



Joint Standing Committee on the Corruption and Crime Commission

Parliamentary Inspector's report on a complaint by Dr Robert Cunningham and Ms Catherine Atoms

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Joint Standing Committee on the Corruption and Crime Commission

Parliamentary Inspector's report on a complaint by Dr Robert Cunningham and Ms Catherine Atoms

Report No. 4

Presented by

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

Laid on the Table of the Legislative Assembly and Legislative Council
on 12 October 2017

Chair's Foreword

This report, which endorses the findings of the Parliamentary Inspector of the Corruption and Crime Commission (PICCC), is significant in several respects.

First, it serves to demonstrate how valuable the role of the PICCC is. His close examination and the provision of independent advice without fear or favour serves as a bulwark against complacency, inertia, or worse, incompetence.

Second, it sets out a course of conduct by the Corruption and Crime Commission, and to a lesser extent, the WA Police which reflects badly on both organisations.

Third, the report begs the question that if the Commission declines to independently investigate a matter such as this, then what are the characteristics of a case it would be prepared to take on?

Moreover, the oft repeated assertion by the Commission that it does not have the resources to undertake further examination of the matter in light of the comprehensive 2016 findings of the District Court is indefensible.

As previous PICCC Steytler QC found [there were] “credible and serious allegations.” Members of the Committee were confounded this case was considered unworthy of the Commission’s ongoing attention.

How is it that such scrutiny by the Commission is regarded as not being in the public interest?

The recommendations of the PICCC are in the strongest terms available to him within the bounds of his jurisdiction. The Inspector’s role is to assess the effectiveness and appropriateness of the Commission’s procedures.

The disinclination of the Commission to review the incident after evidence had been tested in civil proceedings in the District Court may stem from the desire of current Commissioner McKechnie QC to draw a line across past sub-optimal practices.

Reference is made on more than one occasion in correspondence with the PICCC that many of the matters currently in contention were issues dealt with by his predecessors over a period of nine years that he was unwilling to revisit.

The desire for quality improvement and for more robust procedures in future cases is laudable. Similarly, it is conceded that the Commission’s scrutiny would, at best, result in a non-binding opinion and it certainly has no power to launch prosecution action on its own motion. The Committee however rejects this argument.

The public interest would suggest that WA Police deliver more proportionate disposition of the matter and this needs to be initiated by the Commission making recommendations for this to occur.

There will be ongoing concerns in the integrity and capacity of the Commission to oversight internal police investigations or conduct its own independent inquiries if, at this stage, it is not prepared to assess whether systemic deficiencies or procedures were present throughout its assessment process of this case over the years.

Finally, the most cursory examination of the efforts of Dr Cunningham and Ms Atoms to have the incident reviewed over many years leads to the conclusion that it was only with their considerable persistence and resources as well as familiarity with the law which enabled them to do so. This leads to the inevitable conclusion that others in similar circumstances would have capitulated at a much earlier stage.

In the same way we encourage greater access to justice with the legal system, the Committee is uncomfortable with a situation where serious misconduct and breaches in integrity standards can only be disclosed after such protracted and tenacious efforts.

A handwritten signature in black ink, appearing to read 'M.M. Quirk', with a stylized, cursive script.

MS M.M. QUIRK, MLA
CHAIR

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Findings and Recommendations

Recommendation 1

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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

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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.

Chapter 1

Committee's consideration of the PICCC's report

The plight of Dr Cunningham and Ms Atoms, subjected to the unlawful use of force, unlawful arrest and unlawful detention at the hands of Western Australian police officers in Fremantle on 2 November 2008, is well known to the Committee. It was reported on in 2011 by then Parliamentary Inspector of the Corruption and Crime Commission (PICCC) Hon Christopher Steytler QC¹, and has been the subject of various news articles since that time.

The Committee thus welcomed the recent report of the current PICCC, Hon Michael Murray AM QC, on a complaint made by Dr Cunningham and Ms Atoms about the Corruption and Crime Commission (CCC). This report was provided to the Joint Standing Committee on 5 September 2017 and is attached at Appendix 1.

A selected chronology of events

The PICCC's report outlines that, for the best part of a decade, Dr Cunningham and Ms Atoms have been battling to somewhat rectify the disturbing treatment they were subjected to. They want the CCC to undertake an independent investigation into the conduct of the three police officers involved.

The PICCC's report sets out a full chronology of relevant events. Selected events are set out below:

- On 2 November 2008, Dr Cunningham and Ms Atoms were arrested while attempting to help a man who had fallen into a garden bed. During the course of the arrest, they were both tasered and subject to rough treatment by the arresting police officers.
- In December 2008, Dr Cunningham complained to the CCC about the incident. The CCC oversaw an internal police investigation which found no evidence of misconduct on the part of the police officers.

1 Parliamentary Inspector of the Corruption and Crime Commission, *The procedures adopted by the CCC when dealing with complaints of the use of excessive force by police*, 11 August 2011, found in the report of the Joint Standing Committee of the Corruption and Crime Commission, *Parliamentary Inspector's Report concerning the Procedures adopted by the Corruption and Crime Commission when Dealing with Complaints of the Use of Excessive Force by Police*, Report 18 of the 38th Parliament, September 2011, p5.

- In April 2010, Dr Cunningham and Ms Atoms were subjected to criminal proceedings for their alleged conduct leading to their arrest on 2 November 2008. The charges were dismissed.
- In mid-2010, Dr Cunningham wrote to the WA Police, the CCC and, lastly, the PICCC regarding the ongoing investigation of the incident. The WA Police found the officers had acted appropriately. The CCC referred the matter back to WA Police for investigation and, ultimately, determined not to take any further action.
- In 2011, the PICCC investigated the matter. The PICCC's report was annexed to a report of a former Joint Standing Committee on the Corruption and Crime Commission (38th JSCCCC) in September 2011.² The PICCC found, and the 38th JSCCCC agreed, that serious and credible complaints concerning police use of excessive force should be subject to a full independent investigation by the CCC.
- In December 2016, Dr Cunningham and Ms Atoms successfully sued the police officers and the State of Western Australia. The District Court determined that the nature of the police officers' conduct was unlawful and malicious.³ Dr Cunningham and Ms Atoms were awarded general, aggravated, exemplary and special damages totalling \$110,304.10 and \$1,024,822.11 respectively.

The police officers' appeal of the District Court decision

In January 2017, the police officers appealed the District Court decision.

Dr Cunningham and Ms Atoms sought an order for security for costs against the police officers for the appeal. The order was granted for a number of reasons, including that the police officers are impecunious and would not have been in a position to satisfy a costs order in favour of Dr Cunningham and Ms Atoms if the appeal was unsuccessful. Other reasons included that the grounds of appeal were far from strong, and that Dr Cunningham and Ms Atoms would have suffered a significant financial burden in having to respond to the appeal.⁴

The judge also ordered that if the security for costs was not paid by the police officers by an agreed date, the appeal would be dismissed.

2 Joint Standing Committee on the Corruption and Crime Commission, *Parliamentary Inspector's Report concerning the Procedures adopted by the Corruption and Crime Commission when Dealing with Complaints of the Use of Excessive Force by Police*, Report No. 18 in the 38th Parliament, Parliament of Western Australia, Perth, 8 September 2011.

3 *Cunningham v Traynor* [2016] WADC 168

4 *Traynor v Cunningham* [2017] WASCA 125.

The police officers appealed the order for security of costs in the Supreme Court. This appeal was dismissed on 23 August 2017.⁵ The police officers did not pay the security for costs by the agreed date, thus their appeal against the findings of the District Court was dismissed.

The State's appeal of the District Court decision

The State filed an appeal notice against the District Court decision on 27 January 2017. This appeal has not yet been heard.

The State's seven grounds of appeal are based on section 137(5) of the *Police Act 1892* (WA). This section states that:

137(5) The Crown is liable for a tort that results from –

(a) anything done by a member of the Police Force, without corruption or malice, while performing or purporting to perform the functions of a member of the Police Force, whether or not under a written or other law.

The grounds challenge the “judge’s findings of joint liability to pay compensatory and/or aggravated damages in circumstances where it is alleged that Her Honour also made findings of malice.”⁶

The State made an application for a stay of orders from the District Court requiring the State to pay the sums awarded to Dr Cunningham and Ms Atoms. This stay was granted in June 2017, meaning that some of the monies awarded to Dr Cunningham and Ms Atoms by the District Court will not be paid until the State’s appeal is determined, or a further order is made.⁷

A further complaint to the CCC

Following the findings of the District Court, Dr Cunningham reiterated his complaint to the CCC, requesting that it reopen the matter and properly conduct an independent investigation. The CCC declined to investigate for reasons set out in full in the PICCC’s report (see page 21).

⁵ *Traynor v Cunningham* [No 2] [2017] WASCA 159.

⁶ *The State of Western Australia v Cunningham* [2017] WASCA 119 at pp16.

⁷ *The State of Western Australia v Cunningham* [2017] WASCA 119.

Some of the matters the CCC considered in deciding to take no further action in respect of Dr Cunningham's complaint included:

- the findings of the District Court, in particular that it did not contain any new information or evidence.
- that the District Court's findings are incontrovertible and binding; by comparison the CCC has no power to make findings, only to form a non-binding opinion.
- that the CCC has limited resources and these must be deployed to best advantage.

Subsequent complaints to the PICCC and this Committee

Dr Cunningham complained to both the PICCC and this Committee about the failure of the CCC to conduct a full independent investigation. The PICCC and the CCC Commissioner exchanged a series of letters on this matter, summaries of which are provided in the PICCC's report.

Ultimately, the PICCC's report outlines his assessment that the CCC:

has not given any reason to justify its decision not to reject the demonstrably flawed police internal investigation conducted soon after the incident in Fremantle in 2008; nor, in my opinion are there proper grounds for its decision not to reassess Dr Cunningham and Ms Atom's complaint in light of the District Court proceedings in 2016.

The PICCC makes two recommendations (see pages 30 to 31).

Committee's consideration and recommendations

The Committee has considered the PICCC's report and the recommendations made therein.

The Committee found the WA police officers' treatment of Dr Cunningham and Ms Atoms disproportionate, arbitrary and unlawful. The conduct could not be categorised as a transitory impulsive overreaction but included a sustained course of actions over months and years to deceive and exonerate.

The Committee is dismayed and perplexed at the outcome of the internal investigation which cleared the police officers of any wrongdoing and the CCC's ongoing decision not to conduct its own investigation into the matter. A more clear-cut case of police misconduct over which the CCC should exercise its powers to investigate is hard to envisage.

The Committee supports the intent of the recommendations made by the PICCC in his report. It urges the CCC to take action to appropriately respond to this untenable situation.

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.

A handwritten signature in black ink, appearing to read 'M.M. Quirk', is positioned above the printed name.

MS M.M. QUIRK, MLA
CHAIR

Appendix One

Parliamentary Inspector's report

A COMPLAINT BY DR ROBERT CUNNINGHAM AND MS CATHERINE ATOMS AGAINST THE CORRUPTION AND CRIME COMMISSION

Sections 199 and 201 of the *Corruption, Crime and Misconduct Act 2003 (WA)*

5 September 2017

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1. THE NECESSITY FOR THIS REPORT

This report is to inform the Joint Standing Committee for the Corruption and Crime Commission and Parliament of the unresolved complaint made by Dr Robert Lee Cunningham and Ms Catherine Mary Atoms to the Corruption and Crime Commission about the misconduct of three police officers, by way of the unlawful use of force, unlawful arrest and unlawful detention, in Fremantle on 2 November 2008, and associated issues.

Various decisions made by the Commission and the Police since 2008 to the present day have failed to properly render the conduct of the three police officers involved, subject to proper scrutiny under the State's integrity statutory framework, or subject to the processes of the criminal law, if that was thought to be in the public interest in all the circumstances.

In passing I make the observation that, although Dr Cunningham and Ms Atoms have complained to me about that outcome, my functions are limited in a case such as this to assessing the effectiveness and appropriateness of the Commission's procedures and to making recommendations to the Commission, upon which I may, as I now do, report to the Parliament.

I have no power to recommend to the Police that they undertake a new investigation of the case and that they give consideration to taking disciplinary action against those involved who remain police officers and/or to the criminal prosecution of any or all of the police officers involved.

Dr Cunningham and Ms Atoms successfully sued the police officers and the State in District Court civil proceedings in 2016. The Court incontrovertibly determined the nature of the police officers' conduct, impugning it as unlawful and malicious. Yet this judgment failed to move the Commission to reassess Dr Cunningham and Ms Atoms' complaint, despite my recommendations that it do so.

As a consequence of the position taken by the Commission, if it is maintained, the conduct of the three police officers will likely remain unaddressed by the integrity law created to sanction such conduct, and by the State's criminal law.

In my assessment the Commission has not given any reason to justify its decision not to reject the demonstrably flawed police internal investigation conducted soon after the incident in Fremantle in 2008; nor, in my opinion are there proper grounds for its decision not to reassess Dr Cunningham and Ms Atom's complaint in light of the District Court proceedings in 2016.

The making of this report marks the limits of my powers under the Act in trying to bring about a remedy for an injustice of the kind Dr Cunningham and Ms Atoms have suffered for so long. It is now for Parliament to consider whether an appropriate amendment to the Act is needed to avoid a recurrence of the situation in which the only two State agencies that can take adequate steps to address and deal with obvious and proved unlawful and malicious conduct by public officers, the Commission and the Police, fail to do so. I will return to this discussion in due course.

2. THE COMPLAINT TO THE HON CHRISTOPHER STEYTTLER QC

Dr Cunningham and Ms Atoms first complained to my predecessor, the Hon Christopher Steytler QC, on 31 August 2010 about the ineffectiveness and inappropriateness of the Commission's procedures used to oversee, and to accept the findings of, an internal police investigation into their complaint of misconduct made against three police officers in Fremantle on 2 November 2008.

Mr Steytler QC conducted a lengthy investigation in 2010 - 2011 into Dr Cunningham and Ms Atoms' complaint and other complaints of the use of excessive force by police officers. He subsequently tabled a report with the Joint Standing Committee on the Corruption and Crime Commission on 11 August 2011.¹

The relevant information in Mr Steytler QC's report concerning the complaint and the Commission's refusal to accept his recommendations to conduct its own independent investigation into the police officers' conduct can conveniently be restated here for ease of reference for the purpose of my report:²

The second incident involved a man ('A') and a woman ('B') who (on their version of events) were wrongly made the subject of police attention. A's version of events is as follows.

In the early hours of 2 November 2008, A was walking near the Esplanade Hotel in Fremantle with B and another friend after celebrating A's birthday. A had not been drinking. A and his friends came across two men in the street. One had fallen into a garden bed and the other was trying to pull him out. A and his friends were asked to help pull the man out (he had become wedged in the bushes). In the course of lending aid, A was pushed from behind by an unknown person, into the same garden bed.

After A had extricated himself from the garden bed, he saw that two WAP officers were speaking to B nearby. As she turned and walked away from the officers, one of them grabbed her by the arm. She screamed in pain.

A approached the officer, to ask what was going on. As he approached, he heard the officer say to B, in an aggressive tone, 'You are required to leave Fremantle'. She replied 'That's not really possible. I live in Fremantle'. This comment related to a 'move-on' notice that the officer was attempting to issue in respect of B.

A approached the officer and told him that he was a solicitor (although working as an Associate Professor of Law at a Perth university, he maintains a

¹ Titled *The procedures adopted by the CCC when Dealing with Complaints of the Use of Excessive Force by Police*, a report which subsequently became the basis for the Joint Standing Committee's report titled *Parliamentary Inspector's Report concerning the Procedures adopted by the Corruption and Crime Commission when Dealing with Complaints of the Use of Excessive Force by Police*, Report No. 18 in the 38th Parliament, published in September 2011.

² Pages 16-24 of the Joint Standing Committee's report in which 'A' represents Dr Cunningham and 'B' represents Ms Atoms.

right to practise in this jurisdiction). As he said this, the other WAP officer grabbed A by the arm. A repeated that he was a solicitor and asked why B was receiving a move-on notice. Both WAP officers then placed A's hands behind his back and one officer removed his handcuffs from his armaments belt.

As the officers pulled A's arms behind his back, he asked them to be careful with his left shoulder, as a football injury had restricted the movement of his left arm. One officer pushed A onto the street whilst handcuffing him. Once he had been handcuffed, the other officer kicked A very hard in the legs a number of times in an attempt to trip him, notwithstanding that he was wearing spectacles.

A was pushed further into the street towards a parked police van. He heard a person shouting from a balcony on the nearby Esplanade Hotel to the WAP officers that they should 'stop the violence' and that he was recording the incident. A was then tasered, causing excruciating pain in his back and thigh. He fell to the ground on his face whilst handcuffed. He suffered several electric shocks to his back as he lay on the road.

B was also tasered.

A more senior WAP officer arrived. A told him that he was a solicitor and that all that he had done was to ask one of the officers a question. The officer responded by saying words to the effect 'Mate, we don't give a fuck who you are, or what you were doing.'

A saw the arresting officers looking up towards the balcony from which the person had shouted earlier. They were counting the floors leading to that balcony. A was then roughly put into the back of the police van, along with B. He asked several WAP officers why he was under arrest. His question was ignored. At no time was A told that he was under arrest. A asked that his handcuffs be loosened, as he was in pain because they had been over-tightened. His request was ignored.

At the Fremantle Police Station, A asked if he could be given medical assistance. One of the officers replied 'We don't give a shit about you mate. You can make your way to the hospital when we let you out of here.' Shortly afterwards, B, who was nearby, made a call on her mobile telephone. While in mid-sentence, an officer took the telephone from her and said words to the effect 'If you know of anyone else with a camera, tell them to bring it down here so we can delete the images.'

A, whose wrists were bleeding and who was suffering after-effects from having been tasered, again asked for medical assistance. This was refused. A asked if he could speak with the most senior officer at the station. His request was eventually granted and he was taken to a separate room where he spoke to a Sergeant. A told her what had happened.

Afterwards, A was provided with a bail form which contained a condition preventing him from attending the Esplanade Hotel (A had planned to return

to the hotel to see if he could find any witnesses to the incident). He refused to sign a bail form containing this condition. Eventually, this condition was removed. After being charged and released (A and B were charged with the offence of resisting arrest), A and B were spoken to, outside the station, by the Sergeant to whom A had earlier complained. A says that the Sergeant said:

‘Look guys, I am really sorry about what happened to you two tonight. We have a problem in WA whereby there is a shortage of police. Recently, the government has been recruiting police officers from the U.K. Many of these guys have had little training and they can go a little overboard at times. Look, I am really sorry, ok?’

A, B and their friend then spoke to several workers at the Esplanade Hotel. One worker told them that the police had come over to the hotel and that he had let them into one of the upstairs rooms.

A later issued a summons in order to obtain the contact details of each patron who had been in a room of the Esplanade Hotel overlooking the incident at the material time. He eventually identified and spoke to a person (“C”) who had witnessed and recorded the incident. C provided details of two other people who had witnessed the event.

A and B pleaded not guilty to the criminal charges. On 2 March 2009, A received from the WAP disclosure materials in respect of the prosecution. This included CCTV footage obtained from Marine House in Essex Street, Fremantle. On or about 9 March 2009, A’s office at the university at which he lectures was broken into and his external hard drive was stolen, along with the CCTV footage of the incident he received during the disclosure process. However, the CCTV footage made available for the trial by the WAP had numerous gaps, including gaps of 13 seconds, 1 minute and 12 seconds and 32 seconds respectively. The first of those occurred at the approximate time that A was being kicked and tripped. The second and third occurred at the approximate times when A and B were being tasered.

The hearing at the Fremantle Magistrates Court on 29 April 2010

On 29 April 2010, the charges against A and B were heard at Fremantle Magistrates Court.

After cross-examination of the first witness called by the prosecution (one of the arresting officers), the police prosecutor suggested to A’s legal representative that he make a ‘no case’ submission. This submission was made and accepted by the Magistrate. The charges were dismissed and \$15,000 costs were ordered in favour of A and B.

The Magistrate was critical of the officer who gave evidence and stated that he [the Magistrate] was not satisfied that the officers involved in A’s arrest acted appropriately or lawfully. In dismissing the charges, the Magistrate said:

I found that the testimony given [by the arresting officer] was extremely evasive, it was imprecise, and ... his evidence lacked recollection, was extremely vague [and] he was, in my view, unreliable and unconvincing during the course of his testimony. He constantly stated that he could not remember, he was fatigued. He admitted versions of his statement were inaccurate. ...

He admitted that the summary of facts was inaccurate. He admitted that [the] actions [of the sergeant who had tasered A and B] may have been inappropriate in relation to the use of the taser in [the] circumstances.

[He] denied that there was collusion with [his colleague] regarding the formulation of the statements made by both officers that were put to him. That was a most unconvincing explanation for the reason given in relation to the spelling error made in both statements and also in relation to the terminology used as alleged by himself and in the statement of [his colleague] that it may not have been accurate. If there had not been collusion, how else could such an exact statement have been recalled by both he and [his colleague]?

There was clearly an attempt to minimize his role ... and also the other officers' roles in the overall set of circumstances and, in all the circumstances, the CCTV speaks for itself.

On the evidence I am not satisfied that there is a case to answer, that the officer acted appropriately and/or lawfully. His evidence lacked such credibility and reliability that it should be totally rejected and, accordingly, I am not satisfied that [B] acted in a manner that breached the peace initially. I am not satisfied there was any lawful reason for ... any demand for her to give her name and address. There was no lawful reason as to why [the other arresting officer] should have grabbed her by the arm. I am not satisfied that she was notified as to why her name and address was required.

There is no evidence to suggest that, having rejected the evidence of [the arresting officer] that that was the case and, accordingly, the actions taken by the officers after the intervention of [A] give rise to a conclusion that there is no case to answer concerning the lawfulness of their behaviour towards him after he intervened ...

A's complaints

On 12 December 2008, some months prior to the hearing in the Fremantle Magistrates' Court, A complained to the CCC about the incident. The CCC referred his complaint to the WAP for investigation. The WAP found no evidence of misconduct on the part of the officers involved.

On 31 May 2010, after being acquitted of the charge that had been brought against him, A wrote to the WAP providing further information about the

incident and mentioning the circumstance of his acquittal. He asked the WAP to reopen its investigation. He was told on 3 June 2010 that the WAP would review the court proceedings to determine whether a reinvestigation of his complaint was warranted.

A also wrote again to the CCC on 31 May 2010. He asked it to investigate his complaint, given the outcome of the prosecution against him. He provided details of 12 witnesses, 7 of whom had witnessed the incident.

On 5 July 2010, the CCC wrote to A, telling him that it had formed the opinion that misconduct on the part of one or more WAP officers may have occurred. A was also told that the CCC had asked for the WAP file.

On 12 July 2010, the WAP wrote to A, telling him that, having reconsidered his complaint in light of the failed prosecution, it would not reinvestigate his complaint but that it would arrange for 'managerial action' to be taken in relation to the WAP officer's 'performance as a witness'.

On 21 July 2010, the CCC wrote to A, informing him that it had decided to refer his complaint back to the WAP for 'investigatory or other action'.

On 31 August 2010, A complained to me about the procedure adopted by the CCC in dealing with his complaint. After assessing the CCC's file, I wrote to Commissioner Roberts-Smith on 21 September 2010, urging the CCC to independently investigate A's complaint.

The Commissioner replied on 29 September 2010. He informed me that, having regard for a number of considerations and notwithstanding his concerns about the matter, he considered that 'the best course at this stage at least is to let the police investigation run, subject to close monitoring by the Commission'. The considerations relied upon by him were essentially the fact that 'the Commission presently has little capacity to take on additional investigations' and competing demands on its resources.

A was advised of the outcome of the internal WAP investigation in early December 2010. It effectively found that police officers had acted appropriately. A complained to the CCC by letter dated 9 December 2010. He expressed gross dissatisfaction with the process and outcome of the WAP investigation. He raised what he saw as serious discrepancies in the investigation. The CCC referred these to the WAP for further investigation by it.

On 14 March 2011, Acting Commissioner Herron of the CCC informed me that the CCC had reviewed this investigation and assessed its outcome as appropriate in the circumstances. He attached a letter sent by the CCC to A on 14 March 2011 ('letter of explanation') explaining what the CCC had done and why it did not intend to take any further action in respect of his complaints.

The more pertinent information provided by the letter of explanation (which addressed only the matters raised by A in his letter dated 9 December 2010) was as follows:

1. The review by the CCC had consisted of examining:
 - A's 'statement of complaint';
 - correspondence between A and the CCC;
 - statements and reports from WAP officers involved;
 - WAP internal investigation reports;
 - court transcript regarding the evidence given by the police officer who had testified at the trial of A and B;
 - WAP policy concerning 'use of force issues';
 - conversations with witnesses whose details had been provided by A, including the witness, C, who had filmed events from the Esplanade hotel balcony; and
 - CCTV footage from the Esplanade Hotel and the Fremantle Police 'Lock Up'.
2. The CCC had spoken to C, who had said that his memory was 'clouded' and that he had not witnessed tasers being used. He did not wish to become involved. However C had confirmed that, during the night in question, he had been interviewed by police who had determined that the images recorded by him had no evidentiary value because the video footage was 'too dark for anything to be made out'. C had deleted the images that night.
3. The sergeant who had tasered B did so because B was 'on the back of [one of the police officers] with her arm around his throat area'. He thought that she might injure the officer.
4. The same sergeant tasered A. He did so because he formed the opinion that the two officers who were arresting him appeared to be suffering fatigue and were in danger of being injured.
5. WAP policy FR 1.6.4, which governs the use of tasers, stipulates that:

The use of taser should be reasonable and appropriate in the circumstances and members will be accountable for any excessive use of force. The taser shall only be used to prevent injury to any person and shall not be used as a compliance tool.

In this instance the taser was used to prevent injury and accordingly fell within this policy.
6. The CCC had telephoned 8 of 12 witnesses who had been listed by A as persons who might have been able to contradict the police version of events (the CCC had been unsuccessful in its attempts to contact the other 4). One of the persons contacted had witnessed the incident but he now had no recollection of it. The other 7 had not witnessed the incident.

7. There was no evidence that police officers had ‘conferred with each other to deliberately bring about a false outcome’.

On 22 March 2011, A again complained to me [the Hon Steytler QC] about the CCC’s investigation. He reiterated his intense dissatisfaction with it. Once again, I obtained the CCC’s file. I examined the information given to the CCC by the WAP upon which the CCC’s final assessment of A’s complaint was based. My examination disclosed that:

1. The WAP internal investigation was conducted by officers from Fremantle Police Station, where the three officers about whom A had complained were stationed.
2. The CCTV footage from the Esplanade Hotel was described in the CCC’s review of the police investigation in terms which are consistent with A’s version of events up to the time at which he was handcuffed. However, events were said to have moved ‘out of the CCTV range’ at that point. Immediately prior to that point, the CCTV is said to have shown that one of the officers ‘pushed [B] in the chest area quite forcibly as she attempted to assist [A]’.
3. One of the arresting officers had said that B was told that she would be issued with a ‘move on’ notice because she was behaving in a disorderly manner. A was ‘forcibly arrested’ because, having ‘attempted to reach [B]’, he was told to ‘back off’ and ‘refused to back down’.
4. One of the arresting officers had said that, upon arresting A, he attempted to handcuff him. After handcuffing one of A’s wrists behind his back, the officer attempted to force A onto the ground by pulling downwards on the handcuffs and kneeling A in his left leg as hard as he could. The officer said he felt ‘completely exhausted’ at that point. He held A against the police van and radioed for urgent assistance.
5. The other arresting officer said that, while he and his colleague began to arrest A, B took hold of the officer’s arm. The officer pushed her away and told her to stay back. The officer said that he and his colleague continued to struggle with A, but he felt fatigued and feared for his safety. He said that B again grabbed him by the arm and pulled him away. A struggle ensued in the course of which B put both her arms around his neck and jumped on his back. A short time later, the arresting officer heard someone running up behind him and B suddenly fell off his back.
6. The sergeant who tasered A and B had prepared a statement on 4 November 2008. In it, he said that he attended the scene after hearing a radio call for urgent assistance. He saw B with her arm around one of the arresting officers’ throat. The sergeant immediately yelled ‘taser, taser, taser’. When B did not release her arm from the officer’s throat, he tasered her on the lower back and then tasered her again on her right thigh.

7. The sergeant also said that he then saw the two arresting officers struggling with A. He shouted to the officers that they should use their tasers. He asserts that they did not do so because they were fatigued. He then tasered A in the lower back and again on his right thigh, at which point A fell to the ground.
8. There appears to be no evidence suggesting that A posed any threat to police prior to his arrest, other than that he is said to have wagged his finger at them in an aggressive manner. Nor does there appear to be any evidence to contradict his evidence that he struggled to keep his footing when the police tried to trip him because of concern that his spectacles would break.
9. CCTV footage from the Fremantle police station reveals that B used a telephone provided by police. During the conversation, one of the officers took the telephone from her and said to the person to whom B had been speaking, 'Hello. Yeah, bring it with you mate we'll be seizing it as evidence. Thank you, bye'.
10. On 2 November 2008, the sergeant submitted a 'use of force report' in which he recorded the circumstances of the incident and the reason why he had used his taser. He wrote that B was attacking both officers before he arrived and, upon arrival, he saw the woman with her right arm around an officer's throat. The sergeant said that he used his taser on both A and B in order for the arresting officers to avoid injury. Finally, he recorded that 'empty hand control' against A and B was 'also already ineffective' (a reference presumably made to the two arresting officers, as the sergeant did not use any means other than his taser to subdue A and B).
11. The sergeant who used the taser was not interviewed by the police officer who investigated the complaint or by the CCC.
12. A senior police officer from Fremantle, who reviewed the WAP internal investigation, was present during a 'small portion' of the evidence given by the only arresting officer who was called in the WAP prosecution of A and B at Fremantle Magistrates Court on 29 April 2010. The senior officer dismissed the Magistrate's 'scathing' criticism of the arresting officer's evidence, saying that it was 'well known that [the officer] was not prepared to be confronted with aggressive defence tactics and showed that he was insufficiently prepared to think positively'. The senior officer rejected the suggestion that the arresting officer may have colluded with his colleague in preparing his evidence. He also suggested that the dismissal of the charges by the magistrate, and his criticism of the evidence adduced, did 'not negate the fact the offences did occur'.
13. The senior officer dismissed that aspect of the arresting officer's evidence which conceded that the sergeant's use of the taser against A and his partner may have been 'inappropriate' by concluding that it was only the sergeant himself who could give such evidence. As the sergeant was 'exonerated' by the previous WAP internal investigation in respect of this

aspect of A's complaint, the senior officer did not further examine this issue.

The Hon Steytler QC made three recommendations to improve the Commission's investigation of credible and serious complaints of the use of excessive force by police officers:

1. The CCC should change its procedures so as to implement the emphasis placed by the CCC Act on police misconduct by independently investigating instances at the upper end of the category of serious and credible complaints concerning the use of excessive force by police, especially complaints concerning the unnecessary discharge of a firearm or taser;
2. Having regard for the CCC's understanding of the legislative intention conveyed by the CCC Act, consideration should be given to amending the Act, perhaps by way of an amendment to s 7B (which specifies how the Act's purposes are to be achieved), so as to ensure that greater importance is accorded by the CCC Act to the need to conduct independent investigation into allegations of the kind identified in recommendation 1 above, and
3. If the resources of the CCC are inadequate to give effect to recommendation 1, consideration should be given to providing the Commission with additional resources for that purpose.³

The Joint Standing Committee endorsed Mr Steytler QC's recommendations, stating in part:

When an apparently serious and credible complaint alleging excessive use of force by police is made to the CCC, it is plainly the role of the CCC to conduct a full independent investigation. As stated by the Committee in an earlier report to Parliament, the Committee is firmly of the belief that the CCC's priority should be on improving its oversight of the WA police, as the Committee believes that the CCC's most important function is to ensure that the work and role of the WA Police is not hampered by misconduct or corruption. The Parliamentary Inspector's report on this matter has strengthened the Committee's belief that there is significantly more that the CCC should be doing in this regard.⁴

3. CUNNINGHAM –v- TRAYNOR [2016] WADC 168

In 2016 Dr Cunningham and Ms Atoms successfully sued the three police officers involved in the incident and the State in the District Court of W.A. The case was heard by Her Honour Davis DCJ on 16 – 27 November 2015 and 8 – 17 March 2016. The evidence Dr Cunningham and Ms Atoms gave in respect of the conduct by the

³ Page xiii of the Joint Standing Committee's report.

⁴ Page x of the Joint Standing Committee's report.

officers was consistent with the allegations they had made to the W.A. Police and the Commission.

On 9 December 2016 Her Honour delivered comprehensive reasons extending over 241 pages, giving judgment for the plaintiffs against all of the defendants. Dr Cunningham was awarded damages assessed in the sum of \$110,304.10, and Ms Atoms was awarded damages assessed in the sum of \$1,024,822.11.

The findings of fact and of law by Her Honour that are relevant to this Report are as follows:

1. Ms Atoms was an honest person and for the most part her evidence was generally credible and reliable;⁵
2. Dr Cunningham was an honest, careful and conscientious person who did not seek to embellish, exaggerate or reconstruct events. He was a generally credible, honest and reliable witness and his evidence was generally both truthful and reliable;⁶
3. 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;⁷
4. 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;⁸
5. 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;⁹
6. There were no reasonable grounds for the police officers to suspect that Ms Atoms committed a breach of the peace or the offence of disorderly conduct or was hindering or obstructing the officers; there were no reasonable grounds for the officers to give her a move-on notice, or for telling her that she would be getting such an order; there were no reasonable grounds for the officers to

⁵ Pages 69-70 of Her Honour's judgment.

⁶ Ibid, 74-75.

⁷ Ibid, 75-79.

⁸ Ibid, 79-88.

⁹ Ibid, 88-91.

ask her for her name and address; officer Traynor had no lawful reason to touch, grab or detain her, and his restraint and detention of her was unlawful;¹⁰

7. Police officer Clark's pushing of Ms Atoms was not justified;¹¹ there was no justification for officer Caldwell's tasering of her;¹² her arrest was not lawful;¹³ the officers' treatment of her constituted battery¹⁴ and her subsequent imprisonment by the officers was neither lawful nor justified;¹⁵
8. The three police officers acted with malice in their dealings with Ms Atom,¹⁶ and the bringing and continuation of the charges against her 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;¹⁷
9. There was no justification for the arrest of Dr Cunningham and it, and everything which followed his arrest, was unlawful;¹⁸
10. The force used to arrest Dr Cunningham and his subsequent treatment by police officers Traynor and Clark was unnecessary and excessive,¹⁹ and there was no justification for tasering him,²⁰ and
11. The police officer's use of excessive force against Dr Cunningham constituted battery and his imprisonment was neither lawful nor justified;²¹ 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.²²

Because of the malice shown by the Police officers in their treatment of Dr Cunningham and Ms Atoms, Her Honour awarded general, aggravated, exemplary and special damages to them both.

4. THE REITERATION OF THE COMPLAINT TO THE CCC

Dr Cunningham reiterated his complaint to the Commission on 31 January 2017 and requested it to reopen the matter and properly conduct an independent investigation. Commissioner McKechnie QC replied to Dr Cunningham by letter on 15 February 2017, saying:

¹⁰ Ibid, 117-118.

¹¹ Ibid, 133.

¹² Ibid, 149.

¹³ Ibid, 149.

¹⁴ Ibid, 158.

¹⁵ Ibid, 158-160.

¹⁶ Ibid, 165.

¹⁷ Ibid, 165-175.

¹⁸ Ibid, 125.

¹⁹ Ibid, 133.

²⁰ Ibid, 154.

²¹ Ibid, 158.

²² Ibid, 165-175.

As of course you know, on 26 March 2014 the Commission wrote to you advising that it is aware of your intended civil action against Western Australia Police resulting from an incident in Fremantle in November 2008. The Commission advised that it would reconsider opening its file if the District Court hearing identified new evidence.

The District court hearing took place between 16 and 27 November 2016 and judgment was delivered on 9 December 2016.

The judgment was comprehensive and carefully assessed by the Commission against the background you had previously given and other material. The Commission did not identify any new information or evidence.

The matter was considered by the Operations Committee, which makes recommendations to the Commissioner about priorities and investigations. The Commission's resources are limited and must be deployed to best advantage.

The Commissioner accepted the Operations Committee recommendation to take no further action pursuant to the *Corruption, Crime and Misconduct Act 2003* s 33(1)(d).

On 6 July 2017, at the conclusion of my correspondence with the Commission in respect of Dr Cunningham's complaint to me (both of which are described in the following chapter), Commissioner McKechnie QC wrote to Dr Cunningham and Ms Atoms for the final time in respect of their complaint to the Commission:

As you note, the judgment of Davis DCJ is meticulous and deals comprehensively with the event, the actions of all concerned and the liability of the parties. 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.

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 Commission's decision on your earlier notification was reassessed following your letter of 13 March 2017. 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 now to justify an investigation.

5. DR CUNNINGHAM'S COMPLAINT TO ME

On 13 March 2017 Dr Cunningham complained to me about Commissioner McKechnie QC's decision not to conduct an independent investigation of the conduct of the three police officers, saying that he remains 'intensely dissatisfied' with it. In one paragraph Dr Cunningham said:

The specific basis of my present dissatisfaction with the CCC's most recent response dated 15 February 2107 is that the CCC indicates "the Commission did not identify any new information or evidence" as a result of the civil trial and accompanying judgment delivered by Judge Davis in the District Court on 9 December 2016. This being the case, I must assume the CCC has had at its disposal for several years most if not all of the relevant evidence meticulously outlined in the 241 page judgment of Judge Davis. Yet despite this, I submit the CCC has not appropriately responded to allegations of "serious misconduct" as defined in section 3 of the *Corruption and Crime Commission Act 2003 (WA)* ...

On the same day, independently of his complaint to me, Dr Cunningham wrote to Commissioner McKechnie QC raising his concern with the Commissioner's point that he would not reconsider the complaint because 'the Commission did not identify any new information or evidence' in the judgment of Davis DCJ. Dr Cunningham listed 11 central issues of fact determined by Her Honour, asked the Commissioner whether the Commission was aware of them and whether its decision not to reconsider his complaint was made with that awareness.

Dr Cunningham also said to Commissioner McKechnie QC that if the Commission believed that any one of those 11 central issues of fact could not be substantiated then he would appreciate the opportunity to assist the Commission in that regard.

Dr Cunningham has said that Commissioner McKechnie QC did not reply to his letter, even though he had requested him to do so – specifically to confirm, or not, the Commission's awareness of the 11 central issues of fact at the time of making the decision not to reconsider his complaint.

I raised Dr Cunningham's complaint to me with Commissioner McKechnie QC on 30 March 2017 in a nine page letter, the most relevant observations being:

1. The facts established by Her Honour Davis DCJ in her judgment dated 9 December 2016 concerning the conduct of the police officers, and the reasons for the Fremantle Magistrate's emphatic rejection of the police officers' prosecution of Dr Cunningham and Ms Atoms on 29 April 2010, were consistent with the conduct of which Dr Cunningham and Ms Atoms complained on 12 December 2008;
2. The Hon Steytler QC was critical of the Commission's continued refusal to remove from the Police its internal investigation of Dr Cunningham's complaint, even when the investigation found – after the failed prosecution in the Fremantle Magistrates Court – that the arresting police officers had acted appropriately during the incident;

3. As the Commission had originally accepted Dr Cunningham's complaint and had referred it to the Police for internal investigation, it is clear that the Commission suspected misconduct or serious misconduct had been committed by one or all of the police officers involved, and in my view, the point at which the Commission's procedures demonstrably departed from being effective or appropriate was when it accepted the Police internal investigation's outcome, which was illogical and remains so;
4. The Commission should not have accepted the Police internal investigation's outcome because neither the Police internal investigators nor the Commission could accept the police officers' versions as truthful. As such, the only two credible sources of evidence upon which the Commission could properly assess the complaint were Dr Cunningham and Ms Atoms;
5. The issue now to be resolved is whether the Commission's decision to be content with a demonstrably flawed Police internal investigation whose conclusions of fact were formed in direct contradiction to findings of fact by the Magistrate in contested proceedings, was erroneous and has never been corrected to ensure that the conduct of the police officers was properly investigated, something the Act envisages should be done;
6. After the District Court judgment on 6 December 2016 and the history of the matter, it is difficult for me to accept the Commission's assessment that the proven facts of the incident do not now provide it with an adequate basis to itself investigate the conduct of the police officers;
7. The public interest in ensuring that the Commission is seen to fulfil its primary statutory purpose of addressing demonstrable cases of unlawful police behaviour – particularly when two judicial officers have accepted the credibility of the complainants and rejected that of the police officers – should be a significant consideration for the Commission;
8. I did not understand how the Commission's requirement for 'new information or evidence' to now investigate the matter has any valid forensic basis because the Commission does not lack the necessary evidence to investigate the suspected criminality of the police officers;
9. I did not understand the Commission's basis for thinking that there is likely to be another source of 'new information or evidence' which was not discovered and adduced in the proceedings before the District Court, and
10. For these reasons I recommended that the Commission should investigate the conduct of the police officers 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.

Commissioner McKechnie QC replied to me on 20 April 2017, saying:

1. He was not the Commissioner when the original decision by the Commission was made not to investigate Dr Cunningham's complaint, and he did not

propose to defend the original decision or concede that it was wrong; but the responsibility for the present decision to take no further action is his alone;

2. He has to determine how to use the Commission's finite resources over thousands of allegations, assigning priority to those which would appear to require active investigation in the public interest, and in doing so he is immeasurably assisted by the advice given to him by a team of experienced and qualified officers. Recommendations were made to him by the operations committee, sometimes after vigorous debate within it, as to the best way to serve the public interest;
3. Since 1 July 2016 the Commission has received or created 3605 allegations, 2037 of which related to police officers; and 1928 notifications, 836 of which were from police officers;
4. The Commission is monitoring or reviewing fewer matters since its reorganisation in 2016. There are currently 17 matters in monitor, 9 matters in review, 11 matters the subject of preliminary investigation (although some of these are suspended due to lack of resources and more urgent priorities) and 18 matters under active investigation (utilising the whole of the Commission's investigative capacity);
5. It is not the primary statutory purpose of the Commission to address demonstrated cases of police brutality, but to improve continuously the integrity of, and to reduce the incidence of misconduct in, the public sector;
6. 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 the current areas of risk to the State, and possible inappropriate use of force by police officers is obviously one such area, but there are other areas of current risk to the body politic which must be considered by him as Commissioner in allocating the Commission's resources;
7. He does not have the luxury of choosing matters of personal interest to investigate but, aided by advice, must make the best decision he can in all the circumstances as to what matters in the public interest should be pursued. Such 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 them due to its finite resources. That would be probably remain so even if the Commission's resources were magically doubled;
8. He did not intend to justify the Commission's previous decision not to investigate Dr Cunningham's complaint, though it should not be inferred that he considered it to be wrong. He approached his current decision about the matter on the factors known in 2017, the chief one of which was the District Court's binding judgment, whose findings are incontrovertible. They include findings of unlawful conduct by the three police officers;

9. In contrast to the binding findings made by the District Court about the nature of the conduct of the three police officers, the Commission has no power to make findings, but can only form non-binding opinions;
10. The Commission cannot investigate the police officers to assist in determining if there may be criminality in their conduct. Any recommendation for the criminal prosecution of a person is not a finding that the person is guilty of a criminal offence. Moreover, the Commission cannot charge any person with a criminal offence, and
11. The District Court judgment comprehensively deals with the conduct of the police officers and their liability, but having regard to the various competing priorities of the Commission, the lack of new information, the binding nature of the judgment, and the non-binding notion of any Commission report, he concluded that there was no sufficient public interest to justify the allocation of significant resources by the Commission into the complaint. He did not intend to alter his decision.

I replied to Commissioner McKechnie QC on 2 June 2017, my main points being:

1. The Commission's considerations as to why it would not reopen Dr Cunningham's complaint had, in my opinion, miscarried, and I hoped to persuade him to reverse his decision;
2. So far as police misconduct is concerned, and as s 3 of the Act makes clear, it is never categorised as minor misconduct, but is always serious misconduct, and in this case there is evidence that various criminal offences may have been committed by the three police officers arising by way of their unlawful use of excessive force against Dr Cunningham and Ms Atoms, and their unlawful detention, and that these offences would fall within the definition of serious misconduct within s 4(c) of the Act;
3. The Police internal investigation of Dr Cunningham's complaint miscarried because it failed to reach the appropriate conclusions and failed to consider whether any of the three police officers involved should be prosecuted for any, and if so which, criminal offences;
4. There is now no demonstrable need to reinvestigate the conduct of the police officers for the purpose of reaching conclusions of fact because the facts have been incontrovertibly established by Her Honour Davis DCJ. Nor is there any need for the Commission to inquire, by way of its investigation, whether there is now new information or evidence upon which its assessment should in part be based;
5. The Commission should now take Dr Cunningham's renewed complaint, review the available evidence and make its assessment as to whether it should express its opinion that police misconduct has occurred by way of the commission of one or more criminal offences, and otherwise in the way in which the complainants were dealt with in the course of their prosecution and later;

6. In light of the Commission's opinion so formed, it should give consideration to whether the appropriate course is to refer the matters to the Police as the appropriate authority to commence criminal prosecutions and ultimately take disciplinary action against those who remain police officers;
7. It is not simply a matter of adding the non-binding opinion of the Commission to the binding judgment of the District Court, but of determining whether the case demands referral to the appropriate authority for further action in the light of the facts as they are presently known, and that question may not be determined by having regard to the Commission's resources issues, and
8. In a real sense the question is whether the complaint by Dr Cunningham, if permitted to stand unaddressed, risks perpetuating the impression of injustice and the failure of the integrity framework created by the Act.

Commissioner McKechnie QC replied on 22 June 2017 confirming that he had not deviated from his position, and that he remains of the view that there are insufficient grounds to justify any further involvement by the Commission.

Finally, in response to Commissioner McKechnie QC's letter to Dr Cunningham and Ms Atoms dated 6 July 2017, and to provide a copy of my draft report to the Commissioner for any representations he may wish to make, I wrote to him on 7 August 2017, saying:

Thank you for your letter dated 22 June 2017, in which you refer to your observations in your letter of 20 April 2017. You remain of the view expressed there that there are insufficient grounds to justify any further involvement by the Commission. May I raise two propositions for your final consideration of the matter?

Firstly, a Commission report with the appropriate opinions and recommendations (including, if you thought fit, for criminal prosecutions) in respect of the conduct of the police officers would require the Police to respond to your recommendations, and to be accountable for that response.

The Commission would then have done what it could in this matter to advance the purpose of the Act, expressed in s 7A(b), 'to improve continuously the integrity of, and to reduce the incidence of misconduct in, the public sector'.

It would stand in stark contrast to the current situation where the conduct of the police officers is allowed to go unpunished. This is the obvious distinction between the separate purposes served by a judicial decision and the Act. In this sense a report by the Commission would not, in my view, be superfluous.

My 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.

6. MY ASSESSMENT

Dr Cunningham and Ms Atoms' complaint to the Commission about the conduct of the three police officers which, it must be remembered, was commenced on 12 December 2008, must be dealt with under the Act as it was prior to the *Corruption and Crime Commission Amendment (Misconduct) Act 2014*.²³ However, the Commission's powers in the exercise of its misconduct function are not now materially different from their original formulation and so it will be convenient and ultimately more useful to consider this matter in the context of the Act as it is currently framed.

The Act has, as one of its two purposes, under s 7A(b), 'to improve continuously the integrity of, and to reduce the incidence of misconduct in, the public sector.' The Commission's serious misconduct function is more fully described in s 18. By s 18(1) its function is 'to ensure that an allegation about, or information or matter involving, serious misconduct is dealt with in an appropriate way'.

I need not refer to the provisions of Division 4 of Part 3 of the Act, which deal with the process of investigation, and the formation of the Commission's opinion following its assessment of a matter. Ultimately, where the view is that prosecution or disciplinary action, or both, should be taken by another agency, the Commission makes its recommendation under s 43.

Parliament expressed its elevated concern about police conduct by stating in s 21A of the Act that the Commissioner of Police must notify the Commission of each instance of 'reviewable police action' as defined in s 3(1).²⁴ The Commission may then deal with the notification as a matter of suspected misconduct. Parliament's intention to heighten the importance and treatment of police misconduct in the Act is unquestionable and unquestioned.

It is noteworthy that, although the attention of the Commission is now focussed on 'serious misconduct' as defined in s 3(1) of the Act, leaving 'minor misconduct', as defined, to be dealt with by the Public Sector Commissioner, 'police misconduct', including reviewable police action, whether serious or minor, is included in the concept of serious misconduct as defined.

It is also important to bear in mind that when, as in this case, the Commission is considering whether further action in relation to an allegation is warranted s 18(3) of the Act requires it to consider:

- (a) the seriousness of the conduct...to which the allegation relates;

²³ See s 228 of the Act.

²⁴ Reviewable police action includes conduct by a police officer that is contrary to law; is unreasonable, unjust, oppressive or is improperly discriminatory; is in accordance with a rule of law, or a provision of an enactment or practice, that is or may be unreasonable, unjust, oppressive or improperly discriminatory; is taken in the exercise of a power or a discretion, and is so taken for an improper purpose or on irrelevant grounds, or on the taking into account of irrelevant considerations; or is a decision that is made in the exercise of a power or a discretion and the reasons for the decision are not, but should be, given.

(b) whether or not the allegation is frivolous or vexatious or is made in good faith;

(c) whether or not the conduct...to which the allegation relates is or has been the subject of appropriate investigatory or other action otherwise than for the purposes of this Act;

(d) whether or not, in all the circumstances, the carrying out of further action for the purposes of this Act is justified or is in the public interest.

I have no doubt that, in considering the factor referred to in s 18(3)(d) of the Act, it is open to the Commission to consider, as it evidently did in this case, the current matters before it demanding its attention and the impact of further action in this matter upon its capacity to deal appropriately with the other matters before it.

Having regard to those matters causes me to conclude that in this case the Commission has failed without justification to adopt appropriate and effective procedures to properly perform its central misconduct function.

In this regard I endorse the assessment of the Hon Steytler QC, endorsed by the Joint Standing Committee, that the Commission so failed when it accepted the demonstrably flawed police internal investigation of Dr Cunningham and Ms Atoms' complaint. Since then the Commission has compounded its failure by refusing to recognise, acknowledge or correct the errors it made by accepting that investigation.

This brings me to the most recent refusal by the Commission to reconsider Dr Cunningham's repeated complaint, the validity of which falls to be considered in the light of the findings of fact made by the District Court as to how the police conducted themselves on the night of 2 November 2008 and subsequently in the detention and handling of Dr Cunningham and Ms Atoms, findings described, with respect rightly, by the Commissioner as 'incontrovertible'.

The Commissioner has written to the complainants in similar terms on 15 February 2017 and 6 July 2017, referring to the conclusion of the Commission's investigation being in terms of 'non-binding opinion' as to the police officers' misconduct and potentially criminal conduct. That is contrasted to the judgment of the District Court, but, of course, Davis DCJ could not make the recommendations open to the Commission, that the Police should reopen their investigation and give consideration to the prosecution of the police officers concerned in the matter and the taking of disciplinary action against the men who remained in the Police force: s 43 of the Act.

The Commissioner refers to 'the lack of new evidence'. There seems to me to have been a sufficient investigation in one form or another to establish the facts of the matter. The question for the Commission would appear to be whether there is evidence to warrant the recommendation referred to above. In my opinion that describes the nature of the investigation which should now be undertaken by the Commission.

The Commissioner observed that the 'Commission's resources are limited and must be deployed to best advantage.' He has properly expanded upon that observation in

his letter to me dated 20 April 2017, in which he presented the arguments to which I have referred and which I have endeavoured to refute in my letters by way of reply. I note that it is not said that there is any resources consideration in terms that to re-enter upon this matter would materially affect the Commission's capacity to deal properly with other matters which require its attention.

I have noted that it is beyond my power to remedy the situation presented upon the complaint made to me other than by reporting the matter to the Joint Standing Committee and the Parliament and by making recommendations to the Commission as to how, in my view, it should proceed: s 195(1)(c), (d) and (e) of the Act. The exercise of my powers to refer and make recommendations to agencies other than the Commission under s 196(3)(f) and (g) is limited to the performance of my functions: s196(2). I make no recommendation that that should be changed by amendment of the Act.

In essence the issue remains whether the Commission should now reinvestigate and reassess the matter so that it may refer it to the Police to do likewise and consider whether there is now a need to prosecute and/or take disciplinary action. That would, in my view, be a just outcome in respect of apparently serious misconduct which remains un-remedied, whatever be the decision ultimately made as to the public interest in further action.

7. REPRESENTATIONS

The Commission, the W.A. Police and the three police officers involved in this matter were given the opportunity to make representations to me under s 200 of the Act in respect of matters adverse to them in my report.

Commissioner McKechnie QC said that after careful consideration of my two recommendations his views of the matter remain unchanged, and he made no further representation.

The three police officers did not make representations to me.

Acting Commissioner of Police Dreiberger APM said that my report appears to him to be primarily addressed to the Commission, and that therefore the W.A. Police does not have any representations to make. However, he added:

We would, however, observe that the recommendations you foreshadow, it adopted by the CCC, would have the WA Police Force reinvestigate the conduct of the three police officers in light of "the *findings* made by Judge Davis in *Cunningham v Traynor* [2016] WADC 168" [emphasis added]. It would create significant legal difficulties for WA Police Force to reinvestigate the matter on the basis of the *findings* made rather than the evidence led in that matter.

It appeared to me that Mr Dreiberger may have misinterpreted the purpose of my second recommendation made below. I replied to him as follows:

Thank you for your letter of today's date. I note that the W A Police do not wish to make any representations in respect of the draft report which I have prepared and circulated preparatory to its tabling. But in view of your observations about the recommendations I propose to make, directed, as you rightly observe, to the Commission, I thought I should add some explanatory remarks which the Police may find helpful.

You are right to say that the recommendations are directed to the Commission. My function, in a case such as this, is limited to assessing the 'effectiveness and appropriateness of the Commission's procedures': *Corruption, Crime and Misconduct Act 2003 (WA) s 195(1)(c)*, and I may make recommendations as to those matters to the Commission.

I may also refer matters for consideration by, and make recommendations to consider criminal prosecution, to other appropriate authorities, such as the Police, but only in respect of Commission officers: s 196(3)(f) and (g).

It is the Commission which has the power, under s 43 of the Act, to refer matters to, and recommend consideration of criminal prosecution of, other public officers, such as police officers, and those who were at relevant times, officers of that kind.

It is for that reason that my recommendations are directed to the Commission, and I refer briefly to these matters in the draft report at Pp 1 and 21. The second recommendation is directed to persuade the Commission that it should act in that way having regard to the history and the facts as it might find them to be having regard to the findings made by the District Court.

Of course it remains open to the Police, acting without any recommendation by the Commission, to investigate the matter afresh and to give consideration in the ordinary way to disciplinary action or the prosecution of those who were at the relevant time police officers.

In that investigation the Police would be at large, but investigators would no doubt pay attention to the evidence led in the District Court, as well as before the Magistrate, in gathering evidence which might be presently available, bearing upon the matters in issue. As to that exercise, of course, I make no comment.

8. MY RECOMMENDATIONS

My two recommendations to the Commission are:

1. The Commission recommends to the Commissioner of Police that the conduct of the three police officers is reinvestigated by experienced investigators unconnected to the original internal investigation for the purpose of identifying criminal conduct on the part of the three officers, and prosecuting the officers for those offences, and that those police officers who are amenable be subjected to appropriate disciplinary processes.

2. The Commission, at the appropriate time, should reassess and report on the conduct of the three police officers involved in the complaint made by Dr Cunningham and Ms Atoms, in the light of the known facts as established upon investigation and having regard to the findings made by Her Honour Judge Davis in CUNNINGHAM – v – TRAYNOR [2016] WADC 168.



HON MICHAEL MURRAY AM QC
PARLIAMENTARY INSPECTOR

Appendix Two

Committee's functions and powers

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.