SUPREME COURT OF QUEENSLAND

CITATION:	*Flori v Winter & Ors* [2019] QSC 106
PARTIES:	**RICKY ANTHONY FLORI** (Plaintiff) **v** **DAVID BRETT WINTER** (First Defendant) **PETER DOYLE** (Seventh Defendant) **DIRK PETERSEN** (Eighth Defendant) **STATE OF QUEENSLAND** (Ninth Defendant)
FILE NO/S:	BS No 4178 of 2017
DIVISION:	Trial Division
PROCEEDING:	Determination of a separate question
DELIVERED ON:	3 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	28 February 2019
JUDGE:	Bowskill J
ORDER:	**The answer to the question posed for separate determination by the court is no, the letter dated 21 February 2010 is not capable of being a "public interest disclosure" under s 15 of the *Whistleblowers Protection Act* 1994, as it does not contain information about conduct that is "official misconduct" within the meaning of ss 14 and 15 of the *Crime and Misconduct Act* 2001.** **I will hear from the parties about any consequential orders, and as to costs.**
CATCHWORDS:	COMMUNICATIONS LAW – WHISTLEBLOWER PROTECTION AND PUBLIC INTEREST DISCLOSURE LEGISLATION – determination of a separate question under r 483 of the *Uniform Civil Procedure Rules* 1999 (Qld) – where the plaintiff sent a letter to the Crime and Misconduct Commission alleging conduct engaged in by two police officers – where the plaintiff contends the letter was a public interest disclosure under s 15 of the *Whistleblowers Protection Act* 1994 (Qld) (repealed) and therefore the *Public Interest Disclosure Act* 2010 (Qld) – whether the letter

contained information about conduct which amounts to "official misconduct" under s 15 of the *Crime and Misconduct Act* 2001 (Qld) – whether the alleged conduct is "conduct" within the meaning of s 14 of the *Crime and Misconduct Act* – if so, whether the alleged conduct could, if proved, be a criminal offence and/or a disciplinary breach providing reasonable grounds for termination of a police officer's services under s 15 of the *Crime and Misconduct Act*

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – PARTICULAR WORDS AND PHRASES – GENERALLY – consideration of the meaning of the phrases "breach of the trust placed in the person" and "misuse of information or material acquired" in s 14 of the *Crime and Misconduct Act* – consideration of the meaning of "a place to which the public are permitted to have access" for the purposes of s 227 of the *Criminal Code* – consideration of the meaning of "use" of a motor vehicle in s 408A(1)(a) of the *Criminal Code*

Acts Interpretation Act 1954 (Qld) s 35C
Crime and Misconduct Act 2001 (Qld) (Reprint No. 5) (now the *Crime and Corruption Act* 2001 (Qld)) s 14, s 15, s 20, s 21
Criminal Code Act 1899 (Qld) s 227(1)(a), s 408A(1)(a)
Police Service Administration Act 1990 (Qld) s 1.4, s 7.4(2), s 7.4(3)
Public Interest Disclosure Act 2010 (Qld) s 42, s 74
Transport Operations (Road Use Management) Act 1995 s 135(1)(a)
Uniform Civil Procedure Rules 1999 (Qld) r 483
Whistleblowers Protection Act 1994 (Qld) (Reprint No. 5D) (repealed) s 3, s 7(2), s 7(3), s 14, s 15, schedule 6

Aldrich v Ross [2001] 2 Qd R 235
Bollmeyer v Daly [1933] SASR 295
Cunneen v Independent Commission Against Corruption [2014] NSWCA 421
Deputy Commissioner Stewart v Dark [2012] QCA 228
Dickinson v Motor Vehicle Insurance Trust (1987) 163 CLR 500
Dodd v Brown [2012] NTSC 102
Gardem v Edmistone [2018] QDC 118
Greiner v Independent Commission Against Corruption (1992) 28 NSWLR 125
Hardman v Minehan (2003) 57 NSWLR 390
Hollingsworth v Bean [1970] VR 819
Mansfield v Kelly [1972] VR 744
McKenzie v Acting Assistant Commissioner Wright [2011] QCATA 309
Mowe v Perraton [1952] 1 All ER 423
O'Brien v Assistant Commissioner Gollschewski [2014]

QCATA 148
Police Service Board v Morris (1985) 156 CLR 397
R v Wibberley [1965] 3 All ER 718
Ramsay v Samuels (1975) 14 SASR 77
Re Newnham [1993] 1 Qd R 502
Re Watson [1997] 1 Qd R 340
Walker v Crawshaw [1924] NZLR 93
Wray v Robertson [1970] Tas SR 253

COUNSEL: DP O'Gorman SC and D Marckwald for the plaintiff
K A Mellifont QC and SA McLeod QC for the defendants

SOLICITORS: Cavanagh Gillies for the plaintiff
Crown Law for the defendants

Introduction

[1] The plaintiff, a former police officer, has brought proceedings against three other police officers and the State of Queensland, claiming damages for the statutory tort of reprisal under s 42 of the *Public Interest Disclosure Act* 2010 (Qld). The alleged reprisal is said to have occurred because of a letter the plaintiff sent to the Crime and Misconduct Commission on about 22 February 2010.

[2] The plaintiff alleges the letter is a "public interest disclosure" under s 15 of the *Whistleblowers Protection Act* 1994 (Qld) (repealed)[1] and therefore under the *Public Interest Disclosure Act*.[2] It is common ground that if the letter is not a public interest disclosure under the *Whistleblowers Protection Act*, the plaintiff's proceeding must fail.

[3] Accordingly, the parties agreed to an order under r 483 of the *Uniform Civil Procedure Rules* 1999 (Qld) for the separate determination of the following question:

> "Was the letter dated 21 February 2010 sent by the plaintiff to the then known Crime and Misconduct Commission referred to in paragraph 6 of the plaintiff's fourth amended statement of claim filed 18 September 2018 capable of being a public interest disclosure under section 15 of the *Whistleblowers Protection Act 1994*, that is,
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> (a) do the contents of the letter amount to:

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1 The relevant version is reprint no. 5D.

2 See s 74, which provides that a public interest disclosure made under the repealed *Whistleblowers Protection Act* before the commencement of s 74 is taken, from the commencement, to be a public interest disclosure under the new *Public Interest Disclosure Act* 2010. Sections 1 and 2 of the new Act commenced on the date of assent (20 September 2010); all remaining provisions, including s 74, commenced on 1 January 2011 (2010 SL No. 305).

> (i) information about conduct that is conduct within the meaning of s 14(b)(ii) or (iii) of the *Crime and Misconduct Act 2001*? and
>
> (ii) information about conduct that could, if proved, be conduct described in s 15 of the *Crime and Misconduct Act 2001*, that is a criminal offence or a disciplinary breach providing reasonable grounds for terminating the person's services, if the person is or was the holder of an appointment?"

[4] For the following reasons, the answer to this question is "no", the letter is not capable of being a public interest disclosure under s 15 of the *Whistleblowers Protection Act*.

Meaning of "public interest disclosure" under the *Whistleblowers Protection Act*

[5] The principal object of the (now repealed) *Whistleblowers Protection Act* was described in s 3 as "to promote the public interest by protecting persons who disclose –

- unlawful, negligent or improper conduct affecting the public sector
- danger to public health or safety
- danger to the environment."

[6] Section 7(2) described the protection given by the Act as very broad, necessitating a number of "balancing mechanisms" intended to, inter alia, focus the protection where it is needed. As confirmed in s 7(3), the scheme of the Act:

> "gives protection only to a ***public interest disclosure***, which is a particular type of disclosure defined by reference to the person who makes the disclosure, the type of information disclosed and the entity to which the disclosure is made (the ***appropriate entity***)."

[7] As defined in schedule 6 to the Act, "public interest disclosure" means:

> "a disclosure of information specified in sections 15 to 20 of the Act made to an appropriate entity and includes all information and help given by the discloser to an appropriate entity."

[8] Part 3 of the *Whistleblowers Protection Act* described the type of disclosures that may be made as public interest disclosures under the Act, and who may make them (s 13).

[9] Section 14 of the Act provided:

> "**14 What type of information can be disclosed?**
>
> (1) The types of information that may be disclosed by a public interest disclosure, and who may make the disclosure, are

specified in sections 15 to 20.

(2) A person has information about conduct or danger specified in sections 15 to 20 if the person honestly believes on reasonable grounds that the person has information that tends to show the conduct or danger.

(3) If information is about an event, it may be about something that has or may have happened, is or may be happening, or will or may happen.

(4) If information is about someone else's conduct, the information may be about conduct in which the other person has or may have engaged, is or may be engaging, or is or may be intending to engage.

(5) The information need not be in a form that would make it admissible evidence in a court proceeding.

Example –

The information may take the form of hearsay."

[10] Relevantly, one of the types of disclosure of information was described in s 15, as follows:

"**15 Public officer may disclose official misconduct**

A public officer may make a public interest disclosure about someone else's conduct if –

(a) the officer has information about the conduct; and

(b) the conduct is official misconduct."

[11] As a police officer, the plaintiff was a "public officer" at the time of the disclosure.[3]

[12] For the purposes of s 15, the term "official misconduct" had the same meaning as in the *Crime and Misconduct Act* 2001 (Qld) (now called the *Crime and Corruption Act* 2001).[4] The concept of "official misconduct" was dealt with in chapter 1, part 4 (interpretation), division 2 (ss 14-19) of the *Crime and Misconduct Act*.

[13] At the relevant time,[5] ss 14 and 15 of the *Crime and Misconduct Act* provided:

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[3] See s 7 and the definition in schedule 6 to the *Whistleblowers Protection Act*.

[4] See s 8(1) and the definition of "official misconduct" in schedule 6 to the *Whistleblowers Protection Act*.

[5] See reprint no. 5.

"**14 Definitions for div 2**

In this division –

conduct means –

(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 –

(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 –

(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.

hold an appointment means hold an appointment in a unit of public administration.[6]

15 Meaning of *official misconduct*

Official misconduct is conduct [within the meaning of s 14] that could, if proved, be –

(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."

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[6] See s 20 (meaning of unit of public administration) and s 21 (holding appointment in unit of public administration) of the *Crime and Misconduct Act*.

[14] The heading to division 2, "official misconduct", forms part of the division.[7] Reading ss 14 and 15 together, the term "*official* misconduct" is concerned with misconduct, of a particularly serious kind (s 15), in connection with the performance of the functions or the exercise of the powers of a unit of public administration, or by the holder of an appointment in such a unit (s 14). The meaning of "conduct", as one element of the definition of "*official* misconduct", is to be construed in this context.

[15] "Misconduct" is a broader term than "official misconduct". "Misconduct" is defined in schedule 2 to the Act to mean "official misconduct or police misconduct". "Police misconduct" is defined in the schedule to mean:

> "conduct, other than official misconduct, of a police officer that –
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> (a) is disgraceful, improper or unbecoming a police officer; or
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> (b) shows unfitness to be or continue as a police officer; or
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> (c) does not meet the standard of conduct the community reasonably expects of a police officer."

[16] As these definitions make clear, conduct of a police officer, which is nevertheless of a serious nature (including, for example, where it could, if proved, be a criminal offence) may amount to "police misconduct", but fall short of "*official* misconduct".

The letter of 21 February 2010

[17] The letter alleges conduct engaged in by two police officers, who I will refer to as A and B. Relevantly, replacing the names with A and B (and removing place names) it reads:

> "In late 2009 [A] was seen at Red Rooster at … by [two other police officers] with [B] in the … District Duty Officer police car. It was obvious that [B] had her head in [A's] lap giving him a head job [*second paragraph*]
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> In the last month in the early hours of the morning [another two police officers] from … found a car parked in the carpark of the shops in … by itself in the early hours of the morning. They checked and it was [B's] car. A very short time later the … District Duty Officer police car speed out from behind the shopping centre and left. [B] was in that car. [A] was spotted at … in plain clothes with [B], both got out of the … District Duty Officer police car. He was seen by an officer that was at the academy with him and knew him personally. [*third paragraph*]

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[7] Section 35C of the *Acts Interpretation Act* 1954 (Qld).

> On nightwork [A] meets up with [B] to have coffee at the BP at … outside his district on a regular basis. He is working at the time and sometimes she comes with him, or just meets him there. [*fourth paragraph*]
>
> [B] is the officer involved in a stupid prank at … some time ago where it was swept under the carpet by [another police officer]. [B] has been seen in the … District Duty Officer car on multiple other occasions off duty. [*fifth paragraph*]
>
> … [some] Police believe that special attention is given to [B] by the ... District Duty Officers and we feel this is wrong by a person who is supposed to be supervising. I can see the headline. Senior police officer receives fellatio in police car [*sixth paragraph*]"

[18] The letter names a person other than the plaintiff as the apparent author if it.

[19] The plaintiff contends that the letter was a public interest disclosure because it disclosed information about conduct two police officers (A and B) had been engaging in, as identified in the second and fourth paragraphs, which was "official misconduct", being:

1. "conduct", within the meaning of s 14 of the *Crime and Misconduct Act*, by those police officers that involved:

   (a) a breach of the trust placed in them as police officers; and/or

   (b) a misuse of material acquired in connection with the performance of their functions as police officers (namely, a police car);

2. that could, if proved, be:

   (a) a criminal offence, namely:

      (i) an offence under s 227 of the *Criminal Code* (Qld) of doing an indecent act in a place to which the public are permitted to have access;

      (ii) an offence under s 408A of the *Criminal Code* of unlawful use of a motor vehicle; and/or

      (iii) an offence under s 135 of the *Transport Operations (Road Use Management) Act* 1995 (Qld) of driving or otherwise using a vehicle on a road without the owner's consent; and/or

   (b) a disciplinary breach providing reasonable grounds for terminating their services as police officers (s 15 of the *Crime and Misconduct Act*).

[20] The issue for present purposes is whether the conduct disclosed in the letter amounts to "official misconduct" as defined. The questions are whether the conduct disclosed in the letter is "conduct" (within the meaning of s 14) which "could, if proved" be a criminal offence or a disciplinary breach providing reasonable grounds for termination (under s 15). In answering these questions, it is the content of the letter that is relevant and determinative; not whether the conduct might be "conduct", "or could, if proved" fall within s 15(a) or (b), if more information was known or disclosed.[8]

(Official mis) Conduct

[21] The conduct described in the letter which is said to be "official misconduct" is:

1. A and B engaging in a sexual act in a police car at [outside] Red Rooster (second paragraph of the letter).

2. A meeting up with B to have coffee, while A is on duty, at a location outside A's district (fourth paragraph of the letter).

[22] The plaintiff relies on the remaining parts of the letter as relevant to the question whether the conduct in 1 and/or 2 (if it is "conduct") could, if proved, be a disciplinary breach providing reasonable grounds for termination (but does not contend those other parts of the letter describe anything which could be "official misconduct" in itself).[9]

[23] The plaintiff relies upon two bases to contend that the conduct described in the second and fourth paragraphs of the letter is "conduct" within the meaning of s 14 of the *Crime and Misconduct Act*. Firstly, that it is or involves a breach of the trust placed in A and B as police officers; and, secondly, that it is or involves misuse of material (namely, a police car) acquired in or in connection with the performance of their functions as police officers.

Conduct that is or involves a breach of the trust placed in the persons as police officers

[24] The plaintiff submits that A and B's conduct is conduct that involves a breach of the trust placed in them as police officers because:

1. it "involved deliberately using police vehicles, to which the officers had been entrusted, for a purpose other than for which they were provided and for their own benefit"; and

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[8] *Gardem v Edmistone* [2018] QDC 118 at [202] and [206] per Andrews SC DCJ.

[9] T 1-42 to 1-43.

2. "the use of police vehicles for sexual acts and for personal meetings, whilst on duty, is a breach of the trust that is placed on police officers to act appropriately, and in pursuance of their employment, whilst on duty".[10]

[25] There has been some judicial consideration of the meaning of the phrase "breach of the trust placed in the person", in a similar context.

[26] In *Re Watson* [1997] 1 Qd R 340 Thomas J considered the meaning of the phrase conduct "that … involves a breach of the trust placed in the person by reason of his … holding the appointment" in s 32(1) of the *Criminal Justice Act* 1989 (Qld), which defined "official misconduct". The conduct in that case was a police officer pointing his loaded police revolver at a fellow police officer, in the constables' day room and, separately, in the home of a third officer. Thomas J (at 344) said:

> "The words 'breach of the trust placed in the person by reason of his holding the appointment' is not a term of art, and should be given its ordinary meaning. When a police officer assaults a member of the public or abuses his powers, the natural response of both the public and, when the occasion arises, the sentencing court, is to describe such conduct as damaging the public trust that is placed in the force… The relevant words in s 32 do not require that the breach be committed in the face of the public. It seems to me that the privilege of having arms is a particularly sensitive one which calls for serious personal discipline, and that breach of such discipline is capable of amounting to a breach of the trust placed in a police officer by reason of his position. The threatening of a fellow police officer with a service firearm is in my view capable of involving such a breach of trust."

[27] Thomas J also said, in this context:

> "Police officers are vested with considerable powers and it is a matter of public importance, and I think public trust, that police officers do not abuse those powers."[11]

[28] In *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125 at 165, Mahoney JA observed that the similar, but not identical phrase, "breach of public trust" includes the misuse of an office or of the powers of an office for a purpose for which it was not given. In that case it had been found that "Mr Greiner [the Premier of NSW] and Mr Moore [a Minister] used their position, their power and the influence it

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[10] Plaintiff's submissions at [15].

[11] Underlining added.

gave them to procure the preferment of Dr Metherell [for appointment to a particular public service position] for the purpose of achieving for them a political advantage".[12]

[29] In *Re Newnham* [1993] 1 Qd R 502 conduct by the former Police Commissioner, which involved failing to refund (or pay) the cost of return air fares the Queensland Police Service had paid for the Commissioner and his wife to travel to Vancouver, in circumstances where the Australian Federal Police had provided the funds to the Commissioner for those airfares, was accepted (without any detailed consideration) by the Court as constituting a breach of the trust placed in him as the holder of a relevant appointment, within the meaning of s 2.23(1)(b)(ii) of the *Criminal Justice Act* 1989.[13]

[30] As to the ordinary meaning of "trust" in this context, the following definition is apt: the obligation or responsibility imposed on someone in whom confidence is placed or authority is vested, or who has undertaken to carry out a particular duty or role.[14] A "breach" of that trust is breaking that obligation, or failing in that responsibility.

[31] For conduct to constitute "a breach of the trust placed in the person as [a police officer]", there must be some relation between the conduct, and the performance of the functions or exercise of the powers conferred on the police officer (or other holder of a relevant appointment). That connection was apparent in *Re Watson* (the abuse of the power (privilege) of bearing a firearm); *Greiner* (the misuse of power and influence to effect an appointment); and *Newnham* (essentially an act of dishonesty, failing to repay public money).

[32] It is not apparent in the conduct described in the second (or fourth) paragraph of the letter.

[33] Taking the conduct referred to in the second paragraph at its highest, it involves two police officers, seen in a police car parked outside a Red Rooster, with one officer performing a sexual act on the other.[15]

[34] Such conduct may amount to "police misconduct" as defined in the *Crime and Misconduct Act*, as being improper, unbecoming a police officer, or not meeting the standard of conduct the community reasonably expects of a police officer.

[35] But I am unable to conclude that it involves a breach of the trust placed in the person(s) as police officers, for the purposes of this element of the definition of "official misconduct". The conduct does not involve the abuse or misuse of any power or

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[12] Referred to with approval by Basten JA in *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 at [76]-[78].

[13] See at 505 (only particular (iii) found to be made out), 508 and 510.

[14] Oxford English Dictionary online.

[15] As the defendants submit, the second paragraph of the letter could be taken as saying no more than that it *appeared* one officer was performing a sexual act on the other. However, for the purposes of answering the separate question, I have proceeded on the basis set out above.

privilege conferred on the police officers, as police officers. The conduct is not related to, and has no connection with, their role as police officers, or the exercise of their functions or powers. The fact that they are sitting in a police car, and using the car for a reason unrelated to their professional duties at the time of the sexual act, is not sufficient, in my view, to raise "misconduct" to the level of "official misconduct".

[36] As for the fourth paragraph, there is no basis on which to conclude that the conduct described – of a police officer, on nightwork (who may or may not be on a break) meeting up with another police officer (who may or may not be on duty) to have coffee at a service station outside their district – could be said to involve a breach of the trust placed in the persons as police officers.

[37] The plaintiff's submissions give a very broad meaning to "the trust placed in the person[s] as" police officers, capturing the standard of appropriate behaviour expected of police officers, such that any falling below that standard would amount to a "breach of the trust placed in the person as" a police officer. For the reasons discussed above, in my view this does not reflect the proper construction of the words, in the context of the definition of "official misconduct" in ss 14 and 15 of the *Crime and Misconduct Act*.

Misuse of information or material acquired in or in connection with the performance of the person's functions

[38] The plaintiff submits that having regard to the plain meaning of the word "material" (as including "articles of any kind requisite for making or doing something", "formed or consisting of matter; physical; corporeal", "relating to, concerned with or involving matter"), this would include a police vehicle. The plaintiff contends the conduct of A and B, described in the second and fourth paragraphs of the letter, involves a misuse of material (a police car) acquired in connection with the performance of their functions as police officers.[16]

[39] As submitted by the defendants, there is no reference to a police car in the fourth paragraph. That is sufficient to deal with the argument about that paragraph.

[40] But dealing with the substance of the argument, in my view the conduct described in the second paragraph of the letter (and the fourth paragraph, if one assumes a police car was used) is not conduct by A and/or B that is or involves a misuse of (information or) material acquired in or in connection with the performance of their functions as police officers, for the following reasons.

[41] The phrase which appears in the statute is "information or material". It may be accepted that the addition of the words "or material" in the phrase "information or material" was intended to broaden the scope of the provision beyond what might fall

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[16] Paragraphs 18 and 19 of the plaintiff's submissions.

within the ordinary meaning of "information" (relevantly, knowledge, whether that be acquired in writing or verbally or in some other way) to include physical things (including physical things on or in which information, or knowledge, may appear or be stored or kept). But the word "material" must be construed in the context in which it appears, which is as part of the composite phrase "information or material acquired in or in connection with the performance of the person's functions…" In my view, a car does not fall within the meaning of "information or material" in the context of this provision.

[42] In any event, the information or material must have been "acquired" in or in connection with the performance of the person's functions as a police officer. Even if it were accepted that a car is capable of falling within the meaning of "information *or material*", a police officer who is allocated a police car to use for the duration of their shift does not, in the ordinary sense of the word, "acquire" that police car.[17]

[43] The defendants further submit that for the section to be enlivened, there must be a "misuse" of the information or material acquired, for a benefit (whether that is for the person's benefit, or the benefit of someone else), which connotes two separate elements. Here, the "misuse" and the purported "benefit" are the same thing – the sexual act in the car. I am not persuaded that as a matter of construction this provides an answer to the plaintiff's submission. But it does demonstrate that the manner in which the plaintiff seeks to engage s 14(b)(iii) involves a strain of the language used in the section.

[44] The purpose of the provision is to capture conduct of, relevantly, a police officer, who misuses information or material acquired by them in or in connection with the performance of their duties, for the benefit of themselves or someone else (for example, to secure a promotion or some other benefit or privilege, or damage another's reputation). Conduct which involves a personal frolic in the course of a shift – whether that is the sexual conduct referred to in the second paragraph, or the coffee break in the fourth paragraph, even where that involves the use of a police car – does not, in my view, fall within the language of misusing information or material acquired in or in connection with the performance of the functions of a police officer, for a benefit.

[45] It follows that in my view the conduct described in the second and fourth paragraphs of the letter is not "conduct" within the meaning of s 14 of the *Crime and Misconduct Act*. Therefore, it cannot be "official misconduct" within the meaning of s 15.

[46] However, in deference to the parties' submissions, and in case a different view be taken elsewhere, I will address the arguments about s 15.

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[17] As that may be informed, for example, by reference to the Macquarie Dictionary online (to come into possession of; get as one's own; or to gain for oneself through one's actions or efforts) or the Oxford English Dictionary online (to gain possession of through skill or effort; to obtain, develop, or secure in a careful, concerted, often gradual manner).

(Official mis) Conduct that could, if proved, be a criminal offence or disciplinary breach providing reasonable grounds for termination

[47] As already set out above, s 15 of the *Crime and Misconduct Act* provides that "official misconduct" is conduct (as defined in s 14) that could, if proved, be:

(a) a criminal offence;[18] or

(b) a disciplinary breach providing reasonable grounds for termination of the person's services, if the person is or was the holder of an appointment.

Does the letter disclose conduct that could, if proved, be a criminal offence?

[48] In an equivalent statutory context it has been held that in a provision referring to conduct which "could involve any of the following matters" (referring to a list of various criminal offences), "could" means that a jury properly instructed could reasonably conclude that the offence had been committed.[19] This reflects the test in a criminal proceeding, where on the close of the prosecution case a submission is made for the defendant that there is no case to answer. The question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands the defendant *could* lawfully be convicted.[20]

[49] That is the approach I take to s 15(a).

[50] Indecent act. First, the plaintiff submits the second paragraph of the letter discloses conduct which could, if proved, be an offence under s 227(1)(a) of the *Criminal Code* of doing an indecent act in a place to which the public are permitted to have access.

[51] Taking the information disclosed at its highest: A and B are sitting in a police vehicle, in a carpark outside a Red Rooster. B is observed with her head in A's lap, "giving him a head job".

[52] The elements of the offence are:

1. Wilfully doing an indecent act;

2. In a place to which the public are permitted to have access;

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[18] There is no definition of "criminal offence" in the *Crime and Misconduct Act* 2001. The word "offence" is defined in s 2 of the *Criminal Code* and, in s 3, a distinction is drawn between "criminal offences" and "regulatory offences". Under s 3(2), "criminal offences" comprise crimes, misdemeanours and simple offences. In the absence of any contrary indication in the *Crime and Misconduct Act* 2001, it is appropriate to adopt that as the meaning of "criminal offence" in s 15(a).

[19] *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125 at 136 per Gleeson CJ; *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 at [7] per Bathurst CJ (in relation to s 8(2) of the *Independent Commission Against Corruption Act* 1988 (NSW)).

[20] *May v O'Sullivan* (1955) 92 CLR 654 at 658.

3. Without lawful excuse.

[53] It may be accepted that the facts, if proved, could satisfy elements 1 and 3. There is no suggestion the conduct was other than voluntary and deliberate, therefore wilful on the part of both A and B. "Indecency" is a matter to be judged by currently accepted community standards, in the light of time, place and circumstances. It is open to conclude that a properly instructed jury could find an act of oral sex in a car in a public carpark an "indecent act". There is no lawful excuse.

[54] The next question is whether the act was being done "in any place to which the public are permitted to have access". There is no definition of "place" for the purposes of s 227.[21] On one view, the act was being done in a police car, which one might think is not a place to which the public are permitted to have access. However, on another view, the act was being done in a (police) car in a public car park, to which the public do have access. That is, although A and B are in a car, they are also "in any place to which the public are permitted to have access", namely the Red Rooster carpark.

[55] The observations of Sim J, made in *Walker v Crawshaw* [1924] NZLR 93, in relation to an equivalent offence[22] remain apt in relation to the offence under s 227:

> "The object of the legislation contained in s 41 is to prevent not immorality, but indecency; and the gist of the crime created by that section is the offence to other persons."

[56] In that case it was held that an indecent act committed inside a closed motor vehicle, which was parked on a street, is committed in the street and therefore in a public place. The facts of the case indicate the defendant had his car in the street for the purpose of being hired, but it was not suggested that meant the car itself became a "public place". The public place was the street on which the car was located. The fact that the act (two people having sexual intercourse in the back of the car) was done in circumstances that may possibly be seen by others made it an indecent act.

[57] Similarly, in *Mansfield v Kelly* [1972] VR 744 it was held that a person found drunk in a motor car which is in a public street is "found drunk in a public place" within the meaning of s 13 of the *Summary Offences Act* 1966 (Vic). Although the court accepted that the car itself was not a public place, the car was in a public street, which was a public place, and "where the motor car was, there were the defendants also". The court distinguished circumstances where a person may be drunk in a caravan or tent, in a public place, "because of the degree of [their] insulation" from the public place,

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[21] Cf s 230A, which has a definition of "place", but only for the purposes of chapter 23 of the Code.

[22] See at 94-95: "The charge against the appellant was laid under s 41 of the Police Offences Act, 1908, which enacts that every person is liable to imprisonment with hard labour for any term not exceeding one year who wilfully does any grossly indecent act in any public place or within the view thereof, whether alone or with any other person".

observing that "[a]n ordinary motor car is not in the same category as a caravan or tent. Its occupants are readily visible to outside observers".[23]

[58] On the other hand, in the context of an offence prohibiting a person from possessing a loaded firearm "in a public place", it has been held that a person who has such a firearm in an enclosed vehicle on a public street is not "in a public place" for the purposes of the offence.[24] The purpose of this offence provision has been described as to guard the public against the "self evident" risk posed by possession of a loaded firearm; not to guard against the reaction the mere possession of such a weapon may provoke in a member of the public. As McColl JA observed in *Hardman v Minehan* at [104], in this sense, the firearm offence can be distinguished from the public decency offences, the underlying purpose of which is to avoid offence to the public. In the case of public decency offences, to adopt her Honour's words from [122], the ability to observe the conduct in question is not inhibited by the illusory interposition of a windscreen.

[59] A jury could therefore find that element 2 is also satisfied in this case. Accordingly, taking the facts in the second paragraph of the letter at their highest, that paragraph does describe conduct that *could*, if proved, be a criminal offence under s 227. However, because I have found it is not "conduct" within the meaning of s 14, it cannot be "official misconduct" within the meaning of s 15.

[60] Unlawful use of a motor vehicle. The plaintiff next contends that the conduct described in the second and fourth paragraphs of the letter is conduct that could, if proved, be a criminal offence under s 408A(1)(a) of the *Criminal Code,* of unlawfully using a motor vehicle without the consent of the person in lawful possession of it.

[61] The elements of this offence are:

1. Unlawfully;
2. Using;
3. A motor vehicle;
4. Without the consent of the person in lawful possession of the motor vehicle.

[62] In relation to the fourth paragraph, the unlawful use is said to arise from the inference that A diverted from his "district", during a nightwork shift, in the police car he was

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[23] At 745. See also *Wright v McMurchy* [2011] WASC 219 at [23]-[24] per Commissioner Sleight and, on appeal, [2012] WASCA 257 at [36]-[37], noting that in this case the taxi in which the indecent act took place was itself found to be a "public place".

[24] *Hardman v Minehan* (2003) 57 NSWLR 390 at [17] per Tobias JA and at [94], [96], [103] and [126] per McColl JA, Meagher JA dissenting (referring, inter alia, to *Forte v Sweeney, ex parte Forte* [1982] Qd R 127, in which it was held that a person sitting in a car on a public street, with a loaded firearm in the car with him, was at the material time in a public place, namely the street, and the fact that he was sitting in a car did not matter).

using, for a coffee break with B. As already noted above, there is no reference to a car in the fourth paragraph. But even if this be assumed, there is no substance in the contention that such conduct could, if proved, be a criminal offence. There is no basis to conclude that the use by a police officer, in the course of a shift, of the police car allocated to the officer for that shift, to travel to obtain a coffee, even if that is outside the area he or she is working in, becomes a criminal (unlawful) use for the purposes of s 408A.[25]

[63] In relation to the second paragraph, the unlawful use is said to be the sexual act. Again, in my view, there is no substance to this contention.

[64] The person in lawful possession of the relevant police car at the relevant time may be the police officer(s) to whom it has been allocated for the purposes of their shift, which on the face of the letter could be A or B or both of them.[26]

[65] But in any event, the performance of a sexual act is not, in my view, a "use" of the vehicle for the purposes of s 408A(1)(a). "Use" of a motor vehicle has been held to extend to everything that fairly falls within the conception of the use of a motor vehicle as a motor vehicle, including a use which does not involve the vehicle moving, and including use by a passenger.[27] If the police officers are not "in lawful possession" of the car allocated to them (or either of them) for the shift, they are at least the custodians of it and, by inference, they are permitted to drive, park and sit in the car, as necessary. Engaging in a personal act in the car, contemporaneously with the permitted acts (of being in the car, and using the car) does not amount to a separate "use" of the car, such as to amount to a criminal offence under s 408A(1)(a).

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[25] See, by analogy, *R v Wibberley* [1965] 3 All ER 718; [1966] 2 QB 214 at 219-220, distinguishing a case in which the driver had finished work, and made a deviation for personal reasons, before returning the work vehicle as directed (*Mowe v Perraton* [1952] 1 All ER 423) from one in which the driver's work day was completed, he had failed to return to the work vehicle, and then later drove it for his own purposes (*Wibberley*). See also *Wray v Robertson* [1970] Tas SR 253 at 259 per Burbury CJ (a cab driver who was permitted to take the cab to his home for the weekend, bringing it back on Monday morning, and who was permitted to use it for limited personal use, but who exceeded that permission by travelling a further distance, was held not to have criminally used the cab, even though he had departed from the conditions of permitted use).

[26] See the definition of "possession" in s 1 of the *Code*, as including "having under control in any place whatever, whether for the use or benefit of the person of whom the term is used or of another person, and although another person has the actual possession or custody of the thing in question". See also *R v Judkins* [1979] Qd R 527. Cf *R v Wibberley* [1966] 2 QB 214 at 219 (which might suggest the police officers merely have custody of the vehicle, not legal possession).

[27] See *Dickinson v Motor Vehicle Insurance Trust* (1987) 163 CLR 500 at 505 (in the context of insurance); see also *Bollmeyer v Daly* [1933] SASR 295 at 297 (in relation to an offence of "driving or using" a motor vehicle without the consent of the owner); and *Ramsay v Samuels* (1975) 14 SASR 77 at 78 (in relation to an offence of using a motor vehicle without the owner's consent). The Supreme and District Courts Criminal Directions Benchbook direction 191 states that "used" in the context of s 408A(1)(a) "means used as a conveyance – that is that the defendant travelled in it whether as the driver or a passenger". No authority is provided for that proposition. It is supported by the High Court and South Australian authorities just referred to, but may be more narrow (on the authorities just referred to, sitting stationary in the vehicle (as opposed to travelling in it) may also be a "use" of a vehicle). See, for example, *Dodd v Brown* [2012] NTSC 102 at [38]-[39] per Barr J, in relation to a person found sleeping in a stolen car.

[66] This circumstance is to be distinguished from the limited permission found in *Hollingsworth v Bean* [1970] VR 819. In that case, the defendant was only permitted by the owner of the car to sit in the car at lunchtime to listen to the car radio while he ate his lunch. He was not permitted to drive the car. When on one occasion he drove the car away, he was found to have unlawfully used the car. The case of A and B is more analogous to the "departure from the conditions of a permitted use" cases, which do not give rise to criminal responsibility (such as *Mowe v Perraton* [1952] 1 All ER 423 or *Wray v Robertson* [1970] Tas SR 253).

[67] For the same reasons, I find the conduct is not such that it could, if proved, be a criminal offence under s 135(1)(a) of the *Transport Operations (Road Use Management) Act* 1995 (Qld), which provides that a person must not, without the owner's consent, drive or otherwise use a vehicle on a road.

Does the letter disclose conduct that could, if proved, be a disciplinary breach providing reasonable grounds for terminating the person's services?

[68] In so far as s 15(b) is concerned, in *Re Watson* [1997] 1 Qd R 340 Thomas J said of a similarly worded provision[28] that it "introduces in each case a matter of circumstance and degree"[29] and that to satisfy the provision it was at least necessary to show that the conduct in question was such that termination "would be a reasonably possible outcome" (at 344).

[69] Once again, it is the contents of the letter which are relevant and determinative. As Andrews SC DCJ said in *Gardem v Edmistone* [2018] QDC 118 at [202], the use of the word "could" is not a legislative invitation to consider more facts than are disclosed before concluding whether the disclosure was of conduct described in, relevantly, s 15.

[70] A police officer is liable to disciplinary action in respect of conduct considered (by the relevant officer authorised to take disciplinary action) to be misconduct or a breach of discipline. The disciplinary action that may be imposed ranges from a deduction from, or reduction in, the officer's salary, through to demotion in rank or, at worst, dismissal.[30]

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[28] Section 32(1)(d) of the *Criminal Justice Act* 1989, which provided that the relevant conduct "constitutes or could constitute … in the case of conduct of a person who is the holder of an appointment in the unit of public administration … a disciplinary breach that provides reasonable grounds for termination of the person's services in the unit of public administration".

[29] See also *Deputy Commissioner Stewart v Dark* [2012] QCA 228 at [33].

[30] See s 7.4(2) and (3) of the *Police Service Administration Act* 1990 (Qld).

[71] The term "misconduct" is defined in s 1.4 of the *Police Service Administration Act* 1990 (Qld) in the same terms as "police misconduct" in schedule 2 to the *Crime and Misconduct Act* (set out at paragraph [15] above). A "breach of discipline" is defined as a breach of the *Police Service Administration Act*, the *Police Powers and Responsibilities Act* 2000 or a direction of the Commissioner given under the *Police Service Administration Act*, but not to include misconduct.

[72] I proceed on the assumption that the conduct described in the second paragraph of the letter (sexual act in the police car) could be "misconduct". I find it difficult to make that assumption in relation to the fourth paragraph (A meeting B for coffee at a service station outside his district), on the basis of the contents of the letter alone; although it could be a breach of discipline. It does not affect the conclusion I have reached if the conduct in the fourth paragraph is also assumed to be "misconduct".

[73] The question posed by s 15(b) raises different matters for consideration to the question posed by s 15(a). Considering whether a disclosure is of conduct which, if proved, could be a criminal offence, is a relatively straightforward matter of considering whether the conduct disclosed demonstrates the elements of a particular criminal offence. On the other hand, the question whether the disclosure is of conduct which, if proved, could be a disciplinary breach providing reasonable grounds for terminating the person's services:

1. requires consideration of the nature of the conduct disclosed, as well as matters of circumstance and degree;

2. requires recognition that the determination of the appropriate disciplinary action in any given case will involve the exercise of particular expertise by the original decision-maker, a police officer of varying seniority depending upon the nature of the conduct, to which considerable weight is to be given, in the event of any external review of a disciplinary decision;[31]

3. incorporates, in the express words of the statute, a requirement to consider whether the conduct could, if proved, be a disciplinary breach providing *reasonable* grounds for terminating the person's services; and

4. requires recognition of the principle that sanctions imposed as part of disciplinary proceedings are not punitive, but protective;[32] and of the need to ensure the sanction is proportionate, and endeavour to achieve consistency.[33]

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[31] *Aldrich v Ross* [2001] 2 Qd R 235 at [43] and [45].

[32] *Police Service Board v Morris* (1985) 156 CLR 397 at 412.

[33] *O'Brien v Assistant Commissioner Gollschewski* [2014] QCATA 148 at [48]; and *McKenzie v Acting Assistant Commissioner Wright* [2011] QCATA 309 at [52] and [55].

[74] Those matters support the approach suggested by Thomas J in *Re Watson*, that in determining whether the conduct disclosed is conduct that *could*, if proved, be a disciplinary breach providing reasonable grounds for dismissal, it is at least necessary to show that the breach in question was such that dismissal would be a reasonably possible outcome.

[75] On this issue, the defendants relied upon evidence from Chief Superintendent Glenn Horton. He has 37 years' experience as a police officer, and was appointed as the Chief Superintendent, Internal Investigations Group, Ethical Standards Command, in June 2017. In this role, Chief Superintendent Horton is responsible for the investigation of complaints relating to police misconduct and corruption in accordance with the monitoring functions of the Crime and Corruption Commission. The curriculum vitae annexed to Chief Superintendent Horton's second affidavit outlines 20 years' experience with the Queensland Police Service discipline process, including as an investigator, hearings officer, professional practice manager responsible for case managing internal investigations in the Brisbane Metropolitan North Region, chief of staff to the Police Commissioner and now Operations Commander responsible for internal investigations and overall complaint management for the QPS.

[76] Chief Superintendent Horton outlines the procedure involved when a discipline complaint is made in relation to a QPS employee (see [5]-[6] of his first affidavit). Together with the Assistant Commissioner of the Ethical Standards Command, Chief Superintendent Horton has the overall responsibility for complaint management, including determining the classification of conduct as either a breach of discipline or police misconduct, and determining what disciplinary action is warranted ([6(d)]).

[77] Chief Superintendent Horton gives evidence that, in his role, he has knowledge of the types of misconduct which have resulted in the dismissal of members from the Queensland Police Service (at [11]). He annexes to his first affidavit a table setting out a precis of recent matters which have resulted in termination (or declarations that the conduct would have resulted in termination, had the person not already resigned). He also annexes a table containing a precis of recent comparative matters and sanctions imposed for misconduct involving sexual activity.

[78] Having regard to the letter of 22 February 2010, Chief Superintendent Horton expresses the following opinion (at [13] of his first affidavit):

> "I am of the view, based on comparative matters, that the conduct described in the letter, even if substantiated to the requisite standard, would not have resulted in the dismissal of either of the officers referred to therein."

[79] The plaintiff, by his counsel, objected to the admissibility of Chief Superintendent Horton's affidavits on the ground of relevance, arguing that his opinion (that the conduct outlined in the letter *would* not have resulted in dismissal of A or B) was not relevant to the statutory question posed by s 15(b), whether the conduct *could*, if

proved, be a disciplinary breach providing reasonable grounds for dismissal. That objection was overruled. Having regard to the matters outlined at paragraphs [73]-[74] above, the evidence of Chief Superintendent Horton is clearly relevant.

[80] A further objection was taken to the evidence of Chief Superintendent Horton, on the basis of fairness. A request from the plaintiff's solicitor for "access to the complaints system or other databases where disciplinary matters are recorded back to 2010", so that they could review the tables annexed to the first affidavit, as well as possibly identify other examples,[34] was refused. The reasons for the refusal were not the subject of evidence, but I have no difficulty accepting that it would be entirely inappropriate to provide access to such a database, which would conceivably contain private, confidential and possibly privileged information. The defendants' legal representatives sought to address the plaintiff's complaint, by annexing redacted copies of the decisions relating to the matters referred to in the tables to a second affidavit of Chief Superintendent Horton. The plaintiff's objection to the affidavits went beyond this, and was on the basis that his legal representatives had not been afforded the opportunity to interrogate the QPS complaints database, with a view to identifying whether there were other examples, apart from those referred to in Chief Superintendent Horton's affidavit, which may bear upon the question in this proceeding. As a consequence, it was said to be unfair to admit the evidence. I did not consider this rendered the affidavits inadmissible; although accepted it may be a matter going to the weight of the evidence.

[81] Otherwise, no objection was taken to the admissibility of the opinion expressed by Chief Superintendent Horton at [13] of his first affidavit. That was appropriate. Having regard to his qualifications, experience and position, the Chief Superintendent is demonstrably appropriately qualified to give admissible opinion evidence in terms of [13]. It is not an answer in itself to the statutory question, but is clearly relevant, and probative, having regard to the approach suggested by Thomas J, which I adopt, to answering the question whether the conduct could, if proved, be a disciplinary breach providing reasonable grounds for termination (dismissal), by considering whether dismissal would be a reasonably possible outcome.

[82] As it turned out, the objections to the affidavits having been overruled, the plaintiff's counsel did not seek to cross-examine Chief Superintendent Horton. I accept that there could be other examples to be extracted from the QPS database. But having regard to Chief Superintendent Horton's evidence, I consider the examples of disciplinary matters he has referred to provide useful guidance in determining the question posed by s 15(b), and, in light of the opinion he has expressed in [13] of his first affidavit, do not consider the weight of his evidence is detrimentally affected by the plaintiff's inability to interrogate the database, and provide further examples.

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[34] See exhibit MC-2 to the affidavit of Mitchell Cavanagh, filed 25 February 2019.

[83] Having considered each of the redacted decisions annexed to Chief Superintendent Horton's second affidavit, in relation to the cases involving officers 1 to 8, set out in the table marked "GH-1" and officers 9 to 19, set out in the table marked "GH-3", I am not satisfied that the conduct referred to in the second and/or fourth paragraphs of the letter (even taking into account the rest of the letter) is conduct that could, if proved, be a disciplinary breach providing reasonable grounds for dismissal of other officer A (the more senior officer) or officer B.

[84] On the face of the letter, by reference to which the s 15(b) question is to be determined, what is disclosed is:

1. an isolated incident of consensual sexual activity in a police car, between two police officers, one more senior than the other;

2. regular occasions on which the senior officer A meets up with officer B at a service station outside his district, for coffee.

There is the suggestion of some kind of regular interactions between A and B, sometimes involving a police car (in the third paragraph) and the suggestion of special attention being given by A to B (in the sixth paragraph).

[85] It is clear to me having considered each of the matters annexed to Chief Superintendent Horton's affidavit that a sanction of dismissal in relation to the conduct disclosed in the letter would be inconsistent with the sanctions imposed in those other disciplinary matters referred to in the evidence. In comparison with the conduct which has resulted in dismissal (and the conduct which has not) the conduct disclosed in the letter is not conduct that could, if proved, be a disciplinary breach providing reasonable grounds for terminating A or B's services.

[86] I do not propose to refer to each of the matters the details of which are in evidence. General reference to a few examples suffices to make the point.

[87] On the material before the court, conduct which did not result in dismissal includes:

1. A Detective Senior Sergeant, over a period of about two years, found (following review by QCAT) to have engaged in sexual and other forms of harassment of three women (a fellow officer, and two employees of other departments). Although the original decision on sanction was dismissal, on review by QCAT, with some allegations not found to be substantiated, a sanction of demotion to Sergeant was substituted [officer 9].

2. A Sergeant found to have engaged in improper conduct, in that he participated in consensual sexual conduct, whilst on duty, in the office, with three separate female officers. He was demoted to Senior Constable [officer 10]. Two of the female officers who engaged in sexual conduct with him [officer 12 and officer 13] were sanctioned with a deduction from salary.

3. A Senior Sergeant who, whilst on duty, made inappropriate comments of a sexual nature to female officers under his command; used the QPS computer system to send inappropriate emails to another staff member; and whilst on duty, on two occasions, drove a police vehicle to the private premises of a Constable and had sex with her. He was demoted to Senior Constable [officer 11].

[88] In contrast, on the material before the court, conduct which has been sanctioned by dismissal includes:

1. Persistent conduct by a Senior Constable (with a history of other discipline complaints) including sending inappropriate photographs and accompanying offensive texts and, over a period of some 12 months, accessing the QPS computer system on multiple occasions for purposes unrelated to his police duties, to obtain "personal particulars and associated occurrences" in relation to himself and other people, as a result of which he was charged and convicted of computer hacking [officer 2].

2. A Constable, off duty, intoxicated at a bar, who produced his police identification in an attempt to persuade a woman he did not know to have sex with him (as well as inappropriately touching two other women, without their consent) [officer 5].

3. A Constable (of less than 2 years' service) who enabled the Senior Constable he was on duty with to engage in "serious misconduct" by engaging in various sexual acts in the back seat of a police car, with a woman they had picked up outside a nightclub in the early hours of the morning. The woman had asked the police officers for a lift home. The Constable drove around in the police vehicle, and parked at various times, whilst the Senior Constable was with the woman in the back of the police car. It is to be inferred the woman involved was not a police officer, but a member of the public.[35] It is not clear whether she was known to the officers or not. It is also to be inferred, from reading the decision, that there was, to some extent, an element of force involved in the sexual conduct constituting the "serious misconduct" of the Senior Constable. The Constable was described as wilfully ignoring the misconduct of the Senior Constable taking place in the police vehicle whilst on duty, and subsequently withholding that information, demonstrating his lack of suitability to remain a police officer [officer 14].[36]

4. A Constable, over a period of almost three years, accessing official and confidential information on the QPS computer system, for purposes unrelated to his police duties, to obtain information about various people, including in relation to the work performance of female colleagues, their personal addresses and phone

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[35] On the basis that, in the disciplinary decisions before the court, where the conduct is directed at fellow officers, this is identified.

[36] The disciplinary decision in relation to the Senior Constable is not included in the material before the court.

numbers; and, over the same period, engaging in disgraceful and inappropriate behaviour involving harassment and sexual harassment of 16 female work colleagues, by sending them explicit messages and photographs of himself, and propositioning them [officer 19].

[89] Comparing the contents of the letter with the matters referred to in [87] and [88] (and the remaining examples before the court in which dismissal has, and has not, resulted) supports the conclusion that what is disclosed in the letter is not conduct which could, if proved, be a disciplinary breach providing reasonable grounds for terminating A and/or B's services.

Orders

[90] For the reasons set out above, the question posed for separate determination by the court should be answered "no". The letter dated 21 February 2010 is not capable of being a "public interest disclosure" under s 15 of the *Whistleblowers Protection Act*, as it does not contain information about conduct that is "official misconduct" within the meaning of ss 14 and 15 of the *Crime and Misconduct Act*.

[91] I will hear from the parties about any further consequential orders, including as to costs.