

**Special Commission of Inquiry into the Offending by Former Corrections
Officer of Wayne Astill at Dillwynia Correctional Centre**

WRITTEN SUBMISSIONS OF THOMAS WOODS

1. Mr Woods makes these submissions pursuant to the orders made by the Commissioner on 30 November 2023.
2. In their Written Submissions dated 6 December 2023 ("**CAWS**"), Counsel Assisting submit at paragraphs [1207] - [1208] that a "**finding**" should be made in respect of Mr Woods:

1207. As noted, Mr Woods accepted that he was told during the mediations that Astill had approached an inmate who was seated and raised his leg with his foot on the chair putting his crotch at eye level.

1208. We submit that the Special Commission should find that that allegation was at least "other misconduct" within cl. 253(1)(a) CAS Regulation. The conduct was highly inappropriate in a range of ways – it was bullying, intimidation and involved sexual harassment. We submit that the Special Commission should find that Mr Woods was bound by cl. 253(1) CAS Regulation to report the conduct. His report to Mr Shearer contained no reference to this conduct and we submit that he failed to comply with cl.253(1) CAS Regulation (underlining added)

3. Mr Woods submits that this finding should not be made.
4. Before the Commission could make the finding, the Commission would need to be reasonably satisfied on a *Briginshaw*¹ basis that all of the elements of cl.253 could be made out, including that:
 - (i). the allegation that Astill "raised his leg with his foot on the chair putting his crotch at eye level" constituted "other misconduct" within cl. 253(1)(a) CAS Regulation;
 - (ii). Mr Woods had an opinion that this allegation was "other misconduct" within cl. 253(1)(a);

¹ *Briginshaw v Briginshaw* [1938] HCA 34; 60 CLR 336 at 362: accepted by Counsel Assisting at CAS [917]

- (iii). that the allegation had not already been reported to a more senior correctional officer, pursuant to cl.253(3).
5. Neither of necessary elements at (ii) or (iii) above are even addressed in the CAWS in respect of the proposed finding.

Did Mr Woods have an opinion that it was "other misconduct"?

6. Mr Woods gave evidence that: *So I don't believe I was hearing anything of misconduct by an officer.*² That evidence was not challenged, and means that the proposed finding is unavailable.
7. The lack of a challenge is hardly surprising. As Counsel Assisting submit at CAWS [163]:

Most significantly, there is no record on the personnel file of any report or complaint about Astill's conduct, whether sourced from an inmate or CSNSW staff member.

8. There was no reason for Woods to believe that Astill was guilty of any more general misconduct. That was an entirely different context to that understood by Governor Martin or indeed Director Shearer. Mr Woods should have been given more information if it was known, and in that case, Mr Woods would not have then conducted the mediations at all.³

Had the allegation already been reported?

9. The relevant allegation had already been reported to Mr Hamish Shearer, a more senior officer than Mr Woods⁴ as well as the substantive Governor of Dillwynia, Ms Shari Martin, by the time that Mr Woods learnt of the allegation.
10. Clause 253(3) does not require that Mr Woods be the person that reported the allegation, but that the allegation has been reported.
11. Mr Woods had been told in an email sent by Governor Martin on 17 December 2017, that the allegations in the complaints of Witness P, Witness B and Witness V had been discussed with Astill, Governor Martin and Director Shearer.⁵

² Inquiry Transcript P 2096 L 26-27.

³ Inquiry Transcript P2103 L 43 – P2104 L8

⁴ Clause 316 of CAS Regulation, Statement of Hamish Shearer 13 November 2023, paragraphs 5-7.

⁵ Tender Bundle 3, Vol 17, Tab 514, CSNSW.0002.0002.0399_0001

12. Astill himself had reported the issue of intimidation towards some inmates, and Inmates being in fear or reprisals on 25 November 2017 (CAWS at [1009]),⁶ after the allegations had been put to Astill at a meeting between Mr Shearer, Mr Astill and Ms Martin on 22 November 2017 (CAWS at [1009]):⁷

Whilst neither Mr Shearer nor Ms Martin had a precise recollection of the matters discussed at that meeting, a document prepared by Astill bearing the date 25 November 2017 discloses at least some of things which were discussed at that meeting.

13. It was Mr Shearer, the more senior officer, who then reported this to Mr Woods, when sending Astill's report to Mr Woods.⁸
14. Mr Woods was asked to conduct the mediations.⁹ During the mediations, "*The inmates had raised their concerns that were previously raised with the Governor.*"¹⁰ As far as Mr Woods had been told, Mr Shearer and Governor Martin had agreed on the mediation as the appropriate course,¹¹ which was an available resolution option under applicable policy.¹²

15. As Counsel Assisting submit at CAWS [1011]:

Mr Shearer in his evidence frankly accepted that at least some of the allegations the subject of Astill's defence in this document and which were likely to be the subject of the discussion on 22 November 2017 involved allegations of serious misconduct which plainly had to be reported to the PSB or NSWPF through the IB.

16. If that submission is to be accepted, and it should be, the gravamen of the matters had already been communicated to a more senior person than Mr Woods.
17. In any event, the matters the subject of complaint were then reported by Mr Woods. As he said:

⁶ Ex. 39, TB4, Vol 20, Tab 36, CSNSW.0002.0023.2977-2980

⁷ Transcript, 14 November 2023, T2298.19-27; Transcript, 16 November 2023, T2489.12-27

⁸ Tender Bundle 3, Vol 17, Tabs 519-520 CSNSW.0002.0023.2976_0001 - 0002.0023.2977_0003

⁹ Inquiry Transcript P 2087 at L 6-9.

¹⁰ Inquiry Transcript P2096, L24-25.

¹¹ Tender Bundle 3, Vol 17, Tab 514, CSNSW.0002.0002.0399_0001

¹² Statement of Angela Zekanovic 27 September 2023 at p.413.

MS DAVIDSON: Right. That is, is it your evidence that you prepared a report to Shari first?

*MR WOODS: And left it at the centre, yes.*¹³

18. That evidence was not challenged.
19. Governor Martin did not deny that she had a Manilla folder with Astill's name on it. She could not recall, but did not deny that Woods had left a report on the mediation in that file.¹⁴
20. The Commission should not make any finding as to what Mr Woods reported, or did not report in the absence of that report. On a *Briginshaw* basis, the Commission could not do so.

Was the conduct "other misconduct"?

21. Counsel Assisting submits at CAWS [1208] that: *"the Special Commission should find that that allegation was at least "other misconduct"...The conduct was highly inappropriate in a range of ways – it was bullying, intimidation and involved sexual harassment."*
22. The allegation was not bullying. The standard definition of bullying is set out in section 789FD of the *Fair Work Act 2009* (Cth). That definition in turn arose from the House of Representatives Standing Committee on Education and Employment Report, *Workplace Bullying We just want it to stop*. The Committee considered the existing definitions used by State, Territory and federal jurisdictions and expert evidence and concluded that there were three criteria that were most helpful in defining bullying behaviour — the behaviour has to be repeated, unreasonable and cause a risk to health and safety.
23. The allegation in this case was clearly not repeated. There is no evidence that it caused a risk to health and safety. It may, in particular circumstances have been unreasonable. That depends upon contextual matters, such as the distance away from the inmate, the height and width of the lounge chair in which she was sitting in the area, and the way in which the conduct occurred, which matters were not the subject of evidence. A thrusting motion, for example, would clearly be

¹³ Inquiry Transcript P 2099 L 30-33

¹⁴ Inquiry Transcript P2407 L 25 - 38.

unreasonable, but there was no evidence of that, and that allegation was withdrawn.¹⁵

24. The behaviour was also unlikely to constitute sexual harassment. The definition of sexual harassment in s.28A of the *Sex-Discrimination Act 1984* (and s.12 of the *Fair Work Act 2009*) defines sexual harassment as an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person, or other unwelcome conduct of a sexual nature in relation to the other person, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.
25. While reasonable minds might differ about whether particular nature is sexual or not, the lack of context would tell against a finding of sexual harassment. As Mr Woods stated, he did not see the allegation as having a sexual connotation.¹⁶ If he had more information about Astill's prior behaviour, that may have provided such context, but Mr Woods was not provided with that information.¹⁷
26. In any event, the action was intimidatory. Was it, however, other misconduct for the purposes of the regulation?
27. Misconduct is not defined in the CAS Regulation, other than by reference to section 69 of the *Government Sector Employment Act 2014*. Council Assisting properly accept this at CAWS [172]. Whether an action is capable of constituting misconduct, for the purpose of section 69, will depend upon the seriousness of the action.
28. Counsel Assisting also correctly note that not every act of inappropriate conduct amounts to misconduct. In *Holland v Industrial Relations Secretary on behalf of the Department of Communities and Justice* [2022] NSWIRComm 1106 at [9] the Commissioner observed:

During the course of the hearing I put, and the parties agreed, that a contravention of the policy code of conduct or legislative instrument might

¹⁵ Inquiry transcript P2089 L 46 - P2090 L 6.

¹⁶ Inquiry transcript P2088 at L11, 33, P2090 L 27-28, 36-37.

¹⁷ Inquiry transcript P2103 L 43 – P2104 L8.

constitute misconduct for the purpose of s 69. However, whether it does constitute misconduct will depend on the level of seriousness of the breach.

29. Guidance about what actually does constitute misconduct may be taken from *Pillai v Messiter* (No 2) (1989) 16 NSWLR 197 at 200-201 in which President Kirby said in an analogous context (underlining added):

*In the 1988 supplement to the Corpus, reference is made to *Beaunit Mills Inc v Board of Review, Division of Employment Security, Department of Labor and Industry* 128 A 2d 20 (1956). In that case, the New Jersey Superior Court held that "misconduct" does not mean mere mistakes, errors in judgment or in the exercise of discretion or minor but casual or unintentional, carelessness or negligence. It did not mean mere inefficiency, unsatisfactory conduct, failure of performance as a result of inability or incapacity inadvertent in isolated instances or errors of judgment which were not made in bad faith or some other ingredient. Numerous other recent cases are cited to support the proposition that, in the United States, "misconduct" generally means wrongful, improper or unlawful conduct, motivated by premeditated or intentional purpose or by obstinate indifference to the consequences of one's acts. Similar approaches to the meaning of the word "misconduct" have been taken in Australia, outside the context of professional discipline: see, eg, *O'Connor v Palmer* (No 1) (1959) 1 FLR 397.*

The primary dictionary meanings confirm that this is also the way "misconduct" is used in everyday speech.

30. Finally there is a question as to the utility of making any such finding. A contravention of the Regulation by an employee may be dealt with under s. 69 of the GSE Act as misconduct: see CAWS [171]. Were any action to be taken on that basis, there are appeal rights for employees under s 97 of the *Industrial Relations Act 1996* (NSW). Mr Woods is no longer an employee and the Department could no longer have action taken against him under that section. He would have no right of appeal against any finding of the Commission other than judicial review. The finding would be essentially unactionable and unappellable. There would be little utility in making such a finding.

Ian Latham

14 December 2023