

*Joint Standing Committee on the Corruption and Crime Commission — Ninth Report —
A need for clarity — Parliamentary Inspector's report: Can the Corruption and Crime Commission
decline to form an opinion that serious misconduct has occurred despite the definition being met?*

Resumed from 30 March.

Motion

Hon Dr STEVE THOMAS: I move —

That the report be noted.

This is a very interesting read for those who have a bent towards legality. The very hardworking Joint Standing Committee on the Corruption and Crime Commission has again relied on the work of Matthew Zilko, SC, the Parliamentary Inspector of the Corruption and Crime Commission. Matthew Zilko is a highly intelligent and diligent officer of this Parliament, and this is an excellent report. I say at the outset that I agree with the findings of this report absolutely, but I suspect that Matthew Zilko and I might slightly disagree on what I think is the probable solution.

The Corruption, Crime and Misconduct Act defines corruption in the public service. In the wider public service, it defines a couple of different levels of corruption. It has minor misconduct and serious misconduct, but members will probably be aware that one of the major foci of the Corruption and Crime Commission is police, and all police misconduct is considered serious misconduct. An incident occurred back in 2020 and the report is in this report. On 5 March 2020, a police officer noticed that a person was cycling without a helmet, which is, interestingly enough, an offence. The police officer asked this person whether they had any identification on them. This person said no and attempted to leave and leave the police officer there. The police officer then escalated it to the point of restraining the person, which ultimately involved a police dog. This person resisted that restraint and continued to try to move off. This escalated pretty severely and they were bitten as part of the process. At the bottom of page 7 of the committee report, Matthew Zilko, SC, points out in his report —

Section 16(4C) of the CIIP Act —

That is the Criminal Investigation (Identifying People) Act 2002 —

provides that if an officer makes a request to a person under this section, the officer may detain the person for a reasonable period for the purpose of the person's compliance. Section 16(6) provides that failure to comply with such a request without a reasonable excuse is an offence punishable by twelve months' imprisonment.

It is not an insignificant offence. Under the act, an officer may request the person's personal details, which include their full name, date of birth, usual address and current address. The problem in this case is that the police officer did not ask for their identification; the police officer asked whether they had any identification on them. The person said no and tried to leave without answering the police officer's questions. The police officer escalated the situation to restraint. If the police officer had asked for their personal details instead of asking whether they had any identification on them, this would not have proceeded to serious misconduct. What did the police officer get wrong? The police officer asked the wrong question. They were not necessarily wrong in principle, but they were wrong on the technicalities of the law. The lady was arrested. It went to trial and the charges were thrown out on the basis that the police officer asked whether the person had identification on them, rather than asking for their identification. Most people would have assumed that that was part of the process, but this person obviously did not want to be identified. I do not think there is any argument about whether they were wearing a helmet. I do not think that was ever contested. It is simply around that particular test.

The definition of misconduct by police in particular is in the Corruption, Crime and Misconduct Act. Section 3 provides for police misconduct. It defines it as including —

... any action taken by a member of the Police Force, an employee of the Police Department or a person seconded to perform functions and services for, or duties in the service of, the Police Department that —

(a) is contrary to law; or

It then refers to paragraphs (b), (c) and (d), but paragraph (a) provides that it is contrary to law. The simple truth is that the police officer's actions were contrary to law because the police officer involved should have asked for identification instead of asking whether the person had identification on them, and for that reason, the case was thrown out.

The person involved put in a complaint to the CCC and they got an answer back that said that the CCC was not going to investigate. They took it to the parliamentary inspector. The parliamentary inspector took it back to the CCC. The CCC decided that although there was a case of acting illegally, it was not, in its view, an issue that should be dealt with by the commission. Page 8 of the committee report states —

The Commission advised ... that on the basis of all the evidence it had gathered and scrutinised, it had concluded that the officer had not engaged in any act that constituted serious misconduct under the CCM Act. That is, despite the Commission acknowledging that the officer had acted unlawfully, it found that his actions did not amount to serious misconduct as prescribed in ... the definition of ‘reviewable police action’ ...

It appears obvious under the current definition in the act that any police action that is unlawful is serious misconduct. The CCC decided that this was not the purposes of the CCC. If a police officer made a simple mistake in the question that they asked, it was hardly serious misconduct. The parliamentary inspector takes the position that it is not open to the CCC to decide what is and is not serious misconduct and that the legislation is quite plain: if a police officer engages in an act that is unlawful, despite all the best efforts and intent—I do not think anybody, even the parliamentary inspector, questions the intent—that constitutes serious misconduct. The parliamentary inspector takes the position that therefore a finding of serious misconduct should have been made. Under the current legislation, that is a reasonable argument. The outcome, however, of a serious misconduct finding against a police officer who asked the wrong question—who asked “Do you have any identification?” instead of “Can I have your identification?”—of labelling that officer as someone who engaged in serious misconduct is, in my view, a travesty that would have impacted on their future career. Although the parliamentary inspector is completely correct in his assessment of this, in my view, the issue lies with the Corruption, Crime and Misconduct Act in allowing no leeway for the Corruption and Crime Commission to allow for an innocent mistake in an otherwise properly instigated event.

The parliamentary inspector suggests in his report that all police misconduct is serious misconduct, that the Corruption and Crime Commission has no opportunity to vary that and that this officer should have been found to have engaged in serious misconduct. The Corruption and Crime Commission decided that that was an unfair outcome. I think the parliamentary inspector is correct. I suspect that the Corruption and Crime Commission has no legal authority to apply natural justice and I suspect that if we got into a debate about natural justice on this, it would look very different. The government has suggested in its response to the committee’s report that it will look at the single recommendation, which is that the government look at the report and make a determination on whether changes need to be made to the Corruption, Crime and Misconduct Act because the law basically hamstrings this act of natural justice.

I think this is really important. The government needs to look at this and correct it. I believe that the Corruption and Crime Commission needs the power to not engage in retributive or frivolous findings against police officers who are trying to do their job. That is the risk here—that it will make it worse. I hope the government comes back with a change to the law that will allow some flexibility.

Hon KLARA ANDRIC: I rise today to make a contribution to the consideration of the ninth report of the Joint Standing Committee on the Corruption and Crime Commission, *A need for clarity: Parliamentary inspector’s report: Can the Corruption and Crime Commission decline to form an opinion that serious misconduct has occurred despite the definition being met?* As Hon Dr Steve Thomas has outlined, it is a very fitting title considering that I, too, was pondering both the interpretations by the parliamentary inspector and the position of allowing for a bit of understanding of the police’s role and intent within the jurisdiction of serious misconduct. I, too, have been thinking about this, and I believe this report really outlines the difference of opinions between the parliamentary inspector and the commission, and does so in a way that is understandable about why both have reached those opinions or conclusions.

As mentioned earlier, the title of the report is *A need for clarity: Parliamentary inspector’s report: Can the Corruption and Crime Commission decline to form an opinion that serious misconduct has occurred despite the definition being met?* The report was tabled on 30 March this year by Matthew Zilko, SC, Parliamentary Inspector of the Corruption and Crime Commission. The committee met with the parliamentary inspector a few times and only recently the committee had a hearing with both Matthew Zilko and his legal assistant Sarah Burnside. I also agree that it is very pleasant to work with the parliamentary inspector. Hon Dr Steve Thomas gave an outline of the legalities of everything. Although I must say, with no disrespect, honourable member, he is probably not as refined as the parliamentary inspector. That is understandable, given his legal background, which I do not believe is any.

Hon Dr Steve Thomas: Only as the defendant!

Hon KLARA ANDRIC: The member still does an incredible job on the committee, but he is certainly not as refined as the parliamentary inspector. I do concur with the honourable member that he does a fantastic job in outlining those issues and why he believes the legalities of one thing or another is as is.

In the ninth report, the parliamentary inspector informs Parliament of the legal disagreement between his office and the CCC. The disagreement in question serves as the above mentioned title in this report whether the CCC has the discretion to form an opinion of serious misconduct when the police officer’s discretions are contrary to the law.

I would like to use my time today to break down the incident in question that initiated this disagreement, but before I do that, I will read out from page 5 of the report, which outlines the differences of opinions as stated by the parliamentary inspector. He states —

When this matter came before the Commission, it concluded that although the police officer's actions had been unlawful, there had been no serious misconduct on his part. In my view —

The parliamentary inspector's view —

that conclusion was not open to the Commission to make given the CCM Act's definitions of 'reviewable police action', 'police misconduct' and 'serious misconduct'. These definitions interact with each other to produce the clear result that any action taken by a police officer that is contrary to law will constitute serious misconduct.

In circumstances where a police officer is found to have acted contrary to law, therefore, it seems to me evident that the intent of the CCM Act is that an opinion of serious misconduct must follow. The Commission takes a different view, namely, that it is not bound to form an opinion of serious misconduct despite a public officer's actions meeting the relevant definition.

Following that, I want to note that on page 13, although the difference of opinions between the parliamentary inspector and commission is evident, Matthew Zilko, the parliamentary inspector states —

It is in the nature of lawyers to disagree with each other on legal questions, including matters of statutory interpretation. In view of this, the occasional difference of opinion between the Commission and my office is to be expected and is not cause for concern.

I was very pleased to see that, and I know that the parliamentary inspector has a very good relationship with the commission, but of course there are times when we come across matters such as this when one must question. That is precisely the role of the parliamentary inspector to do.

However, going back to the incident that resulted in this report and subsequent recommendations to the government, it is quite detailed. Hon Dr Steve Thomas talked about the incident that occurred in March 2020, I believe. The complaint was filed in August 2022. The incident involved a male police officer and a woman, the complainant, and the officer was on duty and observed the complainant cycling without a helmet. This then resulted in the officer at the time asking for identification of the person in question. When he asked the complainant for identification, it is understood that she did not have any at the time. When she then proceeded to leave, the officer attempted to detain her, which led to a physical struggle. The situation escalated quite severely when the officer's dog was involved. If members read through the report they will see noted that it was understood that the activation of the release of the dog from the van was as a result of the confrontation between the police officer and the woman in question who accidentally, they believe, set off the alarm for the system that opened the gate for dogs. Once it is opened, they are trained to then engage. I understand from reading the report that the police officer did not immediately allow for the dog to be released on the person who he was trying to restrain; however, as stated, after he made a few warnings he released the dog, which resulted in quite severe dog bite injuries to the woman's arm. I have read in the report, though I do not know exactly where it is, and am pleased to see that there have been considerations to changes for police officers who work with dogs when they are out in the community working, and whether they are alone as a form of protection. There have been considerations about ensuring that police who work with dogs always attend these incidents with other members of the police force.

During the subsequent trial, the officer claimed that he did not intentionally release the dog and suggested that the complainant accidentally activated the button on his vest, which caused the dog to engage. The officer initially restrained the dog but he made a decision to let it go when the person did not fall into line.

The DEPUTY CHAIR (Hon Dr Brian Walker): Hon Klara Andric.

Hon KLARA ANDRIC: I will continue with my remarks, because I forgot to look at the clock to see how fast 10 minutes runs out! As I was saying, the complainant was charged with assaulting and obstructing the officer. Her legal representatives argue that the officer failed to correctly request her details as required by the law. Under section 16(2) of the relevant law, it allows officers to request personal details if they reasonably suspect a person is committing an offence. From what we can understand at the time, that police officer believed the woman in question was committing the offence of not wearing the safety helmet when she was on her bike.

By law, police are required to ask for personal details, including full name, date of birth, their usual address and current address. Section 16(4)(c) allows officers to detain individuals for not complying with the request without reasonable excuse. I believe the Hon Dr Steve Thomas said that the offence is punishable by 12 months' imprisonment—I am pretty sure that is also what I read—which is not that insignificant, so it is worth noting. I did not realise that refusing to give a police officer one's details when asked correctly could result in 12 months in prison. Yes, 12 years would be a lot. I was trying to say something! That would be quite extreme.

Hon Darren West: Tough on crime.

Hon KLARA ANDRIC: Tough on crime on steroids, I would say.

The term of imprisonment is quite severe and obviously the police officers are obliged to ask the appropriate question, as they are meant to. In this case, as discussed, the officer did not formally request the complainant's personal details, and as a result her failure to provide her personal details was not deemed to be an offence. If the police officer had asked the question correctly, this would not have occurred. Unfortunately, because she was not asked, it is legally deemed that she did not commit an offence, and the officer had no legal authority to detain her, let alone the events that occurred following the struggle between them both. Therefore, the magistrate determined that the complainant had the right to resist the officer's actions, which were not considered excessive or unreasonable under the circumstances. To repeat that, her response to being detained was not deemed by the magistrate to be excessive or unreasonable.

I want to touch on the disagreement I have outlined in the report between the parliamentary inspector and the commission. The commission clearly states there is no cause for concern on where they stand on this matter. In light of the incident, the parliamentary inspector believes that when public officers engage in serious misconduct, the Corruption and Crime Commission should not have the discretion to avoid forming an opinion on the matter. However, as I have stated previously, the CCC argues that it has the discretion to choose whether to form an opinion on such cases. I refer to the parliamentary inspector's views in report 9 on page 5. These are the words of the parliamentary inspector —

When this matter came before the Commission, it concluded that although the police officer's actions had been unlawful, there had been no serious misconduct on his part. In my view, that conclusion was not open to the commission to make given the CCM Act's definitions of 'reviewable police action', 'police misconduct' ...

I agree with the parliamentary inspector. However, I understand the position of the Corruption and Crime Commission, and as outlined by Hon Dr Steve Thomas, the importance of having that little bit of balance on how direct we are with serious police misconduct.

Although these disagreements are undesirable, the parliamentary inspector respectfully recommends that the Department of Justice consider this report during the amendment of the Corruption and Crime Commission Act 2003. I take the opportunity to read out this recommendation, because I do not believe anyone who has spoken on it has done so. The recommendation from the report states —

That the Attorney General direct the Department of Justice to examine matters raised in the attached report by the Parliamentary Inspector as part of its project to modernise the *Corruption, Crime and Misconduct Act 2003*, and report to Parliament as to the action, if any, proposed to be taken by the government with respect to these matters.

The government's response to the ninth report is set out in attachment A. It states —

The Government accepts the recommendation set out Report 9.

As you are aware, I previously directed the Department of Justice to develop proposals for the modernisation of the *Corruption, Crime and Misconduct Act 2003* In accordance with the recommendation, I have instructed the Department to consider Report 9 and provide advice on changes that may be required to resolve any ambiguity about the ability of the Corruption and Crime Commission to form an opinion of serious misconduct. Following my review of the advice, I will submit any proposed changes to the Act for consideration by Parliament

We all look forward to seeing that. The original recommendation in the ninth report was forwarded to the Attorney General's office, and that is the government's response to the recommendations made in the ninth report. It is also worth noting that the committee agrees with the parliamentary inspector's suggestions, as the law is a cornerstone of a functioning society.

The chair's foreword states —

The committee agrees with the Parliamentary Inspector's suggestion that consideration be given to amending the CCM Act to clarify its intent in respect of matters raised in his report. There is an opportunity to do this as part of the Department of Justice's reform of the CCM Act.

We look forward to an update on this, particularly on the report and concerns made by the parliamentary inspector. It should be as clear as possible to mitigate any incidents due to vagueness, because serious misconduct is very important. I want to thank the parliamentary inspector for raising the matter.

Consideration of report postponed, pursuant to standing orders.

Progress reported and leave granted to sit again, pursuant to standing orders.