

JOINT STANDING COMMITTEE ON THE CORRUPTION AND CRIME COMMISSION

Sixth Report — “Parliamentary Inspector’s report on the issuing of notices by the Corruption and Crime Commission under s 42 of the Corruption, Crime and Misconduct Act” — Tabling

MS M.M. QUIRK (Girrawheen) [3.49 pm]: I present for tabling the sixth report of the Joint Standing Committee on the Corruption and Crime Commission entitled “Parliamentary Inspector’s report on the issuing of notices by the Corruption and Crime Commission under s 42 of the Corruption, Crime and Misconduct Act”.

[See paper 1024.]

Ms M.M. QUIRK: I will not speak at length about this report. It is self-explanatory. It deals with the power of the Corruption and Crime Commission under section 42 of the Corruption, Crime and Misconduct Act to issue a notice to other agencies to ensure that concurrent investigations do not go on. The Parliamentary Inspector of the Corruption and Crime Commission outlines an issue that occurred on one occasion. I am pleased to say that with communication and a better understanding of the import of that section, there probably does not need to be any immediate change to that section of the act. The reports of the committee were tabled earlier in the upper house. The deputy chair, Hon Jim Chown, has had the opportunity to speak at length about them. With the indulgence of the chamber, I mention that a report of the Parliamentary Inspector of the Corruption and Crime Commission about misconduct and unauthorised disclosure of confidential information was also tabled today. I give the opposition notice that its members can pick up a copy of that report, which has been tabled. When the committee finally considers the matter in the new year, they will be full bottle on the matter and will not need to seek an adjournment or some notice that we will hand down that report. I commend the report of the parliamentary inspector on the unauthorised disclosure of confidential information.

Seventh Report — “Unfinished business: The Corruption and Crime Commission’s response to the Committee’s report on Dr Cunningham and Ms Atoms” — Tabling

MS M.M. QUIRK (Girrawheen) [3.51 pm]: I also present for tabling the seventh report of the Joint Standing Committee on the Corruption and Crime Commission entitled “Unfinished business: The Corruption and Crime Commission’s response to the Committee’s report on Dr Cunningham and Ms Atoms”.

[See paper 1025.]

Ms M.M. QUIRK: At the outset I want to thank committee research staff, principal research officer Alison Sharpe and research officer Vanessa Beckingham, for their diligent and conscientious efforts, not only on this matter, but also for their work throughout the year. The output of the committee is considerable and the issues confronting us are wide and varied, and I thank them for climbing the steep learning curve so magnificently. I could equally make the same comments about the members of the committee: deputy chair, Hon Jim Chown, MLC; the member for Kalamunda, Matthew Hughes; and Hon Alison Xamon, MLC. All members are extremely actively engaged in our deliberations and, unlike some other committees I have served on, not a passenger is amongst them. I look forward to continuing to work with them.

This report follows our fourth report, which was tabled on 12 October 2017 entitled, “Parliamentary Inspector’s report on a complaint by Dr Robert Cunningham and Ms Catherine Atoms”. That report endorsed the Parliamentary Inspector of the Corruption and Crime Commission’s findings on the protracted saga of Dr Cunningham and Ms Atoms. The Joint Standing Committee on the Corruption and Crime Commission endorsed the findings of the parliamentary inspector and made two recommendations. We have since received a response from the Corruption and Crime Commission. The report that has been tabled today is the committee’s reaction to the latest determination of the CCC—that it does not intend to take any further action.

Before I reiterate the background to the matter, members will note that this report is not large. Key to understanding what has occurred in recent months is some correspondence between the parliamentary inspector and the CCC, and between the CCC and the committee. This correspondence is annexed to the report and those interested not only in this particular case, but also in how the oversight process operates in practice may find these letters instructive. I will refer to key sections of the correspondence shortly. As outlined at length in our earlier report, Dr Cunningham and Ms Atoms were both subject to excessive use of force at the hands of Western Australian police officers, subjected to a prosecution that was later withdrawn, and have been fighting for acknowledgement, recompense or even a simple apology for their treatment for over nine years.

As we observed from the extensive findings of the District Court, some of which it is conceded were obiter dicta, and in our last report, this incident was not just an impulsive rush of blood to the head by young and inexperienced police officers on a busy night in Fremantle. A number of subsequent incidents compounded the use of excessive force, including intimidation of a witness, collusion in evidence, failure to disclose, and tampering with evidence. It represented a sustained course of improper conduct over many months, if not years. The incident, which occurred in 2008, has had reverberations since then, but as we note in the title to this report, this is still unfinished business.

The committee found that the protracted nature of their quest for an acknowledgement of their treatment has materially exacerbated the distress of the complainants. In the committee's report in October, two recommendations were made and the committee has subsequently received correspondence from the CCC, which is annexed. The commissioner notified the committee that he did not intend to accede to these recommendations. Recommendation 1 stated —

That the Corruption and Crime Commission recommends to the Commissioner of Police that the conduct of the police in this matter is reinvestigated by experienced investigators unconnected to the original internal investigation. Focus would be on ascertaining whether any criminal conduct on the part of police occurred and if so, consideration be given to appropriate prosecution and disciplinary proceedings.

Recommendation 2 stated —

That the Corruption and Crime Commission reassess and report on the conduct of the police involved in the complaint made by Dr Cunningham and Ms Atoms, in the light of all relevant facts, including those established upon investigation and having regard to the findings made by Her Honour Judge Davis in CUNNINGHAM —v—TRAYNOR [2016] WADC 168.

I would like to briefly quote the letter from Commissioner McKechnie received on 20 November, in which he stated —

I am aware of the criticism of the Commission about its perceived inaction on the use of force allegations.

I set out my general response in my letter to the Parliamentary Inspector dated 20 April 2017 partially, but accurately reproduced in his report.

I will refer to that shortly. The letter continues —

I assume that the Committee, in failing to seek a response from the Commission before tabling its adverse report, concluded that the failure to accord natural justice was because the Committee considered that the Commission could not usefully add to its letter of 20 April 2017.

If that was the Committee's reason for not according procedural fairness, it was correct.

I interpolate that that was in fact the case. The letter of 20 April, which is annexed to the report, is quite comprehensive and sets out the commissioner's objections to looking at the matter further. The letter goes on —

However, as explained to the Committee recently, the Commission has reorganised its monitor and review function generally and specifically in relation to use of force allegations.

The letter concludes —

As to the recommendation, —

This is about recommendation 1 —

— the Commission lacks a proper basis to make such a recommendation and so declines to do so.

In response to recommendation 2, the letter continues —

While I have considered the Committee's opinion, the reasons expressed in the letter of 20 April 2017, I respectfully decline to accede to the recommendation.

As the report states —

The Committee appreciates that a strict interpretation of the precise powers of the commission to direct police to act on the extensive findings of the District Court and Parliamentary Inspector may be circumscribed, however, the outright refusal to revisit the case even to examine whether its own processes were lacking is most regrettable. And clearly insufficient consideration has been given to the wider public interest.

In the Committee's report, two recommendations were made and the Committee has subsequently received correspondence from the Commission which is annexed.

...

The Committee considers the Commissioner's reference to this Committee's failure to provide 'procedural fairness' bemusing. The Committee had the benefit of reading his earlier and lengthy letter of 20 April 2017 to the Parliamentary Inspector in which the Commissioner outlines why the case would not be further pursued by the Commission. These reasons included the finite nature of the Commission's resources and the already comprehensive nature of the findings in the District Court.

Moreover, the Committee's report and its recommendations closely reflect the Parliamentary Inspector's report. As the Commissioner points out, the provision of the report to the Commission, whether before or after its tabling, has done nothing to change his position on this matter.

Telling in the earlier correspondence with the Parliamentary Inspector is the reference to the Commission's role to improve integrity of and reduce the incidence of misconduct in the public sector.

In fact, the commissioner's letter of 20 April states —

You say that there is a public interest in ensuring that the Commission is seen to fulfil its primary statutory purpose of addressing demonstrated cases of police brutality.

That, with respect, is not the Commission's statutory purpose. The relevant purpose is to improve continuously the integrity of and to reduce the incidence of misconduct in the public sector. This purpose is to be achieved, among other ways by investigating cases of serious misconduct.

Notwithstanding the views of successive Parliamentary Inspectors, my reading of some Commission files is that police excessive use of force has always been matter of concern to the Commission. However, that is of no moment.

The committee also noted —

The Committee is perplexed as to how the Commission's failure to exercise its functions at all on this occasion enhances standards and integrity?

How does consigning action on demonstrably flawed police practices by the internal investigation unit address standards and integrity when the Commission is intransigent by asserting there is no public interest to be served?

Similarly, how is a refusal to revisit its response to this case merely because decisions were taken by predecessors appropriate? How will that assist in improving outcomes in the future?

Also, in the letter of 20 April in that context the commissioner states —

I was not Commissioner when the original decision was made. I do not propose to defend the original decision or concede that it was wrong.

The responsibility for the present decision to take no further action is mine alone.

...

I have to determine how to use the Commission's finite resources over thousands of allegations, assigning priority to those which would appear require active investigation in the public interest.

That amplifies some of what was said in the later letter by the commissioner earlier this month. The report continues —

The Committee and the broader community holds serious concerns that in recent years the Commission has demonstrated little appetite for investigating police matters, in particular those involving alleged excessive use of force.

Although, there is an indication from the commission that it intends to do better in the future. The foreword continues —

It is appreciated that in other jurisdictions there are separate independent bodies to oversight allegations against police. But that does not relieve the Commission of its statutory duty and begs the inevitable question: —

As I have posed on previous occasions —

if this case is not worthy of the Commission's attention, what is?

The commissioner's letter on April of this year argues —

Unlike New South Wales and no doubt related to economies of scale, Western Australia does not have a Police Misconduct Commission separate from a Public Sector Commission. The definition of serious misconduct includes, but is wider than police misconduct.

The decision as to which of the multitude of allegations received should be the subject of an investigation, is informed by many factors including the Commission's intelligence as to where are current areas of risk to the State.

Possible inappropriate police use of force of which your letter instances an example, is obviously one such area.

There are however other areas of current risk to the body politic which must be considered by me in allocating the Commission's resources.

I do not have the luxury of choosing matters of personal interest to investigate but, aided by advice, must make the best decision I can in all the circumstances as to what matters in the public interest should be pursued. These decisions are made knowing that inevitably there will be occasions when the decision turns out to be wrong. Moreover, there are a significant number of matters which ought to be the subject of investigation but the Commission cannot investigate due to —

Wait for it —

its finite resources. That would probably be so even if the Commission's resources were magically doubled.

Those are the arguments of the commissioner in April 2017. He has considered the parliamentary inspector's report. He has considered the report, which basically endorses the parliamentary inspector's report recently tabled in this place, and he has rejected the recommendations.

The foreword concludes by stating —

It is arguable that had the Commission taken a more active, comprehensive and timely examination of this matter that it would have obviated the need for Dr Cunningham and Ms Atoms to embark upon the emotionally taxing and costly District Court proceedings to establish the facts and to clear their reputations.

If not for their knowledge of the law and tenacity at pursuing a just outcome, this whole matter would have been swept under the rug years ago.

MR M. HUGHES (Kalamunda) [4.06 pm]: I am conscious of the time and that the Chair of the Joint Standing Committee on the Corruption and Crime Commission has outlined the details of the report. I am most perplexed that we are in a situation, notwithstanding that the commission is an independent commission, that the observations made by the parliamentary inspector and the joint standing committee have, in fact, not been responded to in a more positive way by the commissioner. I go to the fourth report and quote from the parliamentary inspector's letter regarding this matter, which was dated 6 July 2017. He makes two points and in the second observation he is addressing the commissioner. The letter states —

The second observation is that you may find it persuasive that the Commission should again become involved so that its final reported assessment accords with the judgment of Davis DCJ, if that is indeed your conclusion.

If we look at some of the details of the findings of Her Honour Davis, in the matter of *Cunningham v Traynor*, [2016] WADC 168—I will not read all the findings, there were 11 of them—pertinent to the behaviour of the police and the police investigation, they state —

Very little of the evidence given by police officer Traynor as to what occurred on the footpath at the time of the incident was supported by CCTV footage; on critical issues his evidence was manufactured or reconstructed in an attempt to put himself in the best possible light or to justify what he did; his evidence was inconsistent and neither accurate nor reliable, and Her Honour was unable to accept any of his evidence unless it was inherently probable or corroborated by other acceptable evidence;

Finding 4 states —

The evidence of police officer Clark involved a reconstruction of events and had many inconsistencies, and on critical issues was neither accurate nor reliable. Her Honour was unable to accept any of his evidence unless it was inherently probable or corroborated by other acceptable evidence;

Finding 5 states —

The evidence of by then retired police officer Caldwell and his service history raised a real question as to his attention to detail, his honesty and whether his evidence could be relied on, given his propensity to lie, his disrespect for the work of tribunals and his cavalier tendency to give both inaccurate and self-serving accounts of events. Her Honour was unable to accept any of his evidence unless it was inherently probable or corroborated by other acceptable evidence;

Finding 11 states —

The police officer's use of excessive force against Dr Cunningham constituted battery and his imprisonment was neither lawful nor justified; the officers acted with malice in their dealings with him, and the bringing and continuation of the criminal charges by officer Clark amounted to a misuse, or wrongful or unreasonable use, of power for a purpose other than the proper invocation of the criminal law.

I think that in effect of the judgement and the civil proceedings are most damning. Both Dr Cunningham and Ms Catherine Atoms went through all the processes available to them at law to have this matter investigated both

by the police and the Corruption and Crime Commission. What was available to them? They got no succour there. They went to the civil jurisdiction to make their case and we know what the findings were. I find it incredible indeed that the commissioner is unable to move on this issue, despite the opinion of the parliamentary inspector and the considered view of this parliamentary committee on the matter. I urge members present to read “Unfinished business: The Corruption and Crime Commission’s response to the Committee’s report on Dr Cunningham and Ms Atoms”, because it is indeed unfinished. Justice has not been served in relation to allegations of criminal activity against these two citizens of our state, and it is a disgrace. I also urge members to read the fourth report of October 2017 that gives give something of the context of the “Unfinished business” report. I thank you, Mr Speaker, for your indulgence.

MRS L.M. HARVEY (Scarborough — Deputy Leader of the Opposition) [4.11 pm] — by leave: Once again, we stand in this place in opposition with no member of the Liberal opposition in the Legislative Assembly forming part of the committee that deliberated on and produced this report. This is a very important report. That is why the opposition still wants to hold the government to account with respect of its management of business and oversight. We would have liked to have had one of our members be able to rise for 10 minutes and speak to the body of this report. Instead, we have had 20 minutes to look at it and try to digest what is in it, and it is a very important matter.

Seven members interjected.

The SPEAKER: Members!

Mrs L.M. HARVEY: Members might recall this issue. It was scandalous. In November 2008, Dr Cunningham and Ms Atoms were walking about Fremantle, having been out for dinner and some drinks. They stopped to assist a couple of individuals they did not know who had fallen into a garden bed. During that process I believe that Dr Cunningham was pulled into the garden bed while trying to pull out one of the gentlemen. Out of that a melee occurred, with a couple of police officers getting involved. This was a subject of a Corruption and Crime Commission report in 2011 and members might recall it. In the course of this activity, the police officers behaved in an appalling fashion. Dr Cunningham indicated that he had a sore shoulder, as I recall. At the time the police officer handcuffed him really tightly so his shoulder was pulled. Dr Cunningham said that the police officer was kicking him and trying to push him over. The police officers were swearing at Dr Cunningham and Ms Atoms. Ms Atoms had both of her arms pulled up over her head and she was handcuffed and manhandled into the back of the police wagon and after she was tasered. She is five-foot-one and weighs 55 kilos and she was tasered by police officers. Dr Cunningham and Ms Atoms were only being were good Samaritans helping two individuals extricate themselves from the garden bed they had fallen into because, I believe, they may have been inebriated.

Dr Cunningham and Ms Atoms went to court in 2010. The magistrate dismissed that court action and awarded \$15 000 worth of costs to Dr Cunningham and Ms Atoms. After this, Ms Atoms spent a significant period of time unable to work and needed rehabilitation, and I believe subsequently they have sued for damages. I also believe that they won, and good on them. I do not think that money will compensate Ms Atoms or Dr Cunningham for the interruption to the lives they have enjoyed or, indeed, for the physical pain that Ms Atoms suffered as a result of these actions. At the time, in late 2008, the CCC looked at the matter and determined that WA Police should interrogate it with respect to any form of misconduct and WA Police said there was no misconduct. During the court process in 2010, the judge was quite scathing of the two officers involved. The judge made some findings that he believed the officers had pretty much colluded on the statements to the point at which the statements were virtually a word-for-word copy of each other, including—to give some insight into the intelligence of the individuals involved—the same spelling error.

Dr A.D. Buti interjected.

Mrs L.M. HARVEY: Yes, the magistrate was.

There was also an allegation in the CCC report of 2011 that Dr Cunningham had been given closed-circuit television footage as part of the disclosure component in preparation for court, and, oddly, for the first time ever in his career, his office at the University of Western Australia was broken into. The report stated that the footage was taken from his computer, which only left the police footage of the incident. Dr Cunningham asserted to the CCC at the time that the footage was missing three significant segments. Those three significant segments of footage included the footage that showed the officer kicking Dr Cunningham in the legs, which Dr Cunningham asserted happened and the police officers denied. Oddly enough, it was also missing the two segments showing the two individuals being tasered.

This is a very serious issue and that is why the Joint Standing Committee on the Corruption and Crime Commission looked at it as well as the operation of the CCC generally in looking at complaints of excessive use of force by police. The committee has seen fit to look at this matter again, because it is not happy with the response of the Corruption and Crime Commission. I understand that. We do not have a member in this place who can speak with

Extract from *Hansard*

[ASSEMBLY — Thursday, 30 November 2017]

p6451a-6456a

Ms Margaret Quirk; Mr Matthew Hughes; Mrs Liza Harvey

any authority about what was uncovered as part of the deliberations of this committee. I want to draw members' attention to a couple of lines of the report that stood out to me, bearing in mind, that one of the reasons that we would like to have a member of Liberal Party in the Legislative Assembly on the CCC committee is that this government has made a decision to give additional powers to the CCC to look at organised crime and unexplained wealth. That is going to create a workload for the Corruption and Crime Commission, and we found out in the budget estimates process that no additional funds have been given to the CCC to perform this function. What did we find from Hon John McKechnie in the sensitive document that appears on page 6 of the report? He stated —

There are presently 11 matters the subject of preliminary investigation, although some of these are suspended due to lack of resources and more urgent priorities. There are 18 matters under active investigation, utilising the whole of the Commission's investigative capacity.

It will be interesting to know how the commission will take on that additional role in interrogating unexplained wealth. The sensitive document continues on page 7 of the report, and the commissioner goes on to state —

I do not have the luxury of choosing matters of personal interest to investigate but, aided by advice, must make the best as decision I can in all the circumstances as to what matters in the public interest should be pursued ... Moreover, there are a significant number of matters which ought to be the subject of investigation, but the Commission cannot investigate due to its finite resources. That would probably be so even if the Commission's resources were magically doubled.

That is interesting. We have this report. Once again, no-one from the Liberal opposition in the Legislative Assembly forms part of this very important oversight committee of CCC. We will not have a member of that committee to look at and interrogate the resourcing this government is providing to the Corruption and Crime Commission to perform all of its functions. The government-controlled oversight committee into Corruption and Crime Commission in this place and the chair are requesting of the commission to investigate this and the commission is saying it does not have the money to do it. The opposition would like to have one of its members in the Legislative Assembly on that committee to pursue this matter as part of the committee process. We will talk to Hon Jim Chown about this, as we track this matter over the course of this government and keep pressure on the government to resource the Corruption and Crime Commission consistent with the demands of the member for Girrawheen, who is the chair of the committee, so that it can do more and better—apparently in an under-resourced environment. We would like to have a member on the committee to interrogate that but we do not, just as we have not had acceptable responses on a range of matters of transparency that we have discussed ad nauseam in the first seven months of this Parliament. The Parliament is being used for stunts to get a political headline in the newspapers to try to take pressure off the government in another area. Parliament's time has been taken up in two motions to suspend standing orders because the government could not take the step on an opposition-initiated suspension motion yesterday to refer the member for Darling Range to the Procedure and Privileges Committee, so we have wasted Parliament's time today. Now, at 20 past four, Parliament is about to adjourn for the year and we still have not finished dealing with the business on the notice paper. We are hardly finishing the parliamentary session with a punch with the Appropriation (Recurrent 2010–11 to 2015–16) Supplementary Bill 2017.