REPORT ON THE OPERATION OF THE *CORRUPTION, CRIME AND MISCONDUCT ACT 2003:* THE DEFINITION OF 'PUBLIC OFFICER'

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

7 February 2022

INDEX

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 alert the Parliament to some flaws inherent in the CCM Act's definition of 'public officer', and their impact on the work of the Corruption and Crime Commission (Commission) and of my office, so that this matter may be considered in the current review of the CCM Act.

The Commission's serious misconduct jurisdiction extends to all public officers in the State by virtue of the CCM Act's definition of 'serious misconduct', which refers only to conduct by public officers. The question as to whether a person is a 'public officer' is, self-evidently, critical to the exercise of both the Commission's jurisdiction and mine. However, this question does not always have a straightforward answer.

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 discussed in some detail below, includes allegations of assault and deprivation of liberty on the part of persons whose status as public officers was unclear and required resolution.

The persons concerned were security guards employed by a company which had been contracted by the WA Country Health Service (WACHS). I do not propose to identify either the individual guards or the security company that employed them. Although I am subject to statutory restrictions on the disclosure of official information, I am empowered to disclose such information in particular circumstances, including when reporting to the Parliament or the JSCCCC. However, it is not necessary to identify these parties for the purpose of the present report, as its focus is not on their conduct but on the CCM Act's definition of 'public officer'.

As the Commissioner noted in a letter dated 28 September 2021 and cited further below, this matter highlighted 'some of the complexities that arise with regards to determining the public officer status of contractors, particularly given the different circumstances in which they may be engaged by a government agency'.

I have, accordingly, decided to use the complaint as a case study to demonstrate these complexities and their consequences. The relevant circumstances are outlined below.

2. THE COMPLAINANT'S ALLEGATIONS

The complainant in this matter is an elderly man who alleges that he was assaulted by two security guards on the Albany Health Campus when he was a patient there in 2019.

The complainant was 84 years old at the relevant time. He had attended the Albany Hospital on 15 July 2019 of his own accord following a bout of suspected food poisoning and an injury. He had gone to bed unwell the previous evening and woke up that morning feeling as though he was going to be sick. He quickly rolled out of bed but

in doing so, he hit his right temple on the bedside table, momentarily knocking himself out. He then took an ambulance to the hospital. The complainant states that he was given several tests at the hospital and within the next three hours he felt well again so he got out of bed and did his usual exercises. During the afternoon a nurse advised him that his wife was on her way to visit him and he decided to leave his room and go to meet her elsewhere in the hospital.

Accounts of what happened next differ as between the complainant and the security guards and orderlies who were present. The complainant says that when he advised one of the nursing staff of his intention to go and meet his wife a security guard told him he could not leave, another security guard pressed a button to close the doors, and he was blocked from leaving. The complainant stated that he reached out towards a security guard with his left hand, with his palm open, and asked him to move out of the way so he could go downstairs to meet his wife, whereupon the security guard grabbed his hand and twisted his left arm behind his back. The complainant alleges that another security guard then forced his right arm behind him and both guards pinned him up against a wall before frogmarching him back to his bed.

The security guards have provided statements in which they allege that the complainant was behaving in an aggressive manner and was restrained only after he punched one of the guards in the head with his left hand. The complainant denies acting in this manner. The guards also maintain that the complainant's arms were either held in front of him or at his sides, not twisted up behind his back. Documents from the hospital state that the complainant presented with confusion and speech disturbance when he was admitted and was under hospital security supervision for his own welfare.

The complainant alleges that this incident left him with physical and psychological injuries. After complaining to the hospital, WACHS and the Western Australia Police Force he made allegations of serious misconduct to the Commission. The Commission concluded that there was not sufficient evidence of serious misconduct as defined in the CCM Act.

3. COMPLAINT TO THE COMMISSION

On 31 March 2021 the complainant contacted my office and I requested access to the Commission's file in order to assess the procedures it had used in dealing with the complaint.

The file contained correspondence from the complainant and other relevant documents, including statements from the security guards involved in the incident. It also included documents produced by the Commission during its assessment procedures.

The Commission had determined that it was not possible to corroborate the complainant's version of events. Notably, although there was CCTV footage, it did not depict the entire incident: the footage shows the doors closing as the complainant raised his left hand towards a security guard with his palm open. As this occurred just prior to any physical altercation occurring, the footage did not assist in establishing one way or the other what took place. The Commission concluded that there was insufficient evidence that excessive force was used, and that the complainant's injuries would likely not meet the elements for the offence of assault causing bodily harm.

In exercising my function in section 195(1)(c) of the CCM Act, my focus is not on the substantive merits of an allegation of serious misconduct and I do not act as an advocate for complainants. Rather, my role is to determine whether the procedures used by the Commission were effective and appropriate. If I find material flaws in those procedures, or if I consider that the Commission has reached a conclusion that was not open on the evidence before it, I may recommend that it should reassess a complaint.

Here the Commission was faced with diametrically opposed versions of events, including an allegation of assault made against the complainant himself. It is difficult in such situations to determine the truth of the matter, and it is indeed unfortunate that the CCTV footage available does not provide any assistance.

However, upon reading the file I was concerned that the Commission's procedures had been materially impacted by a failure to consider a key aspect of the complaint. That is, the assessing officers had not sought to determine whether the complainant had been unlawfully deprived of his liberty contrary to section 333 of the *Criminal Code*.

The complainant had not specifically asserted that he had been deprived of his liberty, but this allegation was in my view implicit in his correspondence to the Commission. It was evident that the security officers detained him in a corridor of the hospital and in his room, and that the alleged assault upon him occurred while doing so. There was no information in the file as to any law that enabled the hospital's staff or contractors to detain the complainant, and it appeared to me that the question as to whether it had been lawful to do so was simply not addressed.

Relevantly, the Commission's conclusion that there was 'insufficient evidence to determine if the security officers used excessive force against [the complainant]' seemed to imply that some degree of force was warranted and therefore lawful. However, it was not clear to me that this was the case. The complainant was not under arrest. Whether or not he had appeared confused upon being admitted to the hospital, he was a voluntary patient who had decided to leave his room to go and meet his wife elsewhere within the building. In the absence of a lawful reason to detain him, *any* force used against him would have been excessive.

I wrote to the Commission on 7 May 2021 setting out these concerns. I concluded that if there was no law which permitted the hospital or its security guards to detain the complainant and physically compel him to remain in a particular room of the hospital's choosing, then there had not only been a breach of section 333 of the *Criminal Code* but also an assault in the commission of that offence. Such behaviour by the staff or contractors of the hospital would, I suggested, be very serious misconduct.

On 15 July 2021 the Commissioner wrote to advise that the Commission had obtained further information from WACHS to inform its reconsideration and that he would write to me in due course once the process had been completed. On 28 September 2021 the Commissioner advised that the Commission had given further consideration to the question as to whether the security guards working at the Albany Health Campus constituted public officers. The Commissioner informed me that it had not been possible to secure particular information requested by the Commission, including any instrument of appointment or authorisation to exercise functions under the *Health Services (Conduct and Traffic) Regulations 2016.*

The Commissioner concluded that in the absence of the above documents, it could not be established that the security officers were public officers at the relevant time. On this basis, the allegation that the complainant had been deprived of his liberty lay outside the Commission's jurisdiction. Contemporaneously with the Commissioner's letter, additional documents were provided to my office that demonstrated the attempts made to determine whether the security guards were public officers.

4. THE DEFINITION OF 'PUBLIC OFFICER'

Section 3 of the CCM Act provides that 'public officer' has the meaning given by section 1 of the *Criminal Code.* That section in turn provides that this term means any of the following —

> (a) a police officer;
> (aa) a Minister of the Crown;
> (ab) a Parliamentary Secretary appointed under section 44A of the *Constitution Acts Amendment Act 1899*;
> (ac) a member of either House of Parliament;
> (ad) a person exercising authority under a written law;
> (b) a person authorised under a written law to execute or serve any process of a court or tribunal;
> (c) a public service officer or employee within the meaning of the *Public Sector Management Act 1994*;
> (ca) a person who holds a permit to do high-level security work as defined in the *Court Security and Custodial Services Act 1999*;
> (cb) a person who holds a permit to do high-level security work as defined in the *Prisons Act 1981*;
> (d) a member, officer or employee of any authority, board, corporation, commission, local government, council of a local government, council or committee or similar body established under a written law;
> (e) any other person holding office under, or employed by, the State of Western Australia, whether for remuneration or not;

The new documents provided to my office demonstrated that the Commission had obtained internal legal advice and sought further information from WACHS. Ultimately, it concluded that on the basis of the limited information available to the Commission, the security guards were not public officers. The Commission then reassessed the complainant's allegation that he was assaulted and determined that this and his other allegations were outside its jurisdiction.

However, although the Commission had made further enquiries, I was not satisfied that it had asked all necessary questions of WACHS to determine whether the security guards could be considered public officers. In particular, I considered that the question as to whether the security guards could be viewed as 'employees', and as such would be included within paragraph 1(c) or (e) of the above definition, remained open. As discussed further below, it is settled law that a person may be an employee notwithstanding that they are purportedly engaged as an independent contractor.

I wrote to the Commission on 5 October 2021 setting out these concerns and observing that there was 'little information available as to, for instance, the extent to which the security officers could determine their own hours of work, the uniforms they wore, and whether they were subject to the direction and control of WACHS'. I concluded that it

did not presently seem possible to determine whether the security guards were properly regarded as WACHS employees, and therefore as public officers. Accordingly, I requested that additional questions be put to WACHS so the issue could be resolved.

On 14 October 2021 the Commissioner wrote to advise that further information had been requested. Documents subsequently added to the file demonstrated that one of the Commission's officers wrote to WACHS on 13 October 2021 posing the following questions about the nature of the security guards' engagement at the Albany Health Campus:

1. Does WACHS control the officers in terms of their obligation to work, how their work is performed (for example, through work policies and procedures), level of remuneration, working hours etc?
2. Does WACHS remunerate the officers directly?
3. Does WACHS deduct income tax on the officers' behalf?
4. Is WACHS responsible for the provision of the officers' equipment?
5. Does WACHS allocate the officers' work, such as by preparing work rosters?
6. Does WACHS have the power to terminate the officers' services?
7. Is each officer specifically engaged by WACHS to do the work, with no ability for the officer to delegate to another person?
8. Are the officers permitted to approve work or incur expenses on WACHS' behalf?

A WACHS officer responded to the Commission in a 19 October 2021 email which simply read: 'The answer to each of the questions posed in the letter…is no'.

On 21 October 2021, the Commissioner wrote to me to advise that the further information received did not support the view that the security guards were employees rather than contractors. Consequently, they were not public officers and no further action would be taken regarding the complainant's allegations.

5. FURTHER ENQUIRIES

Together with its letter, the Commission provided additional materials including correspondence to and from WACHS. On reviewing these, I was frankly dissatisfied with the brevity and lack of detail in the email from WACHS to the Commission dated 19 October 2021. I was especially concerned that sufficient thought may not have been given to the questions posed and the answers provided.

For example, in relation to the specific complaint before me, with particular relevance to the first question posed by the Commission above, there was uncontradicted evidence that the security guards in question acted in response to an instruction from the nursing staff to return the complainant to his room. A statement provided by one of the security guards included the following information:

> I asked the nurse if they wanted the patient to return to his room the response was yes. i went ahead and closed the fire doors to prevent him from departing [sic]

Although the Commission had closed its file, I elected to continue pursuing this question as part of my function in section 195(1)(aa) of auditing the operation of the CCM Act. I note that section 196(2) of the CCM Act provides that I have the power to do all things necessary or convenient for the performance of my functions.

I wrote to WACHS on 9 November 2021 outlining my role and seeking more detailed answers to the questions posed by the Commission on 13 October 2021 regarding the security guards' engagement at the Albany Health Campus. I advised that I intended to report to Parliament on the matter given that it exemplified the difficulties that can be encountered in ascertaining whether a person is a 'public officer' for the purposes of the CCM Act. Representatives from WACHS subsequently contacted my office and it was agreed that a response would be provided by 17 December 2021.

On 14 December 2021 Ms Colette Young, Executive Director of WACHS People, Capability & Culture Directorate provided a comprehensive response on behalf of WACHS which answered the questions previously posed by the Commission. Ms Young's letter emphasised that the contractual relationship was between WACHS and the security company and did not enable WACHS to control individual security guards. The letter also attached relevant documentation, being a request for tender for the provision of security services at WACHS sites, an award of contract letter and an exercise of contractual extension letter.

6. RELEVANT LEGAL PRINCIPLES

As noted above, it is now settled that a person may be an employee at law regardless of the existence of contractual arrangements that characterise their situation differently. I do not propose to canvass the law on this subject exhaustively, but I mention it briefly due to its relevance to the matter at hand.

One of the leading Australian cases on the subject is *Hollis v Vabu Pty Ltd* [2001] HCA 44, in which a majority of the High Court found that couriers engaged by a company to deliver packages were employees rather than independent contractors and that on this basis the company could be held vicariously liable for tortious acts committed by them. The majority observed among other things that:

> Viewed as a practical matter, the bicycle couriers were not running their own business or enterprise, nor did they have independence in the conduct of their operations…these couriers were not providing skilled labour or labour which required special qualifications. A bicycle courier is unable to make an independent career as a free-lancer or to generate any 'goodwill' as a bicycle courier. The notion that the couriers somehow were running their own enterprise is intuitively unsound, and denied by the facts disclosed in the record…
>
> Vabu retained control of the allocation and direction of the various deliveries. The couriers had little latitude. Their work was allocated by Vabu's fleet controller. They were to deliver goods in the manner in which Vabu directed. In this way, Vabu's business involved the marshalling and direction of the labour of the couriers, whose efforts comprised the very essence of the public manifestation of Vabu's business. It was not the case that the couriers supplemented or performed part of the work undertaken by Vabu or aided from time to time; rather, as the two documents relating to work practices suggest, to its customers they were Vabu and effectively performed all of Vabu's operations in the outside world. It would be unrealistic to describe the couriers other than as employees.[1]

[1]Gleeson CJ, Gaudron, Gummow, Kirby, Hayne JJ at [47], [48] and [57].

Employment practices are changing rapidly, and the law on this point continues to develop and evolve. Relevantly, the High Court is presently considering *CFMMEU v Personnel Contracting Pty Ltd* (Case P5/2021), which concerns a tripartite arrangement whereby an English backpacker, Mr Daniel McCourt, carried out work for a construction company on various sites around Perth through a labour hire provider. The case was heard on 31 August 2021, with the Court reserving its decision.

That case was an appeal from the Full Federal Court decision of *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2020] FCAFC 122, in which the Court concluded that Mr McCourt was not an employee. The court considered itself bound by a previous case that was directly on point,[2] with Allsop CJ commenting, for instance, that 'Unconstrained by authority I would favour an approach which viewed the relationship…as that of casual employment'.[3]

The facts in that case were distinct from the present situation in several important respects, including the security guards' status as licence holders pursuant to the *Security and Related Activities (Control) Act 1996* rather than providers of unskilled labour.

For present purposes it is sufficient to note that a person may be considered an employee despite not being characterised as such in contractual documents and that it is sometimes difficult to determine who meaningfully exercises control over a worker in the context of labour hire and other contemporary employment practices.

7. ANALYSIS OF CONTRACTUAL DOCUMENTS

It will be evident from the brief discussion above that determining whether a person is an employee is not a simple box-ticking exercise but requires an analysis of all the conditions of their working arrangements.

The documents provided by WACHS painted a picture of a complex situation with some indicia suggesting the existence of an employment relationship while others pointed in the opposite direction. In reviewing these materials, my focus was necessarily on the extent to which WACHS could be said to have had control over the security guards in the performance of their work, and the degree of control exercised.

The tender provided by WACHS made it clear that hospital staff were entitled to give instructions to the security guards and expect those instructions to be obeyed. For instance, security guards were 'required to attend the specified site within 30 minutes of receiving a request from the Customer's Representative' and were also required to 'remain at the site for as long as circumstances require or as directed by the Customer's Representative'. They were also required to 'perform such operations at the site as directed by the Customer's Representative'.

In concurring with the majority in *Hollis v Vabu* on the question of vicarious liability, McHugh J characterised the paradigm case of an independent contractor as being 'someone who acts as an independent principal, exercising an independent discretion in carrying out a task for his own business interest and who is retained simply to produce a

[2] *Personnel Contracting Pty Ltd trading as Tricord Personnel* v *Construction, Forestry, Mining and Energy Union of Workers* [2004] WASCA 312.
[3] Allsop CJ at [31].

result'.[4] A security guard engaged to carry out work at WACHS sites would not, in my view, possess these characteristics.

However, the absence of these characteristics of an independent contractor does not, in and of itself, render a person an employee. In this instance, there were other indicia that suggested strongly that the security guards were not employed by WACHS. Notably, the tender contained a mechanism that expressly reduced the day-to-day control that WACHS could exercise over them. That is, the tender required that the security firm have in place a supervisor to deal with and oversee workplace issues. The nominated supervisor was obliged to 'regularly supervise the [security guards] and ensure that security services are carried out in the manner prescribed', oversee the training of new or replacement security guards, and ensure that equipment was used in the correct manner. The tender formed part of the contractual arrangements between WACHS and the security company.

Therefore, although the security guards were required to follow instructions given by the hospital staff, the manner in which they carried out their work was to be supervised by the security firm rather than any employee of WACHS. This arrangement appeared inconsistent with the existence of an employment relationship between the security guards and WACHS. There were also other indicia that pointed away from an employment relationship, including the fact that the security guards were not remunerated directly by WACHS, and that WACHS did not deduct income tax or supply equipment other than access cards and could not terminate their employment.

It seemed to me that it was an open question as to how a court might construe the relationship between the security guards and WACHS if called upon to do so. However, having considered the documents provided, and in particular having had regard to the requirement that the security company had to provide its own supervisor, it seemed more likely than not that the persons referred to in the complaint were not WACHS employees. Some nine months after first receiving the complaint, I was finally able to conclude my assessment of the Commission's procedures.

I determined that it had been reasonable for the Commission to conclude that the relevant security guards were not public officers and that their conduct fell outside its remit. Being satisfied that the Commission's procedures were appropriate and effective, I closed my file on the matter and wrote to the complainant to advise of my reasons for doing so.

8. MY ASSESSMENT AND RECOMMENDATIONS

Although my statutory function had now been fulfilled, the outcome was far from optimal. It is plainly undesirable that it should take this degree of time and effort to ascertain whether a person constitutes a 'public officer', and therefore whether their conduct comes within both the Commission's jurisdiction and my own.

Having formed the view that some amendment to the definition in the CCM Act was required, I prepared this report and circulated it in draft form to the Commission, the Director of the Albany Hospital, WACHS and the security company that employed the

[4] *Hollis v Vabu* at [68].

relevant security guards. I received a submission from the Commissioner on behalf of the Commission, with the other parties declining to comment.

The Commissioner agreed that the scope of the 'public officer' jurisdiction required clarity. He outlined the impact of the current definition on the Commission's work, noting that considerable resources are expended on determining the issue of jurisdiction, such that the Commission's approach was usually to take a conservative view, seek internal legal advice on specific cases and err on the side of caution. He conceded that this could result in delay in action taken on an allegation, perceived inconsistency in approach and decisions that appear opaque or arbitrary.

As noted above, at present the CCM Act adopts the definition of 'public officer' that applies in the *Criminal Code* and an amendment could be made by either changing the Code definition (which would have flow-on effects beyond the issues raised in this report) or by including a standalone definition in the CCM Act itself. The Commissioner has expressed a preference for the latter option, noting that the two statutes perform very different roles: the CCM Act's purpose is to improve the integrity of the public sector, whereas the Code has a focus on expectations of behaviour by individuals. Having considered the matter, I agree that there may well be benefit in maintaining a separate definition of 'public officer' in the CCM Act, if it is feasible to do so. These complexities are matters for the Parliament to consider and resolve.

In addition, there is a policy question as to the appropriateness of excluding independent contractors working within the public sector from this definition. It is concerning that an independent contractor working within a public sector agency, who may be working with vulnerable people and exercising the coercive powers of the State, lies beyond the Commission's jurisdiction purely due to the nature of their engagement by the relevant department.

Relevantly, the Commissioner has observed that the current definition of 'public officer' has not evolved to recognise the increasing use within the public sector of varying employment arrangements that are outside the traditional permanency of employment in the sector. For example, he notes that the *Criminal Code* definition does not always capture persons who wholly or exclusively contract services to a public sector agency, nor recognise that the public sector often seeks to implement policy and provide public value through public/private partnerships. Nor does it recognise all classes of volunteer workers within the public sector who expend public funds and work alongside paid employees who are undoubtedly public officers.

In this instance, from the complainant's perspective, he was allegedly assaulted and detained against his will by persons working in a public hospital in the State of Western Australia where he was a voluntary patient. The fact that the people who allegedly mistreated him were not employed by the hospital directly, but rather were engaged as independent contractors, is immaterial to him. Yet the nature of their contractual arrangements with WACHS has the effect that their conduct lies beyond the Commission's scrutiny and thereby denies the complainant the opportunity to have his allegations of serious misconduct considered and acted upon by both the Commission and me.

This outcome, in my view, runs counter to the overall purpose of the CCM Act, and it is on this basis that I raise the matter for the Parliament to consider.

MATTHEW ZILKO SC
PARLIAMENTARY INSPECTOR