious misconduct is mandatory. However, the Commission maintained that even where this definition is met, it retains a discretion whether to form an opinion of serious misconduct. The Commission has characterised its position as follows:

'If conduct is found to fit the definition of police misconduct, the Commission's discretion to form an opinion is enlivened. Whether an opinion (which has no legal consequences) is expressed is a matter of discretion in each case'.

In essence, it appears that the Commission perceives a distinction between concluding that serious misconduct has taken place according to the definition in the CCM Act on the one hand and forming an opinion to that effect on the other. The nature and origins of this distinction are not clear to me.

Finally, the Commission once again emphasised that the word 'may' is used in section 22(1) of the CCM Act. It contended that the 'evident purpose' of this section is 'to make the formation of an opinion a matter of discretion'.

For the reasons set out above at page 9, and with respect to the Commission, I cannot accept that this is the 'evident purpose' of that section at all. On the contrary, as noted on page 9, the discretion afforded by section 22(1) is confined to that very specific class of case where, despite the absence of an allegation of serious misconduct, the Commission may proceed to consider a particular matter and conclude that serious misconduct has occurred.

8. CONCLUSION AND RECOMMENDATIONS

In summary, the Commission and I are agreed that all unlawful actions by a police officer will be police misconduct and therefore serious misconduct. However, I cannot agree with the proposition advanced by the Commission that section 22(1) of the CCM Act allows it to find as a matter of fact that serious misconduct has taken place but elect not to form an opinion in that regard.

It is in the nature of lawyers to disagree with each other on legal questions, including matters of statutory interpretation. In view of this, the occasional difference of opinion between the Commission and my office is to be expected and is not cause for concern.

However, in this instance, I believe it is undesirable that these two bodies have opposing views on something as important as the question whether, on finding that serious misconduct has taken place, the Commission can nonetheless decide not to form an opinion to that effect.

I understand that the Attorney General has directed the Department of Justice to develop proposals for the modernisation of the CCM Act. I respectfully suggest, therefore, that as part of this process, consideration be given to amending the Act to clarify its intent in respect of the above matters.

A handwritten signature in black ink, appearing to read 'Matthew Zilko', written in a cursive style.

MATTHEW ZILKO SC
PARLIAMENTARY INSPECTOR