

JOINT STANDING COMMITTEE ON THE CORRUPTION AND CRIME COMMISSION

**OFFICE OF THE PARLIAMENTARY INSPECTOR OF
THE CORRUPTION AND CRIME COMMISSION**



**TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
WEDNESDAY, 23 NOVEMBER 2022**

SESSION ONE

Members

**Mr M. Hughes, MLA (Chair)
Hon Dr Steve Thomas, MLC (Deputy Chair)
Mr S. Love, MLA
Hon Klara Andric, MLC**

Hearing commenced at 10.28 am**Mr MATTHEW HOWARD ZILKO, SC****Parliamentary Inspector of the Corruption and Crime Commission, examined:****Ms SARAH BURNSIDE****Adviser, Office of the Parliamentary Inspector of the Corruption and Crime Commission, examined:**

The CHAIR: Sorry to keep you waiting, parliamentary inspector. Good morning. I would like to begin by acknowledging the Whadjuk Noongar people, the traditional owners of the land on which we meet today, and pay our respects to their elders both past and present. On behalf of the committee, I would like to thank you for agreeing to appear today. My name is Matthew Hughes and I am the Chair of the Joint Standing Committee on the Corruption and Crime Commission. I would also like to introduce the other members of the committee who are present today: Hon Dr Steve Thomas, MLC, my deputy chair; and Mr Shane Love, MLA. There are apologies from Hon Klara Andric, MLC, who cannot be with us today. It is important that you understand that any deliberate misleading of this committee may be regarded as a contempt of Parliament. Your evidence is protected by parliamentary privilege; however, this privilege does not apply to anything that you might say outside of today's proceedings.

Before we begin with our questions, do you have any questions about your attendance here today?

Mr ZILKO: No.

The CHAIR: Would you like to make an opening statement?

Mr ZILKO: I thought, perhaps as an opening statement, I would just give you an overview of what has been happening because there are a couple of matters that I wanted to raise with you, but in closed session, if you are happy to do that. Certainly, the opening comments can be in open session.

The CHAIR: What we will do is take the comments that you want to make in closed session later.

Mr ZILKO: Yes. In terms of the year, up until 30 June this year, we have had a busy and productive year. You will know from my appearance before you last year that I asked the Commissioner of the Corruption and Crime Commission if he would be prepared to let people know, in any closure letter that he sent to them where he had not agreed that there was serious misconduct or corruption, of the existence of my office so that they could come to me if they felt that the commission had not dealt with their matter properly. That was agreed to, and from 1 January last year, 2021, that was implemented, and that immediately caused a spike in complaints. I think, Dr Thomas, you said, "You'll regret that." We have not regretted it.

Hon Dr STEVE THOMAS: I think I said you might regret it, but we will see how we go!

Mr ZILKO: We have not regretted it. We have been busy and we are kept busy, pretty well every day in the days that we work, but I suspect that a lot of those people may not have actually come to us without the extra paragraph in the Commission's letters. It gets back to a matter that I have raised with this committee before, and I will raise it again; that is, sometimes people just need to have the issues explained to them in a fairly transparent way so that they can see what has happened and why it has happened.

The commission and I have a difference of opinion about what the oath of confidentiality encompasses. The commission takes the view, or at least appears to take the view, that nothing can be conveyed to a complainant, and, in addition to that, I think they are very busy. From speaking to Mr McKechnie and speaking to other senior people in the commission, I get the impression that they are run off their feet, largely, and, therefore, they do not have time—and, of course, they are not lawyers—to compose letters which are clear and articulate the legal issues that are involved in the complaint and what has happened.

I have taken a slightly different view. I do not divulge the names of anybody who is a witness. For example, if it is a complaint about the police, I do not divulge the names of police officers who may have been interviewed or whatever; or if it is a complaint about local government, I do not divulge the names of any councillors who were approached and had witness statements taken from them by the commission. What I do is I try to explain and assure people, if I agree with the commission that there is not any evidence of serious misconduct that the commission has looked at their file fully, because I accept that the commission has. On a few occasions we have been concerned that they have not looked at it fully, but they are in the minority. By and large, they do appear to look at them properly. They might come to the wrong conclusion occasionally, in my view, but they have looked at the stuff put to them by the complainant.

So, I try to explain to the complainant what the law is, what requirements are needed to satisfy the definition of “serious misconduct”, and I point out that it is quite a high bar. For example, it is a deliberate intent to act corruptly or to perform some criminal act which attracts a prison sentence of not less than two years. Now, once I explain that to people, I say, “Your complaint doesn’t meet those criteria because there was no evidence of a corrupt intent and there was no evidence of a crime. What you have complained about is something that you infer from their conduct or you believe is the only reasonable conclusion that one can draw, but, in fact, there are other conclusions.” I also point out that serious misconduct is not to be confused with laziness or rigidity of thinking or carelessness; it has got to be something more than that.

I have found that when I write a letter like this, and I set it out in two or three pages, the feedback is good. Often it is something like, “Thank you very much for explaining it to me. If that had been explained to me back at the commission, I would not have wasted your time, but I now fully understand the position.” Other people still argue. I have had the usual—not the usual, but I have had, not infrequently, people write back and say, “You’re just as corrupt as the commission; that’s obvious from your letter.” The usual sort of slanging match then gets going—well, not from my point of view; I quietly explain again that I am not corrupt and that I am trying to explain to them what has happened. Some people, unless you tell them what they want to hear, as you all know, do not want to hear from you at all. We have kept that up and we have written quite detailed letters where we can, and that has been useful.

So, we are busy, but we are not in the position where we have to say, “Can we increase the number of days or hours that we are working?” Up to 30 June, as you will have seen from my report, our numbers are pretty well double what they were before I started. They are up close to around 120, and I think the last year before I started, they were 57—is that right?

Ms BURNSIDE: I think so, yes.

Mr ZILKO: But we are dealing with it.

I wanted to update you on the audit function. The arrangement I have with the commission is that every quarter they bring down any applications made to the Supreme Court for the use of surveillance devices. They do not need Supreme Court leave for assumed identities?

Ms BURNSIDE: No; that is an internal process.

Mr ZILKO: So, that is for surveillance devices?

Ms BURNSIDE: Yes, and their own applications for assumed identities and integrity testing for controlled operations.

Mr ZILKO: So, anything which falls within their broad powers—for example, taking on an assumed identity, to integrity test someone by laying a trap in a department, and surveillance work by telephone or by concealed cameras—they show me what they have got. There is an issue in relation to phone tapping, because it is a commonwealth law; and, if they provide it to me, they would have to redact parts of it. We are hoping that the commonwealth law is changed in that regard, but at the moment it has not been. Hopefully, with the creation of the national integrity commission, they will start to alter those things as well that are a problem. That aside, that was the only specific audit that I did. That was once every quarter.

Bear in mind, of course, every time somebody complains to me, I am effectively auditing the commission. If I get 120 complaints a year, I immediately call for the file in each case. When I read the file, I am effectively auditing the commission. So, the auditing is extensive in that regard, but in terms of the formal audit process, it is once a quarter.

I had a meeting with John McKechnie—he is on leave at the moment, but I had a meeting with him a few weeks ago—and said that I wanted to see more in terms of the audit function. He looked like he was a bit worried, not because I think he is trying to hide anything, but because I think they are busy. But I said, “Look, all I think you should do is to let me know what happens at the end. You let me know what happens at the start by showing me your applications to the court for this or that, but you don’t let me know how that’s ended, and I don’t know what’s happened in between the start and the end.” I said, “If you gave me your closure reports”, because they have to prepare a closure report when they finish an assumed identify situation or surveillance or whatever, “then we would see precisely what has happened from the moment you went to court to get orders that you needed right through to what happened at the end and the conclusion of it.” He immediately cheered up because it did not mean any more work for any officer of the commission; he can just provide me with a copy, and he has now agreed to do that, so we are good in that regard.

Now, as certainly you know, chair—I do not know whether Mr Love and Dr Thomas know—but I attended the annual conference of the parliamentary inspectors and reviewers last Tuesday in Sydney. We have a conference once a year for one day to discuss what we are all doing and see where we can improve things. I became aware at that conference—even though matters discussed at the conference, by and large, are confidential, they were quite happy for me to convey this to you—that the parliamentary inspector in Victoria of IBAC, which is the equivalent of our Corruption and Crime Commission, is required to be given by law advance notice of any public hearing or any proposed covert activity by IBAC.

In fact, he gets up to 700 notices a year. Clearly, that is significant. He has a lot of hats he wears and he has a staff of 28 or 29, so his is a much bigger organisation than we are here in Western Australia, but he gets advice so that he can express concern, for example, if there was going to be a public hearing, about the possibility of reputational harm to a witness, and gets an assurance from IBAC’s commissioner that it was necessary to have a public hearing rather than a private hearing.

The parliamentary inspector of ICAC in New South Wales—she has only just started in her job, Gail Furness, SC—she also indicated that she gets it, not because it is by law required, but because she has asked the commissioner of ICAC to give her this advance notice, and he has agreed to do so. Is it a he or a she? I cannot remember who the commissioner is! I think it might be a she, but, anyhow.

I cannot remember whether it is a man or a woman, but whoever the commissioner is, they have agreed to give Ms Furness advance notice and, also, Mr McClintock, SC, who was the parliamentary inspector and has moved over to be the inspector dealing with police, because they divide theirs between police and non-police in New South Wales and they have two different groups. He also gets advance notice by agreement.

So, when Mr McKechnie comes back from his leave, I intend to ask him if we can also get advance notice, I think specifically, of public hearings. In New South Wales, of course, there has been a lot of bad press about people being exposed in a way which is what we might call colloquially a gotcha moment, like Gladys Berejiklian who had the situation where she was brought into the hearing. We all saw it on television, in the news. She came into the hearing. The counsel assisting asked her if she had discussed with her then boyfriend—his name was Daryl Maguire, was it —

Ms BURNSIDE: I think so.

Mr ZILKO: — whether they discussed property development in his electorate, and she said no. Then counsel assisting said, “Let me play you this”, and they had tapped her phone and they listened to her. They had been tapping her phone for days and weeks, and then they had her talking about it. You have to feel sorry for her—or at least I believe so—because she said something like, “I don’t want to go on talking about this, Daryl.” This is in the phone tap, if you remember seeing it on the news. But he persisted and kept talking, and she did not shut him down or terminate the call. She then resigned immediately afterwards as the Premier of New South Wales, and when asked why she resigned before there was any finding, she said, “Because I know how it works and ICAC will take 12 to 18 months to hand down whatever findings they make and I will be under suspicion the whole time. I don’t believe I’ve done anything wrong, but I’m resigning”, which, in a way, is a tragedy. I have no political view on this; I am talking about it on a human spectrum. I understand that ICAC is very slow in delivering its reports. I mean, if you are going to have a public hearing and you are going to name and shame, then you need to get your report out pretty quickly so that people’s reputations are not damaged unnecessarily. For all we know, she might be exonerated, but she has gone.

Hon Dr STEVE THOMAS: If you could take a comment, I will jump in with a comment.

Mr ZILKO: Certainly—anyone.

Hon Dr STEVE THOMAS: That was a trend that we used to see in the CCC in Western Australia. I think we have discussed before that there is a shift away from that currently, which I think is probably a good thing. Certainly, there were plenty of gotcha moments in the 2000s in the CCC in this state, but I think we have tended to move away from that at the moment.

Mr ZILKO: We have, and John McKechnie’s position is that the default position will always be a private hearing, and that is a good thing. The delay, too, in preparing reports is most unfortunate. If you are going to have a public hearing, you need to get the report out pretty smartly. If you have a private hearing, it takes pressure off people, so what they are doing in Western Australia is the better course. Victoria has the same position. Their default position is a private hearing, as is Queensland’s and South Australia’s. So, really, New South Wales is a bit out on a limb on this one; they are a bit unusual.

The CHAIR: Could I just ask: by giving advance notice of a public hearing or a covert operation, just explain how that assists the PICCC in the work that you do.

Mr ZILKO: If the parliamentary inspector in Victoria is given advance notice of a particular activity that is about to be undertaken in a public way and is concerned about it for one reason or another, he cannot stop it. He does not have the power to stop it, but he has the power to go to the

commissioner of IBAC and say, “Why are you doing this? What’s the reasoning?” Or, if it is a public hearing, “Why are you having a public hearing? Why don’t you have a private hearing?” If the commissioner could not give a valid and sensible reason for having a public hearing, then the parliamentary inspector could take the matter up with the joint standing committee; in fact, he would I imagine. He said, “If I felt most uneasy about it and felt there was no rational reason for it, I would immediately seek to engage with my joint standing committee”, and would do so. He gets the notice. He does not have the power to stop it, but he gets the notice so that he can express concern if he has to, either to the commissioner of IBAC or to the joint standing committee. I think that is the only thing that I would be interested in.

I am not really interested in knowing about assumed identities in advance, other than the materials I said are recorded, but I am interested in public hearings, because there has been so much commentary about it in the press and the seriousness of it. I do not know if any of you watched the ABC news, but last night on the 7.30 report, Mark Dreyfus, the federal Attorney-General, was interviewed about this very issue. He was asked, “Why are there only going to be public hearings in exceptional circumstances?” That apparently is what the act is going to say. He said, “Because there’s a risk of reputational damage when it shouldn’t happen.” Apparently an Independent—Helen Haines is the Independent member for Indi—criticised him in Parliament yesterday and said it should be always public and it should only be private in exceptional circumstances. Alternatively, it should always be public unless the commissioner believes they have a reasonable basis to believe that it should not be—in other words, lowering it from “exceptional” to “reasonably required”. He said, “No, I want to leave it at ‘exceptional’ because I believe the best course is to have private hearings rather than public hearings.” I thought he was on the right track there, and he spoke very well about it, actually. That is the position in terms of those things.

I thought you might be interested to know from the Parliamentary Inspectors’ meeting that, generally, the commission in Western Australia is travelling quite nicely compared to our fellow states. Just to let you know what is going on: in South Australia, the equivalent of our commission conducted an inquiry last year or the year before in respect of a police officer—more than one officer. There were allegations of misconduct—and one of the police officers, it was a superintendent, Barr, took his own life as a result of allegations made against him in public. Again, public hearings and before a report had been issued. An Independent member of the South Australian Parliament became very upset about this last year—before the election in South Australia last year—and moved a private member’s bill that the powers of the commission to conduct inquiries be significantly reduced. The upshot of all this is—this is something that is not private; this is public; it has been in the press—that the powers of the South Australian corruption and crime commission have been totally emasculated. The commission has been gutted. It has no power left because of the suicide of a police officer, the impending election, both sides of the chamber rushed to support the private member’s bill and the commission is just nothing now; it is worthless.

Hon Dr STEVE THOMAS: Has the commission been emasculated, the inspector or both?

Mr ZILKO: The commission has been emasculated, which in turn has impacted on the work that the inspector can do.

Hon Dr STEVE THOMAS: The commission is not doing much work, then?

Mr ZILKO: It is not doing much work at all, because it has been gutted of all its powers, there is nothing much it can basically do.

Hon Dr STEVE THOMAS: That is a heck of an outcome.

Mr ZILKO: Yes. It is not a good outcome for the detection of corruption and prevention of corruption in South Australia. It is a bad outcome, and it sounds like an emotive outcome. I mean, it is a great shame that somebody committed suicide, but it seems like, with the election pending, everybody rushed to be seen to be supporting this private member's bill that was going to reduce the powers. In Queensland, the commission has been conducting an inquiry into city councils—I think the Logan City Council in particular. There has been a lot of political interplay in relation to the commissioner. The equivalent of Mr McKechnie, but in Queensland, has been attacked in Parliament in respect of these things and then very recently he sought to table a report in the Queensland Parliament and people who were affected went to the Supreme Court to stop it. When they appeared before a single judge, the judge would not grant an injunction and said that the commission had the power to table his report. The person concerned sought to appeal urgently and the Court of Appeal found 2–1 that the single judge was wrong and that the report could be prevented from being tabled. There is an injunction now in place to prevent the commissioner from tabling his report. As a result, in his view, of the fact that his powers are being interfered with by the judiciary, he has resigned. They are in a complete mess.

Hon Dr STEVE THOMAS: Is that a situation that could be repeated in other jurisdictions?

Mr ZILKO: It is a good question. I do not know, Dr Thomas. I hope it does not happen here. We have not had that situation here. I cannot think of anybody who has gone. Before we table a report, either by me or by the commission, we are obliged to tell anybody affected that we are going to do it and we give them a draft and we say, in my case, "Please let me have any comments within 14 days and I will include them in my report", and I have done that. That is when this person or these persons ran to the court and got an injunction. Nobody has ever done that to me, and I do not think they have done that to a previous parliamentary inspector, but they might have done it —

Ms BURNSIDE: There have been attempts to injunct, to prevent the tabling of reports. I do not think any of them were successful in WA, although I am not sure.

Mr ZILKO: I think the commissioner in Queensland was disgusted that the Court of Appeal upheld the right of these individuals to prevent it being tabled. So he has gone, and they are now in a state of some sort of crisis, so that is a problem. Sorry, did I say Queensland or Victoria?

Hon Dr STEVE THOMAS: You said Queensland.

Mr ZILKO: My apologies—I meant Victoria.

Ms BURNSIDE: They have had similar issues in Queensland.

Mr ZILKO: They have had similar issues. I have mixed it up; I have conflated two stories.

In Victoria, the Court of Appeal has injuncted IBAC and prevented it from tabling a report. My apologies for any confusion. In Queensland, the commissioner has resigned because of repeated attacks on him in the Parliament. I am sorry. Queensland, Victoria and South Australia all have problems. We are looking like a shining star compared to them. At the conference that followed —

Ms BURNSIDE: The Australian Public Sector Anti-Corruption Conference.

Mr ZILKO: — which of course you, chair, attended, I attended the last session on the second day. The chief executive officer of the Tasmanian Integrity Commission gave a talk on his work. I had already previously received a copy of a newspaper account from *The Australian Financial Review* suggesting that the integrity commission in Tasmania was completely useless and a dead duck and had done absolutely nothing in its six years of existence and compared it to the work that ICAC had done in New South Wales in an article written last year. When the chief executive officer spoke, he did not seem to refer to his parliamentary inspector at all, so when they took questions I asked, "Do

you have a parliamentary inspector in Tasmania like all the other states and territories?” The answer was, “No, we do not.” Bruce McClintock was chairing that and he said, “Well, what do you do? What if somebody wants to complain?” The CEO said that they complained directly to the joint standing committee, which I thought was a completely unworkable proposition. I am sure you would not want to be inundated with 50 or 100 complaints a year from members of the public about things that may end up being nothing, but alternatively would then require you to get involved by dealing directly with the commission.

Hon Dr STEVE THOMAS: No, we will not be recommending that outcome.

Mr ZILKO: It seemed like a crazy set up and the article in *The Australian Financial Review* was probably right: it is probably hopeless because if it does not have a parliamentary inspector, that is a bad outcome because the parliamentary inspector is really there to make sure that when important things like eavesdropping, surveillance and assumed identities take place, that the law is not broken and that people act within the confines of the order they have been given by the court or whatever. But, more importantly, the absence of a parliamentary inspector would seem to me to make the whole thing simply unworkable in terms of the public’s interaction with the commission. As I said, the commission here may not be perfect, but it is travelling along at a reasonably good clip at the moment.

That is all I wanted to say about that. I talk about two anonymised cases in the annual report. I will not take up too much time, and I will deal with them in the closed session, and I also want to deal with one other matter in the closed session. I sent a letter to you yesterday, chair. I do not know whether you have seen it.

The CHAIR: I have not read it yet because I got it only this morning. Perhaps you can refer to that your commentary.

Mr ZILKO: In the closed session?

The CHAIR: Yes. Before we go into closed session, do members have any questions arising from the evidence provided?

Hon Dr STEVE THOMAS: The only question I wanted to ask was in relation to Victoria where you have had a legal challenge. Is there any indication that government—it is going to an appeal. I guess you could appeal to the full bench and take it to a higher court. Is there any further action or has the government just accepted this verdict?

Mr ZILKO: I do not know. Of course, their election is on this Saturday and I suspect that they are furiously out campaigning on each side of the chamber. All of this has happened in the last two or three weeks, so probably not. An appeal to the High Court is probably on the cards, simply to do nothing else but clarify the law; in fact, that is required.

Hon Dr STEVE THOMAS: I would have thought so.

Mr ZILKO: And that will help all of us.

The CHAIR: In terms of making an appeal to the High Court, would it not be the commission itself?

Mr ZILKO: It would be the commission itself, because the commission would have been named as the respondent to the application for an injunction. It has now been unsuccessful before the Court of Appeal, so the next step is to apply for special leave to appeal to the High Court. Of course, you have to get special leave to appeal to the High Court on anything. Only one in 10 or 15 matters gets the leave. The High Court tends to confine itself to important questions at law. I would have thought that this is an important question of law and I am sure leave will be granted if in fact the commission

decides to go ahead. Obviously, what they do is not affected by the fact that there is an election on this week. But I imagine that there is probably some interruption.

Hon Dr STEVE THOMAS: They will be in caretaker mode. I imagine government would need to fund it because High Court challenges are not the cheapest thing in the world.

Mr ZILKO: That is right. I suspect something is going to happen after the election.

The CHAIR: We will move into closed session now.

[The committee took evidence in closed session]