

**JOINT STANDING COMMITTEE ON THE
CORRUPTION AND CRIME COMMISSION**

CLOSED SESSION

**TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
THURSDAY, 25 AUGUST 2005**

Members

**Mr John Hyde (Chairman)
Hon Ray Halligan (Deputy Chairman)
Ms Margaret Quirk
Hon Margaret Rowe**

Hearing commenced at 1.22 pm

McCUSKER, MR MALCOLM JAMES
Parliamentary Inspector of the Corruption and Crime Commission,
45 St Georges Terrace,
Perth 6000, examined:

The CHAIRMAN: The procedure for examination of witnesses: the committee hearing is a proceeding of Parliament and warrants the same respect that proceedings in the house itself demand. Even though you are not required to give evidence on oath, any deliberate misleading of the committee may be regarded as a contempt of Parliament. Have you completed the "Details of Witness" form yet?

Mr McCusker: Not today.

The CHAIRMAN: Not yet. Did you receive and read an information for witnesses briefing sheet?

Mr McCusker: I have once received it. Yes. I am familiar with it.

The CHAIRMAN: I will go further with this issue and we may address it later.

The committee has received your submission. Is it a submission or a report?

Mr McCusker: It is a report made pursuant to section 201 of the Corruption and Crime Commission Act.

The CHAIRMAN: My ruling is that this report is not deemed a submission under the standing orders. We are now giving you the "Details of Witness" form, which you will complete. Thank you for submitting the report and also thank you very much for enabling committee members to have an embargoed copy two or three hours ago to read before the meeting. We have all read and understood your report. Would you like to make some general comments to us first of all?

Mr McCusker: Yes. The report is made by me pursuant to section 201 of the Corruption and Crime Commission Act. Section 199 provides that -

- (1) The Parliamentary Inspector may at any time prepare a report as to any of the following matters -

They include any matters affecting the commission, which this particular matter is. I may cause that report to be laid before each house of Parliament or dealt with under section 206; but section 201 of the act provides that in lieu of laying it before the houses of Parliament I may make the report to this standing committee, which is the course I have chosen in this case. Do you want me to go on and speak in general terms about the subject matter of the report?

The CHAIRMAN: I think we have all read it. I am wondering -

Hon RAY HALLIGAN: For the purposes of Hansard, it has not been identified yet.

The CHAIRMAN: If perhaps you speak to your recommendation, committee members may have some questions regarding the content of the report.

Mr McCusker: Well, the recommendation, as such, which appears at paragraph 29, page 11, of the report, is simply that existing commission officers and those appointed in the future should have impressed upon them that it is totally inappropriate conduct for a commission officer to warn a person of interest that he or she is under investigation or under any form of surveillance. I do not

think that one could quarrel with that recommendation, and indeed the person who is the subject of the report agrees with that recommendation, as you can see.

The CHAIRMAN: The committee, I believe, certainly supports that. We would assume, and would like to know your views on whether, that should be the case with any appointment to the commission or parliamentary inspector position; that somewhere in the vetting or the nomination of an applicant this very issue is raised directly with them.

Mr McCusker: I think it should be. Undoubtedly. On my reading of the act, as a result of the particular matters the subject of this report, there is a slight flaw in it. I may be wrong, but there are very clear provisions against disclosure of confidential information. The particular incident that arises in this report was not disclosure, as such, of confidential information. It was -

Ms MARGARET QUIRK: Methodology.

Mr McCusker: It was methodology; and it was, in my view, misuse of information, but the information itself was not disclosed as such. There needs to be, I think, some attention given to the possible desirability of a provision - I know that amendments to the legislation take a while - to the effect that any misuse of information is prohibited; that is, acting upon information in a way which could affect detrimentally the commission's functions. Having said that, I have concluded that in the particular circumstance, although there is no express prohibition on misuse of information, it does amount to misconduct, and it falls within the definition of "misconduct", as I have concluded at paragraphs 34 and 35. It falls within the definition of "misconduct" because it was misuse of information, as I have pointed out in paragraph 34, in that the information given by the commissioner would not have been given but for the position of the person to whom it was conveyed.

The CHAIRMAN: I would like us to come back to that issue. I note in paragraph 35 that you say "which could constitute". You do not unequivocally -

Mr McCusker: The reason I say that is that the definition of misconduct, under section 4(d) of the act, relevantly says -

(d) a public officer engages in conduct that -

...

(iv) involves the misuse of information or material that the public officer has acquired in connection with his or her functions as a public officer, . . .

and constitutes or could constitute -

...

(vi) a disciplinary offence . . .

It is not necessary, for the purpose of concluding there has been "misconduct", to say that it necessarily is an offence; it is enough to say that it is conduct that "could" constitute a disciplinary offence providing reasonable grounds for termination. That is the reason I have simply used the word "could" rather than "does". There was no point, as I see the definition, in saying it "does" constitute such a disciplinary offence; it is sufficient that on the face of it it could. I think it does, but it is arguable.

The CHAIRMAN: Perhaps if we importantly go back, your final comment is that -

As Ms Rayner has voluntarily resigned, disciplinary action would seem inappropriate; and I do not consider her conduct to constitute a criminal offence.

Mr McCusker: That is right.

The CHAIRMAN: That is a clear statement. I would like to ascertain from the committee members that we agree with that. I certainly agree with that at this stage from the information available.

Hon MARGARET ROWE: If she had not resigned, what course of action would have been taken?

The CHAIRMAN: The inspector would have been forced to act, and we would have been forced to table it publicly.

Mr McCusker: I think so. Yes. Probably. With a conclusion that there has been misconduct, I would think that would be a breach of the terms of her office, so a termination would follow. Misconduct constitutes a ground for termination of the officer's position.

The CHAIRMAN: The other issue in us dealing with the issue of transparency and creating some sort of public record of why Ms Rayner is no longer with the commission is that it is my understanding of the act that if you have made a finding against an existing employee, that has to be tabled publicly.

Mr McCusker: It does not have to be. I can simply report to the standing committee. It is open to me.

The CHAIRMAN: It is reporting within - is it seven days or -

Mr McCusker: No.

Ms MARGARET QUIRK: There is something about a finding of misconduct, though.

The CHAIRMAN: A finding of misconduct has to be reported to the Parliament within a time frame. It is a moot point, because the person resigned, but in terms of being transparent or being seen to be transparent, if somebody had stayed on in the position and you had done this report -

Ms MARGARET QUIRK: I think that was upon termination by the Governor.

Mr McCusker: Oh, yes; that is different. That is right. It would then have to occur. I am sorry; I did not follow the line of reasoning. The acting commissioner, unlike other officers, is in the same position as the commissioner. Although there may be removal, it has to be on a motion before both houses. That is the provision you had in mind, I take it.

The CHAIRMAN: Yes. Given the time, can I perhaps suggest that committee members spend about five or so minutes asking you some direct questions?

Mr McCusker: I am happy for that.

The CHAIRMAN: We commend you for having gone to Ms Rayner, showing her what you were intending to report and getting a response. Given the time frame, the members of the committee may see some perceived discrepancies or queries. If we could just raise those with you -

Mr McCusker: Certainly.

The CHAIRMAN: A key issue for me seems to be that Ms Rayner was in an acting position. She was not concerned with this case. Why would the commissioner raise with her cases that an acting commissioner would have nothing to do with?

Mr McCusker: I think there is a good reason for keeping an acting commissioner informed in general terms about what is happening within the commission. Bear in mind that although an acting commissioner may be appointed for specific cases, and has been when the commissioner has some perceived conflict - that has happened on I think at least two occasions, when the commissioner has said "No, I cannot act on this because I know the person," or something like that - the acting commissioner is also there to step into the shoes of the commissioner should something happen to him. Therefore, the acting commissioner cannot be kept, as it were, in isolation. I think he or she needs to be reasonably well informed of what is going on. The point you are making, Mr

Chairman, is that the information was not conveyed for the purpose of her fulfilling a particular task as acting commissioner; it was simply information conveyed to her. Nevertheless, it would not have been conveyed - I made that point in the report - but for the fact that she was an officer of the commission. It is not the kind of information that the commissioner could convey or would have conveyed to just anyone.

The CHAIRMAN: I refer to paragraph 33(c). You say the facts stated in the submissions are correct. There is an earlier comment from Ms Rayner that before she met with Mr Marquet in the hospice, the CCC had been through his hospital room and his belongings. Given that you are a person of interest and you have the CCC going through your hospital belongings, would not a fair assumption be, "Oh hang on, my phone could be tapped," or, "I should be really careful now, these people are serious"?

Mr McCusker: I accept that, without any doubt. A person may well conclude - not necessarily but probably conclude even - that there might be a bugging of the phone. I do not think that is the point. The point is that he had been having unguarded telephone conversations and he was warned not to.

The CHAIRMAN: There is a direct assertion. You say that officers of the commission say that because of the warning from Ms Rayner, he suddenly clammed up.

Mr McCusker: That was their perception. They cannot be certain because they do not know his innermost thoughts. He may have decided not to say any more after the search, but the real issue is not whether that did frustrate the commission's investigations; the real issue, I think, is whether the actions of an officer of the commission, in this case an acting commissioner, have the potential to do so. That is the problem.

The CHAIRMAN: Definitely.

Mr McCusker: As you already made the point, it is the perception and the possibility. If Mr Marquet were to come forward now and say, "Look, I never intended to say another word on the telephone anyway", it would not change the position. It is really the perception and the actions of the officer in giving the warning. In relation to that, it must be said, of course, that she has explained - and it is fully understandable - that she was highly emotional, having seen him in this position. One can understand it from that viewpoint.

The CHAIRMAN: Before Ms Rayner spoke to him, as soon as the commissioner mentioned to Ms Rayner about Laurie Marquet, she told him that he was a close friend.

Mr McCusker: Yes.

The CHAIRMAN: Does the commissioner have any powers, or was there anything that the commissioner could have done, to have stopped an emotional person from going to see that close friend?

Mr McCusker: I think the answer is no. He could not have stopped her. He did warn her, and say, "Look, is this wise? Are you putting yourself in a position of conflict?" But her response was, "He is a friend". She was not going there to see him in her capacity as an officer, so there was nothing the commissioner could do.

The CHAIRMAN: The commissioner could not have ordered CCC officers or police or somebody to prevent access to Mr Marquet by Ms Rayner under his powers?

Mr McCusker: I would not like to answer that off the top of my head. It would be a fairly extreme step to take, I think. It is possible, because he does have wide powers.

The CHAIRMAN: I guess it is just acknowledging how somebody in Ms Rayner's position could even think of going to see -

Mr McCusker: Well, I think from a human aspect it is understandable. She was distressed that he was a friend and suffering. It was the first time that she learnt that he was in the hospice. But it was very injudicious, as she herself agrees in hindsight it was.

Hon MARGARET ROWE: Malcolm, you said that other staff at the commission were aware of the situation. If we do not do anything with this, is something going to come out from there?

Mr McCusker: I would hope not, but I think that within the commission - I do not know how many staff know - certainly the director of operations knows. He only knows because of what he was told by those who were doing the intercepts, so how wide this spreads, I do not know. Obviously, Mike Silverstone knows. It is difficult to keep it totally under control. I would be very disappointed if it were to leak out from the commission, but it could.

Hon MARGARET ROWE: That concerns me.

The CHAIRMAN: Could I offer another scenario? Yesterday on the 9.00 am ABC news an investigator from the CCC said, "We are looking at a Tuart College lecturer. We have had 100 students come forward already saying, in effect, that he has diddled in share trading. If there is anybody else, can you come forward?" He has not been tried yet. I actually think that is a very good managed use of publicity to find out the extent of it. Should we perhaps be discussing that? Unless you are able to give us information that Mr Marquet is definitely going to be charged tomorrow or within the next week, and that might influence -

Ms MARGARET QUIRK: He has already been charged.

The CHAIRMAN: Sorry.

Hon RAY HALLIGAN: He has been charged. He has not been tried.

The CHAIRMAN: Yes - brought to -

Mr McCusker: That will not happen this year. At the moment all it is - I say "all"; he is facing serious charges. We do not know whether he is going to plead guilty or not guilty.

Ms MARGARET QUIRK: All right. If your report was released in toto - sorry to interrupt, Mr Chairman - what is your opinion: would that be unduly prejudicial? Is there stuff in here that we should not be disclosing?

Mr McCusker: Some parts of it may be prejudicial. I think that it is a question of what part could be released that would not be prejudicial. It is possible to dissect it, I think, to say, as is the fact, of course, that the acting commissioner had a discussion with a person of interest - you do not even have to name the person - and in the course of that discussion advised that person not to use the telephone because it was being bugged. The name of the person concerned does not really have to be released. It is probably the best way of dealing with it at this stage, because there is a potential to perhaps prejudice him and a fair trial, of course, by this kind of publicity. It would be enough to say "a person of interest" but I think that there is a very good chance that people will work out who that was.

Ms MARGARET QUIRK: Put two and two together.

The CHAIRMAN: *The West Australian* would possibly dig up an old photo of Laurie and Moira together at UWA in the 1970s and juxtapose that against your comments -

Mr McCusker: - and assume that is the jump to the right conclusion. It is possible. I suppose the first question, Mr Chairman, is: is it the view of the committee that there should be some release of information concerning the circumstances of Ms Rayner's very sudden resignation?

The CHAIRMAN: Your information that some people in the commission know already -

Mr McCusker: They certainly know.

The CHAIRMAN: - and given that one of their investigators did something wrong in South Perth with drink-driving and he was done publicly, to not apply the same rules to an acting commissioner, I do not know whether that sends the right message to the work force.

Mr McCusker: That is a big issue, I think.

The CHAIRMAN: The other issue is that around Parliament House, there are a number of rumours flying around about people being bugged and what is the right of the CCC, what is the right of the ACC and so on. In a climate of misinformation, no information and rumour, perhaps more damage can be done.

Mr McCusker: I think so, yes. Well, I know the commissioner is of the view that there must be some form of public statement. Although it is not directly my role to make the public statement, I tend to agree with him for the reasons that I have stated.

Ms MARGARET QUIRK: Mr Chairman, might I suggest that we form a resolution, given Mr McCusker's advice, that the full report not be tabled because it has the potential maybe to prejudice -

Mr McCusker: The fair trial of Mr Marquet.

Ms MARGARET QUIRK: Yes. That is resolution No 1, and the next question is: what can we release and by what means and how do we release it?

The CHAIRMAN: Okay. In discussion on that, if a journalist goes to Moira on anything concerning her resignation, she is free to speak or comment.

Mr McCusker: Well, yes she is. All she can really comment I suppose is - if she states it in full, she would say that as a result of warning a person of interest who was her friend that his telephone might be bugged, and warning him that he should therefore not make any incriminating statements over the telephone, she was interviewed and, as a result of that interview, realised that that was injudicious on her part and resigned. That is as far as it goes.

Ms MARGARET QUIRK: I think what the Chair is getting at is -

Mr McCusker: Can she release that information?

Ms MARGARET QUIRK: - can she disclose who the person of interest is without any implications?

The CHAIRMAN: Yes. My reading is yes.

Mr McCusker: She can because she visited him in an unofficial capacity as a friend, so she could reveal that.

Hon MARGARET ROWE: Would she be likely to make that sort of statement to the media?

Mr McCusker: I do not know her well enough. I doubt it very much and I suspect that she would say, "I have no comment to make."

The CHAIRMAN: The moment there is any link between the resignation of an acting commissioner and the Clerk of the Parliaments being charged, the speculation will be absolutely huge.

Ms MARGARET QUIRK: But there does not need to be any reference to the Clerk being charged.

Mr McCusker: No, there does not.

The CHAIRMAN: How many people are persons of interest to the CCC at the moment? There is a share trader at TAFE, and there is Laurie.

Mr McCusker: The media does not know how many persons are of interest, and they are not entitled to know.

The CHAIRMAN: They do not, but they are the only two whom they know about.

Mr McCusker: They are the only two they know about.

The CHAIRMAN: And that will be the speculation. In the other respect, your final comment that it does not constitute a criminal offence is actually something that perhaps should be on the public record. If we are looking at the morale of the commission, if we are looking at a prejudicial trial to Laurie, and if we are looking at fairness to Moira, I think that is an important comment to be public.

Mr McCusker: Whilst there was a finding of misconduct, the inspector found that there was no evidence of a criminal offence having been committed.

The CHAIRMAN: And your misconduct -

Mr McCusker: It could further be said to temper it that the finding was one of misconduct, as distinct from serious misconduct. There are two categories of conduct.

The CHAIRMAN: My experience in these matters with something that is as technical as this is that you actually are in a better position to publicly table the entire document, but make no public comment.

Hon MARGARET ROWE: When you say "publicly table" it, do you mean in the Parliament?

The CHAIRMAN: Well, yes.

Hon MARGARET ROWE: Okay.

The CHAIRMAN: That then means that people are not able to summarise or misconstrue in terms of privilege. They are not able to repeat out of context because that is an offence. Given *The West Australian's* \$20 000 fine this week, I would imagine that the media will be very careful with anything publicly.

Mr McCusker: I would imagine so, although I am not too sure whether \$20 000 is a drop in the ocean to it. It is probably relieved at the size of the fine!

Ms MARGARET QUIRK: I suppose it is an assessment of risk, if the potential of him actually ever going to trial is reasonably limited.

Mr McCusker: I do not think that the references to Mr Marquet as such constitute a serious risk to a fair trial.

The CHAIRMAN: No.

Mr McCusker: On the other hand, she talks about, in the report at the top of page 3 -

The CHAIRMAN: Hands in the till and -

Mr McCusker: - injecting drugs.

The CHAIRMAN: The moment a trial starts, I am sure there will be a number of witnesses saying both that and the opposite.

Mr McCusker: Well, I do not know, because it may be argued by his lawyer that it is irrelevant to the charge. I do not know what he is going to do. He may come forward. I think there is a very strong probability that he will simply put his hand up and plead guilty, and then may make a statement by way of explanation or mitigation.

Ms MARGARET QUIRK: It is more significant if it discloses any ongoing operational activity, which I would be more concerned about. If we are pointing the finger at some person, and if they are still looking at suppliers and everything else, does this cause us a problem?

Mr McCusker: My recommendation, Mr Chairman, would be that there be a statement made, but to the effect that - we are going over old ground a bit - the acting commissioner had voluntarily resigned as a result of certain conduct involving her having warned a person of interest - not that the person was a person of interest, but that because of it his telephone was probably being bugged.

She had subsequently realised that this could have jeopardised the operation and therefore resigned. Something along those lines, if not the precise wording.

The CHAIRMAN: The only thing I would take issue with is that you are paraphrasing that she warned him. My reading of Moira's retorts is that she does not accept that she deliberately warned him.

Mr McCusker: She does. She admitted that to me.

The CHAIRMAN: She admitted that she spoke to him about it, but I just feel that carries a different connotation to -

Mr McCusker: I will just read you a passage.

Ms MARGARET QUIRK: At one place she said she did because she wanted to impress upon him the seriousness of the situation.

The CHAIRMAN: She told him.

Mr McCusker: This is dealing with the interview. At paragraph 16 it states -

During the course of this interview Ms Rayner agreed that when she visited Mr Marquet . . . she had advised Mr Marquet to the effect that he should not make any telephone calls because he was being "bugged". She also agreed that she had seen this as giving rise to a conflict, and that she had felt "most uncomfortable" about it at the time.

At paragraph 18 -

When asked why she had advised Mr Marquet to the effect that his telephone was being bugged, or probably being bugged, and that he should not make any calls, her answer was -

The answer is quoted. Paragraph 20 is the same.

We, the person seconded and I, were not taken aback, but were rather impressed by the fact that she very readily agreed that she had warned him.

The CHAIRMAN: Without being pedantic, can I point out that the terminology is "advised", rather than "warned"?

Mr McCusker: Yes.

The CHAIRMAN: I think somebody admitting that they have advised somebody of something has a different connotation from admitting that I warned somebody of something.

Mr McCusker: Yes.

Ms MARGARET QUIRK: I think "advise" is just a neutral term that people use.

Mr McCusker: I have used it as a neutral term, but I must say that it seems to me that it would be splitting hairs virtually. If you advise someone not to make a telephone call because the telephone call is probably being bugged, you are really warning them.

The CHAIRMAN: In this report here you are not using the word "warned".

Mr McCusker: No, I do not.

The CHAIRMAN: You use the word "advise".

Mr McCusker: I have used a neutral term.

The CHAIRMAN: So, I would think we would be inaccurate - if we are only releasing a summary paragraph - to use the word "warned", rather than "advised".

Mr McCusker: All right. I have no problem with that.

The CHAIRMAN: Okay. In view of the time, are you available later today?

Mr McCusker: I would be pretty late, unfortunately, because I have to go to a meeting today - it is held once a month - of the Legal Aid Commission, which I chair. That starts at 4.30 and does not finish until about 6.30.

The CHAIRMAN: Is there a view that we can hold off making a comment until Tuesday when Parliament sits again?

Mr McCusker: Is there any prospect of us meeting tomorrow at all?

Hon MARGARET ROWE: I will not be here tomorrow; I fly home tomorrow.

Mr McCusker: I see.

The CHAIRMAN: We need to be able to say this in Parliament, so that privilege is held.

Mr McCusker: Yes.

Ms MARGARET QUIRK: If the inspector is out of commission, he is out of commission. I am happy for us not to formally meet, and that we delegate the chairman to find a form of words.

The CHAIRMAN: If we could find a form of words.

Mr McCusker: If you are happy with that.

The CHAIRMAN: Yes. I think I should be able by 4.30 this afternoon to make a short statement in there that enables you and Commissioner Hammond to work out exactly what you are going to say publicly.

Mr McCusker: What do you have to say, Mr Chairman, in the house?

The CHAIRMAN: I have to inform the house that we have had a briefing from the parliamentary inspector and received a report regarding the resignation of Ms Rayner.

Hon MARGARET ROWE: And then use the wording that -

Hon RAY HALLIGAN: Just on that one issue here, and I think you have resolved that. In paragraph 7 there is mention of "On Tuesday 2 August" Ms Rayner telephoned the commissioner. In her comments there is mention of "the 3rd of August", rather than 2 August, and she then talks of having called on Mr Marquet the previous day.

Mr McCusker: You are correct.

Hon RAY HALLIGAN: That should be the Wednesday.

Mr McCusker: It should be.

The CHAIRMAN: Would you like to report that amendment?

Mr McCusker: I would like to report that amendment. Thank you very much. That is at paragraph 6.

Hon RAY HALLIGAN: Paragraph 7.

Mr McCusker: That should read "On Wednesday, the 3rd of August".

The CHAIRMAN: Can the committee also resolve that today's closed hearing, the Hansard transcript and the inspector's report will not be made public at this time? It is so resolved.

Secondly, can the committee resolve that later in today's sitting, the Chairman will make a short statement, after further consultation with the parliamentary inspector, regarding the fact that we have received the report?

Ms MARGARET QUIRK: And that there is no other comment in relation to the matter.

The CHAIRMAN: So resolved. There will be no comment from the committee outside of that and the parliamentary inspector will liaise with the commissioner regarding whether they are going to say anything publicly or not.

Hon MARGARET ROWE: If you do decide to say something publicly, will we know about that before you go public? Or is that not our role?

Mr McCusker: I take it that the standing committee does authorise a statement to be made about this.

The CHAIRMAN: We authorise you to say, "No comment, because of ongoing investigations." It may be that if you and I allude to the fact that we believe that, for transparency to the staff of the CCC and others, it is important that even though there is an existing person of interest -

Mr McCusker: He is charged now; he is no longer a person of interest.

The CHAIRMAN: Yes. That the commission must be seen to be active and transparent.

Ms MARGARET QUIRK: Does that answer your question, Margaret?

Hon MARGARET ROWE: Yes.

The Principal Research Officer: Is that a resolution?

The CHAIRMAN: Yes. In Queensland, the parliamentary inspector refuses to make comments except through the committee, and that allows him to be seen to be above the hurly-burly of politics.

Mr McCusker: That is why I have come here.

Ms MARGARET QUIRK: Can we note that that does not preclude the commissioner from doing whatever he sees fit?

The CHAIRMAN: Yes.

Mr McCusker: I do not propose to make any public statement. It is a question of whether the committee authorises the commission to make a statement.

Ms MARGARET QUIRK: I think we can, because they are the ones who have the call as to the prejudice to the ongoing investigation.

Mr McCusker: Correct. I prefer to leave today, if possible, with the knowledge that I can impart to the commissioner that a public statement may be made, and I can discuss that with him as to the form of it.

The CHAIRMAN: Can we authorise that this transcript go to the commissioner, or should we deal with that another time?

Mr McCusker: I think you should deal with it another time. We do not need it.

Hearing concluded at 2.00 pm