Parliamentary Committees

Inquiry into the Crime and Corruption Commission's investigation of former councillors of Logan City Council; and related matters

Volume of Additional Information

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PARLIAMENTARY CRIME AND CORRUPTION COMMITTEE

INQUIRY INTO THE CRIME AND CORRUPTION COMMISSION'S INVESTIGATION OF FORMER COUNCILLORS OF LOGAN CITY COUNCIL; AND RELATED MATTERS

OUTLINE OF SUBMISSIONS OF COUNSEL ASSISTING[1]

I Introduction

1. On 28 May 2021, this Committee resolved in the terms which have been well publicised and which form the Terms of Reference for this Inquiry.

2. That Resolution was made in the context of Chapter 6, Part 3 of the *Crime and Corruption Act* 2001 (Qld) (**CC Act**). That legislative framework confers functions on this Committee which include '*to monitor and review the Crime and Corruption Commission's performance*' (and the performance of its functions) (ss 9, 292(a)) and to report to the Legislative Assembly (commenting as the PCCC considers appropriate) on matters relevant to the CCC or ones relevant to the performance of the CCC's functions or the exercise of the CCC's powers.

3. This Inquiry arose from a complaint made by the Local Government Association of Queensland (**LGAQ**) dated 5 May 2021 about the conduct and activities of the CCC and some of its officers. The resolution constituted a decision to take action on that complaint for the purposes of s 295(2) of the CC Act. It effectively gives particulars, in the nature of terms of reference.

4. The Committee convened this Inquiry as 'other action' it considered appropriate to take on the LGAQ's complaint, to inquire into the matters it raised, including by way of public hearings.

[1] This Outline of Submissions is to be supplemented by oral submissions, to be made at a public hearing of the Inquiry on a date to be fixed.

5. Sub-section 292(b) of the CC Act empowers the Committee to report to the Legislative Assembly and comment on any matter relevant to the CCC and the performance of its functions and exercise of its powers. The Committee's remit is a wide one.

6. The Committee convened public hearings over the course of 9 days, namely 17-20 August, and 25-26 August, 3 September, and 6-7 September 2021. Ten witnesses were called (one of them twice, the CCC Chair (Mr MacSporran QC)). Summonses had earlier issued to the CCC requesting the production of documents to the Committee relevant to the subject matter of the Resolution. More than 15,000 documents were received. Committee staff reviewed all those documents and provided a subset of them to Counsel Assisting for review. From that subset, three categories of documents were selected by Counsel Assisting arising from the issues which the LGAQ complaint and the Resolution identified, namely:

    a. the nature and degree of the CCC's involvement in proceedings before the Queensland Industrial Relations Commission (**QIRC**);

    b. the processes and decisions involved in charging the former Mayor and 7 former Councillors of the Logan City Council (**LCC**) with fraud under s 408C of the Queensland *Criminal Code*;

    c. the adequacy of certain reporting by the CCC to this Committee about the matters above.

7. Preparation of those bundles involved judgments by Counsel Assisting about which of the documents appeared to us, at that early stage of the Inquiry, to be the most relevant to the matters which the Resolution required be investigated. Those bundles do not contain all relevant documents. Further documents were tabled as volume 3 on the last day of public hearings, other documents were tabled in the course of public hearings and many others were referred to as relevant but were not in the bundles either because they had not been located before the commencement of public hearings or because regular recourse to them was not required in the course of public hearings.

8. The CCC was invited to identify any further documents already produced to the Committee or in the possession of the CCC that it submits are relevant to the Inquiry, but which have not been included in the already tabled materials.

9. Counsel Assisting proceed on the basis that it is not only the tabled documents to which the Committee will have regard, but such other documents as are referred to in these submissions (and any other submissions received by the Committee) and any other documents which Committee staff bring to the Committee's attention as material. The Committee will, of course, also consider and take into account the earlier submissions made to it by the CCC and other interested persons, some of which have already been made public.

10. Counsel Assisting acknowledge the Committee's overarching and routine function of reviewing and monitoring the CCC's performance. We are not privy to the Committee's regular and routine dealings with the CCC, but acknowledge those dealings as a separate source of information and general knowledge that the Committee ought properly to bring to bear upon its consideration of matters raised here. We note this Committee's statutory function is to monitor and review the performance of the CCC's functions in circumstances in which there are few other avenues for the CCC to be subjected to scrutiny and, in particular, public scrutiny.

11. Our opening remarks on 17 August 2021 directed the Committee's attention to four main areas of focus, which, at that time, we thought arose from the LGAQ complaint and the Resolution:

    a. the nature, degree, lawfulness and appropriateness of the CCC's involvement in a civil proceeding in the QIRC commenced by Ms Sharon Kelsey;

    b. the nature, appropriateness and lawfulness and circumstances of advocacy by the CCC for Ms Kelsey to obtain state funding for her QIRC action;

    c. the steps, processes and decision-making by which the former Mayor and 7 former Councillors of the LCC came to be charged with fraud, that resulted in their removal from office and the dissolution of the LCC;

    d. the adequacy of the CCC's reporting to this Committee about the above.

12. The last of these issues receded as the Inquiry took shape. The first and second are part of the same sequence of events and so can be treated together.

13. The CCC, in its initial submission dated 26 July 2021[2] (before the commencement of public hearings and before we, as Counsel Assisting, notified the CCC's lawyers of the particular topics of our focus) welcomed the prospect that this inquiry process would result in mutually beneficial improvements in the way the CCC performs its statutory functions, including its interactions with other entities.[3] The CCC pointed to public interest disclosures and those who make them as '*critically important to the performance of the [CCC's] corruption function, as … an essential source of information as to the existence of corruption, which is by its nature insidious and difficult to detect*'.[4] This, with respect, is an important point and motivated the CCC to assist Ms Kelsey who, on 12 October 2017, made what the CCC regarded as a public interest disclosure about potentially corrupt conduct at the LCC.

14. The former Mayor of LCC was charged, in March and April 2019, with offences other than the fraud charge considered below. Those other charges are presently before the Courts. Nothing in these submissions or the schedule to them should be taken to be directed to those other charges or their merits.

II Available Findings

15. In this section, we identify the key findings that we submit are open to the Committee to make arising from the evidence. We have set out the factual bases for these available findings, by reference to the evidence, in greater detail in a Schedule to these submissions.

16. We have focused in these submissions on the available findings that might be adverse to a person or entity, so that the persons or entities affected by the prospect of the Committee making such a finding may be given a fair and proper opportunity to respond. It is not our purpose, in these submissions, to set out all the possible findings and comments the Committee might make in its final report to the Assembly. That is not our role.

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2 CCC Submission to the Inquiry (Submission 025).
3 CCC Submission to the Inquiry (Submission 025), para 4.
4 CCC Submission to the Inquiry (Submission 025), para 6.

AVAILABLE FINDING 1

The CCC considered its interests and those of Ms Kelsey were shared, and that it ought to assist Ms Kelsey as much as it legitimately could.

17. The CCC considered from the outset of Operation Front and throughout the duration of the QIRC proceeding that it had a common interest with Ms Kelsey and her success there. That view was one held by Mr MacSporran QC and was communicated to Mr Hutchings who regarded it as a mandate. DS Francis too held the same view, but saw this as empathy.

18. From at least 23 February 2018, following a meeting with Ms Kelsey and her lawyer, Mr MacSporran QC expressed 'considerable sympathy' for Ms Kelsey and wanted to assist her.[5] Mr Hutchings accepted that as a mandate from the Chair and acted accordingly.[6]

19. The view of a shared interest became more strongly held and expressed over time. By 4 September 2019, it was an interest such that Mr MacSporran QC described his 'outrage' at the way Ms Kelsey had been treated by LCC and (separately) directed CCC staff to '*do whatever we legitimately can to support Kelsey*'.[7]

20. Ms McIntyre said she was aware of discussions at the CCC that '*we would try and assist Ms Kelsey*'.[8] Despite being the lawyer attached to the criminal investigation team and having no background in civil litigation or employment law, Ms McIntyre contributed to discussions as to how the CCC might assist Ms Kelsey by causing the WhatsApp records to be disclosed in the QIRC proceeding.[9]

21. Mr Hutchings, consistent with Mr MacSporran QC's instruction to him, sought to correct what the CCC saw as a very significant imbalance in the QIRC proceeding. Mr Hutchings' view was fortified by his belief that the Councillors had committed perjury in that proceeding and therefore ought not be allowed to decide the extent to which they

5 Hansard 17 August p 13 point 2.
6 Hansard 18 August p 67 point 1; Hansard 19 August p 3 point 7; Hansard 19 August p 12 point 5; Hansard 19 August p 14 point 3; Hansard 19 August p 15 point 9.
7 Tabled Bundle No. I p 633.
8 Hansard 19 August p 52.
9 Hansard 20 August p 2; I p 501.

should have continuing access to legal representation paid for by insurance. The Councillors were never charged with perjury and no investigation into any such offence by them was even commenced. Well settled legal principle is that all persons are entitled to legal representation and, if they have insurance that covers it, to utilise it for that purpose. Any comparison to the indemnity arrangements which operate with respect to state employees is erroneous. Different constitutional and other considerations apply and, in any event, even those alleged to have committed perjury would nevertheless be likely to enjoy the benefits of insurance or indemnity funding until proven otherwise.

22. The empathy which DS Francis said he had for Ms Kelsey was profoundly held, as shown by the strongly emotive words he used in his memoranda prepared in the decision-making process about charging the Mayor and 7 Councillors with fraud, and in his email of 30 May 2019 about alleged wrongdoing or impropriety of the Administrator.

23. Mr MacSporran QC, Mr Hutchings, DS Francis, and to a lesser extent Mr Alsbury, were strongly motivated by a view that they needed to correct the imbalance for Ms Kelsey and because they had a shared interest in seeing her succeed in being reinstated as the CEO of LCC. This was Mr Hutchings' overarching purpose.

AVAILABLE FINDING 2

The shared interest included Ms Kelsey's being reinstated as CEO, which the CCC acted upon by involving itself in her QIRC proceeding and seeking to make documents it had obtained under compulsion available to her in that proceeding.

24. Ms Kelsey communicated to the CCC her desire, and her pressing need, to be reinstated as CEO.

25. The CCC was closely involved with Ms Kelsey's lawyers in the issue to it of the Notice of Attendance to Produce (**the Notice**). It did not involve the other parties to the proceeding in those discussions. It communicated to Ms Kelsey's lawyers that it would produce documents in response to the Notice and did so promptly. These communications were to the exclusion of the other parties to the QIRC proceeding or their lawyers. They were directed to assisting Ms Kelsey in that proceeding by

providing evidence to the QIRC that the CCC thought would assist in proving that the Mayor and Councillors were dishonest and had colluded with each other unlawfully to cause Ms Kelsey's termination.

26. Although the CCC could lawfully have refused to produce material for the purposes of the QIRC proceeding, it complied with the Notice.

27. Mr MacSporran QC explained to the Inquiry that the CCC chose to produce that material to the registrar of the QIRC, instead of disseminating it directly to Ms Kelsey and the other parties to the QIRC proceeding (namely the LCC, the Mayor and the 7 Councillors). He said this was done so that the QIRC could determine what use, if any, could be made of the documents.[10] That was, in our submission, a lawful approach notwithstanding that the CCC could lawfully have declined to produce the material. That approach also demonstrated *some* conscious observation of the requirements of s 57 of the CC Act for the CCC to act independently and fairly, despite doing so out of its stated desire to assist Ms Kelsey in the QIRC proceeding.

28. Industrial Commissioner Black's decision of 24 August 2018 was a clear statement that all the documents that had been produced in answer to the Notice were ones which ought not be disseminated by the CCC or used by Ms Kelsey in connection with the QIRC proceeding. The Commissioner's conclusions were unmistakeable in their rejection of any notion that it would be proper for that material to be adduced in that proceeding or be available to assist Ms Kelsey.

29. A ruling made by a court of record (which the QIRC is) is something which is authoritative unless disturbed on appeal. No party to the QIRC proceeding sought to challenge the 24 August 2018 ruling. It was clear in its terms that it applied to material in the possession and control of the CCC that had been obtained by compulsion. All the WhatsApp records relevant to this Inquiry and which were later delivered to LCC were obtained by the execution of warrants to seize and interrogate mobile phones. There is no basis to distinguish them from the other kinds of material that was obtained under compulsion and produced to the QIRC, such as telephone intercept material and transcripts of coerced hearings conducted under the CC Act.

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[10] Hansard 17 August p 16.

30. CCC staff regarded the WhatsApp records as public records for the purposes of the *Public Records Act* and as being ones which ought to have been provided by the Mayor and Councillors to the Council for filing and archiving. The State Archivist formed the same view. It would seem that the CCC's point now (and perhaps then) was that if the WhatsApp records were properly to be regarded as public records, then somehow that meant that: a) they were not subject to the QIRC ruling of 24 August 2018; and b) those records, once stored on the Council's record system, would be disclosable in the QIRC quite independently of any consideration which might previously have stood in the way of that. Both views are unsupportable. The documents in question were always ones which had the character of having been obtained under compulsion, and no subsequent event could change that.

31. Those with responsibility to do so in the CCC (principally Mr Hutchings) did not read Commissioner Black's ruling and did not in any event regard it as authoritative. The ruling was a clear admonition against any further attempts to disseminate the documents (or others of materially the same character, namely WhatsApp communications obtained under warrant) to the QIRC or any other entity for Ms Kelsey to use them.

AVAILABLE FINDING 3

Confidential documents, including some that were subject to legal professional privilege, were delivered to Logan City Council on 3 October 2018 by the CCC for *a* weighty and substantial purpose of making them available for Ms Kelsey's use in the QIRC proceeding, contrary to the ruling of Commissioner Black.

AVAILABLE FINDING 4

The delivery on 3 October 2018 by DS Francis was 'improper conduct' for the purposes of s 329 of the CC Act and should have been reported to this Committee in accordance with that section.

32. It was decided within the CCC, after the QIRC ruling was delivered, that the *Public Records Act* might have provided a basis on which some of the documents previously produced to the QIRC (and others of a similar character, namely WhatsApp

communications) could be put back in LCC's hands, such that it would be obliged to disclose them in the QIRC proceeding. Doing so would have made them available to Ms Kelsey, contrary to Commissioner Black's ruling. Despite that being *a* purpose (not necessarily the only purpose) of the deliveries to LCC on 3 October 2018 and 19 November 2018, it was not articulated or recorded. DS Francis acted improperly in delivering the documents to LCC on 3 October 2018 without either a dissemination authority or any formal covering letter. The fact that the delivery was for *a* purpose related to the *Public Records Act* did not excuse the need for a thorough review of those documents for legal professional privilege or for a dissemination authority to be given. If proper processes had been observed, material to which legal professional privilege likely attached would not have been delivered.

33. The documents were retrieved from LCC at the CCC's initiative upon it being drawn to the attention of more senior people that the delivery was irregular and might have included legally professionally privileged material.

34. The facts supporting that inference are:

    a. the CCC's resolve to assist Ms Kelsey (see Available Findings 1 and 2);

    b. the voluntary production by the CCC of documents in response to the Notice and its involvement in the issuing of the Notice itself;

    c. the CCC's disregard of the ruling of Commissioner Black despite its authoritative effect;

    d. the irregularity of the 3 October delivery and of the request for recovery of the documents;

    e. before the 3 October delivery, on 28 August 2018, Minter Ellison had asked the CCC to '*consider providing the documents to the Logan City Council and/or the individual Councillors*'[11];

    f. Minter Ellison persisted in that request after the documents were retrieved from Council;

[11] I p 331.

g. substantially the same documents were delivered on 19 November, 'as requested';[12]

h. such delivery was preceded by a request by Minter Ellison on 16 November 2018[13] to do just that;

i. on 12 February 2019 Mr Alsbury wrote to LCC reminding it of its disclosure obligations, notwithstanding that Ms Kelsey had abandoned an application to that effect in QIRC months before.

AVAILABLE FINDING 5

Confidential documents were delivered to Logan City Council on 19 November 2018 by the CCC for *a* weighty and substantial purpose of making them available for Ms Kelsey's use in the QIRC proceeding, contrary to the ruling of Commissioner Black.

35. It is also open to infer that *a* weighty or substantial purpose for the delivery of documents to LCC on 19 November 2018 was so that they would be disclosed to Ms Kelsey for her use in the QIRC proceeding, again contrary to the ruling of Commissioner Black.

36. The evidence of Ms McIntyre and Mr Hutchings directly supports such a conclusion. To the extent an inference is required to be drawn to support that evidence, the relevant facts are those set out immediately above in connection with the 3 October 2018 delivery (save that, in the case of 19 November, the administrative procedures that were adopted were regular).

AVAILABLE FINDING 6

In August 2018 the CCC gave consideration to charging criminal offences that would cause LCC Councillors to be disqualified, and the LCC to be dismissed and an Administrator appointed. The purpose of that consideration was to assist Ms Kelsey with reinstatement as CEO of the LCC.

12 I p 432.
13 I p 421.

37. Ms Kelsey's plea to the CCC on 6 August 2018 that she was ' in dire straits' and needed reinstatement to make her continued pursuit of the QIRC proceeding 'feasible' caused the CCC to seek State funding for Ms Kelsey to pursue her QIRC action.

38. On 8 August 2018 Ms Kelsey's solicitor told Mr Hutchings that he was 'especially interested' in the appointment of an administrator to LCC as 'the only practical solution now'.[14] On the same day, Mr Hutchings directed CCC staff to undertake research as to what criminal offences would result in the disqualification of Councillors and the effect of such disqualifications on the necessary quorum of a Council, and report that research to Mr MacSporran QC.[15]

39. Mr MacSporran and Mr Hutchings both denied that their desire to assist Ms Kelsey had anything to do with the eventual selection and timing of charges against the Mayor and 7 Councillors. DS Francis, the charging officer, was not party to the email exchange regarding the research undertaken in August 2018.

40. However, we submit that the only rational inference arising from the sequence of events in August 2018 is that, at that time, some officers within the CCC gave consideration to charging LCC Councillors with serious criminal offences, at least in part, so that the charged Councillors would be removed from office and an Administrator appointed to LCC who might be favourable to reinstating Ms Kelsey as CEO.

41. Whether or not that consideration ultimately impacted the decisions to charge, at the time it occurred, it was improper and a serious breach of the CCC's duty to act at all times, independently, impartially and fairly, pursuant to s 57 of the CC Act.

AVAILABLE FINDING 7

The steps taken by the CCC to assist Ms Kelsey in her QIRC proceeding, including with respect to her desire for reinstatement, breached its duty to act, at all times, independently and impartially pursuant to section 57 of the CC Act.

14 I p 293.
15 Tabled Bundle No II pp 9-11.

42. The evidence was that CCC staff acted as they did with respect to the QIRC proceeding in order that the QIRC, as a 'unit of public administration' have all the documents before it when considering Ms Kelsey's case.[16]

43. The CCC had express power under the PID Act (s 48(2)(c) and s 49(2)(b)) to apply for an injunction, to the QIRC or the Supreme Court, respectively. These powers could only be exercised where the CCC was acting in the employee's interest and had: a) Ms Kelsey's consent to do so; and b) where the employee (here, Ms Kelsey) was a public officer. The CCC, including through Mr MacSporran QC, considered whether to exercise these powers and did not.

44. As a general principle, where the legislature gives power by a particular provision which prescribes the mode in which it shall be exercised, and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.[17] The CCC, having decided not to exercise the only powers in the statutory scheme specifically directed to the circumstances in which it could involve itself in civil litigation to which it was not otherwise a party, ought to have had no involvement whatsoever in it. This includes the consultations with Minter Ellison about the issue of the Notice, and the later attempts to put documents under the control or in possession of LCC so that they would be rendered disclosable to Ms Kelsey in the QIRC proceeding.

45. It became apparent in the course of oral evidence, that CCC officers had a fundamental misunderstanding of the processes of the civil courts and the well settled way in which civil litigation occurs. Mr MacSporran QC said his knowledge was being exceeded when asked about the *Public Records Act* and disclosure obligations.[18] Mr Alsbury's background was in criminal law.[19] Ms McIntyre said '*I am not familiar with the civil litigation duty of disclosure. I come from a criminal law background …*'.[20] DI Preston

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16 Hansard (McIntyre) 19 August p 55 ('*The information that was to be placed before the QIRC was relevant to those proceedings and it was up to the QIRC to determine whether they would accept that information*').

17 See, for eg, *Anthony Hordern & Sons Ltd v Amalgamated Clothing & Allied Trades Union of Australia* (1932) 47 CLR 1, 7.

18 Hansard 6 September p 14 point 5.

19 Hansard 18 August (Mr Alsbury) p 42.

20 Hansard 20 August p 2 point 7.

claimed ignorance of QIRC processes: '*I do not really understand what the QIRC does and I never went out of my way to try to understand that'*.[21]

46. None of the witnesses who gave oral evidence had any experience in employment litigation.

47. The inadequate knowledge of civil litigation, generally, and employment litigation specifically on the part of CCC officers made their involvement with the QIRC proceeding even more inappropriate. Their answers to questions on this topic showed that they misunderstood fundamental principles about the means by which evidence is brought before the QIRC in employment disputes.

48. It was an error, as the decision of Black IC of 24 August 2018 shows, for the CCC to have considered the documents produced in response to the Notice should be before the QIRC or given to Ms Kelsey via the QIRC disclosure regime. The CCC should not have worked as it did with Ms Kelsey's lawyers to facilitate the production of those documents to the QIRC. That having been done, the error was compounded by delivering a subset of that material together with some additional documents of the same character to LCC on 3 October 2018 and 19 November 2018.

49. In private civil litigation, it is the parties to it who place material before the Court and there are well-established processes to facilitate them doing so. The parties may seek production of documents relevant to the issues in the proceeding from third parties, and they generally have obligations to disclose to each other all documents in their possession or under their control which are directly relevant to an allegation in issue in the proceeding.

50. It was wrongheaded of the CCC, and contrary to well settled principles about how the civil courts work, for the CCC to consider that it had some role in making available to the QIRC documents which the CCC considered relevant or material, and even more so given the material it produced had been obtained using compulsory powers of one kind or another.

[21] Hansard 25 August p 25 point 9.

51. We do not submit that the evidence given by any of the CCC witnesses about the deliveries on 3 October 2018 and 19 November 2018 was dishonest. Nor was any suggestion to that effect made during the public hearings.

52. Mr Alsbury was asked about the 19 November 2018 delivery and denied that the 'true purpose' of the delivery was to put the documents back in the hands of LCC so they might be susceptible to being disclosed in the QIRC.[22] He said that the CCC was still concerned about public records issues. It was put to him that his evidence in this regard must be false because of his letter of 12 February 2019, which reminded LCC of what he considered to be its disclosure obligations. He denied that assertion.[23] Nevertheless, the letter of 12 February 2019 does contradict his evidence about the true purpose of the delivery, and the Committee is invited to prefer the purpose as revealed in this letter over the denial of such a purpose in Mr Alsbury's oral evidence.

53. The reference to dishonesty in the examination of Ms McIntyre[24] sought to explore an apparent 'double-standard' in which the CCC alleged dishonesty against the former Mayor and Councillors (at least to some extent) on the basis of omissions but Ms McIntyre herself omitted certain important information about *a* purpose or side-effect of the proposed dissemination on 19 November 2018 from her request for dissemination authority.[25] Ultimately, Ms McIntyre said that she was not dishonest and did not intend, in drafting the request for dissemination authority, to be dishonest.[26]

54. We submit that the failure to declare and record in appropriate dissemination authorities that a weighty and substantial purpose of each of those deliveries was to make the material disclosable in the QIRC (to assist Ms Kelsey) was an institutional failing that involved a substantial departure from the requirement on the CCC to act, at all times, independently and impartially, as required by s 57 of the CC Act.

55. The steps taken by the CCC to influence the outcome of the QIRC proceeding in Ms Kelsey's favour, often in concert with or following requests by Ms Kelsey's lawyers, when viewed collectively, were a significant departure from the ordinary and proper

22 Hansard 18 August p 32.
23 Hansard 18 August p 32
24 Hansard 20 August p 14.
25 I pp 425-429.
26 Hansard 20 August p 14.

role of the CCC, having regard to its functions under the CC Act and were entirely inconsistent with its duty to act independently, impartially, and fairly at all times (s 57).

AVAILABLE FINDING 8

The material prepared for and considered at the 30 January 2019 meeting fell short of what was required properly to assess whether the proposed charges against the Mayor ought be laid.

56. DS Francis had concluded in his own mind, at an early stage of Operation Front, that the Mayor was dishonest and conducted his investigation in order to prefer charges alleging dishonesty.

57. On 30 January 2019 he met with Mr MacSporran QC and others to discuss potential charges against the Mayor. In that meeting, Mr MacSporran QC approved the Mayor being charged with offences including fraud.

58. The material referred to was not attended with any structured analysis of what constitutes such an offence (namely, fraud pursuant to s 408C of the Criminal Code), especially in terms of the requirements of proving dishonesty and whether there might be rational inferences consistent with the Mayor's innocence of that charge such as a lawful basis for his detrimental treatment of Ms Kelsey that the prosecution would need to negate at trial.

AVAILABLE FINDING 9

The memoranda prepared for the 24 April 2019 meeting to consider commencing criminal proceedings against the seven Councillors and further proceedings against the Mayor for fraud were inadequate for that purpose.

59. None of the memoranda (authored by DS Francis, DI Preston and Mr Alsbury) prepared for the purposes of commencing criminal proceedings against the 7 Councillors (and additional proceedings against Mayor for fraud) that were considered by Mr MacSporran QC on 24 April 2019 contained any elemental analysis of the

charges proposed against the Councillors or the fraud charge proposed (again) against the Mayor. They did not consider in any detail the evidence that might be relied upon against each individual accused or its admissibility. The 'varying culpability' of the different Councillors was not given any attention. The memoranda did not properly address the public interest considerations, including factors that might weigh against charging each individual accused and the consequences of charging such a number of them that the elected government of Logan City would be dissolved.

60. In preparing the materials for that meeting, all the police officers involved in the investigation knew that Ms Kelsey's matter was listed for closing oral submissions in the QIRC on 2 May 2019. They pressed strongly amongst each other for criminal charges to be laid before 2 May 2019 against the Mayor and 'a good portion' of the 7 Councillors.

61. The police officers agreed timing was critical.[27] This was despite others saying they were not aware of any particular urgency in proceeding with charges.[28]

62. The urgency found its way to the CCC Chair through Mr Alsbury who had, without stated reasons, represented to Mr MacSporran QC that the laying of the charges was 'urgent'. That urgency, albeit perhaps in part referable to a need to keep the matter moving, was principally because closing submissions in the QIRC were then scheduled for 2 May 2019. Mr Alsbury said he could not remember why he marked the memorandum as urgent.[29] The explanation he gave in oral evidence is not one which takes the matter further.[30]

63. Mr MacSporran QC gave similar evidence as to his recollection of the timing of the charges on 26 April 2019.[31]

64. The only rational inference to explain the urgency in charging before 2 May 2019 is that:

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27 II p 93; see also DS Francis - Hansard 20 August pp 66-67.
28 Hansard 17 August p 55 (MacSporran); Hansard 20 August p 33 (McIntyre); Hansard 26 August p 9 (DS Beattie).
29 Hansard 18 August p 43.
30 Hansard 18 August p 47.
31 Hansard 17 August p 55.

a. upon charging, the Mayor and a majority of LCC Councillors would be suspended, which would bring about the inevitable dissolution of the Council;

b. by doing so before the QIRC reconvened, it would come to the attention of the QIRC that the Mayor and Councillors had allegedly behaved dishonestly and criminally; and

c. it would come to the QIRC's attention that an impediment to Ms Kelsey's reinstatement had been removed.

AVAILABLE FINDING 10

The discretion to charge the Mayor and the Councillors with fraud miscarried because it was affected or infected by an improper purpose, namely a desire to assist Ms Kelsey in her QIRC action and for her to be reinstated.

65. It is open to the Committee to infer that the timing of the 26 April 2019 charges was for the purpose of assisting Ms Kelsey's reinstatement. We explored whether there were other explanations for this timing in oral evidence. We submit no other inference is open. The explanations given by witnesses in oral evidence for the urgency was, to say the least, unpersuasive. Thus the inference we invite is, we respectfully submit, an inevitable one.

66. The reasons for the timing of the charges, discussed above, and DS Francis' involvement in the discussion about urgency give further support for Available Finding 10.

67. On 24 April 2029, Mr MacSporran QC approved the referral of alleged criminal conduct by the Mayor and 7 Councillors to DS Francis for his consideration and decision to charge. Mr MacSporran QC 'approved' DS Francis considering 3 charges against the Mayor and one count of fraud for each of the 7 Councillors 'as suggested'.[32]

68. Those preparing the material considered by Mr MacSporran QC on 24 April 2019 (including DS Francis, DI Preston and Mr Alsbury) placed reliance upon the written

[32] II p 317.

closing submissions made on behalf of Ms Kelsey by her lawyers to the QIRC. They did not consider the submissions of the other parties. They formed views about Ms Kelsey's credit and made positive judgments about the merits of her case, but only on the basis Ms Kelsey's submissions. When put to the CCC witnesses, there was some, but only limited, acceptance that to read the written advocacy of one side to civil litigation is not a safe way objectively to assess matters.[33] Mr MacSporran QC said he read Ms Kelsey's submissions '*but for the purposes of assessing what the facts were, not what the advocacy for her was*'.[34]

69. In exercising the discretion to charge and preparing material in support of it, DS Francis was obliged to comply with the 'Director's Guidelines'. Those Guidelines are made under s 11(1)(a)(ii) of the *Director of Public Prosecutions Act* 1984 (Qld) which provides that the DPP may furnish guidelines in writing to the Commissioner of the Police Service with respect to prosecutions in respect of offences.

70. Section 4.9 of the *Police Service Administration Act* provides that the Police Commissioner may give, and cause to be issued, to officers, staff members or police recruits, such directions, written or oral, general or particular as the commissioner considers necessary or convenient for the efficient and proper functioning of the police service. Police Officers to whom such a direction is addressed must comply in all respects with it.

71. Such a direction exists in the 'Operation Procedures Manual' (issue 82 effective 11 June 2021) issued pursuant to section 4.9. The relevant parts of it (ss 3.4.1 and 3.4.5) state:

> Service policy on when to commence proceedings against offenders is drawn from the Office of the Director of Public Prosecutions (State) (ODPP), Director's Guidelines (DPP Guidelines) (see Guidelines 4: 'The decision to prosecute' and 5: 'The decision to prosecute particular cases' of the DPP Guidelines).
>
> The Director of Public Prosecutions (State) Guidelines (DPPG) should be complied with.

72. The Guidelines state the duty of a prosecutor to act fairly and impartially, to act '*temperately and with restraint*' and not to '*try to shut out any legal evidence that*

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33 Hansard 18 August p 48 (Alsbury); Hansard 25 August p 61 (Andrews); Hansard 26 August p 7 (Beattie).

34 Hansard 18 August p 5.

would be important to the interests of the person accused' (page 1). The decision to prosecute is a two-tiered test: whether there is sufficient evidence; and whether the public interest requires a prosecution. The first of these calls for an assessment of '*any lines of defence that are plainly open*' and '*any other factors relevant to the merits of the Crown case*' (p 3). The public interest criteria are introduced as follows:

> If there is sufficient reliable evidence of an offence, the issue is whether discretionary factors nevertheless dictate that the matter should not proceed in the public interest.

73. Discretionary factors are then listed in a non-exhaustive way. They include:

> (b) the existence of any mitigating or aggravating circumstances;
>
> (f) the degree of culpability of the alleged offender in connection with the offence;
>
> (n) whether or not the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the offender has done so;

74. The Guidelines then go on to deal with the topic of 'impartiality', not as a criterion, but as an essential requirement of any prosecution:

> A decision to prosecute or not prosecute must be based upon the evidence, the law and these guidelines. It must never be influenced by:-
>
> …
>
> (b) personal feelings of the prosecutor concerning the offender or the victim;
>
> (c) possible political advantage or disadvantage to the government or any political group or party; …

AVAILABLE FINDING 11

The discretion to charge the Mayor and the Councillors with fraud miscarried also because all material considerations were not taken into account and weighed, and because the decision making about it was not impartial

75. Nowhere do any of the documents used by CCC officers for the purposes of considering whether to prosecute the Mayor or 7 Councillors mention the Director's Guidelines. Nowhere in those documents is it recognised that the effect of the charges being laid will be to suspend the accused from elected office, bring about the

dissolution of the Council, and, in doing so, cause the end of those people's careers and perhaps professional lives, as well as to cause the 4 councillors who were not charged also to be removed from elected office.

76. Mr MacSporran QC's evidence on this topic was that:

a. this statement in the Guidelines under the heading 'public interest criteria' (on page 4) is important:[35]

> The more serious the offence, the more likely, that the public interest will require a prosecution.

b. the reason why there is no weighing of public interest considerations such as that the accused will be suspended as councillors and the Council will be dissolved is that he:[36]

> … did not see how that can come into play if the other tests are satisfied on the people that are the subject of the charging.

c. the statement about possible political advantage and disadvantage extracted above meant, to him:

> … the fact that you are an elected official should not … under these guidelines, be a relevant factor as to whether you are prosecuted or not providing the two-tier test of sufficiency of evidence and public interest is satisfied.

77. When questioned further, the relevant exchanges with Counsel Assisting were as follows:[37]

> **Dr HORTON:** Yes, I see, and not the fact that you are going to affect an elected body independently of those people, including four people who have not been charged with anything.
>
> **Mr MacSporran:** That is just a product of the law, which is passed by parliament and in respect of which the CCC has no part to play.
>
> **Dr HORTON:** Yes, but an effect of an act of parliament which is still an effect. Not all effects prescribed by parliament, by the law, are irrelevant to the exercise of the discretion to charge; correct?

35 Hansard 6 September p 65.
36 Hansard 6 September p 65.
37 Hansard 6 September p 64.

78. Mr MacSporran QC made clear his view that the effect of the charges in terms of suspension of the accused and dissolution of the elected Council was something which was a consequence of an Act of the Queensland Parliament and had very little impact on the exercise of discretion to charge.[38] This consequence, however it arose, was one to which the decision-makers about the charges ought specifically to have addressed themselves, as part of turning their minds to it and giving it active intellectual consideration. The material consequences of laying a charge, especially where they will impact the functioning of democratic institutions, ought be very squarely considered and the fact of their having been taken into account very clearly recorded. The effect on the defendants (which went well beyond mere reputational harm) and upon the Councillors who were not charged, but who lost their elected positions by reason of the dissolution of the Council, ought also to have received treatment in the memoranda.

79. The respects in which it is open to find the discretion miscarried are:

    a. <u>failing properly to state and weigh public interest criteria</u>. DS Francis' treatment of these in his memoranda was one-sided and highly emotive. The only consideration given to factors weighing against charging was 'reputational' harm that might be caused to the accused. That drastically understates what was or should have been known to be the effect of the charges. At the very least, the public interest criteria called for it to be specifically acknowledged that the laying of these charges would result inevitably in the suspension of the accused, the end of their careers as elected representatives and the dissolution of a democratically elected Council, including the dismissal of the councillors not the subject of charges. The reasons given for the omission of this important consideration by Mr MacSporran QC was that it was 'obvious'. Incredibly, DS Francis could not recall when he learned that the consequences of charging fraud would mean the suspension of the Mayor and Councillors and the dissolution of the Council itself;

[38] Hansard 7 September p 34.

b. failing to record the consequences of the charging. The effect on the charged persons and upon the councillors who were not charged is something which ought to have been the subject of specific recognition in the charging memoranda. The omission of something, even if 'obvious', tends to suggest that it was not considered. The Full Court of the Federal Court, for example, in *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts* [2011] FCAFC 59 at [44] – [47] stated these relevant principles about the obligation to consider matters and the importance of recording them:

> The obligation of a decision-maker to consider mandatory relevant matters requires a decision-maker to engage in an active intellectual process, in which each relevant matter receives his or her genuine consideration. … If it is apparent that the particular matter has been given cursory consideration only so that it may simply be cast aside, despite its apparent relevance, then it may be inferred that the matter has not in fact been taken into account in arriving at the relevant decision. …
>
> A failure to include reference to a matter in a statement of reasons may justify the inference that … the matter was not taken into account … [but] [w]hether that inference will be drawn in a particular case will depend on all the circumstances.

c. material considerations were overlooked in the laying of the charges. The above factors were ones which, at least potentially, were a sufficient basis upon which to have exercised the discretion **not** to lay such charges and therefore should have been carefully considered;

d. failing to have legal advice accompany the memoranda. It is one thing for investigating police officers to present a 'download' of references to evidence that might suggest dishonesty. It is quite another to consider the admissibility of that material and whether, even if it were admissible, it is capable of proving the element to which it is directed (namely, dishonesty) and the charge being considered. Such analysis might also have alerted the decision-maker/s to the potential difficulties in excluding, as would be required at trial, reasonable hypotheses consistent with the accused's innocence;

e. the absence of any analysis whatsoever of the evidence as against the 7 councillors individually and their relative culpability. The memoranda contain absolutely no consideration of the elements of the offences of misconduct in public office or fraud and how those elements might be proved

against each person who was to be charged, by reference to the evidence. There is no evidence that this analysis was done in writing or at all;

f. DS Francis acted other than impartially in laying the charges: his personal feelings about Ms Kelsey and the Mayor and Councillors are starkly apparent from, in particular, the language he used in the 'public interest' section of this memoranda and the absence from it of any criterion which might have weighed against the laying of the charges.

AVAILABLE FINDING 12

Detective Sergeant Andrew Francis failed to properly, independently, impartially and fairly exercise his discretion to charge the 7 Councillors with fraud. In doing so he acted in dereliction of his duty as a police officer, contrary to the requirements of the OPM (ss 3.4.1 and 3.4.5) and contrary to s 57 of the CC Act. That failure and his subsequent conduct in relation to Ms O'Shea reflect poorly on his fitness to serve as a police officer.

80. As the charging officer (and the 'case officer'), DS Francis is responsible in a direct sense for the miscarriage of discretion to charge.

81. The extent to which the discretion to charge was affected or infected by the CCC's desire to assist Ms Kelsey, including to achieve reinstatement, is also apparent from the events that followed the dissolution of LCC and the appointment of Ms O'Shea as administrator (considered below).

82. Mr MacSporran QC encouraged Ms O'Shea to reinstate Ms Kelsey as CEO and queried why the LCC was continuing to defend the QIRC proceeding.

83. When the police involved in Operation Front (principally DS Francis) learned that Ms O'Shea would not reinstate Ms Kelsey, they made extraordinary and completely

unwarranted criticism of her.[39] This led to a suggestion the CCC Chair 'petition the Minister' for her removal or take action in the Supreme Court to have her removed.[40]

84. The conduct of the police officers, and especially DS Francis in this respect, was disgraceful. There was no basis whatsoever to seek to impugn Ms O'Shea's conduct.

85. This was the culmination of conduct by the CCC that was entirely inconsistent with its obligation to act, at all times, independently, impartially and fairly having regard to the objects of the CC Act and the public interest. It was entirely contrary to the public interest to seek to remove an independent person appointed by the Minister to administer the LCC in circumstances where her conduct was objectively unimpeachable.

The Chair of the CCC

86. The Chair of the CCC is responsible for the performance of the functions and the exercise of the exercise of power he has under the CC Act. As Chair of the CCC, he is required to ensure that decisions he makes and in which he is involved are impartial, independent, and fair. The decision to charge (and authorise those charges) were decisions that were not impartial.

AVAILABLE FINDING 13

Mr MacSporran QC did not ensure that the CCC acted, at all times relevant to the matters the subject of the Resolution, impartially, independently and fairly. That failing is serious and reflects poorly on his standing as the Chair of the CCC.

87. Mr MacSporran QC was personally involved in each of the CCC's involvement in the QIRC proceeding, the decision to charge, and in seeking to have Ms Kelsey reinstated. Mr Hutchings reported to him regularly about developments in the QIRC proceeding. He attended three meetings with Ms Kelsey personally. He participated in the meetings about charging the Mayor and Councillors, and he asked Ms O'Shea in May 2019 about the possibility of Ms Kelsey being reinstated as CEO.

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39 I pp 589-592; see also further email correspondence between these officers, produced to the Committee by the CCC.

40 I p 590.

88. It follows that Mr MacSporran QC was closely involved in what we submit was, at best, poor decision-making that was not impartial or independent, contrary to s 57 of the CC Act. This partiality and lack of independence is something which it was Mr MacSporran QC's duty, as the Chair of the CCC, to guard against, both in himself and to identify and correct in others within the organisation. He failed to do so.

89. In the course of his oral evidence, having had an opportunity to read the documents, to reflect upon the LGAQ's Complaint, and to read the evidence that had been given in the public hearings, Mr MacSporran QC was resolute in his affirmation that all which had occurred was defensible. Indeed, he defended it. He admitted administrative problems and problems with note-keeping, but denied wrong-doing by the CCC (and its officers) in any matters of substance.

90. We draw the Committee's attention to s 236 of the CC Act, and especially s 236(4). The Committee may wish to consider whether it is appropriate to comment in its Report to the Assembly about this, and we draw to the Committee's attention also to the provisions of s 292(b), which concern what a report to the Assembly may contain.

IV Future Focus: What Measures Might be Appropriate

91. Without in any way seeking to usurp the authority and discretion of this Committee, we offer the following measures which might be considered to prevent the recurrence of what we have identified above.

The charging process: charge selection, timing, sufficiency and public interest assessment

PROPOSED MEASURE 1 – MAINTAINING A DISTINCTION BETWEEN INVESTIGATIVE AND CHARGING FUNCTIONS

Consideration ought be given to a requirement that the CCC obtain the recommendation of the DPP, or a senior independent legal advisor, before exercising (through seconded police officers) the discretion to charge serious criminal offences in the exercise of its corruption function.

92. We note that the Committee, in its most recent Review of the Crime and Corruption Commission's activities considered 'Prosecutorial Discretion' in some detail at section

6.9 of its Report.[41] It is not necessary to repeat that discussion in detail here. However, we note that the Committee commented as follows:[42]

> The committee acknowledges the functions of the CCC include the gathering of evidence for prosecution purposes, and that the CC Act provides for police officers seconded to the CCC to have the functions and powers of a police officer (including the power to charge persons for relevant offences).
>
> The committee notes the distinction between the CCC's role in investigating, assessing and potentially charging persons; and the DPP's ultimate decision to pursue prosecutions.
>
> It is noted that while the CCC does not have discretion to prosecute, it does have the discretion to:
>
> - gather evidence and refer a matter to an entity who does have discretion to prosecute
> - charge a person before referring a matter to an entity who has the discretion to prosecute.

93. Following that discussion, the Committee recommended:[43]

> The committee recommends that further consideration of the Crime and Corruption Commission's prosecutorial practices and interaction with the Director of Public Prosecutions, be reported on as part of the committee's Inquiry into the Crime and Corruption Commission's investigation of former councillors of Logan City Council; and related matters.

94. In our submission, this Inquiry has revealed serious shortcomings in the process by which the Mayor and 7 Councillors came to be charged with fraud in April 2019. These problems are the subject of some of the Available Findings above and more than one Measure is, in our submission, required to avoid recurrence.

95. The Committee may wish to consider the appropriateness of the CCC having, by reason of the secondment of commissioned police officers who retain their capacity to charge, both investigative *and* prosecutorial functions.

96. Historically speaking, s 49 of the CC Act made provision for some matters to be referred to the DPP for a decision whether to charge. That provision was repealed in 2018. The CCC Submission dated 26 July 2021 (Submission 025) at paragraph 214 traces the background to this change.

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41 Report No. 106, 57th Parliament, Parliamentary Crime and Corruption Committee June 2021.
42 CC Act, ss 35(1)(h), 255(5).
43 As above, Recommendation 25.

97. Given that the focus of the CCC is to be on major crime and upon (particularly) the more serious cases of corruption, the subject-matter of CCC investigations will often call for difficult and important judgments to be made about whether to charge. There can be a tendency, as the evidence given to the Inquiry shows, for the energy and commitment of an investigating team to intrude upon what ought to be a reflective and detached decision whether to charge, the specific offence/s to charge, and a weighing of *all* the relevant material factors. This is especially so, as the LGAQ submission to this Inquiry dated 26 July 2021 (Submission 13) points out at paragraph 182, where charges are being considered against democratically elected representatives. The extreme consequences of the laying of certain charges call for the exercise of stronger protections to guard against misjudgments.

98. The Committee may consider that, before charges are laid which involve serious consequences (particularly, as here, the suspension of elected officials and the dissolution of elected bodies and an effect on non-charged elected representatives) that the CCC ought be required, before authority is given to any police officer to charge, to obtain approval or a recommendation to do so from the DPP or some independent senior legal advisor.

99. The Committee may also consider commenting upon the practice of the Queensland Police Service seconding officers to the CCC and the length of such secondments. Limiting the time any individual officer may be seconded to the CCC may assist in preventing a culture from developing in which personal feelings or views of particular officers affect investigations and charging decisions more broadly.

100. The Measure suggested will help to improve the charging process, because the CCC would have to demonstrate to an independent senior person that there has been a proper and rigorous approach to charge selection, sufficiency of evidence and consideration of public interest criteria. Requiring the involvement of an independent check of this kind will also help ensure the impartial character of the ultimate decision.

Limits on tenure and regular refreshment of secondments

PROPOSED MEASURE 2 – NON-RENEWAL OF FIXED TERMS

Consideration should be given to amending the *Crime and Corruption Act 2001* to provide for a single non-renewable appointment for the Chairperson; Ordinary Commissioners; and Senior Officers of the Crime and Corruption Commission, not exceeding seven years.

101. We note that the tenure of senior appointments to the CCC was also considered in some detail in the Committee's last Review of the Crime and Corruption Commission's activities at section 3.1 of its Report.[44] We do not repeat that discussion here, but respectfully submit it is particularly important in light of the evidence given to this Inquiry. We note, in particular, the Committee's comments, as follows:[45]

> The committee acknowledges the importance of attracting and retaining a high calibre of qualified and appropriately experienced staff, particularly at senior levels.
>
> The committee notes, however, that long-term tenures and limited changes at the executive level of an organisation can lead to a potential corruption risk and other issues relevant to a culture and environment of an organisation.

102. The Committee went on to recommend that:[46]

> … consideration be given to amending the *Crime and Corruption Act 2001* to provide for a single non-renewable appointment for the Chairperson and Ordinary Commissioners of the Crime and Corruption Commission, not exceeding seven years.

103. The Committee might consider that the evidence given to this Inquiry strengthens the case for single limited terms of appointment for those in all senior roles at the CCC. It is apparent, we submit, that the problem revealed by this Inquiry will not be cured by limiting only the terms of the Chairperson and Ordinary Commissioners. The 'issues relevant to a culture and environment' of the CCC, noted by the Committee in its last Review[47] are discussed, in the context of this Inquiry below. In our submission, they extend to the senior officers of the CCC. Therefore, the Committee may consider that

44 Report No. 106, 57th Parliament, Parliamentary Crime and Corruption Committee June 2021.
45 Ibid, page 16.
46 Ibid, Recommendation 4.
47 Ibid, page 16.

its previous recommendation[48] for term limits should be considered for all senior officers of the CCC.

104. Limiting terms for these most senior appointments to medium duration, non-renewable periods may help guard against institutional capture, and serve to maintain a culture, from the top of the organisation, that enforces independence, detachment and reflection and acts as a check upon zealousness by, in particular, investigating police officers and others who will, from time to time, become too close a particular case.

PROPOSED MEASURE 3 – SECONDED POLICE OUGHT BE ROTATED MORE REGULARLY

Consideration should be given to limiting the duration and repetition of secondments by police officers to the CCC.

105. The evidence revealed a degree of 'group think' or 'pack' culture amongst the police officers connected with Operation Front; a culture in which each supported the other, even in judgments which were plainly poor. The clearest example of this is their unjustified allegations against the Administrator and their (unsuccessful) attempt to have her removed. They were too close to the Operation and lost sight of the duties to act impartially and independently in their pursuit of Ms Kelsey's cause. The refreshment of members of such Operations by more regular rotations into and out of the CCC from the Police Service will serve to minimise this.

106. By limiting the duration and repetition of secondments by police officers to the CCC, such 'group think' might be avoided, the propriety of the investigative and charging roles maintained, and the occasion for their confusion or abuse reduced.

[48] Ibid, Recommendation 4.

Dissemination of information

PROPOSED MEASURE 4

Consideration should be given to imposing greater statutory limits on dissemination of confidential and sensitive information by the CCC.

107. Amendments were made in 2018 to ss 60 and 62 of the CC Act substantially to widen the circumstances in which the CCC might lawfully disseminate information. The dissemination of material to LCC on 3 October 2018 was subject to the regime before its amendment; the 19 November 2018 delivery was after those amendments.

108. There was laxity in these disseminations: on 3 October 2018 because of the lack of a dissemination authority and because material to which legal professional privilege likely attached was released; and on 19 November 2018 because the request for authority to disseminate was not complete in disclosing all the reasons for it. This lack of propriety shows an institutional attitude to sensitive and confidential information that requires tighter controls. The problem is shown also by the CCC's insistence that these matters did not require a report of improper conduct to be made to the Committee under s 329 of the CC Act.

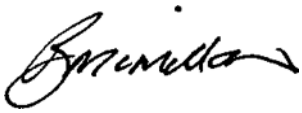
Problems with culture

109. This Inquiry has revealed problems in the culture of the CCC: in the cohort of police officers involved with Operation Front; in the processes for which important decisions with significant consequences for democracy are made; in the independence and competence of those providing legal advice in relation to those decisions; in the failures of senior management to insist upon proper and rigorous processes; and in the willingness to recognise before this Inquiry that anything went substantially wrong.

110. Culture cannot be corrected by the making of isolated Measures or legislative reforms. A positive and healthy culture must come from the top. Impartiality, independence, and fairness are requirements which the Chair and senior officers of the CCC must enforce and inculcate in those within the organisation.

111. The evidence given to the Inquiry reveals a clear refusal on the part of the current CCC leadership to acknowledge these cultural problems and deal with them appropriately. The Committee may consider that the necessary change in culture is unlikely to occur in that context.

JONATHAN HORTON QC



BEN MCMILLAN

Counsel Assisting

29 September 2021

PARLIAMENTARY CRIME AND CORRUPTION COMMITTEE

INQUIRY INTO THE CRIME AND CORRUPTION COMMISSION'S INVESTIGATION OF FORMER COUNCILLORS OF LOGAN CITY COUNCIL; AND RELATED MATTERS

SCHEDULE TO OUTLINE OF SUBMISSIONS OF COUNSEL ASSISTING DATED 29 SEPTEMBER 2021

Evidential Underpinnings for Available Findings and Proposed Measures

1. In this Schedule, we set out the factual underpinnings from the evidence given to the Inquiry, which render the Available Findings and Proposed Measures identified in the body of our submissions open to the Committee.

Appointment of Ms Kelsey

2. The LCC appointed Ms Kelsey as its CEO on 2 June 2017. She had worked for Councils in South Australia and with the Independent Broad-based Anti-corruption Commission in Victoria. Ms Kelsey had been admitted as a lawyer in South Australia. She commenced work at the LCC on 26 June 2017. Soon after doing so, Ms Kelsey made contact with the CCC and met with its Chair, Mr MacSporran QC, for about an hour on 11 September 2017. No notes were taken of that meeting (at least by the CCC) and only Mr MacSporran QC and Ms Kelsey were present. That meeting came against the background of the CCC's interest in local government and what it styled 'Operation Belcarra'. The CCC published its report into that Operation on 4 October 2017. It identified what the CCC saw as widespread non-compliance with legislative obligations relating to local government elections and political donations, which it attributed to 'a deficient legislative and regulatory framework'.

3. Ms Kelsey's employment contract with LCC included a probation period of 6 months, during which her employment could be terminated without cause or reason. A document styled 'Probation conversation report' was prepared within the LCC and a meeting convened on 10 October 2017 at which time that report was given to her. That meeting was attended by Ms Kelsey, the 'Mayoral Cabinet' consisting of the Mayor, the Deputy Mayor and the City Treasurer. The report raised concerns with Ms Kelsey's performance as CEO.

Probation process and the PID

4. On 12 October 2017 Ms Kelsey made a Public Interest Disclosure (**PID**). It took the form of a letter of that date from her solicitors Minter Ellison lawyers to the Chair of the CCC and to the Mayor and Councillors of LCC. In brief terms, the PID alleged that the Mayor had failed to disclose a personal relationship with a Council employee and that he had intervened with her appointment in a way that adversely affected the LCC's function, and that the Mayor was not honest or impartial in that regard, and that he had a conflict of interest. The letter to the Mayor and Councillors alleged inappropriate joint travel by the Mayor and the Council employee. It also complained about what was called the 'purported probation review' arising from the 10 October 2017 meeting and the 'Probation conversation report'. Ms Kelsey claimed that the Mayor intended to retaliate against her in relation to her employment, including because of his dissatisfaction with Ms Kelsey's treatment of the named Council employee.

5. On 17 October 2017, essentially the same allegations were made on Ms Kelsey's behalf to the Director-General of the Department of Local Government, who referred them to the CCC pursuant to s 38 of the CC Act.

6. On 1 December 2017, Ms Kelsey commenced proceedings against the Council and its then Mayor in the Queensland Industrial Relations Commission, alleging contraventions of s 285 of the *Industrial Relations Act* 2016 (Qld) and s 48 of the *Public Interest Disclosure Act* 2010 (Qld) (**PID Act**). The Mayor was restrained from taking part in any resolution by the Council in respect of Ms Kelsey's employment by order of the QIRC on 1 February 2018.[1]

7. Ms Kelsey's employment was terminated on 7 February 2018 by vote of the Council; 7 Councillors voted in favour of termination, and 5 voted against. The Mayor did not vote. Ms Kelsey's employment as CEO was brought to an end by the giving of two weeks' notice.

Initial involvement by the CCC

8. Before the vote, by letter dated 5 February 2018, Mr MacSporran QC wrote to each of the LCC Councillors, referring to the meeting scheduled for 7 February 2018 to consider Ms Kelsey's employment, and 'strongly recommend[ed]' that any resolution voted on by

[1] *Kelsey v Logan City Council* [2018] QIRC 009.

a Council be carefully considered in light of certain matters including the protections afforded to those who disclosed matters to the CCC for the performance of its functions, the ability of the CCC to make applications to the Supreme Court for injunctions, and offences in the PID Act for reprisal acts taken against a discloser.[2] On 6 February 2018, Minter Ellison wrote to the Council's lawyers, seeking an assurance that no adverse decision would be made about her employment, among other matters. Ms Kelsey spoke with the Chief of Staff to the Local Government Minister of 6 February 2018 and notes of that meeting were sent to the Chair of the CCC on 20 February 2018.[3]

9. Mr MacSporran QC charged his Director of Legal Services, Mr Rob Hutchings, with management of the CCC's monitoring of the QIRC proceeding.[4] Mr Hutchings dealt regularly with Mr Dan Williams, a partner of Minter Ellison, who acted for Ms Kelsey in that regard. On 23 February 2018, Mr Hutchings communicated the 'considerable sympathy' which the Chair and the CEO of the CCC had for Ms Kelsey's position. Mr Williams informed Mr Hutchings that his client would seek reinstatement to her position as CEO of the LCC. It was the CCC that 'reached out' to Mr Williams.

10. On 26 March 2018, the Mayor was charged with perjury, official corruption, failure to correct a register of interests and was later committed to stand trial on those offences under s 92A of the Criminal Code. Those charges have not been finalised and nothing more is said of them in our submissions.

11. On 12 April 2018, Minter Ellison wrote to Mr Hutchings seeking the CCC's assistance and requesting it utilise its powers to intervene in the QIRC matter and provide evidence in it, alternatively, to provide relevant information to the QIRC directly, and to provide them (Minter Ellison) with information that may assist Ms Kelsey and so that it could be provided to the QIRC. A suggestion was made by Minter Ellison that Ms Kelsey could seek various formal notices for this to occur if required. The letter went on to 'justify' the CCC's involvement and asserted Ms Kelsey had no income source, nor access to income protection or assistance for funding her legal proceedings.[5]

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2 Table Bundle No. I pp 49-50.
3 Table Bundle No II pp 1-4.
4 Hansard 6 September p 5.
5 I pp 63-64.

12. Mr Hutchings reported regularly to Mr MacSporran QC about developments in the QIRC proceeding and in his dealings with Mr Williams.[6]

13. Ms Kelsey sought and was granted interim reinstatement by the QIRC, but that was set aside on appeal only 7 days later.[7] Minter Ellison wrote to Mr Hutchings on 15 May 2018 and said it would be 'of great assistance' if the CCC could provide documents evidencing alignment between the Mayor and 7 Councillors who had voted in favour of Ms Kelsey's termination and documents in which those individuals had discussed her employment, probation, termination or otherwise.[8] Discussions ensued between the CCC and Minter Ellison about the method by which a process might issue to the CCC to compel the provision of material to the QIRC. On 25 May 2018, Mr Williams asked if there was a particular time he could seek to issue the notice would result in the CCC not rejecting it. Mr Hutchings passed on that request to Ms McIntyre and Mr Alsbury.

14. A telephone conference took place on 31 May 2018 about this and related matters. Mr Williams asserted a common interest with the CCC 'in protecting Sharon' and a more general interest to ensure public interest disclosers are protected and seen to be. Mr Williams said he did not have access to documents or material which contradicted what the Councillors had said about the extent to which they were influenced by the Mayor. Mr Hutchings agreed there was a common interest but said it was '*probably broader than just Sharon's interest*'. He described it as '*central to ... what we're doing*'. Mr Hutchings told the meeting that '*the organisation is very motivated to assist Sharon*'. He said that the meeting was more of an exercise of the CCC listening to what [Minter Ellison] particularly needs rather than the CCC being able to tell Minter Ellison exactly what it has. Mr Williams then stated a desire to have '*from any source*', documents that '*demonstrate that the Councillors, contrary to what they have sworn in their evidence to date, ... did collaborate and perhaps collude ... in relation to the ... decision to terminate Sharon's employment*'. Mr Hutchings said '*there will be material we will be able to provide to you*'. It was not a question of willingness, '*it's just a question of when*', Mr Hutchings said. He went on: '*I am certainly ... keen to try and motivate the hierarchy*

6 Hansard 6 September p 5.
7 See order of Thompson IC [2018] QIRC 053 and subsequent decision of Martin J [2018] ICQ 006.
8 I p 79.

here to assist as soon as possible' and '*whether or not it causes a problem we will comply with it*' and that '*we're willing to help*'.

15. Mr Hutchings was clear in his oral evidence to the Inquiry that there was such a common interest and that he had a mandate to help Ms Kelsey.[9]

QIRC issues a Notice of Attendance to Produce

16. A Notice of Attendance to Produce (**the Notice**) issued at the request of Ms Kelsey from the QIRC to the CCC on 28 June 2018. That Notice sought production of documents more or less in the terms of Minter Ellison's letter of 15 May 2018. Although the CCC could lawfully have declined to produce the documents sought by the Notice, it resolved to comply for reasons which included, as DI Preston said, '*we should be doing everything within our power to support this hearing*'[10] and, as Mr Hutchings advised '*[s]uch proceedings are clearly connected with our corrupt conduct jurisdiction in light of s.49 PID Act as corrupt conduct is one possible element of a reprisal*'[11].

17. The CCC acted promptly in preparing the material in response to the Notice. This occurred against the background of concerns at the CCC that the hearing would proceed without all the relevant evidence being available to the QIRC.[12] A dissemination authority was given by Mr Caughlin (Acting Official Solicitor) for the provision of these documents to the QIRC.[13]

18. The documents which were ultimately produced appear in the Schedule to Mr Caughlin's letter to the QIRC of 5 July 2018.[14] There were 8 categories of material, the first three of which were print outs of WhatsApp group communications and an extraction report. The other documents produced were the transcripts of CCC investigative hearings (conducted using the CCC's coercive powers), exhibits produced at them, telephone intercepts, call transcripts and files seized from the LCC pursuant to warrants. Mr Caughlin's letter stated the CCC was able '*to assist the QIRC to determine the relevant facts in relation to the litigation*' being mindful of the nature of the litigation and what

9 Hansard 19 August p 3 point 8.
10 I p 116.
11 I p 117.
12 I p 115.
13 I p 212.
14 I pp 219 – 225.

were said to be 'common issues' between that litigation and the current CCC investigation.

19. Lawyers for the LCC objected to production of the CCC documents and wrote to the CCC seeking confirmation that the CCC would not produce the documents subject of the Notice until after the objection was determined by the QIRC. The objection was dated 4 July 2018 and alleged that the Notice amounted to an abuse of process because it improperly sought to obtain documents by way of the CCC's investigative powers and not the curial processes available in the proceeding. The CCC, despite the objection, produced the material to the QIRC Registry.

20. Mr Caughlin advised on 4 July 2018 that he believed it remained in order for the CCC to produce the material under the Notice. He said '*there would appear to be no issue with us producing the documents as proposed*'.[15]

21. On 5 July 2018, the CCC advised the Councillors' lawyers that it would lodge the documents with the QIRC later that afternoon, despite the objection. An enquiry was later made by the Council lawyers of the CCC seeking clarification whether, before service of the Notice, the CCC had voluntarily advised Ms Kelsey of the existence of the documents the subject of the Notice. Mr Alsbury replied to that request on 10 July 2018 and stated that the CCC had not advised Ms Kelsey or her representatives of the existence of the documents the subject of the Notice. This was the subject of investigation by the Inquiry. There is no evidence to suggest that Mr Alsbury's statement was not correct.

22. The CCC complied with the Notice on 5 July 2018, producing to the Registrar the material referred to in the Schedule.[16] Mr Alsbury gave a dissemination authority for the production.[17]

23. The request for dissemination authority made by Ms McIntyre[18] and the covering letter[19] signed by Mr Caughlin that accompanied the production to the QIRC, asserted that the WhatsApp document produced revealed alignment between the Mayor and Councillors as pleaded by Ms Kelsey and denied by the Councillors in the QIRC proceeding. Senior

15 I p 212.
16 I pp 219 – 225.
17 I pp 217-218.
18 I pp 213-216.
19 I p 212.

lawyers at the CCC including Mr Hutchings, Mr Alsbury, Mr Caughlin and Ms McIntyre, sought to justify the production of this material to the QIRC and distinguish Justice Atkinson's ruling in *Flori v Commissioner of Police* [2014] QSC 284. That decision otherwise applied as authority for the proposition that material of the kind proposed to be produced to the QIRC that was obtained by the exercise of compulsory power, should not be available for collateral use in other proceedings) on the basis that the warrants by which the CCC had obtained the material to be produced were issued under the CC Act, not under the *Police Powers and Responsibilities Act* (as was the case in *Flori*); because the CCC had power (under s 62 of the CC Act) to use and deal with information and documents in performing its functions; because provision of the material was justified because of their view that sworn evidence in the QIRC proceedings appeared to be directly contradicted by the WhatsApp evidence; and because the WhatsApp evidence was relevant to a matter in issue in those proceedings. [20]

24. Mr Hutchings assisted in the preparation of the request for a dissemination authority. He recorded his thoughts about that in an email of 7 June 2018 to Mr Alsbury and Ms McIntyre. He expressed the 'hope' that the WhatsApp material could be disseminated the next day, noting that timing to have forensic advantage to Ms Kelsey and the overriding concern being one of urgency for her sake.[21] He went into some detail, he said, to 'justify why we are giving the material to the parties who are likely to use them in the civil matter'. It is he who seems to have included the assertions about why *Flori* was distinguished.[22]

6 August 2018 meeting with Ms Kelsey and after

25. On 6 August 2018, a meeting took place between Ms Kelsey, Mr MacSporran and Mr Alsbury in Mr MacSporran's office. It was arranged at short notice.[23] Ms Kelsey claimed to be 'in dire straits' as needing 'support to go through this process' and asserted that 'every day that goes by, the case gets stronger'.[24] She said she was looking at making another reinstatement application and is recorded as saying '*if gets reinstated – makes it*

20 I pp 97; 117-121; 187-191; 195-221; 249-251.
21 See also oral evidence on this point - Hansard 18 August p 70.
22 I p 97.
23 I p 283.
24 I p 277.

feasible'.[25] Mr MacSporran QC recalled this as being referable to her (Ms Kelsey) being financially able to carry on with the QIRC action.[26]

26. Mr MacSporran QC is noted as asking whether Ms Kelsey had requested an *ex gratia* payment from the government and as saying '*we will revisit the issue of what we can do (ie whether we can become a party)*'.[27]

27. The next day, on 7 August 2018, Mr MacSporran QC wrote to the Minister for Local Government with this request:[28]

> … I have decided to take the unusual step that the Government give consideration to funding Ms Kelsey's representation by way of a special payment … .

28. The request was declined. That letter was sent on 8 August. That same day, Mr Hutchings and Mr Williams spoke. No note of that conversation was taken by Mr Hutchings. Mr Hutchings said he told Mr Williams what he and Mr MacSporran QC had spoken about that afternoon, but he could not remember what they spoke about.[29] Mr Williams is noted in Mr Hutchings' email as being 'very appreciative' of the efforts Mr MacSporran QC had made (presumably referring to the request to the Minister for funding for Ms Kelsey). Mr Hutchings then recorded that Mr Williams was 'especially interested' in the appointment of an administrator as the only practical solution now.[30]

29. The oral evidence about this was not clear.[31] It is necessary, therefore, to rely principally on the contemporaneous documents. On 8 August, Mr Hutchings likely asked Mr Docwra, who worked under him as a lawyer, to do some research.[32] It concerned the subject matter '*automatic suspension of Councillors for disqualifying offences, reprisals and quorums for local government meetings*'.[33] The email mentions s 408C of the Criminal Code and that a quorum is a majority of Councillors. Mr Hutchings asked Mr

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25 I p 278.
26 Hansard 17 August p 11 point 7 and p 56 point 8.
27 I p 278.
28 I p 291-292.
29 Hansard 19 August pp 26-27.
30 I p 293.
31 Hansard 19 August pp 26-27 (Mr Hutchings could not remember what he spoke about with Mr MacSporran); Hansard 19 August pp 58-59 (Mr MacSporran did not know what prompted Mr Hutchings' email).
32 Hansard 19 August pp 27-28.
33 Tabled Bundle No II p 9.

Docwra to forward his email about these matters to Mr MacSporran QC, '*touching upon the issues you both discussed yesterday*'. Mr MacSporran QC received the email.[34]

30. On 24 August 2018, Industrial Commissioner Black set aside the Notice.[35]

31. Mr Hutchings did not read Black IC's decision until asked to do so in the course of the public hearings.[36] The decision was delivered on a Thursday. On the following Monday afternoon, Minter Ellison sent a copy of the decision to Mr Hutchings saying:[37]

> We are considering options, one of which may be to request the CCC exercises different powers in relation to the documents.

32. The following day, Minter Ellison suggested to Mr Hutchings that it may be open to the CCC to consider its standing to appeal, given the potential impact of the decision on the CCC's powers. This request was then made:[38]

> We also ask that the CCC consider providing the documents to the LCC and/or the individual Councillors.

33. Mr Albury wrote to Mr Hutchings expressing confusion about what was being suggested in the email just quoted. Context and later events make clear that it was a request to put 'the documents' into the hands of the Council or Councillors so that they would be obliged to disclose them in the QIRC proceeding to Ms Kelsey. At that stage, 'the documents' being sought were those produced to the QIRC by the CCC on 5 July 2018[39] and subject to Black IC's decision.

34. On 3 October 2018, DS Francis delivered to the Acting Chief Executive of the Logan City Council (Mr Silvio Trinca) certain documents. They were extraction reports from the mobile telephone of the Mayor evidencing a number of WhatsApp chat communications between him, Councillors and others. All but one of the chat transcripts had previously been produced to the QIRC on 5 July 2018 and were the subject to Black IC's decision. There was no covering letter and no other formal documentation prepared

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34 II p 9.
35 *Kelsey v Logan City Council* [2018] QIRC 108, see esp. [153], [155], [156] and [158].
36 Hansard 19 August p 4.
37 I p 330.
38 I p 330.
39 See covering letter and schedule of documents at I pp 221-225.

in connection with the delivery. There was no dissemination authority nor any request for one.

35. The exchange which occurred between DS Francis and Mr Trinca on that day was recorded and transcribed. The purpose of the delivery was explained in the recording and by DS Francis when he gave oral evidence as being twofold: to seek a statement from Mr Trinca as to whether the documents concerned council business and; because they were documents considered to be ones which the Council ought have within its records. Before that delivery, CCC police had met with representatives of the State Archives office (on 25 September 2018) and considered that the WhatsApp messages ought to be provided to and kept by the Council pursuant to the *Public Records Act*.[40]

36. The material delivered to Council on 3 October 2018 included some communications which were, at least potentially, protected by legal professional privilege. They were communications between the Mayor and his solicitor, a partner at Gadens Lawyers. DS Francis said in oral evidence that he did review the documents for the purpose of ascertaining if legal professional privilege did apply. DS Francis made that assessment on the basis that the communications lacked formality.[41] He is not a lawyer. He did indicate that a police officer who might have had some legal training had been consulted.[42] In any event, DS Francis was clear on this point:[43]

> … it was clear to me from the very outset, it was not legal professional privilege. Rather, it was critical evidence in regards to the fraud investigation and a public record.

37. The documents delivered on 3 October were recalled by the CCC. DS Francis emailed the Council's lawyers on 9 November at 6:04am, seeking return of the documents.[44] That request mirrored one made the preceding morning to Mr Trinca.[45] These requests came after advice from Council's solicitors that Mr Trinca considered it inappropriate to make any determination relating to the WhatsApp communications provided to him.

38. The documents were delivered back to the CCC on 9 November.

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40 See for example I p 347.
41 Hansard 20 August p 51.
42 Hansard 20 August p 51.
43 Hansard 20 August p 50.
44 I p 407.
45 I p 408.

39. Ms McIntyre, the lawyer attached to the Operation Front investigation team, was on leave on 3 October 2018 and was not consulted about the proposed delivery of documents to LCC before it occurred.[46]

40. On 15 November 2018, Minter Ellison wrote to the CCC (copied to Council's solicitors) referring to an 'outstanding' application for disclosure by Ms Kelsey. Reference was made to correspondence from Council's solicitors said to indicate that the documents provided to the Council by the CCC *'[which] were thus in the [*Council's*] possession at the time our client made her application for disclosure, have since been returned to the CCC'*. This request followed:[47]

> So that the [Council] can if ordered comply with its disclosure obligations and so that Ms Kelsey's application is not defeated by the divestment of relevant documents by the [Council] in the face of an unresolved disclosure application, our client requests that the CCC please return the documents, or copies of the documents, to the [Council].
>
> We ask that the CCC do so **before Tuesday 20 November 2018,** which is the date this matter is again listed before the commission.'
>
> [emphasis in original]

41. Mr Alsbury indicated at 9.17am that morning that he had no problem sending the documents back but that he thought there would be a need to make sure there was a proper written dissemination authority and the versions with potentially legal professional privilege material were sent.[48]

42. Questions were raised upon Ms McIntyre's return from leave about the circumstances in which the documents had come to be delivered to Council on 3 October 2018. Ms McIntyre made enquiries of the police officers and referred to becoming aware on 15 October 2018, that a number of WhatsApp extraction reports had been provided to the Council on 3 October 2018. Her email of 16 October 2018[49] records that she was not aware there had been any decision for this material to be provided until there had been further consideration whether there was a breach of the *Public Records Act*. She recorded an understanding that, whilst there may be such a breach, this was not corrupt conduct. Her view, as expressed in that email, was that even if it were considered there had been

46 Hansard 19 August p 65.
47 I p 415.
48 I p 417.
49 I p 375.

such a breach, this material ought to have been 'formally disseminated'. By that can only be meant that there be a written dissemination authority.

43. Ms McIntyre enquired of the police officers where the decision to provide this material is recorded, whether any formal dissemination was prepared, and whether a covering letter was provided. The ultimate response from Acting DI Andrews was that the decision is recorded in emails, that no formal dissemination authority was prepared, and that there was no covering letter. That is correct.

44. About this time that DS Francis had in mind building a case (to use his words) against the 7 Councillors for misconduct for the use of WhatsApp. He told others by email on 29 October 2018:[50]

> I am keen to build a case against all the Fab 7 for Misconduct for the use of WhatsApp. This advice from state archives affirms the view that Whatsapp is a public record.

45. Ms McIntyre expressed concerns to a more senior lawyer, Mr Kennedy, on 15 November 2018 that there were communications which may be subject to legal professional privilege and mentioned taking a conservative approach by possibly redacting certain communications that may be considered so privileged.

46. Minter Ellison wrote to Council's lawyers on 19 November 2018, asserting it was '*inappropriate for your client to divest itself of documents which are relevant to the current proceedings and which were subject of an unresolved application for disclosure*.' Mr Williams's email records him having asked the CCC to return the documents to the Council's solicitor's office so that Council could comply with its obligation to disclose them. Mr Williams email is based on a misunderstanding: the Council had not divested itself of the documents: it was DS Francis who sought their retrieval.

47. On 16 November 2018, Minter Ellison emailed the CCC and referred to correspondence of 15 November 2018 stating it would be of 'great assistance' if the documents could be returned to Council given the matter was listed before the Commission on 20 November 2018.[51]

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50 I p 382.
51 I p 421.

48. On Monday 19 November 2018, Mr Williams left a voicemail for Mr Hutchings (which was accessed by him) saying '*we've got this issues that the council are resisting disclosure of those WhatsApp documents … because they say they've handed them back to you'*.[52] Mr Hutchings communicated this to Mr Alsbury just before midday. An application for dissemination authority was prepared by Ms McIntyre and signed by Mr Alsbury that same day. The dissemination authority gives as the only 'reasons' for the dissemination, that the WhatsApp communications are '*public records as defined under the Public Records Act*'.[53]

49. Ms McIntyre accepted that 'one purpose' and a 'side effect' of the dissemination was to put the documents in the hands of council so as to render them susceptible to disclosure in the QIRC proceedings.[54] Mr Hutchings agreed that '*one of [his] material reasons for acting as [he] did was that these documents ought be before the QIRC by way of disclosure obligations in order to help correct the imbalance*'.[55]

50. Ms McIntyre accepted that the request for the dissemination authority, under the heading 'reasons', did not identify this other purpose or side effect, and she accepted that she should have included it.[56]

51. On 19 November 2018, documents were delivered to the LCC under cover of a letter from Mr Alsbury stating (among other things) 'I enclose the documents requested'.[57]

52. The only request that had been made in relation to the documents was from Minter Ellison. The letter otherwise only refers to the delivery of the documents being for the purpose of the *Public Records Act.* It makes no reference to documents being delivered for any other purpose.

53. The documents delivered to the LCC on 19 November 2018 were largely the same as those delivered by DS Francis on 3 October 2018. The differences were:

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52 I p 424.
53 I p 428.
54 Hansard 20 August p 13.
55 Hansard 19 August p 13.
56 Hansard 20 August p 13.
57 I p 432.

a. certain content, including communications between the Mayor and his solicitor, was redacted on the grounds of it being material to which legal professional privilege attached;

b. the addition of raw data relating to WhatsApp communications extracted from the mobile phone of Cr Dalley (some of which were the same communications as previously extracted from the Mayor's phone); and

c. an additional extraction report of WhatsApp exchanges between the Mayor and the Council's solicitor (unredacted).

54. A substantial portion of the documents delivered to the LCC on 19 November 2018, (including, notably, the bulk of the communications between the Mayor and Councillors) had been previously produced to the QIRC and were the subject to its ruling on 21 August 2018.

55. On 4 December 2018, Ms Kelsey withdrew her application for disclosure against the respondents in the QIRC, including the LCC. The CCC was unaware this had occurred. It came to the CCC's attention because, on 12 February 2019, Mr Alsbury had written to Mr Trinca advising that the CCC is '*closely monitoring the matter*'. Mr Alsbury drew Mr Trinca's attention to the requirements of the *Industrial Relations (Tribunals) Rules* 2011, and his view that those rules required the LCC to disclose the documents delivered on 19 November 2018 as they were relevant to the proceeding or a matter in issue in the proceeding.[58]

56. Mr Alsbury requested that the LCC advise whether it intends to make disclosure.

57. On 14 February 2019, in response to the letter just mentioned, LCC's solicitors advised the CCC that Ms Kelsey's lawyer had been instructed on 27 November 2018 to withdraw her interlocutory application for disclosure against the respondents. Mr Hutchings expressed surprise, suggesting to Mr Alsbury and the Chair, as well as others, check with Ms Kelsey that this was 'kosher'.[59]

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58 I p 465.
59 I p 495.

58. Developments had occurred in the meantime in relation to the *Public Records Act*. On 5 February 2019, the State Archivist requested dissemination by the CCC to his office of the WhatsApp messages that were thought to be public records. That same day, he provided the CCC with a copy of his final report. He said he considered the identified messages to be '*transitory public records and public records requiring capture into an Official Council system ...*'. On 25 February 2019 Mr Trinca wrote to Mr Alsbury referring to earlier correspondence of 7 February from Mr Alsbury which had drawn Mr Trinca's attention to the recommendations of the State Archivist and the proper management of such records created. Mr Trinca advised that the extraction reports had now been saved to Council's document management system in accordance with the *Public Records Act.*

59. The oral evidence as to the purposes of the delivery on 19 November 2018 from Mr Hutchings was to the effect that the *Public Records Act* purpose and seeking to have the LCC disclose the documents to Ms Kelsey in the QIRC were 'complementary'.[60]

60. Mr Alsbury denied the true purpose of the delivery was to put the documents back in the hands of the council so they might be susceptible to being disclosed in the QIRC.[61] He said that the CCC was still concerned about public records issues, which are articulated in the correspondence dated 19 November 2018. It was put to him that his evidence in this regard must be false because of his letter of 12 February 2019 which reminded the LCC of what he considered to be its disclosure obligations. He denied that assertion.[62]

61. Mr Alsbury placed reliance upon the State Archivist having given an opinion about the WhatsApp records being public records. The CCC, in its second submission to the Inquiry, of 6 September 2021, pointed to the letter of 25 February 2019 from the State Archivist as being important.

62. Ultimately, some WhatsApp records of Councillor Dalley were admitted into evidence in the QIRC. That was because the CCC had delivered to her extracts of those records taken from her telephone under warrant. In the course of QIRC's reasons, finally

60 Hansard 19 August p 13.
61 Hansard 18 August p 32
62 Hansard 18 August p 32

disposing of Ms Kelsey's action, Vice President O'Connor considered those messages and made findings about them.[63]

Charging of Fraud

63. DS Francis was the 'case officer' in respect of the criminal investigation. He reported ultimately to Mr Alsbury.

64. From the commencement of the investigation, at least insofar as it related to the Mayor, there was consideration of charging fraud.

65. On 7 September 2018, DI Preston sent a memo to DSS Andrews about considering a further charge against Mayor Smith under s 92A of the Criminal Code. A detailed evidence matrix was attached addressing the limbs of that offence and the considerations which attended each as well as the evidence referable to them.[64]

66. Exchanges took place internally within the CCC. Various views were expressed.[65]

67. Ms McIntyre commenced preparation of a 'Legal Advice – Observations'[66] document sometime in the week of 7 December 2018.[67] That document was never finalised but the most complete draft of it (at about 14 December 2018) considers charges of misconduct in public office and of fraud. [redacted]. The memorandum concerns only Mayor Smith. [redacted] Ms McIntyre went on leave on 14 December 2018[68] and did not return until (she thought) 14 January 2019.[69]

68. An email was sent by Mr Alsbury on 9 January 2019 to Ms McIntyre and others at the CCC '*to ultimately obtain legal advice regard the prospects of success in relation to a charge in relation to the sacking of Kelsey*'.[70] Mr Alsbury hoped it could act as a catalyst for discussion 'next week' between the recipients of the email and himself, and ultimately

63 *Kelsey v Logan City Council & Ors (No.8)* [2021] QIRC 114 see esp. [769], [771] and [777]-[778].
64 II pp 17-26.
65 II pp 32, 35.
66 II p 43.
67 Hansard 20 August p 22.
68 Hansard 20 August p 22.
69 Hansard 20 August p 26
70 II p 59.

Mr MacSporran QC. Mr Alsbury pointed out there was a '*need to go beyond proving [the Mayor] is an unreasonable tyrant/control freak or that he has little understanding or respect for local governance protocols*'. He said that if 'we' cannot prove failing to perform a function of office or abusing the authority of office under s 92A, then '*we always have fraud (dishonestly causing a detriment) to fall back on*'.[71]

69. On 9 January 2019, Mr Alsbury sent a copy of this memorandum to Mr MacSporran QC.

70. A meeting took place on 30 January 2019 between Mr MacSporran QC, DS Reid, Mr Alsbury, DS Francis and Ms McIntyre. There is no detailed note of that meeting or what documents were before it. It would appear that a 16-page memorandum[72] prepared principally by DS Francis was one of the documents considered. It flagged discussion related to the following:[73]

- Overarching motive (*Control of LCC and Power*)
- Particulars related to *dishonesty and Attempt to Influence* LCC Councillors sic by mayor in supporting his motive
- To provide chronology to the above mentioned discussion points

71. Ms McIntyre's notes of that meeting records '*chair happy with evidence explained*'.

72. DS Francis' notes record:

> All content to charge. Authority by Chair provided.
> …
> Discussion re charge selection
> Settled on 1x fraud (Kelsey) [redacted]

73. On 30 January 2019 Mr MacSporran QC approved the charging of Mayor Smith with charges including fraud. The fraud charge '*dealt with the issues raised within the Kelsey PID and the subsequent influence of the Mayor in the termination of CEO Sharon Kelsey'*. This is the way subsequent memoranda record what had happened on that day as it relates to the fraud charge and the purported basis for that charge.[74]

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71 II p 59.
72 II pp 77-92.
73 II p 77.
74 See DS Francis's memo at II p 97 para 7.

74. Mr MacSporran QC explained what happened on 30 January 2019 as more properly being regarded as a paraphrasing of a decision by him to refer to a commissioned police officer the decision to whether to lay the 'approved' charges. The fraud charge, relevantly, was not laid until 26 April 2019.

75. DS Francis's original 16-page memorandum,[75] upon which the decision on 30 January 2019 to charge the Mayor with offences including fraud was based, did not contain any reference to, or systematic treatment, of the elements of that offence. It was not accompanied by any legal advice or documented consideration of how the evidence might prove fraud, particularly the element of dishonesty, or how it might negative potential inferences consistent with innocence of that charge.

76. DS Francis said of the memorandum '*the entire documents speaks to dishonesty, critically to the element of fraud*'. His recollection was that in drafting the document he was not yet settled on a particular offence, that a number of offences were under consideration, which included misconduct, reprisal and fraud. The memorandum was directed as suggesting dishonesty for the purpose ultimately of a charge of misconduct, reprisal or fraud and he considered the evidence sufficient for that purpose at this early stage.[76]

77. DS Francis principally prepared further memoranda bearing the date 25 March 2019 and one, 5 April 2019. The dates on each may not be precise because they were iterations of the first 16-page Memorandum, which DS Francis described as a 'download' on the issue of dishonesty. He said that he always thought that alleged conduct amounted to dishonesty and said his memoranda were all directed to that issue, namely dishonesty. His view was that the offence of reprisal did not speak adequately to the alleged offending or the nature of the alleged offending as it related to Ms Kelsey.[77] Mr MacSporran QC agreed with this in his oral evidence.[78]

78. The memoranda prepared principally by DS Francis do mention s 408C fraud. But they seem to be directed only to the Mayor's conduct, and not any alleged wrongdoing by the Councillors in that regard. They make no recommendations to charge the 7 Councillors

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75 II pp 77-92.
76 Hansard 20 August 2021 p 63.
77 Hansard 20 August p 64.
78 Hansard 17 August 2021 p 42.

with fraud and nor do they contain any considered analysis of the legal requirements of what constitutes dishonesty for the purposes of charging fraud or any structured consideration of the evidence that goes to prove it.

79. The memorandum concludes with a suggestion under the heading 'tactical considerations' about staggering the charging in the context of securing cooperation.[79]

80. Mr Alsbury on 3 April 2019 expressed reservations as to the alleged reprisal action against Mayor Smith.[80] He noted that Ms Kelsey's probation process had been started before her PID. In terms of the possible charges against the other councillors he stated that he did not think the case based on conduct leading up to the vote as framed by DS Francis reached the standard of beyond reasonable doubt. If each had decided to act on the PID to Ms Kelsey's detriment, he stated, there would be a need to prove each had resolved to continue up until the vote and after receiving legal advice not to act on the PID. Mr Alsbury pointed out that DS Francis had not dealt with the evidence of councillors during the coercive CCC hearings and he said most of the evidence he found to be convincing and 'at the very least' capable of raising a reasonable doubt. Reference is made (although not by name) to Councillor Schwarz who Mr Alsbury referred to as a 'standout' in that she had said she was not in favour of appointing Ms Kelsey in the first place so her vote to dismiss Ms Kelsey was a consequence of the view she (Cr Schwartz) had always held.

81. The memorandum ultimately considered by Mr MacSporran QC on 24 April 2019 was 54 pages in length.[81] It did not consider the charge of fraud (s 408C) in relation to any of the 7 Councillors, preferring against them only offences of misconduct or reprisal under the PID Act. Nor did it contain any structured consideration of the element of dishonesty or indeed any consideration of the evidence that might be admissible against each of the 7 councillors, individually, to prove dishonesty. It was not accompanied by any written legal advice or documented elemental analysis of how the evidence gathered in the investigation could establish that the Councillors were guilty of any offence involving dishonesty or that the Mayor was guilty of fraud.

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79 II p 141; Para 90.
80 II p 146.
81 II pp 257-310.

82. Mr MacSporran QC said such detailed advice and analysis was not needed.[82]

83. Mr Alsbury said that a legal observations document (such as the one Ms McIntyre commenced in draft but did not finish) would normally be prepared for the consideration of charges and how charges might be particularised. However, he said, he '*made a determination it was not necessary in the circumstances of this matter*'.[83] That is remarkable, especially in light of Mr Alsbury's evidence that 'legal observations are now done all the time' and he could not think of a matter that has come across his desk in the past few years that did not have legal observations.[84]

84. DSS Andrews said that 'most times' a memorandum such as DS Francis's recommending the consideration of charges would be accompanied by a legal observations document from a lawyer.[85]

85. Ms McIntyre said that, '*ideally, there would be a brief of evidence, a full brief of evidence, and my observations, but that was not the case here*'.[86] She thought that might have been because the brief of evidence was still being compiled and witnesses still to be interviewed when the charges were laid on 26 April 2019.[87]

86. The tactical considerations previously noted[88] as to the timing of charges persist in para 97 of DS Francis' 54-page memo.[89] The version considered by DI Preston, Mr Alsbury and ultimately by Mr MacSporran QC on 24 April 2019 considered the public interest test and 'standard of proof considerations' over little more than two pages.

87. The memorandum dealt with public interest considerations, but only ones which tended to favour charging.[90] The extent of the public interest considerations weighing against charging were these:

> Robust consideration is certainly warranted. The risk of reputational harm to persons of interest and the CCC is acknowledged.

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82 Hansard 7 September 2021 p 15.
83 Hansard 18 August 2021 p 39.
84 Hansard 18 August 2021 p 46.
85 Hansard 25 August 2021 p 73.
86 Hansard 20 August 2021 p 28.
87 Hansard 20 August 2021 p 32.
88 At [78] above.
89 II p 310.
90 II pp 309-310.

88. There is no mention at all of the effect of s 175K of the *Local Government Act*. The likely 'reputational harm' to the CCC is not equivalent or relevant in anywhere near the same way as it was in respect of those to be charged.

89. On 26 March 2019, before going on leave, DI Preston sent a memo[91] to Mr Alsbury about approval to commence proceedings against the 7 Councillors. He noted that a memo in relation to further charges against Mayor Smith was approved on 30 January 2019, however a decision was made not to proceed until his ex-wife, 'AMS' was in a position to sign a witness statement.

90. DI Preston's memorandum went on to say with evidence in the QIRC matter finalised, lawyers for Kelsey provided a submission '*lodged for determination on 2 May 2019*'. DI Preston wrote that '*[a] copy of the submission is attached for consideration and weighs heavily on actions against Kelsey which could be considered as reprisal*'.[92] No submissions made on behalf of other parties to the QIRC were referred to, and nor were they attached to the memorandum.

91. The memorandum of DI Preston stated that several points have been made in relation to evidence given to the QIRC hearing that would be considered as part of a verbal briefing.

92. On 23 April 2019, Mr Alsbury prepared a memo addressed to Mr MacSporran QC entitled 'Legal Advice – Operation Front'.[93] It was one of a number of attachments to a Chairperson's Cover Sheet[94] '*in relation to a request for approval to consider criminal charges against numerous alleged offenders*'. The facts were said to be relatively complicated and to have been set out in DS Francis's memorandum (which was attached) and also in the outline of closing submissions on behalf of Kelsey in relation to QIRC (also attached). Mr Alsbury stated he had not perused the transcript of evidence in the QIRC proceedings and that he was taking what was said at 'face value'.

93. Mr Alsbury said that the reasons given for Kelsey's dismissal as set out in the affidavits of the Councillors 'do not bear scrutiny'. He went on to quote from the submissions made by Ms Kelsey's lawyers. He expressly agreed with the categorisation of the

91 II pp 315-316.
92 II p 323.
93 II pp 319-322.
94 II pp 317-318.

conduct as '*an egregious example of corrupt public administration*'. Mr Alsbury was of the view it was in the public interest to pursue charges.[95]

94. The 'Chairperson's Cover Sheet' from Mr Alsbury was dated 23 April 2019.[96] It requested approval 'for the matter being referred to a police officer seconded to the CCC so that officer can consider whether or not to charge the relevant councillors (including Luke Smith).'

95. The Chair had already expressed his approval in relation to charges against Mayor Smith and that DS Francis had continued to consider evidence in relation to charges against Smith and councillors who voted for Ms Kelsey's dismissal. Mr Alsbury expressed in summary his view that the charges against Luke Smith '*clearly have reasonable prospects of success*'.

96. He went on to state that, in relation to the Councillors, there were reasonable prospects of securing convictions in relation to appropriate charges covering their criminality. He did express the view that the evidence in relation to the Councillors was not strong.[97]

97. Mr Alsbury's memorandum was marked 'urgent' and gave the date and time, presumably by which the approval was sought, as 'Midday', 26 April 2019. The form required details to be entered regarding reasons for urgency. No reasons were stated, and Mr Alsbury could not remember why he had marked it as 'urgent'.[98]

98. At that time, Ms Kelsey's QIRC proceeding was listed for the hearing of oral closing submissions on 2 and 3 May 2021. This fact was firmly known to the police officers. It was the subject of an email exchange between them. That exchange began relevantly on 15 March 2019 with Ms McIntyre writing to Minter Ellison and requesting the closing submissions that Ms Kelsey's lawyers had prepared.[99] Minter Ellison provided them.[100]

99. DS Andrews then emailed DI Preston, DS Beattie and DS Francis referring to the attached outline as being a 'must read'.[101] The response from DS Beattie to others

95 II pp 321-322.
96 II p 317-318.
97 II p 318.
98 Hansard 18 August 2021 p 43.
99 II p 95.
100 II p 94.
101 II p 93.

including DS Francis was emphatic agreement. He asked '*[w]hen is the QIRC decision?*'. DS Andrews emailed DS Beattie, DI Preston, DS Francis and Ms Roxas on 26 March 2019 at 1.15pm saying:[102]

> 2 May is set for submission in QIRC which will include this doc & who knows how long before a decision – I'm guessing months at least
>
> **We really need to pinch Smithy a decent portion of The Fab7 prior to 2 May.**
>
> [emphasis added]

100. DS Francis responded 11 minutes later saying 'Yup time critical'.[103]

101. The timing of the fraud charges and its motivation were put to numerous witnesses to test whether there was a desire in the CCC to charge the Councillors so that they would be disqualified and the Council dissolved in order to assist Ms Kelsey before the matter came before the QIRC for final submissions. The evidence on that topic appears at Hansard 26 August pp 10-11 (DS Beattie); Hansard 25 August p 62 (DSS Andrews); Hansard 20 August pp 66-67 (DS Francis); Hansard 17 August p 55 (Mr MacSporran QC).

102. On 24 April 2019, Mr MacSporran QC annotated the Chairperson's Cover Sheet:[104]

> I agree with the recommendation to charge Smith x 3 and the 7 relevant Councillors with one count of fraud as suggested.

103. Mr MacSporran QC suggested in his oral evidence this should be read, not as a direction or decision to charge, but as an approval to refer the matter to a seconded police officer for decision whether or not to charge the relevant persons. While the 'approval' certainly influenced the ultimate charging decisions made by the charging officer, DS Francis, it is open to the Committee to accept Mr MacSporran's evidence that his annotation on the Cover Sheet was not a direction to charge as noted but a referral to DS Francis to consider the charges noted.

104. On 26 April 2019, DS Francis arrested and charged each of the Mayor and 7 Councillors, relevantly, with fraud (s 408C). He said in his evidence that each had refused to cooperate, despite being given an opportunity to do so. It would appear that the

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102 II p 93.
103 II p 93.
104 II p 317.

opportunity to which reference is made was offered on 14 March 2018, in the context of the investigation of the Mayor only more than a year before charges were even considered against the Councillors; and again on the day upon which the Councillors attended the CCC and were charged. Councillor Schwarz gave evidence that she was told to attend the CCC office or they would send a police car to her. She could not recall ever being asked to engage in an interview.[105] The evidence suggests that it was on the day they attended to be charged that each were offered (and declined) interviews. An audio recording of Ms Schwarz's arrest confirms that her solicitor advised her not to participate in an interview and Ms Schwarz accepted that advice. Mr Lutton said in evidence that he was offered an interview (through his solicitor) only after he was to be charged. [106]

105. There is no evidence that, any time before 26 April 2019, any of the seven Councillors who were charged with fraud on that day, knowing it to be for that purpose, were offered an opportunity to take part in interview and to avoid being charged on that basis.

106. The effect of the charging was as follows:

    a. each accused was immediately suspended as a councillor upon being charged by operation of s 175K of the *Local Government Act,* because a charge under s 408C of the Criminal Code constituted a 'disqualifying offence': ss 153(4), (5) and (6) and Sch 1;

    b. because more than half the Councillors were so suspended, the Council itself, being unable to continue to constitute a quorum, was such that the Minister would inevitably and reasonably form the view that the Council '*is incapable of performing its responsibilities*', such that the Council ought be dissolved and an interim administrator appointed: *Local Government Act* s 123.

105 Hansard 26 August 2021 p 58.
106 Hansard 26 August 2021 p 52.

The Administrator

107. Ms Tamara O'Shea was appointed as Administrator of the Council by the Minister for Local Government on 2 May 2019.

108. She had previously been acting Director-General of that Department and was well regarded.

109. Mr MacSporran QC spoke by telephone with Ms O'Shea about Ms Kelsey's reinstatement. The evidence of O'Shea and MacSporran QC differs as to when the call occurred, which of them initiated that call, whether reinstatement was raised as a suggestion by MacSporran QC or, to use the word Ms O'Shea word it was 'advocated'[107] for by him. The date upon which the call occurred is not material for present purposes: it seems likely to be either 17 May 2019 (MacSporran QC's evidence) or 29 May 2019 (O'Shea's evidence). Ms O'Shea said Mr MacSporran initiated that telephone call. Mr MacSporran QC recalls it as being the other way around. The Committee is invited to prefer the evidence of Mr O'Shea on this point over that of Mr MacSporran QC. Ms O'Shea made a note of the conversation within a week of it: Mr MacSporran made no note. It is consistent with the background and context that Mr MacSporran would have sought Ms Kelsey's reinstatement at or about that time. It is consistent also with what occurred next.

110. On 30 May 2019, police officers within the CCC engaged in email exchanges which were highly (and unjustifiably) critical of Ms O'Shea. DS Francis appears to have initiated those exchanges. DS Francis in an email of that date says his comments followed a discussion with Ms Kelsey yesterday (ie 29 May 2019). DS Francis alleged that the four Councillors were suffering detriment and that this continued under the hand of Ms O'Shea. She had not demonstrated a resolve, he said, to assist them and had not been 'dormant'. DS Francis made reference to 'strong views' expressed by the four Councillors (those who had not be charged with fraud on 26 April 2019) to him with regards to the disproportionate allocation of funding to favour only the electorates of the charged Mayor and Councillors. The email went on to allege, in effect, that the Administrator was favouring the Mayor and charged councillors and that Ms Kelsey believed her interim reinstatement was a matter for Ms O'Shea.

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[107] Hansard 26 August 2021 p 42.

111. DS Francis alleged that Ms O'Shea now, 'remarkably' advocates for the charged respondents, opposing Ms Kelsey's reinstatement. It was noted that Ms O'Shea had not, to the knowledge of the investigators, requested an 'audience with the CCC' to assist her role or convene a briefing with CCC leadership. DS Francis's email went through at least one draft. The Committee has before it two versions of the email. Each of the other police officers endorsed what DS Francis had written

112. The CCC drew to the Committee's attention the additional documents in this chain that were not within the bundles. That was done only after the police officers involved in the chain had given their evidence to the Inquiry. DI Preston, who in evidence[108] could not recall taking any active role, did in fact do so (and in a way that endorsed what was being suggested by the more junior officers) in an email of 30 May 2019 at 2.55pm.

113. Mr Mark Reid, in his capacity as Director of Corruption operations, sent DI Preston's comments, those of DS Francis and of DSS Andrews to Mr Alsbury and suggested the matter could be discussed with the Chair for his thoughts.

114. Ultimately, Mr Caughlin (in particular) and Mr Alsbury prevented the matter being taken further.[109]

115. The Administration continued under Ms O'Shea. Ms O'Shea said in evidence that she could find no evidence of voting blocs or trends amongst the former Councillor and the budget allocations were not ones which in her view showed any bias in favour of particular divisions.

116. Ms O'Shea was not given any notice of the serious allegations made against her by CCC officers and had no opportunity to respond to them until she gave evidence to the Inquiry.

CCC's view on assisting Ms Kelsey

117. From the outset, senior CCC staff held the view that there was a common interest between the CCC and Ms Kelsey. That view was informed, according to Mr MacSporran QC, by her status as a public interest discloser and CCC's perceived statutory responsibility to provide what assistance the CCC could.[110]

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108 Hansard 26 August 2021 p 46.
109 I p 589.
110 Hansard 17 August p 13 point 3.

118. The CCC had the power, under s 48(2) and 49(2) of the PID Act, to seek injunctive relief in the QIRC or the Supreme Court if certain conditions were fulfilled. Mr MacSporran QC said that the CCC did not join her action '*through sympathy for her*'.[111] He said that decision was one of the hardest he had ever made in his role because he had sympathy for her.[112]

119. Mr MacSporran QC came to hold firmer views and ones more favourable to Ms Kelsey over time. On 4 September 2019, at 5.46pm, Mr MacSporran QC emailed Mr Alsbury, Mr Hutchings, DI Preston and another as follows:[113]

> I am on leave from today but think we should do whatever we legitimately can to support Kelsey.

120. On 23 October 2019, Mr MacSporran said in response to an email from DS Beattie that (about other matters to do with Ms Kelsey and the PID Act):[114]

> … I am sympathetic to these issues, particularly in light of the Kelsey matter which I talk about as an outrage whenever I present publicly in this area.

121. Others within the CCC had views about assisting Ms Kelsey and the instruction from the Chair and senior CCC staff to do so:

    a. DS Francis considered there was a '*shared common interest with Minter Ellison … in respect to a QIRC hearing that was progressing*'.[115] He had '*empathy towards Ms Kelsey and her situation*',[116] empathy which, he said, was '*not dissimilar to that he has for any of his witnesses*', remembering, he said that his history was in the investigation of sexual offences against children;[117]

    b. Mr Hutchings considered there was an 'alignment' of interests between Ms Kelsey and the CCC.[118] His dealings with Minter Ellison were ones he took to be in discharge Mr MacSporran QC's instruction specifically to engage with Ms Kelsey's lawyers because, as he explained, '*of the attitude the Commission had*

111 Hansard 17 August p 13 point 6.
112 Hansard 17 August p 13 point 6-7.
113 I p 633.
114 I p 649.
115 Hansard 20 August p 42 point 9.
116 Hansard 20 August p 65 point 7.
117 Hansard 20 August p 65 point 7.
118 Hansard 18 August p 63.

in respect of Ms Kelsey's circumstances'.[119] It was put to him that this was a mandate from the Chair. He agreed;[120]

c. Mr Hutchings considered there to be a 'very significant imbalance'.[121] That imbalance he saw arose from there being '*some suggestion or at least a perception that the evidence [the Councillors] are giving in the [QIRC] may not be truthful, should not be deciding upon their continued legal funding*'.[122] This was explored the following day with Mr Hutchings. He understood there to be an 'instruction' to help Ms Kelsey.[123] The imbalance, he explained, arose from his view that the Councillors had committed perjury in their affidavits filed in the QIRC.[124] He said that the imbalance he had to correct was unfairness in the Councillors having their legal representation funded by insurance. His view was that those who commit perjury ought not to be able to decide upon their continued access to insurance funded legal representation.[125] This view is wrong;

d. Mr MacSporran QC's oral evidence at the end of public hearings, on this topic, appears at Hansard 6 September pp 2 and 4.

The charges are dismissed

122. The Committal hearing on the charges commenced on 30 November 2020 and continued over 9 hearing days. On the ninth day, it was adjourned to the following year. The DPP invited and received submissions from each of the accused to why the fraud charges relating to the alleged detriment caused to Ms Kelsey ought not proceed.

123. Mr MacSporran QC wrote to Mr Heaton QC by a 20 page letter dated 2 February 2021, referring to conversations with Crown Prosecutors and to a meeting on 10 December 2020 at which the Crown Prosecutor Mr Green had shared his preliminary views.[126] The letter stated that *'[t]he CCC considers there are reasonable prospects of securing*

119 Hansard 18 August p 66-67.
120 Hansard 18 August p 67 point 1.
121 Hansard 18 August p 65.
122 Hansard 18 August p 65 point 6.
123 Hansard 19 August p 3.
124 Hansard 19 August p 45.
125 Hansard 19 August p 30.
126 II p 383.

convictions against the defendants' and requested a meeting with Mr Heaton QC before any decision was made.

124. On 6 April 2021, the DPP, Mr Heaton QC, prepared a memorandum (with the assistance of others) foreshadowing a decision to discontinue the charges of fraud against the Mayor and 7 Councillors on the grounds that '*there are insufficient prospects of success to justify continuing further*'.[127] Mr Heaton QC sent this memo to Mr MacSporran QC on 7 April 2021, and the two met on 9 April 2021 to discuss it.[128]

125. On 14 April 2021, a Magistrate dismissed all the fraud charges relating to the alleged detriment caused to Ms Kelsey and discharged the Mayor and all 7 Councillors in respect of those charges.[129]

JONATHAN HORTON QC

BEN MCMILLAN

Counsel Assisting
29 September 2021

127 II p 403.
128 Tabled Bundle No III p 75.
129 Hansard 3 September p 9.

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IN THE MATTER OF: **THE PARLIAMENTARY CRIME AND CORRUPTION COMMITTEE'S INQUIRY INTO THE CRIME AND CORRUPTION COMMISSION'S INVESTIGATION OF FORMER COUNCILLORS OF LOGAN CITY COUNCIL; AND RELATED MATTERS**

CRIME AND CORRUPTION COMMISSION'S OUTLINE OF SUBMISSIONS DATED 15 OCTOBER 2021[1]

[1] This outline of submissions will be supplemented by oral submissions to be made at a public hearing of the Inquiry on 21 October 2021.

INTRODUCTION

1. These submissions are provided on behalf of the Crime and Corruption Commission ("the Commission") in response to Counsel Assisting's outline of submissions dated 29 September 2021.

2. As stated in its submissions dated 26 July 2021, the Commission recognises the important function of the Parliamentary Crime and Corruption Committee ("the PCCC") under the *Crime and Corruption Act 2001* (Qld) ("the CC Act") to monitor and review the performance of the Commission's statutory functions. The Commission at the time welcomed, and continues to welcome, the prospect that the inquiry may result in mutually beneficial improvements in the way that the Commission performs its statutory functions.

3. These submissions should be read together with the Chronology provided by the Commission to the PCCC on 2 September 2021 ("the Chronology"). As the Commission informed the PCCC at the time, the complaint the subject of this Inquiry, as with any complaint about executive action, cannot be understood in isolation and out of context. A careful analysis of the decisions made before, during and after Operation Front is required.

4. The Chronology summarises important features of that context, including annexures, and the PCCC should have regard to it when reading these submissions.

5. The submissions of Counsel Assisting contend that there are thirteen available adverse findings against the Commission. For the reasons stated in these submissions and which will be supplemented on 21 October 2021, the Commission does not accept that the evidence adduced in the Inquiry supports the alleged available findings.

6. Several of the alleged available findings contend for the most serious possible type of misconduct by the Commission and its officers, namely the commencement of criminal proceedings for an improper purpose (either for the improper purpose, or "infected" or "affected" by it).

7. Although not stated in terms, the implication of what is contended should be appreciated by the PCCC. It amounts in substance to a contention that criminal proceedings were *maliciously* commenced by the Commission, namely for a purpose other than to properly set the process of the criminal law in motion. For the reasons stated in these submissions, including by reference to the overwhelming body of evidence uncovered in the Inquiry which is contrary to it, this gravely serious allegation should be rejected.

8. To find otherwise would require the PCCC to reject the evidence of *every* Commission witness in this Inquiry who was asked questions about it, including two highly experienced lawyers, the Chair of the Commission, Mr MacSporran QC and Mr Paul Alsbury, the Senior Executive Officer of Corruption, as well as the unchallenged opinion provided by retired District Court of Queensland Chief Judge, Mr Kerry O'Brien AM whose opinion was that the laying of the charges was appropriate and in the public interest.

9. It is not contended that the Commission's witnesses gave evidence other than which was honest or credible.[2] To the extent it is suggested otherwise, the contention is rejected.

10. It is necessary to make one additional important point at the outset. There being no available finding to the contrary, then the PCCC should conclude:

    (a.) *first*, that the evidence available to the Commission at the time the fraud charges were laid on 26 April 2019 was sufficient to support prima facie cases that had reasonable prospects of success against the seven councillors and the former mayor; and

    (b.) *second*, that the public interest favoured the laying of the charges.

11. These questions are directly relevant to the matters the subject of the Inquiry. The terms of reference for the Inquiry and the LGAQ complaint dated 5 May 2021 raise the appropriateness of the Commission's decision to charge fraud. It was contended during the Inquiry that there were fundamental problems with the viability of the charge of fraud.[3] The public interest in laying the charges was explored in detail with witnesses.

12. Quite appropriately in light of the evidence in the Inquiry, Counsel Assisting's submissions do not contend that the available evidence did not support the laying of fraud charges against the former mayor and the councillors, or that the public interest did not favour the commencement of the prosecution. The PCCC already has, and should carefully note, the report of retired District Court of Queensland Chief Judge, Mr Kerry O'Brien AM, whose opinion on these matters is directly relevant to these questions. The full brief of evidence has also been available to the PCCC.

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2 See also letter from the Chair of the PCCC dated 16 September 2021 to the Commission.
3 The Commission has previously noted this in its letter dated 6 September 2021 at paras 12 to 16.

13. Once the correctness of the matters at subparagraphs 10(a.) and 10(b.) is understood, then with respect it compels a conclusion that the fraud charges were properly laid and that the arresting officer (DS Francis) was, in fact, *duty-bound to lay them in the public interest*.

14. Moreover, once these features of the case are appreciated, it serves to illustrate, together with the evidence outlined in these submissions, the inherent implausibility that the charges were laid for any purpose other than *the proper and lawful purpose*, namely, to set the process of the criminal law in motion. Any conclusion to the opposite should be rejected.

Salient considerations in assessing how Counsel Assisting put the adverse inferences against the Commission

15. Respectfully, there are aspects of the way the hearing has been conducted by Counsel Assisting which have been unsatisfactory. The Commission wrote to the PCCC in this regard on 6 September 2021, and the PCCC responded on 16 September 2021. A part of the PCCC's response to address those criticisms was to receive the Summary of Opinion of Mr O'Brien AM and the Chronology prepared by the Commission and to permit counsel for the Commission an oral address.

16. Both the matters in the previous paragraph and the matters set out below demonstrate why, respectfully, the submissions of Counsel Assisting generally need to be read with caution and the adverse findings urged should be rejected.

17. First, consistently with what was urged by the LGAQ to instigate this Inquiry, until about the end of the first day of the Inquiry it was put against the Commission that there was an insufficient factual basis for the laying of the charges and the public interest might have been against laying them. That position is now rightly abandoned. It is clear that all of those experienced in criminal law involved – the charging officer; Mr Alsbury; Mr MacSporran QC and Mr Green the experienced prosecutor who was willing to argue the committal for 9 days - never at any stage held such a view. There was not a basis for this to have been pressed to the end of the first day of the hearing.

18. Second, the view of those highly experienced criminal lawyers just mentioned was verified in the retrospective review of Mr O'Brien AM, which was in the hands of Counsel Assisting well before the commencement of the hearings. Counsel Assisting's view that Mr O'Brien's report was not relevant, and on that basis did not provide it to the PCCC (about which the Commission was not advised until 21 August 2021 after four days of hearings had passed) emphasises the

failure to appreciate the true issues in relation to whether the fraud charges were open to be laid.

19. As discussed further throughout these submissions, remnants of the erroneous position of Counsel Assisting at the outset still linger.

20. Third, the theory advanced by Counsel Assisting that the Commission charged the councillors to bring about the dismissal of the Council and thereby achieve Ms Kelsey's reinstatement is misconceived for the reasons explained at length in these submissions by reference to the evidence, but also because if that was the motivation (which is unequivocally rejected), the Commission would have charged only four of the councillors, and left the Council quorate with a majority in power who supported Ms Kelsey. The theory that the charges were laid for any nefarious or improper purpose is wrong.

21. Fourth, this Inquiry and many of the lines of investigation advanced in it arose directly from a complaint made by the LGAQ on 5 May 2021. That complaint was made in the historical context, as the evidence before the Inquiry reveals, of the LGAQ's chief executive officer, Mr Hallam AM, and Mr Jim Soorley involving themselves, before the Council vote on 7 February 2018, in the events leading to the decision to terminate the employment of Ms Kelsey who of course had made a public interest disclosure. Both Mr Hallam AM and Mr Soorley were also concerned to identify a suitable replacement for Ms Kelsey as chief executive officer.[4]

22. Neither Mr Hallam AM or Mr Soorley appears to have had any apparent connection to the Council other than an interest in who is in control of it and who is its senior executive management.

23. Fifth, although the suggestion of dishonesty has been eschewed against Commission witnesses and none of the Commission's witnesses is said to be dishonest, the alleged scheme in which the Commission and its officers is said to have been involved is for all intents and purpose a dishonest scheme, namely one which alleges setting in motion a criminal prosecution for an improper purpose. It is impermissible and unsatisfactory to maintain one foot in both camps. The evidence of the Commission's officers was honest and credible. None of their evidence supports the improper purpose alleged.

24. Finally, the suggestion that the effect of the charges was undemocratic and that this might have been a reason not to lay the charges in the public interest, with respect misunderstands

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4 See Chronology, items 68, 69, 70, 76, 79, 84.

representative and responsible government. It is not the place of an executive agency like the Commission to second guess clear legislative choices made by the Legislative Assembly.

THE COMMISSION'S SUBMISSIONS ABOUT THE ALLEGED AVAILABLE FINDINGS

25. In these submissions, a reference to:

(a.) the several volumes of material prepared for the hearings is by reference to volume number and page number (i.e. "Vol 1, p1");

(b.) the *Hansard* record will be by reference to the relevant date followed by a page reference (i.e. "17 August 2021, p1);

(c.) Counsel Assisting's outline of submissions will be to "CA Submission"; and

(d.) the "Schedule" to the CA Submission will be to "CA Schedule".

26. We will deal with each of the alleged available findings under the separate subheadings below.

Available finding 1:

The Commission considered its interests and those of Ms Kelsey were shared, and that it ought to assist Ms Kelsey as much as it legitimately could

27. The Commission had a legitimate "common interest" with Ms Kelsey because she had made a public interest disclosure under the *Public Interest Disclosure Act 2010* (Qld) ("the PID Act").

28. It was appropriate for the Commission to provide support and protection to Ms Kelsey as a person who had made a public interest disclosure to it. The support provided to her did not extend to having a shared interest that she be reinstated as CEO of Logan City Council.

The importance of public interest disclosers to the performance of the Commission's functions

29. In paragraph 6 of the Commission's submissions dated 26 July 2021, the Commission emphasised the critical importance of public interest disclosures to the performance of the Commission's corruption function. Public interest disclosures are an essential source of information as to the existence of corruption, which is by its nature insidious and difficult to detect. Mr MacSporran QC and Mr Alsbury explained how important public interest

disclosures are to the Commission's functions.[5] Mr MacSporran QC said that protecting whistle-blowers is a "fundamental and important part" of the Commission's operations.[6]

30. One of the main objects of the PID Act is to promote the public interest by facilitating public interest disclosures of wrongdoing in the public sector and to afford protection from reprisals to persons making public interest disclosures.

31. If the Commission is to effectively perform its corruption function, both in the case of the corrupt conduct investigation in Operation Front, and in other cases, the Commission must act upon public interest disclosures and be seen to take them seriously. Those who make public interest disclosures, and the public more generally, must have confidence that the Commission will carefully consider and investigate public interest disclosures and provide them appropriate support in doing so.

32. If the public does not have that confidence there will be a practical deterrent to people making such disclosures, as Mr Alsbury emphasised.[7] The Commission must rely on people to make public interest disclosures to properly fulfil its functions. Mr Alsbury said it is the most important way that corruption is uncovered.[8]

Ms Kelsey was a public interest discloser

33. In this case, Ms Kelsey as a public officer had a statutory duty to report her reasonable suspicion of corruption to the Commission under s38 of the CC Act. Ms Kelsey was not doing the Commission a favour; it was her statutory duty under the CC Act.[9] The former mayor has been committed to stand trial on charges arising out of Ms Kelsey's public interest disclosure. The Commission will say no more about them other than to emphasise that there can be no legitimate dispute or contention that Ms Kelsey was anything other than a public interest discloser under the PID Act and should be treated as such.

34. Ms Kelsey's public interest disclosure was of particular significance, coming as it did after Operation Belcarra and the Commission's focus on corruption in, and the integrity of, the local government sector. The public interest disclosure was also made after the election of the former mayor in 2016 was followed by two of Ms Kelsey's predecessors as chief executive officer, and several other senior Council officers, resigning from the Council with non-disclosure

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5 17 August 2021, p13; 18 August 2021, pp22 – 23.
6 6 September 2021, p43.
7 18 August 2021, p23. Also see Mr MacSporran QC's evidence at 17 August 2021, p13.
8 18 August 2021, p23.
9 18 August 2021, p23.

agreements.[10] As Mr MacSporran QC said, Ms Kelsey's case was an "exceptional case" where there had previously been a pattern of resignations with payouts and non-disclosure agreements in the Logan City Council.[11]

35. Ms Kelsey was the chief executive officer of Logan City Council. As the chief executive officer, she was responsible for making sure the Council had established reasonable procedures to ensure that public interest disclosers were given appropriate support and are offered protection from reprisals from the Council.[12] In the QIRC proceeding, Ms Kelsey alleged that the former mayor and respondent councillors had taken reprisal action against her by terminating her employment because she had made the public interest disclosure. On Ms Kelsey's case, this was a case where the Council (and the former mayor and respondent councillors) had acted in disregard of its statutory duty to protect whistle-blowers. Relevant public interest disclosures were also made to the Commission by others, including the Director-General, Department of Infrastructure, Local Government and Planning.[13]

36. In the circumstances of this case where it appeared that the Council was not providing protection to Ms Kelsey as a public interest discloser (as it was obliged to do under the PID Act), it was appropriate that the Commission provide support to a public interest discloser who had made a disclosure to it. The Commission always intended for any assistance to be within the bounds of the lawful exercise of its powers.

37. Some important features of the Commission's functions under the CC Act are summarised at paragraphs 99 to 113 of the Commission's submissions dated 26 July 2021. One of the main purposes of the CC Act is to continuously improve the integrity of, and to reduce the incidence of corruption in the public sector: s4(b), CC Act. The Commission has an overriding responsibility to promote public confidence in the integrity of units of public administration, including the Council. The Commission has primary responsibility for dealing with complaints about corrupt conduct.[14] The Commission has an important statutory duty to protect persons who assist the Commission from victimisation and other adverse consequences.

38. It is legitimate therefore for the Commission to perceive a common interest with Ms Kelsey in relation to her public interest disclosure. The "common interest" between Ms Kelsey and the Commission was directly linked to her uncontroversial status as a public interest discloser. The

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10 See, in particular, items 2, 3, 4, 6, 8, 9, 13 of the Chronology.
11 6 September 2021, p43.
12 Section 28, PID Act.
13 See Chronology, item 28.
14 Section 45, CC Act.

Commission's performance of one of its core functions of improving the integrity of public sector agencies is undermined by sending a message to public officers, whose statutory duty it is to report suspected corrupt conduct, that they will not receive any support from the Commission once the suspicion is reported.

The Commission's "common interest" with Ms Kelsey did not extend to her reinstatement

39. There is an important limit on the extent of the "common interest" shared between the Commission and Ms Kelsey. It did *not* extend to bringing about her reinstatement in the QIRC or otherwise;[15] always the issues in the QIRC proceeding were to be determined by law by the QIRC. It is not accurate to say, as is suggested in paragraph 17 of the CA Submission, that the Commission considered from the outset that it had a common interest in Ms Kelsey's success in the QIRC proceeding. The issues were not tied in this way. The Commission's interest was to support Ms Kelsey within the remit of the PID Act and the CC Act, but its primary focus was on the corrupt conduct investigation.[16]

40. Ultimately, the Commission decided not to commence its own proceeding in the QIRC because it considered that there was a greater public interest in the Commission focussing on the serious criminal investigation in its ongoing Operation Front (which had commenced before the QIRC proceeding).

41. Mr MacSporran QC did not want anything done in relation to helping Ms Kelsey to affect the integrity of the corrupt conduct investigation.[17] The corrupt conduct investigation was the priority, and early in the investigation Mr MacSporran QC came to realise from intercepted telephone communications how serious the conduct appeared.[18] The corrupt conduct investigation was the "main emphasis" of the Commission's activity and Mr MacSporran QC viewed it as "a much more serious aspect to be pursued as far as we could to its conclusion".[19]

42. Mr MacSporran QC explained the support given to Ms Kelsey was "not black and white" and was an "extremely difficult" decision.[20] Having decided not to apply for injunctive relief, Mr MacSporran QC decided that "we should not be seen to be directly favouring one side over the

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15 7 September 2021, p4.
16 Mr MacSporran QC explained these issues in evidence many times, see for example: 17 August 2021: pp 11 – 13, 18, 23; 6 September 2021, pp 5 – 6, 37, 40, 41; 7 September 2021, p37.
17 6 September 2021, p6.
18 See Chronology, in particular items: 67, 68, 69, 70, 79, 84.
19 17 August 2021, p12.
20 6 September2021, p41.

other".[21] As the head of the Commission, he put in place how the "disparate" and "separate but interrelated" issues should be managed.[22] The more significant focus was on the corrupt conduct investigation managed by Mr Alsbury.[23]

43. In his email of 4 September 2019, Mr MacSporran QC stated: "*we should do whatever we legitimately can to support Kelsey*". He did not hold that view from the outset because the Commission had to assess the matter.[24] It was not to assist Ms Kelsey at all costs.[25] Ms Kelsey was to be assisted in a way consistent with the Commission's jurisdiction in the CC Act.[26]

44. Mr MacSporran QC said he was sympathetic to Ms Kelsey's position, as he would be for every public interest discloser in her position.[27] Mr MacSporran QC was clear in his evidence that any feelings of sympathy he had for Ms Kelsey did *not* mean "that she should be reinstated if at all possible".[28]

45. Mr Alsbury said the Commission was to be "measured" in its assistance which is what he also understood Mr MacSporran QC to mean by "legitimately" supporting Ms Kelsey.[29] Once that was settled on, Mr MacSporran QC supervised it from a distance.[30] The discussions about how it was managed were ongoing.[31]

46. Mr MacSporran QC explained in detail why he had "sympathy" for Ms Kelsey.[32] There is no dispute that the Councillors were funded entirely by insurance, as is their legal right. But it was an objective feature of the imbalance between Ms Kelsey, as a public interest discloser who had a statutory duty to disclose to the Commission, and the respondent Council, former mayor, and councillors. Mr MacSporran QC said that the main feature of the imbalance was in relation to legal funding in the QIRC litigation, which he said was hard fought and lengthy.[33]

47. Mr Hutchings considered there was an "alignment of interests" between the Commission and Ms Kelsey because the Commission was investigating alleged corrupt conduct and reprisal

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21 6 September 2021, p41.
22 6 September 2021, p41.
23 6 September 2021, p41.
24 6 September 2021, p5.
25 6 September 2021, p5.
26 6 September 2021, p5; 7 September 2021, p7.
27 7 September 2021, p7.
28 7 September 2021, p8.
29 18 August 2021, p19, 22.
30 6 September 2021, p5.
31 6 September 2021, p6.
32 17 August 2021, p13.
33 6 September 2021, p4.

action against her.[34] He said it was always the Commission's intention "to assist her in any way we could within the bounds of the law and acting fairly and impartially".[35]

48. Mr Hutchings did not say or agree that his overarching purpose was to see Ms Kelsey succeed in her reinstatement application (as is suggested in para 23 of CA Submissions). The matters stated in the CA Schedule do not support the contention that Mr Hutchings' perception of an alignment of interests between the Commission and Ms Kelsey was that his overarching purpose was that she be reinstated as CEO of the Council.

49. Ms McIntyre said she was aware of discussions that the Commission would try and assist Ms Kelsey.[36] She said that if there was assistance the Commission could provide, the Commission "would consider that along the way".[37] She said the Commission was aware that Ms Kelsey had requested the Commission's assistance "and if we had information to assist her then we would consider".[38] Ms McIntyre's evidence on this topic accurately reflected the Commission's position.

50. The criticism of Ms McIntyre at paragraph 20 of the CA Submissions is unwarranted. There is no suggestion that Ms McIntyre was trying to do anything other than carry out her duties as a lawyer attached to the investigation in a way that was professional, diligent, and honest. And as Ms McIntyre noted in the same passage of questioning,[39] Councillor Dalley had by that time disclosed WhatsApp records in the QIRC proceeding which had been extracted from her council-owned mobile phone under search warrants.[40]

51. DS Francis' empathy for Ms Kelsey did not mean that the Commission's common interest was tied with her success in the QIRC proceeding. DS Francis explained his empathy for Ms Kelsey and the nature and limited extent of his interest in the QIRC proceeding.

52. DS Francis said the Commission had a common interest in protecting Ms Kelsey "in line with her disclosure under" the PID Act.[41] DS Francis' interest as an investigator was to investigate the serious allegations the subject of the public interest disclosure.[42] He agreed that Ms Kelsey's conduct of the QIRC proceeding was included in the common interest as he

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34 18 August 2021, p63.
35 18 August 2021, p70.
36 19 August 2021, p52.
37 19 August 2021, p52.
38 19 August 2021, p52.
39 20 August 2021, p3.
40 Chronology, item 122.
41 20 August 2021, p42.
42 20 August 2021, p42.

understood to exist,[43] but said his interest in the QIRC was limited only to the extent that it could assist the corrupt conduct investigation.[44]

53. The empathy DS Francis had for Ms Kelsey was not dissimilar to the empathy he had for any of his witnesses.[45] He said empathy and trust afforded to witnesses is necessary to guide a witness through the investigative and court process.[46]

Available finding 2:

The shared interest included Ms Kelsey's being reinstated as CEO, which the CCC acted upon by involving itself in her QIRC proceeding and seeking to make documents it had obtained under compulsion available to her in that proceeding

54. We have addressed above the contention that the "shared interest included Ms Kelsey's being reinstated as CEO". The finding is not available for the reasons stated above.

The QIRC Notice to Produce

55. The Commission did not "involve itself" in the QIRC proceeding; it responded to the Notice of Attendance to Produce validly served on it by a party to the litigation who was seeking to put documents before the QIRC. Once the decision was made to respond to the Notice, the Commission advised all the parties of its intention to do so.

56. It was clear by that stage that the Commission had commenced a corruption investigation into the conduct of the former mayor and the councillors and the alleged reprisal against Ms Kelsey. It goes without saying that the Commission may have documents directly relevant to those matters. There is nothing unusual with the Commission's liaising with Ms Kelsey's lawyers in the issue of the Notice of Attendance to Produce. It is consistent with the efficient conduct of litigation for a party to liaise with a non-party about the scope of non-party disclosure orders.

57. It is common practice for litigants in civil proceedings to liaise directly with non-party entities to facilitate obtaining from them documents on disclosure. It is common too that this is carried out by one party only (being the party seeking the documents), to the exclusion of others and there is nothing partial about it. There is no suggestion that the Commission or any of its officers disclosed information to Ms Kelsey about the corrupt conduct investigation or the

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43 20 August 2021, p42.
44 20 August 2021, p65.
45 20 August 2021, p65.
46 20 August 2021, p65.

documents held by the Commission. The Commission was carefully assessing what action it could appropriately take. Once that was decided, the Commission was careful to inform all parties of its intended action, consistent with its obligation to act fairly and impartially.

58. The CA Submission accepts that the Commission's production of documents (which included documents which had been obtained by compulsion) in response to the Notice of Attendance to Produce was lawful (para 27, CA Submission). The documents were produced to the QIRC registry on strict conditions which included that the documents were only to be used by the QIRC, and if permitted by it, the parties, and their legal representatives: Vol 1, p219 – 220. This is an example of the Commission aiding Ms Kelsey, but in a way that is independent and fair and impartial. The Commission could have, but did not, directly disseminate material to Ms Kelsey. The Commission acted entirely appropriately.

59. The Commission's response to the Notice of Attendance to Produce did not merely show "*some* conscious observance" of its obligations under s57 of the CC Act (see para 27, CA Submission). For the Commission to deny the QIRC any access to the documents, given the contents of them and the QIRC's role in adjudicating the dispute before it, would not be consistent with the Commission's statutory functions outlined earlier in these submissions.

60. That the position in relation to the QIRC Notice to Produce adopted by the Commission was one which might support a person who had made a public interest disclosure under the PID Act is not remarkable. It is consistent with the Commission's powers under the PID Act to act in the person's interests and with the Commission's powers under the CC Act to protect persons from alleged victimisation.

Evidence "obtained under compulsion"

61. The decision of Industrial Commissioner Black did not consider the specific documents (nor their specific contents) the subject of the Notice to Produce. The decision of the QIRC was to set aside Ms Kelsey's Notice to Produce. The decision did not rule as a matter of evidence on the admissibility in the QIRC proceeding of each document. The documents themselves were not examined or considered in detail.

62. In December 2018, Councillor Dalley disclosed in the QIRC proceeding the WhatsApp raw data extracted from her council-owned mobile phone. The raw data was evidence recovered by the Commission pursuant to search warrants issued on 30 May 2018 and executed by the

Commission on 1 June 2018.[47] Councillor Dalley had deleted the records and the Commission recovered them and returned them to her (the Commission also returned records to the former mayor).[48]

63. There is a difference between data deleted and recovered from mobile phones and evidence obtained from witnesses in coercive hearings. Although the raw data was obtained by search warrant, it is recovered evidence which had been destroyed, as were the rest of the WhatsApp records the subject of this Inquiry. It is not evidence akin to covert telephone intercept information, or coercively obtained evidence in hearings under the CC Act in which the person does not have a right to refuse to answer questions.[49] The PCCC should carefully read the dissemination authority for the QIRC dissemination where each of the categories of evidence is addressed: Vol 1, p201 – 210.

64. There is no dispute that the WhatsApp data recovered by the Commission from Councillor Dalley's mobile phone was *admissible* in the QIRC proceeding and was in fact *tendered in evidence*. That WhatsApp data was part of the documents which were delivered to the QIRC in July 2018.[50] With respect, it is not correct that in light of Industrial Commissioner Black's decision, the documents produced under the Notice to Produce were inadmissible in the QIRC proceeding because they were "obtained under compulsion".[51]

Available finding 3:

Confidential documents, including some that were subject to legal professional privilege were delivered to Logan City Council on 3 October 2018 by the Commission for a weighty and substantial purpose of making them available for Ms Kelsey's use in the QIRC proceeding, contrary to the ruling of Commissioner Black

65. This finding is not available because the overwhelming evidence proves that the documents were delivered to the Council on 3 October 2021 for the *sole* purpose of the Commission's corruption investigation.

66. The documents were not delivered for "a weighty or substantial purpose" of making them available for Ms Kelsey's use in the QIRC proceeding, contrary to the ruling in the QIRC.

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47 Chronology, item 122; see also Mr Alsbury's evidence at18 August 2021, p34.
48 Chronology, item 108.
49 6 September 2021, p16.
50 Vol 1, p213, item 2 in the table.
51 A point made by Mr Alsbury, 18 August 2021, p29.

67. Contrary to para 32 of the CA Submissions, it was not decided within the Commission, after the QIRC ruling, that the "*Public Records Act* might have provided a basis on which some of the documents previously produced to the QIRC (and others of a similar character, namely WhatsApp communications) could be put back in LCC's hands, such that it would be obliged to disclose them in the QIRC proceeding".

68. The evidence of credible witnesses contradicts such an assertion, as is summarised below.

The public records investigation

69. Detective Inspector Preston was the police officer who was the operations coordinator for Operation Front. His role was one of management, supervision, and support. He was the overviewing and responsible police officer for the investigation.[52]

70. DI Preston explained the background events leading up to the dissemination on 3 October 2018.[53] On or about 25 September 2018, he had attended a presentation at the Commission given by the State Archivist about public records. During that presentation, it came to his attention that the WhatsApp records which had been recovered from mobile phones used by the councillors were public records. If that were the case, then there was a requirement for the councillors to provide the public record to the CEO of the Council.

71. As a result of the presentation, he sent the email of 25 September 2018: Vol 1, p347.[54] He did not only send it to his team in relation to Operation Front. He sent it to his director of operations, and to four other operations coordinators at his level who oversaw other investigations involving local councils. He was sharing the information with them.[55]

72. DI Preston sent the email "for the information of the staff to ascertain as to whether the documents we had or anyone had from any investigation were actually a public record". DI Preston said the police would need to talk to the CEO for them to inspect the documents (which were council documents) and to decide whether they contained council business.[56] He said the State Archivist had advised that "it had to come from the CEO".[57] DI Preston believed "we needed to get that opinion from the CEO".[58]

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52 25 August 2021, p36.
53 25 August 2021, pp36 – 37.
54 25 August 2021, p37.
55 25 August 2021, p37.
56 25 August 2021, p37.
57 25 August 2021, p37.
58 25 August 2021, p38.

73. DI Preston was away on leave on 27 September 2018. When he returned and learned that the documents had been delivered on 3 October 2018, he saw nothing untoward about it.[59] He saw nothing improper or unlawful about what happened.[60] He said there were potentially other offences committed in relation to the documents, and it was "just another part of that process of trying to identify what criminal offences had been committed and for us to follow the process of going back through the CEO to get that information, because we required that in a statement to actually proceed with any criminal investigation there".[61]

74. DI Preston said he had no knowledge of any motivational purpose (and he was asked about either "the" purpose or "a" purpose) in the documents being delivered so the Council would be obliged to disclose them.[62] He agreed that "the purpose and the only purpose was in connection with the Public Records Act".[63]

75. DI Preston said he was confident that the people in his team (that is, the police officers) followed the order of the QIRC in relation to the management of documents and the non-disclosure of documents held by the Commission.[64] He said there were not any motivations to get around the QIRC order: "I would not say there were motivations to get around anything. There was certainly a motivation to complete our investigation and to do the job thoroughly".[65] His evidence was unequivocal: there was not an effort to try to get the material before the QIRC.[66]

76. There is no reason not to accept the evidence of DI Preston. The CA Submission does not explain why the PCCC should not accept it.

DS Francis' evidence

77. DS Francis gave evidence about DI Preston's email of 25 September 2018.[67] He said DI Preston was sharing with the team matters that related to the *Public Records Act*. DS Francis had not previously dealt with that Act; DI Preston's email turned his mind to it and he subsequently familiarised himself with the Act and offences under it.[68]

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59 25 August 2021, p38.
60 25 August 2021, p39.
61 25 August 2021, p39.
62 25 August 2021, p39.
63 25 August 2021, p39.
64 25 August 2021, p52.
65 25 August 2021, p52.
66 25 August 2021, p52.
67 20 August 2021, p45.
68 20 August 2021, p45.

78. DS Francis said he believed he was authorised by DI Preston to do what he did on 3 October 2018.[69] He explained in detail his purpose in making the delivery on 3 October 2018.[70] His evidence is consistent with the audio recording of his attendance disclosed to the PCCC (and with the transcript): Vol 1, starting at p351. DS Francis' purpose of delivery is clearly connected to the purposes of the corrupt conduct investigation and obtaining a statement from Mr Trinca, the acting CEO of the Council.

79. It is also consistent with DI Preston's email of 25 September 2018. It related to the fraud investigation because it was relevant to the councillors deleting WhatsApp messages that they should have retained. The destruction of records by the councillors is probative evidence to the corruption investigation.[71]

80. DS Francis did not know when the Commission had delivered documents to the QIRC.[72] He also did not know that the QIRC had issued a ruling on 24 August 2018 about the Notice to Produce.[73] It is difficult, to say the least, to therefore conclude that his delivery on 3 October 2018 was part of a scheme by the Commission to put documents back into the Council's hands to oblige them to disclose it in the QIRC proceeding.

81. DS Francis said he had not seen Minter Ellison's email of 27 August 2018 (Vol 1, p330) which raised the prospect of the Commission exercising "different powers in relation to the documents".[74] When he saw it during the Inquiry, he said he did not understand what Mr Williams is referring to when he states "the CCC exercises different powers".[75]

82. There is nothing in DS Francis' evidence which suggests the alleged "weighty and substantial purpose" outlined in "available finding 2". Like DI Preston's, DS Francis' evidence is contradictory to it.

The evidence of other Commission witnesses

83. DSS Andrews was acting in DI Preston's role whilst DI Preston was on leave on 3 October 2018. DS Francis agreed that DSS Andrews would have known exactly what he was doing on

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69 20 August 2021, p47, p53.
70 20 August 2021, pp47 - 48.
71 As Mr MacSporran QC said at 6 September 2021, p16.
72 20 August 2021, p45.
73 20 August 2021, p45.
74 20 August 2021, p43.
75 20 August 2021, p43.

3 October 2018.[76] DSS Andrews was not asked any questions about this issue. It was never suggested to him that the delivery was made for the alleged purpose.

84. Mr Alsbury explained that DS Francis was investigating potential non-compliances with the *Public Records Act* in the context of a corruption investigation. DS Francis was carrying out an investigation under the Commission's corruption jurisdiction.[77] Mr Alsbury denied that the documents were delivered to bring about an obligation on the Council to disclose them.[78]

85. Ms McIntyre consistently explained in her evidence that the delivery on 3 October 2018 was for the purpose of investigating a potential breach of the *Public Records Act*.[79] She denied that the Commission was "looking for something that might give you a legitimate basis to deliver these documents" to the Council.[80] She denied that the documents were delivered for the purpose to assist Ms Kelsey in her litigation.[81]

86. Councillor Swenson had at the time recently acknowledged during coercive hearings in September 2018 (which Ms McIntyre conducted) that the WhatsApp conversations included council related matters.[82] Ms McIntyre said they had been looking at the issue of the *Public Records Act* in September 2018.[83]

87. Contrary to what is asserted in the CA Submission, the evidence does not support a finding that the Commission delivered documents on 3 October 2018 to make them disclosable in the QIRC proceeding. Regardless of whether it was "the" purpose or "a" purpose, it was not a purpose *at all*. With respect, the evidence is clear as demonstrated above. To find otherwise would be contradictory to the evidence of the witnesses described above.

88. The investigation of potential offences under the *Public Records Act* was a genuine and bona fide investigation as part of the corrupt conduct investigation. Mr MacSporran QC explained that the Commission for a long time has had a particular focus on the *Public Records Act* dating back to Minister Bailey, including working in cooperation with the State Archivist with a particular focus on local government.[84] An investigation report dated 15 April 2019 was

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76 20 August 2021, p58.
77 18 August 2021, p24.
78 18 August 2021, p30.
79 19 August 2021, p67.
80 19 August 2021, p67.
81 19 August 2021, p69.
82 Chronology, item 109; 20 August 2021, p18.
83 20 August 2021, p18.
84 6 September 2021, p26.

prepared relating to the *Public Records Act* part of Operation Front and has been disclosed to the PCCC.[85]

89. In this case, it also culminated in the publication of a joint advisory with the State Archivist on 3 July 2019 entitled "Council records: A guideline for mayors, councillors, CEOs and council employees".[86] The publication was published as part of the Commission's prevention function. The State Archivist also sent a letter to all Queensland councils, co-signed by the Chairperson of the Commission, to reinforce the importance of maintaining public records (a copy is **annexed**).

Legal professional privilege and the 3 October 2018 documents

90. The documents delivered on 3 October 2018 were Council property. Some of the documents delivered on 3 October 2018 arguably contained material that may have been subject to legal professional privilege. Some of the material was later redacted when it was delivered to the Council in November 2018.

91. In redacting the documents, Mr Alsbury said the Commission took a very conservative view in relation to legal professional privilege.[87] Mr Alsbury accepted in his evidence that the material should not have been delivered unredacted.[88] Mr MacSporran QC made the same concession and said that proper practice should have involved a lawyer checking it for potential legal professional privilege.[89] He said it was "certainly the position now" that documents are assessed by a lawyer.[90]

92. DS Francis made his best assessment of the material for legal professional privilege and concluded that it was not privileged.[91] He said he consulted with other police officers about it.[92] He did not check with Ms McIntyre but there was nothing dishonest about that. DS Francis said if the material was deemed by him or someone else to contain legal professional privilege, it would not have been disclosed.[93]

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85 Contained in disclosure folder "2d" > "Dissemination to OIA".
86 Chronology, item 139.
87 18 August 2021, p30.
88 18 August 2021, p30.
89 6 September 2021, pp26 – 27.
90 6 September 2021, p28.
91 20 August 2021, p51.
92 20 August 2021, p51.
93 20 August 2021, p50.

93. The Commission accepts that best practice on this occasion should have resulted in the material being assessed by a lawyer for potential legal professional privilege, and if necessary, redacted.

Available finding 4:

The delivery on 3 October 2018 by DS Francis was "improper conduct" for the purposes of s329 of the CC Act and should have been reported to this Committee in accordance with that section

94. For the reasons stated above in relation to "Available finding 3", DS Francis did not deliver the documents to the Council for the alleged purpose of making them disclosable by the Council in the QIRC proceeding. His purpose in delivering them is explained above and that purpose was for a purpose of the Commission and was proper in all respects.

A written dissemination authority was not required on 3 October 2018

95. DS Francis did not require a written dissemination authority under s62 of the CC Act to disseminate the documents on 3 October 2018. If material is disseminated for the purposes of the Commission, which it was in this case, a written dissemination authority is not required. DS Francis' dissemination without a written authority was consistent with the CC Act.

96. Section 62 of the CC Act is now repealed but was at the time as follows:

> "**62 Restriction on access**
>
> (1) Any information, document or thing in the commission's possession may be used and dealt with in performing the commission's functions, but otherwise must not be given to or made available for inspection by any person without the commission's express written authorisation.
>
> (2) Subsection (1) is subject to sections 293 and 317."

97. The production of the documents was recorded in an audio recording of the discussion between DS Francis and Mr Trinca.

98. The October 2018 dissemination having occurred in accordance with the requirements of the CC Act, there was no unauthorised disclosure of confidential information which would trigger the requirement to notify pursuant to s329 of the CC Act.

99. It is not established that the 3 October 2018 documents contained material that was in fact (or was likely to be) subject to legal professional privilege. The Commission is not aware of any

evidence of a claim for privilege made in relation to the documents. Whether the material delivered to the Council contained material that was subject to legal professional privilege did not change the character of the material as public records held by the Council.

100. However, the Commission accepts that whilst a written dissemination notice was not *required*, best practice would have involved preparing one because it may have identified that some of the documents might have been the subject of potential legal professional privilege. This, however, does not change the correct position that a written dissemination authority was not required by the CC Act and there was not a duty to notify under s329 of the CC Act.

101. In relation to the matter of reporting "improper conduct" under s329 of the CC Act, please also refer to paragraphs 286 and 289 below, which in the Commission's submission is illustrative of a healthy culture of compliance with the provision.

Available finding 5:

Confidential documents were delivered to the Logan City Council on 19 November 2018 by the CCC for a weighty and substantial purpose of making them available for Ms Kelsey's use in the QIRC proceeding, contrary to the ruling of Commissioner Black

102. The documents were not delivered to the Council on 19 November 2018 for "a weighty and substantial purpose" of making them available for Ms Kelsey's use in the QIRC proceeding.

103. The first point to note is that the documents were documents that belonged to the Council. The documents were Council property being returned to the Council because the records had been extracted from Council phones. The CA Submission does not explain how the documents were relevantly "confidential", noting that matters of *potential* legal professional privilege were redacted in November 2018.

104. The second point is that the Council's property was being returned to it so that it could appropriately manage the property as required by law in circumstances where there could not then reasonably have been, and there cannot be, any dispute that the Council had failed to do so in breach of the *Public Records Act.* The Commission has long had a genuine focus on these issues. The Commission took similar steps in 2017 in providing public records of Minister Bailey to the Department of Premier and Cabinet to be audited and advice provided as to whether any of the records could constitute public records. The records identified as potentially constituting public records were then referred to the State Archivist..

105. The third point is that the conduct of six of the councillors in destroying the public records in the face of a corruption investigation and allegations of a reprisal against a whistle-blower was conduct which self-evidently posed a very serious corruption risk. The Commission was obliged to act as it did in exercising its statutory functions in delivering the documents to the Council in November 2018.

The November 2018 dissemination authority

106. The PCCC should carefully read the November 2018 dissemination authority which is at Vol 1, pp425 to 430.

107. The dissemination authority provides relevant information about the nature of the information being disseminated (at Vol 1, p427), including that:

(a.) examination of the mobile phones used by the former mayor and six of the councillors showed that they had deleted the WhatsApp communication app and, with the exception of Councillor Dalley, had successfully deleted the content of those conversations;

(b.) whilst Councillor Dalley had deleted the WhatsApp communication app, Commission forensic specialists obtained the raw data of those conversations; and

(c.) that raw data indicated that Councillor Dalley would discuss Council related business with the former mayor and the other councillors.

108. At paragraph 48 of the CA Schedule, the following is stated:

> "An application for dissemination authority was prepared by Ms McIntyre and signed by Mr Alsbury that same day. The dissemination authority gives as the only 'reasons' for the dissemination, that the WhatsApp communications are '*public records as defined under the Public Records Act*'".

109. With respect, this mischaracterises the evidence.

110. At Vol 1, pages 427 to 428, the dissemination authority states the "*Reasons why the entity is appropriate to be given the information*" and the Commission asks that the PCCC carefully read it. The dissemination authority there records seven reasons (numbered (a) to (g)), of which para 48 of the CA Schedule refers to half of the first sentence of the fourth reason.

111. It is important to appreciate the above because it demonstrates the overriding and clear main purpose for the delivery in November 2018 which is consistent with Mr Alsbury's letter dated

19 November 2018. Each of the reasons stated in the dissemination authority is completely consistent with the performance of the Commission's corruption and prevention functions. It does not record, as CA Schedule suggests it does in the passage extracted above, merely a nine-word explanation of the reason for the dissemination.

112. In short summary, the reasons can be stated as:

(a.) the WhatsApp messages showed the councillors discussing council business in a way that might be perceived by the community as deceptive and secretive;

(b.) the Council does not have any appropriate policy prohibiting the conduct or the management of public records;

(c.) the councillors' use of the communications apps is a corruption risk;

(d.) the communications are public records under the *Public Records Act 2002* (Qld), which was breached if the communications were not retained by the Council in their system because the Councillors had destroyed them;

(e.) the councillors deleted the records without properly managing them, in breach of the Act;

(f.) the councillors conduct may be misconduct or inappropriate conduct under the *Local Government Act 2009* (Qld) and should be referred to the Department of Local Government, Racing and Multicultural Affairs;

(g.) the dissemination of the information will not compromise the ongoing corruption investigation; and

(h.) because of the Council's lack of proper policies, the dissemination will assist it enact the necessary policies.

Ms McIntyre's evidence

113. The documents were delivered for the proper purpose outlined in the November 2018 dissemination authority. Ms McIntyre's evidence is consistent with this very clearly being the intended purpose of the dissemination, though she said that the "side effect" of the documents possibly being disclosable by the Council should have been stated in the dissemination.

114. Ms McIntyre said that the documents were returned in November 2018 for the purpose of the Council taking preventive action.[94] It was for the Council to store the documents in accordance with a policy and procedure that they would be enacting.[95] Ms McIntyre repeatedly explained this in her evidence.

115. It is important to note that Mr Trinca had informed DS Francis on 3 October 2018 that the documents were *not* captured by the Council: "*It is definitely not, I can tell you now it is definitely not captured by council*".[96] Mr Trinca also said that there was not a policy that covered the use of WhatsApp and that "*there's nothing in our system at the moment*".[97] These statements by Mr Trinca are consistent with the reasons for the dissemination stated in the dissemination authority.

116. Ms McIntyre prepared the dissemination authority. Ms McIntyre said that the contents of the document are "correct and true to the best of my knowledge at that time – that it was being provided, as I have stated, for Logan City Council to undertake governance issues that had been identified".[98] She said she did not write it "with the intention of it going for the purposes of it getting into the QIRC".[99]

117. Ms McIntyre said it would be a "side effect" but "it was not the purpose of providing that material to Logan. The purpose was for them to repair their governance issues".[100] She said she should have included the side effect.[101] She did not turn her mind to it at the time, which rather detracts from a suggestion that it was a purpose of the dissemination.[102]

118. Ms McIntyre disagreed that "the Public Records Act really had nothing to do with the dissemination and it was really all about trying to get them into the QIRC proceedings, and this document is actually just a justification for trying to do that". Dissemination to the Council for them to comply with disclosure was not the intended purpose.[103]

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94 20 August 2021, p5.
95 20 August 2021, p5.
96 Vol 1, p354.
97 Vol 1, p355.
98 20 August 2021, p8.
99 20 August 2021, p8.
100 20 August 2021, p8.
101 20 August 2021, p8, 10.
102 20 August 2021, p10.
103 Ms McIntyre said this four times at 20 August 2021, p11.

The evidence of other Commission witnesses

119. Mr MacSporran QC said the dissemination authority sets out in detail the basis for the dissemination.[104] He said that the dissemination authority sets out the clear purpose from the Commission's point of view.[105] Mr MacSporran QC said perhaps in hindsight there should have been a reference to that aspect of it (being the effect on disclosure), but he did not see it as necessary in the light of the purpose of the dissemination being "very carefully and clearly" stated in the document.[106] He did not agree that it was not the case that the only material purpose of the delivery was for the purpose of the *Public Records Act*.

120. Mr MacSporran QC denied that there was any attempt to "cloak" the November 2018 dissemination in a Public Records Act reason.[107]

121. Mr Alsbury denied that the true purpose was to put the documents back into the hands of the Council so that they might be susceptible to disclosure in the QIRC proceeding.[108] Mr Alsbury did not think that there was any possibility that the dissemination would result in disclosure by the Council because it had made its position "crystal clear" that it would not disclose them.[109]

122. It was suggested that Mr Alsbury's evidence on this question was false in the light of his 12 February 2019 letter. Mr Alsbury denied the assertion. The suggestion that Mr Alsbury's evidence was false was made before he was even asked why he wrote the 12 February 2019 letter.

123. When he was eventually asked, Mr Alsbury explained that by the time of the 12 February 2019 letter, the situation had changed. The State Archivist had reviewed the records and concluded that they contained public records. Mr Alsbury said that an independent party had reviewed the documents, confirmed that they were public records that should have been lodged in the Council's record system, the Commission saw no reason why they should not be disclosed at that time.[110]

124. Also prior to Mr Alsbury's letter of 12 February 2019, the State Archivist's report had been provided to the Council (on 7 February 2019, Vol 1, p457). The State Archivist report has been disclosed to the PCCC. The report concludes that 36 of the 47 identified threads from the

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104 6 September 2021, p29.
105 6 September 2021, p30.
106 6 September 2021, pp30, 31.
107 6 September 2021, pp36 – 37.
108 18 August 2021, p32.
109 18 August 2021, p32.
110 20 August 2021, p33.

extraction reports contained public records and that the actions of the Councillors may have resulted in potential breaches of the *Public Records Act*.

125. On 25 February 2019, Mr Trinca wrote to Mr Alsbury Vol 1, p505. Mr Trinca notified the Commission, in the light of the State Archivist's report of 5 February 2019, that the public records have been saved to Council's document management system in accordance with the requirements of the *Public Records Act*.

126. This evidence is critically important in the light of suggestions made during the Inquiry that the *Public Records Act* investigations carried out were not bona fide. The position ultimately taken by the Council in its letter of 25 February 2019 vindicates the Commission's clear and justified concern with the Council's governance relating to public documents.

127. Mr Hutchings was not directly involved in the dissemination: he said it was not something he was driving.[111] Mr MacSporran QC did not agree with Mr Hutchings' evidence. Mr MacSporran QC said, although he had nothing to do with it at the time, he could see very clearly that the purpose of the November 2018 dissemination was as stated in the dissemination authority.[112]

128. To the extent that evidence at the Inquiry suggests that they believed the intention was for the Council to disclose documents in the QIRC, it is relevant to note that Councillor Dalley had in December 2018 disclosed her WhatsApp records which had been extracted from her council phone.[113] They were later admitted into evidence. These were documents which Councillor Dalley destroyed and which she ought to always have given to the Council.

129. Like the other documents produced to the Council in November 2018, Councillor Dalley's WhatsApp records were recovered from Council phones by executing search warrants. The documents were documents which the Council should always have kept and managed and, where appropriate, disclosed. The documents were always Council documents. The fact that some of the councillors had destroyed them and they had been recovered did not change the character which the documents always had: Council documents which discussed Council business. The documents were admissible in the QIRC proceeding.

130. The Commission was not trying to circumvent the QIRC ruling. Mr MacSporran QC said the Commission would never do that; he naturally did not suggest the Commission ever could or

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111 19 August 2021, p12.
112 6 September 2021, pp 30 - 31.
113 Chronology, item 122.

would. Mr MacSporran QC's evidence, however, was that the Commission had a proper purpose for doing what it did after the 24 August 2018 ruling.[114] The serious corruption risk associated with the failure of the Council and the conduct of the councillors which destroyed the records need only be stated to be understood.

131. As a model litigant, the Council ought to comply with its disclosure obligations in the QIRC proceeding, particularly in a proceeding relating to allegations of reprisal action taken against a public interest discloser in circumstances where it is obvious the Council had failed to appropriately keep and manage the relevant documents as required by law. The Commission has an overriding obligation to promote public confidence in the integrity of the Council. Part of maintaining that public confidence is in the way that it retains and manages its public records. This was particularly important in the light of evidence available to the Commission which showed that some of the councillors had destroyed (and the Council had not retained) directly relevant public documents not only in the face of a corrupt conduct investigation, but after proceedings had been commenced against them by a former chief executive for an alleged reprisal.

132. Although the Commission was not a party to the QIRC proceeding, it had been investigating alleged corrupt conduct involving the Council from 2017, including conduct directly relevant to the QIRC proceeding. The Commission had observed (correctly) the way that the Council had failed to manage its public records in accordance with legislation. The fact that the Commission was not a party to the litigation did not mean that the Commission could legitimately ignore the Council's failures to properly manage (and disclose) public records.

Available finding 6:

In August 2018 the CCC gave consideration to charging criminal offences that would cause LCC Councillors to be disqualified, and the LCC to be dismissed and an Administrator appointed. The purpose of that consideration was to assist Ms Kelsey's reinstatement as CEO of the LCC.

133. The Commission did not give consideration in August 2018 to charging criminal offences that would cause the councillors to be disqualified and the Council dismissed to help get Ms Kelsey reinstated. Research on that topic was carried out, but the evidence, as opposed to speculation,

[114] 6 September 2021, p40.

does not support the finding that it was done as the beginning of, or any part of, a design to help Ms Kelsey's reinstatement.

134. This alleged available finding is connected to alleged available finding 10 in the sense that available finding 6 is suggested, in effect, to be the genesis of the Commission's alleged improper purpose associated with the commencement of criminal proceedings. The allegation should be rejected for the reasons which follow, and for the reasons stated in relation to alleged available finding 10.

Mr Hutchings' evidence

135. Mr Hutchings could not remember what he spoke to Mr MacSporran QC about on 8 August 2018, in the discussion referred to in Mr Docwra's email of 8 August 2018 (Vol 2, pp10 – 11).[115]

136. There is nothing surprising about that given the elapse of time. Mr Hutchings' gave evidence in a candid and forthright manner. There is no reason to doubt his honesty and no reason is suggested in the CA Submission. Importantly, Mr Hutchings said it was never part of his role to have any discussions about charges. He could not recall having any involvement in what and whether to charge the former mayor and the councillors.[116]

Mr MacSporran QC's evidence

137. Mr MacSporran QC did not recall having any involvement in the commissioning of the research.[117] He did not remember what the discussion was about.[118] He was asked the question again on his return before the Inquiry. He said: "what he records there about the appointment, the prospect of the appointment of an administrator, does not resonate with me as something we discussed".[119] Nothing in the email sparked any memory for Mr MacSporran QC about that issue. Mr MacSporran QC said: "I cannot see why, as at August 2018, we would have been discussing anything about the administrator so far as Logan goes".[120]

138. The 8th of August 2018 was a week after Mr MacSporran QC had given evidence at the Economics and Governance parliamentary committee considering the Bills to dissolve Ipswich City Council. He could not immediately make a connection with the email. He said he had no

115 19 August 2021, p27.
116 19 August 2021, p28.
117 17 August 2021, p57.
118 17 August 2021, p57.
119 7 September 2021, p4.
120 7 September 2021, p4.

memory of a connection in discussions with Mr Hutchings or anyone else "about that", meaning the email from Minter Ellison at Vol 1, p293.[121] In July 2018, Mr Docwra had accompanied Mr MacSporran QC to the parliamentary committee hearing.[122] Mr Docwra had also accompanied Mr MacSporran QC when he gave evidence on 28 March 2018 before the same parliamentary committee.[123] Mr MacSporran QC suggested, not unreasonably, that "maybe it is an assessment of what is an integrity offence for councillors to be stood down".[124]

139. When asked by the Chair on 7 September 2021, Mr MacSporran QC, noting that his memory could not take it any further, the only thing that he could link it to was that it "may have had something to do with the Ipswich matter" but that may not be right. He could not recall.[125] When asked if he could recall whether it was intended "to try and set the ground for the council to be dismissed", Mr MacSporran QC said he could not recall, but "it would seem to be not because it is happening back in August 2018".[126]

140. Mr MacSporran QC earlier denied that it was a "fair assessment" to say that the Commission was "trying to help Ms Kelsey with reinstatement".[127] In addition to reprisal, the only two criminal offences which were ever under consideration throughout the entire corrupt conduct investigation were misconduct in relation to public office and fraud.[128] Both offences were integrity offences for the purposes of the *Local Government Act 2009* (Qld).

141. It is wrong therefore to conclude that the research is the "genesis" of a scheme by the Commission to have Ms Kelsey reinstated. Mr MacSporran QC denied it and noted the obvious gap in time between 8 August 2018 and 26 April 2019.[129] More generally, in his evidence Mr MacSporran QC was repeatedly questioned, and he repeatedly denied, that he or the Commission embarked on strategy or quest to have Ms Kelsey reinstated.[130]

The evidence of other Commission witnesses

142. The evidence of other Commission officers also does not support the alleged available finding, or the "genesis" theory more generally. None of those witnesses who were asked about it were

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121 7 September 2021, p4.
122 7 September 2021, p5.
123 Report No 7, 56th Parliament Economics and Governance Committee, April 2018, p39.
124 7 September 2021, p5.
125 7 September 2021, p33.
126 7 September 2021, p33.
127 7 September 2021, p4. He denied it for the reasons he explained in detail the day before.
128 17 August 2021, p57.
129 7 September 2021, p4.
130 See for example, 7 September 2021, p7.

aware of the research. And certainly no Commission officer ever told the Inquiry they were aware of an alleged motivation to lay charges to help Ms Kelsey get reinstated (an issue addressed further in relation to "Available finding 10").

143. Mr Alsbury reports directly to Mr MacSporran QC and is responsible to him for the performance of the Commission's corruption functions, which ultimately included Operation Front.[131] Mr Alsbury had many discussions and meetings with Mr MacSporran QC about the corrupt conduct investigation, including potential criminal charges. Mr Alsbury was not aware of Ms Kelsey's lawyer's email at Vol 1, p293 which referred to the appointment of an administrator. The "expression of interest" there discussed was never raised with Mr Alsbury. Neither was Mr Alsbury aware of the research. He was never party to a discussion in August 2018 as to what offences might be charged which would cause the accused councillors to be disqualified from holding office.[132]

144. Ms McIntyre said she was not aware of the research.[133] She did not recall any conversations among lawyers at the Commission in August 2018 "about finding an offence that would cause the councillors to be removed from office".[134] She said she was not concerned by the research: "it appears to be research in relation to appropriate charges, or consideration of charges." It is a matter that "we would consider".[135] She said the Commission does "not identify an offence and then go look for evidence".[136]

145. DS Beattie was not aware of the research.[137] He said it was not a topic of conversation with police officers attached to Operation Front that there was some need to identify offences that might cause councillors to be disqualified from office.[138] He said as an investigator he is always cognisant of the potential offences that behaviour he is investigating may lend itself to charging.[139]

131 18 August 2021, p16.
132 18 August 2021, p49.
133 20 August 2021, p25.
134 20 August 2021, p25.
135 20 August 2021, p25.
136 20 August 2021, p25.
137 26 August 2021, p6.
138 26 August 2021, p6.
139 26 August 2021, p6.

Available finding 7:

The steps taken by the CCC to assist Ms Kelsey in her QIRC proceeding, including with respect to her desire for reinstatement, breached its duty to act, at all times, independently and impartially pursuant to section 57 of the CC Act

146. For reasons already explained in this submission, the Commission does not accept that anything it did in relation to the support provided to Ms Kelsey meant that it acted in breach of its duty under s57 of the CC Act.

147. In particular, the Commission repeats what is stated in relation to "Available finding 1" and "Available finding 2" and the importance of supporting public interest disclosers. The Commission's response to the Notice to Produce in the QIRC was lawful and appropriate.

148. For the reasons stated under "Available finding 4", the documents were not delivered to the Council for the alleged purpose of making documents available to Ms Kelsey in the QIRC.

149. For the reasons stated under "Available finding 5", the documents were not delivered in November 2018 for the alleged "weighty and substantial purpose" to make them available for disclosure. The Commission's delivery of documents in November 2018 was for the purpose of, and consistent with, the Commission's corruption prevention functions. The conduct of the Council and some of the councillors who deleted public records poses a self-evident and serious corruption risk. It is within the statutory remit of the Commission to do what it did in November 2018 and in February 2019.

150. There can be no dispute, in the light of the State Archivist's report and the Council's response to it in February 2019, that the Commission's position in relation to the Council's lack of policies and inappropriate keeping of public records was correct. There was not a "failure to declare and record in appropriate dissemination authorities" anything in relation to either the October 2018 or the November 2018 disseminations which means that the Commission has breached its duty under s57 of the CC Act.

Available finding 8:

The material prepared for and considered at the 30 January 2019 meeting fell short of what was required properly to assess whether the proposed charges against the Mayor ought to be laid

151. There was only one element of the offence of fraud in issue, namely the element of dishonesty. The material prepared for and considered at the 30 January 2019 meeting (in particular, DS Francis' Memo: Vol 2, p77 – 92) focussed on the element of dishonesty and the available evidence relevant to the former mayor's alleged dishonesty.

152. However, the Commission accepts that the material prepared for and considered at the 30 January 2019 meeting did not include an elemental or structural analysis of what constituted the offence of fraud under s408C of the *Criminal Code*. The Commission also accepts that no formal written legal advice was prepared for the meeting on 30 January 2019. See also paragraphs 168 and 169 below.

153. However, the Commission respectfully emphasises that these matters did not and do not change the fact that when the fraud charges were laid on 26 April 2019, there was a proper basis for them, the charges had reasonable prospects of success, and the public interest supported laying them. The question whether the evidence proved the offence beyond a reasonable doubt was, in a circumstantial case such as this, a quintessential question for the jury to decide. The PCCC should also refer to the Summary of Opinion of Mr O'Brien AM and to Mr MacSporran QC's evidence on 7 September 2021 at p21.

154. The question whether a criminal case is permitted to go to a jury to decide is a legal question, namely whether on the evidence as it stands the defendants *could* (as opposed to would) lawfully be convicted. If that evidentiary threshold is met, namely that there is evidence upon which a defendant could lawfully be convicted, then subject to decisions by prosecutors to discontinue charges about which reasonable minds will often differ, a court will not prevent a case from going to a jury.[140] This is so even if the strengths or weaknesses of the prosecution evidence depends on the views taken of a witnesses' reliability or credit. Mr MacSporran QC said Ms Kelsey's credibility was a factor, but it could never be the determining factor in the

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140 *May v O'Sullivan* (1955) 92 CLR 654, 658 (Dixon CJ, Webb, Fullager, Kitto, and Taylor JJ) and *Doney v The Queen* (1990) 171 CLR 207; cited with approval in *Hamra v R* (2017) 260 CLR 479, [29] (Kiefel CJ, Bell, Keane, Gageler, Nettle, and Edelman JJ).

decision to charge.[141] This is plainly correct in the light of the evidence supporting the charges and which is detailed in the brief of evidence disclosed to the PCCC.

155. The Director of Public Prosecutions, Mr Heaton QC, said the decision he made in April 2021 that there were no longer sufficient prospects to continue the prosecution reflected his conclusion at that point in time (i.e. after the nine day committal).[142] He said the prosecutors who had had "some long-time involvement in the case and had prosecuted it through the committal, of course had assessed the evidence prior to the committal".[143]

156. Mr Heaton QC said that when the prosecutor, Mr Green, expressed himself in terms of "no longer sufficient", it reflected "an assessment by him that the state of the evidence prior to the committal was such that it was at that point – at least on what was evident from the material, the written word – sufficient for the matter to continue to that point in the process".[144]

157. Though it respectfully disagrees with it, the Commission accepts the DPP's decision to discontinue the charges after the committal hearing. The DPP (and not the Commission) is responsible for prosecuting the charges independently. The Commission respects the independence of the DPP and that it is free to make decisions about prosecutions unconstrained by the activities or views of the Commission.

158. Without wishing to derogate from the Commission's acceptance that improvements can and should be made in this part of the process, for context the Commission wishes to note the following relevant parts of the evidence.

159. DS Francis said that the memorandum contained the thoughts, arguments, and evidence which was a product of the police officers involved in Operation Front.[145] DS Francis took ultimate responsibility for the memorandum.[146] The memorandum refers to numbers throughout which are references to additional information in source documents which were easily accessible in the Commission's record system.[147] He said the document was to inform, "to gather together

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141 Mr MacSporran QC's evidence at 17 August 2021, p63; see also the Summary of Opinion of Mr O'Brien AM, paras 5 to 8.
142 3 September 2021, p6.
143 3 September 2021, p6.
144 3 September 2021 p6.
145 20 August 2021, p63.
146 20 August 2021, p74.
147 20 August 2021, p63.

the relevant evidence, make a record of it as a summary and move forward through the organisation for contribution and comment".[148]

160. DS Francis said the entire document "speaks to dishonesty critically [sic] to the element of fraud".[149] DS Francis agreed that given his experience with fraud charges, he considered the material collected in the memorandum was sufficient for considering the charge of fraud.[150]

161. He said it was a "huge body of evidence". He said the memorandum "explores the offending, but it only touches on the offending. The brief of evidence is significantly larger and very much more serious".[151] The brief of evidence has been disclosed to the PCCC and made available for this Inquiry.

162. The process adopted by DS Francis in preferring charges was more involved than usual. DS Francis explained that the process of preparing a memorandum of that nature was different to the normal environment in which a police officer operates.[152] DS Francis said in his service as a police officer in the Queensland Police Services he does not analyse the limbs of the offence in written form. He would do a precis but noted that most offences are not as complex. He accepted that in an offence of this nature it would be good practice to analyse the limbs of the prospective offences in writing.[153] The memorandum was DS Francis efforts at serving that purpose and he agreed it was "a bit of a download".[154]

Available finding 9:

The memoranda prepared for the 24 April 2019 meeting to consider commencing criminal proceedings against the seven Councillors and further proceedings against the Mayor for fraud were inadequate for that purpose

163. The Commission accepts that the memoranda prepared for the 24 April 2019 meeting did not contain an elemental analysis of the charges against the councillors and the former mayor. The Commission also accepts that the memoranda did not address in detail the evidence that might be relied upon against each individual accused having regard to their individual culpability.

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148 20 August 2021, p74.
149 20 August 2021, p63.
150 20 August 2021, p63.
151 20 August 2021, p64.
152 20 August 2021, p64.
153 20 August 2021, pp74 -75.
154 20 August 2021, p75.

164. The Commission respectfully emphasises what is stated above at paragraph 153, which applies equally here.

165. Again, without derogating from the Commission's acceptance of the matters stated in paragraph 163 above, the Commission notes that Mr Alsbury and Mr MacSporran QC had discussed between them the quality of the evidence and the applicability of the fraud charge to the facts of the alleged offending.[155] Mr MacSporran QC said the investigative members of the team, the lawyers, Mr Alsbury and himself "all understood, innately and instinctively, what those four elements [of Fraud under s408C, *Criminal Code*] required and there was only one ever in issue."[156] Mr Alsbury and Mr MacSporran QC both knew fraud was the obvious offence that applied to the circumstances.[157]

166. Mr Alsbury's memorandum of 23 April 2019 was legal advice which he had prepared for the 24 April 2019 meeting. The Commission accepts that the memorandum is not in the form of formal written observations and emphasises that they are now routinely prepared under the Commission's operations manual which came into effect after Operation Front.[158]

167. Mr MacSporran QC said that the differing culpability of the accused were discussed "along the road". He said it was always clear that there were differing levels of culpability.[159] He said that the case of fraud made against each of the individual councillors and the former mayor needed to be assessed in its own right. He was satisfied, together with Mr Alsbury, and the investigators, that the evidence was more than sufficient to lay charges of fraud against each of the accused.[160]

168. Mr MacSporran QC said that considerations whether someone has committed an offence that a jury might convict are routinely carried before charges are laid.[161] He said that decision to charge was carefully considered and appropriately executed but he was not suggesting that the Commission cannot improve on the procedures, and referred in that regard to the Commission's operations manual.[162]

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155 6 September 2021, p57.
156 7 September 2021, p19.
157 7 September 2021, p19.
158 6 September 2021, p57.
159 7 September 2021, p21.
160 7 September 2021, p22.
161 7 September 2021, p23.
162 7 September 2021, p23.

169. Mr Alsbury said, in relation to a "limb-by-limb or element-by-element analysis of the evidence which went to each" was discussed at the meeting on 24 April 2019 and over a period of time.[163] Mr Alsbury said that it should have been done in writing but the issues had certainly been raised by him and understood by others.[164] He said that in future he will do it in writing. He said legal observations are now prepared all the time.[165]

170. Mr Alsbury was asked about whether he had considered what was necessary to prove guilt beyond a reasonable doubt (18 August 2021, p51):

> "Mr SULLIVAN: I understand, Mr Alsbury, but in becoming comfortable that there were reasonable prospects, had you specifically turned your mind that in this type of case that would include proving beyond reasonable doubt defences that the Crown would have to negate?
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> Mr Alsbury: Yes.
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> Mr SULLIVAN: You were comfortable that there was evidence to do that?
>
> Mr Alsbury: Yes, I was.
>
> Mr SULLIVAN: You found that evidence from where?
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> Mr Alsbury: In the evidence that the investigators had collated, expressed in Detective Francis' memo, but I also went into the brief of evidence and read statements, reviewed transcripts, intercepted telephone calls, those sorts of things."

171. The Commission notes, for the avoidance of doubt, that evidence of intercepted telephone conversations was admissible evidence in the fraud proceedings.

172. Mr MacSporran QC conceded, reasonably, that "there is not the best record of all of the factors that were considered" and that it was one matter which has been addressed since this case.[166] Mr MacSporran QC understood the importance of a "documentary trail" but also correctly said to Counsel Assisting: "*But that is a very different thing to a proposition that there was a deliberate attempt to have an ulterior, improper motive to lay charges, as your theory advances*".[167]

173. In relation to "Available finding 9", at paragraphs 60 to 64 of the CA Submission, it is contended that the "only rational inference" about the alleged "urgency" which "found its way

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163 18 August 2021, p45.
164 18 August 2021, p46.
165 18 August 2021, p46
166 6 September 2021, p68.
167 6 September 2021, p68.

to" Mr MacSporran QC was that the charges were laid for an improper purpose to dissolve the Council and assist Ms Kelsey's reinstatement.

174. The contention should be rejected for the reasons stated below in relation to "Available finding 10".

Available finding 10:

The discretion to charge the Mayor and the Councillors with fraud miscarried because it was affected or infected by an improper purpose, namely a desire to assist Ms Kelsey in her QIRC action and for her to be reinstated

175. The Commission unequivocally rejects this contention in the strongest possible terms. It is a grave and serious allegation of alleged impropriety against the Commission and its officers. There is no basis for it. The charges were not laid on 26 April 2019 to assist Ms Kelsey or for any other improper purpose. The charges were not "affected or infected" by any such alleged purpose.

176. The Commission recommends the consideration of criminal charges by a seconded police officer (and charges are laid by that seconded police officer) when the evidence supports them and the public interest favours their prosecution. If the evidence is sufficient and the public interest favours laying them, there are few reasons to depart from a decision to lay charges. The Commission has a duty to recommend the consideration of charges at that point, as it was in this case. There were no features present in this case which meant that the charges should not have been laid in the public interest.

177. For the PCCC to conclude that the charges were laid for the purpose of assisting Ms Kelsey's reinstatement would require it reach that conclusion notwithstanding the sufficiency of the evidence and the public interest in laying them. The Commission repeats what is stated above at paragraphs 10 to 13 and 153 to 156.

178. It would also require the PCCC to reject the honest and credible evidence of the Commission's witnesses which is completely inconsistent with the finding, including the evidence of Mr MacSporran QC, an experienced Queen's Counsel highly experienced in criminal law matters and legal practitioner of long and reputable standing.

179. There is also the additional reason that, if in fact there was the alleged improper purpose amounting to a conspiracy to reinstate Ms Kelsey, there would have been a simple and obvious

way to achieve it. This would involve charging enough of the seven councillors to cause their immediate suspension from office, whilst leaving the Council quorate, but with a majority in power who supported Ms Kelsey's reinstatement.

180. A quorum for a council is a majority of its councillors.[168] There were 13 councillors for the purpose of calculating a quorum of seven. As at April 2019, the former mayor and Cr McIntosh had both been suspended, but their positions as councillors were relevant to the requirement of a quorum.

181. Accordingly, at the time there were 11 councillors who could vote on Ms Kelsey's reinstatement, being the seven accused councillors and the four others who supported Ms Kelsey.

182. If four, not seven, of the councillors had been charged, the Council would have been left quorate with seven councillors, with a majority of four which supported Ms Kelsey's reinstatement. For the avoidance of doubt, the Commission states unequivocally and very clearly that charging for that purpose be abhorrent and malicious. It would never happen. Yet it needs to be stated to highlight the irrationality of the conspiracy being alleged against the Commission.

183. It is stated at paragraph 101 of the CA Schedule:

> "*The timing of the fraud charges and its motivation were put to numerous witnesses to test whether there was a desire in the CCC to charge the Councillors so that they would be disqualified and the Council dissolved in order to assist Ms Kelsey before the matter came before the QIRC for final submissions.*"

184. There follows a reference to six pages of evidence in *Hansard* among over 500 pages before the Inquiry. With respect, this treatment of the evidence does not even come close to what ought to be undertaken before making such a grave and serious allegation against the Commission and its officers.

185. It is not contended that the evidence of any Commission witness was dishonest, yet dishonesty by another name is what is being alleged against the Commission and its officers, namely the commencement of criminal proceedings for a purpose which was not stated and which was not a proper purpose of the criminal law.

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168 Local Government Regulation 2012 (Qld), s259.

186. With respect, the contention advanced is simplistic, speculative, and inherently implausible. The CA Submission (paras 62 to 65) contends that the alleged "urgency" "found its way" to Mr MacSporran QC, leading to the "only rational inference" of charges being laid for the improper purpose of assisting Ms Kelsey's reinstatement. The contention has no merit and is contradicted by the overwhelming evidence received in this Inquiry. As is demonstrated below, the evidence given by credible, honest witnesses for the Commission is contrary to the proposition that charges were laid for (or otherwise affected or infected by) an improper purpose of assisting Ms Kelsey.

Mr MacSporran QC's evidence

187. Throughout the Inquiry Mr MacSporran QC gave consistent and clear evidence about the issue of the "timing" of the charges. The evidence is consistent with evidence he gave to the PCCC on 3 May 2019 a week after the charges were laid.

188. At the meeting on 24 April 2019, there was a discussion about whether the charges should be laid at that point, or whether they should wait because the QIRC proceedings were on foot. Mr MacSporran QC's view was that the Commission would be criticised whether it charged before or after finalisation of the QIRC proceeding.[169]

189. Mr MacSporran QC said that his view given at the meeting was that if the evidence was sufficient, "we should just forget about what was happening in the commission – that was not a relevant consideration for us – and go ahead and do what our investigation had indicated we should do, and had always been the focus of our activity, and just get on with it, which is what happened".[170]

190. His evidence on this topic is consistent with evidence he gave to the PCCC on 3 May 2019, one week after the charges were laid. In the private meeting, Mr MacSporran QC there gave the following evidence (3 May 2019, p6):

> "I can tell you one of the reasons we decided to move immediately. If we proposed to wait for the QIRC to decide the issue, which we anticipated would be at least many months, that was unfair to everyone, not to mention the community of Logan. If we had waited until after the decision and, for instance, Ms Kelsey had been unsuccessful in the QIRC and then we had charged, we would be accused of reprisal ourselves, getting square with him for sacking her. If we waited for the QIRC to find in her favour, we would be accused of waiting until we had that evidence before we were

169 17 August 2021, p55.
170 17 August 2021, p55.

> prepared to charge. Either way, there were significant concerns about delay and, at the end of the day, what they are doing is irrelevant to us. Whatever happens there will not affect our case, because our case is based on the evidence that we have, which is different to theirs in some respects anyway."

191. In the public meeting on the same day, Mr MacSporran QC said to the PCCC:

> "We gave long and hard consideration to the timing of these events. It has been public knowledge for a long time now that we have been investigating Logan, we have laid some charges and what happened on Friday was always a prospect, if not a probability. We decided at the end of the day, given that we are doing something quite separate to what the QIRC is doing, and for different reasons, that we could not delay any longer. There are permutations and combinations. We ultimately concluded that whatever we did in that space we would get criticised, rightly or wrongly. I have a view about that, but it is unnecessary for me to express that here. At the end of the day we concluded that the matter was so serious, and needed to be brought to a head and dealt with sooner rather than later, that we simply acted as we have.
>
> I made the point last Friday, and I reinforce it here, that those proceedings in the QIRC are totally different proceedings. There are different standards of proof including, as I said last Friday, a reverse onus on the councillors in the QIRC proceedings. The member there, being a statutory judicial appointment, is required to decide those matters quite independently of anything we have been doing and so on. There are some factual similarities and crossovers. Some of the evidence in that commission proceeding will be sought to be relied upon in our cases, but they are quite separate and compartmentalised."

192. Mr MacSporran QC had been told that there was some reticence to charge until the entire QIRC proceeding was decided.[171] That is why he expressed the view he described in the meeting on 24 April 2019.[172] Contrary to the contentions advanced as part of the alleged improper purpose, Mr MacSporran QC had been told before the 24 April 2019 meeting that the investigators' inclination was to *wait* until the QIRC proceeding had been finally decided before charging.[173] He had a clear memory of this.[174]

193. Mr MacSporran QC's evidence was also consistent with his evidence to the Inquiry when he returned on 6 September 2021. He did not know what the urgency was. He had been told before the meeting by Mr Alsbury that the investigation team were concerned about charging before the QIRC proceeding had been concluded. He thought about that and came into the meeting on

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171 17 August 2021, p56.
172 17 August 2021, p56.
173 7 September 2021, p22.
174 7 September 2021, p21.

24 April 2019 and expressed the view he had explained earlier in his evidence.[175] His view was that if the evidence was sufficient, there was no basis upon which we should not go ahead and do that, irrespective of what was happening in the QIRC or elsewhere.[176] That approach was appropriate.

194. Mr MacSporran QC said there was not in his mind any convergence between the QIRC proceeding and the criminal investigation.[177]

195. On the first day of the Inquiry, as he did on many other occasions, Mr MacSporran QC rejected the suggestion that the charges were laid to assist Ms Kelsey: "Categorically, I reject that entirely. There was never, ever any ulterior motive in the charging of the seven councillors".[178] He said the suggestion was "personally offensive" and that there "is absolutely no truth in such a suggestion, I can assure you".[179]

196. Mr MacSporran QC said, in relation to the 26 March 2019 email (Vol 2, p93) that "it was never conveyed to me in those terms and, in fact, my decision to refer it" to DS Francis "was not on this basis or anything like it, from me or Mr Alsbury".[180] He said that he knew "what my assessment of the matter was, and the motivations behind it" and it "had no regard to any question of urgency and the QIRC proceedings at all".[181]

Mr Alsbury's evidence

197. Mr Alsbury's evidence about the timing of the charges was consistent with Mr MacSporran QC's evidence about his view expressed at the 24 April 2019 meeting.[182] He agreed that the Commission "chose to go when [it] was ready". He said no other consideration influenced the timing of the decision.[183]

198. Mr Alsbury did not know why he had stated in his memorandum that it was urgent. He speculated, but did not know, that it may have been because things were taking longer than expected.[184] The investigation by this stage had been ongoing for approximately 18 months.

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175 6 September 2021, p58.
176 6 September 2021, p58.
177 6 September 2021, p59.
178 17 August 2021, p59.
179 17 August 2021, p60.
180 6 September 2021, p59.
181 6 September 2021, p60.
182 18 August 2021, p47.
183 18 August 2021, p47.
184 18 August 2021, p58.

As the PCCC will be aware, an important KPI for the Commission's corruption investigations is for 85% of them to be completed within 12 months.

199. Mr Alsbury said he did not have any knowledge now, or at the time, of the charges being motivated or any way informed by the desirability of securing the disqualification of the accused.[185] He denied that there was a desire to charge before 2 May 2019 to assist Ms Kelsey get reinstated or that a desire to assist Ms Kelsey had infiltrated the thinking about the criminal case.[186]

DS Francis' evidence

200. DS Francis described in his evidence the limited extent of his interest in the QIRC proceeding, which was to assist his corrupt conduct investigation.[187]

201. DS Francis explained the context of his reference to "time critical" in the email at Vol 2, p93. DS Francis disagreed that the fact submissions were scheduled on 2 May 2019 meant that he thought it was important the Commission act quickly in laying charges.[188] His sense of urgency was in getting what he needed to get done before charges were laid. He had just obtained statements from Ms Kelsey and Cr Power, and he had to obtain other statements from witnesses involved in the QIRC proceeding.[189] Ms Kelsey's statement was signed on 22 March 2019. Cr Power's was signed on 21 March 2019. Both statements are contained in the brief of evidence disclosed to the PCCC.

202. He had been advised that witnesses would be unavailable for his purposes leading up to and during the proceeding.[190] He said if the witnesses were not able to further liaise with him, it might mean months of delays.[191] He said he was trying to do "my job as quickly as I could to the best of my ability and get to court".[192]

203. DS Francis was asked again about these matters when he returned to the Inquiry on 25 August 2021. His evidence about them was consistent with his earlier evidence.[193]

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185 18 August 2021, p50.
186 18 August 2021, p58.
187 20 August 2021, p65; 25 August 2021, p8.
188 20 August 2021, p66.
189 20 August 2021, p66.
190 20 August 2021, p66.
191 20 August 2021, p67.
192 20 August 2021, p67.
193 25 August 2021, p8.

204. DS Francis was asked about the references to "matters of time" in his 54-page memorandum: (Vol 2, p257, para 8). His evidence was consistent with what is stated in the document and his previous evidence given on 20 August 2021.[194] He denied that he charged fraud for either "the" or "a" purpose of achieving the dissolution of the Council to have Ms Kelsey reinstated.[195]

DSS Andrews' evidence

205. DSS Andrews explained the issue of timing. There is no improper purpose to be associated with sending of the email of 26 March 2019. DSS Andrews wanted to have a date to work towards and to move the investigation along.[196] He did not care whether the QIRC knew or not that the councillors had been charged.[197] It did not enter his thinking about whether a particular charge would suspend councillors.[198] He said that he did not think when the 26 March 2019 email was written he had even thought about a fraud charge.[199]

206. DSS Andrews said that the charges were not laid to disqualify the councillors.[200] He was repeatedly asked the question by Counsel Assisting and he consistently denied it. He said it "was definitely not the case".[201]

DS Beattie's evidence

207. DS Beattie said he did not understand there to be "some particular urgency" with the councillors to be arrested and charged before 2 May 2019.[202] He did not think that the intention to resume the QIRC hearing on 2 May 2019 had any impact on the investigation.[203]

208. He did not recall any discussions around 26 March 2019 about whether or not the councillors may be removed from office.[204] He did not recall receiving any advice from Ms McIntyre or anyone else about charges that would cause councillors to be suspended by operation of the *Local Government Act*.[205]

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194 25 August 2021, p4.
195 25 August 2021, p18.
196 25 August 2021, p62.
197 25 August 2021, p62.
198 25 August 2021, p62.
199 25 August 2021, p63.
200 25 August 2021, p65.
201 25 August 2021, p66, see also p67.
202 26 August 2021, p9.
203 26 August 2021, p10.
204 26 August 2021, p10.
205 26 August 2021, p10.

209. DS Beattie said that from the time of the vote on 7 February 2018, the councillors were suspects for misconduct in relation to public office.[206] Misconduct in relation to public office is, of course, a serious integrity offence under the *Local Government Act*. The alleged offending was always susceptible to a charge of that type. It was incorrectly suggested to him that he formed that view without having taken any steps to understand the reasons for taking the action on 7 February 2018. In fact, as he explained, DS Beattie had appraised himself of the telephone intercept material which had been intercepted since January 2018, before the vote to terminate Ms Kelsey.[207]

210. The Chronology includes relevant evidence of the former mayor and the councillors' conduct in this regard (and the conduct of others who were not part of the Council but involved themselves in the councillors' consideration of the decision to terminate Ms Kelsey).[208] The telephone intercept evidence has been disclosed to the PCCC.

DI Preston's evidence

211. DI Preston said he was aware of the QIRC proceeding but he "could not tell you what was happening on 2 May".[209] He said it "did not really interfere with our investigation".[210]

212. As for timing, he said "there is probably no need to charge before 2 May – the criminal charge before 2 May, but there is no need not to go out and do it before 2 May 2019".[211]

213. DI Preston did not know that "the fact the council was gone would materially help Ms Kelsey in her QIRC proceeding with her quest to be reinstated".[212] He said the council being disbanded and an administrator being appointed "was obviously going to happen. If that was the case, it does not matter where or when we charge, that was going to happen at some stage…".[213]

214. The above summary of the evidence disproves the alleged improper purpose. Plainly, the contended finding is not the inevitable and only available inference from the evidence. Rather, the opposite conclusion is the case: Ms Kelsey's reinstatement had *nothing* to do with the laying of the fraud charges.

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206 26 August 2021, p11.
207 26 August 2021, p11.
208 See Chronology items: 67, 68, 69, 70, 79, 84.
209 25 August 2021, p48.
210 25 August 2021, p48.
211 25 August 2021, p49.
212 25 August 2021, p49.
213 25 August 2021, p50.

Available finding 11:

The discretion to charge the Mayor and the Councillors with fraud miscarried also because all material considerations were not taken into account and weighed, and because the decision making about it was not impartial

215. The Commission rejects the contention that the charge of fraud miscarried. Material considerations were not omitted from consideration and the decision making was not partial.

216. The public interest was properly weighed in this case and the public interest clearly favoured the commencement of the prosecutions. The Commission notes that it is not contended (and nor in the Commission's submission could it ever be on the facts of this case) that the public interest did not favour the exercise of the discretion by DS Francis to charge the former mayor and the councillors.

217. Mr Alsbury referred, at paragraph 14 of his memorandum dated 23 April 2019, when addressing "public interest considerations" to "the significant ramifications of charging the councillors on their future employment as local government politicians".[214] He concluded that the charges were in the public interest. He said that when the charge is serious, public interest considerations "very rarely" mean that you do not pursue a prosecution.[215] Mr Alsbury has many years' experience as a prosecutor both in Queensland (at the DPP) and overseas.[216]

218. The absence of a specific acknowledgement in writing about the consequence of charging under the *Local Government Act*, or to record in writing the consequence that the councillors would be suspended, cannot sensibly lead to the conclusion that the discretion to charge miscarried. It was *not* a material consideration which was overlooked in laying the charges.

219. The consequence that the laying of the charges on the councillors would lead to their automatic suspension was one *that the Legislative Assembly intended.* It was not a factor which could ever influence, override, or outweigh a decision to prosecute where the offence is serious, the evidence is sufficient, and it is in the public interest to prosecute.

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214 Vol 2, p321; 18 August 2021, p41.
215 18 August 2021, p41.
216 18 August 2021, p42.

220. The relevant amendments to the Local Government Act were made in May 2018 pursuant to the *Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Act 2018* (Qld).

221. The Explanatory Notes to that Act state that the objective of the amendments "is to reinforce integrity and provide for increased transparency and accountability in local government": p1. In relation to the suspension of councillors, the "policy objective" is, relevantly, "to provide that a councillor is automatically suspended if the councillor is charged with an offence that would, on conviction, disqualify the councillor from being a councillor under s153 of the LGA": p3. The Explanatory Notes state that there "are no alternative ways to achieve the policy objectives": p10.

222. Under the subheading "Natural justice", the Explanatory Notes relevantly state the following (p10):

> "The amendment does not provide for a show cause process prior to the commencement of the suspension or a review or appeal process. However, the suspension is considered necessary to maintain public confidence that councillors are properly able to perform their role and to make decisions in the public interest. Further, the suspension does not affect the councillor's right to present their case in response to the charge before the appropriate court."

223. The fact that the councillors might be suspended under operation of the *Local Government Act* (as amended) could, contrary to paragraph 79(c) of the CA Submission, *never* have been a sufficient basis not to lay the charges.

224. With respect, the proposition that it could is absurd. It is contrary to the DPP Guidelines, a copy of which is **annexed** to these submissions. It is contrary to the plain intention of the *Local Government Act*. It would treat elected politicians in a way that differs from others and which is inconsistent with the legislation passed by the Legislative Assembly.

225. Many people, as DS Francis pointed out with respect to himself, will immediately lose their job if they are charged with a criminal offence.[217] It is not, as was suggested by Counsel Assisting to DS Francis, a matter of people being ordinarily "innocent until proven guilty".[218]

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217 20 August 2021, p78.
218 20 August 2021, p78.

226. Rather, it is a matter of what the Legislative Assembly intended. It is the clear consequence that, in this case, the Legislative Assembly saw fit to enact legislation which would immediately suspend the councillors from office.

227. It is not for an executive agency such as the Commission to arrogate for itself a discretion to, depending on the characteristics of the accused, decide the ultimate effect of the laws passed by the Legislative Assembly. The Commission could never let that consideration affect the exercise of its powers. That is, with respect, the Legislative Assembly's role. The Legislative Assembly is the arm of government which sets the legal consequences of executive action. For the Commission to decide *not* to recommend charges *because* the councillors might be suspended under law validly passed by the Legislative Assembly would subvert the clear purpose of that law.

228. Instead, if the evidence is sufficient and the public interest favours the prosecution, then short of the accused being on his or her death bed, the DPP Guidelines require a prosecution to be laid as they did in this case.

229. Mr MacSporran QC spoke in detail about why the DPP Guidelines required the prosecution in this case and why the consequence that the councillors would be suspended was not a material consideration which was required to be considered.[219] Counsel Assisting had the opportunity to ask the Director of Public Prosecutions these questions about the DPP Guidelines for the benefit of the PCCC but did not take it up with Mr Heaton QC.

230. Mr Alsbury also gave evidence about the application of the DPP Guidelines: the more serious the offending, the more likely that the public interest will require a prosecution; matters in mitigation can be considered at sentence.[220]

231. DS Francis said that when he charges someone he has regard to the sufficiency and admissibility of evidence and to the public interest. He said the consequences of a charge on a person is one of the lesser considerations in respect of his sworn duty: "I behave in a manner without fear and favour according to my oath. I recognise the impact that this proceeding has had on those involved, but I am not influenced by it".[221] With respect, this response is illustrative of conduct that is entirely appropriate for a sworn police officer and the Commission completely supports it.

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219 6 September 2021, pp 63 – 65. See also 17 August 2021, p50.
220 18 August 2021, p41.
221 20 August 2021, p69.

232. The absence of formal written legal observations and a written analysis of the evidence against the seven councillors individually does not mean that the discretion to charge miscarried or was not impartial. The charges were properly laid in the public interest. We respectfully refer to paragraphs 153 to 156 above.

233. With respect, the use of isolated language by DSS Francis in a fifty-four page memorandum does not provide a reasonable basis to conclude that he was partial or biased in his investigation and charging of the former mayor and the councillors.

234. The Commission accepts, as did DS Francis, that the language was not necessary. DS Francis accepted the language may have been "needless". But he nevertheless explained his use of language, which is important context to note:[222]

(a.) in relation to "cancer", he was referring to a habit of using non-disclosure agreements at the Council in relation to two previous CEOs, two previous directors, managers, and a previous chief of staff;

(b.) he said the use of non-disclosure agreements stood in opposition to accountability and transparency in local government;

(c.) "cancer" is a word he used to "convey a systemic and destructive methodology by the mayor to bury what I believed at the time to be corrupt conduct";

(d.) in relation to a "Jekyll and Hyde" existence, DS Francis said: "I am wishing to convey six months of telecommunications intercepts in which I listened and understood the lifestyle that the mayor was living, and I observed directly the nature in which the mayor was able to evolve from one that commanded respectability to one that operated in a background that was entirely self-serving and used circumstances to manipulate his purported purpose, in this case to dispose of the CEO".

235. In the context of an 18-month corruption investigation, the reliance on isolated instances of language used by DS Francis in a 54-page memorandum, particularly in the light of his explanation about it, is a completely insufficient basis on which to conclude that he was partial and that the discretion to lay criminal charges therefore miscarried. He denied that he was influenced by his feelings with respect to the commencement of prosecutions.[223]

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222 25 August 2021, p2-3. See also Mr MacSporran QC's evidence on 17 August 2021, p48, 49.
223 25 August 2021, p3.

Available finding 12:

DS Andrew Francis failed to properly, independently, impartially and fairly exercise his discretion to charge the 7 Councillors with fraud. In doing so he acted in dereliction of his duty as a police officer, contrary to the requirements of the OPM and contrary to s57 of the CC Act. That failure and his subsequent conduct in relation to Ms O'Shea reflect poorly on his fitness to serve as a police officer

236. For the reasons already stated in this submission, the Commission rejects the contention that DS Francis failed to properly, independently, impartially and fairly exercise his discretion to charge the councillors with fraud. DS Francis was supported by the expertise of others in the investigation and charging process, including senior lawyers of the Commission. DS Francis was entitled to have confidence that his decision-making was supported by that expertise.

237. The Commission wholly supports DS Francis in rejecting any suggestion that:

(a.) he failed to act properly, independently, impartially, and fairly in exercising his discretion to lay charges; or

(b.) he acted in dereliction of his duty as a police officer; or

(c.) any conduct of his reflects poorly on his fitness to serve as a police officer.

238. The contention that the discretion to charge was "affected or infected" by the Commission's desire to assist Ms Kelsey's reinstatement should be rejected for the reasons already explained in this submission.

239. Mr MacSporran QC did not "encourage" Ms O'Shea to reinstate Ms Kelsey as CEO.

240. Mr MacSporran QC said he inquired of Ms O'Shea of her view about Ms Kelsey's position and was there going to be any relief for her.[224] When asked whether he made "any request to her that Ms Kelsey be reinstated as CEO", Mr MacSporran QC said: "I may have asked whether that was in contemplation or whether it was desirable". This is consistent with Mr MacSporran QC's later evidence that it was an "inquiry". He did not ask or encourage Ms O'Shea to reinstate her.[225]

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224 17 August 2021, p59.
225 7 September 2021, p6.

241. Mr MacSporran QC said he did not think he disclosed the phone conversation to anyone.[226]

242. The CA Schedule claims (at para 109) that Ms O'Shea used the word "advocated" in relation to Ms Kelsey's reinstatement. That is literally true, though it ignores of course that Ms O'Shea said immediately afterwards: "Perhaps I misspoke in using the word 'advocate', but certainly there was a strong suggestion she would be beneficial to my term as interim administrator".[227]

243. Ms O'Shea's evidence about the timing of the phone call is contradicted by the available documentary evidence, namely Mr MacSporran QC's phone records produced to the PCCC.

244. Those phone records show that:[228]

(a.) at 4.05pm on 2 May 2019, there was an inbound phone call to Mr MacSporran QC for 55 seconds from a Council number – Mr MacSporran QC thought this was a call to his PA to enter Ms O'Shea's details in his mobile phone;

(b.) at 10.19am on 17 May 2019, there was an inbound phone call to Mr MacSporran QC for 30 minutes, 12 seconds from a Council number;

(c.) at 4.03pm on 3 June 2019, Mr MacSporran accessed his voicemail messages for 23 seconds from Adelaide Airport;

(d.) at 4.49pm on 3 June 2019, Mr MacSporran telephoned Ms O'Shea for 12 mins, 32 seconds;

(e.) at 10.14am on 5 June 2019, Mr MacSporran telephoned Ms O'Shea for 20 seconds.

245. Mr MacSporran QC said he was very confident that the phone records capture every call that he made from any phone at the relevant time on 29 May 2019.[229] The Commission has disclosed all of Mr MacSporran QC's phone records from the Commission's office and his Commission mobile telephone for the relevant period.

246. In response to Mr MacSporran QC saying that his phone records showed that there was no telephone call on 29 May 2019, but that there were calls on 17 May 2019, 3 June 2019, 5 June 2019, and 2 May 2019, Counsel Assisting said that he understood it.[230] Mr MacSporran QC

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226 7 September 2021, p30.
227 26 August 2021, p42.
228 See also, 7 September 2021, pp8 – 9.
229 7 September 2021, p9.
230 7 September 2021, p16.

said the phone records have been disclosed. Counsel Assisting said: "Thank you. All of that, Mr MacSporran, is all clear".

247. However, inexplicably one finds no mention of this evidence in the CA Submission or the CA Schedule. The Commission wishes to remind the PCCC of this evidence.

248. With the greatest of respect, it is a nonsense to suggest that the Commission sought to remove Ms O'Shea (para 85, CA Submission). The Commission did not investigate Ms O'Shea. No investigation was commenced.

249. DS Francis said that an investigation was not commenced.[231] It was not his delegation to decide what he investigates and what he does not. He said: "All I am doing is briefing up". DS Francis was asked who authorised him to "do what you are doing" in the email. He said, correctly: "Mr Horton, I am not doing anything; I am simply communicating".[232] DSS Andrews said "I just sent it up then somebody else can decide".[233]

250. Mr MacSporran QC rejected as "utterly absurd" the suggestion that the Commission took steps to investigate the removal of Ms O'Shea on grounds which included dishonesty.[234] The absurdity of the suggestion is obvious. Indeed, the questioning of DS Beattie on this topic clearly proceeded on the basis that he had *not made any investigations* (and it is clear from the line of questioning that was in fact intended as a criticism of him).[235]

251. As Mr MacSporran QC said in evidence, the emails from police officers "went up the line and was stopped dead in its tracks". That is why it never got to him: "They were not game to give it to me and what I might have done with it".[236]

252. DS Beattie was "completely satisfied" with the response from Mr Alsbury; he was not disappointed, angry, or frustrated.[237] He disagreed that his email was motivated to any extent by the fact that Ms O'Shea had not reinstated Ms Kelsey.[238]

253. In relation to the email, DI Preston said: "Our investigation was around that type of behaviour so it does not surprise me to see communications like this occurring".[239] DI Preston said he

231 25 August 2021, p12.
232 25 August 2021, p13.
233 25 August 2021, p70.
234 7 September 2021, p16.
235 26 August 2021, p32.
236 7 September 2021, p29.
237 26 August 2021, p26.
238 26 August 2021, p33.
239 25 August 2021, p45.

passed on the views to his superiors, but did not himself have an input into their views, or the veracity of them.[240]

254. Contrary to the contentions in the CA Submission (at para 84), the conduct of the police officers was not disgraceful. The conduct consisted in sending emails internally among the investigative team which were sent up the chain of command whereupon the line of inquiry appropriately ended for the reasons stated.

Available finding 13:

Mr MacSporran did not ensure that the CCC acted, at all times relevant to the matters the subject of the Resolution, impartially, independently and fairly. That failing is serious and reflects poorly on his standing as the Chair of the CCC

255. This available finding is rejected because for the reasons already addressed, the Commission did not fail to act impartially, independently, and fairly.

256. At paragraph 86 of the CA Submission, the extraordinary claim is made that Mr MacSporran QC's decision to authorise the charges was not impartial. No evidence is there cited, but the Commission can only assume reliance is placed on the matters variously stated throughout the CA Submission and CA Schedule.

257. The suggestion that Mr MacSporran QC referred consideration of charges against the councillors for the alleged improper purpose is a gravely serious allegation to make in a public forum in circumstances where there is no right of review for Mr MacSporran QC outside of parliament. The contention is unequivocally rejected for the detailed reasons explained in this submission. We have addressed the evidence adduced to the Inquiry in detail to illustrate that these unfounded serious allegations are without merit.

258. There is no basis for concluding that Mr MacSporran QC's decision to refer the charges to a seconded police officer was not impartial, or was biased, or improper (or relevantly "affected" or "infected" by those vices). Nothing Mr MacSporran QC did in relation to the corrupt conduct investigation was motivated by a desire to have Ms Kelsey reinstated. Mr MacSporran QC did not act partially and nothing he did was for, or affected by, an improper purpose. There are no grounds to justify the termination of his appointment under s236 of the CC Act.

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240 25 August 2021, p46.

259. Mr MacSporran QC said that on every occasion when he assesses a case like this or any other he takes into account the need not to be influenced by personal feelings of the prosecutor concerning the offender or the victim. He said his role in assessing it is to consider whether personal feelings have skewed the view of the investigator or the evidence that has been gathered. He said "this was a case where the evidence spoke for itself".[241]

260. Mr MacSporran QC said: "I can tell you absolutely I have never – never – taken the stance to charge or to interfere with charges for a nefarious or collateral or other improper purpose; nor would I".[242]

261. The PCCC should read Mr MacSporran QC's evidence given on the first day of the Inquiry on 17 August 2021 (p44):

> "All I can assure you of, Mr Horton, is that I have had a long, long period of experience both prosecuting and defending, assessing evidence—circumstantial or otherwise—making value judgements about whether the evidence is sufficient, taking into account the impact on people who are being charged. I appeared regularly as defence counsel in high-profile serious difficult cases, some of which I won but many of which, unfortunately, I lost. I understood very poignantly the impact of charging people and the devastating consequences on occasions to not only them personally but their families. I have taken many a client down to the cells after a verdict of guilty and a prison sentence, spoken to them personally, had to console them and then had to leave them and tell their family and explain the consequences to them. I was acutely aware, as anyone responsibly would be, of the huge impact of any decision to charge anyone with a criminal offence…
>
> Do not for a moment think I did not take into account everything within my power to make sure, as I was, that the decision to allow a police officer to charge was entirely the right decision. In my long career I have never, ever let extraneous irrelevant considerations enter my thinking about such a decision.
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> …
>
> But I can assure you that the decision itself to allow it to be referred to a police officer was done not only in good faith but it was the right decision. I thought so then and my view has not changed. Indeed, the Director of Public Prosecutions who received the brief, as they do in the procedure we have, clearly agreed with the appropriateness of the charge that was laid because he proceeded with it. He had the perfect opportunity and right, if not obligation, if

241 17 August 2021, p43.
242 17 August 2021, p53. See also 7 September 2021, p40.

> it had not been the right decision to charge, to stop the prosecution there and then. Instead, the matter went to a committal and it was only after nine days of committal—and bearing in mind, the committal is the venue where evidence gathered that results in charges is tested for its reliability, its accuracy and its substance— that the Director of Public Prosecutions, who was then Mr Heaton, decided that the case no longer had any reasonable prospect of success and determined to discontinue the matter."

262. For the reasons already stated, neither did Mr MacSporran QC seek to have Ms Kelsey reinstated. He merely inquired of Ms O'Shea about it.

263. Mr MacSporran QC was not, as he explained, personally involved in the "CCC's involvement in the QIRC proceeding". He did not commonly become involved in day-to-day operational matters.

THE COMMISSION'S SUBMISSIONS ABOUT THE PROPOSED MEASURES

264. The proposed measures are, respectfully, matters of policy and which for the most part were not addressed directly in the Inquiry. Those matters of policy ought to take account of the findings which the Commission respectfully submits the PCCC ought to make as outlined in the above submissions.

265. The Commission respectfully notes that any proposed amendment to the CC Act or related legislation should be considered by the PCCC upon receipt of more detailed submissions by interested parties in the usual course.

266. The Commission makes the following brief submissions in relation to the proposed measures.

Proposed measure 1: A distinction between investigative and charging functions

267. The Commission intends in the future to obtain independent external advice on complex prosecutions before charges are laid, either from the DPP where appropriate, or some other appropriately qualified and independent advisor. The Commission respectfully notes for the PCCC's benefit the evidence of Mr Heaton (3 September 2021, pp 8 - 9) relevant to the question of the DPP providing advice about charges.

268. To properly perform its independent statutory functions, the Commission must have the flexibility, where appropriate, to be able to recommend the consideration of criminal charges without being required by statute to in every case obtain the prior approval or recommendation of an external stakeholder.

269. The legislative history underlying the current practice of laying charges by police officers at the Commission prior to referral to the DPP is set out in the Commission's outline of submissions dated 26 July 2021 (at paragraphs 213 to 215).

Proposed measure 2: Non-renewal of fixed terms

270. These issues have been addressed in the PCCC's recent five yearly review of the Commission.

271. The Commission supports the recommendation that the Chairperson and Ordinary Commissioner (including the Deputy Chairperson) should have a single non-renewable appointment not exceeding seven years.

272. However, the Commission relies on its earlier submissions made in the five-year review about the application of the single non-renewable appointment of senior officers.

273. The Commission respectfully reiterates its earlier submission that the provisions which limit the tenure of senior officers (as defined) and the Chief Executive Officer should be removed. As set out in our submission to the recent 5-year review, these provisions are inconsistent with both the broader public sector and other integrity agencies throughout Australia and have the potential to limit the development and retention of internal capability.

Proposed measure 3: Seconded police ought be rotated more regularly

274. The important role played by seconded police at the Commission and its predecessors is a fundamental component of Queensland's anti-corruption model since the Fitzgerald Inquiry. The recommendations of Mr Fitzgerald QC at page 374 in his report recognised the importance of this role for seconded police officers.

275. The important role of seconded police officers at the Commission is supported by the QPS, Queensland Police Union, and Queensland Police Commissioned Officers' Union of Employees.

276. The current arrangement with the Queensland Police Service for the secondment of police to the Commission has resulted in the shortest average secondment tenure in the history of the organisation: 2.56 years. These short tenures are a consequence of the new rotation policy agreed with the QPS in 2015 and again in 2020 to facilitate the transition of non-specialist police back to the QPS after 3-5 years tenure at the Commission. Specialist police in the form of surveillance and witness protection officers may have a tenure of up to 8 years.

277. Following the 2013 Callinan and Aroney and Keelty reviews of then Crime and Misconduct Commission, the Commission implemented the new rotation policy and facilitated the return to the QPS of police officers whose tenure at the agency exceeded the arrangements in the new policy. Sixty-two officers seconded before October 2015 were returned to the QPS. They had an average tenure of 9.13 years, with some officers having worked at the organisation for as long as 10, 15 or 20 years.

278. The issue was also subject to review and comment as part of the recent inquiry conducted by the PCCC. The PCCC's report stated as follows: [243]

> "Secondments of Queensland Police Service (QPS) employees are an important part of the CCC's staffing structure. In the CCC's 2019-20 Annual Report it was reported that 20% of the CCC's 373 employees were police officers. At the public hearing, the QPS noted that currently there are 85 police officers seconded to the CCC. There is currently a Memorandum of Understanding between the QPS and the CCC for the secondment of police officers to the CCC. Whilst a QPS officer is seconded to the CCC, the officer retains a relationship with their 'home agency'. Officers can be employed by the commission under section 254 (commission staff), section 255 (officers on secondment) or section 256 (engagement of agents to meet temporary circumstances) of the CC Act.
>
> 3.1.5.1 Stakeholder views
> During the public hearing for the review, the QPS, QPU and the Queensland Police Commissioned Officers' Union of Employees (QPCOUE) commented generally on secondments of QPS employees to the CCC. The QPS acknowledged that police play 'a critical role' in the CCC, making the following comments about the recruitment and retention of police officers at the CCC:
>
> > ...obviously we expect officers at very high standards to come in and work in that environment, as we do within our own Ethical Standards Command. **It is not for everybody. It is an incredibly difficult role at times because of the nature of the work that is being done and also the nature of being quite isolated from the organisation....The recruitment is always challenging, as it should be. That is the way that I view it. You usually are after the best of the best of what you have to work with in that environment.** (emphasis added)
>
> The QPCOUE commented generally about its members, some of whom would find themselves under investigation by the CCC. In regards to the welfare and wellbeing of police officers when seconded to the CCC, Superintendent Stephen Munro, QPCOUE noted:

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243 Report No. 106, 57th Parliament, Parliamentary Crime and Corruption Committee, June 2021, pages 17-18.

> I think they are managed quite well. Two of our executive members work at the CCC. The welfare of our staff and the welfare of the Police Service has always been a high priority for the organisation. **I think there have been significant changes in the last number of years about rotation of staff through the CCC. Historically, some people may have spent 10, 15 or 20 years there, and there is a policy where people do not stay—it is a bit like in our other areas of the organisation. We have certainly matured in that respect**. (emphasis added)

> The CCC acknowledged that in the past, some criticism has been raised regarding the secondment of police to the CCC to assist its investigations, but also noted that the Fitzgerald Inquiry was staffed with seconded police to facilitate its investigations and 'Mr Fitzgerald QC regarded seconded police as essential for an anti-corruption agency, and expressly recommended that as the appropriate mechanism to staff its misconduct investigation function'."

279. The Commission respectfully considers the current policy is an appropriate balance between the advantages of rotation and ensuring tenures do not result in the risks the recommended proposed measure notes. The current leadership of the Commission has achieved this substantial reduction in average secondment tenure and it is based on sound policy which has been mutually agreed with the Queensland Police Service.

280. A further reduction in the tenure of seconded police at the Commission risks compromising operational effectiveness and efficiency. Many criminal and corruption investigations conducted by the Commission are long and complex. The replacement during an investigation of the investigating police officers because of a limit on the officer's tenure might impede the success of the investigation.

Proposed measure 4: Statutory limits on dissemination of confidential and sensitive information by the Commission

281. Most disseminations of confidential information by the Commission are made under section 60 of the CC Act. Commission policy in relation to disclosure and requests for information clarifies that Commission officers generally have authorisation to deal with Commission information when it is relevant to the discharge of their duties and in performing Commission functions (ss60(1) and 342, CC Act).

282. The Commission's policy requires written authority of an authorised delegate prior to the disclosure of Commission information for the purpose of another entity (under ss60(2) or 202,

CC Act) and Commission hearing information (unless the disclosure would not be an offence against s202(1) CC Act).

283. Disclosure under s.60(2) is only allowed where it complies with the CC Act and other legislation, record-keeping, information-transfer and security classification requirements and is determined to be 'appropriate'.

284. Conditions and confidentiality requirements may be placed by the Commission on the use of the information by the recipient. The Commission's policy sets out a list of 16 considerations that should be considered in determining whether a dissemination is appropriate. Respectfully, these are considered by the Commission to adequately safeguard the inappropriate release of confidential information.

285. There are a range of circumstances where disclosure could be made by the Commission to an appropriate entity for that entity's purpose (rather than the Commission's purpose). Imposition of statutory limits beyond the general criterion of appropriateness risks restricting the ability to transfer information where is it in the public interest. Examples of disclosure include:

(a.) information to NSW police relating to persons of interest based in NSW suspected of being involved in drug related activities with Queensland-based Commission targets;

(b.) information to interstate or overseas law enforcement agency about suspected paedophile activity in that jurisdiction;

(c.) information to the Health Ombudsman's Office about an allegation of improper prescriptions and medication to a prisoner when the complaint has been assessed as not within the Commission's jurisdiction;

(d.) information to the QPS relating to threats (for example, from aggrieved complainants) to the life or personal safety of police officers or threats of self-harm;

(e.) providing another research body with a copy of a research instrument (for example, a survey) used in a Commission published report;

(f.) information to the Department of Housing and Public Works regarding a public housing tenant breaching public housing eligibility requirements by owning multiple properties;

(g.) bank records obtained by the Commission to the Australian Taxation Office (ATO) for the purpose of the ATO investigating tax related offences;

(h.) disclosure of information about a protected witness to the Family Court for the purposes of a property settlement between the protected witness and their spouse;

(i.) disclosure, to another Queensland agency, information gained through a procurement process that a tenderer who has a contract with that other agency has criminal connections; and

(j.) information to the QPS regarding known and unknown suspects' use of child exploitation material.

286. No other jurisdiction in Australia has the same obligations or approach as the Commission to managing complaints about officers of their respective anti-corruption/integrity bodies.[244]

287. In Queensland, a matter is notifiable where the notifier (this is usually the chief executive officer) suspects conduct of a person involves, or may involve, improper conduct. In forming a suspicion, the notifier cannot take into account whether or not the conduct was inadvertent.

288. In Queensland, the obligation to notify the Committee and the Parliamentary Commissioner applies to "improper conduct" and extends to matters such as non-compliance with a policy or procedural guidelines set by the Commission, whether inadvertent or deliberate, and that is not minor or trivial in nature.

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244 Report No. 104, 56th Parliament, Parliamentary Crime and Corruption Committee, December 2019, page 13.

289. Since late 2019, Commission officers, including all new employees, are provided with training on these responsibilities by the CEO of the Commission. No matter how minor the non-compliance with a policy may be, there is evidence that Commission officers proactively report. The table below demonstrates this:

Year	Notified to PCCC	Reported to CEO and not notified as improper conduct, but reported to the PCCC as minor against s.329(4)(g).	Reported to CEO and assessed as not improper conduct	Total
2016	13	25	25	63
2017	18	30	24	72
2018	24	27	5	56
2019	28	15	0	43
2020	31	82	14	127
2021	25	67	25	117

Peter Dunning QC and Matthew Wilkinson

Counsel for the Crime and Corruption Commission

15 October 2021

Annexure A

Council records: A guideline for mayors, councillors, CEOs and council employees.

Crime and Corruption Commission
QUEENSLAND

Queensland Government

Department of
Housing and Public Works

Josephine Marsh
QSA18/248
Government Records and Discovery
07 3037 6605

3 July 2019

«Full_name»
«Position_title»
«Public_Authority_name_for_mailout»
«Postal_address_1» «City_and_State» «Postcode»

By email: «Direct_email_address»

Dear «Salutation»

Release of Crime and Corruption Commission and Queensland State Archives joint guideline – *Council records: A guideline for mayors, councillors, CEOs and council employees*

As you may be aware, there has been an increased focus recently on the management of council information by councillors and council employees. Public records are the cornerstone of an accountable and democratic society. Good recordkeeping facilitates integrity and public confidence in effective and efficient management of government business and service delivery; strengthens transparency and good governance; and helps to reduce the risk of corruption.

As Chief Executive Officer of «Public_Authority_name_for_mailout», you are responsible under section 7(1) of the *Public Records Act 2002* (the PR Act) for ensuring your Council:

a) makes and keeps full and accurate records of council activities; and
b) has regard to any relevant policy, standards and guidelines made by the State Archivist about the making and keeping of public records.

These obligations extend to ensuring all council employees (including contractors and volunteers), as well as your mayor and councillors (where their records relate to the administration of council business), meet these obligations.

To assist you with identifying the specific recordkeeping requirements of you and your Council, the Crime and Corruption Commission and Queensland State Archives have issued a new joint guideline, *Council records: A guideline for mayors, councillors, CEOs and council employees*.

435 Compton Road
Runcorn Queensland 4113
GPO Box 1397 Sunnybank Hills
Queensland 4109 Australia

Telephone +617 3037 6630
Website www.archives.qld.gov.au

The joint guideline establishes three requirements to assist all council employees, mayors and councillors fulfil their recordkeeping responsibilities:

1. Council employees, mayors and councillors are aware of and fulfil their recordkeeping obligations under the PR Act
2. Council employees, mayors and councillors must make and keep full and accurate public records
3. Public records must be retained for as long as they are lawfully required to be kept.

Failure to create and keep public records is a breach of an individual's recordkeeping responsibilities under the PR Act and may also be a breach of the *Crime and Corruption Act 2001* (the CC Act) and the *Local Government Act 2009* (the LG Act). Such breaches may be investigated as misconduct by the Office of the Independent Assessor.

The joint guideline supports the five Local Government principles from the LG Act as well as the Standards of behaviour from the *Code of Conduct for Councillors in Queensland*. The joint guideline also provides additional context to advice recently released by the Office of the Independent Assessor and Local Government Association of Queensland: *Your social media and you: A guide for elected council members in Queensland.* This includes advice about the use of applications such as Whatsapp, Wickr and Telegram.

In the coming weeks Queensland State Archives will be participating in a Department of Local Government, Racing and Multicultural Affairs webinar. This webinar will provide detailed information on the new guideline and provide the opportunity for you to ask questions. Please email training@dlgrma.qld.gov.au to register for further information on the webinar.

If you require further advice about your responsibilities under the PR Act in regard to the management of council records, please contact the Director of Government Records and Discovery, Josephine Marsh on telephone 07 3037 6605 or email josephine.marsh@archives.qld.gov.au.

If you require further detailed guidance in relation to corruption matters and your responsibilities under the CC Act, please contact the Director of Integrity Services, Kylee Rumble on telephone 07 3360 6285 or email kylee.rumble@ccc.qld.gov.au.

Yours sincerely

Alan MacSporran QC
Chairperson
Crime and Corruption Commission

Mike Summerell
Executive Director and State Archivist
Queensland State Archives

Council records

A guideline for mayors, councillors, CEOs and council employees

In this advisory, the Crime and Corruption Commission (CCC) and Queensland State Archives (QSA) set out the requirements for the management of council records. It addresses the following questions:

- Why is good recordkeeping important?
- What is a public record?
- What are the requirements for managing records?

Crime and Corruption Commission
QUEENSLAND
Parliamentary Crime and Corruption Committee
Queensland Government

Why is good recordkeeping important?

Public records are the cornerstone of an accountable and democratic society. They allow scrutiny from the public of the decisions made by those who are elected or employed to act on their behalf.

In the past the CCC has identified cases where inadequate recordkeeping has hindered an investigation of alleged corrupt conduct and indeed may have enabled that conduct to occur in the first place.

The risk of misconduct occurring can be significantly reduced by adopting a systematic approach to good recordkeeping.

Effective recordkeeping strengthens transparency and good governance

It also supports the five Local Government principles from the *Local Government Act 2009* (LG Act) that mayors and councillors (as elected representatives), CEOs and council employees must comply with while performing their roles. These principles are:

- transparent and effective processes, and decision-making in the public interest
- sustainable development and management of assets and infrastructure, and delivery of effective services
- democratic representation, social inclusion and meaningful community engagement
- good governance of, and by, local government
- ethical and legal behaviour of councillors and local government employees.[1]

Inadequate recordkeeping increases the risk of councils being unable to provide evidence of their decisions or actions potentially undermining public confidence in the ability of the Council and its employees to conduct itself in an accountable and transparent manner.

Effective recordkeeping allows councils, including mayors and councillors, to:

- meet their legislative requirements and responsibilities
- protect the rights and entitlements of ratepayers
- protect and help defend against complaints or accusations of wrongdoing
- make robust and consistent decisions
- promote confidence in the authenticity and integrity of information
- support efficient and transparent business practices
- provide evidence of decisions and actions.

Inadequate recordkeeping increases the risk of councils being unable to provide evidence of their decisions or actions.

[1] *Local Government Act 2009* s.4 (2)

What is a public record?

The *Public Records Act 2002* (PR Act) defines a public record as "any form of recorded information, created or received by a public authority, in the exercise of its statutory, administrative or other public responsibilities or for a related purpose".[2] Councils are public authorities and therefore required to create and manage public records.

A public record is any record that:

- is evidence of a decision
- is evidence of a transaction or an action taken
- is created or received to meet legal requirements, community expectations or business needs.

Public records can be created in digital or paper formats and include:

- videos
- images
- text messages
- emails
- social media interactions
- data held in business systems
- messaging applications.

How does this apply to council records?

Council records are public records where the content of the record relates to the administration of council business and the responsibilities of council employees, the mayor and councillors under the LG Act or the *City of Brisbane Act 2010* (COBA).[3]

Examples of public records

- ✓ minutes of council meetings and the notes used to make those minutes
- ✓ decisions resulting from discussions between councillors about the administration or management of the local government
- ✓ rate notices
- ✓ dog registrations and renewals
- ✓ an email telling staff about a WHS meeting
- ✓ a text with a decision to approve funding for a project
- ✓ a post-it note with instructions to act on a report
- ✓ a council Facebook post with a complaint from a ratepayer
- ✓ a video or audio recording of a meeting about progress on a council project
- ✓ a Twitter or Instagram post talking about an upcoming council event.

Records relating to the following activities are not public records

- x personal activities and interactions with family and friends
- x political membership or activities
- x electorate, ward or divisional activities.

[2] *Public Records Act 2002*, s.6
[3] *Local Government Act 2009*, s.12, s.13; *City of Brisbane Act 2010*, s.14, s.15

What are the requirements for managing public records?

All public records, including digital records such as social media interactions, conversations within messaging applications and text messages, are subject to legislation and legal processes such as discovery and subpoena.

All public records, including digital records such as social media interactions, conversations within messaging applications and text messages, are subject to legislation and legal processes such as discovery and subpoena.

A range of legislation exists which specifies requirements for the creation and management of public records, including:

- *Local Government Act 2009*
- *Public Records Act 2002*
- *Right to Information Act 2009*
- *Information Privacy Act 2009*
- *Evidence Act 1977*
- *Electronic Transactions Act 2001.*

Councils are also required to abide by the recordkeeping policies and guidelines issued by the State Archivist including:

- Records Governance Policy
- Local Government Sector Retention and Disposal Schedule
- General Retention and Disposal Schedule.

The following pages outline the three requirements essential to good recordkeeping:

1. Council employees, mayors and councillors are aware of and fulfil their recordkeeping obligations under the *Public Records Act 2002*
2. Council employees, mayors and councillors must make full and accurate public records
3. Public records must be retained for as long as they are lawfully required to be kept.

REQUIREMENT 1

Council employees, mayors and councillors are aware of and fulfil their recordkeeping obligations under the *Public Records Act 2002*

Policies and procedures for the management of public records

Councils have a responsibility for the efficient management of public records so that all council employees (including contractors and volunteers), mayors and councillors, can fulfil their recordkeeping obligations under the PR Act, LG Act or the COBA. Inadequate management of public records can constitute corruption. It can also result in dismissal and/or civil action against the individual and organisation involved.

To assist council employees, mayors and councillors in meeting their statutory recordkeeping obligations, council recordkeeping policies and procedures should outline expectations for the capture and management of public records. Recordkeeping policies and procedures should:

- outline the recordkeeping roles and responsibilities of the CEO, council employees, contractors, mayors and councillors
- define council-specific recordkeeping requirements
- specify the use of council-approved technologies and applications that meet security and recordkeeping requirements
- define a public record and provide advice on how to identify one
- identify how public records will be captured and managed appropriately, including:
  - » responsibility for the capture of emails
  - » the management of public records in social media or instant messaging applications
  - » the usage of private accounts and how and when public records are captured
  - » capture protocols for records contained on council-issued mobile devices (e.g. through device management software or routine physical download from devices)
- outline when public records can be disposed of and under what circumstances, including authorisation, disposal methods and documentation.

Mayors and councillors should consult with the CEO (or delegate) of their Council to determine how public records in their possession or control will be managed.

The deliberate use of unapproved technology and platforms by council employees, mayors or councillors would be a breach of council policies. For mayors and councillors this may result in a complaint to the Office of the Independent Assessor (OIA) and would be inappropriate conduct within the meaning of the LG Act. More serious cases may also be misconduct within the meaning of the LG Act on the basis that it is a breach of the trust placed in a councillor, and disciplinary action may be commenced in the Councillor Conduct Tribunal.

REMEMBER

Recordkeeping policies and procedures should:

- outline roles and responsibilities
- define requirements
- specify use of approved technologies
- define a public record
- identify how records will be captured and managed
- outline disposal timeframe.

REQUIREMENT 2

Council employees, mayors and councillors must make full and accurate public records

Recordkeeping responsibilities for council employees

Under the PR Act, overall responsibility for recordkeeping in a local government rests with the Council's CEO. However, the recordkeeping responsibilities outlined in the PR Act extend to anyone who creates or receives public records, including council employees, the mayor and councillors.

Specific recordkeeping responsibilities of the CEO include:

- ensuring the safe custody of all council records (not just public records)[4]
- ensuring the Council makes and keeps full and accurate records of activities and has regard to any relevant policy, standards and guidelines made by the State Archivist.[5]

Recordkeeping responsibilities for mayors and councillors

As with council employees, mayors and councillors are required to comply with all laws that apply to local government.[6] This includes the legislative obligations outlined in the PR Act. Any record created or received in a mayor or councillor's official capacity that relates to their responsibilities under the LG Act or the COBA[7] and is related to the administration of council business is a public record.[8]

Some examples of such records are:

- documents created as part of the administration of the local government
- communications about the adoption and implementation of policy and local laws
- a letter addressed to a councillor from a constituent relating to council business
- an internal memo written by a councillor to their CEO
- posts on social media or any other application about council-related matters that relate to responsibilities under the LG Act or the COBA[9]
- a mayor or councillor's diary of council-related appointments and meetings.

Records relating to personal activities, party political memberships or activities, or electorate or divisional activities are not public records and do not need to be managed as public records.

The failure by council employees, mayors or councillors to make and keep full and accurate records is a breach of the PR Act and may be a breach of the *Crime and Corruption Act 2001* (CC Act). Breaches could result in disciplinary or criminal charges being laid against the individual/s involved.

An individual's credibility may also be called into question if it is revealed that communications were deliberately withheld to avoid the accountability and transparency requirements of the LG Act, the COBA or the Code of Conduct.

[4] *Local Government Act 2009*, s.13(3)(e); *City of Brisbane Act 2010*, s.15(2)(e)
[5] *Public Records Act 2002*, s.7
[6] *Local Government Act 2009*, s.12; *City of Brisbane Act 2010*, s.14
[7] *Local Government Act 2009*, s.12; *City of Brisbane Act 2010*, s.14; Local Government Sector Retention and Disposal Schedule
[8] Local Government Sector Retention and Disposal Schedule, 13.5.1
[9] *Local Government Act 2009*, s.12; *City of Brisbane Act 2010*, s.14

REQUIREMENT 2 continued

Management of records in email, text or app-based communications

Emerging technologies provide opportunities to conduct business more efficiently. Regardless of the format used, communication by councillors, the mayor or council employees about the administration of council business, are public records that must be documented and captured. This includes messages sent and received via email, text messages, social media posts (and related comments) on channels such as Facebook or Twitter, and chats or direct messages through messaging apps such as Facebook Messenger, WhatsApp, Wickr or Telegram. It also includes private email, messaging or social media accounts used to conduct council business.

Failure to capture communications about council business (or similarly, deliberately avoiding the use of approved channels in order to have "off-line" communications), is a breach of an individual's recordkeeping responsibilities.

There are a number of tools that can assist in automating the capture of email, text or app-based communications so that they can be saved as public records.[10] However caution should be exercised when using instant messaging apps in particular as their extraction and identification as public records can be more difficult.

The use of private email and social media accounts to conduct council business (e.g. policy development, decision making etc.) should be avoided as their use can:

- create the perception of corrupt conduct (even if this is not the case)
- be perceived as a way for mayors or councillors to avoid public scrutiny
- give the impression that this information is not intended to be captured as a public record.

Recommended practice for managing records in private accounts includes:

- forwarding any public records received to an official council email account within 20 days of receipt or creation
- using a council account to respond to any communications
- activating automatic replies that direct people to send correspondence related to their local government responsibilities to official council accounts.[11]

Note: The Code of Conduct includes specific requirements regarding councillor use of email. Specifically, standard of behaviour 1.3 requires councillors to "Use only official council electronic communication accounts (e.g. email accounts) when conducting council business".[12]

To assist in determining whether social media accounts are being used in an official capacity, the Office of the Information Commissioner has published specific advice with a range of factors for consideration.[13]

REMEMBER

Use of private email and social media accounts to conduct council business can:

- create the perception of corrupt conduct
- be perceived as a way for mayors or councillors to avoid public scrutiny
- give the impression that this information is not intended to be captured as a public record.

[10] Social media and Yammer
[11] Public records in private accounts
[12] Code of Conduct for Councillors in Queensland
[13] Online and on your phone: processing access applications for social media, webmail and text messages

REQUIREMENT 3

Public records must be retained for as long as they are lawfully required to be kept

Retention of public records

The *Local Government Sector Retention and Disposal Schedule* (QDAN 480v4) and the *General Retention and Disposal Schedule* establish the retention requirements for public records and can be used to assist councils to manage their records and meet the requirements of the PR Act.

Examples of council records that must be retained permanently include:

- a master set of council and committee meeting minutes and agendas[14]
- diaries of mayors[15]
- a speech made by a mayor or councillor on an occasion of historical significance.[16]

Examples of council records that are only required to be retained temporarily include:

- audio recordings of council meetings (once the minutes are confirmed)[17]
- mayor or councillor representation on external committees.[18]

The retention requirements of a record may be changed by activities such as legal action or a Right to Information (RTI) application. See the *General Retention and Disposal Schedule* for the retention requirements for records relevant to legal action or RTI applications.[19]

REMEMBER

Examples of council records that must be retained permanently include:

- a master set of council and committee meeting minutes and agendas
- diaries of mayors
- a speech made by a mayor or councillor on an occasion of historical significance.

[14] Local Government Sector Retention and Disposal Schedule, 13.6.4
[15] Local Government Sector Retention and Disposal Schedule, 13.4.8
[16] Local Government Sector Retention and Disposal Schedule, 2.1.1
[17] Local Government Sector Retention and Disposal Schedule, 13.6.6
[18] Local Government Sector Retention and Disposal Schedule, 13.6.8
[19] General Retention and Disposal Schedule

REQUIREMENT 3 continued

Disposal of public records

Public records can only be disposed of or destroyed with the authorisation of the State Archivist. Retention and disposal schedules are the most common way for the State Archivist to provide authorisation for disposal of public records. Not all public records can be disposed of – some must be retained permanently, and these may be transferred to Queensland State Archives.[20]

Any disposal of public records must meet the requirements of the PR Act. Councils are required to develop and maintain a disposal plan which includes recording the details of when and how any disposal occurs. The Council's CEO or their delegate must endorse any disposal before it occurs.[21]

Any disposal method used must be appropriate for the records in question. For example, records with confidential information will require a disposal method that ensures confidentiality will not be breached. For paper records, this may involve two-axis shredding or burning. For electronic records, this may require digital sanitisation.

The unlawful disposal of public records is an offence under s.13 of the PR Act, punishable by a fine of up to 165 penalty units, or $22,019.[22] The fine may be up to five times that amount for a corporation. The CCC, as well as the State Archivist, has jurisdiction to investigate possible breaches of the PR Act.

For more information on appropriate disposal methods, see QSA advice on how to destroy records[23] and the CCC Corruption Prevention Advisory *Information security and handling.*[24]

Disposal of public records by mayors and councillors

Mayors and councillors are required to follow council recordkeeping processes and must not destroy public records unless authorised. For example, mayors and councillors must not:

- delete council-related emails from council or private email accounts unless those emails have been captured in the council's recordkeeping system where appropriate
- delete any posts that are council-related in social media or any other apps, even when they are in a private account.

REMEMBER

Mayors and councillors mustn't:

- delete council-related emails from council or private email accounts unless those emails have been captured in the council's recordkeeping system where appropriate
- delete any posts that are council-related in social media or any other apps, even when they are in a private account.

[20] Transfer records
[21] Records Governance Policy, Policy Requirement 6
[22] As of 1 July 2019, *Penalties and Sentences Regulation 2015*, s.3
[23] How to destroy records
[24] Information security and handling

Further information and resources

- **Department of Local Government, Racing and Multicultural Affairs**
  www.dlgrma.qld.gov.au
- **Queensland Ombudsman**
  www.ombudsman.qld.gov.au
- **Queensland State Archives**
  www.forgov.qld.gov.au/recordkeeping
- **Office of the Information Commissioner Queensland**
  www.oic.qld.gov.au
- **Queensland Audit Office**
  www.qao.qld.gov.au
- **Office of the Independent Assessor**
  www.oia.qld.gov.au

Crime and Corruption Commission
QUEENSLAND

Queensland Government

Crime and Corruption Commission

Phone: 07 3360 6060 (Toll-free outside Brisbane: 1800 061 611)

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Queensland State Archives

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Annexure B

Director's Guidelines, as at 30 June 2016.

Department of Justice and Attorney-General

Director's Guidelines

As at 30 June 2016

Queensland Government

GUIDELINE INDEX

GUIDELINES TO REPLACE ALL PREVIOUS GUIDELINES

GUIDELINE TO ALL STAFF OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS ACTING ON MY BEHALF, AND TO POLICE

ISSUED BY THE DIRECTOR OF PUBLIC PROSECUTIONS UNDER SECTION 11(1)(a)(i) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT* 1984

These are guidelines not directions. They are designed to assist the exercise of prosecutorial decisions to achieve consistency and efficiency, effectiveness and transparency in the administration of criminal justice.

The Director of Public Prosecutions represents the community. The community's interest is that the guilty be brought to justice and that the innocent not be wrongly convicted.

1. DUTY TO BE FAIR

The duty of a prosecutor is to act fairly and impartially, to assist the court to arrive at the truth.

- a prosecutor has the duty of ensuring that the prosecution case is presented properly and with fairness to the accused;
- a prosecutor is entitled to firmly and vigorously urge the Crown view about a particular issue and to test and, if necessary, to attack the view put forward on behalf of the accused; however, this must be done temperately and with restraint;
- a prosecutor must never seek to persuade a jury to a point of view by introducing prejudice or emotion;
- a prosecutor must not advance any argument that does not carry weight in his or her own mind or try to shut out any legal evidence that would be important to the interests of the person accused;
- a prosecutor must inform the Court of authorities or trial directions appropriate to the case, even where unfavourable to the prosecution; and
- a prosecutor must offer all evidence relevant to the Crown case during the presentation of the Crown case. The Crown cannot split its case.

2. FAIRNESS TO THE COMMUNITY

The prosecution also has a right to be treated fairly. It must maintain that right in the interests of justice. This may mean, for example, that an adjournment must be sought when insufficient notice is given of alibi evidence, representations by an unavailable person or expert evidence to be called by the defence.

3. EXPEDITION

A fundamental obligation of the prosecution is to assist in the timely and efficient administration of justice.

- cases should be prepared for hearing as quickly as possible;
- indictments should be finalised as quickly as possible;
- indictments should be published to the defence as soon as possible;
- any amendment to an indictment should be made known to the defence as soon as possible;
- as far as practicable, adjournment of any trial should be avoided by prompt attention to the form of the indictment, the availability of witnesses and any other matter which may cause delay; and
- any application by ODPP for adjournment must be approved by the relevant Legal Practice Manager, the Director or Deputy Director.

4. THE DECISION TO PROSECUTE

The prosecution process should be initiated or continued wherever it appears to be in the public interest. That is the prosecution policy of the prosecuting authorities in this country and in England and Wales. If it is not in the interests of the public that a prosecution should be initiated or continued then it should not be pursued. The scarce resources available for prosecution should be used to pursue, with appropriate vigour, cases worthy of prosecution and not wasted pursuing inappropriate cases.

It is a two tiered test:-

(i) is there sufficient evidence?; and

(ii) does the public interest require a prosecution?

(i) <u>Sufficient Evidence</u>

- A prima facie case is necessary but not enough.
- A prosecution should not proceed if there is no reasonable prospect of conviction before a reasonable jury (or Magistrate).

A decision by a Magistrate to commit a defendant for trial does not absolve the prosecution from its responsibility to independently evaluate the evidence. The test for the Magistrate is limited to whether there is a bare

prima facie case. The prosecutor must go further to assess the quality and persuasive strength of the evidence as it is likely to be at trial.

The following matters need to be carefully considered bearing in mind that guilt has to be established beyond reasonable doubt:-

(a) the availability, competence and compellability of witnesses and their likely impression on the Court;

(b) any conflicting statements by a material witness;

(c) the admissibility of evidence, including any alleged confession;

(d) any lines of defence which are plainly open; and

(e) any other factors relevant to the merits of the Crown case.

(ii) **Public Interest Criteria**

If there is sufficient reliable evidence of an offence, the issue is whether discretionary factors nevertheless dictate that the matter should not proceed in the public interest.

Discretionary factors may include:-

(a) the level of seriousness or triviality of the alleged offence, or whether or not it is of a 'technical' nature only;

(b) the existence of any mitigating or aggravating circumstances;

(c) the youth, age, physical or mental health or special infirmity of the alleged offender or a necessary witness;

(d) the alleged offender's antecedents and background, including culture and ability to understand the English language;

(e) the staleness of the alleged offence;

(f) the degree of culpability of the alleged offender in connection with the offence;

(g) whether or not the prosecution would be perceived as counter-productive to the interests of justice;

(h) the availability and efficacy of any alternatives to prosecution;

(i) the prevalence of the alleged offence and the need for deterrence, either personal or general;

(j) whether or not the alleged offence is of minimal public concern;

(k) any entitlement or liability of a victim or other person to criminal compensation, reparation or forfeiture if prosecution action is taken;

(l) the attitude of the victim of the alleged offence to a prosecution;

(m) the likely length and expense of a trial;

(n) whether or not the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;

(o) the likely outcome in the event of a conviction considering the sentencing options available to the Court;

(p) whether the alleged offender elected to be tried on indictment rather than be dealt with summarily;

(q) whether or not a sentence has already been imposed on the offender which adequately reflects the criminality of the episode;

(r) whether or not the alleged offender has already been sentenced for a series of other offences and what likelihood there is of an additional penalty, having regard to the totality principle;

(s) the necessity to maintain public confidence in the Parliament and the Courts; and

(t) the effect on public order and morale.

The relevance of discretionary factors will depend upon the individual circumstances of each case.

The more serious the offence, the more likely, that the public interest will require a prosecution.

Indeed, the proper decision in most cases will be to proceed with the prosecution if there is sufficient evidence. Mitigating factors can then be put to the Court at sentence.

(iii) **Impartiality**

A decision to prosecute or not to prosecute must be based upon the evidence, the law and these guidelines. It must never be influenced by:-

(a) race, religion, sex, national origin or political views;

(b) personal feelings of the prosecutor concerning the offender or the victim;

(c) possible political advantage or disadvantage to the government or any political group or party; or

(d) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution.

5. THE DECISION TO PROSECUTE PARTICULAR CASES

Generally, the case lawyer should at least read the depositions and the witness statements and examine important exhibits before a decision whether or not to indict, and upon what charges, is made.

Where the case lawyer has prosecuted the committal hearing, it will generally not be necessary to wait for the delivery of the depositions before preparing a draft indictment. Unless the matter is complex or borderline, the case lawyer will often be able to rely upon his or her assessment of the committal evidence and its impact upon the Crown case without delaying matters for the delivery of the transcript.

(i) Child Offenders

Special considerations apply to child offenders. Under the principles of the Juvenile Justice Act 1992 a prosecution is a last resort.

- The welfare of the child and rehabilitation should be carefully considered;
- Ordinarily the public interest will not require the prosecution of a child who is a first offender where the offence is minor;
- The seriousness of the offence or serial offending will generally require a prosecution;
- Driving offences that endanger the lives of the child and other members of the community should be viewed seriously.

The public interest factors should be considered with particular attention to:-

(a) the seriousness of the alleged offence;

(b) the age, apparent maturity and mental capacity of the child (including the need, in the case of children under the age of 14, to prove that they knew that what they were doing was seriously wrong and was deserving of punishment);

(c) the available alternatives to prosecution, and their efficacy;

(d) the sentencing options available to Courts dealing with child offenders if the prosecution was successful;

(e) the child's family circumstances, particularly whether or not the parents appear able and prepared to exercise effective discipline and control over the child;

(f) the child's antecedents, including the circumstances of any previous caution or conference and whether or not a less formal resolution would be inappropriate;

(g) whether a prosecution would be harmful or inappropriate, considering the child's personality, family and other circumstances; and

(h) the interest of the victim.

(ii) **Aged or Infirm Offenders**

Prosecuting authorities are reluctant to prosecute the older or more infirm offender unless there is a real risk of repetition or the offence is so serious that it is impossible to overlook it.

In general, proceedings should not be instituted or continued where the nature of the offence is such that, considering the offender, a Court is likely to impose only a nominal penalty.

When the defence suggests that the accused's health will be detrimentally affected by standing trial, medical reports should be obtained from the defence and, if necessary, arrangements should be sought for an independent medical examination.

(iii) **Peripheral Defendants**

As a general rule the prosecution should only proceed against those whose participation in the offence was significant.

The inclusion of defendants on the fringe of the action or whose guilt in comparison with the principal offender is minimal may cause unwarranted delay or cost and cloud the essential features of the case.

(iv) **Sexual Offences**

Sexual offences such as rape or attempted rape are a gross personal violation and are serious offences. Similarly, sexual offences upon children should always be regarded seriously. Where there is sufficient reliable evidence to warrant a prosecution, there will seldom be any doubt that the prosecution is in the public interest.

(v) **Sexual Offences by Children**

A child may be prosecuted for a sexual offence where the child has exercised force, coerced someone younger, or otherwise acted without the consent of the other person.

A child should **not be prosecuted** for:-

(a) A sexual offence in which he or she is also the "**complainant**", as in the case of unlawful carnal knowledge or indecent dealing. The underage target of such activity cannot be a party to it, no matter how willing he or she is: R v Maroney [2002] Qd.R285 and Maroney v R (2003) 216 CLR 31.

(b) For sexual experimentation involving children of similar ages in consensual activity.

(vi) **Mental Illness**

- Mentally disordered people should **not** be prosecuted for **trivial** offences which pose no threat to the community.

- However, a prosecution may be warranted where there is a **risk of re-offending** by a repeat offender with no viable alternative to prosecution. Regard must be had to:-

  (a) details of previous and present offences;

  (b) the nature of the defendant's condition; and

  (c) the likelihood of re-offending.

- In rare cases, continuation of the prosecution may so seriously aggravate a defendant's mental health that this outweighs factors in favour of the prosecution. Where the matter would clearly proceed but for the mental deterioration, an independent assessment may be sought.

- The Director may **refer the matter** of a person's mental condition to the Mental Health Court pursuant to section 257 of the Mental Health Act 2000.

- Relevant issues should be brought to the Director's attention as soon as possible. The Director's discretion to refer will more likely be exercised in cases where:-

  (a) either:-

  - the defence are relying upon expert reports describing unfitness to plead, unsoundness of mind or, in the case of murder, diminished responsibility at the time of the offence; or

  - there is otherwise significant evidence of unsoundness of mind or unfitness for trial; **and**

(b) the matter has not previously been determined by the Mental Health Court; **and**

(c) the defence has declined to refer the matter.

- Where the offence is "**disputed**" within the meaning of section 268 the Director will **not refer** the case unless there is an issue about fitness for trial.

- If a significant issue about the accused's capacity to be tried arises **during the trial**, the prosecutor should seek an adjournment for the purpose of obtaining an independent psychiatric assessment. The prosecutor should refer the matter to the Director for consideration of a reference if:-

(a) either:-

- the expert concludes that the accused is unfit for trial and is unlikely to become fit after a tolerable adjournment; or

- the expert is uncertain as to fitness; **and**

(b) the defence will not refer the matter to the Mental Health Court.

If the matter is not referred, consideration should be given to section 613 of the Criminal Code and *R* v *Wilson* [1997] QCA 423.

(vii) **Perjury during investigative hearings**

Where a witness has been compelled to give evidence under oath at an investigative hearing and the witness has committed perjury in the course of giving that evidence, it will generally not be in the public interest to prosecute the witness for the perjury if, the witness subsequently corrected the perjury and was otherwise reasonably considered by the Director, acting on the advice of the agency or agencies involved in the investigation, to have been fully truthful in giving evidence about all matters material to the investigation.

6. CAPACITY OF CHILD OFFENDERS – between 10 & 14 years (see also Guideline 5(v) Child Offenders)

A child less than 14 years of age is not criminally responsible unless at the time of offending, he or she had the capacity to know that he or she ought not to do the act or make the omission. Without proof of capacity, the prosecution must fail: section 29 of the Criminal Code.

Police questioning a child suspect less than 14 years of age should question the child as to whether at the time of the offence, he or she knew that it was seriously wrong to do the act alleged. This issue should be explored whether or not the child admits the offence.

If the child does not admit the requisite knowledge, police should further investigate between right and wrong and therefore, the child's capacity to know that doing the act was wrong. Evidence should be sought from a parent, teacher, clergyman, or other person who knows the child.

7. COMPETENCY OF CHILD WITNESSES

(i) No witness **under the age of 5 years** should be called to testify on any matter of substance unless the competency of the witness has been confirmed in a report by an appropriately qualified expert.

(ii) A brief of evidence relying upon the evidence of witnesses less than 5 years of age will not be complete until the prosecution has received such a report.

(iii) Where a child witness is 5 years of age or older, that witness may be requested to undergo assessment as to his or her competency if that is considered necessary or desirable by the case lawyer responsible for the prosecution and the approval has been obtained from each of a Crown Prosecutor, Practice Manager and Assistant Director.

(iv) Generally, there should only be **one** assessment undertaken. A second assessment must not be sought without the **written consent** of a Practice Manager, Assistant Director, Director or Deputy Director. Consent will only be given in exceptional circumstances.

(v) A child witness is not an exhibit. The prosecution should not consent to a private assessment on behalf of the defence.

8. SECTION 93 A TRANSCRIPTS

In every case where the evidence includes a pre-recorded interview with a child witness, a transcript of the interview must be included in the police brief provided for the committal hearing.

9. AFFECTED CHILD WITNESSES

All affected child witnesses are to be treated with dignity, respect and compassion and measures should be taken to limit, to the greatest practical extent, the distress or trauma suffered by the child when giving evidence.

All cases involving affected child witnesses must be treated with priority to enable the pre recording of the child's evidence at the earliest date possible.

When notice is given by the defence of an intention to plead guilty, the case lawyer should seek an early arraignment, or at least obtain written confirmation of the defence instructions. This is to avoid loosing an opportunity to expedite the child's evidence should the anticipated plea does not eventuate.

Where a plea of guilty has been indicated:-

- Prosecution staff should not delay presentation of an indictment or defer the listing of a preliminary hearing for any significant period unless the accused has already pleaded guilty or has provided written confirmation of his or intention to plead guilty;

- Prosecution staff should not consent to the delisting of a preliminary hearing without an arraignment or written confirmation of the accused person's instructions to plead guilty.

10. INDICTMENTS

(i) Indictments can only be signed by crown prosecutors or those holding a commission to prosecute.

(ii) An indictment must not be signed and presented unless it is intended to prosecute the accused for the offence or offences charged in it.

(iii) Charges must adequately and appropriately reflect the criminality that can reasonably be proven.

(iv) Holding indictments must not be presented.

(v) It is not appropriate to overcharge to provide scope for plea negotiation.

(vi) Substantive charges are to be preferred to conspiracy where possible. However conspiracy may be the only appropriate charge in view of the facts and the need to reflect the overall criminality of the conduct alleged. Such a prosecution cannot commence without the consent of the Attorney-General. An application should only be made through the Director or Deputy Director.

(vii) In all cases prosecutors must guard against the risk of an unduly lengthy or complex trial (obviously there will be cases where complexity and length are unavoidable).

(viii) The indictment should be presented as soon as reasonably practicable, but **no later than 4 months** from the committal for trial.

(ix) If the prosecutor responsible for the indictment is not in a position to present it within the 4 month period, the prosecutor should advise in writing the defence, the Legal Practice Manager and the Director or Deputy Director of the situation.

(x) No indictment can be presented after the 6 month time limit in section 590 of the Criminal Code, unless an extension of time has been obtained from the Court.

11. EX-OFFICIO INDICTMENTS – Section 560 of the Code

An ex-officio indictment (where the person has not been committed for trial on that offence) should only be presented in one of the following circumstances:-

(a) the defence has consented in writing;

(b) the counts on indictment and the charges committed up are not substantially different in nature or seriousness; or

(c) the person accused has been committed for trial or sentence on some charges, and in the opinion of the **Legal Practice Manager** or principal crown prosecutor, the evidence is such that some substantially different offence should be charged;

(d) in all other circumstances (namely where a matter has **not** been committed to a higher court on any charge and the defence has **not** consented) an ex-officio indictment should not be presented without consultation with *the Director or Deputy Director*. The accused must be advised in writing when an ex-officio indictment is under consideration and, where appropriate, should be given an opportunity to make a submission. A decision whether or not to present an ex-officio indictment should be made within **2 months** of the matter coming to the attention of the officer.

12. EX-OFFICIO SENTENCES

The ODPP will not, unless there are exceptional circumstances, present an ex-officio indictment for the purpose of sentence.

The ordinary procedure will be to have the matter committed for sentence pursuant to Part 5 of the *Justices Act 1886* (which includes registry committals in s. 114).

It will be necessary for a defendant who is applying for the presentation of an ex officio indictment to demonstrate what the exceptional circumstances are. An example would be where a defendant has a matter on indictment before a court for sentence and wants other offences to be dealt with at the same time.

The consent of the Director or Deputy Director/s must be obtained before an ex-officio indictment is presented for sentence.

If the Director or Deputy Director/s is satisfied that there are exceptional circumstances and consents to the presentation of an ex-officio indictment for sentence then the following protocol applies:

(i) A defendant may request an ex-officio indictment.

(ii) The use of ex-officio indictments for pleas of guilty is intended to fast-track uncontested matters.

(iii) The case lawyer must prepare an indictment, schedule of facts and draft certificate of readiness within one month of the receipt of the full ex-officio material.

(iv) The ex-officio brief is not a full brief of evidence. The following material will be required:-

(a) any police interviews with the defendant;

(b) a set of any photographs taken;

(c) any witness statements that have already been taken;

(d) for violent or sexual offences:-

- a statement from the victim;
- the victim's contact details for victim liaison; and
- if applicable, a medical statement documenting the injuries and treatment undertaken;

(e) for drug offences, an analyst's certificate, if applicable;

(f) a schedule of any property loss of damage including:-

- the complainant's name and address;
- the type of property;
- the value of the loss or damage;
- the value of any insurance payout; and
- any recovery or other reparation.

(g) a schedule of any property confiscated, detailing the current location of the property and the property number. The value of the property should also be included where the charges involve the unlawful production or supply of dangerous drugs and the property is to be forfeited pursuant to the Drugs Misuse Act 1986.

(v) Prosecutors must be vigilant to ensure that the indictment prepared fairly reflects the gravity of the allegations made against the defendant.

(vi) If summary charges are more appropriate, the case should be referred back to the Magistrates Court (see Guideline 11).

(vii) Where it appears that police have undercharged a defendant, the defence and police should be advised in writing as soon as possible. The

preparation of the ex-officio prosecution should not proceed without reconfirmation of the defence request for it.

(viii) The ODPP *may decline* to proceed by way of ex-officio process where:-

(a) *The defence disputes significant facts:* A request for an ex-officio indictment signifies acceptance of all of the material allegations set out in the police QP9 forms. If there is any relevant dispute about those matters, the appropriate resolution will generally be through a committal hearing.

(b) *Police material is outstanding:* Police should forward the ex-officio brief within 14 days of its request.

If difficulties arise, for example because of the complexity of the matter, the investigating officer should notify the ODPP case lawyer as soon as possible.

Where there is insufficient reason for the delay, the matter will be referred back for a committal hearing.

(c) *The certificate of readiness is not returned:* The matter should be sent back for committal if the defence have not returned the certificate of readiness within 4 weeks of the delivery of the draft indictment and schedule of facts.

(d) A full brief of evidence has already been prepared.

(ix) The ODPP *will decline* to proceed by way of ex officio indictment for certain categories of cases involving violence or sexual offending, or co-offending.

(a) *Serious Sexual or Violent Offending*

For offences of serious sexual or serious violent offending, the conditions for an ex officio prosecution must be strictly met before consent is given.

- Charges must adequately reflect the criminality involved;
- The accused must accept the facts without significant dispute; and
- The application for ex-officio proceedings must be made before a brief of evidence is complete.

(b) *Co-Accused*

It is difficult for a court to accurately apportion responsibility amongst co-offenders if they are dealt with separately. Furthermore the prosecution's position can only be determined after a full assessment of the versions of each accused and the key witnesses. It is therefore desirable that co-accused be dealt with together.

Where two or more people have been charged with serious offences, the office will not consent to an ex-officio indictment for one or some accused only, unless:-

- the accused is proceeding pursuant to section 13A of the Penalties and Sentences Act; and
- there is a clear and uncontested factual basis for the plea.

In other cases, the co-operative co-offender may choose to proceed by full hand-up, enter an early plea and be committed for sentence.

(x) PRESENTATION OF INDICTMENTS

If the accused is in custody the indictment should be presented to the court before the day of arraignment to allow the accused to be produced.
If the accused is not in custody, other than in exceptional circumstances, ex-officio indictments should not be presented to the Court until the day of arraignment. In most cases a failure to appear can be adequately dealt with by a warrant in the Magistrates Court at the next mention date.

(xi) BRISBANE

The following are additional instructions that apply only to Brisbane matters. They are in response to Magistrates Court Practice Direction No 3 of 2004, which operates in Brisbane only.

(a) *Drug Offences*:-

Consent for an ex officio indictment involving drug offences should not be given unless:-

(i) an analyst's certificate (where required) has issued prior to the committal mention date; and
(ii) the quantity exceeds the schedule amount (where relevant).

Where the quantity of drug is less than the schedule amount, the case should be dealt with summarily by the next mention date.

(b) *Complex or Difficult Matters*: Extension of Time

Particular attention should be paid to cases involving:-

- large or complex fraud or property offences;
- serious sexual offences;
- offences of serious violence.

In those cases or any other case: if it is apparent from the QP9 that 8 weeks is not likely to afford sufficient time to meet all requirements for arraignment, the legal officer should seek an extension of time. This is to be done promptly by letter through the Legal Practice Manager to

the Chief Magistrate pursuant to paragraph 5 of Practice Direction No 3 0f 2004. The application should set out detailed reasons.

If the extension of time is refused, the request for ex-officio indictment must also be refused and the matter returned for committal hearing.

(c) *Timely Arraignment*

If the defence have returned the signed certificate of readiness and obtained a sentence date, the indictment should be presented and the accused arraigned before the date listed for committal mention or full hand up.

Early arraignment is necessary to avoid the matter being forced on for hearing in the Magistrates Court pursuant to the Magistrates Court Practice Direction No 3 of 2004.

If the accused pleads guilty the charges can then be discontinued at the next mention date in the Magistrates Court, regardless of whether the matter proceeds to sentence at that time or is adjourned.

If the accused fails to appear for arraignment or indicates that he or she will plead not guilty, the indictment should not be presented.

13. SUMMARY CHARGES

Where the same criminal act could be charged either as a summary or an indictable offence, the **summary offence should be preferred** unless either:-

(a) The conduct could not be adequately punished other than as an indictable offence having regard to:-

- the maximum penalty of the summary charge;
- the circumstances of the offence; and
- the antecedents of the offender; or

(b) There is some relevant connection between the commission of the offence and some other offence punishable only on indictment, which would allow the two offences to be tried together.

Prosecutors should be aware of the maximum penalties provided by section 552H of the Code for indictable offences dealt with summarily.

Below is a schedule of summary charges which will often be more appropriate than the indictable counter-part:-

Indictable Offence	Possible Summary Charge and Maximum Penalty
Threatening violence in the night: Section 75(2) Criminal Code	(a) Assault: Section 335 Code (3 years imprisonment) (b) Public Nuisance: Section 6 Summary Offences Act 2005 (6 months imprisonment)
Threats: Section 359 Code	Public Nuisance: Section 6 Summary Offences Act (6 months imprisonment)
Stalking (simpliciter only): Section 359E Code	Section 85ZE Crimes Act 1914 (Commonwealth) Improper use of telecommunications device (1 year imprisonment)
Unlawful use of motor vehicle (simpliciter): Section 408A Code	Unlawful use of motor vehicle: Section 25 Summary Offences Act (12 months imprisonment and compensation)
Stealing: Section 391 Code	Sections 5 & 6 Regulatory Offences Act (value to $150 wholesale)
Stealing: Section 391 Code Receiving: Section 433 Code Burglary: Section 419 Code Break and enter: Section 421 Code	Unlawful possession of suspected stolen property: Section 16 Summary Offences Act (I year imprisonment) Unlawfully gathering in a building/structure: Section 12 Summary Offences Act (6 months imprisonment) Unlawfully entering farming land: Section 13 Summary Offences Act (6 months imprisonment) Possession of tainted property: Section 92 Crimes (Confiscation) Act (2 years imprisonment)
Fraud: Section 408C Code	False advertisements (births, deaths etc): Section 21 Summary Offences Act (6 months imprisonment) Imposition: Section 22 Summary Offences Act (I year imprisonment)
Production of a dangerous drug: Section 8 Drugs Misuse Act	Possession of things used/for use in connection with a crime: Section 10 Drugs Misuse Act

"Commercial purpose"

Where a person is alleged to have unlawfully possessed a dangerous drug in contravention of s.9 of the *Drugs Misuse Act 1986*, the Crown should allege a commercial purpose when, on the whole of the evidence, it can reasonably be inferred that the defendant did not possess the drug for their own personal use: see s 14 of the *Drugs Misuse Act 1986*.

There will be cases where "personal use" can include small-scale social sharing

in circumstances where there is limited scope and repetition, but this principle should not be allowed to be used to mask cases where the "sharing" spills over into the generation of financial or equivalent advantage.

Care must be taken when considering whether a summary prosecution is appropriate for an **assault upon a police officer** who is acting in the execution of his duty. Prosecutors should note the following:-

(a) Serious injuries to police:-

A charge involving grievous bodily harm or wounding, under sections 317, 320 or 323 of the Code, can only proceed on indictment. There is no election.

Serious injuries which fall short of a grievous bodily harm or wounding should be charged as assault occasioning bodily harm under section 339(3) or serious assault under section 340(b) of the Code. The prosecution should proceed upon indictment.

(b) In company of weapons used:-

A charge of assault occasioning bodily harm with a circumstance of aggravation under section 339(3) can only proceed on indictment, subject to the defendant's election.

(c) Spitting, biting, needle stick injury:-

The prosecution should elect to proceed upon indictment where the assault involves spitting, biting or a needle stick injury **if** the circumstances raise a real risk of the police officer contracting an infectious disease.

(d) Other cases:-

In all other cases an assessment should be made as to whether the conduct could be adequately punished upon summary prosecution. Generally, a scuffle which results in no more than minor injuries should be dealt with summarily. However, in every case all of the circumstances should be taken into account, including the nature of the assault, its context, and the criminal history of the accused.

A charge of assault on a police officer should be prosecuted on indictment if it would otherwise be joined with other criminal charges which are proceeding on indictment.

Where the prosecution has the election to proceed with an indictable offence summarily, that offence must be dealt with summarily unless:

(a) The conduct could not be adequately punished other than upon indictment having regard to:

- The maximum penalty able to be imposed summarily;
- The circumstances of the offence; and
- The antecedents of the offender

(b) The interests of justice require that it be dealt with upon indictment having regard to:

- The exceptional circumstances of the offence/s;
- The nature and complexity of the legal or factual issues involved;
- The case involves an important point of law or is of general importance

(c) There is some relevant connection between the commission of the offence and some other offence punishable only on indictment, which would allow the two offences to be tried together (see section 552D Criminal Code).

PROSECUTION OF DERM MATTERS

There are a number of statutes administered by the Department of Environment and Resource Management (DERM) containing offences (DERM offences) which may be prosecuted on indictment.

This guideline for the ODPP sets out:

- a list of indictable offences;
- the power for the prosecution to elect jurisdiction;
- the power for the accused to elect jurisdiction;
- the power for the magistrate to determine jurisdiction;
- the test to be applied by the prosecution;
- the procedure to be followed in determining prosecution election; and
- the procedure to be followed when the accused is committed for trial or consents to the presentation of an ex-officio indictment.

Indictable offences:

The following offences may be dealt with summarily or upon indictment:

Act	Section	Offence
Environmental Protection Act 1994	289(1) and (2)	False or misleading information about environmental audits
	357(5)	Contravention of Court order (transitional program)
	361(1)	Wilful contravention of environmental protection order
	430(2)(a)	Wilful contravention of an environmental authority
	432(1)	Wilful contravention of a transitional environmental program
	434(1)	Wilful contravention of a site management plan
	435(1)	Wilful contravention of a development

		condition
	435A(1)	Wilful contravention of a standard environmental condition
	437(1)	Wilful unlawful serious environmental harm
	438(1)	Wilful unlawful material environmental harm
	480(1)	False, Misleading or incomplete documents
	481(1)(a) and (b)	False or misleading information
	505(12)	Contravention of a restraint order
	506(6)	Contravention of an interim order
	511(4)	Contravention of an enforcement order
Aboriginal Cultural Heritage Act 2003	23(1)	Breach of cultural heritage duty of care
	24(1)	Unlawful harm to cultural heritage
	25(1)	Prohibited excavation, relocation and taking away
	26(1)	Unlawful possession of cultural heritage
	32(6)	Contravene a stop order
Coastal Protection and Management Act 1995	59(6)	Failure to comply with a coastal protection notice
	60(5)	Failure to comply with a tidal works notice
	148(12)	Contravention of a restraint order
	149(6)	Contravention of an interim order
Marine Parks Act 2004	48(1)	Non-compliance with a temporary restricted access area declaration
	50(1)	Wilful serious unlawful environmental harm to a marine park
	114(4)	Contravention of an enforcement order or an interim enforcement
Nature Conservation Act 1992	62(1)	Taking of a cultural or natural resource of a protected area
	88(2)	Taking a protected animal (class 1 offence)
	88(5)	Keeping or using a protected animal (class 1 offence)
	88B(1)	Keeping or using native wildlife reasonably suspected to have been unlawfully taken (class 1 offence)
	89(1)	Taking a protected plant (class 1 offence)
	89(4)	Keeping or using a protected plant (class 1 offence)
	91(1)	Release of international and prohibited wildlife
	93(4)	Taking of protected wildlife in a protected area (by Aborigine or Torres Strait Islander)
	97(2)	Taking a native wildlife in areas of major interest and critical habitat
	109	Contravention of interim conservation order
	173G(4)	Contravention of enforcement order or interim enforcement order
Torres Straight Islander Cultural Heritage Act 2003	23(1)	Breach of cultural heritage duty of care
	24(1)	Unlawful harm to cultural heritage
	25(1)	Prohibited excavation, relocation and taking away
	26(1)	Unlawful possession of cultural heritage
	32(6)	Contravene a stop order
Water Act 2000	585(1)	Failure to act honestly
	585(3)	Improper use of information
	585(4)	Improper use of position

	617(12)	Knowingly make a false or misleading statement
	619(4)	Providing a document containing false or misleading or incomplete information
Wet Tropics World Heritage Protection and Management Act 1993	56(1)	Prohibited acts

Jurisdiction – Prosecution Election:

The prosecution's authority to elect jurisdiction in relation to DERM offences is contained in the following legislation:

Act	Section
Environmental Protection Act 1994	495(1)
Aboriginal Cultural Heritage Act 2003	156(2)
Coastal Protection and Management Act 1995	145(1)
Marine Parks Act 2004	131(1)
Nature Conservation Act 1992	165(1)
Torres Straight Islander Cultural Heritage Act 2003	156(2)
Water Act 2000	931(2)
Wet Tropics World Heritage Protection and Management Act 1993	82(1)

Jurisdiction – Accused Election / Magistrate Determination:

Even if the prosecution elects summary jurisdiction, the magistrate must not determine the matter if the accused requests that the charge/s be indicted, or if the magistrate believes that the charge/s should be indicted. The statutory basis for this accused election or magistrate determination is contained in the following legislation:

Act	Section
Environmental Protection Act 1994	495(2)
Aboriginal Cultural Heritage Act 2003	156(5)
Coastal Protection and Management Act 1995	145(2)
Marine Parks Act 2004	131(2)
Nature Conservation Act 1992	165(2)
Torres Straight Islander Cultural Heritage Act 2003	156(5)
Water Act 2000	931(5)
Wet Tropics World Heritage Protection and Management Act 1993	82(6)

The Test - Prosecution Election:

Summary jurisdiction will be preferred unless the conduct could not be adequately punished other than on indictment having regard to:

- the likely sentence in the event of a conviction on indictment;
- the maximum penalty a magistrate may impose if the offence is dealt with summarily;
- the antecedents of the alleged offender; and
- the circumstances of the alleged offence, including:
  - the harm or risk of harm to the environment caused by the offence;
  - the culpability of the offender;

- whether a comparable offender has been dealt with for a similar offence on indictment; and
- any other mitigating or aggravating circumstance.

Procedure – Prosecution Election:

If the DERM considers that a charge should be indicted, they must seek advice from the Director of Public Prosecutions (DPP). The request for advice *must* be made before the election of jurisdiction and *should* be made before charges are laid if possible.

The DERM request for advice from the DPP should include:

1. the brief of evidence;
2. the DERM's legal advice on the evidence, prospects of conviction and likely sentence;
3. any time limit within which summary charges must be charged; and
4. any other relevant material.

The DPP must respond to a request for advice from the DERM within one month of the receipt of this material.

Where DPP advises that summary jurisdiction should be elected:

If the DPP disagrees with the DERM's preference for prosecution on indictment, the DPP will explain their reasons in writing. Upon receipt of these written reasons the DERM must elect summary jurisdiction.

Where DPP advises that charges should be indicted:

If the DPP advice is to proceed on indictment the DERM will prosecute the committal hearing.

Procedure – Accused Election / Magistrate Determination:

Where the accused elects to be prosecuted upon an indictment or a magistrate considers that the charge should be indicted, the DERM will conduct the committal hearing.

If a Matter is Committed for Trial on Indictment:

Within one month of the committal hearing the brief of evidence, depositions from the committal, along with any other material the DERM considers relevant should be provided to the Director.

- The Director will decide, after consulting with the nominee of the DERM, whether an indictment should be presented.

- If an indictment is to be presented, it will be presented by the ODPP.

- The Director, in consultation with the DERM, will brief counsel to appear for the prosecution.
- The DERM will be responsible for all costs of the prosecution.
- The prosecution cannot be discontinued without the approval of the Director.

14. CHARGES REQUIRING DIRECTOR'S CONSENT

(i) **Section 229B Maintaining an Unlawful Sexual Relationship with a Child**

(a) For a charge under section 229B of the Code there must be sufficient credible evidence of continuity ie: evidence of the maintenance of a relationship rather than isolated acts of indecency.

(b) Consent will **not** be given where:-

- the sexual contact is confined to **isolated** episodes; or
- the period of offending is **brief** and can be **adequately particularised** by discrete counts on the indictment.

(ii) **Chapter 42A Secret Commissions**

The burden of proof is reversed under section 442M (2) of the Criminal Code. Consent to prosecute secret commissions pursuant to section 442M (3) will **not** be given where:-

- the breach is minor or technical only: section 442J; or
- an accused holds a certificate under section 442L.

15. WORKPLACE HEALTH AND SAFETY PROSECUTIONS

Section 231 of the *Work Health and Safety Act 2011* provides that a procedure may be utilised if a prosecution is not brought after a particular time.

A referral from 'the regulator' under section 231 of the *Work Health and Safety Act 2011* must be referred to the **Deputy Director** or the **Director** within 24 hours of receipt.

16. CONSENT TO CALLING A WITNESS AT COMMITTAL

The calling of a witness to give oral evidence or be cross-examined in a committal proceeding has, since the passing of the *Civil and Criminal Jurisdiction and Modernisation Amendment Act 2010*, been restricted.

In circumstances where the prosecutor has a discretion to agree to the calling of a witness to give oral evidence or be cross-examined at a committal hearing

pursuant to sections 110A (5) & 110B (5) of the *Justices Act 1886*, the prosecutor must not consent to the calling of the witness unless there are substantial reasons why it is in the interest of justice that the person should attend to give oral evidence.

In determining if there are substantial reasons the prosecutor should consider:

1. The nature of the offence;
2. The nature of the witness, including-

- Whether the evidence can be confined to an identified and limited issue;
- Whether the witness is the best person to give the evidence concerning that issue; and
- The purpose for which the evidence is to be used.

Finally, the cross-examination must be restricted to the area that gives rise to the interest of justice and is not at large.

17. CHARGE NEGOTIATIONS

The public interest is in the conviction of the guilty. The most efficient conviction is a plea of guilty. Early notice of the plea of guilty will maximise the benefits for the victim and the community.

Early negotiations (within this guideline) are therefore encouraged.

Negotiations may result in a reduction of the level or the number of charges. This is a legitimate and important part of the criminal justice system throughout Australia. The purpose is to secure a **just result**.

(i) <u>The Principles</u>

- The prosecution must always proceed on those charges which fairly represent the conduct that the Crown can **reasonably prove**;

- A plea of guilty will only be accepted if, after an analysis of all of the facts, it is in the general **public interest**.

The public interest may be satisfied if one or more of the following applies:-

(a) the fresh charge adequately reflects the essential criminality of the conduct and provides sufficient scope for sentencing;

(b) the prosecution evidence is deficient in some material way;

(c) the saving of a trial compares favourably to the likely outcome of a trial; or

(d) sparing the victim the ordeal of a trial compares favourably with the likely outcome of a trial.

A comparison of likely outcomes must take account of the principles set out in *R* v *D* [1996] 1 QdR 363, which limits punishment to the offence the subject of conviction and incidental minor offences which are inextricably bound up with it.

An accused cannot be sentenced for a more serious offence which is not charged.

(ii) **Prohibited Pleas**

Under no circumstances will a plea of guilty be accepted if:-

(a) it does not adequately reflect the gravity of the provable conduct of the accused;

(b) it would require the prosecution to distort evidence; or

(c) the accused maintains his or her innocence.

(iii) **Scope for Charge Negotiations**

Each case will depend on its own facts but negotiation may be appropriate in the following cases:-

(a) where the prosecution has to choose between a number of appropriate alternative charges. This occurs when the one episode of criminal conduct may constitute a number of overlapping but alternative charges;

(b) where new reliable evidence reduces the Crown case; or

(c) where the accused offers to plead to a specific count or an alternative count in an indictment and to give evidence against a co-offender. The acceptability of this will depend upon the importance of such evidence to the Crown case, and more importantly, its credibility in light of corroboration and the level of culpability of the accused as against the co-offenders;

There is an obligation to avoid overcharging. A common example is a charge of attempted murder when there is no evidence of an intention to kill. In such a case there is insufficient evidence to justify attempted murder and the charge should be reduced independent of any negotiations.

(iv) **File Note**

- Any offer by the defence, the supporting argument and the date it was made should be clearly noted on the file.

- The decision and the reasons for it should also be recorded and signed.

- When an offer has been rejected, it should not be later accepted before consultation with the Directorate.

(v) **Delegation**

(a) In cases of **homicide, attempted murder or special sensitivity, notoriety or complexity** an offer should not be accepted without consultation with the Director or Deputy Director. The matter need not be referred unless the Legal Practice Manager or allocated prosecutor sees merit in the offer.

(b) In **less serious cases** the decision to accept an offer may be made after consultation with a senior crown prosecutor or above. If the matter has not been allocated to a crown prosecutor, the decision should fall to the Legal Practice Manager.

(vi) **Consultation**

In all cases, before any decision is made, the views of the investigating officer and the victim or the victim's relatives, should be sought.

Those views must be considered but may not be determinative. It is the public, rather than an individual interest, which must be served.

18. SUBMISSIONS

(i) Any submission from the defence must be dealt with expeditiously;

(ii) If the matter is complex or sensitive, the defence should be asked to put the submission in writing;

(iii) Submissions that a charge should be discontinued or reduced should be measured by the two tiered test for prosecuting, set out in Guideline 4; and

(iv) Unless there are special circumstances, a submission to discontinue because of the triviality of the offence should be refused if the accused has elected trial on indictment for a charge that could have been dealt with in the Magistrates Court.

19. CASE REVIEW

All current cases must be continually reviewed. This means ongoing assessment of the evidence as to:-

- the appropriate charge;
- requisitions for further investigation; and
- the proper course for the prosecution.

Conferences with witnesses are an important part of the screening process. Matters have to be considered in a practical way upon the available evidence. The precise issues will depend upon the circumstances of the case, but the following should be considered:-

- Admissibility of the evidence - the likelihood that key evidence might be excluded may substantially affect the decision whether to proceed or not.
- The reliability of any confession.
- The liability of any witness: is exaggeration, poor memory or bias apparent?
- Has the witness a motive to distort the truth?
- What impression is the witness likely to make? How is the witness likely to stand-up to cross-examination? Are there matters which might properly be put to the witness by the defence to undermine his or her credibility? Does the witness suffer from any disability which is likely to affect his or her credibility (for example: poor eyesight in an eye witness).
- If identity is an issue, the cogency and reliability of the identification evidence.
- Any conflict between eyewitnesses: does it go beyond what reasonably might be expected and hence thereby materially weaken the case?
- If there is no conflict between eyewitnesses, is there cause for suspicion that a false story may have been concocted?
- Are all necessary witnesses available and competent to give evidence?

20. TERMINATION OF A PROSECUTION BY ODPP

(i) A decision to discontinue a prosecution or to substantially reduce charges on the basis of *insufficient evidence* cannot be made without consultation with a Legal Practice Manager. If, and only if, it is not reasonably practicable to consult with the Legal Practice Manager, the consultation may be with a principal crown prosecutor, in lieu of the Legal Practice Manager.

(ii) Where the charges involve ***homicide, attempted murder*** or matters of ***public notoriety*** or high ***sensitivity***, the consultation must then extend further to the Director or Deputy Director. The case lawyer should provide a detailed memorandum setting out all relevant issues. The Director may assemble a consultative committee to meet with case lawyer and consider the matter. The consultative committee shall comprise the Director, Deputy Director and two senior principal prosecutors.

(iii) In all cases the person consulted should make appropriate notes on the file.

(iv) A decision to discontinue on ***public policy grounds*** should only be made by the Director.

If, after an examination of the brief, a case lawyer or crown prosecutor is of the opinion there are matters which call into question the public interest in prosecuting, the lawyer, through the relevant Legal Practice Manager, should advise the Director of the reasons for such opinion.

(v) The decision to discontinue a prosecution is final unless:

(a) There is fresh evidence that was not available at the time the decision was made; or
(b) The decision was affected by fraud; or
(c) There is a material error of law or fact that would lead to a substantial miscarriage of justice:

And It is in all the circumstances in the interests of justice to review the decision.

21. CONSULTATION WITH POLICE

The relevant case lawyer or prosecutor must advise the arresting officer whenever the ODPP is considering whether or not to discontinue a prosecution or to substantially reduce charges.

The arresting officer should be consulted on relevant matters, including perceived deficiencies in the evidence or any matters raised by the defence. The arresting officer's views should be sought and recorded prior to any decision. The purpose of consultation is to ensure that any final decision takes account of all relevant facts.

It is the responsibility of the Legal Practice Manager to check that consultation has occurred and that the police response is considered before any final decision is made.

If neither the arresting officer, nor the corroborator, is available for consultation within a reasonable time, the attempts to contact them should be recorded. After a decision has been made, the case lawyer must notify the arresting officer as soon as possible.

22. CONSULTATION WITH VICTIMS

The relevant case lawyer or prosecutor must also seek the views of any victim whenever serious consideration is given to discontinuing a prosecution for violence or sexual offences (see Guideline 25).

The views of the victim must be recorded and properly considered prior to any final decision, but those views alone are not determinative. It is the public, not any individual interest that must be served (see Guideline 4).

Where the victim does not want the prosecution to proceed and the offence is relatively minor, the discretion will usually favour discontinuance. However, the more serious the injury, the greater the public interest in proceeding. Care must also be taken to ensure that a victim's change of heart has not come from intimidation or fear.

23. REASONS FOR DECISIONS

(i) Reasons for decisions made in the course of prosecutions may be disclosed by the **Director** to persons outside of the ODPP.

(ii) The disclosure of reasons is generally consistent with the open and accountable operations of the ODPP.

(iii) But reasons will only be given when the inquirer has a legitimate interest in the matter and it is otherwise appropriate to do so.

- Reasons for not prosecuting must be given to the **victims** of crime;
- A legitimate interest includes the interest of the media in the open dispensing of justice where previous proceedings have been **public**.

(iv) Where a decision has been made not to prosecute prior to any public proceeding, reasons may be given by the Director. However, where it would mean publishing material too weak to justify a prosecution, any explanation should be brief.

(v) Reasons will **not** be given in any case where to do so would cause unjustifiable harm to a victim, a witness or an accused or would significantly prejudice the administration of justice.

24. DIRECTED VERDICT/NOLLE PROSEQUI

If the trial has not commenced, ordinarily, a nolle prosequi should be entered to discontinue the proceedings.
In the absence of special circumstances, once the trial has commenced, it is desirable that it end by verdict of the jury. Where a prima facie case has not been established, this will be achieved by a directed verdict.

Special circumstances which may justify a nolle prosequi instead of a directed verdict will include circumstances where:-

(a) without fault on the part of the prosecution, it is believed there cannot be a fair determination of the issues: for example: where a ruling of law may be the subject of a Reference;

(b) a prosecution of a serious offence has failed because of some minor technicality that is curable; or

(c) matters emerge during the hearing that cause the Director or Deputy Director to advise that it is not in the public interest to continue the hearing.

25. VICTIMS

This guideline applies to a victim as defined in section 5 of the Victims of Crime Assistance Act 2009 (VOCA). This is a person who has suffered harm either:-

(a) because a crime is committed against the person; or

(b) because the person is a family member or dependant of a person who has died or suffered harm because a crime is committed against that person; or

(c) as a direct result of intervening to help a person who has died or suffered harm because a crime is committed against that person.

(i) General Guidelines for Dealing with Victims

The ODPP has the following obligations to victims:-

(a) To treat a victim with courtesy, compassion, respect and dignity;

(b) To take into account and to treat a victim in a way that is responsive to the particular needs of the victim, including, his or her age, sex or gender identity, race or indigenous background, cultural or linguistic diversity, sexuality, impairment or religious belief;

(c) To assist in the return, as soon as possible, of a victim's property which has been held as evidence or as part of an investigation.

- Where appropriate, an application must be made under Rule 55 or 100 of the Criminal Practice Rules 1999 for an order for the disposal of any exhibit in the trial or appeal.

- Where a victim's property is in the custody of the Director of Public Prosecutions and is not required for use in any further prosecution or other investigation, it should be returned to the victim as soon as is reasonably possible.

- If the victim inquires about property believed to be in the possession of the police, the victim is to be directed to the investigating police officer. The victim should also be told of section 39 of the Justices Act 1886, which empowers a court to order the return of property in certain circumstances.

(d) To seek all necessary protection from violence and intimidation by a person accused of a crime against the victim.

- Where a **bail** application is made and there is some prospect that if released, the defendant, would endanger the safety or welfare of the victim of the offence or be likely to interfere with a witness or obstruct the course of justice, all reasonable effort must be made to investigate whether there is an **unacceptable risk** of future harm or interference. Where sufficient evidence of risk has been obtained, bail should be opposed under section 16(1) (a) (ii) or 16(3) of the Bail Act 1980. If it has not been practicable in the time available to obtain sufficient information to oppose bail on that ground, an adjournment of the bail hearing should be sought so that the evidence can be obtained.

- Where bail has been granted over the objection of the prosecution and there is a firm risk of serious harm to any person, a report must be given as soon as possible to the Director for consideration of an appeal or review.

- When a person has been convicted of an offence involving **domestic violence** and there is reason to believe that the complainant remains at significant risk the prosecutor should apply to the Court for a **domestic violence order** pursuant to section 30 of the Domestic Violence (Family Protection) Act 1989. If there is a current domestic violence order and a person has been convicted of an offence in breach of it, section 30 requires the Court to consider whether there ought to be changes to it. A copy of the **original order** is therefore required. If at the time of sentencing a prosecutor is aware of the existence of such an order he or she must supply the Court with a copy of it.

- If at the conclusion of a prosecution for **stalking** there is a significant risk of unwanted contact continuing, the prosecutor should apply for a restraining order under section 248F of the Code. This is so even if there is an acquittal or discontinuance.

(e) To assist in protecting a **victim's privacy** as far as possible and to take into account the victim's welfare at all appropriate stages.

Protection for victims of violence

- The Court has power to suppress the home address or contact address of a victim of **personal violence** (except where those details are relevant to a fact in issue). An application should be made under section 695A of the Criminal Code where appropriate.

Closed Court for sex offences

- The Court must be closed during the testimony of any victim in a sexual offence case: see section 5 Criminal Law (Sexual Offences) Act 1978; section 21A Evidence Act 1977

- The Prosecutor must be vigilant to ensure this is done.

- In the pre-hearing conference, the victim must be asked whether he or she wants a support person. A "support person" includes external support persons.

- If the victim is a child, he or she should also be asked whether he or she wants his or her parent(s) or guardian(s) to be present (unless that person is being called as a witness in the proceeding). If the victim does not want such person(s) present then information as to why this is so should be obtained and file noted. If the victim does want such person(s) present, the prosecutor must make the application to the Court.

Anonymity for victims of sex offences

- In the initial contact, the victim must be told of the prohibition of publishing any particulars likely to identify the victim. The Court may permit some publication only if good and sufficient reason is shown.

- During criminal proceedings, the prosecutor should object to any application for publication unless the victim wants to be identified. In such a case, the prosecutor is to assist the complainant to apply for an order to allow publication.

Improper questions

- Prosecutors have a responsibility to protect witnesses, particularly youthful witnesses, against threatening, unfair or unduly repetitive cross-examination by making proper objection: see section 21 of the Evidence Act 1977.

- Questions should be framed in language that the witness understands.

- Prosecutors need to be particularly sensitive to the manner of questioning children and intellectually disabled witnesses.

- The difficulties faced by some Aboriginal witnesses in giving evidence are well catalogued in the government publication "*Aboriginal English in the Courts – a handbook*" and the Queensland Justice Commission's report *"Aboriginal Witnesses in Queensland's Criminal Courts"* of June 1996.
- Generally, questions about the sexual activities of a complainant of sexual offences will be irrelevant and inadmissible. They cannot be

asked without leave of the Court. The only basis for leave is "*substantial relevance to the facts in issue or a proper matter for cross-examination as to credit*".

Special witness

- Special witnesses under section 21A of the Evidence Act are children under the age of 16 and those witnesses likely to be disadvantaged because of intellectual impairment or cultural differences.

- The provision gives the Court a discretion to modify the way in which the evidence of a special witness is taken.

- The prosecutor must, before the proceeding is begun, acquaint himself or herself with the needs of the special witness, and at the hearing, before the special witness is called, make an application to the court for such orders under section 21A, subsection (2) as the circumstances seem to require.

- The prosecutor must apply for an order under section 21A, subsections (2)(c) and (4), for evidence via closed circuit television where the witness is:-

  (a) 15 years old or younger; and

  (b) to testify in relation to violent or sexual offences.

  The application must be made in every such case except where the child would prefer to give evidence in the courtroom.

(f) To minimise inconvenience to a victim.

Information for Victims

The following information should be given in advance of the trial:-

(a) Every victim who is a witness must be advised of the trial process and his or her role as a prosecution witness.

(b) Where appropriate, victims must also be provided with access to information about:-

  - victim-offender conferencing services;

  - available welfare, health, counselling, medical and legal help responsive to their needs;

  - Victims Assist Queensland, for advice and support in relation to financial assistance under the Victims of Crime Assistance Act 2009

- Penalties and Sentences Act 1992 - section 9(2) which requires the court, in sentencing an offender, to have regard to any damage, injury or loss caused by the offender; section 35 relating to the court's power to order the offender to pay compensation; and

- Juvenile Justice Act 1992 - section 192 relating to the power of the court to order that a child make restitution or pay compensation.

(c) In the case of a complainant of a sexual offence, the victim should be told:-

- that the Court will be closed during his or her testimony;

- that there is a general prohibition against publicly identifying particulars of the complainant.

(d) As soon as a case lawyer has been allocated to the case any victims involved must be advised of:-

- the identity of the person charged (except if a juvenile);

- the charges upon which the person has been charged by police, or, as appropriate, the charges upon which the person has been committed for trial or for sentence;

- the identity and contact details of the case lawyer; and

- the circumstances in which the charges against the defendant may be varied or dropped;

(e) If requested by the victim, the following information about the progress of the case will be given, including:-

- details about relevant court processes, and when the victim may attend a relevant court proceeding, subject to any court order;

- details of the availability of diversionary programs in relation to the crime;

- notice of a decision to substantially change a charge, or not to continue with a charge, or accept a plea of guilty to a lesser charge;

- notice of the outcome of a proceeding relating to the crime, including any sentence imposed and the outcome of any appeal.

A victim who is a witness for the prosecution in the trial for the crime committed against the victim is to be informed about the trial

process and the victim's role as a witness for the prosecution if not already informed by another prosecuting agency.

Information which the victim is entitled to receive must be provided within a reasonable time after the obligation to give the information arises.

Notwithstanding that a victim has not initially requested that certain information be provided, if later a request is made, the request is to be met.

Where a case involves a **group of victims**, or where there is one person or more against whom the offence has been committed and another who is an immediate family member or who is a dependant of the victim(s), the obligation to inform may be met by informing a representative member of the group.

If the victim is an **intellectually impaired person** and is in the care of another person or an institution, the information may be provided to that person's present carer, but only if the person so agrees.

If the victim is a **child** and is in the care of another person or an institution, the information may be provided to the child's present carer unless the child informs the ODPP that the information is to be provided to the child alone. The child should be asked questions in order to determine the child's wishes in this regard. Sensitive information should not be provided to a child's carer if that carer, on the information available, seems to be unsympathetic towards the child as, for example, a mother who seems to be supportive of the accused stepfather rather than her child.

Note: Where it appears that a victim would be unlikely to comprehend a form letter without **translation** or explanation the letter may be directed via a person who can be entrusted to arrange for any necessary translation or explanation.

(ii) **Pre-trial Conference**

Where a victim is to be called as a witness the case lawyer or prosecutor is to hold a conference with the victim beforehand and, if reasonably practicable, the witness should be taken to preview proceedings in a Court of the status of the impending hearing.

(iii) **Victim Impact Statements**

At the pre-trial conference, if it has not already been done, the victim is to be informed that a Victim Impact Statement may be tendered at any sentence proceeding. The victim is, however, to be informed of the limits of such a Statement (see Guideline 47(iv)).

The victim is also to be advised that he or she might be required to go into the witness box to swear to the truth of the contents and may be cross-examined if the defence challenges anything in the Victim Impact Statement.

(iv) **Sentencing**

Pursuant to section 15 of VOCA, the prosecutor should inform the sentencing Court of appropriate details of the harm caused to the victim by the crime, but in deciding what details are not appropriate the prosecutor may have regard to the victim's wishes.

The prosecutor must ensure the court has regard to the following provisions, if they would assist the victim:-

- Penalties and Sentences Act 1992 - section 9(2) (c), which states that a court, in sentencing an offender, must have regard to the nature and seriousness of the offence including harm done to the victim.

- Juvenile Justice Act 1992 - section 109(1) (g), which states that in sentencing a child a court must have regard to any impact of the offence on the victim.

The above are the minimum requirements in respect of victims (see also Guideline 47).

(v) In an appropriate case, further action will be required, for example:-

- To ensure, so far as it is possible, that victims and prosecution witnesses proceeding to court, at court and while leaving court, are protected against unwanted contact occurring between such person and the accused or anyone associated with the accused. The assistance of police in this regard might be necessary.

- In any case where a substantial reduction or discontinuance of charge is being considered, the victim and the charging police officer should be contacted and their views taken into account before a final determination is made (see Guidelines 20 and 21).

- In any case where it is desirable in the interests of the victim and in the interests of justice that the victim and some witnesses, particularly experts, are conferred with before a hearing, a conference should be held.

Officers required to comply with the above requirements must make file notes regarding compliance.

26. ADVICE TO POLICE

(i) Appropriate References

In circumstance where the Police have charged a person with an offence the Police may refer the matter to the Director for advice as to whether the prosecution should proceed only when:-

The Deputy Commissioner considers that the evidence is sufficient to support the charge, but the circumstances are such that there is a reasonable prospect that the ODPP may later exercise the discretion not to prosecute on public interest grounds.

(ii) Form of Request and Advice

(a) Advice will not be given without a **full brief of evidence**;

(b) All requests for advice must be answered within one month of receipt of the police material;

(c) Any **time limit** must be included in the referral; and

(d) As a general rule, both the police request for advice and the ODPP advice must be in **writing**.

There will be cases when the urgency of the matter precludes a written request. In those cases, an **urgent oral request** may be received and, if necessary, oral advice may be given on the condition that such advice will be formalised in writing within two days. The written advice should set out details of the oral request and the information provided by police for consideration.

(iii) Nature of ODPP Advice

Whether police follow the advice as is a matter for them. The referral of the matter for advice and any advice given is to be treated as confidential.

The ODPP will not advise the police to discontinue an investigation. Where the material provided by police is incomplete or further investigation is needed, the brief will be returned to police who will be advised that they may re-submit the brief for further advice when the additional information is obtained. For example, this may include requiring police to give an alleged offender an opportunity to answer or comment upon the substance of the allegations.

(iv) Source of Advice

The advice must be provided by the **Director** in all matters.

27. HYPNOSIS AND REGRESSION THERAPY

This guideline concerns the evidence of any witness who has undergone regression therapy or hypnosis, including eye movement and desensitisation reprocessing. Evidence in breach of this guideline is likely to be excluded from trial.

Where it is apparent to an investigating officer that a witness has undergone counselling or therapy prior to the provision of his or her witness statement, the officer should inquire as to the nature of the therapy. If hypnosis has been involved the witness's evidence cannot be used unless the following conditions are satisfied:-

(1) (i) The victim **had recalled the evidence prior to any such therapy**; and

(ii) his or her prior memory can be established independently; or

(2) Where a "recollection" of the witness has **emerged for the first time during or after hypnosis**:-

1. The hypnotically induced evidence must be limited to matters which the witness has recalled and related prior to the hypnosis – referred to as "the original recollection". In other words evidence will not be tendered by the Crown where its subject matter was recalled for the first time under hypnosis or thereafter. The effect of that restriction is that no detail recalled for the first time under hypnosis or thereafter will be advanced as evidence.

2. The substance of the original recollection must have been preserved in written, audio or video recorded form.

3. The hypnosis must have been conducted with the following procedures:-

(a) the witness gave informed consent to the hypnosis;

(b) the hypnosis was performed by a person who is experienced in its use and who is independent of the police, the prosecution and the accused;

(c) the witness's original recollection and other information supplied to the hypnotist concerning the subject matter of the hypnosis was recorded in writing in advance of the hypnosis; and

(d) the hypnosis was performed in the absence of police, the prosecution and the accused, but was video recorded.

The fact that a witness has been hypnotised will be disclosed by the prosecution to the defence, and all relevant transcripts and information provided to the defence well in advance of trial in order to enable the defence to have the assistance of their own expert witnesses in relation to that material.

Prosecutors will not seek to tender such evidence unless the guidelines are met. Police officers should therefore make the relevant inquiries before progressing a prosecution.

28. BAIL APPLICATIONS

(i) Section 9 of the Bail Act 1980 prima facie confers upon any unconvicted person who is brought before a Court the right to a grant of bail.

(ii) Pursuant to section 16, the Court's power to refuse bail has three principal aspects:-

- the risk of re-offending;
- the risk of interfering with witnesses; and
- the risk of absconding.

In determining its attitude to any bail application, the prosecution must measure these features against the seriousness of the original offence and the weight of the evidence.

Proposed bail conditions should be assessed in terms of their ability to control the risks.

(iii) Where a **bail** application is made and there is some prospect that if released, the defendant would endanger the safety or welfare of the victim of the offence or be likely to interfere with a witness or obstruct the course of justice, all reasonable effort must be made to investigate whether there is an **unacceptable risk** of future harm or interference. Where sufficient evidence of risk has been obtained, bail should be opposed under section 16(1) (a) (ii) or 16(3) of the Bail Act 1980. If it has not been practicable in the time available to obtain sufficient information to oppose bail on that ground, an adjournment of the bail hearing should be sought so that the evidence can be obtained.

(iv) Where bail has been granted over the objection of the prosecution and there is a firm risk of serious harm to any person, a report must be given as soon as possible to the Director for consideration of an appeal or review.

(v) **Reversal of Onus of Proof**

Prosecutors should note that pursuant to section 16(3) of the Bail Act 1980, the defendant must show cause why his or her detention is not justified where there is a breach of the Bail Act, a weapon has been used or the alleged offence has been committed while the defendant was at large in respect of an earlier arrest.

(vi) **Reporting Conditions**

Reporting conditions are imposed to minimise the risk of absconding.

Some bail orders allow for the removal of a reporting condition upon the consent of the Director. Consent will not be given merely because of the inconvenience of reporting.

Where it is considered that the request has merit, it should be referred to a Legal Practice Manager, or above.

(vii) **Overseas Travel**

Staff should not consent to a condition of bail allowing overseas travel without the written authority of a Legal Practice Manager, the Director or the Deputy Director.

29. DISCLOSURE: Sections 590AB to 590AX of the Criminal Code

The Crown has a duty to make full and early disclosure of the prosecution case to the defence.

The duty extends to all facts and circumstances and the identity of all witnesses reasonably regarded as relevant to any issue likely to arise, in either the case for the prosecution or the defence.

However, the address, telephone number and business address of a witness should be omitted from statements provided to the defence, except where those details are material to the facts of the case: *section 590AP*. In the case of an anonymity certificate, the identity of the protected witness shall not be disclosed without order of the court: sections 21F and 21I of the Evidence Act 1977.

(i) **Criminal Histories**

The criminal history of the accused must be disclosed.

Where a prosecutor knows that a Crown witness has a criminal history, it should be disclosed to the defence.

Where the defence in a joint trial wishes to know the criminal history of a co-accused it should be provided.

The prosecution must, on request, give the accused person a copy of the Criminal History of a proposed witness for the prosecution in the possession of the prosecution.

(ii) **Immunity**

Any indemnity or use-derivative-use undertaking provided to a Crown witness in relation to the trial should be disclosed to the defence. However, the advice which accompanied the application for immunity is privileged and should not be disclosed.

The Attorney-General's protection from prosecution is limited to truthful evidence. This is clear on the face of the undertaking.

If the witness's credibility is attacked at trial, the undertaking should be tendered. But it cannot be tendered until and unless the witness's credibility is put in issue.

(iii) **Exculpatory Information**

If a prosecutor knows of a person who can give evidence that may be exculpatory, but forms the view on reasonable grounds that the person is not credible, the prosecutor is not obliged to call that witness (see Guideline 39).

The prosecutor must however disclose to the defence:-

(a) the person's statement, if there is one, or

(b) the nature of the information:-

- the identity of the person who possesses it; and
- when known, the whereabouts of the person.

These details should be disclosed in good time.

The Crown, if requested by the defence, should subpoena the person.

(iv) **Inconsistent Statement**

Where a prosecution witness has made a statement that may be inconsistent in a material way with the witness's previous evidence the prosecutor should inform the defence of that fact and make available the statement. This extends to any inconsistencies made in conference or in a victim impact statement.

(v) **Particulars**

Particulars of sexual offences or offences of violence about which an "affected child witness" is to testify, must be disclosed if requested: section *590AJ(2)(a)*.

(vi) **Sensitive Evidence**: ***sections 590AF; 590AO; 590AX***

Sensitive evidence is that which contains an image of a person which is obscene or indecent or would otherwise violate the person's privacy. It will include video taped interviews with complainants of sexual offences containing accounts of sexual activity, pornography, child computer games, police photographs of naked complainants and autopsy photographs.

Sensitive evidence:-

- **Must not** be copied, other than for a legitimate purpose connected with a proceeding;
- **Must not** be given to the defence without a Court order;
- **Must be** made available for viewing by the defence upon a request if, the evidence is relevant to either the prosecution or defence case;
- **May be** made available for analysis by an appropriately qualified expert (for the prosecution or defence). Such release must first be authorised by the Legal Practice Manager, upon such conditions as thought appropriate.

(vii) **Original Evidence***: section 590AS*

Original exhibits must be made available for viewing by the defence upon request. Conditions to safeguard the integrity of the exhibits must be settled by the Legal Practice Manager.

(viii) **Public Interest Exception**: ***section 590AQ***

The duty of disclosure is subject only to any overriding demands of justice and public interest such as:-

- the need to protect the integrity of the administration of justice and ongoing investigations;
- the need to prevent risk to life or personal safety; or
- public interest immunity, such as information likely to lead to the identity of an informer, or a matter affecting national security.

These circumstances will be rare and information should only be withheld with the approval of the Director. When this happens, the defence must be given written notice of the claim (see Notice of Public Interest Exemption).

(ix) **Committal Hearings**

All admissible evidence collected by the investigating police officers should be produced at committal proceedings, unless the evidence falls into one of the following categories:-

(a) it is unlikely to influence the result of the committal proceedings and it is contrary to the public interest to disclose it. (See paragraph 25 (viii) above);

(b) it is unlikely to influence the result of the committal proceedings and the person who can give the evidence is not reasonably available or his or her appearance would result in unusual expense or inconvenience or produce a risk of injury to his or her physical or mental health, provided a copy of any written statement containing the evidence in the possession of the prosecution is given to the defence;

(c) it would be unnecessary and repetitive in view of other evidence to be produced, provided a copy of any written statement containing the evidence in the possession of the prosecution is given to the defence;

(d) it is reasonably believed the production of the evidence would lead to a dishonest attempt to persuade the person who can give the evidence to change his or her story or not to attend the trial, or to an attempt to intimidate or injure any person;

(e) it is reasonably believed the evidence is untrue or so doubtful it ought to be tested upon cross-examination, provided the defence is given notice of the person who can give the evidence and such particulars of it as will allow the defence to make its own inquiries regarding the evidence and reach a decision as to whether it will produce the evidence.

- Any doubt by the prosecutor as to whether the balance is in favour of, or against, the production of the evidence should be resolved in favour of production.

- Copies of written statements to be given to the defence including copies to be used for the purposes of an application under *section 110A* of the *Justices Act 1886*, are to be given so as to provide the defence with a reasonable opportunity to consider and to respond to the matters contained in them: they should be given at least 7 clear days before the commencement of the committal proceedings.

- In all cases where admissible evidence collected by the investigating police officers has not been produced at the committal proceedings, a note of what has occurred and why it occurred should be made by the person who made the decision and attached to the prosecution brief.

(x) **Legal Professional Advice**

Legal professional privilege will be claimed in respect of ODPP internal advices and legal advice given to the Attorney-General.

(xi) **Witness Conferences**

The Director will not claim privilege in respect of any taped or written record of a conference with a witness provided there is a legitimate forensic purpose to the disclosure, for example:-

(a) an inconsistent statement on a material fact;

(b) an exculpatory statement; or

(c) further allegations.

The lawyer concerned must immediately file note the incident and arrange for a supplementary statement to be taken by investigators. The statement should be forwarded to the defence.

(xii) **Disclosure Form**

The Disclosure Form must be fully completed and provided to the legal representatives or the accused at his bail address or remand centre no later than:-

- 14 days before the committal hearing;
- again, within 28 days of the presentation of indictment, or prior to the trial evidence, whichever is sooner.

The police brief must include a copy of the Disclosure Form furnished to the accused. The ODPP must update the police disclosure but need not duplicate it: *section 590AN.*

Responsibility for disclosure within ODPP rests with the case lawyer or prosecutor if one has been allocated to the matter.

(xiii) **Ongoing Obligation of Disclosure**

When new and relevant evidence becomes available to the prosecution after the Disclosure Forms have been published, that new evidence should be disclosed as soon as practicable. The duty of disclosure of exculpatory information continues after conviction until the death of the convicted person: *section 590AL*.

Upon receipt of the file a written inquiry should be made of the arresting officer to ascertain whether that officer has knowledge of any information, not included in the brief of evidence, that would tend to help the case for the accused.

Post conviction disclosure relates to reliable evidence that may raise reasonable doubt about guilt: *section 590AD.*

(xiv) **Confidentiality**

- It is an offence to disclose confidential ODPP information other than in accordance with the duty of disclosure or as otherwise permitted by legislation: *section 24A of the Director of Public Prosecutions Act 1984.*

- Inappropriate disclosure of confidential information may affect the safety or privacy of individuals, compromise ongoing investigations or undermine confidence in the office. This means sensitive material must be carefully secured. It must not be left unattended in Court, in cars or in any place where it could be accessed by unauthorised people.

30. QUEENSLAND COLLEGE OF TEACHERS AND COMMISSION FOR CHILDREN AND YOUNG PEOPLE

(Queensland College of Teachers Act) 2005 imposes a duty upon prosecuting agencies to advise the Queensland College of Teachers of the progress of any prosecution of an **indictable offence** against a person who is, or is thought to have been, a registered **teacher**.

Section 318 of the Commission for Children and Young People Act 2000 imposes a similar duty where the person is listed under section 310.

- In the case of committal proceedings or indictable offences dealt with summarily through police prosecutors, the obligation falls on the Commissioner of Police.

- In all other cases, the responsibility rests with the ODPP case lawyer.

31. UNREPRESENTED ACCUSED

A prosecutor must take particular care when dealing with an unrepresented accused. There is an added duty of fairness and the prosecution must keep the accused properly informed of the prosecution case. At the same time the prosecution must avoid becoming personally involved.

(i) Staff should seek to avoid any contact with the accused unless accompanied by a witness;

(ii) Full notes should be promptly made in respect of:-

- any oral communication;

- all information and materials provided to the accused; and

- any information or material provided by the accused.

(iii) Any admissions made to ODPP staff or any communication of concern should be recorded and mentioned in open court as soon as possible.

The prosecutor should **not** advise the accused about legal issues, evidence or the conduct of the defence. But he or she should be alert to the judge's duty to do what is necessary to ensure that the unrepresented accused has a fair trial. This will include advising the accused of his or her right to a voir dire to challenge the admissibility of a confession see *McPherson* v *R* (1981) 147 CLR 512.

An accused cannot personally cross-examine children under 16, intellectually impaired witnesses, or the victim of a sexual or violent offence: see sections 21L to 21S of the Evidence Act 1977. Where the accused is unrepresented and does not adduce evidence, the crown prosecutor (other than the Director) has no right to a final address: *section 619* of the Criminal Code; *R v Wilkie* CA No 255 of 1997.

32. JURY SELECTION

Selection of a jury is within the general discretion of the prosecutor. However, no attempt should be made to select a jury that is unrepresentative as to race, age, sex, economic or social background.

33. OPENING ADDRESS

A prosecutor should take care to ensure that nothing is said in the opening address which may subsequently lead to the discharge of the jury. Such matters might include:-

- contentious evidence that has not yet been the subject of a ruling;
- evidence that may reasonably be expected to be the subject of objection;
- detailed aspects of a witness's evidence which may not be recalled in the witness box.

34. PRISON INFORMANT/CO-OFFENDER

When a prosecutor intends to call a prison informant or co-offender, the defence should be advised of the following:-

- the witness's criminal record; and
- any information which may bear upon the witness's credibility such as any benefit derived from the witness's co-operation. For example: any immunity, sentencing discount, prison benefit or any reward.

35. IMMUNITIES

The general rule is that an accomplice should be prosecuted regardless of whether he or she is to be called as a Crown witness. An accomplice who pleads guilty and agrees to testify against a co-offender may receive a sentencing discount for that co-operation. There will be cases, however, where the accomplice cannot be prosecuted. The issue of immunity most commonly arises where there is no evidence admissible against the accomplice, but he or she has provided an induced statement against the accused.

The Attorney-General has the prerogative power to grant immunity from prosecution. The power is also granted pursuant to Section 7(1) *Attorney-General Act 1999*. The immunity will usually be in the form of a **use-derivative-use undertaking** (an undertaking not to use the witness's evidence in a nominated prosecution against the witness, either directly or indirectly, as evidence against the witness or to use that evidence to obtain other evidence against the witness), but may also be an indemnity (complete protection for nominated offences). Protection in either form will be dependent upon the witness giving truthful evidence. It is a last resort only to be pursued when the interests of justice require it.

Any application should be through the Director or Deputy Director in the first instance so that advice may be furnished to the Attorney-General if requested.

The witness' statement must exist in some form before an application for immunity is made. The application can only be considered in respect of completed criminal conduct. Any form of immunity granted does not operate to cover future conduct.

The application must summarise:-

(i) the witness' attitude to testifying without immunity;
(ii) the witness' attitude to testifying with immunity;
(iii) the existing prosecution case against the accused (without immunity for the witness);
(iv) the evidence which the witness is capable of giving (including the significance of that evidence and independent support for its reliability);
(v) the involvement and culpability of the proposed witness;
(vi) public interest issues: including the comparative seriousness of the offending as between the accused and the witness; whether the witness could and should be prosecuted (e.g. what is the quality of the evidence admissible against the witness and the strength of any prosecution case against him or her); and
(vii) reasons why the applicant believes that the application should be granted.

The application must contain:-

(i) Notification of the date by which the decision of the Attorney-General is requested;
(ii) A full copy of the brief of evidence, by way of attachment to the application;

(iii) The name and full contact details of the applicant, including the rank and registration number of that person where the applicant is a member of a police service;
(iv) The endorsement by way of signature of the applicant at the end of the application;
(v) The name and contact details of a senior member of the organisation responsible for the making of the application who holds the opinion that the granting of the immunity is in the interests of justice. Where that organisation is a police service, that person must be of the rank of Superintendent or higher;
(vi) Details of all matters concerning the credibility of the witness that are or may be relevant to the determination of the application;
(vii) A copy of the record of all conversations held with the witness. Where that record is an electronic record, a full transcript of the conversation must also be supplied;
(viii) A copy of the record of all conversations held with the alleged principal offender or offenders. Where that record is an electronic record, a full transcript of the conversation must also be supplied; and
(ix) The full criminal history of each of the witness and the alleged principal offender or offenders from each State and territory of Australia by way of an attachment to the application. Where it is asserted that the witness or alleged principal offender or offenders do not have any prior criminal convictions in any one or more State or territory, that fact must be stated in the body of the application.

In addition to the application and the other materials required to be provided, there must also be supplied an affidavit sworn or affirmed by the applicant attesting to the following facts:

(i) That the brief of evidence that accompanies the application contains all statements and other information and materials that would be required to be provided so as to comply with the requirements of Chapter 61 Chapter Division 3 *Criminal Code* if the brief had been supplied to the alleged principal offender or offenders; and
(ii) That the contents of the application are true and correct and that there are no further matters known to the applicant which are or may be relevant to the determination of the application.

All applications and other materials must be received at least 42 clear days ("the prescribed period") prior to the day by which the decision of the Attorney-General is requested, unless exceptional circumstances exist.

Where the application or the accompanying material is considered to be deficient and more information is requested to be provided, that further material must be provided at least 42 clear days prior to the day by which the decision of the Attorney-General is requested, unless exceptional circumstances exist.

In either case, where it is suggested that exceptional circumstances exist, the applicant must provide an affidavit attesting to what those circumstance are and justifying why they are said to be "exceptional". Whether the circumstances are exceptional will be a matter solely for the decision of the Director or Deputy Director, as the case may be.

If all the required materials are not received prior to the prescribed period, and exceptional circumstances do not exist, the ODPP may not be able to provide any advice requested by the Attorney-General in sufficient time to allow the application to be determined by the requested date.

36. SUBPOENAS

Where subpoenas are required all reasonable effort must be made to ensure that the service of those subpoenas gives the witnesses as much notice as possible of the dates the witnesses are required to attend court.

37. HOSPITAL WITNESSES

This guideline applies to medical witnesses employed by hospitals in the Brisbane district.

(i) All hospital witnesses (other than Government Medical Officers) are to be served with a **subpoena**;

(ii) All subpoenas are to be accompanied by the appropriate form letter;

(iii) The subpoena should be prepared and served with as much notice as reasonably possible;

(iv) Service of the subpoena is to be arranged through the Hospital Liaison Officer where appropriate or through the Arresting Officer otherwise;

(v) Such subpoenas are to be accompanied by the form letter addressed to the Liaison Officer or Investigating Officer requesting confirmation of the service.

(vi) A file "**bring up**" should be actioned 2 weeks from the date of the letter, if there is no response.

(vii) Where the ODPP is advised of the hospital witness's unavailability, the file should be referred to a Legal Practice Manager or a Crown Prosecutor for consideration as to whether the witness is essential or whether alternative arrangements can be made. Such advice should be given to the relevant workgroup clerk within a week, or sooner, depending upon the urgency of the listing.

(viii) If the witness is essential and alternative arrangements cannot be made, the matter should be listed immediately for mention in the appropriate Court.

38. OTHER MEDICAL WITNESSES

Pathologists and Government Medical Officers do not require a subpoena, but should be notified of trial listings by the relevant form letter.

Medical practitioners in private practice will require written notice of upcoming trials, with the maximum amount of notice. Generally they will not require a subpoena.

39. WITNESSES

In deciding whether or not to call a particular witness the prosecutor must be fair to the accused. The general principle is that the Crown should call all witnesses capable of giving evidence relevant to the guilt or innocence of the accused.

The prosecutor should not call:-

- unchallenged evidence that is merely repetitious; or
- a witness who the prosecutor believes on reasonable grounds to be unreliable. The mere fact that a witness contradicts the Crown case will not constitute reasonable grounds.

See: Richardson v R (1974) 131 CLR 116; R v Apstolides (1984) 154 CLR 563; Whitehorn v R (1983) 152 CLR 657 at 664, 682-683.

The defence should be informed at the earliest possible time of the decision not to call a witness who might otherwise reasonably be expected to be called. Where appropriate the witness should be made available to the defence.

40. EXPERT WITNESSES

When a prosecutor proposes to call a government medical officer or other expert as a witness, all reasonable effort should be made to ensure that the witness is present at court no longer than is necessary to give the required evidence.

41. INTERPRETERS

Care must be taken to ensure that every crown witness who needs an interpreter to testify has one.

42. CROSS-EXAMINATION

Cross-examination of an accused as to his or her credit must be fairly conducted. In particular, accusations should not be put unless:-

(i) they are based on information reasonably assessed to be accurate; and

(ii) they are justified in the circumstances of the trial.

The Crown cannot split its case. Admissions relevant to a fact in issue during the Crown case ordinarily should not be introduced during cross-examination of the accused: R v Soma [2003] HCA 13.

43. DEFENDANT'S PRE-TRIAL MEMORANDUM

Where the Court has ordered the preparation and delivery of a pre-trial memorandum the prosecutor must not use a statement in the defendant's pre-trial memorandum to cross-examine the defendant in the trial except in exceptional circumstances and with prior notice to the defendant or the defendant's legal representatives.

44. ARGUMENT

A prosecutor must not argue any proposition of fact or law which the prosecutor does not believe on reasonable grounds can be sustained.

45. ACCUSED'S RIGHT TO SILENCE

The right to silence means that no adverse inference can be drawn from an accused's refusal to answer questions: Petty v The Queen (1991) 173 CLR 95.

- Where an accused has declined to answer questions, no evidence of this should be led as part of the Crown case (it will be sufficient to lead that the accused was seen by police, arrested and charged);

- Where a defence has been raised for the first time at trial:-

  (a) if the accused has previously exercised his right to silence, the prosecutor should **not** raise recent invention;

  (b) if the accused has previously given a version, but omitted the facts relied upon for the defence at trial, it may be appropriate for the prosecutor to raise recent invention.

46. JURY

No police officer, prosecutor or officer of the ODPP should:-

(a) communicate outside of the trial with any person known to be a juror in a current trial;

(b) obtain or solicit any particulars of the private deliberations of a jury in any criminal trial;

(c) release personal particulars of any juror in a trial.

Any police officer, prosecutor or ODPP officer who becomes aware of a breach of the Jury Act should report it.

47. SENTENCE

It is the duty of the prosecutor to make submissions on sentence to:-

(a) inform the court of all of the relevant circumstances of the case;

(b) provide an appropriate level of assistance on the sentencing range;

(c) identify relevant authorities and legislation; and

(d) protect the judge from appealable error.

(i) Notice

The arresting officer should be advised through the Pros Index of the date for sentence.

(ii) Mitigation

The prosecution has a duty to do all that reasonably can be done to ensure that the court acts only on truthful information. Vigilance is required not just in the presentation of the Crown case but also in the approach taken to the defence case. Opinions, their underlying assumptions and factual allegations should be scrutinised for reliability and relevance.

Section 590B of the Code requires that advance notice of expert evidence be given.

- Where the defence seeks to rely, in mitigation, on reports, references and/or other allegations of substance, the prosecutor must satisfy himself or herself as to whether objection should be made, or challenge mounted, to the same;
- The prosecutor must provide reasonable notice to the defence of any witness or referee required for cross-examination;
- If the prosecutor has been given insufficient notice of the defence material or allegations to properly consider the Crown's position, an adjournment should be sought;
- Whether there has been insufficient notice will depend upon, inter alia:-
    - the seriousness of the offence;
    - the complexity of the new material;

- its volume;
- the significance of the new allegations;
- the degree of divergence between the Crown and defence positions; and
- availability of the means of checking the reliability of the material.

Victims of crime, particularly those associated with an offender, are often the best source of information. They should be advised of the sentencing date. They should be asked to be present. And as well, they should be told that if, when present in court, there is anything said by the defence which they know to be false, they should immediately inform the prosecutor so that, when appropriate, the defence assertions may be challenged.

Bogus claims have been made in relation to things like illness, employment, military service, and past trauma. Where the prosecution has not had sufficient notice to verify assertions prior to sentence, the truth may be investigated after sentence. The sentence may be reopened under section 188 of the Penalties and Sentences Act to correct a substantial error of fact.

(iii) **Substantial Violence or Sexual Offences**

While it is necessary at sentence for the prosecutor to summarise the victim's account, this may be inadequate.

- In cases of serious violence or sexual offences, the **victim's statement** should be tendered.
- When available, any **doctor's description** of injuries and **photographs** of the injuries should also be put before the judge.
- The court should also be told of any period of hospitalisation, intensive care or long term difficulties.

(iv) **Victim Impact Statements**

Where a victim impact statement has been received by the prosecution, a copy should be provided to the defence upon receipt.

Inflammatory or inadmissible material, such as a reference to uncharged criminal conduct, should be blocked out of the victim impact statement. If the defence objects to the tender of the edited statement, the unobjectionable passages should be read into the record.

(v) **Criminal Histories**

The prosecution must ensure that any criminal history is current as at the date of sentence.

The Police Information Bureau will not forward any interstate history unless it is expressly ordered. Judgment about whether an out of state search should be conducted will depend upon the nature of the present offences, and any information or suspicion that the offender had been interstate or in New Zealand. For example:-

- a trivial or minor property would not normally justify an interstate search;

- an offence of personal violence by a mature aged person who has lived interstate would suggest a full search should be made.

If information regarding offences in New Zealand is required, QPS will require the details of the current Queensland proceeding: ie: the Court, its district and the date of the hearing, as well as the current offence/s against the accused. No abbreviations will be accepted.

(vi) **Risk of Re-Offending Against Children**

When an offender has been convicted of a sexual offence against a child less than 16 years of age, a judge has the power to make an order under section 19 of the Criminal Law Amendment Act 1945, if there is a **substantial risk** of re-offending against a child. A section 19 order requires the offender to report his or her address and any change of address to police for a specified period.

Such orders allow police to know the offender's whereabouts during the specified period. It also means that the Attorney-General can act under section 20 to provide information to any person with a legitimate and sufficient interest.

Prosecutors should apply for an order under section 19(1) if a substantial risk of re-offending may be identified from the present offences either alone or in conjunction with the criminal history, expert evidence and other relevant facts.

(vii) **Transfer of Summary Matters**

Sections 651 and 652 of the Criminal Code limit the circumstances in which a summary matter can be transferred to a Superior Court for a plea of guilty.

Importantly, the **consent of the Crown** is required.

The ODPP should respond in writing **within 14 days** to any application for transfer.

The Registrar of a Magistrates Court will refuse an application for transfer without the written consent of the ODPP.

Prosecutors should not consent unless the summary matter has **some connection** to an indictable matter set down for sentence. Circumstances in which consent may be given include:-

(a) An evidentiary relationship: where the circumstances of the summary offence would be relevant and admissible at a trial for the indictable offence.

For example:-

- an offender has committed stealing or receiving offences and during the period of offending he is apprehended with tainted property;
- in the course of committing indictable drug offences (such as production or supply) the offender has committed simple offences such as possession of a utensil, possession of proceeds.

(b) The facts form part of the one incident:-

For example:-

- the unlawful use of a motor vehicle or dangerous driving committed whilst driving unlicensed;
- the offender is unlawfully using a motor vehicle to carry tainted property.

(c) The offences overlap or are based on the same facts:-

For example:-

- the unlawful use of a motor vehicle or dangerous driving committed whilst driving unlicensed;
- an indictable assault which also constitutes a breach of a domestic violence order;
- grievous bodily harm and a firearm offence relating to the weapon used to inflict the injury.

(d) The summary offences were committed in resistance to the investigation, or apprehension, of the offender for the indictable offence:-

For example:-

- upon interception for the indictable offence, the offender fails to provide his or her name, or gives a false name, or resists, obstructs or assaults police in the execution of their duty;

(e) There is a substantive period of remand custody that could not otherwise be taken into account under section 161 of the Penalties and Sentences Act:-

For example:-

(i)
- the indictable and summary offences were the subject of separate arrests; and
- the accused was remanded in custody on one type of offence and bail was subsequently cancelled on the other offence; and

(ii) the unrelated summary matters number 5 or less and would not normally justify a significant sentence of imprisonment on their own; and

(iii) the period of remand otherwise excluded from a declaration on sentence is greater than 8 weeks.

Consent to a transfer of summary matters **should not be given**:-

(a) where all offences could be dealt with in the Magistrates Court. This relates to the situation where:-

- the defence have an election under section 552B of the Code in respect of the relevant indictable offence/s; and
- the relevant indictable offence/s could be adequately punished in the Magistrates Court.

(b) for a breach of the Bail Act. Such offences should be dealt with at the first appearance in the Magistrates Court.

Driving Offences

When the application relates to traffic offences, the following principles should be considered, subject to the above:-

- the Magistrates Court ordinarily will be the most appropriate Court to deal with summary traffic offences;
- it is important that significant or numerous traffic offences be dealt with in the Magistrates Court unless all such offences have strong and direct connection to an indictable offence; and
- traffic matters should be dealt with expeditiously.

(viii) **Serial Offending**

Upon a sentence of 5 or more offences a schedule of facts should be tendered.

(ix) **Section 189 Schedules**

Where an accused person is pleading guilty to a large number of offences, it may be appropriate to limit the indictment to no more than 25 counts, with a schedule of outstanding offences to be taken into account on sentence pursuant to section 189 of the *Penalties and Sentences Act 1993*; see also section 117 of the *Juvenile Justice Act 1992*. This is only possible where the accused is represented and agrees to the procedure.

(a) Defence Consent: If the prosecutor elects to proceed by section 189 schedule, the defence must be given a copy of:-

- the draft indictment;
- the draft section 189 schedule;
- evidence establishing the accused's guilt for the schedule offences (if not already supplied); and
- the draft consent form.

The matter can only proceed if the defence have filled out the consent form.

If the accused will plead to only some of the offences on the draft schedule, the prosecutor must consider whether the section 189 procedure is appropriate. If it is, a new draft schedule and form should be forwarded to the defence for approval.

A copy of the defence consent must be delivered to the Court, at least **the day before** sentence.

(b) Limitations of the Schedule: If a section 189 schedule is used, the following instructions apply:-

- the most serious offences must appear on the indictment, not in the schedule;
- generally, all serious indictable offences should be on the indictment, not the schedule: for example: *Vougdis* (1989) 41 A Crim R 125 at 132; *Morgan* (1993) 70 A Crim R 368 at 371;
- all dangerous driving offences must be on the indictment, not the schedule;
- the indictment should reflect the full period of offending;

- Supreme Court offences cannot be included in a schedule for the District or Children's Court;
- the schedule must not contain offences of a sexual or violent nature involving a victim under the VOCA legislation; and
- the schedule must not contain summary offences.

(x) **Financial Loss**

The arresting officer should provide ODPP with details of a complainant's financial loss caused by the offence together with supporting evidence.

The ODPP should provide those details to the defence and to the court.

Compensation must have priority over the imposition of a fine: section 48(4) of the Penalties and Sentences Act 1993.

(xi) **Submissions on Penalty**

A prosecutor should not fetter the discretion of the Attorney-General to appeal against the inadequacy of a sentence.

While an undue concession by a crown prosecutor at the sentence hearing is not necessarily fatal to an appeal by the Attorney-General, it is a factor which strongly militates against such appeals. McPherson JA said in *R v Tricklebank ex-parte Attorney-General*:-

> *"The sentencing process cannot be expected to operate satisfactorily, in terms of either justice or efficiency, if arguments in support of adopting a particular sentencing option are not advanced at the hearing but deferred until appeal".*

Judges have the duty of fixing appropriate sentences. If they are manifestly lenient the error can be corrected on appeal. But if a judge is led into the error by a prosecutor, justice may be denied to the community.

- Concessions for non custodial orders should not be made unless it is a clear case.
- In determining the appropriate range, prosecutors should have regard to the sentencing schedules, the appellate judgments of comparable cases, changes to the maximum penalties and sentencing trends.
- The most recent authorities will offer the most accurate guide.

48. REPORTING OF ADDRESS OF SEXUAL OFFENDERS AGAINST CHILDREN

(i) At any sentence proceeding in the District or Supreme Court which involves sexual offences against children, the prosecutor must consider whether an application for reporting under section 19(1) of the Criminal Law Amendment Act 1945 should be made.

(ii) If an order is sought, a draft order should be prepared with the duration of the reporting period left blank.

(iii) An order cannot be made unless the Court is satisfied a **substantial risk** exists that the offender will, after his or her release, re-offend against a child.

(iv) In assessing the risk, all relevant circumstances should be considered including:-

(a) the nature and circumstances of the present offence;

(b) the nature of any past criminal record; and

(c) any expert reports.

A reporting order will allow police to know the offender's whereabouts during the reporting period. It will also allow the Attorney-General to release information about the sexual offences to any person with a legitimate interest: section 20. This might include a potential employer or a neighbour.

49. YOUNG SEX OFFENDERS

The Griffith Adolescent Forensic Assessment and Treatment Centre is the joint venture of Griffith University (Schools of Criminology and Criminal Justice and Applied Psychology) and the Department of Communities. Its objective is the rehabilitation of young sexual offenders.

To formulate a program of assessment and treatment, the Centre requires information about the offence. That information would, most conveniently, be available in the form of the statements or transcripts of interviews with complainant(s) and transcripts of interviews with the accused, where available.

The prosecutor should tender clean copies of such documents upon the conviction of a child for sexual offences. This is for all cases: whether the conviction is by plea or by jury.

This then allows the Court to control the sensitive information that may be released. Requests for such information should be directed to the Court rather than the ODPP.

If the Court requires a pre-sentence assessment, the Court can order that copies of relevant statements or interviews be forwarded to the Centre for that purpose.

If after sentence, the Department of Communities makes a referral to the Centre as part of the rehabilitation program for a probation or first release order, it is again appropriate for the Court to determine what material, including Court transcripts, is released.

50. APPEALS AGAINST SENTENCE

In every case the prosecutor must assess the sufficiency of the sentence imposed. The transcript should be ordered and a report promptly provided to the Director if it is considered that either:-

(i) there are reasonable prospects for an Attorney-General's appeal; or

(ii) the case is likely to attract significant public interest.

- The report should be finalised within **2 weeks** of the sentence. It should follow the template, and include the transcript and sentencing remarks (if available), any medical or pre-sentence reports, the criminal history, victim impact statements and a copy of any judgments relied upon.

- The report should only be forwarded through the relevant Legal Practice Manager.

- An analysis of the prospects for an Attorney's appeal should have regard to the following principles:-

  (a) An Attorney-General's appeal is exceptional: it is to establish and maintain adequate standards of punishment and to correct sentences that are so disproportionate to the gravity of the crime as to undermine confidence in the administration of justice;

  (b) The Court of Appeal will not intervene unless there is:-

    (i) a material error of fact;

    (ii) a material error of law; or

    (iii) the sentence is manifestly inadequate.

  (c) The sentencing range for a particular offence is a matter on which reasonable minds might differ;

  (d) For reasons of double jeopardy the Court of Appeal will be reluctant to replace a non custodial sentence with a term of actual imprisonment, particularly if the offender is young or if the proper period of imprisonment is short;

(e) The Court of Appeal will be reluctant to interfere where the judge was led into error by the prosecutor, or the judge was unassisted by the prosecutor; and

(f) The issue on appeal in relation to fact finding, will be whether it was reasonably open to the judge to find as he or she did.

51. RE-TRIALS

(i) Where a trial has ended without verdict, the prosecutor should promptly furnish advice as to whether a re-trial is required.

Relevant factors include:-

- the reason why the trial miscarried (for example: whether the jury was unable to agree or because of a prejudicial outburst by a key witness, etc);
- whether the situation is likely to arise again;
- the attitude of the complainant;
- the seriousness of the offence; and
- the cost of re-trial (to the community and the accused).

The prosecutor must provide a report to the Directorate after a **second hung jury**. A third trial will not be authorised except in special circumstances.

In **other** cases of mistrial, the prosecution should not continue after the **third trial**, unless authorised by the Director or Deputy Director.

(ii) Where a conviction has been quashed on appeal and a re-trial ordered, the prosecutor on appeal should promptly furnish advice as to whether a re-trial is appropriate or viable.

52. DISTRICT COURT APPEALS

(i) The ODPP may represent police on appeals to the District Court from a summary hearing involving a prosecution under any of the following:-

- Bail Act 1980
- Corrective Services Act 2000
- Crimes (Confiscation) Act 1989
- Criminal Code
- Domestic Violence (Family Protection) Act 1989
- Drugs Misuse Act 1986
- Peace and Good Behaviour Act 1982

- Police Powers and Responsibilities Act 2000
- Regulatory Offences Act 1985
- Transport Operation (Road Use Management) Act and related legislation
- Summary Offences Act 2005
- Weapons Act 1990

(ii) The ODPP may decline to accept the brief if it involves any issue of constitutional law.

(iii) The ODPP will not appear in respect of any other District Court Appeals.

(iv) Costs

(a) The maximum award for costs under section 232A of the Justices Act is $1800.

(b) No order for costs can be made if the appeal relates to an indictable offence dealt with summarily (see section 232(4) (a) of the Justices Act) or if the relevant charge is under the Drugs Misuse Act 1986 (section 127).

(c) A prosecutor cannot settle any agreement as to costs without prior instructions from the Queensland Police Service Solicitor.

(v) Police Appeals

(a) A police request for an appeal against a summary hearing must be in writing and forwarded to the ODPP by the Queensland Police Service Solicitor. Direct requests from police officers, including police prosecutors, will not be considered but returned to the Queensland Police Service Solicitor.

(b) Such requests must be received at least **5 business days** before the expiration of the 1 calendar month time limit.

(c) The ODPP will then consider whether or not the proposed appeal has any merit. If so, the ODPP shall draft a notice of appeal. If not, the ODPP shall advise both the Queensland Police Service Solicitor and the officer initiating the request as to the reasons it was declined.

(d) Where a Notice of Appeal has been drafted, the ODPP shall send it to the Queensland Police Service Solicitor who shall then make the necessary arrangements for service of the notice of appeal on both the respondent and the clerk of the court. The ODPP shall also send a blank pro-forma recognisance with the notice of appeal to the Queensland Police Service Solicitor. It will then be the responsibility of the appellant police officer to enter into the recognisance within the applicable time limit.

(e) The appellant police officer shall then, as soon as possible, advise the ODPP in writing of the details of the steps taken as per paragraph (d) above, including:-

- the date and time the notice of appeal was served on the respondent;
- the place where service was effected;
- the method of service, ie: person service (for example, *"by personally handing a copy of the notice of appeal to …"*); and
- full details of the police officer effecting service including full name, station, rank and contact details.

The purpose of this information is so that the ODPP can attend to the drafting of an affidavit of service which will then be sent to the officer effecting service for execution and return. A copy of the recognisance must also be sent to the ODPP.

53. EXHIBITS

All non-documentary exhibits are to be kept in the custody of police. The ODPP must not retain any dangerous weapons or dangerous drugs.

54. DISPOSAL OF EXHIBITS

(i) A Trial Judge may make an order for:-

(a) the disposal of exhibits under rule 55 of the Criminal Practice Rules 1999; or

(b) the delivery of property in possession of the Court under section 685B of the Code.

Rule 55(2) of the Criminal Practice Rules 1999 allows for the return of exhibits to the tendering party in the event that no specific order is made.

(ii) Where exhibits have been tendered, the prosecutor should make an application at the conclusion of proceedings. The usual form of order sought would be the return of the exhibits:-

(a) upon the determination of any appeal; or

(b) if no appeal, at the expiration of any appeal period;

to:-

(a) the rightful owners; or

(b) the investigating officer (in the case of weapons, dangerous drugs or illegal objects etc).

(iii) Where the prosecutor is aware of further related property held by police and not tendered as an exhibit, he or she should apply for an order for the delivery of the property to the person lawfully entitled to it.

If the identity of the person lawfully entitled to it is unknown, the prosecutor should seek such order with respect to the property as to the Court seems just.

(iv) All other "exhibits" not tendered in Court should be returned to police.

55. CONVICTION BASED CONFISCATIONS

(i) Legal officers preparing matters for trial or sentence are required to address confiscation issues in preparation as per observations form and where confiscation action is appropriate, prepare a draft originating application and draft order and forward copies of those documents to the defence with a covering letter advising that it is proposed to seek confiscation orders against the accused at sentence.

(ii) If the benefit from the commission of the offence is more than $5,000, a real property and motor vehicle search is to be obtained by the legal officer preparing the case and the Confiscation Unit is to be consulted regarding the obtaining of a restraining order.

(iii) Crown Prosecutors (including private counsel briefed by the Director of Public Prosecutions) and legal officers are instructed **to apply** for appropriate confiscation orders **at sentence**.

(iv) Where a confiscation order is made at sentence, instructing clerks are required to forward a draft order, with the words "order as per draft" written on it, to the Confiscation Unit, as soon as possible.

(v) The forfeiture provisions of the Criminal Proceeds Confiscation Act 2002 are not to be used as a means of disposing of exhibits. As a general guide, only property approximated to be $100 or greater is to be so forfeited.

(vi) When property is not forfeited or returned to the accused, an order for disposal should be sought under section 685B of the Criminal Code or section 428 of the Police Powers and Responsibilities Act 2000 (see also Guideline 48).

(vii) No application should be brought after the sentence proceeding **unless** the property exceeds:-

- in the case of a forfeiture order – $1000

- in the case of a pecuniary penalty – $2000
- in the case of a restraining order – $5000

(viii) In the case of a restraining order, any **undertaking** as to costs or damages should be authorised by the Legal Practice Manager or Principal Crown Prosecutor. Where the property is income producing or there is a real risk that liability will be incurred, the commencement of the proceeding and the giving of the undertaking must be approved by the Director or Deputy Director.

(ix) Once a restraining order has been obtained, the **Confiscations Unit** must be included in any negotiations regarding confiscations orders.

(x) Negotiations should proceed on the understanding that there is a reversal of onus in respect of restrained property that has been acquired within 6 years of a serious criminal offence (maximum of 5 years or more imprisonment).

(xi) Similarly, under the Criminal Proceeds Confiscations Act 2002, property will be automatically forfeited 6 months after conviction for a serious drug offence unless the respondent demonstrates that property was lawfully acquired.

56. NON-CONVICTION BASED CONFISCATIONS – Chapter 2 Criminal Proceeds Confiscations Act 2002

(i) Where substantial assets are identified, the Confiscations Unit should be advised.

(ii) The ODPP is the solicitor on the record for the CMC. Instructions should therefore be obtained from the CMC throughout the course of the proceedings regarding any step in the action.

(iii) No matter is to be settled or finalised without first obtaining **instructions from the CMC**. No undertaking in support of a restraining order should be given without instructions.

(iv) Where possible, no more than one confiscation matter per day should be set down on the chamber list.

(v) Examinations are to be conducted before a Registrar of the Supreme Court. They are to be set down on Monday and Tuesday afternoons. If they will take longer than 2 hours, a letter should be sent to the Deputy Registrar advising of the requirement to set the examination down for an extended date.

(vi) Directions as to the conduct of the matter are to be agreed upon between the parties, where possible.

(vii) Matters are not to be set down for trial unless they are ready to proceed.

(viii) All telephone conversations and attendances should be file noted.

(ix) Details of orders made and applications filed should be entered into the confiscations system as they occur.

57. LISTING PROCEDURES AND APPLICATIONS FOR INVESTIGATION

It is undesirable that a matter should be listed for hearing before a Judge who has previously heard an application to authorise any investigative step in the case, such as an application for a warrant under Part 4 of the Police Powers and Responsibilities Act 2000.

(i) The officer in charge of an investigation must forward to the ODPP with the brief of evidence:-

- a note to the prosecutor setting out the nature of any application, when it was made and the name of the Judge who heard it; and
- a copy of any warrant or authority, if obtained.

(ii) The ODPP should submit to the listing Judge that it would not be suitable to list the trial before the Judge who heard the application.

(iii) Investigators should be mindful of the fact that there is only one Supreme Court Judge resident in each of Cairns, Townsville and Rockhampton. Where any resulting trial is likely to be held in one of those Courts, the investigative application should be made to a Judge in Brisbane or in a district not served by the Judge in whose Court the case might be tried.

58. MEDIA

(i) Public servants are not permitted to make public comment in their professional capacity without approval from the Director-General of the Department.

(ii) Section 24 A of the Director of Public Prosecutions Act imposes a duty of confidentiality.

(iii) There is no prohibition against confirming facts already on the public record. Indeed the principle of open justice and the desirability of accurate reporting would support this. But there is no obligation to provide information to the media.

(iv) Staff may confirm:-

- information given in open court; or

- the terms of charges on an indictment that has been presented (but not the name of any protected complainant).

(v) Matters which **should not be discussed** with the media, include:-

- the likely outcome of proceedings;
- the intended approach of the prosecution (for example: discontinuance, ex-officio indictment, appeal/reference);
- the correctness or otherwise of any judicial decision;
- any part of the trial which was conducted in the absence of the jury;
- the name or identifying particulars of any juvenile offender unless authorised: see Juvenile Justice Act 1992;
- the name or identifying particulars of a complainant of a sexual offence;
- the contact details for any victim or lay witness;
- any details which would breach the protection given to informants under section 13A of the Penalties and Sentences Act 1993; and
- details of any person who carries some personal risk: for example: informants: section 120 of the Drug Misuse Act 1986.

(vi) The media should not be given copies or access to tapes of any recorded interviews, re-enactments, demonstrations or identifications.

(vii) The media should not be given any medical, psychological or psychiatric reports on offenders or victims.

59. RELEASE OF DEPOSITIONS

The ODPP is the custodian of depositions. A request to access those depositions by anyone not directly involved in the proceedings must be by way of a Right to Information application. This is because of the potentially sensitive nature of the material which may include things such as protected evidence from victims, investigative methodology and the names of informants.

The Right to Information model is designed to strike a balance between the interests of the applicant seeking the release of the documents and any contrary public interest. It provides for transparency of process and the right of external review. It also gives legislative protection to the decision maker who releases the documents

60. LEGISLATIVE RESTRICTIONS ON PUBLICATION

The Criminal Law (Sexual Offences) Act 1978 (CLSOA) prohibits publication of the name of the accused in two ways – one is for the protection of the accused and the other is for the protection of the complainant.

Other prohibitions on naming offenders are contained in the Juvenile Justice Act 1992 (JJA) and the Child Protection Act 1999 (CPA).

ODPP staff should be aware of the statutory restrictions on publication.

(i) Protection for the Accused

- Persons accused of a prescribed sexual offence (ie: **rape**, **attempted rape**, **assault with intent to commit rape** and **sexual assault**) cannot have their name or identifying details published until after being committed. This protection **does not apply to sexual offences generally**. Persons charged with incest, indecent dealing or sodomy are **not protected** unless they fall within the protection afforded to complainants.

- Specifically, under section 7 of the CLSOA, any report made or published concerning an examination of witnesses (ie: the committal) in relation to a **prescribed sexual offence**, other than an exempted report (see section 8) shall not reveal the name, address, school or place of employment of a defendant or any other particular likely to lead to the identification of the defendant unless the Magistrate conducting the committal "for good and sufficient reason shown" orders to the contrary.

  The protection ends once the person is committed for trial.

- An accused is also protected under section 10(3) of the Act, which prohibits the making of a statement or representation revealing identifying particulars (other than in a report concerning a committal or trial), **before the defendant is committed for trial** upon the charge. There are some exceptions, set out in section 11.

- **Juvenile accused** are protected from being identified by section 62 of the JJA. No "identifying matter" (name, address, school, or place of employment or any other particular likely to lead to the identification of the child charged, or any photo or other visual representation of the child or of any person that is likely to identify the child charged) can be published about a criminal proceeding. "Criminal proceeding" should be taken to include the process of a person being charged.

(ii) Protection for the Complainant

- Accused persons may also benefit from the protection afforded to complainants in sexual offences, which protection extends indefinitely.

This will usually occur when there is a relationship between the accused and the complainant.

- Section 6 of the CLSOA prohibits the making or publishing of any report concerning a committal or trial, other than an exempted report, which reveals the name, address, school or place of employment of a complainant, **or any other particular likely to lead to the identification of the complainant**, unless the Court "for good and sufficient reason shown" orders to the contrary.

- Section 10 protects the complainant from publication at any other time, even if no-one is actually charged with an offence.

  This protection **is not restricted to prescribed sexual offences**.

- Child witnesses **in any proceeding** in a Court are also protected under section 193 of the CPA.

- For offences of a sexual nature, if a child is a witness or the complainant, a report of the proceeding must not disclose prohibited matter relating to the child, without the Court's express authorisation. "Prohibited matter" means the child's name, address, school or place of employment, **or other particular likely to lead to the child's identification**, or any photo or film of the child or of any person that is likely to lead to the child's identification.

- For any other offences, the Court may order that any report not include any prohibited matter relating to a child witness or complainant.

- The accused may benefit from these provisions if identifying the adult would inevitably identify the child.

61. CONFIDENTIALITY

ODPP has obligations in respect of confidentiality (section 24A of the Director of Public Prosecutions Act 1994) and privacy (Queensland Government policy).

Information about a case **other than what is on the public record** should not be released without authority from either the Director of Deputy Director subject to the following exceptions:-

(i) the release of information to **complainants** to meet VOCA obligations, as set out in guidelines;

(ii) the release of information to **police** as required or investigative, prosecution and consultative processes; and

(iii) the duty of full and early disclosure of the prosecution case to the **defence**.

This means that any request from individuals, other agencies or the media for information which is not a matter of public record should be referred to the Directorate.

Internal memoranda should not be released in any circumstances without prior approval.

Further information on privacy can be accessed from the Department's website www.justice.qld.gov.au or contact the Privacy Unit on 07 3247 5474.

Director's Guidelines – current as at 30 June 2016

M R BYRNE QC
DIRECTOR OF PUBLIC PROSECUTIONS

Summary table

This summary table is provided for your convenience in navigating this research brief.

The summary table provides the number of times the terms 'recall' and 'remember' are used in the quotes contained in the witness tables as set out in this research brief. The selected quotes have been obtained from searches of the PCCC transcripts, as outlined on pages 8 and 9 of this Brief. Accordingly the searches cannot be regarded as definitive, and the selected quotes (based on the searches) are without context.

Witness	Number of times the terms 'recall' and 'remember' are used in the references to the selected phrases contained in the tables on pages 10-54	Page references for detailed information in tables below
Mr Alan MacSporran QC, Chairperson	57	pp 9-13
		p 14
		p 46
		pp 48-50
		pp 51-3
Mr Paul Alsbury, Senior Executive Officer, Corruption	18	pp 15-17
Mr Rob Hutchings (former Commission Officer)	38	pp 17-18
		pp 19-22
Ms Makeeta McIntyre, Principal Lawyer, Corruption Division	20	pp 22-5
		pp26-7
Detective Sergeant Andrew Francis (former secondee from the Queensland Police Service)	60	pp 28-31
		pp 32-5
Detective Inspector David Preston (former secondee	41	pp 35-8

Witness	Number of times the terms 'recall' and 'remember' are used in the references to the selected phrases contained in the tables on pages 10-54	Page references for detailed information in tables below
from the Queensland Police Service)		
Detective Senior Sergeant Mark Andrews (former secondee from the Queensland Police Service)	29	pp 39-42
Detective Sergeant David Beattie (former secondee from the Queensland Police Service)	11	pp 43-5

Compiled by the Queensland Parliamentary Library from the tables below.