



**Joint Standing Committee on the Corruption and Crime Commission**

# Unfinished business

**The Corruption and Crime Commission's response to the Committee's report on Dr Cunningham and Ms Atoms**

**Report No. 7  
November 2017**

Parliament of Western Australia

## Committee Members

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# **Joint Standing Committee on the Corruption and Crime Commission**

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## **Unfinished business**

### **The Corruption and Crime Commission's response to the Committee's report on Dr Cunningham and Ms Atoms**

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Report No. 7

Presented by

**Ms M.M. Quirk, MLA and Hon. J.E. Chown, MLC**

Laid on the Table of the Legislative Assembly and of the Legislative Council  
on 30 November 2017



## Chair's Foreword

This report marks the unsatisfactory conclusion to a long running saga where the Crime and Corruption Commission has consistently declined over a number of years to exercise its statutory duty to monitor and report upon a case of police misconduct, excessive use of force, tampering with physical evidence and collusion in the content of sworn evidence.

The matter was the subject of the fourth report of this committee on the *Parliamentary Inspector's report on a complaint by Dr Robert Cunningham and Ms Catherine Atoms* dated 12 October 2017.

As outlined previously, Dr Cunningham and Ms Atoms were both subject to excessive use of force at the hands of Western Australian police officers, subjected to prosecution, later withdrawn, and have been fighting for acknowledgement and recompense for their treatment for over nine years. The Committee found that the protracted nature of their quest for an acknowledgement of their treatment or even an apology would have materially exacerbated the distress of Dr Cunningham and Ms Atoms.

The Committee appreciates that 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 Commissioner notified the Committee that he did not intend to accede to these recommendations.

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.

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?

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.

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

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.

A handwritten signature in black ink, appearing to read 'M.M. Quirk', written in a cursive style.

MS M.M. QUIRK, MLA  
CHAIR

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# Chapter 1

## The Commission's response to the Committee's report on a complaint by Dr Cunningham and Ms Atoms

On 12 October 2017, the Joint Standing Committee on the Corruption and Crime Commission (Committee) tabled a report *Parliamentary Inspector's report on a complaint by Dr Robert Cunningham and Ms Catherine Atoms* in the Legislative Assembly and Legislative Council.

Consistent with the report of the Parliamentary Inspector, the Committee's report made two recommendations:

### Recommendation 1

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

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.

On 20 November 2017, the Committee received the Corruption and Crime Commission's (Commission) response to its recommendations. Essentially the Commission declined to accede to the recommendations.

Given the importance of this matter, the Committee considered it necessary to make public the Commission's response to its recommendations, and its reasons for maintaining its position. A copy of the response is included at Appendix One.



MS M.M. QUIRK, MLA  
CHAIR



# Appendix One

## Commission's response

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**SENSITIVE**

**CCC** | Corruption and  
Crime Commission

Your reference: A637300  
Our reference: 00769/2017

20 November 2017

Ms Margaret Quirk, MLA  
Chair  
Joint Standing Committee on the  
Corruption and Crime Commission  
Level 1, 11 Harvest Terrace  
WEST PERTH WA 6005

Dear Chair

### **Joint Standing Committee Report 4**

Thank you for your letter of 12 October 2017. I have considered it and have also noted with interest the views, sometimes trenchantly expressed by members and others within Parliament.

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

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.

I anticipate that the Commission will report more often on the results of a review.

Turning finally to the Committee's recommendations:

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**SENSITIVE**

**SENSITIVE**

Recommendation 1

The Commissioner of Police has been well aware of the matter and the judgment. The State is an Appellant. The Commissioner has always been well placed to take disciplinary or other action if such action was considered warranted.

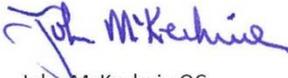
The Commission has suggested that Police formalise a procedure for review when a judicial officer makes adverse comments about behaviour of a police officer and the Commissioner has put that in train.

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

Recommendation 2

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

Yours sincerely



John McKechnie QC  
Commissioner

Encl.

**SENSITIVE**

**SENSITIVE**



Government of Western Australia  
Corruption and Crime Commission

Your Ref: -  
Our Ref: LS01024/2017/KAN

20<sup>th</sup> April 2017

Hon. M J Murray, AM, QC  
Parliamentary Inspector of the  
Corruption and Crime Commission  
Level 3, BGC Centre  
28 The Esplanade  
PERTH WA 6000

*Michael,*  
Dear Parliamentary Inspector

**ALLEGATION OF POLICE MISCONDUCT - DR ROBERT CUNNINGHAM AND MS CATHERINE ATOMS**

Thank you for your letter of 30 March 2017.

In that letter you describe the long, unfortunate history of this matter as it has been considered by more than one Commissioner, an Acting Commissioner, your predecessor the Hon. C Steytler and you.

The matter has been the subject of a Parliamentary Report. It has been considered by two courts, the Magistrate and latterly the District Court, where the events of the incident were the direct subject of the litigation.

As I understand your position, you take issue with the Commission's procedures in the historical treatment of the allegations in the period from December 2008 to 2011. You state that the incident warranted a thorough independent investigation by the Commission at the outset.

You also disagree with the Commission's decision, made subsequent to the judgment in *Cunningham v Traynor* (2016) WADC 168.

You "recommend that the Commission investigates the conduct of the Police officers involved in the incident so that, firstly, any criminal liability on their part is properly determined, and secondly, any opinion of misconduct and serious misconduct can properly be formed, should either prove to be the case."

CORRUPTION AND CRIME COMMISSION

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**SENSITIVE**

**SENSITIVE**

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 carefully read your letter and considered its contents, reviewed the Commission's file and re-read the judgment.

You of course rightly focus on this one matter of alleged police misconduct.

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.

In performing my function in this regard, I am immeasurably assisted by the advice given to me by a team of experienced and qualified officers. Recommendations are made to me by the operations committee, sometimes after vigorous debate within it as to the best way to serve the public interest.

Since 1 July 2016, the Commission has received/created:

- 3605 allegations, 2037 of these (56%) relate to WA Police (they were the subject officer);
- 1928 notifications ; and
- 836 of these notifications (43%) were from WA Police. This number of notifications from WA Police includes (about 8%) matters that relate to other agencies.

Following a reorganisation last year, the Commission is monitoring or reviewing fewer matters. Those that are selected are now actively monitored and extensively reviewed. There are currently 17 matters in monitor and 9 matters in review.

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.

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 a matter of concern to the Commission. However, that is of no moment.

**SENSITIVE**

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

You have done me the courtesy of a lengthy exposition leading to your view that the Commission should now investigate Dr Cunningham and Ms Atom's allegation which is why I respond similarly. The preceding however is by way of background as to the exercise of my power to investigate or not and the need to balance many factors including priorities and available resources.

I now turn to the specific matter.

As I intimated earlier, I do not intend to justify the Commission's previous decision not to investigate. Though it should not be inferred that I consider it was wrong.

Rather, I approach the current decision on the factors known in 2017. The chief factor is that there is now a binding judgment (I understand there is an appeal but I set that aside as irrelevant for present purposes).

The incident involving Dr Cunningham, Ms Atoms and police officers was the subject of findings by Davis DCJ. Those findings are incontrovertible. They are binding on the parties, one of whom was the State of Western Australia which has also been held liable. They include findings of unlawful conduct by Officers Traynor, Clark and Caldwell (who is no longer a police officer).

By contrast, the Commission has no power to make findings, only to form a non-binding opinion.

Contrary to your ultimate paragraph, the Commission cannot investigate so that "any criminal liability on their part is properly determined."

**SENSITIVE**

Any recommendation as to whether consideration should be given for the prosecution of particular persons is not a finding that a person is guilty of a criminal offence. Moreover, the Commission cannot charge any person with a criminal offence.

The evidence before the District Court was all about the event. Much of it was the earlier subject of comment, perhaps strictly speaking obiter dicta, by Magistrate Lawrence.

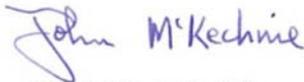
The judgment of Davis DCJ comprehensively deals with the event, the actions of all concerned and the liability of the parties.

Having regard to the various competing priorities of the Commission, the lack of new information, the binding nature of the District Court judgment, the non-binding notion of any Commission report, I concluded that there was no sufficient public interest to justify the allocation of significant resources by the Commission into an investigation.

I conveyed that decision in summary terms to Dr Cunningham.

I always treat your recommendations with the seriousness they deserve. They are another source of valuable information to guide me in making or reviewing a decision which Parliament has entrusted to me alone. I do not intend to alter my decision.

Yours sincerely



John McKechnie, QC  
**COMMISSIONER**

## Appendix Two

### Committee's functions and powers

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By concurrence between the Legislative Assembly and the Legislative Council, the Joint Standing Committee on the Corruption and Crime Commission was established on 15 June 2017.

The Joint Standing Committee's functions and powers are defined in the Legislative Assembly's Standing Orders 289-293 and other Assembly Standing Orders relating to standing and select committees, as far as they can be applied. Certain standing orders of the Legislative Council also apply.

It is the function of the Joint Standing Committee to -

- a) monitor and report to Parliament on the exercise of the functions of the Corruption and Crime Commission and the Parliamentary Inspector of the Corruption and Crime Commission;
- b) inquire into, and report to Parliament on the means by which corruption prevention practices may be enhanced within the public sector; and
- c) carry out any other functions conferred on the Committee under the *Corruption, Crime and Misconduct Act 2003*.

The Committee consists of four members, two from the Legislative Assembly and two from the Legislative Council.