

CORRUPTION AND CRIME COMMISSION ACT 2003
(Section 27(5))

Protocol for the Investigation of Allegations Against Judicial Officers

Introduction

1. This protocol has been formulated by the Corruption and Crime Commission (the Commission) and the Chief Justice of Western Australia pursuant to s. 27(5) of the *Corruption and Crime Commission Act 2003* (the Act) for the purpose of setting out the conditions and procedures which are to apply to the investigation of a holder of judicial office by the Commission.

Objects

2. This protocol is intended to promote and facilitate the prompt and effective investigation of allegations against the holders of judicial office falling within the jurisdiction of the Commission (defined by s. 27(3) of the Act), having regard to:
 - (a) the need to have proper regard for the preservation of the independence of judicial officers (s. 27(4) of the Act);
 - (b) the need to ensure that the holders of judicial office are afforded procedural fairness, including a reasonable opportunity to know and answer any allegations made against them, prior to the determination of any complaint;
 - (c) the desirability of avoiding circumstances in which an investigation by the Commission might impede or compromise pending judicial proceedings, or an appeal from those proceedings;
 - (d) the desirability of maintaining the responsibility of the head of each court jurisdiction for the maintenance of the integrity of that court, and of maintaining the responsibility of the Chief Justice for the maintenance of the integrity of the justice system; and
 - (e) the desirability of maintaining public confidence in the justice system.
3. The Commission has jurisdiction to assess and investigate allegations of misconduct by public officers (s. 18 of the Act).
4. The term "public officer" has the same meaning as in section 1 of *The Criminal Code* (s. 3 of the Act). A holder of judicial office is a public officer within that definition.

5. "Misconduct" has a very specific meaning in the Act (defined in s. 4 of the Act).
6. The Chief Justice is a "notifying authority" under s. 3 of the Act and so obliged to report suspected misconduct to the Commission under s. 28 of the Act.
7. However, s. 27(3)-(6) of the Act makes special provision for the Commission's jurisdiction in respect of allegations about a person in their capacity as the holder of a judicial office.

Statutory Background

8. Subsections 27(3), (4), (5) and (6) of the Act provide that –

"(3) An allegation about a person in his or her capacity as the holder of a judicial office must not be received or initiated by the Commission unless the allegation relates to –

- (a) the commission or attempted commission of;
- (b) the incitement of the commission of; or
- (c) a conspiracy to commit,

an offence under section 121 of *The Criminal Code* or is of a kind that, if established, would constitute grounds for removal from judicial office.

(4) The Commission, when performing its functions in relation to the conduct of a holder of judicial office must proceed having proper regard for preserving the independence of judicial officers.

(5) When investigating a holder of judicial office, the Commission must act in accordance with conditions and procedures formulated in continuing consultation with the Chief Justice.

(6) In this section –

"holder of a judicial office" has the same meaning as it has in section 121 of *The Criminal Code*."

9. Section 121 of *The Criminal Code* relevantly provides:

"Any person who –

- (1) Being the holder of a judicial office, corruptly asks, receives, or obtains, or agrees or attempts to receive or obtain any property or benefit of any kind for himself or any other person on account of anything already done or omitted

to be done, or to be afterwards done or omitted to be done, by him in his judicial capacity; or

- (2) Corruptly gives, confers, or procures, or promises or offers to give or confer, or to procure or attempt to procure to, upon, or for any person holding a judicial office, or to, upon, or for any other person, any property or benefit of any kind on account of any such act or omission on the part of the person holding the judicial office;

Is guilty of a crime, and is liable to imprisonment for 14 years.

The term “**holder of a judicial office**” in this section includes an arbitrator or umpire and any member of any board or court of conciliation or arbitration; but in the case of an offence committed by or with respect to any such person, the longest term of imprisonment is 7 years.”

Those persons who constitute courts of record are clearly holders of judicial office. In addition, there are members of boards, tribunals and bodies exercising governmental powers. Whether those persons are holders of judicial office and within the scope of this protocol will be determined by taking account of the relevant statutory context and circumstances.

10. Section 27(3) of the Act operates as a restriction upon the jurisdiction which the Commission would otherwise have over public officers who hold judicial office. If an allegation is made against the holder of a judicial office in that capacity, the Commission only has jurisdiction if the allegation comes within s. 27(3) of the Act – the Commission takes the view that the s. 4 definition of “misconduct” has no work to do in that situation.

11. It follows that a person who holds an executive appointment but who may be required to act judicially on occasion (e.g., a Registrar or Justice of the Peace)

- is subject to the Commission’s more restricted jurisdiction under s. 27(3) of the Act only when acting in a judicial capacity; but
- when not so acting may be subject to the Commission’s (wider) general jurisdiction under s. 18 and s. 4 of the Act.

12. Where appropriate, the Commissioner will consult with the Chief Justice on whether or not any person concerned is the holder of a judicial office within the scope of this protocol.

Procedure

- 13.1 "Allegation" hereafter means allegation about a person in their capacity as the holder of a judicial office.
- 13.2 "Commissioner" means the Commissioner of the Corruption and Crime Commission, and includes an Acting Commissioner.
- 13.3 "Judicial Officer" means a holder of judicial office against whom an allegation has been made in that capacity.
14. When the Commission receives an allegation, it will report that to the Chief Justice, or if the allegation is against the Chief Justice, then to the judge who would, in the absence of the Chief Justice, be the Acting Chief Justice. In such a case, this protocol will be applied as if all references herein to the Chief Justice are taken as a reference to the person who would, in the absence of the Chief Justice, be the Acting Chief Justice.
15. The Commissioner will confer with the Chief Justice on:
- (a) whether or not the allegation should also be reported to the head of the relevant court or jurisdiction,
 - (b) whether the allegation falls within s. 27(3) of the Act, although that is, of course, a determination to be made by the Commission.

Assessment of Allegation (Preliminary Investigation)

16. The Commission will assess the allegation and form an opinion and make a decision that the Commission considers appropriate in the circumstances (s. 32 of the Act). That decision may be to
- take no further action;
 - consult any person or body about the allegation;
 - conduct a preliminary investigation;
 - conduct a full Commission investigation, or
 - refer the allegation to another agency (e.g., WA Police) for investigation;

- investigate or take action in co-operation with an independent agency or appropriate authority (sections 32 and 33 of the Act).
17. If the Commission considers there is no substance to the allegation, the Commission
- will notify the Chief Justice (and, if appropriate, the head of the relevant court),
 - will notify the informant (s. 35 of the Act),
 - may notify the judicial officer, if
 - (a) the judicial officer so requests, or
 - (b) the Commission considers it to be in the judicial officer's best interests, and (in either case)
 - (c) if the Commissioner considers it to be in the public interest to do so (s. 36 of the Act).
18. If the allegation is to be further investigated, the Commissioner will so advise and consult with the Chief Justice (and, if appropriate, the head of jurisdiction) on whether to inform the judicial officer.

Investigation

- 19.1 Where the Commission is of the opinion that the judicial officer may be physically or mentally unfit to properly exercise the functions of a judicial office, it will consult with the Chief Justice and/or the head of the relevant court regarding a request for the judicial officer to undergo a medical or psychological examination.
- 19.2 In the case of a Magistrate, the Commission will also give consideration to whether the Attorney General should be advised in order that he or she might consider action pursuant to Schedule 1 of the *Magistrates Act*.
- 19.3 In the case of other categories of judicial officer, the Commission will consider consultation with, dependent on the relevant statutory context and circumstances, an appropriate person with authority over such judicial officer.
20. If the Commission is considering whether to hold public hearings as a part of its investigation, it will consult the Chief Justice and, as appropriate, the head of the relevant court, tribunal or other body regarding whether the Commission should exercise its discretion under s. 140(2) of the Act, albeit the discretion is one which the

Commission must exercise itself. S. 140(2) of the Act provides that, in exercising its discretion, the Commission shall consider if, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, it is in the public interest to hold the examination in public.

21. During any investigation falling within this protocol, the Commission will consult with the Chief Justice and, as appropriate, the relevant Head of Jurisdiction when so requested or at predetermined intervals or both.

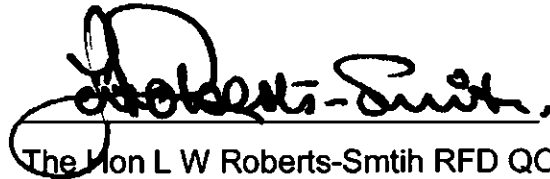
22. The purpose of such consultation is to

- keep the Chief Justice informed, as the responsible judicial officer;
- enable assurance that the investigation is being conducted in accordance with s. 27(4) of the Act; and
- to enable the Chief Justice to take any appropriate or necessary action with respect to the standing or conduct of the judicial officer or the business of the relevant court.



The Hon Justice Wayne Martin
Chief Justice of Western Australia

Date: 26 FEB 2008



The Hon L W Roberts-Smtih RFD QC
Commissioner
Corruption and Crime Commission

Date: 26 FEB 2008