



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

**Report No. 108, 57th Parliament
Parliamentary Crime and Corruption Committee
December 2021**

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Parliamentary Crime and Corruption Committee

Chair	Mr Jon Krause MP, Member for Scenic Rim
Deputy Chair	Mr Jimmy Sullivan MP, Member for Stafford
Members¹	Mr Michael Crandon MP, Member for Coomera Mrs Melissa McMahon MP, Member for Macalister Ms Jonty Bush MP, Member for Cooper Ms Jess Pugh MP, Member for Mount Ommaney Dr Mark Robinson MP, Member for Oodgeroo

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Acknowledgements

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All web address references are current at the time of publishing.

¹ NB: Ms Jess Pugh MP and Ms Jonty Bush MP were appointed as members of the committee on 31 August 2021. The former Member for Stretton, Mr Duncan Pegg MP, was a member of the committee until 10 June 2021. Mr Barry O'Rourke MP, Member for Rockhampton, was a member of the committee until 31 August 2021. Mr Adrian Tantari MP, Member for Hervey Bay, was a member of the committee from 15 June 2021 to 31 August 2021.

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Identities

Quick reference guide for persons mentioned in this report.

CCC Officers	
Alan MacSporran QC	CCC Chairperson
Paul Alsbury	Senior Executive Officer, Corruption
Robert Hutchings	Former Director, Legal Services
Makeeta McIntyre	Principal Lawyer
Mark Docwra	Then Assistant Director, General Legal
CCC Seconded Police Officers	
Detective Sergeant Andrew Francis	Operation Front Case Officer
Detective Superintendent Mark Reid	Executive Director, Corruption Operations
Detective Senior Sergeant Mark Andrews	Operations Leader, Corruption Operations
Detective Sergeant David Beattie	Investigating Officer
Detective Inspector David Preston	Operations Coordinator, Corruption Operations
Office of the Director of Public Prosecutions	
Carl Heaton QC	Director of Public Prosecutions
Mark Green	Consultant Crown Prosecutor
Logan City Council Officers	
Sharon Kelsey	Former CEO
(Timothy) Luke Smith	Former Mayor
Cherie Dalley	Former Councillor, included in reference to the 'Fab 7'
Trevina Schwarz	Former Councillor, included in reference to the 'Fab 7'
Laurence Smith	Former Councillor, included in reference to the 'Fab 7'
Phillip Pidgeon	Former Councillor, included in reference to the 'Fab 7'
Stephen Swenson	Former Councillor, included in reference to the 'Fab 7'
Russell Lutton	Former Councillor, included in reference to the 'Fab 7'
Jennifer Breene	Former Councillor, included in reference to the 'Fab 7'
Darren Power	Former Councillor
Laurie Koranski	Former Councillor
Stacey McIntosh	Former Councillor
Lisa Bradley	Former Councillor
Jon Raven	Former Councillor
Silvio Trinca	Acting CEO (after Ms Kelsey)
Tamara O'Shea	Interim Administrator (after dismissals of Logan City Councillors)
Rachel Hunter	External Consultant on Kelsey's Probation
Legal Representatives in QIRC Matter	
Dan Williams (for Sharon Kelsey)	MinterEllison Lawyers
Timothy Fynes-Clinton (for Logan City Council)	King & Company Solicitors
Glenn Caligaris (for the 7 Logan City Councillors)	McInnes Wilson Lawyers

Chair's foreword

This report outlines very serious findings about the Crime and Corruption Commission (CCC) and its actions.

The findings and recommendations in this report are made on a bipartisan basis.

The committee has set out in a high level of detail the facts and circumstances relevant to the terms of reference. An objective observer may consider that 'some aspects of the narrative are somewhat confronting, and in some respects surprising causing disappointment with how some things were apparently done, or not done.' This is precisely how Mr Bret Walker SC described, in advice to the committee, aspects of the events subject to this inquiry.

Queensland needs an effective, impartial and independent watchdog on public sector corruption and major crime. The committee's report tabled on 30 June 2021 made a number of recommendations in this respect, and this report builds on that. Key to this is Queenslanders having confidence in the CCC and its use of the extraordinary powers that have been entrusted to it – in particular, that these powers will be used impartially, independently, fairly and having regard to the public interest, at all times and in all places. The committee finds that the CCC has exceeded the specific limits on its powers under the *Public Interest Disclosure Act 2010* in the Logan City Council matter and the *Crime and Corruption Act 2001* (in regards to assistance within the Queensland Industrial Relations Commission process), and further finds that the CCC Chairperson did not ensure the CCC acted independently and impartially.

This inquiry was about that Logan matter. However, the findings and recommendations of the committee should be seen as the starting point to ensuring that events about which the committee makes serious findings are never repeated.

Counsel Assisting, Dr Jonathan Horton QC and Mr Ben McMillan, submitted that numerous findings were open to be made ("Available Findings"). The committee has made amendments to these, where the committee saw fit, but otherwise adopted the majority of Available Findings or their basis. The committee also makes additional findings, outlined in this report.

The factual context of this report involves the CEO's dismissal at Logan City Council in 2018, CCC involvement in an industrial relations commission matter regarding the dismissal, charges of fraud being laid in relation to the dismissal, the suspension of councillors, dissolution of the Logan City Council and the appointment of an administrator before, nearly two years after being laid, the fraud charges were discontinued in April 2021. The impact of the events examined on Logan City residents, its former councillors and the broader Queensland political landscape should not be underestimated (indeed, significant legislative amendments followed the CCC's investigation into Logan City Council, which followed an investigation into Ipswich City Council). Public confidence in the CCC has been questioned, and not only because of the drastic consequences of their decisions in the Logan matter and subsequent failure of prosecutions, but also because of other significant events that have come into the public domain in recent times.

The Parliamentary Crime and Corruption Committee is established by the *Crime and Corruption Act 2001*. Four members are nominated by the Government, and three are nominated by the Opposition. The committee did not reach agreement on all Available Findings submitted by Counsel Assisting.

In oral submissions, Counsel Assisting submitted it was open to the committee to conclude that it may not have confidence in the CCC Chairperson maintaining the CCC's independence, impartiality, and fairness, and pointed the committee accordingly to section 236(4) of the *Crime and Corruption Act 2001* and the possibility of a recommendation to the Legislative Assembly that the CCC Chairperson's appointment be terminated. The committee has not made such a finding or recommendation.

The committee took a differing, although serious, view of the conduct of Detective Sergeant Francis (Available Finding 12) and considered it unnecessary to make a finding in respect of Available Finding 8.

Public hearings of this committee have examined these events, and the conduct of the CCC, in an unprecedented manner. It is clear that concerns persist over the CCC possessing both investigatory and charging functions (through seconded police officers). Problems examined in the inquiry may not have existed, but for the CCC being structured in this way. The committee has therefore recommended that the Queensland Government instigate a review of this structure of the CCC that has its roots in the Fitzgerald Inquiry, by a Commission of Inquiry or similar review function. In my view, it should be a Commission of Inquiry, and it should be headed by senior counsel of sufficient standing to undertake such a review of this structure that came about in 1989.

I also highlight the recommendation to review section 60 of the *Crime and Corruption Act 2001*. The only statutory limitation on the dissemination of material held by the CCC, including that obtained under coercion, is whether the CCC considers it 'appropriate' to be disseminated. It is not hard to see that this has the potential to create significant public policy problems, especially in terms of procedural fairness and natural justice, if such material is disseminated in particular circumstances.

I thank all who made submissions to the inquiry, particularly on the broader policy issues addressed in the report. I thank the many people who enabled this inquiry, including Committee Secretary, Erin Jameson, the committee secretariat and those seconded to it during this inquiry for their work in assessing thousands of documents (over 15,000 were produced under summons) and contributing to the smooth running of the inquiry. At the outset of this inquiry, the former Parliamentary Commissioner, Ms Karen Carmody, was also involved in this process. This work enabled issues to be refined and the inquiry to be focussed, from the beginning. The Principal Legal Officer to the Parliamentary Crime and Corruption Commissioner, Mr Mitchell Kunde, assisted Counsel Assisting and the Parliamentary Commissioner, particularly in the earlier stages of this inquiry. Thank you to Hansard and the Parliamentary Service for their assistance over the 10 days of public hearings.

Thank you to Counsel Assisting for their work as professional, independent inquisitors. The application of their experience and skills over those lengthy days of public hearings enabled the committee to gain insights that would have remained shrouded if the inquiry was conducted solely by Members of Parliament. In addition to that, Counsel Assisting brought to this inquiry independence from the political process that is invaluable in support of the findings and recommendations made by the committee.

I also wish to record my thanks to other members of the committee for their dedication to this inquiry, including those members who took part in only part of the inquiry. Although we did not always agree on everything throughout the process, there was a great willingness to co-operate in seeking answers and to form recommendations that will strengthen the CCC.

I commend this report to the House.



Jon Krause MP
Chair
Member for Scenic Rim

Terms of Reference

This inquiry was conducted pursuant to a resolution of the Parliamentary Crime and Corruption Committee (committee), a statutory committee of the Parliament of Queensland.

The Parliamentary Crime and Corruption Committee resolved unanimously on 28 May 2021 to:

- investigate the issues raised by the LGAQ in its correspondence to the committee, dated 5 May 2021 (the 'complaint'); and
- publicly inquire into and report on:
 - a) the CCC's investigation of former councillors of Logan City Council which led to the former councillors being charged with fraud (which charges have now been discontinued);
 - b) the decision and considerations of the CCC to charge these former councillors;
 - c) the evidence and submissions and other relevant documentation provided to the Director of Public Prosecutions (DPP) by the CCC in support of these charges;
 - d) the communications, whether oral or in writing, from the DPP to the CCC with respect to these charges;
 - e) the CCC's involvement in related civil matters including those which were brought before the QIRC and Queensland Industrial Court (QIC), including the CCC's interaction with former councillors, the former CEO of Logan City Council and any other relevant officers of Logan City Council at relevant times;
 - f) the CCC's use of coercive powers and matters relating to the dissemination of information obtained under coercion to parties in non-criminal proceedings;
 - g) the process by which the CCC considers and determines whether to refer matters to the DPP;
 - h) the CCC's interaction with the DPP more broadly, including existing information sharing and other processes that facilitate interaction, and whether the current processes and guidelines are appropriate;
 - i) whether current provisions enabling the CCC to report on an investigation to particular entities under section 49 of the CC Act is appropriate and sufficient;
 - j) the CCC's role in charging persons with an offence arising from its investigations; and
 - k) any other related matters.

1 Overview

On 5 May 2021 the Parliamentary Crime and Corruption Committee (committee) received a complaint from the Local Government Association of Queensland (LGAQ) regarding the conduct of the Crime and Corruption Commission (CCC) in its investigation of certain matters related to Logan City Council. In response to the complaint, on 28 May 2021 the committee resolved to inquire into issues raised by the LGAQ, and other matters.

The committee called for submissions and held public hearings over ten days. Witnesses included personnel from the CCC, former councillors, the Director of Public Prosecutions and the former Interim Administrator of Logan City Council. The committee also served a summons on the CCC requiring the production of material relevant to the inquiry's terms of reference.

The committee was assisted during its inquiry by two independent legal counsel, Dr Jonathan Horton QC and Mr Ben McMillan who were engaged to act for the committee as Counsel Assisting.

During the conduct of the inquiry, with the assistance of Counsel Assisting, the committee focused on four areas of concern:

- the nature, degree, lawfulness and appropriateness of the CCC's involvement in civil proceedings in the Queensland Industrial Relations Commission (QIRC);
- the nature, appropriateness and lawfulness and circumstances surrounding the advocacy by the CCC during a QIRC matter;
- the steps, processes and decision-making by which the Logan City Council Mayor and seven councillors came to be charged with fraud that resulted in their removal from office, and the dissolution of the Logan City Council; and
- the adequacy of the CCCs reporting to the committee about the above.

On 2 May 2019, the Logan City Council was dissolved following a motion moved by the Minister for Local Government in the Queensland Parliament. This dissolution was a consequence of the charging by the CCC of a majority of councillors with fraud, their removal from office and a resulting inability for the Logan City Council to be quorate. The Logan City Council could not pass a resolution or a budget. On the same date, the Minister appointed an Interim Administrator. While not the primary interest of the inquiry, the dissolution of the council was significant and the committee considered the process that led to this outcome.

An effective public interest disclosure and corruption prevention framework is necessary to ensure public confidence in our public bodies. The committee understands the importance of ensuring that those who come forward to report corruption in these public bodies, and the investigation of such reports, are dealt with and managed professionally, impartially and fairly. In the committee's view, there is scope for improvements to be made to Queensland's public interest disclosure framework and the referral and advice process between the CCC and the Office of the Director of Public Prosecutions. Some of the problems identified in this report can be addressed through legislative changes, but others require a change of approach from within the CCC. That is why the committee has made recommendations that speak to the need for the CCC to engage in cultural change.

During the inquiry the committee sought not to re-litigate the case against the former mayor and councillors, nor to comment on determinations made in the QIRC. In considering all the evidence before it in written and oral submissions, the committee makes findings and recommendations not only in response to the LGAQ complaint, but with a view to improving the CCC's processes and governing legislation, enhancing public confidence in its performance and ensuring that where mistakes have been made, they are not repeated in the future. The committee outlines a series of findings and recommendations to address these matters.

2 Summary of Findings and Recommendations

The committee applies the civil standard of proof – on the balance of probabilities – in making its findings in this report. This is, appropriately, a lower standard than the ‘beyond reasonable doubt’ standard required for criminal matters.

The committee has had regard to the well-established common law principles from *Briginshaw v Briginshaw* (1938) 60 CLR 336, which relevantly provides:

But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency.²

2.1 Findings of the committee

In assisting the committee with the Inquiry, Counsel Assisting submitted that certain findings were available to the committee to consider. These findings are contained in Counsel Assisting’s Outline of Submissions, included in the Additional Volume.³ Whilst Counsel Assisting’s submissions were invaluable to the committee during its consideration, the committee had scope to accept fully or in part, or to reject the findings outlined to it by Counsel Assisting.

The findings of the committee, and their genesis in Counsel Assisting’s submissions or otherwise, are set out below.

Finding 1	64
The Crime and Corruption Commission’s actions were not in accordance with the <i>Public Interest Disclosure Act 2010</i> and exceeded the specific limits on the Crime and Corruption Commission’s powers under that Act.	
Finding 2	66
In assisting Ms Kelsey as a public interest discloser within the Queensland Industrial Relations Commission process the Crime and Corruption Commission acted outside its specific powers in the <i>Crime and Corruption Act 2001</i> .	
Finding 3	67
The committee finds that the Crime and Corruption Commission considered its interests and those of Ms Kelsey were shared, and it ought to assist Ms Kelsey as much as it legitimately could. (<i>Counsel Assisting Available Finding 1</i>)	

² Dixon J, at [362].

³ Outline of submissions of Counsel Assisting, 29 September 2021, pp 5-24.

- Finding 4** 68
- The committee finds that the Crime and Corruption Commission acted upon the shared interest by involving itself in Ms Kelsey's Queensland Industrial Relations Commission proceedings and seeking to make documents it had obtained under compulsion available to her in that proceeding.
- The inference may be drawn that this was done for the purpose of Ms Kelsey's reinstatement as chief executive officer.
- (Based on Counsel Assisting Available Finding 2)*
- Finding 5** 77
- The committee finds that the totality of the steps taken by the Crime and Corruption Commission to assist Ms Kelsey in her Queensland Industrial Relations Commission 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 *Crime and Corruption Act 2001*.
- (Based on Counsel Assisting Available Finding 7)*
- Finding 6** 87
- The committee finds that confidential documents, including some that were likely subject to legal professional privilege, were delivered to Logan City Council on 3 October 2018 by Crime and Corruption Commission officers, without a dissemination authority, for a purpose of making them available for Ms Kelsey's use in the Queensland Industrial Relations Commission proceeding.
- (Based on Counsel Assisting Available Finding 3)*
- Finding 7** 97
- The committee finds that confidential documents were delivered to Logan City Council on 19 November 2018 by the Crime and Corruption Commission for a weighty and substantial purpose of making them available for Ms Kelsey's use in the Queensland Industrial Relations Commission proceeding, contrary to the ruling of Black IC.
- (Based on Counsel Assisting Available Finding 5)*
- Finding 8** 114
- The committee considers the conduct of Detective Sergeant Andrew Francis (that was rightly criticised by Counsel Assisting) to be an example of and symptomatic of the culture of the Crime and Corruption Commission.
- Finding 9** 118
- The committee finds that the material prepared for, and evidenced discussions of, the 24 April 2019 meeting of the Crime and Corruption Commission to consider commencing criminal proceedings against the 7 Logan City Councillors (and further proceedings against the Mayor) for fraud in respect of Ms Kelsey's public interest disclosure and termination as chief executive officer were inadequate for that purpose.
- (Based on Counsel Assisting Available Finding 9)*
- Finding 10** 118
- The committee finds that the discretion to charge the 7 Logan City Councillors and Mayor with fraud was affected by a desire to assist Ms Kelsey.
- (Based on Counsel Assisting Available Finding 10)*
- Finding 11** 118
- The committee finds that the discretion to charge the 7 Logan City Councillors and Mayor with fraud in respect of Ms Kelsey's public interest disclosure and termination as chief executive officer miscarried because all material considerations and evidence were not taken into account and weighed.
- (Based on Counsel Assisting Available Finding 11)*

Finding 12 **120**

The committee finds that in August 2018 the Crime and Corruption Commission gave consideration to charging criminal offences that would cause Logan City Councillors to be removed, and the Logan City Council to be dismissed and an Administrator appointed.

(Based on Counsel Assisting Available Finding 6)

Finding 13 **135**

The committee finds that Crime and Corruption Commission officers should have reported the absence of a dissemination authority for the delivery of documents to the Logan City Council on 3 October 2018, to the chief executive officer (CEO) of the Crime and Corruption Commission, and that the CEO should have notified the committee pursuant to section 329 of the *Crime and Corruption Act 2001*.

(Based on Counsel Assisting Available Finding 4)

Finding 14 **140**

The committee finds that as Chairperson, Mr Alan MacSporran QC, did not ensure that the Crime and Corruption Commission acted, at all times relevant to the matters the subject of the inquiry resolution, independently and impartially. That failing is serious and reflects poorly on the Crime and Corruption Commission.

(Based on Counsel Assisting Available Finding 13)

2.2 Recommendations of the committee

In assisting the committee with the inquiry, Counsel Assisting submitted that certain proposed measures were available to the committee to consider. These proposed measures are contained in Counsel Assisting's Outline of Submissions, included in the Additional Volume. Whilst Counsel Assisting's submissions were invaluable to the committee during its consideration, the committee had scope to accept fully or in part, or to reject these proposed measures outlined to it by Counsel Assisting.

The recommendations of the committee, and their genesis in Counsel Assisting's submissions or otherwise, are set out below.

Recommendation 1 **64**

The committee recommends the Queensland Government review the effectiveness and appropriateness of protections afforded to public interest disclosers under the *Public Interest Disclosure Act 2010*, including the roles of the Crime and Corruption Commission and other relevant entities.

Recommendation 2 **90**

The committee recommends that the Queensland Government review the broad scope of both the present section 60 and former sections 60 and 62 of the *Crime and Corruption Act 2001* to ensure an appropriate balance is reached between the Crime and Corruption Commission being able to utilise information in pursuance of its functions and the rights of other parties to not be detrimentally impacted by the dissemination of that information, in particular that obtained by use of the Crime and Corruption Commission's extraordinary powers.

(Based on Counsel Assisting Proposed Measure 4)

Recommendation 3 **127**

The committee recommends the Queensland Government review section 49 of the *Crime and Corruption Act 2001*. Furthermore, consideration should be given to a requirement that the Crime and Corruption Commission obtain the recommendation of the Director of Public Prosecutions, or a senior independent legal advisor, before exercising (through seconded police officers) the discretion to charge serious criminal offences (including disqualification offences under the Local Government Act 2009) in the exercise of its corruption function.

(Based on Counsel Assisting Proposed Measure 1)

Recommendation 4

142

The committee recommends that the Crime and Corruption Commission engage in reform of culture (including seeking external advice) to assist in creating a best practice organisational culture that aligns with the purpose, functions and goals of the Crime and Corruption Commission under the *Crime and Corruption Act 2001*, and to enhance public confidence in the organisation.

Recommendation 5

142

The committee recommends the Department of Justice and Attorney-General consider issues regarding the tenure of senior officers, and take into account the Crime and Corruption Commission's (CCC) adoption of the committee's position in relation to single, non-renewable appointments for the CCC Chairperson, Deputy Chairperson and Ordinary Commissioners, in conjunction with its consideration of relevant recommendations of the committee's Report No. 106, arising from the five year review, tabled on 30 June 2021.

(Based on Counsel Assisting Proposed Measure 2)

Recommendation 6

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The committee recommends the Queensland Government instigate a review of the CCC's structure in regards to its investigatory and charging functions, and the role of seconded police officers at the CCC, as a Commission of Inquiry or similar, to be headed by senior counsel of sufficient standing to consider this structural basis of the CCC that has its roots in the Fitzgerald Inquiry.

(Based on Counsel Assisting Proposed Measure 3)

3 Basis for this report, findings and recommendations

3.1 Role of the committee

The Parliamentary Crime and Corruption Committee (committee) is a statutory committee of the Queensland Legislative Assembly under section 291 of the *Crime and Corruption Act 2001* (CC Act).⁴

The principal functions of the committee are to:

- monitor and review the performance of the functions of the Crime and Corruption Commission (CCC) and the structure of the CCC, including examining the CCC's annual report and other reports
- report to the Legislative Assembly on matters relevant to the CCC or its performance of its functions and exercise of its powers (including matters appearing or arising out of the CCC's reports)
- participate in the appointment of commissioners and the chief executive officer (CEO) of the CCC
- undertake a five-yearly review of the CCC and report to the Legislative Assembly on any action that should be taken in relation to the CC Act or the functions, powers and operations of the CCC
- issue guidelines and give directions to the Commission as provided under the CC Act.⁵

3.2 Background to the inquiry

3.2.1 Local Government Association of Queensland complaint

On 9 February 2018, the committee received correspondence from the President of the Local Government Association of Queensland (LGAQ) outlining concerns with respect to the CCC's investigations associated with Operation Belcarra. The committee assessed the complaint and determined it was satisfied that the CCC acted appropriately, based on the information provided.

However, following the dismissal of Ms Kelsey's claims in the Queensland Industrial Relations Commission (QIRC) and of the charges laid on the 7 Logan City Councillors, the LGAQ again wrote to the committee on 5 May 2021, making a complaint regarding the conduct of the CCC. The LGAQ's complaint has been published and is available on the committee's website. The LGAQ alleged:

- inappropriate intervention in matters relating to the dismissal from employment of the former chief executive officer of the Logan City Council, Ms Sharon Kelsey, and in particular, inappropriate intervention and involvement in civil proceedings instituted by Ms Kelsey in the QIRC, and to which it was not itself a party, and in a manner that was likely to alter the outcome of those proceedings, including
- inappropriate use of its power to charge councillors with the crime of fraud (as defined in section 408C of the Criminal Code).⁶

In particular, the LGAQ questioned:

- the CCC's response to a Notice to Produce issued as part of the QIRC proceedings by providing evidence obtained through its coercive powers to the QIRC proceedings
- subsequent deliveries of the same, or some of the same, evidence by the CCC to the Logan City Council in October 2018 and November 2018

⁴ *Parliament of Queensland Act 2001* (POQA), section 88; Legislative Assembly of Queensland, Standing Rules and Orders of the Legislative Assembly, standing order 194.

⁵ *Crime and Corruption Act 2001* (CC Act), s 292.

⁶ Local Government Association of Queensland (LGAQ), correspondence, 5 May 2021, pp 1-2.

- Ms Kelsey's knowledge of the evidence held by the CCC
- the timing of the laying of fraud charges on councillors
- a request by the CCC Chairperson to the Queensland Government for the State to provide financial support to Ms Kelsey.

3.3 Inquiry process

3.3.1 Submissions

The committee called for submissions addressing the terms of reference of the inquiry on 6 July 2021, with submissions closing on 26 July 2021. The committee accepted 31 submissions; a list of submissions is at Appendix A. Submissions authorised for publication are available on the committee's webpage. A number of submissions remain confidential.

3.3.2 Hearings

The committee held public hearings on 17-20, 25-26 August 2021, 3, 6 and 7 September 2021 and on 21 October 2021, in Brisbane. A list of the witnesses that appeared at the public hearings is at Appendix B.

3.3.3 Summons

Pursuant to section 25 of the *Parliament of Queensland Act 2001* (POQA), 'an authorised committee may order a person, other than a member, to attend before the committee and also to produce to the committee any document or other thing in the person's possession'.

Section 26 of the POQA requires that a person who is ordered to attend by an authorised committee must be given a summons issued by the Clerk of Parliament on notification by the committee's chairperson. The summons must state a reasonable time and place for the attendance and, if a document or other thing is ordered to be produced, reasonable particulars of the document or other thing.

The committee served a summons on CCC Chairperson, Mr Alan MacSporran QC, requiring his attendance before the committee and the production of material related to certain matters including material relating to:

- allegations raised by the LGAQ in its correspondence to the committee, dated 5 May 2021
- the terms of reference for the committee's inquiry into the Crime and Corruption Commission's investigation of former councillors of Logan City Council; and related matters

including but not limited to:

- a) the public interest disclosure(s) made by Ms Kelsey and any communications with Kelsey about her public interest disclosure(s);
- b) the documents assembled for dissemination in answer to Ms Kelsey's Attendance Notice to Produce (June 2018);
- c) the documents delivered by the CCC to the Logan City Council in October 2018, and
 - i. the Dissemination Registers that record the disseminations of these documents
 - ii. any other supporting paperwork explaining the legislative basis for disseminating the material
 - iii. communications, including any record of meetings or conversations within the CCC, with respect to the delivery and then the collection of those documents
 - iv. any covering letters eg the letter accompanying the bundle of documents delivered
 - v. emails or other documents authorising the dissemination of the documents;

- d) the documents delivered by the CCC to the Logan City Council in November 2018, and
 - i. the Dissemination Registers that record the disseminations of these documents
 - ii. any other supporting paperwork explaining the legislative basis for disseminating the material
 - iii. communications, including any record of meetings or conversations within the CCC, with respect to the delivery and then the collection of those documents
 - iv. any covering letters eg the letter accompanying the bundle of documents delivered;
 - v. emails or other documents authorising the dissemination of the documents;
- e) the Notices to Produce which were given by the CCC to the former councillors and former Mayor;
- f) copies of communications, including any record of meetings or conversations between Ms Kelsey's legal representatives and the CCC;
- g) copies of communications, including any record of meetings or conversations between Ms Kelsey and the CCC;
- h) copies of all correspondence mentioned in the LGAQ correspondence, in the possession of the CCC;
- i) with respect to the dissemination of any Telecommunications Interception material the authorisations permitting them to be disseminated and the grounds for the dissemination;
- j) CCC internal advices/memoranda in relation to the laying of charges on the former councillors and former Mayor;
- k) the CCC's briefs of evidence provided to the Director of Public Prosecutions (DPP);
- l) any other documents or communications between the CCC and DPP.

Copies of the material published in relation to the inquiry, including transcripts of the public hearings, public submissions and other documents published by the committee, can be found on the inquiry webpage.⁷

The committee also served a summons on the public hearing witnesses listed at Appendix B.

3.4 Independent legal assistance

Upon the committee's request, two independent legal counsel, Dr Jonathan Horton QC and Mr Ben McMillan, were appointed by the Speaker of the Legislative Assembly to assist the inquiry. Mr Horton QC and Mr McMillan are both respected Queensland barristers and have extensive experience in commissions, reviews and inquiries.

Counsel Assisting made written and oral submissions to the committee as to what findings were open on the evidence, about possible recommendations the committee might make, and as to the law and legal interpretation.

On 6 September 2021, the committee instructed Mr Bret Walker AO SC to provide advice as to whether the way in which matters had been put to that time was appropriate. Mr Walker SC is a highly experienced member of the private Bar. Mr Walker SC was entirely independent of the committee and Counsel Assisting. The committee received Mr Walker SC's advice on 22 September 2021, and it is referred to in various sections of this report.

⁷ Parliamentary Crime and Corruption Committee PCCC, Inquiry webpage, <https://www.parliament.qld.gov.au/Work-of-Committees/Committees/Committee-Details?cid=171&id=3105>

4 Overview of the Crime and Corruption Commission's Corruption function

The CCC is a statutory body whose main purposes is to:

- combat and reduce the incidence of major crime; and
- continuously improve the integrity of, and reduce the incidence of corruption in, the public sector.⁸

The CCC has a range of functions set out in the CC Act.

The main functions of the CCC subject to this inquiry are the corruption and prevention functions, as well as the CCC's role under the *Public Interest Disclosure Act 2010* (PID Act).

5 Introduction to the facts and the evidence

The committee notes there are current matters related to the inquiry which may be subject to ongoing court proceedings and has deliberately not included specific details in relation to those matters.

5.1 Appointment of Ms Kelsey

The Logan City Council 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 Logan City Council on **26 June 2017**. Soon after doing so, Ms Kelsey made contact with the CCC and met with its Chairperson, Mr MacSporran QC, for about an hour on **11 September 2017**.

No notes were held by the CCC in relation to that meeting 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 its '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'.

Ms Kelsey's employment contract with Logan City Council 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 Logan City Council 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.

5.2 Probation process and the Public Interest Disclosure

Two days after Ms Kelsey's probation 'conversation' meeting, 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 MinterEllison lawyers to the CCC Chairperson and to the Mayor and Councillors of the Logan City Council. Relevantly, the PID alleged that the Mayor had intervened with the appointment of an officer of the Logan City Council, in a way that adversely affected the Logan City Council's function, and that the Mayor was not honest or impartial in that regard, and that he had a conflict of interest. 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 a named Logan City Council employee.

⁸ CC Act, ss 4, 5, 7.

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 section 38 of the CC Act.

On **8 November 2017**, the Logan City Councillors met with Tim Fynes-Clinton of King & Company to discuss a vote on the probationary process as proposed by MinterEllison in their letter of 12 October 2017.⁹ On the same day, the CCC approved the investigation plan for Operation Front, with the operation commencing the next day on **9 November 2017**.¹⁰ Operation Front was an investigation of:

- (a) allegations against Mayor Smith directly related to matters under consideration in Operation Belcarra;
- (b) allegations against Mayor Smith (and others – but not the 7 former councillors the subject of this inquiry) made by Ms Kelsey; and
- (c) alleged recriminations against Ms Kelsey's PID by the Mayor.¹¹

On **1 December 2017**, Ms Kelsey commenced proceedings against the Logan City Council and its then Mayor in the Queensland Industrial Relations Commission (QIRC), alleging contraventions of section 285 of the *Industrial Relations Act 2016* (Qld) and section 48 of the *Public Interest Disclosure Act 2010* (Qld) (PID Act).

On **4 December 2017**, Ms Kelsey applied for, and the QIRC granted, a suppression order to Ms Kelsey under the PID Act.¹² The CCC also executed a search warrant upon the Logan City Council, with Ms Kelsey bringing DS Francis into the budget meeting with Logan City Councillors. The CCC stated they were unaware of the QIRC hearing that day.¹³

On **30 January 2018**, the CCC served Notices to Discover to 6 of the Logan City Councillors (Phillip Pidgeon, Stephen Swenson, Jennifer Breene, Laurence Smith, Russell Lutton and Cherie Dalley).¹⁴ The CCC also executed a search warrant for Mayor Smith's computer in relation to Operation Front matters.¹⁵ The next day, **1 February 2018**, the QIRC ordered that the Mayor be restrained from taking part in any resolution by the Logan City Council in respect of Ms Kelsey's employment.¹⁶

On **7 February 2018**, the CCC served a Notice to Discover on Ms Kelsey as Logan City Council CEO.¹⁷ On the same day, Logan City Councillors received a briefing from solicitors and counsel retained by the Logan City Council on their legal rights and responsibilities in respect of Ms Kelsey's employment. Ms Kelsey's employment was terminated in a meeting that day by vote of the Logan City Council; 7 Logan City 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 2 weeks' notice.

5.3 Initial involvement of the Crime and Corruption Commission

Before the vote, by letter dated **5 February 2018**, Mr MacSporran QC wrote to each of the Logan City 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 a council be carefully considered in light of certain matters including the protections afforded to those who disclosed

⁹ PCCC-2013; PCCC-2014; PCCC-0066.

¹⁰ Volume 1, pp 23-40, PCCC-2697; PCCC-3757.

¹¹ PCCC-0002, p 2.

¹² *Kelsey v Logan City Council and Another (No. 2)* [2018] QIRC 017; PCCC-2529.

¹³ Volume 2, p 8, para 6, PCCC-0047.

¹⁴ Submission 25, p 10.

¹⁵ Submission 25, p 9.

¹⁶ *Kelsey v Logan City Council and Another* [2018] QIRC 009.

¹⁷ Submission 25, p 9, para 41.

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.¹⁸ On **6 February 2018**, MinterEllison wrote to the Logan City Council's lawyers, seeking an assurance that no adverse decision would be made about her employment, among other matters.

On **15 February 2018**, Ms Kelsey met with the CCC Chairperson and the CCC's CEO in a meeting requested by Ms Kelsey. Ms Kelsey spoke with the Chief of Staff to the Local Government Minister on **16 February 2018** and notes of that meeting were sent to the CCC Chairperson on **20 February 2018**.¹⁹

Mr MacSporran QC charged his Director of Legal Services, Mr Rob Hutchings, with management of the CCC's monitoring of the QIRC proceeding.²⁰ Mr Hutchings dealt regularly with Mr Dan Williams, a partner of MinterEllison, who acted for Ms Kelsey in that regard. On **23 February 2018**, Mr Hutchings communicated the 'considerable sympathy' which the CCC Chairperson and CCC CEO had for Ms Kelsey's position.²¹ Mr Williams informed Mr Hutchings that his client would seek reinstatement to her position as CEO of the Logan City Council. It was the CCC that 'reached out' to Mr Williams.

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 section 92A of the Criminal Code (those charges have not been finalised by the Court process and nothing more will be said of them).

On **12 April 2018**, MinterEllison 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, or alternatively, to provide relevant information to the QIRC directly, and to provide them (MinterEllison) with information that may assist Ms Kelsey and so that it could be provided to the QIRC. A suggestion was made by MinterEllison 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.²²

Mr Hutchings reported regularly to Mr MacSporran QC about developments in the QIRC proceeding and his dealings with Mr Williams.²³

The next month, on **4 May 2018**, Ms Kelsey was granted interim reinstatement to her position as CEO of Logan City Council by the QIRC,²⁴ but that was set aside on appeal 7 days later.²⁵

On **14 May 2018**, the CCC invited Logan City Councillors Dalley, Schwarz, Breene, Swenson, Pidgeon, Lutton, and L Smith to participate in a voluntary criminal interview.²⁶ All Logan City Councillors declined the invitation.²⁷ This is the only evidenced occasion upon which the 7 Logan City Councillors were invited to participate, voluntarily, in such an interview until the time of the charging.

MinterEllison 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 Logan City Councillors who had voted in favour of Ms Kelsey's termination and documents in which those individuals had

¹⁸ Volume 1, pp 49-50, PCCC-1407.

¹⁹ Volume 2, pp 1-4, PCCC-2532.

²⁰ Public hearing transcript, Brisbane, 6 September 2021, p 5.

²¹ Volume 1, p 57.

²² Volume 1, pp 63-64, PCCC-0940.

²³ Public hearing transcript, Brisbane, 6 September 2021, p 5.

²⁴ *Kelsey v Logan City Council & Ors* [2018] QIRC 053.

²⁵ *Dalley & Ors v Kelsey & Ors* [2018] ICQ 006; *Kelsey v Logan City Council & Ors* [2018] QIRC 053.

²⁶ PCCC-2838.

²⁷ Crime and Corruption Commission (CCC), correspondence, 2 September 2021, Chronology, p 23, item 89.

discussed her employment, probation, termination or otherwise.²⁸ Discussions ensued between the CCC and MinterEllison about the method by which a process might issue to the CCC to compel the provision of material to the QIRC.

On **21 May 2018**, the *Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Act 2018* (Qld) received Assent.²⁹ A new Schedule 1 of the *Local Government Act 2009* was inserted to include a list of 'Serious integrity offences' under section 153. Offences included Misconduct in Public Office (section 92A) and Fraud (section 408C). In relation to this amendment, the explanatory memorandum stated in part:

The policy intent is for the automatic suspension of a councillor charged with an offence which would result in disqualification under s153.³⁰

On **25 May 2018**, Mr Williams asked if there was a particular time he could seek to issue the notice that would result in the CCC not rejecting it. Mr Hutchings passed that request on to Ms McIntyre and Mr Alsbury.

Four days later, on **29 May 2018**, Mr Alsbury authorised the holding of closed investigative hearings for Operation Front.³¹

A telephone conference took place on **31 May 2018** between CCC officers (McIntyre, Hutchings, Francis) and Ms Kelsey's legal representative to discuss, in part, their common interest in helping Ms Kelsey. 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 Logan City 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 MinterEllison particularly needs rather than the CCC being able to tell MinterEllison 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 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'.³²

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.³³

²⁸ Volume 1, p 79, PCCC-0219.

²⁹ Assent: <https://documents.parliament.qld.gov.au/bills/2018/2955/18AC009-f629.pdf>.

³⁰ Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018, Explanatory Notes for Amendments To Be Moved During Consideration In Detail By The Honourable Stirling Hinchliffe, Minister for Local Government, Minister for Racing and Minister for Multicultural Affairs, p 14, <https://www.legislation.qld.gov.au/view/pdf/bill.third.exp/bill-2018-018>.

³¹ PCCC-2841.

³² Volume 3, supplement 3, p 5/13, PCCC-3552.

³³ Public hearing transcript, Brisbane, 19 August 2021, p 3.

The next day on **1 June 2018**, the CCC executed search warrants against the mobile phones of Logan City Councillors Dalley, Schwarz, Breene, Swenson, Pidgeon, and L Smith. Attendance notices for the hearings were also issued on this date.³⁴

Five days later, on **6 June 2018**, the CCC executed a search warrant on Logan City Council and seized council mobile phones that were previously used by Logan City Councillors Dalley, Lutton, Pidgeon, and Swenson. The CCC also recovered WhatsApp data from Cr Dalley's mobile phone on the same day.³⁵

On **7 June 2018**, Mr Hutchings proposed dissemination of WhatsApp data to parties in the QIRC proceeding.³⁶

The CCC conducted closed investigative hearings for Operation Front from **11 June 2018 to 3 July 2018** with two further investigative hearings held on **24 July 2018** (Cr Dalley) and **11 September 2018** (Cr Swenson).³⁷

On **14 June 2018**, the Industrial Court of Queensland (ICQ) allowed the appeal against the orders of QIRC from 4 May 2018. Ms Kelsey's application for interim reinstatement as CEO pending the hearing and determination of her substantive application was dismissed.³⁸

Six days later, MinterEllison wrote to Mr Hutchings and stated 'it is imperative that all relevant materials are provided to the parties promptly'.³⁹ Mr Hutchings then emailed Mr Alsbury about 'another option – a summons issued by the court' with the CCC Chairperson copied in to the email.⁴⁰ The CCC Chairperson, Ms McIntyre, Mr Hutchings and Mr Alsbury then met and notes stated 'give all to everyone'.⁴¹ Mr Alsbury then emailed Ms McIntyre the next day and expressed concern that the QIRC hearing would proceed without all the relevant evidence available.⁴²

5.4 Queensland Industrial Relations Commission issues a Notice of Attendance to Produce

On **26 June 2018**, Mr Hutchings and MinterEllison were in contact about how material could be disseminated. Following emails between Mr Hutchings and Mr Williams of MinterEllison regarding different notice types, a Notice of Attendance to Produce (Notice) was issued at the request of Ms Kelsey's lawyers from the QIRC to the CCC on **28 June 2018**. That Notice sought production of documents more or less in the terms of MinterEllison'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'⁴³ 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'.⁴⁴

³⁴ PCCC-3060; PCCC-3284.

³⁵ PCCC-3060; PCCC-3284.

³⁶ Volume 1, p 97, PCCC-0210.

³⁷ Submission 25, p 10, para 51.

³⁸ *Dalley & Ors v Kelsey & Ors* [2018] ICQ 006.

³⁹ Volume 1, p 107, PCCC-0974.

⁴⁰ Volume 1, p 110, PCCC-0970.

⁴¹ Volume 1, p 113, PCCC-0222.

⁴² PCCC-2833.

⁴³ Volume 1, p 116, PCCC-2833.

⁴⁴ Volume 1, p 117, PCCC-1638.

The CCC acted promptly in preparing 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.⁴⁵ A dissemination authority was given by Mr Caughlin (Acting Official Solicitor) for the provision of these documents to the QIRC.⁴⁶

The documents which were ultimately produced appear in the Schedule to Mr Caughlin's letter to the QIRC of **5 July 2018**.⁴⁷ 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 Logan City Council 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 were said to be 'common issues' between that litigation and the current CCC investigation.

Lawyers for the Logan City Council 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.

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'.⁴⁸

The dissemination authority sought by Ms McIntyre (and given by Mr Caughlin) asserted that the WhatsApp chats reveal alignment between the Mayor and Logan City Councillors as pleaded by Ms Kelsey and denied by the Logan City Councillors in the QIRC proceeding. The dissemination authority distinguished Justice Atkinson's ruling in *Flori v Commissioner of Police* [2014] QSC 284 (*Flori*) on the basis that the warrant in this case was not under the *Police Powers and Responsibilities Act 2000* (PPRA); because the CCC has power to use and deal with information and documents in performing its functions; because provision of the evidence was justified in 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.

On **5 July 2018**, the CCC advised the Logan City Councillors' lawyers that it would lodge the documents with the QIRC later that afternoon, despite the objection. An enquiry was later made by the Logan City 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). Mr Alsbury also explained the CCC's basis for providing material in response to the Notice to Produce. The very next day, Ms Kelsey filed an application to inspect and copy documents produced by the CCC or, alternatively, to inspect the documents.⁴⁹

⁴⁵ Volume 1, p 115, PCCC-2833.

⁴⁶ Volume 1, p 212, PCCC-0201.

⁴⁷ Volume 1, pp 219-225, PCCC-0150.

⁴⁸ Volume 1, p 212, PCCC-0201.

⁴⁹ *Kelsey v Logan City Council & Ors* [2018] QIRC 108, at [19].

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.⁵⁰ 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.⁵¹

Mr MacSporran QC explained to the inquiry that the CCC chose to produce that material directly to the registrar of the QIRC, instead of disseminating it directly to Ms Kelsey and the other parties to the QIRC proceeding (namely the Logan City Council, the Mayor and the 7 Logan City Councillors). He said this was done so that the QIRC could determine what use, if any, could be made of the documents.⁵² That was, in the committee's view, 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 section 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.

5.5 6 August 2018 meeting with Ms Kelsey and events following

On **6 August 2018**, a meeting took place between Ms Kelsey, Mr MacSporran QC and Mr Alsbury in Mr MacSporran QC's office. It was arranged at short notice.⁵³ 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'.⁵⁴ She said she was looking at making another reinstatement application and is recorded as saying 'if gets reinstated – makes it feasible'.⁵⁵ Mr MacSporran QC recalled this as being referable to her (Ms Kelsey) being financially able to carry on with the QIRC action.⁵⁶

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 (i.e. whether we can become a party)'.⁵⁷

The next day, on **7 August 2018** Mr MacSporran QC wrote to the Minister for Local Government with this request:

... 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 under the *Financial Accountability Act 2009*.⁵⁸

In the course of the letter, several assertions were made by Mr MacSporran QC:

- a) the legislature has evidenced an intention to give the CCC a role in reprisal matters;
- b) it is inappropriate to become involved in civil litigation while simultaneously investigating alleged criminal and corrupt matter in relation to matters the subject of the civil litigation;
- c) Ms Kelsey has an arguable case, which she may well be prevented pursuing through lack of resources;

⁵⁰ Public hearing transcript, Brisbane, 18 August 2021, p 70.

⁵¹ Volume 1, p 97, PCCC-0210.

⁵² Public hearing transcript, Brisbane, 17 August 2021, p 23.

⁵³ Volume 1, p 283, PCCC-3493.

⁵⁴ Volume 1, p 277, PCCC-2460c.

⁵⁵ Volume 1, p 278.

⁵⁶ Public hearing transcript, Brisbane, 17 August 2021, pp 11, 56.

⁵⁷ Volume 1, p 278, PCCC-2460c.

⁵⁸ Volume 1, pp 291-292, PCCC-1431.

- d) the average length of service is about 2.6 years and many millions of rate payer dollars are wasted paying CEOs to leave confidentially so that questionable conduct of councillors is never brought to light;
- e) Ms Kelsey is privately funding her representation but the Council, Mayor and a number of other councillors have not had to concern themselves with resourcing legal representation, they have an unfettered ability to pursue litigation at no personal costs.

The request was declined. That letter was sent on **8 August 2018**. That same day, Mr Hutchings and Mr Williams spoke. Mr Hutchings said he told Mr Williams what he and Mr MacSporran QC had spoken about that afternoon, but he could not remember what that was when he gave oral evidence.⁵⁹ Mr Williams is noted in Mr Hutchings' email to Mr MacSporran QC on the same day 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 records as follows:

He [Mr Williams] was especially interested in the prospect of the appointment of an administrator as he sees it as the only practical solution now.⁶⁰

The oral evidence about this was not clear.⁶¹ It is necessary, therefore, to rely principally on the contemporaneous documents. On **8 August 2018**, Mr Hutchings likely asked Mr Docwra, who worked under him as a lawyer, to do some research.⁶² It concerned the subject matter 'automatic suspension of Councillors for disqualifying offences, reprisals and quorums for local government meetings'.⁶³ The email mentions section 408C of the Criminal Code and that a quorum is a majority of Councillors. Mr Hutchings asked Mr 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 and responded '[t]hanks Mark'.⁶⁴

On **24 August 2018**, former Industrial Commissioner Black of the QIRC (Black IC) set aside the notice of attendance to produce.⁶⁵ Black IC concluded as follows:

[153] It is also clear that any access on the part of the applicant to such material would likely prejudice the prospects of a fair trial and may lead to interference in the administration of justice. I also accept that if the applicant were given access to the material produced, notwithstanding the undertakings provided by the applicant's lawyers about access, there is a significant prospect that material which is inadmissible and/or subject to restrictions on its use or publication by the CCC, might find its way into evidence, a decision of the commission, or the public domain.

...

[155] I arrive at the following conclusions which support a decision to set aside the notice:

general legal principles and common law principles enunciated in *Flori* and *R v Leach* preclude the applicant's unrestricted access to materials and the use of materials obtained under compulsion;

having regard to such principles, I am satisfied that an implied limitation emerges out of the structure and purposes of the CC Act to the effect that material obtained by the CCC by use of its coercive powers cannot be used in the applicant's proceeding;

⁵⁹ Public hearing transcript, Brisbane, 19 August 2021, pp 26-27.

⁶⁰ Volume 1, p 293, PCCC-0882.

⁶¹ Public hearing transcript, Brisbane, 19 August 2021, pp 26-27 (Mr Hutchings could not remember what he spoke about with Mr MacSporran QC); Public hearing transcript, Brisbane, 19 August 2021, pp 58-59 (Mr MacSporran QC did not know what prompted Mr Hutchings' email).

⁶² Public hearing transcript, Brisbane, 19 August 2021, pp 27-28.

⁶³ Volume 2, p 9, PCCC-1639.

⁶⁴ Volume 2, p 9, PCCC-1639.

⁶⁵ *Kelsey v Logan City Council* [2018] QIRC 108.

the implied limitation, consistent with the reasoning in *Williams v Keelty*, extends to a prohibition on the derivative use of the material, including use by the applicant in the preparation of her case;

if material obtained under compulsion cannot be disclosed to the applicant or to the applicant's lawyers, and cannot be used by the applicant in the substantive proceedings, and cannot be tendered into evidence, it can serve no legitimate forensic purpose and, save for a consideration of material other than material obtained by compulsion, the notice must be set aside;

the use by the applicant of material obtained under compulsion may jeopardise the fair conduct of the substantive proceedings and risk interfering with the administration of justice;

dissemination of material obtained under compulsion for use by the applicant in the substantive proceedings is not consistent with the performance of the CCC's functions; and

neither s 60(2) of the CC Act, nor s 62(1) of the CC Act expressly authorise the giving of information by the CCC to the QIRC for use by the applicant in the substantive proceedings.

[156] In circumstances where it is known that the majority of the documents produced by the CCC were documents obtained under compulsion, where there is a disagreement about the use of other material produced resulting from telephone intercepts, and where valid claims of legal professional privilege are likely to be made in respect to some of the documents produced, there is a basis to conclude that there is little prospect that the great majority of the subpoenaed documents produced by the CCC will serve any legitimate forensic purpose.

...

[158] In these cases the applicant said that it should be able to seek discovery of those documents from the CCC. However, in my view if the existence of such documents rests on the premise that some or all of the respondents may not have complied with disclosure orders, then the remedy is not to pursue those documents via a third party, but to commence an action against the respondents for a failure to comply with disclosure directions.

Mr Hutchings did not read Black IC's decision until asked to do so in the course of the public hearings:

... my view on the reasoning was ambivalent. I did not consider it something I needed to know.⁶⁶

The decision was delivered on a Thursday. On the following Monday afternoon, **27 August 2018**, MinterEllison sent a copy of the decision to Mr Hutchings saying 'We are considering options, one of which may be to request the CCC exercises different powers in relation to the documents'.⁶⁷

The following day, **28 August 2018**, MinterEllison 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:

We also ask that the CCC consider providing the documents to the LCC [Logan City Council] and/or to the individual Councillors.⁶⁸

Mr Alsbury wrote to Mr Hutchings expressing confusion about what was being suggested in MinterEllison's email of Monday afternoon. The committee accepts that context and later events make clear that it was a request to put 'the documents' into the hands of the Logan City Council or Logan City 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 and subject to Black IC's decision.⁶⁹

⁶⁶ Public hearing transcript, Brisbane, 19 August 2021, p 4.

⁶⁷ Volume 1, p 330, PCCC-0320.

⁶⁸ Volume 1, p 330, PCCC-0320.

⁶⁹ Volume 1, pp 219-221, PCCC-0150; Volume 1, pp 223-225, PCCC-0328.

On **3 October 2018**, DS Francis delivered to the Acting CEO of 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, Logan City 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 in connection with the delivery. There was no dissemination authority, nor any request for one.

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 in essence, to seek a statement from Mr Trinca as to whether the documents concerned council business. Before that delivery, police seconded to the CCC had met with representatives of the Queensland State Archives (QSA) on 25 September 2018 and considered that the WhatsApp messages ought to be provided to and kept by the Logan City Council pursuant to the *Public Records Act 2002*.⁷⁰

The material delivered to Logan City 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. He is not a lawyer. He did indicate that a police officer who might have had some legal training had been consulted.⁷¹ In any event, DS Francis was clear on this point:

... 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.⁷²

DS Francis made that assessment on the basis that the communications lacked formality.⁷³

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 the Logan City Council before it occurred.⁷⁴ Questions were raised upon Ms McIntyre's return from leave about the circumstances in which the documents had come to be delivered to the Logan City 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 Logan City Council on 3 October 2018. Her email of **16 October 2018** 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 2002*.⁷⁵ 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 if it was considered there was a breach, this material ought to have been 'formally disseminated'. By that, it can only be meant that there should be a written dissemination authority.

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.

⁷⁰ Volume 1, p 347, PCCC-0365.

⁷¹ Public hearing transcript, Brisbane, 20 August 2021, p 51.

⁷² Public hearing transcript, Brisbane, 20 August 2021, p 50.

⁷³ Public hearing transcript, Brisbane, 20 August 2021, p 51.

⁷⁴ Public hearing transcript, Brisbane, 19 August 2021, p 65.

⁷⁵ Volume 1, p 375, PCCC-0375.

On **23 October 2018**, Ms Kelsey's lawyers made an application to the QIRC for disclosure by Logan City Council of documents of a specific class, which appeared to encompass the documents delivered to Logan City Council in October 2018.⁷⁶

On **29 October 2018**, DS Francis telephoned Mr Fynes-Clinton of King & Company (Logan City Council Solicitors) to ask whether a decision had been made regarding whether the Logan City Council considered the documents to be a 'public record'.⁷⁷

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

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.⁷⁸

DS Francis emailed Mr Trinca on **31 October 2018** regarding any advice about the electronic communications between Logan City Councillors.⁷⁹ The next day on **1 November 2018**, Mr Fynes-Clinton advised DS Francis that the Logan City Council would not be making a determination as to whether parts of the October documents were a 'public record' until the QIRC resolved the issue of discoverability and admissibility on 20 November 2018.⁸⁰

On **7 November 2018**, the State Archivist notified DS Francis that if a councillor uses WhatsApp for council business then the record is a 'public record' under the *Public Records Act 2002*.⁸¹ The following day on **8 November 2018**, DS Francis emailed Mr Trinca seeking the return of the documents. Mr Trinca advised the documents were with Mr Fynes-Clinton of King & Company.⁸²

The documents delivered on 3 October 2018 were recalled by the CCC. DS Francis emailed the Logan City Council's lawyers on 9 November 2018 at 6:04am, stating 'I would be grateful if you could facilitate the return of these documents'.⁸³

That request mirrored one made the preceding morning to Mr Trinca: 'Can I now make arrangements to take back possession of the documents I provided to you?'⁸⁴

These requests came after advice from Logan City Council's Solicitors that Mr Trinca considered it inappropriate to make any determination relating to the WhatsApp communications provided to him.

The documents were delivered back to the CCC on **9 November 2018**.

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

So that the [Logan City 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 [Logan City Council]

⁷⁶ PCCC-1214.

⁷⁷ PCCC-1214.

⁷⁸ Volume 1, p 382, PCCC-0381.

⁷⁹ PCCC-1420.

⁸⁰ PCCC-1420.

⁸¹ Volume 1, pp 403-404, PCCC-0390.

⁸² Volume 1, p 407, PCCC-0393.

⁸³ Volume 1, p 407, PCCC-0393.

⁸⁴ Volume 1, p 408, PCCC-0393.

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 [Logan City 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.⁸⁵

[emphasis in original]

Mr Alsbury indicated at 9:17am that morning that he had no problem sending the documents back but that he thought the CCC would need to make sure there was a proper written dissemination authority and the versions with potentially legal professional privilege material were not sent.⁸⁶

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.

On **16 November 2018**, MinterEllison emailed the CCC and referred to correspondence of 15 November 2018. The request was as follows:

As outlined, given that the matter is listed before the Commission on Tuesday 20 November 2018, it would be of great assistance if you could please advise if you will agree to our request to return the relevant documents to Council.⁸⁷

MinterEllison wrote to Logan City Council's Solicitors 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' email records him having asked the CCC to return the documents to the Logan City Council's Solicitor's office so that Logan City Council could comply with its obligation to disclose them. Mr Williams' email is based on a misunderstanding: the Logan City Council had not divested itself of the documents; DS Francis sought their retrieval.

On **19 November 2018**, Mr Williams left a voice mail for Mr Hutchings (which was accessed by him) saying 'we've got this issue that the council are resisting disclosure of those WhatsApp documents ... because they say they've handed them back to you'.⁸⁸

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 the only 'reasons' for the dissemination. Relevantly, this included the purported purpose, that the WhatsApp communications are 'public records as defined under the Public Records Act'.⁸⁹

Ms McIntyre accepted that 'one purpose' and a 'side effect' of the dissemination was to put the documents in the hands of the Logan City Council so as to render them susceptible to disclosure in the QIRC proceedings.⁹⁰ 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'.⁹¹

⁸⁵ Volume 1, p 415, PCCC-0405.

⁸⁶ Volume 1, p 417, PCCC-0400.

⁸⁷ Volume 1, p 421, PCCC-0419.

⁸⁸ Volume 1, p 424, PCCC-0417.

⁸⁹ Volume 1, p 428, PCCC-0415.

⁹⁰ Public hearing transcript, Brisbane, 20 August 2021, p 13.

⁹¹ Public hearing transcript, Brisbane, 19 August 2021, p 13.

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.⁹²

On **19 November 2018**, documents were delivered to the Logan City Council under cover of a letter from Mr Alsbury. That letter contains this paragraph:

I **enclose** the documents requested.⁹³

[emphasis in original]

The only request that had been made in relation to the documents was from MinterEllison. The letter otherwise only refers to the delivery of the documents being for the purpose of the *Public Records Act 2002*. It makes no reference to documents being delivered for any other purpose.

The documents delivered to the Logan City Council on **19 November 2018** were largely the same as those delivered by DS Francis on 3 October 2018. The differences were:

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

A substantial portion of the documents delivered to the Logan City Council on 19 November 2018, (including, notably, the bulk of the communications between the Mayor and Logan City Councillors) had been previously produced to the QIRC and was the subject of its ruling on 24 August 2018.

On **4 December 2018**, Ms Kelsey withdrew her application for disclosure against the respondents in the QIRC, including the Logan City Council. 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 Logan City Council to disclose the documents delivered on 19 November 2018 as they were relevant to the proceeding or a matter in issue in the proceeding:

In my view, absent of any claim of legal professional or other privilege from production, it is clear that the public records are relevant to a matter in issue in PID 2017/3 and are, prima facie, required to be disclosed in this proceeding which is currently before the commission.⁹⁴

Mr Alsbury made this request:

Please advise by **4pm today, 12 February 2019**, whether the LCC intends to make disclosure in this proceeding in the manner discussed above so that the CCC can consider its position.

[emphasis in original]

On 14 February 2019, in response to the letter just mentioned, Logan City Council's Solicitors advised that Ms Kelsey had withdrawn her interlocutory application for disclosure against the Logan City Council on 4 December 2018. Mr Hutchings expressed surprise, suggesting to Mr Alsbury and the CCC Chairperson, as well as others, as follows:

I suppose we should consider whether we send this to Kelsey to check it is all kosher.⁹⁵

⁹² Public hearing transcript, Brisbane, 20 August 2021, p 13.

⁹³ Volume 1, p 432, PCCC-0563.

⁹⁴ Volume 1, p 465, PCCC-0506.

⁹⁵ Volume 1, p 495, PCCC-0509.

The following morning, Mr Hutchings sent an email to Mr Alsbury, Mr MacSporran QC and others about a discussion between him, Mr MacSporran QC and Mr Alsbury since receipt of the Logan City Council's Solicitor's letters of the day before:⁹⁶

Hi everyone

This is a wrap up of the discussions between Paul, Alan and myself since receipt of this letter yesterday afternoon.

The letter from King & Co seeks to justify why disclosure of the WhatsApp material has not, to this point, been made by the Council. Although I am at some considerable distance from the CCC's investigation and more so the litigation brought by Ms Kelsey, it does appear to be a very hard-fought dispute with apparently little regard to the local government principles, model litigant principles, or the broader picture of how this is going to reflect on the LCC as a unit of public administration in the near and medium future. As I understand it, as at yesterday the LCC had not disclosed, itself, the Whats App material which is very difficult to understand in circumstances where the CCC has made it clear that disclosure of that material is a real issue.

In this regard, I consider the position taken by the CCC from the start of this issue has been the right one – to stay in touch with the litigation, to head off the prospect of a miscarriage of justice. Naturally, some parties to the litigation will take the view that represents a partisan approach but my view is different. We have in my view discharged the s.57 obligation to act fairly, and (importantly), in the public interest.

The LCC cannot, in my view, deal with the Whats App issue by saying that Cherie Dalley has disclosed it. The Council should address this issue itself and reach a position, and it is appropriate that we continue to take an interest in the approach they take.

I understand that until recently the LCC has been using the doubt about the public record status of the Whats App communications as some justification for not disclosing that material. Alan, Paul and I discussed whether it was appropriate or necessary to disseminate the Whats App material to the parties, formally, in light of the fact the public records issue has now been put to bed by the State Archivist.

One problem in disclosing the material is that the QIRC has ordered that the material is not disclosable. Disseminating it to the parties may be viewed as undermining that order, or even contempt. We should avoid that if possible, given the parties to this litigation are so litigious. As it turns out, I understand that Cherie Dalley's appropriate disclosure of the recovered What App communications will likely achieve the objective sought by Ms Kelsey and the CCC – namely full and accurate disclosure, in these proceedings, of the circumstances surrounding her employment. As much was confirmed when I spoke with her solicitor last night (Dan Williams).

As the litigation has nearly concluded (today is the last allocated day of evidence), Mr Williams and I had a much more frank and detailed discussion last night about Ms Kelsey's position. He confirmed, as we suspected, that the disclosure last week of the Dalley material was 'startling' and a 'game changer' for their case. He indicated that they were quite comfortable with how the matter has progressed to this point, and sounded quite upbeat and grateful for the work we had obviously been doing to keep the parties honest. He confirmed that the LCC has not made disclosure of the Whats App material and they (Minters) were concerned and disappointed by that attitude. Nevertheless, the fact that they had the material seems to have satisfied them.

He also indicated that they were not particularly motivated to pursue the Whats App disclosure issue too much further. This is because in light of the history of this matter they are primarily concerned with bringing this litigation to some finality. In practice, that means minimising any likely appeal points which could lead to the litigation dragging on. The Whats App material is one such possible appeal point. I understood that position. We discussed the possibility of using the TI material (as you had suggested Makeeta). I gathered that a fight about TI – despite its likely utility – is considered by Kelsey's legal team to be in the same category so they don't look like they will want to pursue it. Overall they seem to be happy with how its gone to date.

FYI,

Rob.

⁹⁶ Volume 1, p 497, PCCC-0512.

Ms McIntyre, after reading that letter, suggested:

Maybe we should disseminate the material provided to Smith/Council on the basis that they failed to disclose during the period, provided we gave the material to the parties during this period of disclosure.⁹⁷

Mr Hutchings rejected that suggestion but noted Ms McIntyre was 'probably right' about the obligation of disclosure.

Developments had occurred in the meantime in relation to the *Public Records Act 2002*. 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 2019 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 Logan City Council's document management system in accordance with the *Public Records Act 2002*. He enclosed a summary of council current guideline framework about the use of communication apps and maintenance of records.

The oral evidence as to the purposes of the delivery on 19 November 2018 was as follows:

Dr Horton: ... so far as you were involved, one of your material reasons for acting as you did was that these documents ought be before the QIRC by way of disclosure obligations in order to help correct the imbalance?

Mr Hutchings: Correct.

...

Dr Horton: do we see, first of all, the systemic treatment of the balance or tension of the two issues, public records act

Mr Hutchings: But my recollection was that the two objects were complementary, both consistent with our objective, and I would not routinely record for posterity that we were undertaking activity that would be—that would achieve the same objective—or two activities that would achieve the same objective.

...

Mr Hutchings: ... but if you are trying to get to the issue of ... why we were pressing the council to make disclosure, it was because we were under no apprehension that they understand what they had to do in the proceeding.

...

Mr Hutchings: we were very concerned to make sure they discharged their duty of disclosure, so the fact that Ms Kelsey chose not to pursue the disclosure is not really relevant to that.⁹⁸

Mr Alsbury denied that 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.⁹⁹ He said that the CCC was still concerned about public records issues, which are articulated in the correspondence dated 19 November 2018. That correspondence does indeed articulate those 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 the Logan City Council of what he considered to be its disclosure obligations. He denied that assertion.¹⁰⁰

⁹⁷ Volume 1, p 501, PCCC-0513.

⁹⁸ Public hearing transcript, Brisbane, 19 August 2021, pp 13-14.

⁹⁹ Public hearing transcript, Brisbane, 18 August 2021, p 32.

¹⁰⁰ Public hearing transcript, Brisbane, 18 August 2021, p 32.

Ultimately, some WhatsApp records of Cr 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 disposing of Ms Kelsey's action, Vice President O'Connor of the QIRC (VP O'Connor) considered those messages and made these findings about them:

[769] The applicant's submission is the WhatsApp messages, whilst not the sole matter that is relied upon, demonstrate alignment between the Second to Ninth Respondents and allow the Commission to draw a finding against them in terms of reliability of their reasons for termination.

...

[771] I do not accept that the Third to Ninth Respondents were politically aligned in the way alleged by the Applicant. The evidence simply does not support the contention.

...

[777] In the submissions of the Applicant, it is contended that the WhatsApp record a visceral enmity against the Applicant which cannot be explained by any concerns about her performance which were generally held. The hatred is only explicable by reference to the PID and the attack against Mayor Smith.

[778] Whilst I accept that the WhatsApp transcripts reveal a level of hostility towards Ms Kelsey and demonstrate a distrust of her, they cannot be explained by reference to the lodging of a PID.¹⁰¹

5.6 Charging of fraud

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

From the commencement of the investigation, there was consideration of charging fraud in relation to the Mayor. In a document styled 'project/operation/probe/investigation name registration form' for Operation Front, authorised on 8 November 2017 by DS Andrews, allegations against Mayor Smith were said to be relevant to possible offences under sections 110 and 408C of the Criminal Code. It was foreshadowed at this early stage that no disciplinary standard was disclosed by the *Local Government Act 2009*, hence the CCC's 'jurisdiction' to investigate was restricted to potentially corrupt conduct, including conduct that would, if proved, amount to a criminal offence.¹⁰²

On **7 September 2018**, DI Preston sent a memo to DSS Andrews about considering a further charge against Mayor Smith under section 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.¹⁰³ There was no similar memo in relation to the other 7 Logan City Councillors, even though almost all relevant material in relation to Ms Kelsey's dismissal was in the hands of the CCC by this time.

Exchanges took place internally within the CCC. Various views were expressed, including by Mr Alsbury and Ms McIntyre about the various charges under consideration, including section 92A.

Ms McIntyre commenced preparation of a 'Legal Advice – Observations'¹⁰⁴ document sometime **in the week of 7 December 2018**.¹⁰⁵ 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. That document begins some analysis of the legal considerations which attends such charges, the elements of them and the evidence referable to each. The memorandum concerns only Mayor Smith in respect

¹⁰¹ *Kelsey v Logan City Council & Ors (No.8)* [2021] QIRC 114.

¹⁰² CC Act, s 15.

¹⁰³ Volume 2, pp 17-26, PCCC-1479.

¹⁰⁴ Volume 2, p 43, PCCC-1512.

¹⁰⁵ Public hearing transcript, Brisbane, 20 August 2021, p 22.

of Ms Kelsey's termination of employment as CEO of Logan City Council. Ms McIntyre went on leave on 14 December 2018¹⁰⁶ and did not return until (she thought) 14 January 2019.¹⁰⁷

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'.¹⁰⁸ Mr Alsbury hoped it could act as a catalyst for discussion 'next week' between the recipients of the email and himself, and ultimately Mr MacSporran QC. Mr Alsbury pointed out if 'we' can't prove failing to perform a function of office or abusing the authority of office under section 92A, then 'we always have fraud (dishonestly causing a detriment) to fall back on'.¹⁰⁹ He went on to point out:

Although Kelsey has stated that she initially engaged with solicitors on 25 September 2017 regarding a possible PID, I know of no evidence to suggest that Smith would have known of the PID until 2 days after the probation meeting. This being the case, it seems the motivation for **commencing** the biased performance appraisal could never have been the PID.¹¹⁰

[Emphasis in original]

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

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 prepared principally by DS Francis was one of the documents considered.¹¹¹ It flagged discussion related to the following:

- Overarching motive (*control of LCC and power*)
- Particulars related to *dishonesty and Attempt to Influence* LCC Councilors [sic] by Mayor in supporting his motive
- to provide chronology to the above mentioned discussion points.¹¹²

Ms McIntyre's notes of that meeting records 'chair happy with evidence explained' and:

Need to ensure able put across evidence

Step it out – re: Kelsey matter¹¹³

DS Francis' notes record:

All content to charge. Authority by Chair provided.

...

Discussion re charge selection

Settled on 1x fraud (Kelsey) and 1x misconduct [other]¹¹⁴

DSS Andrews's notes record a '1 on 1 with DS Francis re briefing paper for misconduct charge (Kelsey)'.

¹⁰⁶ Public hearing transcript, Brisbane, 20 August 2021, p 22.

¹⁰⁷ Public hearing transcript, Brisbane, 20 August 2021, p 26.

¹⁰⁸ Volume 2, p 59, PCCC-1526.

¹⁰⁹ Volume 2, p 59, PCCC-1526.

¹¹⁰ Volume 2, p 60, PCCC-1526.

¹¹¹ Volume 2, pp 77-92, PCCC-1536.

¹¹² Volume 2, p 77, PCCC-1536.

¹¹³ PCCC-3589.

¹¹⁴ PCCC-3586, p 3.

His notes for 31 January 2019 state:

AF plus DP – Chair approved ... plus 1x fraud (Kelsey) against Smith pending AMS signing statement¹¹⁵

The reference to 'AMS' is the Mayor's wife and a statement by her that was then in preparation.

On **30 January 2019**, Mr MacSporran QC approved the charging of Mayor Smith with 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 and the purported base for the charge.¹¹⁶

However, 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 whether to lay those charges. Such charges were not laid until 26 April 2019.

DS Francis's original 16 page memorandum, upon which the decision on 30 January 2019 to charge the Mayor with fraud was based, did not contain any reference to, or systematic treatment, of the elements of that offence.¹¹⁷ It was not accompanied by any legal advice or documented consideration of how the evidence might prove that offence, particularly the element of dishonesty.

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.¹¹⁸

DS Francis principally prepared further memoranda bearing the date **23 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 accepted to be a 'download' on the issue of dishonesty.¹¹⁹ He said that he always thought that misconduct 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 offending or the nature of the offending.¹²⁰

Mr MacSporran QC agreed in his oral evidence to the inquiry:

The fraud charge was more appropriate because the evidence that we assessed and looked at and gathered was clearly appropriate to the elements of that offence. It was easier to prove because it concentrated on the element of dishonesty and this case was all about dishonesty.¹²¹

The memoranda prepared principally by DS Francis do mention section 408C fraud under the Criminal Code. However, they seem to be directed only to the Mayor's conduct, and not any alleged wrongdoing by the Logan City Councillors in that regard. The memoranda make no recommendations to charge 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 might prove it.

¹¹⁵ PCCC-3589, p 4.

¹¹⁶ Volume 2, p 97, para 7, PCCC-1551.

¹¹⁷ Volume 2, pp 77-92, PCCC-1536.

¹¹⁸ Public hearing transcript, Brisbane, 20 August 2021, p 63.

¹¹⁹ Public hearing transcript, Brisbane, 20 August 2021, p 75.

¹²⁰ Public hearing transcript, Brisbane, 20 August 2021, p 64.

¹²¹ Public hearing transcript, Brisbane, 17 August 2021, p 42.

The memorandum concludes with a suggestion as follows under the heading 'Tactical considerations':

The case officer is optimistic that after the proceedings are commenced for the Mayor and subsequently the Mayoral cabinet (Dalley and Schwartz[sic]), aligned councillors who might express an intention to assist the CCC in the investigation of these offences. While the case officer acknowledges sufficiency is demonstrated in the evidence at hand, further assistance by the aligned councillors will not be refused. Such co-operation might be achieved through staggered approach to the commencement of proceedings.¹²²

It is noted that in evidence from other CCC officers, this strategy was rejected, and did not eventuate.

Mr Alsbury on **3 April 2019** expressed reservations as to the alleged reprisal action by Mayor Smith.¹²³ He noted that Ms Kelsey's probation process had been started before her PID. In terms of the possible charges against the other Logan City 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 referred to certain evidence of the Logan City Councillors and he said most of that he found to be convincing and 'at the very least' capable of raising a reasonable doubt. Reference is made (although not by name) to Cr 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 Schwarz) had always held.

The memorandum ultimately considered by Mr MacSporran QC on **24 April 2019** was 54 pages in length.¹²⁴ It did not consider the charge of fraud (section 408C) in relation to any of the 7 Logan City Councillors, preferring 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 Logan City 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 Logan City Councillors and Mayor were guilty of any offence involving dishonesty.

Mr MacSporran QC said such detailed advice and analysis was not needed:

The memo was coming to a person, namely myself, who had vast experience in criminal law and routinely dealt with issues of dishonesty, including as a young prosecutor. I was one of the first prosecutors to use the new amendment 408C in 1979, I think it was. So I had very great experience with 408C and aspects of dishonesty. I was well versed in assessing evidence to see whether it met the test of dishonesty. No-one had to spell out to me for my recommendation that a police officer consider charging what was involved in evidence of dishonesty.¹²⁵

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'.¹²⁶ 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 them.¹²⁷ It is also remarkable owing to the doubts

¹²² Volume 2, p 141, pPCCC-1551.

¹²³ Volume 2, p 146, PCCC-1553.

¹²⁴ Volume 2, pp 257-310, PCCC-1569.

¹²⁵ Public hearing transcript, Brisbane, 7 September 2021, p 15.

¹²⁶ Public hearing transcript, Brisbane, 18 August 2021, p 39.

¹²⁷ Public hearing transcript, Brisbane, 18 August 2021, p 46.

Mr Alsbury had expressed about the laying of charges in respect of Ms Kelsey's termination of employment given that her performance review process had commenced before she lodged a PID.

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.¹²⁸

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'.¹²⁹ 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 2019.¹³⁰

The 'tactical considerations' previously noted as to the timing of charges persist in paragraph 97 of DS Francis' 54 page memorandum.¹³¹ 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.

The memorandum dealt with public interest considerations as follows:

c. Public interest test

The need for the CCC to protect whistle blowers cannot be overstated. Belcarra, Operation Windage and Operation Front have demonstrated much needs to be done in the landscape of senior political figures in LG and Council administration in the context of corruption and misconduct. Corruption within local government incurs immeasurable costs to a range of stakeholders enmeshed in the business of public administration. The integrity of individuals in leadership positions both within government and administration is kept in check by those persons with the courage to report, as required by law.

The duty of an individual to report corrupt conduct is in itself insufficient to ensure compliance with such a duty. Whistle blowers must be protected from reprisal (and termination). Furthermore, such individuals must be supported in their lawful rights period this protection and support is the spirit of the PID Act and its critical function in ensuring the continued compliance with the duty to disclose corrupt conduct.

Operation Front asserts the practice of 'burying' corruption and misconduct in non-disclosure financial statements is a cancer within LG, and stands opposed to the PID Act. The cost to the community in such financial settlements is significant.

Mayor Smith's use of covert messaging applications is of high concern. The mayor conspired to delete this material once its purpose had been served, as did the other Cr's. The Mayor resisted continued discovery orders within the QIRC to disclose such evidence when in his possession, as did LCC. This was the tool utilised to effect reprisal. The use of covert means of communication, in the digital age is a challenge to the Public Records Act. This too is a challenge to the broader public service, and this concern has been well articulated by the State Archivist in liaison with Operation Front.

Ms Kelsey responded to the Mayor's corruption as she was legally obliged to do. The Council, as her employer, ought to have protected her in compliance with the PID Act and failed to do so. Ms Kelsey is a person who, until the Mayor alleged she had otherwise, had an outstanding reputation as a public sector administrator. Her integrity is of the highest calibre. Her evidence is corroborated almost to competition either with file notes, personal notes, emails, council records, documents and witness statements. Ms Kelsey has co-operated with the CCC, her early versions and statements corroborate each other flawlessly.

Mrs Kelsey credibility stands in contrast to the Mayor. The Mayor does not take notes, commit matters to writing, has not provided the CCC with an interview and lives with ease as a person living a Jeckle [sic] and Hyde existence. He destroys evidence (... Panel notes, WhatsApp) and encourages others to do the

¹²⁸ Public hearing transcript, Brisbane, 25 August 2021, p 73.

¹²⁹ Public hearing transcript, Brisbane, 20 August 2021, p 28.

¹³⁰ Public hearing transcript, Brisbane, 20 August 2021, p 32.

¹³¹ Volume 2, p 310, para 97, PCCC-1569.

same. His distorted view of the truth is easily demonstrated in evidence. His manipulation of his truth is easily demonstrated in the evidence. Similarly, councillors aligned to him have proven during compulsive hearings, statements, WhatsApp, covert council recordings although convincing, on a thorough assessment of the evidence to have little credibility. Minter Ellison provides a compelling and articulate record of the Councillors misrepresentation of fact. Such an adherence to values, such as in the case of Ms Kelsey ought to be broadcast to the community as an example of public office.

Mr Trinca and Councillors not caught up in the Mayors conspiracy all state Ms Kelsey was an exceptional CEO who rapidly gained the trust and confidence of the executive and Council. Ms Kelsey makes complaint of the Mayors fraudulent representation of facts on her probation conversation report, and further of the Mayors and Councils reprisal against her. These matters, and the determination of truth ought to be test by a jury.

The Mayor's conspiracy involves ruthlessly destroying the reputation and credibility of a person by corruptly aligning the self-interest of over half the LC Councillors, to conceal his own course of corrupt conduct firstly by falsifying justifications within a flawed probation process and unlawfully leveraging the integrity of Ms Kelsey for her termination in a flawed process of Council.

Ms Kelsey attempt to protect her rights from reprisal has been entirely self-funded. The Mayor and his aligned Cr's have relentlessly pursued Ms Kelsey for her compliance with the PID act and the CCC Act. The decision maker for this monumental legal battle has been A/CEO LCC itself. That LCC, a model litigant might determine to resist Ms Kelsey application while remaining unbiased is concerning. Operation Front suggests that this is yet another function of the Mayors influence.

For these reasons this case is of high public interest and will continue to provide clear direction to the community and public service on how reprisal might be defined and what the lawful response might be expected in the face of reprisal.¹³²

The extent of the public interest considerations weighing against charging were these:

Robust consideration is certainly warranted. The risk of reputation harm to persons of interest and the CCC is acknowledged.¹³³

There is no mention of section 175K of the *Local Government Act 2009* or its effect.

On **26 March 2019**, before going on leave, DI Preston had sent a memorandum to Mr Alsbury about approval to commence proceedings against the 7 Logan City Councillors.¹³⁴ He noted that a memorandum in relation to further charges against Mayor Smith was approved on 30 January 2019, however a decision was made not to proceed until 'AMS' was in a position to sign a witness statement.

DI Preston's memorandum went on to state that, with evidence in the QIRC matter finalised, lawyers for Ms 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 Ms Kelsey which could be considered as reprisal'.¹³⁵ No submissions made on behalf of other parties to the QIRC were referred to, and nor were they attached to the memorandum.

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.

On **23 April 2019**, Mr Alsbury prepared a memo addressed to Mr MacSporran QC entitled 'Legal Advice – Operation Front'.¹³⁶ It was one of a number of attachments to a Chairperson's Cover Sheet¹³⁷ 'in relation to a request for approval to consider criminal charges against numerous alleged offenders'.

¹³² Volume 2, pp 309-310, PCCC-1569.

¹³³ Volume 2, p 179, PCCC-1561.

¹³⁴ Volume 2, pp 315-316, PCCC-1572.

¹³⁵ Volume 2, p 323, PCCC-1572.

¹³⁶ Volume 2, pp 319-322, PCCC-1571.

¹³⁷ Volume 2, pp 317-318, PCCC-1571.

The facts were said to be relatively complicated and to have been set out in DS Francis' 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:

... As such I am taking what is said in the submissions about the evidence at face value. The affidavit material and the transcripts of the evidence will, of course, have to form part of brief.

... The submissions demonstrate that the case for Kelsey went well.¹³⁸

Mr Alsbury said that the reasons given for Kelsey's dismissal as set out in the affidavits of the Logan City Councillors 'do not bear scrutiny'. Alsbury went on to quote from the submissions made by Ms Kelsey's lawyers. He expressly agreed with the categorisation of the conduct as 'an egregious example of corrupt public administration'. Mr Alsbury went on to say this in relation to the public interest:

... [e]ven considering the availability of disciplinary proceedings and the significant ramifications of charging the councillors of their future employment as local government politicians, I am of the view that it is in the interest to pursue charges.

He said that the following charges were appropriate:

- a) for Mayor Smith - s 92A;
- b) for the seven councillors and Mayor Smith - s 408C.¹³⁹

Finally, he mentioned that for strategic reasons, the investigators do not plan to charge all Logan City Councillors and Mayor at the same time.

The Chairperson's Cover Sheet from Mr Alsbury was dated **23 April 2019**. 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)'.¹⁴⁰

It noted that the CCC Chairperson had already expressed his approval in relation to charges against Mayor Smith (in respect of the PID and Ms Kelsey's termination as CEO) and that DS Francis had continued to consider evidence in relation to charges against Smith and the Logan City Councillors who voted for Ms Kelsey's dismissal. Mr Alsbury expressed in summary his view that:

... charges against Luke Smith clearly have reasonable prospects of success and it is really a matter of choosing the criminality to be subject of charges and the appropriate charges to reflect that criminality.¹⁴¹

He went on to state that, in relation to the Logan City Councillors, there were reasonable prospects of securing convictions in relation to appropriate charges covering their criminality. He then stated:

... I will record here, however, that it has taken me some time to arrive at that conclusion and I don't consider the evidence against these councillors to be overly strong in light of evidence that may well be given in response to the prosecution case.¹⁴²

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'.¹⁴³

¹³⁸ Volume 2, pp 319-320, PCCC-1571.

¹³⁹ Volume 2, pp 321-322, PCCC-1571.

¹⁴⁰ Volume 2, pp 317-318, PCCC-1571.

¹⁴¹ Volume 2, p 318, PCCC-1571.

¹⁴² Volume 2, p 318, PCCC-1571.

¹⁴³ Public hearing transcript, Brisbane, 18 August 2021, p 43.

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 MinterEllison:

I ... understand you have filed closing submissions on behalf of Ms Kelsey.

I would be pleased if you would provide each of the above exhibits [2 were mentioned being WhatsApp messages and raw data] and your closing submissions. This material is deemed relevant to our investigation. ...¹⁴⁴

MinterEllison responded providing the requested exhibits and 'our closing submissions'.¹⁴⁵

DS Andrews then emailed DI Preston, DS Beattie and DS Francis referring to the attached outline as a 'must read'.¹⁴⁶

The response from DS Beattie to others including DS Francis was:

Totally agree, a must read. I've emailed bits I cut and pasted from it where Minter Ellison have submitted the respondents have false evidence.

When's the QIRC decision?¹⁴⁷

DS Andrews emailed DS Beattie, DI Preston, DS Francis and Ms Roxas on 26 March 2019 at 1:15pm as follows:

2 May is set for submissions 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.¹⁴⁸

DS Francis responded 11 minutes later saying:

'Yup time critical'.¹⁴⁹

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

The oral evidence on that topic is set out below.

Evidence of DS Beattie¹⁵⁰

Mr McMillan: ... Did you understand that there was some particular urgency in the investigation that required the mayor and 'a decent portion of The Fab7' to be arrested and charged before 2 May?

Det. Sgt Beattie: No.

Mr McMILLAN: What did you understand Detective Senior Sergeant Andrews to be referring to when he said, 'We really need to arrest those people before 2 May'?

Det. Sgt Beattie: His personal view on the matter.

¹⁴⁴ Volume 2, p 95, PCCC-1550.

¹⁴⁵ Volume 2, p 94, PCCC-1550.

¹⁴⁶ Volume 2, p 93, PCCC-1550.

¹⁴⁷ Volume 2, p 93, PCCC-1550.

¹⁴⁸ Volume 2, p 93, PCCC-1550.

¹⁴⁹ Volume 2, p 93, PCCC-1550.

¹⁵⁰ Public hearing transcript, Brisbane, 26 August 2021, pp 10-11.

Mr McMILLAN: And you did not have any understanding at that stage as to why that was necessary?

Det. Sgt Beattie: No.

Mr McMILLAN: You had asked the question in your email: 'When's the QIRC decision?'

Det. Sgt Beattie: Yes.

Mr McMILLAN: Why was that important to you?

Det. Sgt Beattie: I felt it was important just to keep abreast of the QIRC proceedings generally.

Mr McMILLAN: Nothing more?

Det. Sgt Beattie: Nothing more.

Mr McMILLAN: You did not think that the intention, at least at that stage, to resume the QIRC proceedings on 2 May had any impact on your investigation at all?

Det. Sgt Beattie: No.

Mr McMILLAN: Were you aware at that stage that Ms Kelsey was seeking reinstatement as the CEO of the Logan City Council?

Det. Sgt Beattie: Yes.

Mr McMILLAN: And that, when those proceedings in the Industrial Relations Commission resumed, the commission was scheduled to hear closing oral submissions by the parties?

Det. Sgt Beattie: Yes.

Mr McMILLAN: And that one of the issues that would be the subject of submissions on that date would be whether or not Ms Kelsey could or should be reinstated if she was successful in her action?

Det. Sgt Beattie: I am not entirely sure that I was cognisant to that level of detail.

Mr McMILLAN: You had just read the written submissions made by her Queen's Counsel, had you not?

Det. Sgt Beattie: Yes, I had.

Mr McMILLAN: And surely that issue would have been apparent in your mind at that time, having just read the submissions made by her Queen's Counsel?

Det. Sgt Beattie: Well, I do not have a recollection of actually what particular submissions Ms Kelsey's counsel was making in respect of her petition before the QIRC, other than his summation of the respondents' false evidence.

Mr McMILLAN: What did you understand to be the consequence of arresting the mayor and 'a decent portion of The Fab7' before the QIRC proceedings resumed on 2 May?

Det. Sgt Beattie: They would be charged, to face a criminal court in the Magistrates.

Mr McMILLAN: And did you understand at this stage—that is, on 26 March 2019—that the team were considering charges that might result in the councillors being removed from office upon being charged?

Det. Sgt Beattie: I do not recall any discussions around whether or not the councillors may be removed from office, no.

Mr McMILLAN: At this stage, what charges were the team considering?

Det. Sgt Beattie: Misconduct in relation to public office, to the best of my recollection.

Mr McMILLAN: And were you given any advice by Ms McIntyre or anyone else that a charge of that kind would cause the councillors to be suspended from office by operation of the Local Government Act?

Det. Sgt Beattie: I do not recall whether I received any advice from Ms McIntyre or anyone else on that point, no.

Evidence of DSS Andrews¹⁵¹

Dr HORTON: ... So, why the arrest and charge before 2 May if not because the QIRC submissions are that day?

Det. Snr Sgt Andrews: I wanted to get it done before the submissions happened. Like, I wanted to work towards a date, a milestone that the team could work towards, and I wanted to have it done before that because after that, if we had not got it done, it could have dragged on and on and on and I did not want that to happen. I wanted to move the investigation along and I needed to have it done before then to give us the best opportunity to get the people we were investigating to cooperate.

Dr HORTON: Okay. So it is not an arbitrary date. You said before that you did want an arbitrary date, but the date you set is 2 May for the arrest and charge to happen before.

Det. Snr Sgt Andrews: Yes.

Dr HORTON: I see. And that date is not arbitrary. That date is the date for closing submissions in the QIRC; correct?

Det. Snr Sgt Andrews: That is the information we had, correct.

Dr HORTON: So, you wished the councillors—the charged councillors—and the mayor and the QIRC to know that these people are being charged before 2 May?

Det. Snr Sgt Andrews: I did not care whether the QIRC knew or not.

Dr HORTON: What did you know at this time about the effect of charging these people before 2 May? What did you think was the effect of what was going to happen?

Det. Snr Sgt Andrews: I know that the laws changed not long before that, that when councillors are charged with certain offences they would be suspended.

Dr HORTON: When did you first learn that?

Det. Snr Sgt Andrews: When the amendment was made by the government. I do not know when that was. It was not long before it.

Dr HORTON: Is it May 2018 that it might have occurred?

Det. Snr Sgt Andrews: I could not say with any precision, sorry.

Evidence of DS Francis¹⁵²

Dr HORTON: And that at that stage at least, submissions were scheduled to be heard by the QIRC on 2 May 2019?

Det. Sgt Francis: Yes, that is correct.

Dr HORTON: And that led you to think that it was important that the CCC acted quickly in terms of progressing the charges which had been under discussion on 30 January?

Det. Sgt Francis: That is not my recollection, I am sorry. My recollection and my contribution to this email chain is: there was a sense of urgency in getting what I needed to get done prior to any formal preferment of charges, and the sense of urgency was that the witnesses I was involved with at that time—I acknowledged that a couple of days previous to this date. I had only just obtained a statement from Sharon Kelsey, and that statement took months to obtain. I also similarly obtained a statement from mayor Power, and that statement took months to obtain. But I had yet to obtain further statements from other councillors that were going to be involved in these proceedings on 2 May. I was aware—because they had communicated to me—that they would be unavailable for my purposes leading up to and during that proceeding. So my reference to ‘time critical’ there is an acknowledgement, yes, we need to move and move quickly. I was also very much aware of the frustration that was being felt by my supervisors with how long some of these statements had taken. That was a responsibility that I was undertaking and

¹⁵¹ Public hearing transcript, Brisbane, 25 August 2021, p 62.

¹⁵² Public hearing transcript, Brisbane, 20 August 2021, pp 66-67.

under pressure to undertake—and, bearing in mind, too, that Andrea Millberry-Smith had yet to sign her statement.

Dr HORTON: What was the rush?

Det. Sgt Francis: All the stars were aligned, so to speak—if I can use that—in respect of moving forward with charges. If the witnesses were not in a position to further liaise with me, that might mean months of delays for the organisation and costs in moving forward to getting those charges. That is my recollection in respect to the email that you have referred to.

Dr HORTON: What was the need for the rush prior to 2 May especially?

Det. Sgt Francis: What was the need for the rush prior to 2 May? I have just explained that.

Dr HORTON: I see. That is your answer?

Det. Sgt Francis: That is my answer.

Dr HORTON: And 2 May had a special significance for the reasons you have just explained?

Det. Sgt Francis: That is the background to my response on this email, yes.

Evidence of Mr MacSporran QC¹⁵³

Dr HORTON: What were the circumstances of urgency, so far as you were aware?

Mr MacSporran: Look, I am not aware, actually, what that is a reference to. I know there was a general desire to wrap it up. My memory is that as at the meetings leading up to 26 April—and I think there was one on the 24th, from memory—there was a discussion about whether the charges should be laid at that point or later, and in particular later because of the pending QIRC proceedings. The considerations that were put to me—or I learnt before the meeting, I think, for discussion at the meeting of 24 April—were: should we go ahead with charging before the QIRC case had finalised and been published, as it were? I came into the meeting and said, ‘Look, I have thought about that. This is my view for your consideration. If we wait until after the QIRC case is finally decided and Kelsey wins that case, we will appear in the public eye—rightly or wrongly—to have not been game or willing to proceed until we had the backing of the QIRC.’

Alternatively, if you had waited until the QIRC had concluded and Kelsey had lost, we would undoubtedly have been accused, if we had gone ahead and charged, of some sort of reprisal ourselves for Kelsey failing in the commission but we had proceeded after that anyway to deal with the thing. The third consideration was obviously that there was no way of knowing—it turned out to be correct—how long that commission case was going to take to be concluded. This is April 2019 we are talking about and, of course, the commission case was ultimately decided in April this year, 2021, so two years later.

For all of the obvious reasons, my view was that if the evidence was sufficient, as it turned out to be when we assessed it in that period, 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.

The explanations offered for why the timing of the charges was not referable to the QIRC hearing being imminent, and it being a desire of those involved to bring to its attention the suspension of the defendants, the dissolution of the Logan City Council, their criminality and the fact that those with whom there had been a breakdown in trust had been removed were unpersuasive. The ‘explanations’ offer no explanation at all to act as the documents show they did.

On **24 April 2019**, Mr MacSporran QC annotated the Chairperson’s Cover Sheet with the words:

I agree with the recommendation to charge Smith x 3 and the 7 relevant Councillors with 1 count of fraud as suggested.¹⁵⁴

¹⁵³ Public hearing transcript, Brisbane, 17 August 2021, p 55.

¹⁵⁴ Volume 2, p 317, PCCC-1571.

On **26 April 2019**, DS Francis arrested and charged the Mayor and Logan City Councillors. He said in his evidence that each had refused to cooperate, despite being given an opportunity to do so. It would appear that the 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 Logan City Councillors; and again on the day upon which the Logan City Councillors attended the CCC and were charged. Cr 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.¹⁵⁵ The evidence suggests that it was on the day they attended to be charged that each of the Logan City Councillors and the Mayor were offered and refused 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.¹⁵⁶

There is no evidence that, any time before 26 April 2019, any of the 7 Logan City Councillors who were charged with fraud on that day, knowing it to be for that purpose, were offered an opportunity to take part in an interview and to avoid being charged on that basis.

The effect of the charging was as follows:

- 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': see sections 153(4), (5) and (6) and Schedule 1;
- 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 to be dissolved and an interim administrator appointed: *Local Government Act 2009* section 123.¹⁵⁷

5.6.1.1 The Administrator

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

She had previously been acting Director-General of that department and was well regarded. She held that position for some 11 months, up until 20 April 2020 when the new Logan City Council was declared following the quadrennial local government elections.

Mr MacSporran QC spoke by telephone with Ms O'Shea about Ms Kelsey's reinstatement. The evidence of Ms O'Shea and Mr MacSporran QC differs as to when the call occurred, which of them initiated that call, whether reinstatement was raised as a suggestion by Mr MacSporran QC or, to use the word Ms O'Shea used, it was 'advocated' for by him.¹⁵⁸ The date upon which the call occurred is not material for present purposes: it seems likely to be either **17 May 2019** (Mr MacSporran QC's evidence) or **29 May 2019** (Ms O'Shea's evidence). Ms O'Shea said Mr MacSporran QC initiated that telephone call. Mr MacSporran QC recalls it as being the other way around. The committee was invited by Counsel Assisting to prefer the evidence of Ms O'Shea on this point over that of Mr MacSporran QC, and does so. Ms O'Shea made a note of the conversation within a week of it. Mr MacSporran QC made no note. It is consistent with the background and context that Mr MacSporran QC would have sought Ms Kelsey's reinstatement at or about that time. It is consistent also with what occurred next.

On **30 May 2019**, police officers within the CCC engaged in email exchanges which were highly critical of Ms O'Shea. DS Francis appears to have initiated those exchanges. DS Francis in an email of that date

¹⁵⁵ Public hearing transcript, Brisbane, 26 August 2021, p 58.

¹⁵⁶ Public hearing transcript, Brisbane, 26 August 2021, p 52.

¹⁵⁷ Outline of Submissions by Counsel Assisting, 29 September 2021, p 24, para 106.

¹⁵⁸ Public hearing transcript, Brisbane, 26 August 2021, p 42.

says his comments followed a discussion with Ms Kelsey yesterday (i.e. 29 May 2019). DS Francis alleged that the 4 Logan City 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, notwithstanding she had not been 'dormant' in other activities as Administrator.¹⁵⁹ DS Francis made reference to 'strong views' expressed by the 4 Logan City Councillors (those who had not been 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 Logan City Councillors. The email went on to allege, in effect, that the Administrator was favouring the Mayor and charged Logan City Councillors and that Ms Kelsey believed her interim reinstatement was a matter for Ms O'Shea.

DS Francis alleged that Ms O'Shea now, 'remarkably' advocates for the charged Logan City Councillors, opposing Ms Kelsey's reinstatement.¹⁶⁰ 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' 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.

DSS Andrews considered it a matter of urgency that if these concerns were to be acted upon by the CCC then it 'needs to be done ASAP or QIRC could make another ruling without full facts or potentially on the basis of incorrect or dishonest information provided by the Administrator and/or the A/CEO'.¹⁶¹

DS Beattie considered the Administrator's claim that Ms Kelsey's return could be disruptive to be 'unjustifiable' and 'strongly echoed' DS Francis and DSS Andrews' comments. DS Beattie then wrote:

I would be supportive of the Chair taking our concerns to the Minister to petition the Minister to have the Administrator removed due to apparent bias which offends principle 1 (Integrity and Impartiality) of the Public Sector Ethics Act 1994 (Qld), not acting in the interests of the majority of LCC staff and LCC rate payers which offends principle 2 (promote the public interest), failing to meet with elected LCC councillors and meeting only with the Acting CEO and the former Mayor's advisor and failing to withdraw LCC as a party to the QIRC proceedings offends principle 3 (supporting the system of government) and not meeting with Ms Kelsey and reportedly offering the four remaining councillors a contract with strict gagging provisions offends principle 4 (accountability and transparency).

Failing that why not apply to the Supreme Court to have the Administrator removed?¹⁶²

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 could not recall taking any active role, did in fact do so in an email of **30 May 2019** at 2:55pm. That email stated:

Mark,

Mark and Andrew have been following the QIRC hearings with interest, in particular the appointment of the new Administrator and how her appointment to LCC would affect the sacking of Kelsey. The information provided below paints a fairly poor picture with serious detriment to Kelsey and four councillors who have not been charged, when one would believe they should be supported by the administrator over the charged councillors.

It also appears that the administrator is being groomed by Cowan and Trinca to continue support for those criminal charged [sic] and will not support the return of Kelsey to her rightful position. Whilst the councillors have all been gagged they are in fear of losing their positions all together.

¹⁵⁹ Volume 1, p 591, OpFront-TermsOfReference-07615, PCCC-TP0102.

¹⁶⁰ Volume 1, p 592, OpFront-TermsOfReference-07615, PCCC-TP0102.

¹⁶¹ Volume 1, p 591, OpFront-TermsOfReference-07615, PCCC-TP0102.

¹⁶² Volume 1, p 590, OpFront-TermsOfReference-07615, PCCC-TP0102.

In relation to the budget matters, it would appear that the pre-determined budget by the charged mayor and councillors, has continued to go through council without change and will heavily favour the areas of the sacked councillors.

I too am at a loss as to what we can do as an agency, thus this is being forwarded for consideration as to what action if any we can take.

If there is anything else we can add or provide around this matter we are happy to assist however it is respectively requested this matter be referred to the Senior Executive Officer Corruption, Mr Alsbury and the Chairman for their information.¹⁶³

Mr Mark Reid, in his capacity as CCC 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 CCC Chairperson for his thoughts.

Ultimately, Mr Caughlin and Mr Alsbury prevented the matter being taken further. Mr Caughlin wrote to Mr Reid and Mr Alsbury as follows:

... I think each of the steps taken by the administrator are capable of being seen as an effort to maintain the status quo with respect to the contentious matters within council.

Obviously we need to bear in mind that the administrator's role is to run the council, not to favour the views of one side or another, and certainly not to protect the interests of either the four councillors or Ms Kelsey (or the charged councillors).¹⁶⁴

Mr Alsbury agreed, writing to Mr Caughlin:

Agreed. We are not going to help anyone by going off half-cocked.¹⁶⁵

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 Logan City Councillors and the budget allocations were not ones which in her view showed any bias in favour of particular divisions.

5.7 The charges are dismissed

The CCC sent a partial brief on the charges against the Mayor and the 7 Logan City Councillors to the DPP on **28 June 2019**, an update on **5 August 2019** and the full brief on **11 September 2019**. Mr MacSporran QC said he took 'comfort' from Mr Byrne QC (the DPP at the time) not having any reservations about running the case.¹⁶⁶ He said that he and Mr Alsbury went to see Mr Byrne QC (as a courtesy) and discussed with him in a very summary way what the charges were and the basis for them. He said that Mr Byrne QC did not ever say anything about the appropriateness, or inappropriateness, of the charges.¹⁶⁷

The present DPP, Mr Carl Heaton QC, said this in oral evidence (noting that he was not privy to the meeting of which Mr MacSporran QC spoke):

Dr HORTON: I think you might be saying as a general proposition whatever comfort one obtains from the DPP accepting, in effect, the brief at the time it arrives, it is comfort which has to be understood against the background that that is not ordinarily the time at which some detailed assessment is automatically to be undertaken?

Mr Heaton: Absolutely. And, in fact, it seems that a detailed analysis of this matter was not done until months later.

¹⁶³ Public hearing transcript, Brisbane, 26 August 2021, p 46.

¹⁶⁴ Volume 1, p 589, OpFront-TermsOfReference-07615, PCCC-TP0102.

¹⁶⁵ Volume 1, p 589, OpFront-TermsOfReference-07615, PCCC-TP0102.

¹⁶⁶ Public hearing transcript, Brisbane, 17 August 2021, p 63.

¹⁶⁷ Public hearing transcript, Brisbane, 17 August 2021, p 59.

...

And in anticipation of the committal coming up and the directions hearings that took place beforehand and the like—the very ordinary course of the life of a matter through the system.¹⁶⁸

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 Logan City Councillors to why the fraud charges ought not proceed.

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.¹⁶⁹ The letter stated that '[t]he CCC considers there are reasonable prospects of securing convictions against the defendants' and requested a meeting with Mr Heaton QC before any decision was made.

On **6 April 2021**, Mr Heaton QC, prepared a comprehensive and balanced memorandum (with the assistance of others) foreshadowing a decision to discontinue the charges of fraud against the Mayor and 7 Logan City Councillors on the grounds that 'there are insufficient prospects of success to justify continuing further'.¹⁷⁰ That memorandum, relevantly included, amongst other things:

40. In my view, whilst the evidence might give rise to a suspicion that it was the PID that was the substantial reason, the evidence is insufficient to conclude, to the requisite standard, that it was in fact, the PID that was the substantial reason for the vote to terminate. In short, the evidence is insufficient to exclude that any of the many other reasons that had from time to time been expressed by the individual defendants, were not genuinely held by them at the time of the vote or that they were not the operative reason, individually or in combination, for the individual defendant's vote to terminate.

41. I have concluded that the state of the evidence is such that there are no reasonable prospects of success and that the case should not proceed further. I thank the prosecution team for their obvious effort and consideration of this complex case. Their advice and analysis of the considerable volumes of evidence has been invaluable to my consideration of the issues raised here and assisted to identify the critical issues.

42. The Crown should discontinue the fraud offence in relation to all defendants. In my view, there are no reasonable prospect of conviction before a reasonable jury.¹⁷¹

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.¹⁷²

On 14 April 2021, Mr Green told the Magistrate:

... after a thorough review of the matter the Crown has determined that there is insufficient evidence to continue with the fraud charge where all eight are charged and so therefore will be offering no evidence on that charge and ask for ... them to be discharged.¹⁷³

The Magistrate said in response:

I will be careful with my language ... but from what I saw and heard in those two weeks in November I think that's a—that a proper decision.¹⁷⁴

¹⁶⁸ Public hearing transcript, Brisbane, 3 September 2021, p 3.

¹⁶⁹ Volume 2, p 383, PCCC-1619.

¹⁷⁰ Volume 2, p 403, PCCC-1634.

¹⁷¹ Volume 2, p 411, PCCC-1634.

¹⁷² Submission 25, p 15, para 83.

¹⁷³ Public hearing transcript, Brisbane, 3 September 2021, p 9.

¹⁷⁴ Committal hearing transcript, 14 April 2021, day 1, pp 1-4.

6 The Logan City Council investigation

This chapter explores the CCC's actions in respect of its investigation of former Logan City Councillors, including:

- the CCC's role in the PID
- general assistance and dealings with Ms Kelsey
- the CCC's response to a QIRC notice to produce
- the CCC's delivery of documents to Logan City Council
- the charging of the former councillors with fraud
- the referral of the matter to the DPP

6.1 Corruption function of the Crime and Corruption Commission

The purposes, functions and powers of the CCC are provided for in the CC Act.

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'.¹⁷⁵

The CCC's corruption functions are provided by section 33 of the CC Act which states:

- (1) The commission has the following functions for corruption (the **corruption functions**)—
 - (a) to raise standards of integrity and conduct in units of public administration;
 - (b) to ensure a complaint about, or information or matter involving, corruption is dealt with in an appropriate way, having regard to the principles set out in section 34.
- (2) The commission's **corruption functions** also include—
 - (a) investigating and otherwise dealing with—
 - (i) conduct liable to allow, encourage or cause corrupt conduct; and
 - (ii) conduct connected with corrupt conduct; and
 - (b) investigating whether corrupt conduct or conduct mentioned in paragraph (a)(i) or (ii) may have happened, may be happening or may happen.¹⁷⁶

The CCC can perform its corruption functions by doing one or more of the things listed in section 35(1) of the CC Act. This includes dealing with complaints about corrupt conduct, investigating and otherwise dealing with corruption, conducting and monitoring investigations, and gathering evidence for the prosecution of persons for offences.

The CCC is also required to 'help units of public administration to deal effectively and appropriately with corruption by increasing their capacity to do so'.¹⁷⁷

In performing its corruption functions, the CCC is to apply the principles of cooperation, capacity building, devolution and public interest.¹⁷⁸

¹⁷⁵ CC Act, s 4(1)(b).

¹⁷⁶ CC Act, s 33.

¹⁷⁷ CC Act, s 5(3)(b).

¹⁷⁸ CC Act, s 34.

6.2 Role of the Crime and Corruption Commission in relation to Public Interest Disclosures

A public interest disclosure (PID) is 'a disclosure about wrongdoing in the public sector that serves the public interest'.¹⁷⁹ To be considered a PID under Queensland's legislative framework for public interest disclosures, it must be:

- public interest information about serious wrongdoing or danger
- an appropriate disclosure
- made to a proper authority.¹⁸⁰

The PID Act provides the governing framework for PIDs in Queensland. The main objects of the PID Act are:

- (a) to promote the public interest by facilitating public interest disclosures of wrongdoing in the public sector; and
- (b) to ensure that public interest disclosures are properly assessed and, when appropriate, properly investigated and dealt with; and
- (c) to ensure that appropriate consideration is given to the interests of persons who are the subject of a public interest disclosure; and
- (d) to afford protection from reprisals to persons making public interest disclosures.¹⁸¹

Section 41 of the PID Act makes it an offence to take a reprisal.¹⁸² Reprisals are defined under section 40 of the PID Act, which provides:

40 Reprisal and grounds for reprisal

- (1) A person must not cause, or attempt or conspire to cause, detriment to another person because, or in the belief that—
 - (a) the other person or someone else has made, or intends to make, a public interest disclosure; or
 - (b) the other person or someone else is, has been, or intends to be, involved in a proceeding under the Act against any person.
- (2) An attempt to cause detriment includes an attempt to induce a person to cause detriment.
- (3) A contravention of subsection (1) is a reprisal or the taking of a reprisal.
- (4) A ground mentioned in subsection (1) as the ground for a reprisal is the unlawful ground for the reprisal.
- (5) For the contravention mentioned in subsection (3) to happen, it is sufficient if the unlawful ground is a substantial ground for the act or omission that is the reprisal, even if there is another ground for the act or omission.

¹⁷⁹ Queensland Ombudsman, What is a public interest disclosure?, <https://www.ombudsman.qld.gov.au/improve-public-administration/public-interest-disclosures/what-is-a-public-interest-disclosure>.

¹⁸⁰ Queensland Ombudsman, What is a public interest disclosure?, <https://www.ombudsman.qld.gov.au/improve-public-administration/public-interest-disclosures/what-is-a-public-interest-disclosure>.

¹⁸¹ PID Act, s 3.

¹⁸² PID Act, s 41.

The PID Act provides that a public officer is guilty of misconduct if the officer contravenes section 41 (Offence of taking reprisal), section 65 (Preservation of confidentiality) or section 66 (False or misleading information).

6.2.1 Crime and Corruption Commission powers and functions in regards to Public Interest Disclosures

The CCC has the power to investigate a contravention (or alleged or suspected contravention) of sections 41, 65 and/or 66 of the PID Act if:

- (a) the public officer is a member of the police service; or
- (b) the contravention is corrupt conduct by a person holding an appointment in a unit of public administration within the meaning of the *Crime and Corruption Act 2001*.¹⁸³

Pursuant to sections 48(2) and 49(2) of the PID Act, the CCC is able to apply for an injunction about a reprisal to the QIRC and the Supreme Court, with the consent of the employee.

The general importance of PIDs to the operation of the CCC was outlined in the CCC's submission to the inquiry.¹⁸⁴

The CC Act requires a public official who reasonably suspects that a complaint, or information or matter involves, or may involve, corrupt conduct to notify the CCC of the complaint.¹⁸⁵

The committee acknowledges the importance of the 'legislative duty' of public officers to notify the CCC of reasonable suspicion of corrupt conduct and notes the CCC statement that 'complaints that come from within organisations are a very important way for corruption to be uncovered'.¹⁸⁶

6.2.2 Crime and Corruption Commission submissions concerning law relating to protection of disclosers

Provisions of the PID Act aim to protect whistleblowers, and sections 48 and 49 of the PID Act provide the CCC with a specific and limited ability to seek injunctive relief in the QIRC or Supreme Court, to protect disclosers from reprisals.

The CCC submitted that it has 'an interest in assisting and protecting those people who have helped it to carry out its statutory functions, most notably public interest disclosers'.¹⁸⁷ It submitted:

The CC Act protects persons who assist the Commission in performing its functions and gives to the Commission broad powers to assist and protect them from victimisation or reprisal.¹⁸⁸

...

The victimisation of a person because they have helped the Commission in the performance of its functions is an offence. Under section 212 of the CC Act, a person must not

- (a.) prejudice, or threaten to prejudice, the safety or career of any person; or
- (b.) intimidate or harass, or threaten to intimidate or harass, any person; or
- (c.) do an act that is, or is likely to be, to the detriment of any person,

¹⁸³ PID Act, s 67(2)(b).

¹⁸⁴ Submission 25, p 2, para 6.

¹⁸⁵ CC Act, s 38.

¹⁸⁶ Mr Paul Alsbury, public hearing transcript, Brisbane, 18 August 2021, p 23.

¹⁸⁷ Submission 25, p 19, para 109.

¹⁸⁸ Submission 25, p 19, para 109.

because the person, or someone else, gave evidence to, or helped, the commission in the performance of its functions.¹⁸⁹

The CCC suggested it had a general obligation to 'take protective action for a PID',¹⁹⁰ with Mr Paul Alsbury, explaining:

In relation to public interest disclosures, the legislation had indicated that the Crime and Corruption Commission potentially had an interest in that. The interest is particularly strong when it relates to a public officer under our legislation advising or notifying the commission of a reasonable suspicion of corruption. I think that makes it clear that the commission has a role to play in protecting whistleblowers, for want of a better term. It is certainly consistent with one of the corruption functions of contributing to the integrity of the public sector.¹⁹¹

6.2.2.1 The public interest disclosure and the Crime and Corruption Commission in the Logan City Council investigation

The CCC submitted 'the QIRC Proceeding was not a purely industrial or civil matter about which the Commission did not have an interest' and that the CCC 'was under a statutory obligation to consider whether and to the extent it intervened on Ms Kelsey's behalf'.¹⁹²

The CCC said it has 'specific powers in the PID Act to intervene in a person's interest and with the person's consent to protect them from reprisal actions'.¹⁹³ The CCC noted Ms Kelsey 'was a 'public officer' under the PID Act and therefore 'was entitled to the protection afforded by section 212 of the CC Act'.¹⁹⁴

The CCC further submitted:

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.¹⁹⁵

The CCC did not, however, bring an action for injunctive relief.¹⁹⁶

At a private meeting with the committee in February 2019, Mr MacSporran QC told the committee the CCC had 'a right to apply to be joined' to the QIRC proceeding, but the CCC:

...decided that, because of the fact that we were investigating serious corrupt conduct independently of those proceedings, in the public interest it would not be appropriate for us to join those proceedings, but we have done what we can to make sure that Ms Kelsey is not otherwise disadvantaged.¹⁹⁷

The CCC submitted that it ultimately decided not to commence QIRC proceedings 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)'.¹⁹⁸

¹⁸⁹ Submission 25, pp 19-20, paras 109-110.

¹⁹⁰ Mr Alan MacSporran QC, public hearing transcript, Brisbane, 17 August 2021, p 14.

¹⁹¹ Public hearing transcript, Brisbane, 18 August 2021, p 22.

¹⁹² Submission 25, p 17, para 93.

¹⁹³ Submission 25, p 17, para 93.

¹⁹⁴ Submission 25, p 20, para 111.

¹⁹⁵ CCC, Outline of submissions, 15 October 2021, p 8, para 36.

¹⁹⁶ Mr Alan MacSporran QC, public hearing transcript, Brisbane, 17 August 2021, p 36.

¹⁹⁷ Private meeting transcript, Brisbane, 15 February 2019, p 6.

¹⁹⁸ CCC, Outline of submissions, 15 October 2021, p 9, para 40.

The extent of the role of the CCC regarding PIDs was challenged by the submission of former Logan City Councillors to this inquiry, who submitted that it should be:

...a limited, purely facilitative function, designed to provide relief against threatened retaliation' and 'does not provide for the CCC to act for the person, or to have a role in substantive industrial proceedings, or to provide funding or other supports in that regard.¹⁹⁹

6.3 General assistance and dealings with Ms Kelsey

The level of assistance provided by the CCC to Ms Kelsey was examined by the committee, following suggestions of inappropriate intervention²⁰⁰ and conduct which may amount to 'partial and unfair conduct' and bias.²⁰¹

The LGAQ submitted:

...the actions of the CCC in this matter constitute extraordinary, partial and unfair conduct on its behalf. Moreover, that its behaviour reeks of confirmation bias, prejudice and lack of justice and as such is entirely contrary to section 57 of the Crime and Misconduct Act.²⁰²

Anderson Legal acting on behalf of Jennie Breene, submitted 'There is clear evidence of significant, personal involvement by the CCC Chairperson in the investigation prompted by Ms Kelsey'.²⁰³ Anderson Legal referred to evidence provided by the CCC Executive Director (Corruption), that he could not 'recall any other occasion' in which the CCC Chairperson had met with a complainant in a case which was being investigated where there was a real prospect of charges being laid or charges having been laid.²⁰⁴

Former Logan City Councillors shared similar concerns:

The extent and nature of the close relationship and co-operation between the CCC and Ms Kelsey and her lawyers in the course of the investigation and industrial proceedings was such that a fair-minded lay observer with knowledge of the objective facts might entertain a reasonable apprehension that the officers of the CCC responsible for making investigative and prosecutorial decisions in the matter might not bring an impartial and unprejudiced mind to their resolution.²⁰⁵

When asked about its conduct during the investigation, the CCC acknowledged that it had acted in a way to support and assist Ms Kelsey.²⁰⁶ The CCC Chairperson had told the then Director, Legal Services, that 'we should do whatever we legitimately can to support Kelsey'.²⁰⁷

The reasons provided for the level of assistance by the CCC centred on Ms Kelsey's status as a discloser under the PID Act.

In this regard, the CCC submitted:

That the position in relation to the QIRC Proceeding 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

¹⁹⁹ Submission 27, p 24, para 113.

²⁰⁰ Submission 27, p 17, para 75.

²⁰¹ LGAQ, supplementary complaint, 26 May 2021, p 1.

²⁰² LGAQ, supplementary complaint, 26 May 2021, p 1.

²⁰³ Submission 26, p 15, para 74.

²⁰⁴ Submission 26, p 16, para 75; committal hearing transcript, day 8, p 8-7, lines 6-11.

²⁰⁵ Submission 27, pp 27-28, para 137.

²⁰⁶ Mr Alan MacSporran QC, public hearing transcript, Brisbane, 17 August 2021, p 18.

²⁰⁷ Volume 1, p 633, OpFront-TermsOfReference-08848.

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.²⁰⁸

Mr Alsbury further explained to the committee:

The support for Ms Kelsey was not connected to the criminal investigation or the criminal offences. It was because of that obligation she had to notify us of suspected corrupt conduct and also her status as a public interest discloser that we felt, given our corruption jurisdiction, that we should support her in some way.²⁰⁹

Throughout the CCC's internal documentation about the investigation, and during the public hearings for the inquiry, CCC officers expressed sympathy for Ms Kelsey's position.²¹⁰

The CCC Chairperson, openly expressed sympathy for Ms Kelsey's position:

She was a PID and we had then—and have now and ongoing—a statutory responsibility to provide what assistance we could to a PID. I carefully considered, after getting advice internally, about exactly what we would do. A lot of factors came into play. She had no funding. She was funding the action herself. She was up against the mayor and councillors who, as you have correctly noted, were funded entirely by insurance. It was not a level playing field.

No matter what you thought of her, she was a PID. There is a tendency sometimes to forget how important it is in the public sector generally—and I am sure in the private sector as well, frankly—to do whatever can be done to protect PIDs. If you are not seen to be protecting PIDs, you undermine the entire ability to have corruption reported and properly dealt with by agencies such as ourselves...

That is why, whilst we could have ignored Ms Kelsey—and I would be sitting here now if we had ignored her and there would be an inquiry into why I was not taking some action to protect someone who was a public interest discloser. We did not join the action through sympathy for her and I have termed it one of the hardest decisions I have ever made in this role not to join in her action because I did have sympathy for her in her situation. But we decided not to do that but to do what we could whilst we did what we should do, more importantly, which was to pursue the corrupt conduct investigation.²¹¹

Sympathy with Ms Kelsey's position was apparent throughout internal documents prepared by DS Francis, including in a memorandum titled 'Sharon Kelsey Public Interest Disclosure'.²¹²

DS Francis stated:

The empathy that I had with Ms Kelsey is not dissimilar to the empathy that I have with any of my witnesses. It is part of my methodologies. When I am purposed to obtain a witness statement from a victim—and remembering that my history is in the investigation of sexual offences against children—I journey with a witness through the committal process and the court process, and that empathy and trust afforded is necessary to then guide a witness through that process, to relate to a witness in order to get a statement and a statement that serves the court purposes.²¹³

...

I think I would have to lack self-awareness to not concede that I was influenced by a sense of feeling and my observations over a long-term investigation, as this is.²¹⁴

²⁰⁸ Submission 25, p 29, para 151.

²⁰⁹ Public hearing transcript, Brisbane, 18 August 2021, p 55.

²¹⁰ Mr Rob Hutchings, public hearing transcript, Brisbane, 18 August 2021, p 62; Mr Alan MacSporran QC, public hearing transcript, Brisbane, 17 August 2021, p 13.

²¹¹ Public hearing transcript, Brisbane, 17 August 2021, p 13.

²¹² Volume 2, p 77, PCCC-1536; Volume 2, p 257, PCCC-1569.

²¹³ Public hearing transcript, Brisbane, 20 August 2021, p 65.

²¹⁴ Public hearing transcript, Brisbane, 25 August 2021, p 3.

The committee was told on numerous occasions by numerous CCC witnesses that actions were taken by the CCC in light of an imbalance which needed to be corrected, as it was not a 'level playing field' between Ms Kelsey and the former Logan City Councillors.

Mr Hutchings told the committee that he believed there was an imbalance which needed to be corrected, and that the 'playing field between Ms Kelsey and the council was not level'.²¹⁵

Mr Hutchings went further to say that the CCC 'felt strongly about trying to level that playing field',²¹⁶ and noted that the CCC Chairperson had conveyed to him that 'there was a distinctly unlevel playing field and that was really what we were trying to redress'.²¹⁷ When asked about the imbalance, Mr Hutchings explained that he had a concern that 'having had some exposure to the state indemnity regime, Ms Kelsey was at a significant disadvantage if the councillors were funded and she was not'.²¹⁸

During the public hearing it became apparent that, in Mr Hutchings' view, the action taken to address the imbalance extended to dissemination of documents to the QIRC 'with a view to balancing the competing interests for and against disclosure'. Mr Hutchings contended however, that it was 'always our intention to assist her in any way we could within the bounds of the law and acting fairly and impartially'.²¹⁹

6.3.1 Crime and Corruption Commission's view of its actions

When questioned about the appropriateness of the support provided to Ms Kelsey, CCC witnesses denied the CCC had gone too far in assisting Ms Kelsey and rejected any allegations it had acted in a partial or biased manner.²²⁰

Mr Alsbury suggested the CCC was measured in its approach, and stated 'In fact, some might say we did not do enough for Ms Kelsey'.²²¹

Mr Hutchings expressed the view that 'all actions taken by the commission in this matter were entirely appropriate given the suspicion that a reprisal was taking place against Ms Kelsey'.²²² Mr Hutchings noted Ms Kelsey had made a PID and retained lawyers, 'funding it out of her own pocket' and stated there 'is absolutely no reason we should not have involved ourselves in this—and in fact, if we had not, who would have?'.²²³

The CCC Chairperson disagreed that the CCC had done more than seek to assist Ms Kelsey in a measured way.²²⁴

6.3.2 Crime and Corruption Commission Chairperson's meetings with Ms Kelsey

While there is evidence, referred to above, that the CCC Chairperson had not previously or on another occasion, met personally with a complainant in any other matter where charges may be laid or had

²¹⁵ Public hearing transcript, Brisbane, 18 August 2021, p 63.

²¹⁶ Public hearing transcript, Brisbane, 18 August 2021, p 63.

²¹⁷ Public hearing transcript, Brisbane, 19 August 2021, p 43.

²¹⁸ Public hearing transcript, Brisbane, 19 August 2021, p 32.

²¹⁹ Public hearing transcript, Brisbane, 18 August 2021, p 70.

²²⁰ Mr Paul Alsbury, public hearing transcript, Brisbane, 18 August 2021, pp 54-55.

²²¹ Public hearing transcript, Brisbane, 18 August 2021, p 55.

²²² Public hearing transcript, Brisbane, 19 August 2021, p 21.

²²³ Public hearing transcript, Brisbane, 19 August 2021, p 32.

²²⁴ Public hearing transcript, Brisbane, 18 August 2021, p 34; public hearing transcript, Brisbane, 7 September 2021, p 8.

been laid,²²⁵ there is evidence of Ms Kelsey meeting with the CCC Chairperson personally, on three occasions (11 September 2017, 15 February 2018 and 6 August 2018).²²⁶

When asked about those meetings Mr MacSporran QC advised:

None of us knew her until she came to introduce herself in person to me before she made her PID. I saw nothing unusual in that. I regularly meet people in the local government sector particularly. She was a new CEO. It is a very important position. She contacted my office and wanted to meet, just to introduce herself. That is how I met her. No-one to my knowledge—in fact, I am sure no-one—in my organisation knew her in any capacity. She was with IBAC in Victoria, which is my equivalent organisation in Victoria. I am not sure when she was there or for how long but no-one from my office knew her there or at our office.²²⁷

Two of these meetings occurred after Ms Kelsey's PID was made, and Operation Front had commenced.

6.3.3 Crime and Corruption Commission's support of Kelsey and consideration of other evidence

During the inquiry the committee examined concerns about the CCC not adequately considering other evidence (evidence adverse to Ms Kelsey), including evidence of the former Logan City Councillors that went to their reasons for voting for Ms Kelsey's termination not related to the PID.

Concerns were raised that the CCC had not performed due diligence in respect to evidence of the former Logan City Councillors,²²⁸ and it was suggested this was evidence of 'bias, partiality and unfairness'.²²⁹

The LGAQ's supplementary complaint noted that the former Logan City Councillors had given evidence in the QIRC proceedings which was under oath and subjected to cross-examination, and stated that 'one would have thought that the CCC would have taken enormous and detailed interest in this evidence, given under oath, in the QIRC proceeding'.²³⁰ The LGAQ alleged that the CCC had ignored the evidence and 'elected to have regard to summaries of this evidence, prepared by the lawyers for Ms Kelsey'²³¹ only rather than the other parties. It was the LGAQ's opinion that if the CCC had reviewed the summary of evidence and closing submissions of the other parties to the QIRC proceeding:

... it would have clearly become appraised of an alternative view of the conduct that occurred prior to, and on the day of, Ms Kelsey's termination of employment - the very same conduct that was relevant to the laying of the fraud charge.²³²

Anderson Legal, on behalf of Ms Jennie Breene (former Logan City Councillor), submitted:

Beyond ignoring information or evidence that contradicted its case, the assumption of the CCC appears to be that it had no function in investigating matters that centrally concerned the credibility and reliability of its case.

...

²²⁵ Submission 26, p 16, para 75; committal hearing transcript, day 8, p 8-7, lines 6-11.

²²⁶ CCC, correspondence, 20 July 2021; CCC, correspondence, 2 September 2021, Chronology, items 11, 82 and 103.

²²⁷ Public hearing transcript, Brisbane, 14 May 2021, p 8.

²²⁸ Submission 26, p 15, para 73; LGAQ supplementary complaint, 26 May 2021, pp 4-5.

²²⁹ LGAQ supplementary complaint, 26 May 2021, p 5.

²³⁰ LGAQ supplementary complaint, 26 May 2021, p 4.

²³¹ LGAQ supplementary complaint, 26 May 2021, p 4.

²³² LGAQ supplementary complaint, 26 May 2021, p 5.

It is open to conclude that the CCC both ignored evidence that contradicted its allegations or made inadequate investigations into a range of issues that were central to the credibility and reliability of its witnesses and claims they made.²³³

As an example of the alleged shortcomings of the CCC, Anderson Legal referred to Ms Breene's circumstances, in which she expressed her preference for another candidate as CEO of the Logan City Council at the time of the appointment vote, and stated her opinion that Ms Kelsey was not suitable for the role and her reasons for her opinion, well before the PID was made by Ms Kelsey.²³⁴ Ms Breene had testified at the committal proceeding that she had voted against Ms Kelsey's appointment in an informal 'straw poll' at a meeting of the Logan City Council on about 23 May 2017. Anderson Legal submitted that this showed 'the CCC was never in possession of any credible, admissible evidence that could overcome the obvious, clear and compelling innocent explanation Ms Breene had for voting the way she did'.²³⁵

When asked if CCC officers had attended the QIRC hearings or read transcripts of the proceedings or submissions made, the CCC Chairperson said he did 'not think so'. Mr MacSporran QC stated he did not agree that had the CCC reviewed the transcripts or attended the QIRC hearings this may have raised important considerations about the credit of the witnesses and weighed upon the public interest on the decision to charge.²³⁶

DS Beattie agreed he had read the affidavit and submissions of Ms Kelsey submitted to the QIRC but only 3 affidavits of the former Logan City Councillors (and respondents to the QIRC) in preparation for coercive hearings,²³⁷ and did not consider it important that someone in Operation Front read and consider the final submissions made by the other parties to the QIRC proceedings.²³⁸

Similarly, Mr Alsbury agreed that while he had access to the QIRC submissions made on behalf of Ms Kelsey, he did not consider looking at other submissions from the other parties to the proceeding.²³⁹ When asked if he ought to have done this to gain a complete picture, Mr Alsbury disagreed and stated he had looked at Ms Kelsey's submissions 'to look at the explanations that the councillors had given for terminating Ms Kelsey and how they performed when those reasons were examined during the QIRC proceedings'.²⁴⁰ He considered those submissions to be comprehensive and accurate when compared to the transcripts.²⁴¹

When asked about evidence given by Ms Kelsey in the QIRC proceedings (in which the presiding QIRC member commented on the credibility of Ms Kelsey as a witness), Mr MacSporran QC acknowledged while he would have had access to the QIRC material (including transcripts or submissions), he did not consider her credibility to be a 'determining factor'.²⁴²

²³³ Submission 26, p 15, paras 71, 73.

²³⁴ Submission 26, p 8, para 39.

²³⁵ Submission 26, pp 8, 11, paras 39, 45.

²³⁶ Public hearing transcript, Brisbane, 17 August 2021, p 54.

²³⁷ Public hearing transcript, Brisbane, 26 August 2021, p 21.

²³⁸ Public hearing transcript, Brisbane, 26 August 2021, p 7.

²³⁹ Public hearing transcript, Brisbane, 18 August 2021, p 48.

²⁴⁰ Public hearing transcript, Brisbane, 18 August 2021, p 48.

²⁴¹ Public hearing transcript, Brisbane, 18 August 2021, p 48.

²⁴² Public hearing transcript, Brisbane, 17 August 2021, pp 62-63.

6.3.4 Interactions with MinterEllison

The CCC had regular dealings with Ms Kelsey's legal representatives (in particular, Mr Williams, a partner at MinterEllison), in the course of Ms Kelsey's QIRC proceedings.²⁴³ Mr Hutchings told the committee he had 'been asked by the chair to specifically engage with Ms Kelsey's lawyer because of the attitude the commission had in respect of Ms Kelsey's circumstances'.²⁴⁴

Documents provided by the CCC under summons included a transcript of a teleconference between officers of the CCC and MinterEllison on 31 May 2018.²⁴⁵ In that discussion, Mr Williams of MinterEllison suggested the CCC and MinterEllison shared a 'common interest' in protecting Ms Kelsey and stated 'I thought that it was time for us to have a ... discussion just to see where ... our interests could meet'.²⁴⁶ Mr Hutchings told Mr Williams that the CCC was 'very motivated to assist' Ms Kelsey, and provided this rationale:

...I think it's important at the same time to understand that the organisation is very motivated to assist Sharon, ah not just because of her personal circumstances and the importance of PIDs to the CCC, but the broader question of um the engagement of CEOs in local authorities generally and the, what seems to us to be somewhat prevalent practice of CEOs' contracts being um run and then – and then burned early, often with great um significant financial consequences to the public purse.²⁴⁷

McInnes Wilson, on behalf of the former Logan City Councillors, referred to file notes of this discussion in their submission to the inquiry, expressing the following opinion:

... that the CCC saw itself as having a "common interest" with Ms Kelsey's lawyer in protecting her should be of grave concern. Ms Kelsey was taking private litigation in her own financial interests. The CCC was (presumably) investigating the offence it ultimately charged the Former Councillors with. Its closeness to Ms Kelsey and its desire to "protect" her does not demonstrate an objective investigation – quite the opposite.²⁴⁸

McInnes Wilson also referred to these further notes from the meeting, suggesting these 'reveal an attempt to orchestrate a scheme to clothe the otherwise impermissible dissemination of coercively obtained material to a party for the purposes of use in a civil proceeding with legitimacy':

Intervene in the QIRC matter – not aware of [U/I] this could happen

Provide info about matter to QIRC directly

Provide info to ME to provide to QIRC

Best course would be [U/I] summons [U/I] info have and provide.²⁴⁹

The teleconference included discussion between Mr Hutchings and Mr Williams about 'what powers or discretions' the CCC could exercise to 'assist', and reference to a letter from MinterEllison to the CCC on 12 April 2018.²⁵⁰ That letter 'seeks the assistance of the CCC and requests that the CCC utilise its powers' to:

1. Intervene in the present QIRC matter and provide evidence in that matter on its own behalf.
2. Alternatively, provide relevant information about the QIRC matter to the QIRC directly so that the QIRC may consider that information in determining the matter.

²⁴³ Mr Rob Hutchings, public hearing transcript, Brisbane, 18 August 2021, p 65.

²⁴⁴ Public hearing transcript, Brisbane, 18 August 2021, p 66.

²⁴⁵ Volume 3, supplement 3, p 3/13, PCCC-3552.

²⁴⁶ Volume 3, supplement 3, p 3/13, PCCC-3552.

²⁴⁷ Volume 3, supplement 3, p 5/13, PCCC-3552.

²⁴⁸ Submission 27, pp 8-9, para 42.

²⁴⁹ Submission 27, p 9, paras 43-44.

²⁵⁰ Volume 3, supplement 3, p 5/13, PCCC-3552.

3. Provide us, as her lawyers, with information held by the CCC that may assist her in continuing her claim so that this information can be provided to the QIRC during the matter. Ms Kelsey can seek the issuance of a summons, an attendance notice and/or notice of non-party disclosure if that is required.²⁵¹

Mr Hutchings discussed those options with Mr Williams but advised he saw the discussion as ‘more of an exercise of us listening to what you particularly need, rather than us being able to tell you exactly what we have’.²⁵² Mr Hutchings reiterated that the CCC was ‘willing to help’ but acknowledged the CCC ‘will obviously always comply with a um condition, a QIRC ah summons’. Mr Hutchings told Mr Williams:

... if we indicate that we have material we can give you immediately then um if you have um issues about – about the issue of a summons, per se, whether that might, you know, be relevant to you, then that might be something – something you want to consider.²⁵³

Mr Hutchings concluded by advising MinterEllison that ‘we will now go away and um contemplate what the – the most appropriate course for us might be and we’ll be in touch, Dan’.²⁵⁴

Mr Hutchings did not agree with the proposition that he was being persuaded by Ms Kelsey’s legal representatives to assist Ms Kelsey in a way that was becoming improper.²⁵⁵

Further consideration of the CCC’s assistance to Ms Kelsey regarding disclosure of documents, is explored at section 5.4 of this report, Queensland Industrial Relations Commission issues a Notice of Attendance to Produce.

6.3.5 Advocacy for financial assistance to Ms Kelsey for legal proceedings

On 6 August 2018 the CCC Chairperson met with the then Minister for Local Government to discuss Ms Kelsey’s financial position and the status of the QIRC litigation.²⁵⁶ This was followed by a letter from the CCC Chairperson to the Minister requesting consideration of an *ex gratia* payment to Ms Kelsey.²⁵⁷ In the letter to the Minister the CCC outlined a number of reasons it believed to be relevant. This included that Ms Kelsey lacked the financial resources to pursue what the CCC believed to be a viable claim against Logan City Council, as well as the CCC’s ongoing concerns about the high turnover of CEOs in Local Government, with an average tenure of less than 3 years.

In giving evidence to the committee in a public meeting in early 2021, the CCC Chairperson said that he had not done this before, and nor was he aware of any other occasion when such a request had been made by the CCC to the government.²⁵⁸

While the request was declined and no funding was provided,²⁵⁹ the LGAQ claimed the request for funding was ‘further evidence’ that the CCC had ‘taken sides’ and ‘was acting where it could to advance the interests of Ms Kelsey and to damage the interests of the councillors who had voted to terminate the employment of Ms Kelsey’.²⁶⁰

²⁵¹ Volume 1, pp 63-64, PCCC-0940.

²⁵² Volume 3, supplement 3, p 5/13, PCCC-3552.

²⁵³ Volume 3, supplement 3, p 10/13, PCCC-3552.

²⁵⁴ Volume 3, supplement 3, p 12/13, PCCC-3552.

²⁵⁵ Public hearing transcript, Brisbane, 18 August 2021, p 67.

²⁵⁶ Submission 25, p 37, para 146; Volume 1, pp 273-278, PCCC-1345.

²⁵⁷ Submission 25, p 37, para 197; Volume 1, pp 291-292, PCCC-1431.

²⁵⁸ Public meeting transcript, Brisbane, 26 February 2021, p 14.

²⁵⁹ Submission 25, p 37, para 198.

²⁶⁰ LGAQ complaint, 5 May 2021, p 22, para 40.

A similar view was expressed by the former Logan City Councillors:

The meeting in August 2018, whereby Ms Kelsey sought the CCC's assistance by either joining in or bringing a further injunction proceeding or seeking financial support for her to maintain the substantive QIRC proceedings bespeaks a grave distortion in the role of the CCC and its understanding of its role.

It is inconceivable that a body which aligned itself with a complainant to such a degree that this extraordinary step was taken, was able to independently, impartially and fairly perform its statutory obligations in relation to the investigation and prosecution of the Former Councillors.²⁶¹

The CCC disagreed with this characterisation of the conduct and submitted that it had acted appropriately in regards to the request for funding:

Ms Kelsey was a public officer employee who had discharged her responsibilities under section 38 of the CC Act to report alleged corrupt conduct to the Commission and, it is not disputed, had made a public interest disclosure under the PID Act. The Commission acted appropriately in attempting to support her.²⁶²

The CCC had been made aware at the meeting on 6 August 2018 that Ms Kelsey was in 'desperate straits in terms of her financial capability to continue on'.²⁶³

The CCC Chairperson acknowledged he had never before written to or met with a Minister to request similar funding, but stated this was 'an exceptional case' and reflected a pattern 'of people going away with payouts and confidentiality clauses and so on as a context'.²⁶⁴

Mr Alsbury also noted that to his knowledge, the CCC had never before sought legal assistance from the government on behalf of a party in other civil proceedings as done in this case for Ms Kelsey.²⁶⁵

6.3.6 Attempts to reinstate Ms Kelsey as Chief Executive Officer

Ms Kelsey sought reinstatement as CEO of the Logan City Council following her termination, through the QIRC.

On 4 May 2018 the QIRC ordered that Ms Kelsey be reinstated to the position of CEO of Logan City Council effective from 8:00am on Monday 14 May 2018; until the hearing and determination of her related PID matter.²⁶⁶ This was successfully appealed by the Logan City Council (with the other interim orders of the QIRC) on 14 June 2018.²⁶⁷

Shortly after Ms Kelsey's reinstatement was overturned, on 20 June 2018, MinterEllison wrote to Mr Hutchings and stated 'it is imperative that all relevant materials [that is, documents held by the CCC] are provided to all parties promptly.' This triggered Mr Hutchings to email Mr Alsbury about 'another option – a summons issued by the court', a reference to the first attempt by the CCC to provide documents into the QIRC proceedings. There followed, in what has been described by Mr Walker SC as 'a very unusual course that was taken', a series of steps – examined in later sections of this report – seeking to have documents held by the CCC form part of the QIRC consideration. The commencement of this sequence of events, immediately following Ms Kelsey's reinstatement being overturned, is suggestive of CCC support for her to be reinstated.

²⁶¹ Submission 27, p 32, paras 159-160.

²⁶² Submission 25, p 38, para 201.

²⁶³ Mr Alan MacSporran QC, public hearing transcript, Brisbane, 17 August 2021, p 29.

²⁶⁴ Public hearing transcript, Brisbane, 6 September 2021, p 43.

²⁶⁵ Public hearing transcript, Brisbane, 18 August 2021, p 57.

²⁶⁶ *Kelsey v Logan City Council* [2018] QIRC 53.

²⁶⁷ *Dalley & Ors v Kelsey & Ors* [2018] ICQ 006.

Following a meeting between Ms Kelsey and Mr MacSporran QC on 6 August 2018, Mr MacSporran QC met with the Minister for Local Government on 6 August 2018 to discuss possible funding for Ms Kelsey's QIRC proceedings.²⁶⁸ On 8 August 2018, Mr Hutchings spoke with Mr Williams of MinterEllison and then emailed Mr MacSporran QC. In this email, Mr Hutchings states:

I let Dan know what we spoke about this afternoon, and he is very appreciative of the efforts you have made. He will keep Sharon informed. He was especially interested in the prospect of the appointment of an administrator as he sees it as the only practical solution now.²⁶⁹

It was suggested by Counsel Assisting that the CCC 'knew Ms Kelsey wanted reinstatement, had sought it and had not been successful in getting it'.²⁷⁰

The CCC Chairperson acknowledged that Ms Kelsey had told him on 6 August 2018 that her reinstatement would make it 'feasible' in terms of her financial capability to survive.²⁷¹

It was suggested to the CCC that appointment of an interim Administrator to the Logan City Council could have been a strategy to assist in Ms Kelsey's reappointment as CEO of the Logan City Council.²⁷²

Ms Tamara O'Shea was appointed as an interim Administrator of the Logan City Council on 2 May 2019. She acted in this role until 20 April 2020.²⁷³

Ms O'Shea told the committee she had taken a 'neutral stance' in relation to the QIRC matter, and noted that in her time as interim Administrator, final submissions had been made by the parties to the QIRC, with only oral submissions remaining.²⁷⁴

During Ms O'Shea's appointment as interim Administrator, Ms O'Shea considered whether Ms Kelsey should be reinstated to her position as CEO of the Logan City Council.²⁷⁵ As part of this consideration, Ms O'Shea sought advice from the Public Service Commissioner and Logan City Council's legal representatives, and familiarised herself with material relating to the QIRC matter (including final submissions of the parties).²⁷⁶ Ms O'Shea read Ms Kelsey's probationary report, prepared by Ms Rachel Hunter, which Ms O'Shea characterised as a '360-degree report'.²⁷⁷

In regards to reinstatement of Ms Kelsey, Ms O'Shea stated:

In the course of my reading of industrial relations material I came to see that concerns had been raised around perception of Ms Kelsey's alignment to some councillors over others. They raised some red flags for me. I also was questioning some of Ms Kelsey's decision-making post her termination that included attending council events at the invitation of the councillors who had not voted to terminate her contract and also to attend ratepayer events and things like that, which included GoFundMe pages and things. It called into question Ms Kelsey's, I guess, judgement in respect of that role. I would have to say that decision led me to think that perhaps reinstatement at that juncture was not a good thing.

...

I was also conscious that I had by this point made the decision to continue council's defence of the industrial matter. My CEO: whoever that happened to be, I needed to work very closely with them. I

²⁶⁸ CCC, correspondence, 2 September 2021, Chronology, p 26, item 103.

²⁶⁹ Volume 1, p 293, PCCC 0882.

²⁷⁰ Dr Jonathan Horton QC, public hearing transcript, Brisbane, 6 September 2021, p 63.

²⁷¹ Dr Jonathan Horton QC, public hearing transcript, Brisbane, 6 September 2021, p 62.

²⁷² DS Francis, public hearing transcript, Brisbane, 25 August 2021, p 12.

²⁷³ Ms Tamara O'Shea, public hearing transcript, Brisbane, 26 August 2021, p 35.

²⁷⁴ Public hearing transcript, Brisbane, 26 August 2021, p 36.

²⁷⁵ Ms Tamara O'Shea, public hearing transcript, Brisbane, 26 August 2021, p 36.

²⁷⁶ Ms Tamara O'Shea, public hearing transcript, Brisbane, 26 August 2021, p 38.

²⁷⁷ Ms Tamara O'Shea, public hearing transcript, Brisbane, 26 August 2021, p 39.

needed to have confidence in them and them to have confidence in me. I had a huge governance agenda and reform package that I wanted to introduce in a very short period of time—less than nine months—so I needed to be able to work with that person incredibly closely. If that CEO was someone I was in active litigation with, I could not see how that conflict could be resolved. I was also conscious that four of my IMC [Interim Management Committee] were people who were actively supporting Ms Kelsey in her litigation matter and the CEO would have been a crucial, pivotal role in the IMC and its body of work. I was concerned about the conflict with Ms Kelsey and those four former councillors and I could not see how that would be resolved.²⁷⁸

Ms O'Shea's decision to not support Ms Kelsey's request for reinstatement was communicated to Ms Kelsey's legal representatives on 28 May 2019.²⁷⁹

Ms O'Shea said that the CCC Chairperson had called her regarding the QIRC matter, and during that call 'he also wanted to suggest that I reinstate Ms Kelsey to her role as CEO'.²⁸⁰ Ms O'Shea said she was:

...concerned that there was a conflict of interest from Mr MacSporran in making that call to me to advocate for Ms Kelsey's reinstatement and questioning why council was persisting in its litigation. I thought it was a little odd and it raised some concern.²⁸¹

Ms O'Shea told the committee she 'undertook to note' the CCC Chairperson's suggestion but 'did not give him any indication one way or other what I would do'.²⁸²

When asked about the call, Mr MacSporran QC told the committee 'I do not accept that there was a request as such to reinstate Ms Kelsey. I made the inquiry of Ms O'Shea, who had been appointed the administrator'.²⁸³ Mr MacSporran QC further explained:

She was seeking advice from me about various aspects of the administration, and during the course of that discussion I simply asked what she intended to do in the administration and did she intend to reinstate Ms Kelsey. On my recollection, she said she was going to remain neutral as the administrator, maintain the status quo, and, for the same reasons, was not proposing to reinstate Ms Kelsey.²⁸⁴

When pressed about his intention behind the call and any suggestion of reinstatement, Mr MacSporran QC told the committee:

I had ... taken a course to assist Ms Kelsey where possible within the bounds of the jurisdiction and powers that we had to manage a PID without getting into an injunction in the Supreme Court or the QIRC but so that our investigation of what was clearly, in our view, corrupt conduct of a mayor and seven councillors could be pursued to its logical conclusion. I was not setting out on a crusade to have Ms Kelsey reinstated at all costs and for any reason.²⁸⁵

Both Mr MacSporran QC's and Ms O'Shea's evidence to the committee was that the conversations between them were courteous and professional in nature.

²⁷⁸ Public hearing transcript, Brisbane, 26 August 2021, p 39.

²⁷⁹ Ms Tamara O'Shea, public hearing transcript, Brisbane, 26 August 2021, p 39; volume 3, supplement 6, p 16/18, PCCC-1220.

²⁸⁰ Ms Tamara O'Shea, public hearing transcript, Brisbane, 26 August 2021, p 42. Note: Mr MacSporran QC asserts that Ms O'Shea had called him – public hearing transcript, Brisbane, 7 September 2021, p 9.

²⁸¹ Ms Tamara O'Shea, public hearing transcript, Brisbane, 26 August 2021, p 42.

²⁸² Ms Tamara O'Shea, public hearing transcript, Brisbane, 26 August 2021, p 42.

²⁸³ Public hearing transcript, Brisbane, 7 September 2021, p 6.

²⁸⁴ Public hearing transcript, Brisbane, 7 September 2021, p 6.

²⁸⁵ Public hearing transcript, Brisbane, 7 September 2021, p 6.

6.3.6.1 *Criticism of interim Administrator*

On 30 May 2019, concerns about the interim Administrator were raised internally by some officers at the CCC. DS Francis emailed his direct report DSS Andrews, stating 'I have serious concerns regarding the conduct of the Administrator' following his discussion with Ms Kelsey and 4 former Logan City Councillors. DS Francis' email included the following:

The Administrator has yesterday provided advice and direction to the QIRC proceedings, and has demonstrated her willingness to provide legal advocacy only for the respondents (Mayor and aligned councillors). The Administrator provided no support or fairness to Ms Kelsey, an employee of LCC (in the absence of alleged dishonest conduct) and importantly a whistle-blower. The PID Act provides a duty to an employer to protect the interests of an employee.²⁸⁶

These concerns were forwarded to DI Preston and copied to DS Beattie who suggested he would be 'supportive of the Chair taking our concerns to the Minister to have the Administrator removed'.²⁸⁷

After being further forwarded to Mr David Caughlin, then A/Director, Office of the Senior Executive Officer Corruption, however, Mr Caughlin responded:

Without seeing the correspondence and the affidavit, it's difficult to judge, but I think each of the steps taken by the administrator are capable of being seen as an effort to maintain the status quo with respect to the contentious matters within council.

Obviously we need to bear in mind that the administrator's role is to run the council, not to favour the views of one side or another, and certainly not to protect the interests of either the four councillors or Ms Kelsey (or the charged councillors).²⁸⁸

It was put to DS Francis that his email raising his concerns regarding the Administrator of Logan City Council demonstrated he was partial in charging the former Logan City Councillors and motivated by personal feelings.²⁸⁹ DS Francis contended that the reprisal against Ms Kelsey was his concern and he was not investigating a reprisal by the Administrator but was merely 'briefing up'²⁹⁰ and was 'simply passing on the strong views—emotional views, I acknowledge—of my witnesses in this case'.²⁹¹

The CCC Chairperson confirmed that he had not seen the emails raising concern about the interim Administrator, and suggested the emails were reflective of the officers' 'simply workshopping ideas about what is actually happening'.²⁹² Mr MacSporran QC stated he agreed with Mr Caughlin's rationale which is quoted above.²⁹³

The committee notes the evidence demonstrates the suggested action in relation to Ms O'Shea was rejected by more senior CCC officers.

Mr MacSporran QC outlined this in the following exchange:

Dr HORTON: And you come here proudly defending what is done at 591 and 592 and offer no excuse for it to this committee, other than you defend it?

Mr MacSporran: It is not a matter of offering excuses for it; it is a matter of explaining the context for it. And significantly, the point you seem to be missing entirely, with respect, Mr Horton, is that the gatekeeper—the lawyers—knocked it on the head, as they should have.

²⁸⁶ Volume 1, p 590, OpFront-TermsofReference-07615, PCCC-TP0102.

²⁸⁷ Volume 1, p 592, OpFront-TermsofReference-07615, PCCC-TP0102.

²⁸⁸ Volume 1, p 589, OpFront-TermsofReference-07615, PCCC-TP0102.

²⁸⁹ DS Francis, public hearing transcript, Brisbane, 25 August 2021, p 9.

²⁹⁰ DS Francis, public hearing transcript, Brisbane, 25 August 2021, p 13.

²⁹¹ DS Francis, public hearing transcript, Brisbane, 25 August 2021, p 15.

²⁹² Mr Alan MacSporran QC, public hearing transcript, Brisbane, 7 September 2021, p 10.

²⁹³ Mr Alan MacSporran QC, public hearing transcript, Brisbane, 7 September 2021, p 10.

Dr HORTON: Thank goodness.

Mr MacSporran: And you know, Mr Horton, the gatekeepers we have at the CCC would do this routinely.²⁹⁴

6.3.7 Conclusions

6.3.7.1 *Findings*

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

The view of a shared common 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 Logan City Council. Mr Hutchings, consistent with the CCC Chairperson's instruction to him, had sought to correct what the CCC saw as a very significant imbalance in the QIRC proceeding. Mr Hutchings' view was fortified by his view that the former Logan City Councillors had committed perjury in that proceeding and therefore ought not be allowed to decide the extent to which they should have continuing access to legal representation paid for by the Logan City Council's insurer. The Logan City 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, whether or not they are accused of serious wrongdoing such as perjury. Any comparison to the indemnity arrangements which operate with respect to state employees is misplaced.

The committee has also received submissions concerning public comments of the CCC Chairperson in 2020 in which he described Ms Kelsey as a 'poor woman' subject to disgraceful conduct by the former Logan City Councillors.²⁹⁵ These comments, made after the CCC Chairperson had stated in public at the time of charging that the charges were now a matter for the courts, illustrate the depth of empathy with Ms Kelsey of the CCC Chairperson — empathy that grew over time, such that the CCC Chairperson was no longer an impartial, independent participant in the matter.

The evidence shows, to the satisfaction of the committee, that the CCC Chairperson, 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 Logan City Council. This was Mr Hutchings' declared overarching purpose.

6.3.7.2 *The Public Interest Disclosure Act 2010*

The CCC did in fact, and acknowledged, that it had acted in a way to support and assist Ms Kelsey throughout the investigation into her PID and the corruption investigation into Logan City Council because she was a public interest discloser under the PID Act. The CCC Chairperson specifically directed CCC officers to do 'whatever we legitimately can to support Kelsey'.²⁹⁶

The CCC insisted its motivation to assist was mostly based on an understanding that it should protect Ms Kelsey as a public interest discloser of matters relating to alleged corrupt activity of a UPA, and to level what it saw as an unfair playing field between Ms Kelsey and the former Logan City Councillors.

²⁹⁴ Public hearing transcript, Brisbane, 7 September 2021, p 10.

²⁹⁵ Submission 27, p 34, para 176.

²⁹⁶ Volume 1, p 633, OpFront-TermsofReference-08898.

Putting to one side the issue of an unfair playing field, it is apparent that much of the CCC's explanation for its actions rely upon its claim to powers under the PID Act and the CC Act of a function or duty to protect whistleblowers. The committee, therefore, needs to examine these powers.

The committee agrees public interest disclosers are integral to identifying and addressing wrongdoing in the public sector and should be afforded protections necessary to allow them to make disclosures. The committee acknowledges the provisions of the PID Act which allow the CCC to investigate contraventions of the PID Act and apply for injunctions about reprisals to the QIRC or Supreme Court (with consent of the employee). The committee accepts that the CCC has a role in connection with the PID Act, and that this includes having a concern for those who make such disclosures to it. The CCC in its submission 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'.²⁹⁷ It is a view which, the committee finds, motivated the CCC to assist Ms Kelsey.

It is not clear to the committee, however, that the CCC's role in connection with public interest disclosers extends beyond the avenues set out in sections 48(2) and 49(2) of the PID Act. In this regard, the committee does not accept that the PID Act authorises the CCC to act in such a broad way as it did in a public interest discloser's interests and considers it highly questionable whether the CC Act provides such power either. If it does, it must be read in conjunction with the CCC's obligations under section 57 of the CC Act which require the CCC to at all times act independently, impartially and fairly and in the public interest.

The PID Act makes express provision for the CCC to have a role in connection with public interest disclosures. Sections 48(2) and 49(2) of the PID Act permit the CCC to seek injunctive relief in the QIRC or the Supreme Court (respectively) 'about a reprisal' if certain conditions were fulfilled. Those conditions included the employee being a public officer (which Ms Kelsey clearly was), having the discloser's consent, and the reprisal involving an act or omission that the CCC may investigate. The application could only be made if the alleged reprisal had caused or may cause detriment to the discloser and involved a breach of the IR Act or an industrial instrument under that Act.

The difficulty with alleging reprisal was always that Ms Kelsey's PID was made after Logan City Council had commenced the disciplinary process, and it was never found that Logan City Council had some prior knowledge of any intention of hers to make a PID before commencing that process. Mr Alsbury reflected on this on various occasions in consideration of criminality arising from Ms Kelsey's termination as CEO. The CCC did not, in terms, ever charge anyone in connection with the matter the subject of this committee's inquiry with the offence of reprisal under section 40 of the PID Act.

Counsel Assisting submitted:

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.²⁹⁸

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, on one respectable view, ought not to have involved itself further in it. The CCC is a creation of statute and cannot, in the view of the committee, claim powers or functions to assist those who make disclosures in the public interest in ways other than statute expressly allows. Sections 48(2) and 49(2) of the PID Act are attended with thresholds for the exercise of powers under them for good reason. They ensure that there is a 'reprisal', that there is a relevant breach, and that the discloser consents

²⁹⁷ Submission 25, p 2, para 6.

²⁹⁸ Outline of submissions of Counsel Assisting, 29 September 2021, p 12, para 44.

to it. To act in ways that neither the CC Act nor the PID Act expressly contemplate is liable to give rise to the kinds of difficulties that this inquiry is reporting on. The CCC attempted to explain its assistance to Ms Kelsey in connection with her QIRC proceeding by reference to an asserted 'statutory duty to protect whistle-blowers'.²⁹⁹ That duty, in terms, does not exist in the PID Act or the CC Act. To imply such a duty risks overreach and risks the CCC acting beyond the remit that statute gives to it.

To decide not to exercise those powers brought into sharp focus the requirement that the CCC should act at all times, independently, impartially and fairly. Had it acted pursuant to sections 48(2) or 49(2) of the PID Act, it had the express statutory authority to do so. Beyond that, the appropriateness of its involvement in Ms Kelsey's civil proceedings became fraught with the real risk that it would overstep proper boundaries and act other than required by section 57 of the CC Act. The CCC is not a body, as the oral evidence showed, with a depth of knowledge in civil law and practice. Mr MacSporran QC said his knowledge was being exceeded when asked about the Public Records Act and disclosure obligations.³⁰⁰ Mr Alsbury's background was in criminal law.³⁰¹ Ms McIntyre told the committee 'I am not familiar with the civil litigation duty of disclosure. I come from a criminal law background ...'.³⁰² DI Preston 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'.³⁰³ None of the witnesses who gave oral evidence had any experience in employment litigation.

There are good reasons, both legal and practical, why the proper boundaries of the CCC's involvement in Ms Kelsey's civil proceedings ought to have either been according to the requirements (and the structure) of sections 48(2) and 49(2) of the PID Act, or not at all.

The committee finds that the reliance placed by the CCC upon the PID Act in providing assistance to Ms Kelsey in connection to her QIRC proceeding was, and is, misplaced. That reliance was an overreach of the powers afforded to the CCC.

Finding 1

The Crime and Corruption Commission's actions were not in accordance with the *Public Interest Disclosure Act 2010* and exceeded the specific limits on the Crime and Corruption Commission's powers under that Act.

To ensure clarity of the CCC's jurisdiction and powers which can and should be exercised in relation to PIDs, the committee recommends a review of the effectiveness and appropriateness of protections afforded to public interest disclosers under the PID Act, including the roles of the CCC and other relevant entities.

Recommendation 1

The committee recommends the Queensland Government review the effectiveness and appropriateness of protections afforded to public interest disclosers under the *Public Interest Disclosure Act 2010*, including the roles of the Crime and Corruption Commission and other relevant entities.

²⁹⁹ CCC, Outline of Submissions, 15 October 2021, p 8, para 37.

³⁰⁰ Public hearing transcript, Brisbane, 6 September 2021, p 14.

³⁰¹ Mr Alsbury, public hearing transcript, Brisbane, 18 August 2021, p 42.

³⁰² Public hearing transcript, Brisbane, 20 August 2021, p 2.

³⁰³ Public hearing transcript, Brisbane, 25 August 2021, p 70.

6.3.7.3 *Crime and Corruption Act in respect of Public Interest Disclosers*

As outlined above, the CCC submitted that it has 'broad powers' to assist and protect PIDs. Reference is made to section 212 of the CC Act, an offence provision that makes it an offence to victimise a PID, but does not provide a specific power for the CCC to act upon in relation to PIDs.

It was also submitted that the CCC has 'an interest in assisting and protecting' PIDs.³⁰⁴ Mr Alsbury, in evidence, referred to the legislation 'indicating' the CCC 'potentially' had an interest and that the CCC has a 'role to play' in protecting PIDs.³⁰⁵ The CCC's submission to this inquiry refers, in general terms, to the corruption and prevention functions given to the CCC in the CC Act.

Each of these claims to a power to protect PIDs under the CC Act is expressed very broadly, and it is vitally important to note that in no submission to the committee does the CCC expressly claim that its actions in relation to Ms Kelsey's PID – and its claimed justification for many of its actions as being to protect a PID – are authorised by specific sections of the CC Act. Most likely that is because the CCC's actions are, in fact, not expressly authorised by the CC Act. The CCC is, in essence, submitting that it had overarching or more general powers of the CC Act that gives them the power to protect and assist PIDs.

The CCC's submissions to this inquiry do not claim reliance on their prevention function or corruption function either. The submissions and evidence from CCC witnesses are a combination of reliance on the PID Act and the CCC's 'interest' and claimed statutory role in protecting PIDs under the CC Act. The committee notes that the CCC has not sought to claim a specific ground in legislation to give power to their 'interest' in protecting a PID – noting that having an 'interest' in doing something does not automatically give rise to a legislative authority to do it, even for the CCC.

Noting that PIDs can disclose allegations of corrupt activity that could enliven the CC Act, the committee considers that if the CCC was seeking to rely on a general power under its corruption or prevention function to justify its actions then the general duty imposed on the CCC to act in accordance with section 57 of the CC Act would take on a paramount importance.

In relation to the PID Act, however, the CCC Chairperson himself has given evidence to the committee, in 2019, that provides his view as to where the public interest lies – one of the key elements in section 57 of the CC Act. As referred to above, at a private meeting with the committee in February 2019 Mr MacSporran QC told the committee the CCC had 'a right to apply to be joined' to the QIRC proceeding, but the CCC:

...decided that, because of the fact that we were investigating serious corrupt conduct independently of those proceedings, in the public interest it would not be appropriate for us to join those proceedings, but we have done what we can to make sure that Ms Kelsey is not otherwise disadvantaged.³⁰⁶

Evidence in this inquiry confirms that while the CCC was not publicly joined as a party to the QIRC proceedings as it may have been under the PID Act, it was very much taking an active role in assisting Ms Kelsey in the proceedings behind the scenes – despite the comments from Mr MacSporran QC, quoted above, concerning where the public interest lies.

It having being determined that there is no express power in the PID Act or the CC Act upon which the CCC is empowered to pursue its 'interests' in relation to PIDs as it has done in these circumstances, the question then turns on whether the actions of the CCC 'to make sure that Ms Kelsey is not otherwise disadvantaged' were in accordance with section 57 of the CC Act.

³⁰⁴ Submission 25, p 19, para 109.

³⁰⁵ Mr Alsbury, public hearing transcript, Brisbane, 18 August 2021, p 22.

³⁰⁶ Private meeting transcript, Brisbane, 15 February 2019, p 6.

Finding 2

In assisting Ms Kelsey as a public interest discloser within the Queensland Industrial Relations Commission process the Crime and Corruption Commission acted outside its specific powers in the *Crime and Corruption Act 2001*.

6.3.7.4 General assistance and dealings with Ms Kelsey

The committee makes findings in relation to this with full awareness of their gravity. This inquiry has shone a light on actions and the culture of the CCC that the committee finds deeply regrettable. The committee reflects on the advice provided by Mr Walker SC, in which he states that ‘some aspects of the narrative are somewhat confronting, and in some respects surprising causing disappointment with how some things were apparently done, or not done’.³⁰⁷

Counsel Assisting suggested that it was open for the committee to find that 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. It was suggested that the shared interest included Ms Kelsey’s being reinstated as CEO, which the CCC acted upon by involving itself in her QIRC proceedings and seeking to make documents it had obtained under compulsion available to her in those proceedings.³⁰⁸

The CCC agreed it had a legitimate ‘common interest’ with Ms Kelsey as a person who made a PID, but asserted ‘the support provided to her did not extend to having a shared interest that she be reinstated as CEO of Logan City Council’.³⁰⁹

The direct communications between senior CCC officers and Ms Kelsey’s legal representatives, and the level of emotive and defensive descriptions of Ms Kelsey’s matter, appear to the committee to be not to the standard expected of the CCC. It is required – by its own statute – to demonstrate integrity, and to act at all times independently, impartially, fairly and in the public interest.

The committee considers that the CCC was essentially acting ‘in concert’ with MinterEllison and their client, Ms Kelsey. This was evidenced by the content and tone of the correspondence between the parties (especially the CCC and MinterEllison), the level of tactical and strategic thought entered into by the CCC as to how it could assist Ms Kelsey (and the back-and-forth considerations of these matters between CCC and MinterEllison) and the vast extent of time over which this correspondence took place. It is noted by the committee that MinterEllison was still in contact with the CCC about what could be done to assist Ms Kelsey even after this inquiry had commenced, in early June 2021.

Many in the CCC thought they had a shared interest with Ms Kelsey, including Ms Kelsey being a PID, in relation to allegations of corrupt activity in a UPA, turnover of CEOs in local government and their view of her termination of employment. In that context, the shared interest extended to Ms Kelsey’s desire for reinstatement. Reference is made to emails outlined above from Mr Hutchings to Mr MacSporran QC in August 2018 in relation to the appointment of an interim Administrator. This email followed discussions between Mr Hutchings and Mr MacSporran QC just after Mr MacSporran QC had met with Ms Kelsey (and she informed him she was in ‘dire straits’ and that reinstatement would ‘make it feasible’),³¹⁰ and also followed Mr MacSporran QC meeting with the Minister for Local Government. In this context, Mr Hutchings emailing Mr MacSporran QC, referring to ‘what we spoke about this afternoon’ and then indicating that Mr Williams of MinterEllison was ‘especially interested in the prospect of the appointment of an Administrator as he sees it as the only practical solution

³⁰⁷ Mr Walker SC, correspondence, 21 September 2021, p 3, para 11.

³⁰⁸ Outline of submissions of Counsel Assisting, pp 5-6.

³⁰⁹ CCC, Outline of Submissions, 15 October 2021, p 6, para 28.

³¹⁰ Public hearing transcript, Brisbane, 6 September 2021, pp 5, 62.

now³¹¹ leads to only one rational inference: Mr MacSporran QC and the CCC were not only interested in having Ms Kelsey reinstated as CEO, but were considering how an Administrator could be appointed to make it happen.

The committee accepts the evidence of Ms O'Shea in relation to Mr MacSporran QC advocating that she reinstate Ms Kelsey as CEO, and notes that Ms O'Shea's evidence showed her to have turned her mind to this matter in an independent, impartial manner, bearing in mind the best interests of the council she was administering. Many of the considerations that she took into account, arguably, were never considered by the CCC in terms of their support for Ms Kelsey to be reinstated.

The CCC also argued that:

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.³¹²

With due respect to DS Francis, emails examined in this inquiry in which DS Francis expressed his views about the decision of the Administrator not to reinstate Ms Kelsey are clear evidence against the CCC's submission. They show his interest went well beyond being one of a 'limited extent'.

Having regard to the communications with the interim Administrator and subsequent internal correspondence regarding her character, the committee finds the email correspondence on this issue to show a culture of partiality and bias that permeated across the various aspects of this matter in the CCC. Upon questioning about the sentiments and views expressed in the emails about the Administrator, the CCC had no legitimate explanation for their contents. The committee cannot find any reasonable justification for the ongoing involvement by the CCC. This leads the committee to conclude that the manner in which the CCC conducted itself had little regard for its section 57 obligations, and was unconcerned with interfering in matters in which it had no proper part, the clearest perhaps being its interest in how the Administrator was exercising and proposed to exercise her functions.

The failure by the CCC officers to accept there was anything wrong with this chain of correspondence and reflect on their actions – even now – is something the committee considers highly relevant to finding that the CCC's culture is one of resistance to institutional oversight and review.

In relation to DS Francis, and other seconded police officers for that matter, their conduct and attitudes expressed in evidence was, an example of, and symptomatic of, the culture of the Crime and Corruption Commission.

Finding 3

The committee finds that the Crime and Corruption Commission considered its interests and those of Ms Kelsey were shared, and it ought to assist Ms Kelsey as much as it legitimately could.

(Counsel Assisting Available Finding 1)

³¹¹ Volume 1, p 293, PCCC-0882.

³¹² CCC, Outline of submissions, 15 October 2021, p 11, para 51.

Finding 4

The committee finds that the Crime and Corruption Commission acted upon the shared interest by involving itself in Ms Kelsey's Queensland Industrial Relations Commission proceedings and seeking to make documents it had obtained under compulsion available to her in that proceeding.

The inference may be drawn that this was done for the purpose of Ms Kelsey's reinstatement as chief executive officer.

(Based on Counsel Assisting Available Finding 2)

6.4 The Queensland Industrial Relations Commission notice to produce

6.4.1 Preceding steps – communications between the Crime and Corruption Commission and Ms Kelsey's lawyers

On **12 April 2018** MinterEllison wrote to Mr Hutchings seeking the CCC's assistance and requesting the CCC utilise its powers to intervene in the QIRC matter and provide evidence in it or, alternatively, provide relevant information to the QIRC directly. MinterEllison also asked the CCC to provide them (MinterEllison) with information that might assist Ms Kelsey. MinterEllison suggested that Ms Kelsey could seek the issue of certain formal notices for this to occur if required. Their letter went on to justify the CCC's involvement. MinterEllison also asserted Ms Kelsey had no source of income, nor access to income protection or funding assistance for her legal proceedings.³¹³

On **15 May 2018** MinterEllison asked the CCC to provide them with the following documents:

- documents evidencing any alignment between the Mayor and and Councillors Dalley, Lutton, Swenson, L. Smith, Pidgeon, Schwarz and Breene (the **7 Councillors**) in relation to matters including Ms Kelsey and her employment (including any communications through email, social media (including applications with a self-deleting function etc); and
- documents (including notes or records of any interactions (including discussions correspondence, meetings etc) of the Mayor and the 7 Councillors during which Ms Kelsey's employment, probation, termination or otherwise was discussed.³¹⁴

On **25 May 2018**, Mr Williams asked if there was a particular time at which he could seek the issue of the notice which would result in the CCC not rejecting it. Mr Hutchings passed on that request to Ms McIntyre and Mr Alsbury.³¹⁵

In a telephone conference meeting on **31 May 2018** between CCC officers and Ms Kelsey's legal representatives, Mr Williams asserted there was a common interest with the CCC 'in protecting Sharon' and a more general interest in ensuring public interest disclosures are protected and seen to be so. Mr Williams said he did not have access to documents or material which contradicted what the Logan City Councillors had said about the extent to which they were influenced by the Mayor. Mr Hutchings agreed there was a common interest and it was 'probably broader than just Sharon's interests'. He described it as 'central to ... what we're doing'. Mr Hutchings told the meeting that 'the organisation is very motivated to assist Sharon'.³¹⁶

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'll be able to provide to you'. It was not a question of willingness, 'it's just a question

³¹³ Volume 1, p 63, PCCC-0940.

³¹⁴ Volume 1, p 79, PCCC-0219.

³¹⁵ Volume 1, p 959, PCCC-0959.

³¹⁶ Volume 3, supplement 3, p 5/13, PCCC-3552.

of when', Mr Hutchings said. He went on: 'I am certainly ... keen to try and motivate the hierarchy 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'.³¹⁷

In response, the CCC decided to take what it describes as a 'neutral position as between Ms Kelsey and the Council'.³¹⁸ On **26 June 2018**, Mr Hutchings advised MinterEllison that the commission would prefer to produce any material to the QIRC, rather than to the parties directly.³¹⁹

On **26 June 2018**, Mr Hutchings advised Mr Alsbury by email (copied to others including Mr MacSporran QC):

In accordance with your view/instructions I have contacted Dan Williams at Minter Ellison and asked him to consider the ways in which we can be compelled to comply. He said that one way was via a notice of Non-Party Disclosure, which gives as an option the ability of the party complying to provide material directly to the party requesting. I indicated that given our obligation under s.57 our preference would be to be required to give the material to the QIRC direct. Dan is going to explore the ways we can do that and come back to me.

I don't have any particular concern about the width of the subpoena given the operation of s.213 which exempts commission officers from compliance with any requirement to produce documents or give information in courts.

I will now prepare the covering letter regarding the material for your consideration.³²⁰

6.4.2 The notice to produce

On **28 June 2018**, Ms Kelsey (through her lawyers MinterEllison) requested the QIRC issue an attendance notice to produce and a notice ('the notice'), was issued by the QIRC on that date.³²¹ That notice was directed to the CCC and sought production of the following:

- 1 Documents evidencing communication or collaboration between Mayor Timothy Luke Smith (Mayor) and Councillors Dalley, Lutton, Swenson, Laurence Smith, Pidgeon, Schwarz and/or Breene in relation to matters involving Ms Kelsey and her employment (including any communications through email, social media (including applications with a self-deleting function etc); and
- 2 Documents (including notes or records of any interactions (including discussions, correspondence, meetings etc) of the Mayor and the Mayor and/or Councillors Dalley, Lutton, Swenson, Laurence Smith, Pidgeon, Schwarz and/or Breene in which matters related to Ms Kelsey's employment, probation, termination or matters relating to her making of a public interest disclosure or the commencement by her of legal proceedings was discussed.³²²

Mr David Caughlin (the CCC's then acting Official Solicitor) advised on 4 July 2018 that he believed it remained in order for the CCC to produce the material under the notice. Mr Caughlin said 'there would appear to be no issue with us producing the documents as proposed'.³²³

³¹⁷ Volume 3, supplement 3, p 10/13, PCCC-3552.

³¹⁸ Submission 25, p 22, para 127.

³¹⁹ Volume 1, p 123, PCCC-0867; volume 1, p 127, PCCC-1443.

³²⁰ Volume 1, p 119, OpFront-TermsOfReference-09313.

³²¹ Volume 1, p 129, PCCC-0861.

³²² PCCC-0979.

³²³ Volume 1, p 187, PCCC-2637.

6.4.3 The Crime and Corruption Commission's response to the notice

The CCC could lawfully have declined to produce the documents sought by the notice.³²⁴ Notwithstanding this, the CCC elected to comply with the notice. In the words of DI Preston, the CCC considered it 'should be doing everything within our power to support this hearing'.³²⁵ Mr Hutchings told the committee 'such 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'.³²⁶

Lawyers acting for the Logan City Council 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 this objection was determined by the QIRC. The objection, dated 4 July 2018, asserted that the notice amounted to an abuse of process on the basis it improperly sought to obtain documents obtained by exercise of the CCC's investigative powers, and not through the curial processes available in the QIRC proceeding.

The CCC's reasons for complying with the notice were set out in its letter dated 10 July 2018 to lawyers acting for the parties in the QIRC proceeding (Gadens Lawyers, MinterEllison and King & Company Solicitors).³²⁷

On 23 July 2018 the CCC summarised its position in a letter to the committee:

... the CCC has determined to assist Ms Kelsey's case in the QIRC by providing certain evidence gathered to the tribunal, which will decide in due course the use to which that material may be put.³²⁸

The CCC stated:

The Commission at all times acted transparently and pursuant to its statutory functions, including by informing the PCCC of its actions and reasons for them.

...

That the position in relation to the QIRC Proceeding 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.³²⁹

In response to what was sought in the notice, the CCC produced the documents and other materials to the QIRC registry on 5 July 2018, under cover of a letter of that date signed by Mr Caughlin. The documents produced were listed in a schedule enclosed with that letter.

Apart from a statement by a CCC officer, the material produced consisted of material obtained by the CCC pursuant to coercive or compulsive powers, comprising:

- print outs of WhatsApp group communications (obtained pursuant to search warrant) and a related extraction report
- transcripts of CCC investigative hearings (conducted using the CCC's coercive powers)
- exhibits produced at those investigative hearings
- lawfully intercepted material under the TI Act, and
- files seized from the Logan City Council obtained pursuant to a notice to discover directed to the Logan City Council.

³²⁴ CC Act, s 213(4).

³²⁵ Volume 1, p 116, PCCC-2833.

³²⁶ Volume 1, p 117, OpFront-TermsOfReference-03409.

³²⁷ PCCC-1417.

³²⁸ CCC, correspondence, 23 July 2018; submission 25, pp 27-28, para 145.

³²⁹ Submission 25, pp 28-29, paras 148, 151.

In its letter to the QIRC, the CCC stated regarding the transcripts produced:

... the question of admissibility is one for the [Industrial] Commission, and it does not bear on the production of the information under the Notice.³³⁰

A dissemination authority was prepared (under section 62 of the CC Act) in relation to the production of the documents.

The authority, dated 5 July 2018 and signed by Mr Alsbury, included a request for the authority, prepared by Mr Caughlin. The request summarised the CCC's reasons for producing the documents and included its views on their admissibility.

6.4.3.1 *Committee comment*

The committee agrees with the submission of Counsel Assisting that this approach of producing documents to the QIRC for a determination as to admissibility in proceedings, not to any of the parties directly, was one that showed some conscious observance of requirements under section 57 of the CC Act. While it is arguable that on a review of the totality of the circumstances the CCC was, even at this stage, failing its requirement to act impartially and independently by acting in concert with MinterEllison and Ms Kelsey in respect of her interests in the QIRC, this approach to the disclosure of documents to the QIRC, considered in isolation, is one that might be considered to accord with section 57 requirements.

6.4.4 **The objection to the notice**

The lawyers acting for the Logan City Councillors, McInnes Wilson, wrote to the CCC on **29 June 2018** advising of their objection to the CCC producing documents in response to the notice, asserting Ms Kelsey was improperly using the CCC's broad investigative powers to assist in the prosecution of a civil action. McInnes Wilson also asked the CCC how Ms Kelsey came to know the CCC may be in possession of such information.³³¹

Mr Alsbury responded to McInnes Wilson by letter dated **3 July 2018**, stating that sections 60 and 62 of the CC Act gave the CCC power to disseminate information and documents. Mr Alsbury continued:

I am mindful of the nature of the litigation pending in the QIRC and common issues between that litigation and the current CCC investigation. Moreover, I consider the CCC is in a position, by disseminating information and/or documents, to assist the QIRC to determine the relevant facts in relation to the litigation. .. [A]ny documentation will be delivered to the QIRC and will be subject to further directions and rulings with respect to access and use. It should be noted that these factors are not an exhaustive list of the things I have considered.

I am minded to comply with the notice. However, I am content to delay any final decision in this regard until close of business on 4 July 2018, to allow you to make further submissions if you wish.³³²

Mr Alsbury also responded to McInnes Wilson's query as to how Ms Kelsey would have known of the existence of the documents:

Ms Kelsey's complaint, in addition to other matters associated with the Logan City Council, is being investigated by the CCC and this fact is lawfully known to Ms Kelsey and her lawyers, amongst others.

On **4 July 2018**, McInnes Wilson lodged in the QIRC a formal objection to production of the CCC documents, asserting that the notice amounted to an abuse of process on the basis it improperly sought to obtain documents obtained by exercise of the CCC's investigative powers, and not through the curial processes available in the QIRC proceeding.

³³⁰ PCCC-1142.

³³¹ Volume 1, p 157, PCCC-0153.

³³² Volume 1, p 167, PCCC-1411.

McInnes Wilson sought confirmation from the CCC that it would not produce the documents the subject of the notice until after this objection was determined by the QIRC.

On **5 July 2018**, the CCC advised McInnes Wilson that it would lodge the documents with the QIRC later that afternoon. McInnes Wilson later sought the CCC's clarification as to whether the CCC had advised Ms Kelsey of the existence of the documents the subject of the notice.

On **10 July 2018** Mr Alsbury wrote to the solicitors for all parties to the QIRC proceeding, detailing the reasons for the CCC's decision to deliver documents to the QIRC in response to the notice. Mr Alsbury also stated the CCC had not advised Ms Kelsey or her lawyers of the existence of the subject.

6.4.5 The dissemination authority for the production to the Queensland Industrial Relations Commission

The internal CCC dissemination authority for the production of the documents was signed by Mr Alsbury and issued on the basis of a request signed by Ms McIntyre. The authority included a statement that the WhatsApp chats revealed alignment between the Mayor and Councillors (as pleaded by Ms Kelsey and denied by the Councillors in the QIRC proceeding).

The request for the dissemination authority anticipated, correctly, that:

There is likely to be an objection to the admissibility in the QIRC proceedings of the disclosed WhatsApp communications and other material obtained under a warrant or Notice to Discover on the basis that the evidence was obtained pursuant to a warrant issued in relation to the investigation of corruption and/or criminal offences.³³³

This statement was alluding to the decision in *Flori*.³³⁴ There, the Supreme Court of Queensland held that evidence obtained pursuant to a search warrant obtained under the *Police Powers and Responsibilities Act 2000* (PPRA), regarding the investigation of an offence of misconduct in public office, could not be used in disciplinary proceedings. Material obtained under the compulsion of a search warrant may only be used for the statutory purpose for which the warrant was granted, being to obtain evidence of the commission of an offence.

The request for the dissemination stated that the ultimate admissibility of the evidence would be a matter for the QIRC, and that the material was 'merely being made available to the QIRC in the first instance and, subject to rulings and directions, the named parties to the litigation'.³³⁵

The dissemination authority then addressed *Flori* and sought to distinguish it on these bases:

- The warrant was not a PPRA warrant, rather it was issued under s.87 of the CC Act;
- Contrary to the position in respect of the Queensland Police Service (QPS), the CCC has the power to use and deal with any information, document or thing in performing its functions. It may also give material to others with the CCC's express written authorisation, subject always to the obligation under s.57 of the CC Act to act independently, impartially and fairly;
- Providing the evidence obtained by compulsion to the parties to the civil proceeding is justified because the sworn evidence of some parties in the QIRC proceedings appears to be directly contradicted by the WhatsApp evidence; and
- The WhatsApp evidence is disclosable in the QIRC proceedings as material that is relevant to a matter in issue in those proceedings.³³⁶

³³³ Volume 1, p 206, PCCC-0201.

³³⁴ *Flori v Commissioner of Police* [2014] QSC 284

³³⁵ Volume 1, p 206, PCCC-0201.

³³⁶ Volume 1, pp 206-207, PCCC-0201.

The request then considers at length a range of other issues of admissibility and legal issues that might arise regarding the various categories of documents. The request recorded that the CCC was not bound to produce the documents, before setting out a number of conditions that ought be imposed on access to the documents produced.

The CCC placed conditions on the use that could be made of the documents. In doing so, it noted that the material produced (apart from a statement by a CCC officer) had been obtained 'pursuant to compulsory or coercive legal processes'. Accordingly, the CCC's letter to the QIRC set out conditions including:

- The documents are and remain the exclusive property of the CCC and the CCC has copyright in them.
- The documents are confidential and carry the security classification: Protected.
- Subject to the following dot point, the documents are not to be copied or disseminated or disclosed by any means to a third party without the express written authority of the Chairperson of the CCC.
- The documents are only to be used by the QIRC and, if permitted by order of the QIRC, the parties ... and their legal representatives for the purpose of that matter.³³⁷

The CCC later characterised these conditions as:

... appropriate and fair having regard to the public interest in the QIRC having the information but the Commission retaining power over the use to which it may be put.³³⁸

The committee notes the difference between these conditions and the position later taken by the CCC in relation to certain of these documents being considered public records that belonged to the Logan City Council.

6.4.6 The Queensland Industrial Relations Commission decision on the notice

On 24 August 2018, Black IC delivered his decision setting aside the notice of attendance to produce.³³⁹

6.4.7 Motivation for the notice and the Crime and Corruption Commission's response to it

As noted earlier, MinterEllison had written to Mr Hutchings on 12 April 2018 seeking the CCC's assistance and requesting the CCC utilise its powers to intervene in the QIRC matter and provide evidence in it or, alternatively, to provide relevant information to the QIRC directly, and to provide them (MinterEllison) with information that may assist Ms Kelsey and so that it could be provided to the QIRC. MinterEllison suggested that Ms Kelsey could seek the issue of certain 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.³⁴⁰

Against this background, two questions arise:

- Were the CCC's actions in complying with the notice to produce motivated by an intention to assist Ms Kelsey in her QIRC proceedings, and if so, to what extent?
- If the CCC was so motivated, was this an appropriate course for the CCC to take?

The CCC's position regarding its response to the notice was that it could have lawfully disseminated information to Ms Kelsey under section 60 and/or section 62 of the CC Act, and any such dissemination

³³⁷ Submission 25, p 26, para 140.

³³⁸ Submission 25, p 26, para 141.

³³⁹ *Kelsey v Logan City Council & Ors* [2018] QIRC 108.

³⁴⁰ Volume 1, pp 63-64, PCCC-TP0004.

would have been consistent with the performance of the commission's corruption function. Notwithstanding, the CCC described it as 'a neutral position'.³⁴¹

The Commission's view was, and remains, that it was appropriate for the QIRC to determine how, and if, the Commission's information could be used by the parties in the QIRC Proceeding. The Commission did not wish to make the information available only to select parties, such as Ms Kelsey.³⁴²

The CCC Chairperson told the committee:

... generally speaking there was concern that the QIRC proceedings, the way they were proceeding, was in a way that we had concerns about the commission being denied relevant evidence to properly assess what they were doing, and that is why we had no objection to providing documents to the commission for its information and use if it thought appropriate, as opposed to a party as such.³⁴³

The CCC, noting the conditions on which it made the material available,³⁴⁴ including that the documents were only to be used by the QIRC, and if permitted by it, the parties, and their legal representatives, stated:

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.³⁴⁵

The CCC also submitted:

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 [as set out in see para 27 of Counsel Assisting's 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.

That the position ... 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.³⁴⁶

6.4.8 Conclusion on the evidence

Counsel Assisting suggested it was open to the committee to find that:

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.³⁴⁷

Counsel Assisting explained:

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.

...

³⁴¹ Submission 25, p 22, para 127.

³⁴² Submission 25, pp 22-23, para 128.

³⁴³ Public hearing transcript, Brisbane, 17 August 2021, p 17.

³⁴⁴ Volume 1, pp 219-220, PCCC-0150.

³⁴⁵ CCC, Outline of submissions, 15 October 2021, p 13, para 58.

³⁴⁶ CCC, Outline of submissions, 15 October 2021, p 13, paras 59-60.

³⁴⁷ Outline of submissions of Counsel Assisting, 29 September 2021, p 11, Available Finding 7.

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.³⁴⁸

The CCC did 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 s 57 of the CC Act'.³⁴⁹ It submitted:

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.³⁵⁰

The CCC could have lawfully refused to respond to the notice to produce. The CCC does not dispute that its response was motivated by a desire to assist Ms Kelsey. The question for consideration is whether this was an appropriate course for the CCC to take.

The CCC was closely involved with Ms Kelsey's lawyers leading up to the issue of the notice. These communications were to the exclusion of the other parties to the QIRC proceedings.

On this aspect, the CCC submitted:

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.

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.³⁵¹

6.4.8.1 *Committee comment*

The committee is acutely aware that the CCC is unlike any other non-party entity that may be in possession of information relevant to industrial or civil proceedings. The CCC arguing that its liaison with MinterEllison is nothing unusual is an argument that cannot be sustained because of the inherently unusual nature of its powers which requires the CCC to give, at all times, due consideration to how they exercise them. Confidence in the CCC and the granting of extraordinary power to the CCC depends on confidence that they exercise that consideration at all times and in all places, in particular the need to be acting in accordance with section 57 of the CC Act.

The comment made by Mr Hutchings in the exchange of emails with Mr Williams outlined above at section 6.4, that 'whether or not it causes a problem we will comply with it',³⁵² in the context of Mr Williams seeking documents 'from any source' to assist Ms Kelsey's case, is something that should not represent the proper position of the CCC. This statement, considered in the context of many other emails and phone calls between the CCC and MinterEllison, belies the fact that the CCC had taken sides in the QIRC matter. It also illustrates a willingness in this matter to utilise the vast powers of the CCC to influence and even insert itself in matters outside the specific powers of the CC Act. The committee is cognisant of the fact that such an approach could see the CCC use its compulsory hearings power, or other significant power, to gather evidence that is then provided to non-criminal matters – for example, police disciplinary or public service disciplinary matters.

³⁴⁸ Outline of submissions of Counsel Assisting, 29 September 2021, pp 13-14, paras 50, 54.

³⁴⁹ CCC, Outline of Submissions, 15 October 2021, p 31, para 146.

³⁵⁰ CCC, Outline of Submissions, 15 October 2021, p 31, para 147.

³⁵¹ CCC, Outline of Submissions, 15 October 2021, p 12, paras 56-57.

³⁵² Volume 3, supplement 3, p 10/13, PCCC-3552.

The committee also notes the submission that the position taken by the CCC was a 'neutral' position in that, the CCC submitted, questions of admissibility were left to the QIRC. The committee has concerns with this characterisation, owing to the circumstances in which the position came about – it was solely as a result of communication between MinterEllison and the CCC acting in concert to agree upon the disclosure process. That is not neutral. The CCC does not appear to have considered the partiality and unfairness of this approach. It did not consult with other parties to the QIRC proceedings, and in fact was open to taking advice from MinterEllison about how the disclosure could occur. The following quote is from an email authored by Mr Hutchings in discussing ways the CCC can assist Ms Kelsey:

Dan is going to explore the ways we can do that and come back to me.³⁵³

For the CCC to be receiving and acting upon legal advice from the lawyers for a party to adversarial industrial proceedings so that the CCC can help that party is not independent or impartial. It is one thing to respond to Notices to Produce filed completely independently of the CCC - and even if that were the case, there would be a reasonable argument for why the CCC ought to have not responded owing to the fact that this was a matter before the QIRC, and the parties should be left to that dispute. It is quite another matter for the CCC to work in concert with a party to a private civil proceeding to, essentially, pre-arrange a process to help that party. The CCC could have joined the QIRC proceedings in line with the relevant sections of the PID Act in order to assist Ms Kelsey. That is where the CCC is given clear, express power under statute to intervene. The CCC did not take this approach.

Again, these actions seem to have proceeded on the basis that the CCC considered it had a duty to act as it did because Ms Kelsey was a public interest discloser. As outlined in previous sections, this duty and the power granted to the CCC to assist public interest disclosers is not specifically granted either in the PID Act or the CC Act. The CCC's reasoning and reliance on supporting public interest disclosers ignores other considerations, such as ensuring that parties to civil and or industrial relations disputes are afforded due process, and are not subject to undue influence or support provided by the CCC to their opponents. The committee considers the CCC to have taken it upon itself to act as it did, failing to adequately take heed of the duties actually imposed on it by statute. The depth of interaction, co-operation, planning and acting in concert between Ms Kelsey and her legal representatives and the CCC demonstrates a distinct partiality and lack of independence.

The committee notes that an independent observer described these interactions as 'remarkable'. In legal advice provided to the committee, Mr Walker SC stated:

The remarkable dealings between the CCC and Ms Kelsey's solicitors acting for her in the QIRC proceedings present a markedly different picture. They have been stoutly defended, especially by Mr MacSporran, on the basis that the uncompelled willingness of the CCC to produce documents on Ms Kelsey's request (by a notice that would compel its recipient normally, but which need not be complied with by the CCC) to the QIRC was properly in aid of the CCC's legitimate function or purpose of protecting a PID or vindicating the entitlement not to suffer reprisal of Ms Kelsey as a PID. [In respect of events outlined later in this report, Mr Walker SC continued] ... This thinking extended to the extraordinary manoeuvre that followed the QIRC's ruling against granting Ms Kelsey access to the CCC produced documents. (This Opinion does not involve any critique, favourable or otherwise, of that interlocutory decision.) In essence, it involved returning some seized material (eg WhatsApp records) to the Council, in the knowledge and arguably expectation that Ms Kelsey's solicitors could (and would) then press for disclosure of them by the Council. It is surely to be understood, as I think counsel assisting have fairly raised, that this expedient would permit lawful disclosures to be compelled from the Council, following the ruling against disclosure by the CCC.

The details of the various CCC officers' justifications of this episode are canvassed in the transcripts and documents. They include what can fairly be called liaison with Ms Kelsey's solicitors, in terms redolent of the CCC's active involvement in assisting them. An example is the timing of document return of the

³⁵³ Volume 1, p 119, OpFront-TermsOfReference-09313.

Council that happened to meet a QIRC deadline for Ms Kelsey to obtain production of them. The enlisting of a supposedly unconnected approach of testing the Council's observance of requirements for the maintenance of its public archive has been appropriately tested by counsel assisting. The semantic arguments by some CCC witnesses about the Public Records purpose and the QIRC production collateral effect or benefit are not very impressive, and counsel assisting have appropriately doubted their merits, and whether they are worthy of the CCC.³⁵⁴

The CCC's actions were directed to assisting Ms Kelsey in that proceeding to an extent that exceeded the bounds of the CC Act 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 to unlawfully terminate her employment. The CCC's actions here evidence the high level of direct communication between senior CCC officers and Ms Kelsey's legal representatives that, as set out earlier at section 6.3.7, appear to the committee to be unusual and not of the standard to be expected by an organisation required to demonstrate the upmost integrity.

Finding 5

The committee finds that the totality of the steps taken by the Crime and Corruption Commission to assist Ms Kelsey in her Queensland Industrial Relations Commission 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 *Crime and Corruption Act 2001*.

(Based on Counsel Assisting Available Finding 7)

Refer also to finding 2 at section 6.3.7.3 of this report.

6.4.9 The effect and scope of the Queensland Industrial Relations Commission decision

As mentioned above, the notice of attendance to produce was set aside in the QIRC on 24 August 2018.³⁵⁵ Relevantly, Black IC concluded as follows:

It is also clear that any access on the part of the applicant to such material would likely prejudice the prospects of a fair trial and may lead to interference in the administration of justice. I also accept that if the applicant were given access to the material produced, notwithstanding the undertakings provided by the applicant's lawyers about access, there is a significant prospect that material which is inadmissible and/or subject to restrictions on its use or publication by the CCC, might find its way into evidence, a decision of the commission, or the public domain.

...

I arrive at the following conclusions which support a decision to set aside the notice:

- (a) general legal principles and common law principles enunciated in *Flori* and *R v Leach* preclude the applicant's unrestricted access to materials and the use of materials obtained under compulsion;
- (b) having regard to such principles, I am satisfied that an implied limitation emerges out of the structure and purposes of the CC Act to the effect that material obtained by the CCC by use of its coercive powers cannot be used in the applicant's proceeding;
- (c) the implied limitation, consistent with the reasoning in *Williams v Keelty*, extends to a prohibition on the derivative use of the material, including use by the applicant in the preparation of her case;
- (d) if material obtained under compulsion cannot be disclosed to the applicant or to the applicant's lawyers, and cannot be used by the applicant in the substantive proceedings, and cannot be tendered into evidence, it can serve no legitimate forensic purpose and, save for a consideration of material other than material obtained by compulsion, the notice must be set aside;
- (e) the use by the applicant of material obtained under compulsion may jeopardise the fair conduct of the substantive proceedings and risk interfering with the administration of justice;

³⁵⁴ Mr Walker SC, correspondence, 21 September 2021, p 5.

³⁵⁵ *Kelsey v Logan City Council & Ors* [2018] QIRC 108.

(f) dissemination of material obtained under compulsion for use by the applicant in the substantive proceedings is not consistent with the performance of the CCC's functions; and

(g) neither s 60(2) of the CC Act, nor s 62(1) of the CC Act expressly authorise the giving of information by the CCC to the QIRC for use by the applicant in the substantive proceedings.

In circumstances where it is known that the majority of the documents produced by the CCC were documents obtained under compulsion, where there is a disagreement about the use of other material produced resulting from telephone intercepts, and where valid claims of legal professional privilege are likely to be made in respect to some of the documents produced, there is a basis to conclude that there is little prospect that the great majority of the subpoenaed documents produced by the CCC will serve any legitimate forensic purpose.

...

In these cases the applicant said that it should be able to seek discovery of those documents from the CCC. However, in my view if the existence of such documents rests on the premise that some or all of the respondents may not have complied with disclosure orders, then the remedy is not to pursue those documents via a third party, but to commence an action against the respondents for a failure to comply with disclosure directions.³⁵⁶

The CCC advised it '... respectfully disagrees with the decision of QIRC as to the operation of (the now amended and repealed) sections 60 and 62 of the CC Act'.³⁵⁷

As to the scope of the decision, Mr Alsbury made these three points to the committee:

One is, when courts or commissions decide issues, they decide things based on the specific circumstances that they are presented with. Secondly, this matter is decided basically lumping everything in together. Thirdly, Councillor Dalley or Mrs Dalley disclosed the WhatsApp chats to the commission and they were used in the commission. So that seems to suggest to me that they were not inadmissible.³⁵⁸

The CCC stated:

As far as possible the CCC left it to the QIRC to determine the question of the admissibility of the information. In this respect, the CCC acted consistently with the way that any other third-party entity will act when asked to produce documents to a court or tribunal pursuant to a summons or notice to produce.³⁵⁹

The CCC appeared to draw a distinction between the setting aside of the notice and a consideration of the admissibility of the material produced in response to it:

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.³⁶⁰

This last statement appears to be accurate, to the extent that a careful reading of the decision suggests that much of the material covered by the notice was not specifically addressed by Black IC. However, at para [145], Black IC stated:

Both *R v Leach* and *Flori* are authority for the proposition that material obtained under compulsion cannot be used in collateral civil proceedings.³⁶¹

³⁵⁶ *Kelsey v Logan City Council & Ors* [2018] QIRC 108, at [153], [155]-[156], [158].

³⁵⁷ Submission 25, pp 26-27, para 143.

³⁵⁸ Public hearing transcript, Brisbane, 18 August 2021, p 29.

³⁵⁹ Submission 25, pp 3-4, para 10.

³⁶⁰ CCC, Outline of Submissions, 15 October 2021, p 13, para 61.

³⁶¹ *Kelsey v Logan City Council & Ors* [2018] QIRC 108, at para 145.

The CCC urged the committee to carefully read the dissemination authority for the QIRC dissemination where each of the categories of evidence is addressed.³⁶² The CCC then stated:

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".³⁶³

In its letter to the QIRC registrar enclosing the documents, the CCC described the documents (aside from the statement of the CCC office) as having '... been obtained by the CCC pursuant to compulsory or coercive legal processes'.³⁶⁴

The CCC had recovered WhatsApp raw data extracted from Cr Dalley's council-owned mobile phone, pursuant to a search warrant issued on 30 May 2018 and executed on 1 June 2018. Councillor Dalley had deleted the records and the CCC returned them to her after they were recovered. In December 2018 (that is, subsequent to the QIRC decision setting aside the notice), Cr Dalley disclosed this WhatsApp data in the QIRC proceeding.³⁶⁵

The CCC makes the point that this WhatsApp data from Cr Dalley's mobile phone was admissible in the QIRC proceeding and was tendered in evidence.³⁶⁶

In its submission on the evidence, after referring to these developments regarding Cr Dalley's mobile, the CCC drew this distinction:

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.³⁶⁷

The QLS, after noting that the CC Act provides the CCC with 'extremely broad investigative powers', stated in its submission:

In submissions to previous inquiries by this Committee and other Parliamentary Committees, we have outlined why there should generally be a prohibition against the derivative use of evidence and why this is a fundamental tenet of our justice system. The authorities of *Flori v Commissioner of Police & Another ...* and *R v Leach ...* provide that evidence obtained by an authority, such as the Queensland Police Service, for one purpose cannot be admitted into evidence in a separate proceeding. Material obtained pursuant to the compulsion of a search warrant may only be used for the statutory purpose for which the warrant was granted, that is, to obtain evidence of the commission of an offence.

Therefore, it is of significant concern, and contrary to law, if the CCC obtains documents or information using its coercive powers and subsequently seeks to use, or have the documents or information used, for another purpose, including another legal proceeding other than as permitted by the Act.

Given the scope of its powers, QLS recommends that better guidance is provided to CCC officers about compliance with the Act in respect of disclosure of documents and information including the circumstances in which disclosure is permitted under section 60 of the Act, and how this intersects with section 213.³⁶⁸

³⁶² CCC, Outline of Submissions, 15 October 2021, p 14, para 63.

³⁶³ CCC, Outline of Submissions, 15 October 2021, p 14, para 64; Mr Paul Alsbury, public hearing transcript, Brisbane, 18 August 2021, p 29.

³⁶⁴ Volume 1, pp 219-220, PCCC-0150.

³⁶⁵ CCC, submission 25, pp 13-14, para 62.

³⁶⁶ CCC, Outline of Submissions, 15 October 2021, p 14, para 64.

³⁶⁷ CCC, Outline of Submissions, 15 October 2021, p 14, para 63.

³⁶⁸ Submission 35, p 1.

6.4.10 Committee comment

The ruling of Black IC (a Court of Record) applied to the material that the CCC had obtained by the exercise of compulsory powers, and also the WhatsApp records. The committee notes that the CCC, in its letter to the QIRC registrar enclosing the documents, described the documents (with the stated exception only of the statement of the CCC officer) as having:

... been obtained by the CCC pursuant to compulsory or coercive legal processes.³⁶⁹

The actions of the CCC in delivering material to the Logan City Council in October 2018 and again in November 2018 do need to be assessed in this light and are considered in more detail below at sections 6.5 and 6.6.

The committee is of the view that the documents delivered to the Council on 3 October 2018 and 19 November 2018 (recognising them to be almost identical and in any event materially the same as those the subject of Black IC's ruling) were ones which were ruled upon as being ones that ought not be accessed by Ms Kelsey because such access 'would likely prejudice the prospects of a fair trial and may lead to interference in the administration of justice'.³⁷⁰

6.5 Delivery of documents to Logan City Council in October 2018

6.5.1 The documents and their delivery

On 3 October 2018, DS Francis (accompanied by Detective Sergeant Troy Newman) delivered certain documents to the acting chief executive of the Logan City Council (Mr Silvio Trinca). The documents were extraction reports of WhatsApp group communications which the CCC had extracted from the mobiles of Mayor Smith and Cr Dalley.

The CCC had delivered copies of these documents to Mr Smith's lawyers and to Ms Dalley on 10 September 2018.

The documents were part of the material produced by the CCC to the QIRC, in response to the notice that was subsequently set aside by Black IC.

There was no covering letter and no other formal documentation prepared in connection with the delivery, and no dissemination authority nor any request for one to be prepared. However the exchange between DS Francis and Mr Trinca at delivery on that day was recorded and later transcribed.³⁷¹

In response to a request by Cr Dalley's lawyers, on 13 December 2018, the CCC consented to Cr Dalley disclosing the WhatsApp group communications that had been delivered to her for the purposes of the QIRC proceedings.³⁷² As the matter transpired, the WhatsApp group communications were considered by VP O'Connor of the QIRC to be not helpful to Ms Kelsey's claims.³⁷³

6.5.2 Return of the documents to the Crime and Corruption Commission

The documents delivered on 3 October 2018 were recalled by the CCC, with DS Francis emailing the Logan City Council's lawyers on 9 November 2018, stating he 'would be grateful if you could facilitate the return of these documents'.³⁷⁴ (That request followed one DS Francis made to Mr Trinca the preceding morning, only to be told that the documents were in the possession of the solicitors).

³⁶⁹ Volume 1, pp 219-220, PCCC-0150.

³⁷⁰ *Kelsey v Logan City Council & Ors* [2018] QIRC 108 at [153].

³⁷¹ Volume 1, p 351, PCCC-0370.

³⁷² Submission 25, p 31, para 164.

³⁷³ *Kelsey v Logan City Council & Ors (No.8)* [2021] QIRC 114.

³⁷⁴ Volume 1, p 407, PCCC-0393.

These requests followed advice from Logan City Council's lawyers to DS Francis on 1 November 2018 that, in their view, the material delivered on 3 October 2018 was:

- almost certainly part of the material that was the subject of the decision and orders of Black IC of 24 August 2018, and
- as such was not capable of disclosure as it was inadmissible in these QIRC proceedings.³⁷⁵

Logan City Council's lawyers further advised that therefore it was inappropriate for Mr Trinca to make any determination in relation to which parts of that material were public records and entered into Council's records system 'until such time as the QIRC has resolved the issue of the discoverability (and admissibility) of the material ...'.³⁷⁶ The solicitors referred to the previous decision of Black IC, specifically para 155.

The documents were delivered back to the CCC later on 9 November 2018, by the solicitors for the Logan City Council.

6.5.3 Issues of legal professional privilege

The material delivered on 3 October 2018 included some communications which were, at least potentially, the subject of legal professional privilege. In evidence to the committee, DS Francis said he was:

... aware that when conversations similar to this come into my possession between a lawyer and another person there has to be a level of scrutiny in regards to legal professional privilege...³⁷⁷

As to whether the material had been reviewed for such content prior to the delivery, his evidence was somewhat contradictory. DS Francis said he could not recall whether the material had been reviewed for such content by any lawyer at the CCC, prior to his obtaining the material.³⁷⁸

DS Francis then said:

... 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.³⁷⁹

In response to further questioning, he denied having inferred by this statement that he thought 'something being critical evidence means legal professional privilege does not attach or goes away.'³⁸⁰

DS Francis also stated:

If it was deemed by myself or any other person that viewed that evidence that it was legal professional privilege, it would not have been disclosed.³⁸¹

DS Francis could not recall who, besides himself, had reviewed the material, which he described as:

... a function of my poor memory. The evidence was very relevant to our team and it is likely that we all considered it.³⁸²

The committee considers the most probable version of these events is that insufficient consideration was given to this issue of privilege by any legal practitioner within the CCC, and that DS Francis gave

³⁷⁵ Volume 1, p 393, PCCC-0382.

³⁷⁶ Volume 1, p 393, PCCC-0382.

³⁷⁷ Public hearing transcript, Brisbane, 20 August 2021, p 50.

³⁷⁸ Public hearing transcript, Brisbane, 20 August 2021, p 50.

³⁷⁹ Public hearing transcript, Brisbane, 20 August 2021, p 50.

³⁸⁰ Public hearing transcript, Brisbane, 20 August 2021, p 50.

³⁸¹ Public hearing transcript, Brisbane, 20 August 2021, p 50.

³⁸² Public hearing transcript, Brisbane, 20 August 2021, p 50.

cursorily verging on no consideration of the same issue. In any event, as noted later in this report, concerns were later raised within the CCC (after the documents had been disseminated) about the possibility that some of the content was subject to legal professional privilege.

6.5.4 The purposes of the delivery

The questions of the need for, or desirability of, any dissemination authority, and any requirement to notify the committee under section 329 of the CC Act are considered in section 6.13.1 of this report.

The issue is whether the delivery in October 2018 was intended as a manoeuvre to avoid the effect of the decision of Black IC setting aside the notice to produce, with the aim of making them liable to being disclosed by the Logan City Council, and thus available to Ms Kelsey, in those proceedings. This in turn raises the issue of whether the true, or primary, purpose of the delivery was related to the requirements under the Public Records Act.

Counsel Assisting suggested to the committee that a finding available to the committee was that 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 above decision of Black IC.

In response, the CCC asserted:

- Such a finding was not available as the 'overwhelming evidence proves that the documents were delivered to the Council on October 2018 for the *sole* purpose of the Commission's corruption investigation'.³⁸³
- 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'.³⁸⁴

Counsel Assisting also suggested to the committee that it could be concluded:

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.³⁸⁵

The CCC's view was that this assertion was contradicted by the evidence of credible witnesses.³⁸⁶ The CCC then provided a summary of that evidence.³⁸⁷

³⁸³ CCC, Outline of Submissions, 15 October 2021, p 14, para 65.

³⁸⁴ CCC, Outline of Submissions, 15 October 2021, p 14, para 66.

³⁸⁵ Outline of submissions of Counsel Assisting, 29 September 2021, p 8, para 32.

³⁸⁶ CCC, Outline of Submissions, 15 October 2021, p 15.

³⁸⁷ CCC, Outline of Submissions, 15 October 2021, p 15; submission 25, p 30, from para 162.

6.5.5 The evidence as to the purpose of the October delivery

The CCC advised the committee:

As suggested by Mr Preston's email of 25 September 2018, the material was provided to Mr Trinca because, as the acting CEO of the Council, it was his responsibility under the PR [Public Records] Act to ensure that the Council kept full and accurate records of its activities. Mr Trinca was asked to determine whether the communications were public records and advise whether they had been retained by the Council.³⁸⁸

On 25 September 2018, DI Preston had met with members of the Queensland State Archives. Later that day he emailed various colleagues, including DS Francis and the rest of the Operation Front investigation team. He also sent it to his director of operations, and to four other operations coordinators at his level who oversaw other investigations.³⁸⁹ DI Preston explained:

... this was about sharing the information in relation to the State Archives and what we had found or what we had considered was probably a potential issue for us for this council, and I was aware of other investigations that were being conducted at the time that involved a number of other councils that could potentially utilise this sort of information to make a determination or what was required to make a determination in relation to contents of those documents.

...

I have sent this email out 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. We would need to talk to the CEO for them to have a look at their documents as they owned those documents—they were not ours; they owned those documents—and for them to make a determination as to what was council business and what was not council business. The State Archivist provided the information that they could not do that; it had to come from the CEO.

...

So that was basically to start a conversation to see if we could make a continuance of our investigation, see if we could take that any further in relation to the release of the public documents.³⁹⁰

Relevantly, the email included the following statements:

I today met with two members from the State Archives office and they are interested in working closely with us in relation to Record keeping within councils and government departments. At this stage the State Archives has the power to prosecute but they have never done it and have referred matters back to the respective agency to address.

...

I believe it would be appropriate for our investigators to take the WhatsApp messages they have downloaded from the councillors phone and produce them to the Logan City Council CEO to see whether Councillors have provided such records for keeping in accordance with the legislation. In this event, the CEO could then confirm what they have on record or if councillors have individually breached [s 13 of the Public Records Act].³⁹¹

³⁸⁸ Submission 25, p 31, para 165.

³⁸⁹ CCC, Outline of Submissions, 15 October 2021, p 16, para 71; public hearing transcript, Brisbane, 25 August 2021, p 37.

³⁹⁰ Public hearing transcript, Brisbane, 25 August 2021, p 37.

³⁹¹ Volume 1, p 347, PCCC-0365.

For his part, DS Francis said that by this email DI Preston:

... turned my mind to the [Public Records Act] and subsequent to this email I have then familiarised myself in regards to specifically section 13 and others, 7 and 8, in regards to public records and offences within that Act.³⁹²

DS Francis' oral evidence as to his state of knowledge regarding the documents provided to the QIRC in response to the notice to produce and the decision of Black IC setting aside that notice was unclear:

Dr HORTON: Had anyone informed you or did you otherwise know as at 25 September 2018 that some documents had been produced by the CCC to the QIRC?

Det. Sgt Francis: As I am sitting here, Mr Horton, I cannot confirm or deny whether by that date the QIRC had received documents from the CCC. I do not know.

Dr HORTON: Good. I will ask you to assume for a minute that it had.

Det. Sgt Francis: Yes.

Dr HORTON: Did anyone inform you before 25 September 2018, or did you otherwise know, that the QIRC had issued a decision on 24 August 2018 about the notice which had been issued to the CCC?

Det. Sgt Francis: No. I can provide context to that if needed.

Dr HORTON: Yes.

Det. Sgt Francis: My interest to the QIRC was as a detective sergeant investigator. I had an interest. My interest was limited to Ms Kelsey's public interest disclosure and subsequent affidavits. And my interest was in—was later motivated, after this, in regards to the construction of her statement. My other avenue of interest related to affidavits completed by the councillors. It was always my belief—strong belief—that those affidavits were in conflict with evidence that we had gathered in respect to telecommunications intercepts, in regards to this WhatsApp dialogue that is the subject of this conversation now and I believe they are admissible in this investigation. However, I was strongly informed by—strongly informed that that evidence was not obtainable due to suppression orders within the QIRC, and that was a frustration of mine. That is the extent of my interest in the QIRC.

Dr HORTON: What was the evidence that you understood was not obtainable due to suppression orders in the QIRC?

Det. Sgt Francis: The affidavits of the councillors.

Dr HORTON: I see. And so I had understood you to say, 'It was always my belief' that the councillors had given affidavits which were inconsistent with what you had seen in the WhatsApp material.

The CCC referred to the evidence given by DS Francis and asserted:

DS Francis did not know when the Commission had delivered documents to the QIRC. He also did not know that the QIRC had issued a ruling on 24 August 2018 about the Notice to Produce. 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.³⁹³

The transcript of the conversation at the time of delivery includes DS Francis saying to Mr Trinca regarding the documents:

... these are not confidential

... because the fact that they're obtained on council property. But we're after your opinion ah as the CEO of Logan City Council as to whether these relate to council business.

...

³⁹² Public hearing transcript, Brisbane, 20 August 2021, p 45.

³⁹³ CCC, Outline of Submissions, 15 October 2021, p 17, para 80.

And if they do relate to council business well then there is some significant implications that are surrounding the documents I'm about to give you. Um the, you'll see that there's a title there there's an Extraction Report.

Each of these documents contain to a different device if that makes sense and they're not complete which is another reason that I'm here as well. So it might well be that you have the complete records...³⁹⁴

In his evidence, DI Preston agreed that he thought 'the purpose and the only purpose was in connection with the Public Records Act'.³⁹⁵

When asked whether there were 'any motivations or assistance in trying to get around' the QIRC order, he responded:

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.³⁹⁶

DI Preston also agreed that his evidence was that there was not an effort to try to get prohibited material before the QIRC after the ruling.

In addressing DI Preston's evidence, the CCC stated:

His evidence was unequivocal: there was not an effort to try to get the material before the QIRC.

There is no reason not to accept the evidence of DI Preston. The [submission of Counsel Assisting] does not explain why the PCCC should not accept it.³⁹⁷

Ms McIntyre was asked:

Did it strike you that there might be some conflict between that action and the ruling delivered by Commissioner Black in August—

...

—about the admissibility of that material in the Industrial Relations Commission proceedings?³⁹⁸

Ms McIntyre replied no as 'we were looking at breaches of the Public Records Act'.³⁹⁹

There is evidence that the purpose of this October dissemination to Logan City Council was in accordance with Available Finding 3 suggested by Counsel Assisting.⁴⁰⁰

Firstly, the approach adopted by the CCC in its treatment of these documents significantly departs from that taken when it elected to produce documents to the QIRC earlier in 2018. In that process, the CCC placed conditions on the use of the documents, reflecting, as Counsel Assisting put it 'some conscious observation' of the requirements of section 57 of the CC Act.⁴⁰¹ The substance of those conditions in the July 2018 dissemination to QIRC were:

- The documents were deemed to be and to remain the exclusive property of the CCC and the CCC had copyright in them.
- The documents were deemed to be confidential and had the security classification: protected.

³⁹⁴ Volume 1, pp 351-368, PCCC-0370.

³⁹⁵ Public hearing transcript, Brisbane, 25 August 2021, p 39.

³⁹⁶ Public hearing transcript, Brisbane, 25 August 2021, p 52.

³⁹⁷ CCC, Outline of Submissions, 15 October 2021, p 16, paras 75, 76.

³⁹⁸ Public hearing transcript, Brisbane, 19 August 2021, p 66.

³⁹⁹ Public hearing transcript, Brisbane, 19 August 2021, p 66.

⁴⁰⁰ Outline of submissions of Counsel Assisting, 29 September 2021, p 8.

⁴⁰¹ Outline of submissions of Counsel Assisting, 29 September 2021, p 7, para 27.

- Subject only to use by the QIRC or parties to the QIRC proceedings, the documents were not to be copied or disseminated or disclosed to any third party without the express written authority of the CCC.⁴⁰²

These conditions, reflecting as they did 'some conscious observation' of the CCC's section 57 obligations, are completely at odds with the treatment of the very same documents in the October (and November) disseminations. The CCC has not submitted in any way how their view of the documents went from being 'exclusive property of the CCC' to being Logan City Council property, nor how protected documents were reduced in classification to being documents that were public records and to be placed in the public domain or that the considerations which led to conditions which required no further dissemination, copying or disclosure without the express written authority of the CCC to be overturned.

Mr Walker SC, as an independent observer, indicated in advice to the committee about 'the remarkable dealings' between the CCC and Ms Kelsey's solicitors that:

...the enlisting of a supposedly unconnected approach of testing the Council's observance of requirements for the maintenance of its public archive has been appropriately tested by counsel assisting. The semantic arguments by some CCC witnesses about the Public Records purpose and the QIRC production collateral effect or benefit are not very impressive, and counsel assisting have appropriately doubted their merits, and whether they are worthy of the CCC.⁴⁰³

The entire process was, with respect to the CCC, highly irregular. No dissemination authority was prepared, no cover letter was prepared and no internal documentation was prepared that fully and comprehensively explains the purpose of the delivery. The nature of the discussion between DS Francis and Mr Trinca is such that it appears that DS Francis is confused about the intention of the delivery to Logan City Council.

The context and totality of the evidence to the inquiry is also relevant in considering this issue. The CCC had resolved to assist Ms Kelsey in the QIRC proceedings. It is also apparent to the committee that the CCC had little regard for the decision of Black IC, and certainly did not consider itself to be bound by it, even if it meant finding alternative ways to circumvent the decision. MinterEllison specifically requested the CCC, after Black IC's ruling, to 'consider providing the documents to the Logan City Council and/or the individual Councillors'.⁴⁰⁴ The fact is, that is exactly what transpired – the CCC did in fact deliver the documents to the Logan City Council, as suggested by MinterEllison. Prior to this request, the issue of the Public Records Act does not feature highly, if at all, in the consideration of the CCC and the internal correspondence of the CCC.

Finally, it is worth observing in this context that Ms McIntyre gave evidence, in addressing the November delivery (see further below) in which she accepted that one of the intended, though not primary, purposes of disseminating the WhatsApp material to the Logan City Council was to assist Ms Kelsey in her application for disclosure in the QIRC.⁴⁰⁵

6.5.6 Committee comment

The committee notes the CCC's argument that a purpose of the delivery was for the stated reasons arising under the *Public Records Act 2002*.

⁴⁰² Volume 1, p 217, PCCC-0150.

⁴⁰³ Mr Walker SC, correspondence dated 21 September 2021, p 5.

⁴⁰⁴ Outline of submissions of Counsel Assisting, 29 September 2021, p 9, para 33.

⁴⁰⁵ Public hearing transcript, Brisbane, 20 August 2021, p 13.

As noted above, Counsel Assisting suggested this finding was open in relation to the October 2018 delivery:

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.⁴⁰⁶

Counsel Assisting also submitted:

All the WhatsApp records relevant to this Inquiry and which were later delivered to the 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.⁴⁰⁷

...

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.⁴⁰⁸

The committee acknowledges that reasonable minds may differ on the extent and meaning of the decision of Black IC, in particular in relation to the *Flori* matter. However, the committee considers that not material in all the circumstances. The decision of Black IC was not appealed and dealt with the exact same (save for a document or two) set of documents. The committee considers that the CCC, as an integrity body, should have taken heed of that authoritative decision and respected it, no matter how it was reached or whether or not the CCC agreed with it. Instead, the committee considers that the CCC took steps to disseminate the documents to the Logan City Council so that they would find their way into the QIRC proceedings in another way.

Finding 6

The committee finds that confidential documents, including some that were likely subject to legal professional privilege, were delivered to Logan City Council on 3 October 2018 by Crime and Corruption Commission officers, without a dissemination authority, for a purpose of making them available for Ms Kelsey's use in the Queensland Industrial Relations Commission proceeding.

(Based on Counsel Assisting Available Finding 3)

6.6 Delivery of documents to Logan City Council in November 2018

6.6.1 Legislative changes

Between the dates of the October and November deliveries, legislative provisions relevant to the CCC's power to disseminate material changed. As at the October delivery, the relevant provisions were sections 60 and 62 in the CC Act:

60 Commission may give evidence or information to other entities

(1) The commission may give evidence of, or information about, a possible offence against a law of the State, the Commonwealth or another State to an entity or a law enforcement agency the commission considers appropriate.

⁴⁰⁶ Outline of submissions of Counsel Assisting, 29 September 2021, p 8, available finding 3.

⁴⁰⁷ Outline of submissions of Counsel Assisting, 29 September 2021, para 28.

⁴⁰⁸ Outline of submissions of Counsel Assisting, 29 September 2021, pp 7-8, paras 29-30.

(2) Also, the commission may give information coming to its knowledge, including by way of a complaint, to a unit of public administration if the commission considers that the unit has a proper interest in the information for the performance of its functions.

Example—

The commission may consider that information in the commission's possession should be given to the auditor-general or the ombudsman for consideration in the performance of the entity's functions.

(3) Subsection (1) does not limit anyone's right to start a prosecution for an offence.

(4) This section is subject to section 62.

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 317.⁴⁰⁹

These sections were affected by amendments to the CC Act, effected by s 15 of the *Crime and Corruption and Other Legislation Amendment Act 2018*. The amendments took effect upon the Assent date of 9 November 2018. Section 62 was (and remains) repealed. Section 60 was amended to read:

60 Use and disclosure of information, document or thing

(1) The commission may use any information, document or thing in the commission's possession in performing the commission's functions.

(2) The commission may give intelligence information or other information to any entity the commission considers appropriate, including, for example—

- (a) a unit of public administration; and
- (b) a law enforcement agency; and
- (c) the auditor-general; and
- (d) a commissioner under the *Electoral Act 1992*; and
- (e) the ombudsman.

Note—

See section 213 in relation to making a record of, or wilfully disclosing, information given to a person under this section on the understanding, express or implied, that the information is confidential.

It is important to note that none of these dissemination provisions can override the provisions in the TIA Act which prohibit the use or communication of TI product, other than in accordance with that Act. As noted by the CCC at the time, this meant the CCC could not '...disseminate' or otherwise provide the TI product to the QIRC...'.⁴¹⁰

While it is unnecessary to analyse these amendments in any great detail for present purposes, it is doubtful whether the amendments had any impact on what the CCC could — or should — have done, in terms of the two deliveries to the Logan City Council.

The position of DS Francis, and presumably of the CCC as a whole, was that the delivery in October was made *in performing the commission's functions*.

On this basis, the October 2018 delivery would fall within the wording of both the old section 62 and the new section 60.

⁴⁰⁹ CC Act, ss 293, 317 respectively set out the powers of the committee and the Parliamentary Commissioner.

⁴¹⁰ Volume 1, pp 120-121, OpFront-TermsOfReference-09313.

As at that time, under the then section 62(1), if the use or dealing with the information, document or thing was in the performance of the CCC's functions, there was no *statutory* requirement for the express consent of the CCC.⁴¹¹ This would for example allow a CCC investigator or seconded police officer to show documents or provide information to a suspect during an interview or to a witness for comment or explanation without the commission having to expressly authorise in writing every disclosure of every piece of information, document or thing. Were it otherwise, the CCC could not properly function – it would be hamstrung.

The former section 62(1) provided CCC officers with a fairly wide discretion as to what use and dealing might be considered to be *in performing the commission's functions*. This legislative approach is also reflected in the amended section 60(1). Indeed the amended section appears even wider. The explanatory notes for the Bill that included the new section 60 stated the new provision *will provide the Commission with a broad power to disclose information to entities the Commission considers appropriate*.⁴¹²

A disclosure relevant to a possible offence – for example, under the Public Records Act – no longer needed to be for the purpose of *performing the commission's functions* – it only needed to be to an entity considered *appropriate*. The committee notes this extremely broad wording of section 60(2) effectively gives the CCC *carte blanche* in respect of information it holds, no matter the source of that information.

Whatever else might be said about the actions and motives of the CCC in the October 2018 and November 2018 deliveries to the Logan City Council, it is quite arguable that they were in compliance with these statutory provisions.

The QLS queried whether section 60 authorised dissemination to a court or commission in proceedings that are not for the prosecution of an offence:

Section 60(2) is not exhaustive and "entity" is not defined in the Act, though we note in Schedule 1 of the *Acts Interpretation Act 1954* the term can include "a person and an unincorporated body." The Explanatory Notes state that the provision allows the commission, where appropriate, to give information and evidence to other law enforcement agencies if it has evidence of an offence against a law of the State, the Commonwealth or another state. The commission may also give information to a unit of public administration with a proper interest in receiving the information. The explanatory material does not speak to giving information specifically to a court or commission or in respect of a legal matter that is not the prosecution of an offence.⁴¹³

Despite the breadth of its language, the committee questions whether section 60 should be more properly aimed at a court or similar tribunal in the capacity as a unit of public administration, that is, an entity in the public sector, and using public funds and with public sector employees, rather than in the capacity of a body hearing and making determinations in legal proceedings before it. Indeed, this would seem a more appropriate approach to take when taking into account the broad obligation of the CCC under section 57 of the CC Act, but that section in itself is also very broad and open to interpretation. To take a wider view opens the door to the CCC acting in a way that would unfairly impact parties to other proceedings, regardless of whether those actions relate back to a function of the CCC – and that is completely inappropriate for a body possessed of such wide-ranging powers. The dissemination provisions are subject only to the proviso that the CCC considers its actions 'appropriate', which, to state the obvious, does not provide any clear boundaries on the use of information held by the CCC.

⁴¹¹ This is distinct from the question whether there was any requirement for such consent under the CCC's internal policies and procedures.

⁴¹² Crime and Corruption and Other Legislation Amendment Bill 2018, explanatory notes, p 5.

⁴¹³ Submission 35, p 2.

Recommendation 2

The committee recommends that the Queensland Government review the broad scope of both the present section 60 and former sections 60 and 62 of the *Crime and Corruption Act 2001* to ensure an appropriate balance is reached between the Crime and Corruption Commission being able to utilise information in pursuance of its functions and the rights of other parties to not be detrimentally impacted by the dissemination of that information, in particular that obtained by use of the Crime and Corruption Commission's extraordinary powers.

(Based on Counsel Assisting Proposed Measure 4)

6.6.2 The November 2018 documents

The timeline set out earlier in this report contains the following chain of events:

On **7 November 2018**, the State Archivist notified DS Francis that if a councillor uses WhatsApp for council business then the record is a 'public record' under the *Public Records Act 2002*.⁴¹⁴ The following day on **8 November 2018**, DS Francis emailed Mr Trinca seeking the return of the documents. Mr Trinca advised the documents were with Mr Fynes-Clinton of King and Company.⁴¹⁵

The documents delivered on 3 October 2018 were recalled by the CCC. DS Francis emailed the Logan City Council's lawyers on 9 November at 6:04am, stating 'I would be grateful if you could facilitate the return of these documents'.⁴¹⁶

That request mirrored one made the preceding morning to Mr Trinca: 'Can I now make arrangements to take back possession of the documents I provided to you?'⁴¹⁷

These requests came after advice from Logan City Council's solicitors that Mr Trinca considered it inappropriate to make any determination relating to the WhatsApp communications provided to him.

The documents were delivered back to the CCC on **9 November 2018**.

After the documents were retrieved from the Logan City Council on 9 November 2018, MinterEllison wrote to the CCC on **15 November 2018**, asking for the documents to be returned to Logan City Council by 20 November 2018. MinterEllison wrote:

On 13 November 2018, we received the enclosed correspondence from King & Co [the Council's solicitors]. The correspondence indicates that the documents provided to the First Respondent by the CCC and were thus in the First Respondent's possession at the time our client made her application for disclosure, have since been returned to the CCC.

So that the First Respondent 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 First Respondent 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 First Respondent.

We ask that the CCC do so before Tuesday 20 November 2018, which is the date this matter is again listed before the Commission.⁴¹⁸

This letter was followed up by MinterEllison via an email to Mr Hutchings on the following day, which stated:

We refer to the correspondence from our office of 15 November 2018.

⁴¹⁴ Volume 1, pp 403-404, PCCC-0340.

⁴¹⁵ Volume 1, p 407, PCCC-0393.

⁴¹⁶ Volume 1, p 407, PCCC-0393.

⁴¹⁷ Volume 1, p 408, PCCC-0393.

⁴¹⁸ Submission 25, p 34, para 177.

As outlined, given that the matter is listed again before the Commission on Tuesday 20 November 2018, it would be of great assistance if you could please advise if you will agree to our request to return the relevant documents to Council.⁴¹⁹

On **19 November 2018**, the CCC delivered substantially the same documents to the Logan City Council. The documents contained extraction reports from WhatsApp communications in which the CCC alleged the former mayor of Logan City Council and the former councillors were discussing Logan City Council-related business. However, this time some of the documents had been redacted due to issues of legal professional privilege.

The documents were accompanied by a covering letter and a 'Request and authority to disclose information (other than CCC hearing information) to an appropriate entity' document (dissemination authority) signed by Mr Alsbury.⁴²⁰

In the covering letter from Mr Alsbury, it stated:

In addition to its Corruption function, the CCC also has a prevention function. One way the CCC helps to prevent corruption is by providing information to, and consulting with, and making recommendations to units of administration...

The use of communication apps such as WhatsApp to communicate business of Logan City Council not only poses a corruption risk but also a security risk. This risk is heightened in the absence of adequate governance around the use of such communication apps and proper management of records created as a result of such use.

As I have indicated above, I am of the view the content of the WhatsApp conversations relate to Logan City Council business and consequently are public records...

Having regard to the seriousness of the councillors conduct and Logan City Council's lack of governance around the use of communication apps and management of public records, I am providing to you the following documents to assist in the implementation of appropriate governance measures...

... These documents have been provided to you pursuant to an Authority under section 60(2) of the CC Act.

I wish to advise that these documents will also be referred to the State Archivist for consideration and action. Consideration is also being given to referring this material to the newly formed Office of the Independent Assessor for consideration of whether the councillors should be disciplined for engaging in misconduct and/or inappropriate conduct under the LG Act.⁴²¹

The third last paragraph also read 'I enclose the requested documents'.⁴²²

The dissemination authority outlined that the Logan City Council had a proper interest in the information and disclosure to the Logan City Council was appropriate, for the following reasons:

- (a) The WhatsApp communications evidence conduct by seven Councillors discussing Logan City Council related business in a way that may be perceived by the community of Logan to be deceptive and secretive and was undertaken by excluding other elected Councillors.
- (b) Logan City Council does not have any enacted policy prohibiting the use of communication apps to communicate business of Logan City Council. Similarly, there does not appear to be a policy on the management of public records.
- (c) The use of communication apps to communicate business poses not only a corruption risk but also a security risk at Logan City Council particularly when there is no policy prohibiting the use of such communication apps. The absence of a policy prevents the proper management of these records.

⁴¹⁹ Submission 25, p 34, para 179.

⁴²⁰ Submission 25, pp 34-35, para 181, 185.

⁴²¹ Volume 1, p 432, PCCC-0563.

⁴²² Volume 1, p 432, PCCC-0563.

- (d) It is submitted the communications are public records as defined under the *Public Records Act 2002* (PR Act). Logan City Council is deemed to be a public authority, as defined under the PR Act. As a result, Logan City Council must make and keep full and accurate records of its activities (section 7(1) of the PR Act) and the CEO is responsible and accountable for ensuring the public authority complies with these requirements. Logan City Council is made up of an elected body of councillors responsible for the good rule and local government of Logan. It is submitted the individual Councillors fall within the definition of a public authority and are responsible for keeping full and accurate records of their activities. It is further submitted, the use of WhatsApp to communicate Logan City Council related business is a breach of the PR Act, particularly given the communications were not held in the custody of or preserved by Logan City Council (section 8 of the PR Act)
- (e) The Councillors deleted the WhatsApp communication app and conversations without properly managing these records. It is submitted this disposal of public records is a breach of section 13 of the PR [Public Records] Act.
- (f) It is submitted the use of the WhatsApp communication app and subsequent deletion of public records generated as a result of using WhatsApp to discuss Logan City Council related business, may be misconduct and/or inappropriate conduct as defined under the *Local Government Act 2009* (LG Act).
- (g) The dissemination of this information will not compromise the ongoing investigation.⁴²³

Subsequently, in a letter sent to the Logan City Council on 12 February 2019, Mr Alsbury advised that the State Archivist had 'identified a number of messages that are transitory public records, and public records requiring capture into an official council system to be retained for two (2) or more years'. Mr Alsbury noted that in the views of the State Archivist, the actions of Logan City Councillors and employees 'are likely to have resulted in multiple potential breaches of the *Public Records Act 2002*', and Mr Alsbury advised he was of the view that the conduct of councillors may amount to misconduct and/or inappropriate conduct under the *Local Government Act 2009*.⁴²⁴

The CCC put its position on the November 2018 delivery this way:

The reasons stated in Mr Alsbury's letter of 19 November 2018 were genuine, valid, and lawful reasons for the Commission to disclose the information to the Council. As was later confirmed by the State Archivist, many of the messages deleted by some of the Councillors were, in fact, public records belonging to the Council. It was appropriate therefore that they be given to the Council. To the extent that the delivery on 19 November 2018 of documents to the Council also potentially assisted Ms Kelsey's foreshadowed disclosure application against the Council, then such assistance provided by the Commission to Ms Kelsey was consistent with the Commission's statutory functions in relation to assisting those who make public interest disclosures.⁴²⁵

However, Counsel Assisting submitted to the committee that an available finding regarding the delivery of the documents on 19 November 2018 was 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'.⁴²⁶ Counsel Assisting based this argument on the following:

...

- e. before the 3 October delivery, on 28 August 2018, MinterEllison had asked the CCC to 'consider providing the documents to the Logan City Council and/or the individual Councillors'
- f. MinterEllison persisted in that request after the documents were retrieved from Council

⁴²³ Volume 1, pp 427-428, PCCC-0415.

⁴²⁴ PCCC-0494, p 1.

⁴²⁵ Submission 25, p 35, para 186.

⁴²⁶ Outline of Submissions of Counsel Assisting, 29 September 2021, p 10.

- g. substantially the same documents were delivered on 19 November, 'as requested'
- h. such delivery was preceded by a request by MinterEllison on 16 November 2018 to do just that
- i. on 12 February 2019 Mr Alsbury wrote to Logan City Council reminding it of its disclosure obligations, notwithstanding that Ms Kelsey had abandoned an application to that effect in QIRC months before.⁴²⁷

McInnes Wilson Lawyers similarly submitted that '...the inescapable inference is that the CCC was making decisions to advance Ms Kelsey's private interests demonstrating (at least) a lack of objectivity and impartiality'.⁴²⁸

At the public hearing on 17 August 2021, when Mr MacSporran QC was asked whether it was his understanding that the documents being returned to the Logan City Council in November 2018 was to assist Ms Kelsey with respect to her application for disclosure in the QIRC proceedings on the face of the documents, Mr MacSporran QC replied 'it is clear the 15, 16, 19 November area is all about not frustrating the 24 October notice to produce issued by Ms Kelsey'.⁴²⁹ Mr MacSporran QC also agreed that the sentence 'I enclose the requested documents' is a reference to MinterEllison's request.⁴³⁰

When asked whether he agreed with the November delivery on the sole understanding that those documents are being delivered in order to assist Ms Kelsey in her application for disclosure or like process as against the council, having subsequently learned about it, Mr MacSporran QC responded 'Yes, in the context of her having issued a notice to produce at a time when the documents were at the council'.⁴³¹

However, when the CCC Chairperson was subsequently questioned about the purpose of the re-delivery of the documents to the Logan City Council in November, he stated that the reason for the dissemination was:

...to ascertain from the acting CEO, Mr Trinca, whether the documents being returned to Logan council, the ones that we had seized by warrant, downloaded the contents of the phones forensically—returning the WhatsApp material to have Mr Trinca give a statement to the investigators as a witness in the corruption investigation of the mayor and councillors as to whether those records being returned were, in fact, retained as records in the council document management system.⁴³²

When it was then put to Mr MacSporran QC that the return of the documents to the Logan City Council on 19 November 2018 was in response to the letter from MinterEllison asking for the documents to be returned by 20 November 2018, and that the real purpose was not to check whether they were public records, but to fulfil the request from MinterEllison, Mr MacSporran QC disagreed with this proposition. Mr MacSporran QC claimed the CCC must not have known about Ms Kelsey's application for disclosure on 24 October because:

...they took the documents back on 9 November which arguably would have defeated her application for disclosure filed on 24 October. They are back at the CCC. MinterEllison then have to write to the CCC and say, 'Can you send them back to the council? Otherwise you will defeat our lawful application for disclosure in the QIRC'.⁴³³

⁴²⁷ Outline of submissions of Counsel Assisting, 29 September 2021, pp 9-10.

⁴²⁸ Submission 27, p 15.

⁴²⁹ Public hearing transcript, Brisbane, 17 August 2021, p 34.

⁴³⁰ Public hearing transcript, Brisbane, 17 August 2021, p 34.

⁴³¹ Public hearing transcript, Brisbane, 17 August 2021, p 34.

⁴³² Public hearing transcript, Brisbane, 6 September 2021, p 39.

⁴³³ Public hearing transcript, Brisbane, 6 September 2021, p 29.

Mr MacSporran QC expanded on this, stating:

As I said before, I reject out of hand that conclusion to be drawn from that sequence. That sequence really falls apart, as I said before, when you look at the documents going to Logan on 3 October. They are brought back to the CCC on 9 November. While we have been talking about this, I am remembering—it may well have been the case that the Logan council or the council's lawyers requested that they be taken back by the CCC, which they were on 9 November. That potentially frustrates Ms Kelsey's application of 24 October between those two dates. If it is suggested that the CCC's purpose was to help Ms Kelsey at all costs, or any cost, they have done a pretty bad job of it by taking the documents out of a place where they were available to Ms Kelsey and back to the CCC.⁴³⁴

An email from Ms McIntyre on 26 November 2018 to Mr Alsbury, a week after the November delivery to the Logan City Council, appears to refer to the CCC's reasoning for returning the documents to Logan City Council. Ms McIntyre told Mr Alsbury:

I spoke to Rob about contacting Dan Williams on the phone. Sorry, I just can't recall if he told me he did. I do recall that it was agreed we would not be informing Dan Williams or any representative of Minter Ellison that we intended on providing the WhatsApp chats to Council for the purpose of considering governance issues surrounding the use of communication apps to discuss business related matters and deletion of possible public records generated by the use of communication apps. The relevant material was not provided as a result of a request by Minter Ellison.⁴³⁵

Mr MacSporran QC also stated:

The CCC could have, at any stage really, directly disseminated material to Ms Kelsey in the exercise of its powers and discretion to do so. We had taken—I had taken a decision very early in the piece that we would not directly benefit her by getting an injunction or doing any one of a number of other things we might have done because I was concerned that we should pursue the greater public interest, which was in investigating what we clearly believed to be, and turned out to be, serious corrupt conduct. I was very concerned that that purpose, appropriate and mandated though it was under our legislation, should not be interfered with—undermined—by any other activity.

Having said that, I recognised very early in the piece that we did need to do what we could, bearing in mind our main objective, but still what we could do to protect Ms Kelsey as a PID, and that is consistent with all of our other statutory provisions under our act and under the PID Act. So it is not a matter of in any way dressing something up to be what it is not. My assessment, although I was not involved personally, reviewing all the material, is that the purpose was a Public Records Act purpose and collaterally of benefit to Ms Kelsey as she had been asking for the dissemination for the purposes of obtaining the documentation which was relevant to her action.⁴³⁶

However, Mr MacSporran QC also acknowledged that the documents were returned to the Logan City Council within the timetable requested by MinterEllison.⁴³⁷

Mr Alsbury similarly told the committee that the purpose of redelivering the documents was in relation to the *Public Records Act 2002*, not for the purpose of putting these documents back in the hands of the Logan City Council so that they might be susceptible to disclosure in the QIRC proceeding, telling the committee:

In relation to timing, I did not want to or want for the commission to be accused of frustrating any disclosure obligations by having taken the documentation back at the start of November, I think it was. In terms of timing, we made sure we did this by the time that MinterEllison were requesting. When I signed that dissemination authority, I did not think there was any possibility that it would result in the documents being disclosed to the QIRC. I took that view based on Mr Fynes-Clinton's email of 1 November 2018. He had made the council's position crystal clear in relation to that point, so I knew this was not

⁴³⁴ Public hearing transcript, Brisbane, 6 September 2021, p 34.

⁴³⁵ OpFront-TermsOfReference-09795, p 1.

⁴³⁶ Public hearing transcript, Brisbane, 6 September 2021, p 37.

⁴³⁷ Public hearing transcript, Brisbane, 6 September 2021, p 34.

going to result in anything being disclosed. We were still concerned about public records issues, which are articulated in the correspondence dated 19 November 2018.⁴³⁸

When Counsel Assisting referred to the letter sent by Mr Alsbury to the Logan City Council on 12 February 2019 and proposed that it contained a suggestion, if not instruction, to the Logan City Council to disclose certain things in the QIRC proceeding, and asked whether the evidence he gave regarding the delivery of the documents in November was false, Mr Alsbury explained 'We felt that there was some independent party having reviewed them, and given that they were records that should have been lodged in the council's record system, we saw no reason why they could not be disclosed at that time'.⁴³⁹ Mr Alsbury also argued that if the CCC had been taking sides, then they would have disseminated the documents directly to Ms Kelsey, but instead they gave the documents to the Logan City Council.⁴⁴⁰

Ms McIntyre told the committee that the documents were returned to the Logan City Council in November 2018 because the Logan City Council did not have policies regarding the use of WhatsApp material and it was to facilitate the Logan City Council meeting its own obligations.⁴⁴¹ She stated:

...we were referring that material back for him to deal with that material as they did not have any policies in place with regards to the use of WhatsApp material by councillors and employees of Logan City Council. It was for him to then, I suppose, deal with that material and create policies. It was more of a prevention side of the house.⁴⁴²

Ms McIntyre also stated that while she accepted that the documents being delivered to the Logan City Council before the date of 20 November raises a suspicion, 'at that time I did not write this memo with the intention of it going for the purposes of it getting into the QIRC'.⁴⁴³ However, Ms McIntyre also told the committee that 'Logan City Council having possession of that documentation at that time, 20 November, would assist the QIRC and ultimately Sharon Kelsey with regards to matters that were happening or being litigated during those proceedings'.⁴⁴⁴

In contrast, Mr Hutchings told the committee that it was his understanding that that the CCC returned the documents to the Logan City Council because 'it would have been consistent with our object, which was to level the playing field and to keep the parties honest'.⁴⁴⁵ He explained that it was MinterEllison's motive to put the documents in the hands of the Logan City Council so that the council might be liable to the obligation of disclosure in the QIRC, which is a motive that accorded with the CCC's desire to correct the imbalance between Ms Kelsey and the former councillors.⁴⁴⁶

Ms McIntyre also confirmed that disseminating the documents in November 2018 was not for the sole purpose of having those documents at the Logan City Council's premises for the purpose stated in the dissemination document, but also to have those documents before Logan City Council for them to comply with their obligation for disclosure. However, she also stated that the latter purpose was not an intended purpose, but 'there was a consideration of the material being provided to Logan City

⁴³⁸ Public hearing transcript, Brisbane, 18 August 2021, p 32.

⁴³⁹ Public hearing transcript, Brisbane, 18 August 2021, p 33.

⁴⁴⁰ Public hearing transcript, Brisbane, 18 August 2021, p 34.

⁴⁴¹ Public hearing transcript, Brisbane, 19 August 2021, p 74.

⁴⁴² Public hearing transcript, Brisbane, 19 August 2021, pp 73-74.

⁴⁴³ Public hearing transcript, Brisbane, 20 August 2021, p 8.

⁴⁴⁴ Public hearing transcript, Brisbane, 20 August 2021, p 8.

⁴⁴⁵ Public hearing transcript, Brisbane, 19 August 2021, p 11.

⁴⁴⁶ Public hearing transcript, Brisbane, 19 August 2021, p 11.

Council for them to comply with their obligation for disclosure ... This was one way of providing that for them to then act on that duty.⁴⁴⁷

Ms McIntyre conceded that her memorandum about the dissemination authority did not, but should have, address the potential 'side effect' that the Logan City Council's duty to disclose the documents to the QIRC might be enlivened by delivery of the documents, nor did it acknowledge the date requested by MinterEllison that the documents be returned by.⁴⁴⁸

Mr MacSporran QC disagreed with Ms McIntyre that the memorandum should have included the second purpose to include that material for the purpose of disclosure:

I am not suggesting for a moment she does not honestly hold that view, and that is reflected in there—in her responses as I read them to the questioning and what she said was her motivation and so forth. My view, I think consistent with Mr Alsbury's view, is that the purpose, as I keep saying, with respect, was the Public Records Act matter, or whatever the dissemination authority indicated it was. A benefit, quite collaterally but a benefit nonetheless, to Ms Kelsey was it made them available potentially for disclosure in the QIRC proceedings.⁴⁴⁹

The fact that it is collaterally beneficial in different proceedings is frankly neither here nor there, but it is consistent with our desire to help Ms Kelsey within the bounds we have described if possible but not to go out of our way in the way that you are suggesting or to try and construct something to help her that has not been fully articulated honestly.⁴⁵⁰

When questioned whether staff at the CCC understood the purpose of the dissemination to be to respond to the request by MinterEllison, Mr MacSporran QC acknowledged that staff expressed those views in part in the emails before him (the summonsed documents), but that the documents were the only way for him to know that, as he was not involved with the delivery of the documents at the time.⁴⁵¹

6.6.3 Committee comment

Section 6.5 of this report, addressing the October 2018 dissemination, is relevant to this section also, in particular but not limited to the extent to which that section addresses the willingness of the CCC to assist Ms Kelsey in the QIRC proceedings by seeking to have the relevant documents disseminated in a way so that they could be used in those proceedings.

The committee acknowledges the importance of the *Public Records Act 2002* and public entities' compliance with it. The committee notes that, absent any of the other obvious circumstances surrounding the documents in question and the QIRC proceedings on foot, the CCC's actions may well have been legitimate within their prevention function, although there is certainly room for argument in that matter also as compliance with the *Public Records Act 2002* is not a matter that, ordinarily, is considered corruption and would usually be more fitting to be dealt with by the QSA with their powers.

The committee considers the initial evidence of Mr MacSporran QC, given on 17 August 2021, and that of Mr Hutchings, both of which provide a clear indication that the, or at least a, purpose of the November 2018 dissemination was in line with the purpose expressed in Available Finding 5 set out by Counsel Assisting, to be far more credible and realistic than later evidence.

The committee, having considered the totality of the evidence, finds that the weighty and substantial purpose for the CCC's dissemination of documents in November 2018 was for discovery in the QIRC proceedings.

⁴⁴⁷ Public hearing transcript, Brisbane, 20 August 2021, p 11.

⁴⁴⁸ Public hearing transcript, Brisbane, 20 August 2021, pp 11, 13.

⁴⁴⁹ Public hearing transcript, Brisbane, 6 September 2021, p 18.

⁴⁵⁰ Public hearing transcript, Brisbane, 6 September 2021, p 19.

⁴⁵¹ Public hearing transcript, Brisbane, 7 September 2021, pp 17, 18.

The committee notes Mr MacSporrán QC's assertion that the CCC would not have taken the documents back from the Logan City Council on 9 November 2018 if they were seeking to aid Ms Kelsey's application of 24 October 2018. Evidence before the committee shows that on 1 November 2018, solicitors for the Logan City Council had indicated they would not make any determination about whether or not the documents in question were 'public records' until at earliest 20 November 2018, the date of hearing for Ms Kelsey's application. On 7 November 2018, DS Francis was notified by the QSA that WhatsApp messages of council business would be considered a 'public record' under the *Public Records Act 2002*. The very next day, DS Francis seeks the return of the documents from Logan City Council's Solicitors – and they are returned on 9 November 2018. By this time, concerns had been raised within the CCC about the dissemination undertaken in October 2018, and the committee considers that this QSA advice provided the CCC with the opportunity to attempt to 'normalise' the dissemination under its policies and the CC Act. It appears highly unlikely to the committee that DS Francis' swift action after 7 November 2018 is coincidental. Rather, the committee considers this course of events was aimed at seeing the documents provided to the Logan City Council under the justification of the Public Records Act – a legitimate purpose, but not the primary purpose in this regard.

The timing of events and its correlation with the suggested course of action set out in correspondence from MinterEllison to the CCC is highly persuasive in this matter. The committee considers that, on the totality of the evidence, the CCC and MinterEllison were acting in concert to seek to have documents placed before the QIRC that Black IC had ruled out. It also seems that, when it came to communications between MinterEllison and the CCC, there was a high-level of responsiveness by the CCC to MinterEllison's requests.

The committee points again to the observations of Mr Walker SC concerning the 'semantic arguments by some CCC witnesses' in relation to this matter.

Finding 7

The committee finds that confidential documents were delivered to Logan City Council on 19 November 2018 by the Crime and Corruption Commission for a weighty and substantial purpose of making them available for Ms Kelsey's use in the Queensland Industrial Relations Commission proceeding, contrary to the ruling of Black IC.

(Based on Counsel Assisting Available Finding 5)

6.7 The charging with fraud

The committee's examination of the charging of the councillors with fraud included consideration of these aspects:

- the roles of QPS and CCC officers generally in deciding whether to charge and in determining charges
- the CCC's process in reaching the decision to charge the councillors, including the level and rigour of analysis and the adequacy of documentation of that analysis
- the decision to charge the councillors
- the selection of the charge of fraud, as opposed to other available charges
- the timing of the laying of the charges.

6.7.1 The roles of Queensland Police Service and Crime and Corruption Commission officers in determining charges

The CCC is an investigative agency, not a charging agency.⁴⁵²

CCC officers who are not police do not have a power to charge. However, QPS officers have a power to charge, and this power extends to QPS officers who are seconded to the CCC.

In practice, material is provided to the CCC Chairperson to approve a recommendation to charge.

Mr Alsbury described the process this way:

[The chairperson] is approving that the charges are able to be considered by a seconded police officer. To put that in context, where the seconded police officer has been so closely involved in the investigation then that has already happened, in effect. But that is the nature of the approval.⁴⁵³

In this instance, the CCC submits the charges were laid by seconded QPS officer DS Francis (the case officer for the investigation into the councillors), after a recommendation that charges be considered was approved by the CCC Chairperson.

The charges were laid on 26 April 2019. From that point, the charges were handled by the ODPP as the prosecuting agency. The CCC explained 'This is the usual practice for charges of this nature in Brisbane. From that point the DPP had the conduct of the matter'.⁴⁵⁴

6.7.2 The Crime and Corruption Commission's process in reaching the decision to charge the councillors

6.7.2.1 *Meeting on 30 January 2019*

On **30 January 2019**, a meeting took place at the CCC, attended by DS Francis, Mr MacSporran QC and Mr Alsbury to discuss charges, including in connection with Ms Kelsey's PID and her termination as CEO. There is no detailed note of that meeting or what documents were before it. This meeting did not consider, let alone recommend charges against the 7 Logan City Councillors in respect of Ms Kelsey's PID and termination as CEO, but could be seen as a precursor to later decision-making in respect of fraud charges laid against the 7 councillors.

The 30 January 2019 meeting appears to have considered a 16 page memorandum authored by DS Francis. DS Francis' note of the meeting indicates that the CCC Chairperson approved the charging of the Mayor with fraud in relation to Ms Kelsey's PID and termination as CEO.

Counsel Assisting has submitted that DS Francis' 16 page memorandum, considered on 30 January 2019, did not contain any reference to, or systematic treatment, of the elements of a fraud charge – nor was it accompanied by any legal advice or documented consideration of how the evidence might prove fraud, dishonesty or the absence of potential inferences consistent with innocence of the fraud charge as it relates to Ms Kelsey's PID and termination as CEO.

The memoranda prepared principally by DS Francis – and there were two further iterations of his 16 page memorandum, around 23 March 2019 and 5 April 2019 – do mention section 408C (fraud) in relation to Ms Kelsey's PID and her termination as CEO. However, they seem to be directed only to the Mayor's conduct, and not any alleged wrongdoing by the Logan City Councillors in that regard. The memoranda make no recommendation to charge the 7 Logan City Councillors with fraud arising from Ms Kelsey's PID and her termination as CEO, nor do they contain any considered analysis of the legal requirements of what constitutes dishonesty, proof of it, or any structured consideration of the evidence that might prove it.

⁴⁵² Public hearing transcript, Brisbane, 17 August 2021, p 37.

⁴⁵³ Public hearing transcript, Brisbane, 18 August 2021, p 36.

⁴⁵⁴ Submission 25, p 14, para 70.

The submissions regarding this meeting

Counsel Assisting said an available finding regarding the material considered at the 30 January 2019 meeting was:

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 [in respect of Ms Kelsey's PID and termination as CEO] ought be laid.⁴⁵⁵

The CCC in its response stated:

... 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 2019.⁴⁵⁶

The committee finds it is unnecessary to adopt Available Finding 8 set out by Counsel Assisting. No charges were laid arising from that meeting. Consideration of the subsequent meeting on 24 April 2019 suffices in terms of considering the substance of the matters before us in relation to the laying of fraud charges against the 7 Logan City Councillors.

6.7.2.2 Meeting on 24 April 2019

On 24 April 2019, a meeting was held at the CCC. It was attended by:

- Mr MacSporran QC, CCC Chairperson
- Mr Alsbury, Senior Executive Officer (Corruption)
- Detective Superintendent Mark Reid, Executive Director, Corruption Operations, and
- Four seconded QPS officers on the investigation team, being DS David Beattie, DSS Mark Andrews, DI David Preston, and DS Andrew Francis.

It was at this meeting that Mr MacSporran QC approved the charging of Logan City Councillors with fraud arising from Ms Kelsey's PID and her termination as CEO.

In preparation for this meeting, various documents had been put before Mr MacSporran QC, including three memoranda:

- a memorandum of advice from Mr Alsbury dated 23 April 2019 (marked "Urgent")
- a memorandum titled 'consideration to commencement of proceedings – Operation Front', prepared by DS Francis and dated 25 March 2019, and
- a memorandum titled 'Operation Front – approval to commence further charges against several Logan City Councillors' prepared by DI Preston and dated 26 March 2019.

Other material was provided to Mr MacSporran QC as follows:

- a Chairperson's Cover Sheet dated 23 April 2019 (prepared by Mr Alsbury)
- a statement by Ms Kelsey dated 22 March 2019
- a statement by then Cr Darren Power dated 21 March 2019
- a statement of the then estranged wife of Mayor Smith, (at that stage still unsigned), and
- an outline of closing submissions on behalf of Ms Kelsey, filed in the QIRC proceedings and dated 19 March 2019.⁴⁵⁷

The other QIRC submissions (on behalf of the Logan City Councillors) were not provided.

⁴⁵⁵ Outline of submissions of Counsel Assisting, 29 September 2021, p 14.

⁴⁵⁶ CCC, Outline of submissions, 15 October 2021, p 32, para 152.

⁴⁵⁷ PCCC-1571.

Issues regarding the adequacy of the material put before the meeting of 24 April 2019, in particular the sufficiency of the memoranda, and the inclusion of only the 'Kelsey' submission, were explored in some detail at the committee's hearings.

One issue related to the absence of a 'legal observations' or similar document in the material. As Mr Alsbury told the committee:

... usually an observations document from a lawyer would be completed which would document the exercise that you are talking about, about going through the elements of the offence. That was not done in this case, although I think there is a draft document from Ms McIntyre that was done at some stage.⁴⁵⁸

In this case, Ms McIntyre, the case lawyer for the investigation, had commenced drafting a document styled 'Legal Advice—Observations', sometime in December 2018. This document, which dealt extensively with the charge of misconduct in public office under section 92A of the Criminal Code but not significantly with fraud under section 408C, was never completed, at least partly because she went on leave that month.⁴⁵⁹

It can be seen that the material that was considered at the meeting on 24 April 2019 included two memoranda which had been prepared by QPS officers on the investigation team. (These two memoranda were relatively lengthy, and had undergone a number of iterations over time). One of the memoranda, 54 pages in length, did not consider the charge of fraud against the 7 Logan City Councillors, preferring instead misconduct in public office, or reprisal under the PID Act. There was no structured consideration of the element of dishonesty in respect of the 7 individual Logan City Councillors that would be required to prove dishonesty.

The absence of a complete 'legal observations' document was a deficiency. Mr MacSporran QC said it wasn't required, and Mr Alsbury said while such a document would normally be prepared, he 'made a determination it was not necessary in the circumstances of this matter.'

The process of consideration of charges clearly benefits from the input from an experienced criminal lawyer, who can often bring a more objective view, informed by knowledge of all the evidence both supporting and not supporting the likely success of any prosecution, in the light of their legal training and experience. Mr Alsbury's covering memorandum, and the cover sheet, do go some way (albeit to a limited extent) to addressing this issue.

For example, in the cover sheet, Mr Alsbury notes:

In relation to [the charges against the councillors] ... I am of the view that there are reasonable prospects of securing convictions in relation to an appropriate charge covering their criminality. I will record here, however, it has taken me some time to arrive at that conclusion and I don't consider the cases against these councillors to be overly strong in light of evidence that may well be given in response to the prosecution case.⁴⁶⁰

In his memorandum, he stated he was disinclined to recommend a charge of reprisal, and notes the unavailability of the use of TI material in evidence on such a charge. He also expressed his view that there were 'a number of potential alternate reasons for the action taken [dismissing Ms Kelsey] that the prosecution could not necessarily exclude'.⁴⁶¹

He concluded that he considered fraud charges against the Logan City Councillors to be appropriate.⁴⁶²

However, overall, particularly having regard to the complexity and extent of the evidence in this matter, the two documents prepared by Mr Alsbury are very brief. As to the absence of a 'legal

⁴⁵⁸ Public hearing transcript, Brisbane, 18 August 2021, p 39.

⁴⁵⁹ Public hearing transcript, Brisbane, 20 August 2021, p 22.

⁴⁶⁰ Volume 2, p 317, PCCC-1871.

⁴⁶¹ Volume 2, p 319, PCCC-1571.

⁴⁶² Volume 2, pp 321-322, PCCC-1571.

observations' document, Mr Alsbury's view was 'I did not require it [a legal observations document] because the issues that we needed to focus on had been raised in Detective Francis' memorandum'.⁴⁶³

Mr MacSporran QC was asked:

In terms of the documents that come to you, would you ordinarily get to see the legal advice observations of the kind that I have shown you that Ms McIntyre had prepared in draft?

Mr MacSporran QC responded:

I would normally. I am not sure at that time. I think I may normally have received them. Certainly now we do routinely under our operations manual, which postdates this case. But ordinarily you would expect to see observations from a lawyer attached to the team—in this case, as you say, Ms McIntyre, who had commenced the process but not completed ...⁴⁶⁴

As to the reservations expressed by Mr Alsbury, and the availability of an offence of fraud, Mr MacSporran QC told the committee:

In this case, Mr Alsbury and I in particular discussed the applicability of fraud, the quality of the evidence. As you know, he expressed in the material ... that he had some reservations initially about the prospects of success, in particular in respect of the seven councillors. I took very seriously Mr Alsbury's reservations for obvious reasons. He is a person whose view I respect. He is a very good lawyer. He has good judgement. When he came back to me ... and it got to 24 April, when we had the meeting in my office—he had changed his view...⁴⁶⁵

...

I was totally satisfied by his view because it coincided with mine about the quality of the evidence, the sufficiency of it to make a prima facie case and, more particularly, the prospects of success and the public interest considerations had all been properly considered.⁴⁶⁶

On 24 April 2019, Mr MacSporran QC gave his approval to the recommendation by endorsing upon the Chairperson's Cover Sheet 'I agree with the recommendation to charge ... the 7 relevant councillors with 1 count of fraud as suggested'.⁴⁶⁷

Mr Alsbury had included the following in the Chairperson's Cover Sheet:

To remove any doubt, the request is for you to approve 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). Also, this cover sheet and my attached observations constitute legal advice to aid you in making a decision in relation to the request for approval.⁴⁶⁸

6.7.2.3 *The submissions*

Counsel Assisting summarised the deficiencies they identified in the content of the memoranda this way:

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 that were considered by Mr MacSporran on 24 April 2019 contained any elemental analysis of the proposed charges. 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 potential defendants was not given any attention. The memoranda did not properly address the public interest considerations, including factors that might weigh against

⁴⁶³ Public hearing transcript, Brisbane, 18 August 2021, p 46.

⁴⁶⁴ Public hearing transcript, Brisbane, 6 September 2021, p 57.

⁴⁶⁵ Public hearing transcript, Brisbane, 6 September 2021, p 57.

⁴⁶⁶ Public hearing transcript, Brisbane, 6 September 2021, p 58.

⁴⁶⁷ Volume 2, p 317, PCCC-1571.

⁴⁶⁸ Volume 2, p 317, PCCC-1571.

charging each individual accused and the consequences of charging such a number of them that the elected government of Logan City would be dissolved.⁴⁶⁹

Counsel Assisting submitted it was open to the committee to find:

The memoranda prepared for the 24 April 2019 meeting to consider commencing criminal proceedings against the seven councillors and further proceedings against the Mayor were inadequate for that purpose.⁴⁷⁰

In response, the CCC stated:

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.⁴⁷¹

In relation to the memorandum of Mr Alsbury dated 23 April 2019, the CCC says this was legal advice 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.⁴⁷²

The CCC submitted that the committee should also refer to the summary of opinion of Mr O'Brien AM and to certain evidence of the CCC Chairperson.⁴⁷³ Turning to that evidence, when asked whether the differing culpability of the 7 Logan City Councillors was discussed in the meeting of the 24 April 2019, Mr MacSporran QC responded:

We did. Well, bear with me. The differing culpability was an issue that was discussed along the road. I cannot tell you whether it was specifically discussed on the 24th, but it was always clear from all the evidence we had that there were differing levels of culpability, as I think I said earlier about the public interest considerations, because it is one of the director's guideline criteria to be considered.⁴⁷⁴

When asked whether he could show the committee anywhere where he had considered the various elements of fraud against each of the people charged, Mr MacSporran QC replied:

I cannot show you a written record of that process because it was not necessary. Mr Alsbury and I both knew the relevance of all those criteria to the decision to refer it to a police officer.⁴⁷⁵

Mr Heaton QC spoke of his practice when considering charges:

... In exercising certainly my discretion, I am always mindful of not only whether there is technically an offence there but what the persuasive strength of the evidence is in terms of it being accepted by a jury. In that sense, credibility does come into play. If it becomes apparent that actions were done for a particular purpose to achieve a particular agenda, even if there might technically be an offence there, a jury might view all of that with some scepticism or indeed not give it perhaps the weight. I am always mindful of how the evidence might come across to a jury and, on that point, similarly with the particular charge and how you might be able to intellectually articulate that the circumstances, the evidence, fits a particular charge. But if a jury is going to struggle to understand it, we are unlikely to succeed.

...

⁴⁶⁹ Outline of submissions of Counsel Assisting, 29 September 2021, pp 15-16, para 59.

⁴⁷⁰ Outline of submissions of Counsel Assisting, 29 September 2021, available finding 9.

⁴⁷¹ CCC, Outline of submissions, 15 October 2021, p 34, para 163.

⁴⁷² CCC, Outline of submissions, 15 October 2021, p 35, para 166.

⁴⁷³ Public hearing transcript, Brisbane, 7 September 2021, p 21.

⁴⁷⁴ Public hearing transcript, Brisbane, 7 September 2021, p 21.

⁴⁷⁵ Public hearing transcript, Brisbane, 7 September 2021, p 21.

I always struggled with this being a 408C offence. I have had discussions with lawyers within my office about it and at least one officer can see how you can make it a 408C offence, but that as I understand it is more a 'how can I' rather than 'whether I should' consideration. As far as I can see, this was a section 40 PID Act offence of retaliation, and even then on the evidence I think there would be insufficient evidence to prove that offence. But at least that goes to the heart of what was done—what was alleged to have been done—that this was a retaliation for the public interest disclosure. A jury can understand that. Dishonestly causing a detriment—that is a bit more convoluted. ...⁴⁷⁶

Noting that the material included the QIRC submissions on behalf of Ms Kelsey, but no submissions in the QIRC for the Logan City Councillors, the LGAQ submitted:

To only have regard to the summaries of evidence, and outline of closing submissions prepared by the applicant/claimant in the QIRC proceeding, but have no regard to either the actual evidence, or the other summaries of evidence and outlines of closing submissions prepared by the three other teams of lawyers representing the opposing parties, suggests bias, partiality and unfairness on behalf of the CCC.⁴⁷⁷

6.7.2.4 *Committee comment*

The CCC asks the committee to accept that matters were considered appropriately which are not reflected anywhere in documentation leading up to the laying of charges on 26 April 2019. The committee does not accept that the memoranda prepared by CCC officers for the 24 April 2019 meeting to consider commencing criminal proceedings against the former Logan City Councillors was adequate, and accordingly is unable to accept that submission of the CCC.

The discretion to charge the 7 Logan City Councillors and Mayor with fraud in respect of Ms Kelsey's public interest disclosure and termination as chief executive officer miscarried because all material considerations and evidence were not taken into account and weighed.

The committee expressed concern at the CCC's apparent reluctance to consider evidence reflecting alternative motivation and factors impacting upon the offence of fraud.

The exchanges between a member of the committee and Mr Heaton QC on this topic are instructive:

Mrs McMAHON: Do you believe that, if that information contained in those submissions was taken into consideration by officers, it might have had an influence on their decision to charge in terms of their sufficiency of evidence, given what came out during the committal was likely foreshadowed by a lot of that information that was contained within those submissions?

Mr Heaton: I guess there was an element of predictability as to where the vulnerabilities were, what answers might be advanced, what reasons might be advanced for the actions that were taken. I would have thought an objective and critical assessment of sufficiency of your evidence at every stage—be it investigation or prosecution—would be of benefit to the task of critically assessing the sufficiency of your evidence and exercising the discretion as to whether or not there was sufficient. I guess I am trying to be careful not to speak to the mind of others and what information they had or what they thought of it at the time.

Mrs McMAHON: I guess what I am trying to get to is: obviously, we discussed that information that came out from the commencement of the committal, which eventually led to the decision—as you said, those vulnerabilities and weaknesses were highlighted to the point where the decision was made. Do you believe that they were foreshadowed in the information that was available in those submissions to the QIRC? As you said, it was predictable that, if that information was adduced during the committal, we were going to have trouble.

Mr Heaton: I would have thought that that would give very telling insight into where the problems might be in the case and in the evidence, bearing in mind we are trying to prove what a state of mind was. Unless they tell us, we can only do it by inference, so all of the evidence that might tend one way or the

⁴⁷⁶ Public hearing transcript, Brisbane, 3 September 2021, pp 13, 14.

⁴⁷⁷ Submission 13, p 3, para 10.

other to support a conclusion I would have thought would be valuable evidence to consider in exercising any discretion.⁴⁷⁸

Particularly in cases where consequences are more severe (such as removal from elected office and the dissolution of an entire council), fairness, common sense and good practice would dictate that there is even more reason to take all available and appropriate steps in a process in order to ensure the decision is right. Public interest considerations were documented, but essentially only those which tended towards charging. The exact scope of public interest considerations recorded in respect of not charging was:

Robust consideration is certainly warranted. The risk of reputational harm to persons of interest and the CCC is acknowledged.⁴⁷⁹

There was a wholly inadequate consideration recorded in relation to these public interest considerations. The committee rejects the CCC's submission that it was not required to consider matters going to the public interest. The DPP Guidelines do not support such a stance and require, to the contrary, consideration of public interest factors for and against the laying of charges.

The memorandum equates reputational harm to the CCC with what those to be charged with the offence of fraud might face. The accused, upon being charged, would necessarily face removal as councillors, the Council would be dissolved and those councillors who had not been charged would likewise face loss of their positions. These factors received almost no treatment in the memorandum and that omission is one of substance.

The CCC witnesses were clear that the factors just mentioned were not ones which were material or that needed to be considered, save for in one respect. Mr Alsbury made passing reference in his memorandum that went to the CCC Chairperson for the meeting of 24 April 2019 to the 'significant ramifications of charging the councillors on their employment as local government politicians...'.⁴⁸⁰ This too is an understatement of the effect, and no mention is made of the inevitable dissolution of the Logan City Council, or the effect on the other (uncharged) Logan City Councillors.

The committee makes the following findings on the basis of the evidence.

6.8 The decision to charge the councillors

6.8.1 The Director's Guidelines and the *public interest* requirement

The CCC advised:

In relation to a decision to charge, the Commission adopts the test described in Section 4 of the DPP "Guidelines" as at 30 June 2016 relating to a decision to prosecute.⁴⁸¹

This is a reference to the ODP's Director's Guidelines, made under section 11(1)(a)(a)(ii) of the *Director of Public Prosecutions Act 1984* (Qld), which provides that the DPP may furnish guidelines in writing to the QPS commissioner with respect to prosecutions in respect of offences.

Section 4.9 of the *Police Service Administration Act 1990* relevantly provides that the QPS 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.

⁴⁷⁸ Public hearing transcript, Brisbane, 3 September 2021, p 14.

⁴⁷⁹ Volume 2, p 179, PCCC-1561.

⁴⁸⁰ Volume 2, p 321, PCCC-1571

⁴⁸¹ Submission 25, p 44, para 218.

Such a direction exists in the CCC's current 'Operation Procedures Manual' (issue 82 effective 11 June 2021) issued pursuant to section 4.9 of the *Police Service Administration Act 1990*. The relevant parts of it currently 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.⁴⁸²

The CCC advised that:

At the time the fraud charges were laid on 26 April 2019, the Commission's policy was in similar terms and was stated in the "Prosecution Protocol".

...

In relation to a decision to charge, the Commission adopts the test described in Section 4 of the DPP "Guidelines" as at 30 June 2016 relating to a decision to prosecute.⁴⁸³

The CCC's Prosecution Protocol and Operations Manual are further explored at section 9.1 of this report (Referral of matters by the Crime and Corruption Commission to the Director of Public Prosecutions).

In summary, in exercising the discretion to charge and preparing material in support of it, DS Francis should have complied with the Director's Guidelines.

The Director's Guidelines start by setting out the duty of a prosecutor to act fairly and impartially to assist the court to arrive at the truth.⁴⁸⁴ The Director's Guidelines set out the requirements for a decision to prosecute as being a 'two tiered test':

- (i) is there sufficient evidence?
- (ii) does the public interest require a prosecution?⁴⁸⁵

A number of public interest criteria are then set out, with this opening observation:

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.⁴⁸⁶

The criteria 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
- (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

The guidelines 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: -

⁴⁸² Sections 3.4.1 and 3.4.5.

⁴⁸³ Submission 25, p 43, para 217.

⁴⁸⁴ ODPP, *Director's Guidelines*, p 1, PCCC-TP0130.

⁴⁸⁵ ODPP, *Director's Guidelines*, p 2, PCCC-TP0130.

⁴⁸⁶ ODPP, *Director's Guidelines*, p 3, PCCC-TP0130.

...

- (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...⁴⁸⁷

Importantly, the Director's Guidelines then state:

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.⁴⁸⁸

6.8.2 Sufficiency of the Crime and Corruption Commission's consideration of the guidelines

In regards to the sufficiency of the CCC's consideration of the guidelines, the committee explored:

- whether the guidelines, in particular the aspects regarding the public interest, were sufficiently considered by the CCC, as part of its decision-making process resulting in the charging of the councillors
- whether the prosecution was proceeded with impartially
- whether any such consideration had been sufficiently documented.

The CCC Chairperson specifically referred to the following statement in the guidelines as being important: 'The more serious the offence, the more likely that the public interest will require a prosecution'.⁴⁸⁹

Similarly, Mr Alsbury noted:

... under the director's guidelines, the more serious the offending the more likely that the public interest will require a prosecution to be pursued. The director's guidelines go on to say matters in mitigation can then be considered at sentence if the matter gets far.⁴⁹⁰

Mr Alsbury noted that in his memorandum that went before the CCC Chairperson for consideration on 24 April 2019, under the heading 'public interest considerations', he had noted 'the significant ramifications of charging the councillors on their future employment as local government politicians'.⁴⁹¹ He explained that this was a reference to the former Logan City Councillors being removed from office.⁴⁹²

Mr Alsbury had stated in his memorandum he agreed with the categorisation of the Logan City Councillors' conduct as an 'egregious example of corrupt public administration', and 'accordingly, notwithstanding this impact (ie the removal from office) he was of the view that it was in the public interest to pursue charges. For Mr Alsbury, this categorisation '... made the offence of a serious nature to the extent that the issue ... about the more serious the offence the more likely the public interest will require a prosecution—it rendered that applicable'.⁴⁹³

The committee noted that the words quoted above 'egregious example of corrupt public administration' were directly taken from the submissions made on behalf of Ms Kelsey to the QIRC.

⁴⁸⁷ ODPP, *Director's Guidelines*, p 4, PCCC-TP0130.

⁴⁸⁸ ODPP, *Director's Guidelines*, p 4, PCCC-TP0130.

⁴⁸⁹ Public hearing transcript, Brisbane, 6 September 2021, p 64; ODPP, *Director's Guidelines*, p 4, PCCC-TP0130.

⁴⁹⁰ Public hearing transcript, Brisbane, 18 August 2021, p 41.

⁴⁹¹ Volume 2, p 321.

⁴⁹² Public hearing transcript, Brisbane, 18 August 2021, p 41.

⁴⁹³ Public hearing transcript, Brisbane, 18 August 2021, p 41.

This exchange followed:

Dr HORTON: I understand that, and I am interested in the words 'more likely'. That is okay; I understand what you are saying. But did that trump all other considerations such that no other public interest consideration needed to be taken into account?

Mr Alsbury: In my view, in practical terms it did.⁴⁹⁴

Mr Alsbury then agreed that his memorandum did not mention the outcome that if a majority of councillors were charged such that the council will be unable to form a quorum it would result in the disbanding of the council. When it was put to him that this was 'an important public interest consideration', he responded: 'It is an important consideration. But as I said, where the charge is a serious one public interest considerations very rarely mean that you do not pursue a prosecution'.⁴⁹⁵

6.8.3 The submissions – sufficiency of documentation and analysis

Counsel Assisting noted that none of the principal documents prepared for the purposes of considering whether to prosecute the Mayor or Logan City Councillors made any mention of the Director's Guidelines.⁴⁹⁶

Further, Counsel Assisting suggested:

[There was] an absence of any analysis of the evidence as against the 7 councillors individually and their relative culpability.

The memoranda [mentioned above] 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 individual to be charged by reference to the evidence. There is no evidence that this analysis was done in writing or at all.⁴⁹⁷

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.⁴⁹⁸

6.8.4 Committee comment – sufficiency of documentation and analysis

Both Mr MacSporran QC and Mr Alsbury (each experienced criminal lawyers) gave evidence that they had turned their minds to the elements of the offence and of the evidence against each of the individual Logan City Councillors. The committee believes there is no written material before the committee to outline such a process. Mr Alsbury's memorandum *did* refer to the loss of office of those charged. In its outline of submissions, the CCC reminded the committee of this, and of Mr Alsbury's 'many years' experience as a prosecutor both in Queensland (at the DPP) and overseas.' The CCC stated regarding Mr Alsbury's evidence on this point:

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". 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.⁴⁹⁹

⁴⁹⁴ Public hearing transcript, Brisbane, 18 August 2021, p 41.

⁴⁹⁵ Public hearing transcript, Brisbane, 18 August 2021, p 41.

⁴⁹⁶ Outline of submissions of Counsel Assisting, 29 September 2021, pp 19-20, para 75.

⁴⁹⁷ Outline of submissions of Counsel Assisting, 29 September 2021, pp 22-23, para 79e.

⁴⁹⁸ Outline of submissions of Counsel Assisting, 29 September 2021, pp 19-20, para 75.

⁴⁹⁹ CCC, Outline of submissions, 15 October 2021, p 45, para 217.

There remain serious deficiencies in the documentation. Simply put, writing things down focusses the mind and enhances critical evaluation and, in the context of public decision making, the omission of material facts and considerations may justify an inference they were not taken into account, or were not the subject of active intellectual consideration.⁵⁰⁰

The incomplete draft 'legal observations' document commenced by Ms McIntyre was based on a CCC template which includes consideration of the Director's Guidelines.⁵⁰¹ Had that document been completed and included in the material for the CCC Chairperson to consider on 24 April 2019, in accordance with what now appears to be usual CCC practice, these deficiencies in analysis and documentation might have been mitigated, or even avoided.

Mr MacSporran QC said in his oral evidence that he had read the submissions prepared for Ms Kelsey by her lawyers in the QIRC proceedings, but 'for the purposes of assessing what the facts were, not what the advocacy for her was'.⁵⁰² The separation of facts and advocacy about the facts may or may not have been possible (Mr MacSporran QC said he 'did not find it difficult'), as submissions seek to present even the facts in the best possible light, and to emphasise the ones that favour the client's case, and to attach less importance to those that might tend otherwise. It remains that Mr MacSporran QC read only the submissions of one side to the QIRC dispute, and this further supports the view of the CCC having acted other than impartially, and in such a way as to favour Ms Kelsey's interests.

The committee notes Finding 9 and its relevance to these matters as well insofar as the committee finds the memoranda and evidenced discussions leading to the charges was inadequate.

In relation to Available Finding 11, the committee makes Finding 11.

The committee refers to a number of submissions outlined by Counsel Assisting:

- a) A failure by the CCC to properly state and weigh public interest criteria.
- b) A failure by the CCC to record the consequence of charging.
- c) Material considerations were overlooked in the laying of the charges.
- d) A failure to have legal advice accompany the memoranda.
- e) The absence of any analysis whatsoever of the evidence as against the 7 councillors individually and their relative culpability.
- f) DS Francis' acting other than impartially in laying the charges.⁵⁰³

6.9 Selection of charge

6.9.1 Possible available charges

There were 3 possible charges considered by the CCC:

- reprisal
- misconduct in public office
- fraud.

The selection of which charge to prefer necessarily and properly involves a consideration of the elements of the various alternative charges available, and whether those elements are able to be proved.

⁵⁰⁰ Outline of submissions of Counsel Assisting, 29 September 2021, pp 21-22; *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts* [2011] FCAFC 59 at [44] - [47].

⁵⁰¹ Ms McIntyre, public hearing transcript, Brisbane, 20 August 2021, p 22.

⁵⁰² Public hearing transcript, Brisbane, 18 August 2021, p 5.

⁵⁰³ Outline of submissions by Counsel Assisting, 29 September 2021, pp 21-23, para 79.

Reprisal

Section 40 of the PID Act creates an offence of reprisal and reads in part:

- (1) A person must not cause, or attempt or conspire to cause, detriment to another person because, or in the belief that—
- (a) the other person or someone else has made, or intends to make, a public interest disclosure; or
 - (b) the other person or someone else is, has been, or intends to be, involved in a proceeding under the Act against any person.

Section 41 of the PID Act provides that the taking of a reprisal is an offence.

Misconduct in public office

Under section 92A of the Criminal Code, misconduct in public office is an indictable offence:

- (1) A public officer who, with intent to dishonestly gain a benefit for the officer or another person or to dishonestly cause a detriment to another person—
- (a) deals with information gained because of office; or
 - (b) performs or fails to perform a function of office; or
 - (c) without limiting paragraphs (a) and (b), does an act or makes an omission in abuse of the authority of office;

is guilty of a crime.

The maximum penalty is 7 years imprisonment.

Fraud

The councillors were charged with an offence of fraud, contained in section 408C of the Criminal Code, which reads in part:

- (1) A person who dishonestly—
- ...
- (e) causes a detriment, pecuniary or otherwise, to any person; or
- ...
- commits the crime of fraud.

The Logan City Councillors were charged in reliance on this provision, and also on section 408C(2A)(a) which imposes a maximum penalty of imprisonment for 20 years, on the basis that the alleged detriment caused was of a value of at least \$100,000.

6.9.2 Selection of the charge of fraud

The CCC states that the only element of the offence of fraud that was really in issue was the element of dishonesty.⁵⁰⁴

In its submission and other material, the CCC explained why it charged with fraud, rather than the other two available offences:

[T]here was evidence not just that elected councillors had taken unlawful reprisal action against a public interest discloser, but that they had done so in the face of warnings from the Commission and then destroyed evidence that suggested they had used "WhatsApp" and other clandestine means to communicate about it. In those circumstances, a charge of reprisal was not fair or appropriate and a charge of fraud reflected the evidence of the aggravating conduct referred to above. Put another way, to

⁵⁰⁴ CCC, Outline of submissions, 15 October 2021, p 32, para 151.

have charged reprisal alone would make the charge incomparable to, say, a councillor in another council who engaged in a reprisal, but did not do so in a manner to evade a warning not to do so and then destroy the evidence.⁵⁰⁵

The CCC told the committee:

A charge of reprisal was considered but the fraud charge was preferred for the reasons set out in the Memorandum of Paul Alsbury dated 23 April 2019.⁵⁰⁶

That memorandum from Mr Alsbury was addressed to the CCC Chairperson and titled *Legal Advice – Operation Front*.⁵⁰⁷ It is one of the documents (attached to the Chairperson's Cover Sheet) which are referred to in more detail above.⁵⁰⁸

In this memorandum, Mr Alsbury considered a possible charge of reprisal under the PID Act, as to which he stated:

I am disinclined to recommend a charge pursuant to section 40 of the PID Act which carries a maximum penalty of a fine or two (2) years' imprisonment'.

As Detective Francis has pointed out, there are impediments to using certain evidence (e.g. telephone conversations intercepted pursuant to a warrant) for offences that carry a maximum penalty of less than three (3) years.

Also, a charge under this provision means that the prosecution has to prove that the making of the public interest disclosure was, for each defendant, a substantial ground for the action taken against Kelsey. I continue to hold the view that there are, for each councillor (other than perhaps Luke Smith) a number of potential alternate reasons for the action taken that the prosecution could not necessarily exclude. For example, one (1) or more of the councillors may have voted to dismiss Kelsey simply to go along with the voting bloc of which they were a part (this is not necessarily inconsistent with the Prosecution case).⁵⁰⁹

6.9.2.1 Availability of telecommunications interception evidence

As to paragraph 4 of Alsbury's memorandum as quoted above, it is worth examining in more detail the legal position regarding the availability of use of evidence of telecommunications interception (TI) product, and whether this might have influenced the charge selection.

Under the *Telecommunications (Interception and Access) Act 1979* (Cth) (TIA Act), the eligible Judge or nominated Administrative Appeals Tribunal member may only issue a TI warrant if satisfied that information likely to be obtained under the warrant would be likely to assist in connection with the CCC's investigation of a 'serious offence', or serious offences, in which the person is involved.⁵¹⁰

There is a need to nominate the serious offence or offences being investigated. Under Queensland legislation, the TI Act defines a 'serious offence' as defined by section 5D of the Commonwealth legislation (TIA Act). Section 5D(2) of the TIA Act states that an offence is a serious offence if it is 'an offence punishable by imprisonment for life or for a period, or maximum period, of at least 7 years' and the conduct involves a number of other factors including 'serious fraud' or corruption by an officer of the State.

Noting the penalty for a reprisal offence under the PID Act is a maximum of two years imprisonment, such an offence is not a 'serious offence' under the TI Act.

⁵⁰⁵ Submission 25, p 3, para 9b.

⁵⁰⁶ Submission 25, p 13, para 67.

⁵⁰⁷ Volume 2, pp 319-322.

⁵⁰⁸ Volume 2, pp 317-318, PCCC-1571.

⁵⁰⁹ Volume 2, p 319.

⁵¹⁰ TIA Act, s 46A(1)(d).

The penalty for the offence of misconduct in relation to public office is 7 years imprisonment. Where there is a suspicion the alleged misconduct involved serious fraud, the offence would fall within the definition of 'serious offence' under section 5D of the TI Act.

Having lawfully obtained TI information pursuant to a warrant, that evidence could then be led in 'exempt proceedings'. Section 74 of the TI Act expressly authorises the use of lawfully intercepted information and interception warrant information in exempt proceedings.

Section 74 provides:

74 Giving information in evidence in exempt proceeding

- (1) A person may give lawfully intercepted information (other than foreign intelligence information, general computer access intercept information or ASIO computer access intercept information) in evidence in an exempt proceeding.
- (2) For the purposes of applying subsection (1) in relation to information, the question whether or not a communication was intercepted in contravention of subsection 7(1) may be determined on the balance of probabilities.
- (3) A person may give interception warrant information in evidence in an exempt proceeding.

Section 5B(1) of the TI Act defines exempt proceedings:

- (1) A reference in this Act to an exempt proceeding is a reference to:
 - (a) a proceeding by way of a prosecution for a prescribed offence; or
 - ...
 - (f) any other proceeding (not being a proceeding by way of a prosecution for an offence) in so far as it relates to alleged misbehaviour, or alleged improper conduct, of an officer of the Commonwealth or of a State; or

In turn, 'prescribed offence' is defined in section 5 to include a serious offence and 'any other offence punishable by imprisonment for life or for a period, or maximum period, of at least 3 years.'

Thus, whereas a TI warrant can only be issued in relation to the investigation of a serious (7 year) offence, TI material obtained under a warrant may be given in evidence in proceedings for the prosecution of an offence punishable by imprisonment for a period of at least 3 years.

In summary, here, the TI evidence would have been admissible in a prosecution for either misconduct in relation to public office, or the charge of fraud, but not the reprisal offence, the latter being neither a serious offence nor a prescribed offence.

Section 40 of the PID Act creates an offence of reprisal and reads in part:

- (1) A person must not cause, or attempt or conspire to cause, detriment to another person because, or in the belief that—
 - (a) the other person or someone else has made, or intends to make, a public interest disclosure; or
 - (b) the other person or someone else is, has been, or intends to be, involved in a proceeding under the Act against any person.

As noted earlier, the penalty for a reprisal offence is a maximum of 2 years imprisonment.⁵¹¹

⁵¹¹ PID Act, s 41.

It was submitted on behalf of the former Logan City Councillors that the decision to charge them with fraud was inappropriate.⁵¹² The submission raised a number of issues and concluded:

In light of the matters already discussed above, these factors lead to the not unreasonable conclusion that there was an ulterior motivation in charging the Former Councillors with fraud, namely, to improve Ms Kelsey's prospects at regaining her position.⁵¹³

...

Whilst Mr MacSporran QC acknowledged on both occasions that the merits of the case were yet to be determined, the expression of his/the CCC's views that: the Former Councillors' conduct "fits" the definition of fraud, that it "clearly" passed a threshold from civil to criminal, to describe the probationary process itself as dishonest and disingenuous and later, describing Ms Kelsey as a "poor woman" subject to "disgraceful" conduct by the Former Councillors in the course of the industrial proceedings was, at its lowest, gravely in error, in its prejudgment of the issues to be determined in the criminal and civil trials.⁵¹⁴

That submission further states:

Finally, only a fraud charge would fall within the definition of an integrity offence under the Local Government Act 2009, automatically leading to the Former Councillors being suspended pending determination.⁵¹⁵

The former Logan City Councillors submission is in error in this respect. A charge of reprisal would not be an integrity offence. However, as well as fraud, the other charge within contemplation – misconduct in public office – does fall within the definition.

6.9.2.2 *Suspension – integrity offences*

Under section 175K of the *Local Government Act 2009*, a person is automatically suspended as a councillor when the person is charged with a 'disqualifying offence'.

On 8 August 2018, Mr Mark Docwra of the CCC sent an email to Mr Hutchings, with the subject line 'automatic suspension of Councillors for disqualifying offences, reprisals and quorums for local government meetings'.⁵¹⁶ The email:

- set out the terms of section 175K
- noted that a reprisal offence is not a 'disqualifying offence'
- set out the quorum requirement for local government meetings (a majority of the councillors).

In noting that a reprisal offence was not a disqualifying offence, Mr Docwra continued:

However, it is unnecessary to include the offence of taking reprisal as an integrity offence in LG Act, Schedule 1 because the very same acts and circumstances comprising any particular offence of taking reprisal may also constitute the offence of:

- fraud under Criminal Code, s.408C(1)(e) [a person who dishonestly causes a detriment, pecuniary or otherwise, to a person commits the crime of fraud]
- conspiracy to commit crime under Criminal Code, s 541, if two or more persons conspire to commit a reprisal amounting to fraud. A prosecution for this offence cannot be instituted without the consent of the Attorney-General.

⁵¹² Submission 27, paras 161 and following.

⁵¹³ Submission 27, p 34, para 174.

⁵¹⁴ Submission 27, p 34, para 176.

⁵¹⁵ Submission 27, p 34, para 173.

⁵¹⁶ Volume 2, p 10. At the time of Mr Docwra's email the section was numbered s 182A, (including), being renumbered in 2019.

Mr Docwra advised that both these offences (under sections 408C(1)(e) and 541) 'are integrity offences ... and thus disqualifying offences ...'.

The following morning, Mr Docwra forwarded this email to Mr MacSporran QC. In doing so, he noted that he had been asked by Mr Hutchings to forward 'the email below touching upon the issues you both discussed yesterday.'

Later that morning, Mr MacSporran QC responded 'Thanks Mark'.

When asked about these emails, Mr MacSporran QC initially told the committee that the context was that Mr Docwra had accompanied him to a hearing of the Queensland Parliament's Economics and Governance Committee in its consideration of the bill for the dissolution of Ipswich City Council on 30 July 2018. He also noted that Mr Docwra had made no mention of the offence of misconduct in public office, which was 'the other matter that we were considering in the Front investigation ...'.⁵¹⁷

However, when his attention was drawn by Counsel Assisting to some material he appeared to accept that the material from Mr Docwra was prepared in the context of the Logan City Council matter, and followed closely after his meeting with Ms Kelsey (and Mr Alsbury) on 6 August 2018, just days earlier. That discussion, he conceded included the question of her reinstatement.⁵¹⁸

Later in his evidence he said:

I think I said this morning—my memory has not enabled me to take it any further—the only thing I can link it to is—because it came from Mr Docwra—it may have had something to do with the Ipswich matter, but that may not be right because the email from Mr Docwra talked about simply the integrity offences and so forth. I do not remember the conversation with Mr Hutchings, but the terms of it, as put to me by counsel assisting, are what they are. I cannot really elaborate further upon that discussion. I do not know what Mr Hutchings said. I have read the transcript. I cannot recall what he said there.⁵¹⁹

6.9.3 Submissions – the decision to charge generally

As mentioned earlier, in the context of the committee's consideration of the adequacy of the material before the CCC Chairperson at the stage when he recommended the consideration of charges, the CCC stated that any shortcomings in the sufficiency of that material:

... 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.⁵²⁰

The CCC also made reference to the opinion of Mr O'Brien AM mentioned earlier. That opinion was obtained by the CCC, in the course of this inquiry of the committee, from retired Chief Judge of the District Court of Queensland, Mr Kerry O'Brien AM. In summary, his opinion (described by the CCC as 'unchallenged')⁵²¹ was that the laying of the charges was appropriate and in the public interest.⁵²²

After a committal hearing over 9 days in late 2020, the charges were withdrawn by the DPP, and the charges were dismissed on 14 April 2021. In the lead up to that decision, solicitors for the various defendant Logan City Councillors had made written submissions arguing for the withdrawal. Also, exchanges of views about the proposal to withdraw the charges had taken place between the CCC and the ODPP, specifically involving Mr MacSporran QC and Mr Heaton QC.

⁵¹⁷ Public hearing transcript, Brisbane, 7 September 2021, p 5.

⁵¹⁸ Public hearing transcript, Brisbane, 7 September 2021, pp 5, 14.

⁵¹⁹ Public hearing transcript, Brisbane, 7 September 2021, p 33.

⁵²⁰ CCC, Outline of submissions, 15 October 2021, p 32, para 153.

⁵²¹ CCC, Outline of submissions, 15 October 2021, p 3, para 8.

⁵²² CCC, correspondence, 2 September 2021.

6.9.4 Committee comment

Despite the charges being withdrawn by the DPP after the conclusion of evidence in the committal hearing, the committee does not consider it appropriate to inquire whether the prosecutorial discretion should have been exercised in favour of charging fraud at all. The exercise of that discretion is a matter for prosecutors. The committee has limited its consideration to what Counsel Assisting submitted were demonstrable errors recognised in public law.

6.9.5 The decision to charge – actions of DS Francis

Counsel Assisting submitted:

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.⁵²³

Counsel Assisting suggested an Available Finding was that:

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.⁵²⁴

The CCC responded that it wholly supported DS Francis in rejecting any suggestion that:

- he failed to act properly, independently, impartially, and fairly in exercising his discretion to lay charges; or
- he acted in dereliction of his duty as a police officer; or
- any conduct of his reflects poorly on his fitness to serve as a police officer.⁵²⁵

6.9.5.1 *Committee comment*

The committee notes Available Finding 12 submitted by Counsel Assisting. The committee is of the view that DS Francis' conduct in his work in preparation for the charging of the 7 Logan City Councillors with fraud in respect of Ms Kelsey's PID and her termination as CEO was fairly criticised by Counsel Assisting.

Finding 8

The committee considers the conduct of Detective Sergeant Andrew Francis (that was rightly criticised by Counsel Assisting) to be an example of and symptomatic of the culture of the Crime and Corruption Commission.

6.10 The timing of the charges

6.10.1 Issue of urgency and timing of charge

On 26 April 2019, Mayor Smith and 7 former Logan City Councillors were arrested and charged with fraud under section 408C of the Criminal Code for dishonestly causing detriment to Ms Kelsey by terminating her employment. At that time, closing submissions for the QIRC proceedings were listed for 2 and 3 May 2019.

At the committee's hearings, the timing of the charges and the reasons for that timing were explored through questioning witnesses. This was to test whether there was a desire within the CCC to charge

⁵²³ Outline of submissions by Counsel Assisting, 29 September 2021, p 23, para 79(f).

⁵²⁴ Outline of submissions by Counsel Assisting, 29 September 2021, p 23, Available Finding 12.

⁵²⁵ CCC, Outline of submissions, 15 October 2021, p 49, para 236, 237.

the Logan City Councillors so that they would be suspended and the Logan City Council dissolved to assist Ms Kelsey before the matter came before the QIRC for final submissions.

The starting point for much of this examination was an internal CCC email dated 26 March 2019 in which DSS Andrews emailed DS Beattie, DS Sergeant Francis and DI Preston, in response to a query from DS Beattie 'When's the QIRC decision?'

DS Andrews replied:

2 May is set for submissions 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 Fab 7 prior to 2 May.⁵²⁶

DS Francis replied:

Yup time critical.

It is noted a charge of fraud and a charge of misconduct in public office would each have the effect that the councillors would be removed from office.⁵²⁷ On the one hand it may be argued that the removal of the Logan City Councillors would have assisted Ms Kelsey in her attempt to be reinstated by the QIRC (as distinct from obtaining damages). This is because it had been submitted in the QIRC proceedings that Ms Kelsey, if successful in her industrial claim, should not be reinstated to her former position of CEO given the complete breakdown of trust between her and the Mayor and Logan City Councillors. It is postulated that if the Logan City Councillors were removed from office, the impediment to reinstatement created by that breakdown in trust might be overcome. On the other hand, this potential motive relies on a few assumptions including:

- this was the only impediment to reinstating Ms Kelsey to her former role
- the QIRC would recommend reinstatement over damages in this instance, and
- any future Administrator would reinstate Ms Kelsey.

This potential desire within the CCC to assist Ms Kelsey in securing reinstatement as CEO was thoroughly explored in questioning of witnesses at the committee's hearings. CCC witnesses denied this. Questioning by Counsel Assisting exposed some alternative possibilities.

1. The date was selected to work towards a deadline, to motivate the team, and to prevent the matter dragging on for a lengthier period.

Dr HORTON: ... So, why the arrest and charge before 2 May if not because the QIRC submissions are that day?

Det. Snr Sgt Andrews: I wanted to get it done before the submissions happened. Like, I wanted to work towards a date, a milestone that the team could work towards, and I wanted to have it done before that because after that, if we had not got it done, it could have dragged on and on and on and I did not want that to happen. I wanted to move the investigation along and I needed to have it done before then to give us the best opportunity to get the people we were investigating to cooperate.⁵²⁸

DS Beattie also underwent sustained questioning. When asked whether he understood there to be some particular urgency in the investigation that required the mayor and 'a decent portion of the Fab 7' to be arrested and charged before 2 May, his reply was no.⁵²⁹

2. Police officers were finalising statements from witnesses (including the Logan City Councillors) who had indicated they would be unavailable around 2 May (due to the QIRC proceedings).

⁵²⁶ Volume 2, p 93, PCCC-TP0050.

⁵²⁷ *Local Government Act 2009*, s 175K.

⁵²⁸ Public hearing transcript, Brisbane, 25 August 2021, p 62.

⁵²⁹ Public hearing transcript, Brisbane, 26 August 2021, pp 10-11.

DS Francis gave evidence around the issue of urgency and timing of the charges. His evidence was that the urgency was to obtain those statements prior to the witnesses becoming unavailable (their unavailability resulting in unnecessarily prolonging the matter).

Dr HORTON: And that at that stage at least, submissions were scheduled to be heard by the QIRC on 2 May 2019?

Det. Sgt Francis: Yes, that is correct.

Dr HORTON: And that led you to think that it was important that the CCC acted quickly in terms of progressing the charges which had been under discussion on 30 January?

Det. Sgt Francis: That is not my recollection, I am sorry. My recollection and my contribution to this email chain is: there was a sense of urgency in getting what I needed to get done prior to any formal preferment of charges, and the sense of urgency was that the witnesses I was involved with at that time—I acknowledged that a couple of days previous to this date. I had only just obtained a statement from Sharon Kelsey, and that statement took months to obtain. I also similarly obtained a statement from Mayor Power, and that statement took months to obtain. But I had yet to obtain further statements from other councillors that were going to be involved in these proceedings on 2 May. I was aware—because they had communicated to me—that they would be unavailable for my purposes leading up to and during that proceeding. So my reference to ‘time critical’ there is an acknowledgement, yes, we need to move and move quickly. I was also very much aware of the frustration that was being felt by my supervisors with how long some of these statements had taken. That was a responsibility that I was undertaking and under pressure to undertake—and, bearing in mind, too, that Andrea Millberry-Smith had yet to sign her statement.

Dr HORTON: What was the rush?

Det. Sgt Francis: All the stars were aligned, so to speak—if I can use that—in respect of moving forward with charges. If the witnesses were not in a position to further liaise with me, that might mean months of delays for the organisation and costs in moving forward to getting those charges. That is my recollection in respect to the email that you have referred to.⁵³⁰

The evidence set out above is that some saw the date of 2 May 2018 as a set date to work towards, but for no particular stated higher reason. Others said they saw the date as relevant to obtaining statements from witnesses before they might, it was thought, become unavailable due to commitments in the QIRC proceedings, which would result in prolonging the criminal matter.

Counsel Assisting suggested the ‘urgency found its way’ to the CCC Chairperson through Mr Alsbury.⁵³¹ Mr Alsbury had marked the cover sheet which he provided to the CCC Chairperson ‘urgent’, but had not entered any reasons for doing so (despite the Chairperson’s Cover Sheet form requiring reasons to be given).

Mr Alsbury said he could not remember why he marked the memo as urgent.⁵³² Mr Alsbury later explained:

I do recall conversations with the chairperson and we were talking about timing of charging in the context of the QIRC proceedings. We identified—this is the chairperson and I—that we were liable to be criticised no matter what we did. So if we charged before the QIRC proceedings, we would be accused of trying to influence the QIRC proceedings. If we charged after, we would be accused, if they had been successful for Kelsey, of just sort of trying to ride on the coat-tails of that and using that decision to bolster our own case. If she had not been successful, we may have been accused of some sort of sour grapes or something like that. The decision was made that we would charge before because we were ready to charge.⁵³³

⁵³⁰ Public hearing transcript, Brisbane, 20 August 2021, pp 66-67.

⁵³¹ Outline of submissions of Counsel Assisting, 29 September 2021, p 16, para 62.

⁵³² Public hearing transcript, Brisbane, 20 August 2021, p 43.

⁵³³ Public hearing transcript, Brisbane, 18 August 2021, p 47.

When asked what the circumstances of urgency were, so far as he was aware, Mr MacSporran QC responded, referring to the meeting of 24 April 2019:

I came into the meeting and said, 'Look, I have thought about that. This is my view for your consideration. If we wait until after the QIRC case is finally decided and Kelsey wins that case, we will appear in the public eye - rightly or wrongly - to have not been game or willing to proceed until we had the backing of the QIRC.'

Alternatively, if you had waited until the QIRC had concluded and Kelsey had lost, we would undoubtedly have been accused, if we had gone ahead and charged, of some sort of reprisal ourselves for Kelsey failing in the commission but we had proceeded after that anyway to deal with the thing. The third consideration was obviously that there was no way of knowing—it turned out to be correct—how long that commission case was going to take to be concluded. This is April 2019 we are talking about and, of course, the commission case was ultimately decided in April this year, 2021, so two years later.

For all of the obvious reasons, my view was that if the evidence was sufficient, as it turned out to be when we assessed it in that period, 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.⁵³⁴

In short, his view was that the CCC would be criticised whether it charged before or after finalisation of the QIRC proceeding.

Mr MacSporran QC also mentioned having heard of a reticence on the part of the investigators to charge before the completion of the QIRC proceedings:

... my memory is that what I was being told is that there was some reticence to charge until after the commission evidence—not only the evidence but the whole case was decided. That is why I came into the meeting on 24 April—if it was that date—to express the views I expressed earlier and to get on with it, which is what happened on 26 April, two days later.⁵³⁵

Mr MacSporran QC reiterated this position on a later hearing day:

The only issue to be closed off on, as I understood it—and I have a very clear memory of this for the meeting of 24 April—was to consider whether we should wait. The investigation, so far as it had gone, was concluded. Everyone understood the evidence was available. The question then became whether we should, as the investigators' inclination was to do, I was told, wait until the QIRC proceedings had been finally decided before we charged or not.⁵³⁶

6.10.2 The submissions

Counsel Assisting submitted the 'only rational inference' to explain for the urgency in charging before 2 May 2019 is that:

- Upon charging, the mayor and a majority of the Logan City Councillors would be suspended, which would bring about the inevitable dissolution of the council.
- 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.
- By doing so before the QIRC reconvened, it would come to the QIRC's attention that an impediment to Ms Kelsey's reinstatement had been removed.⁵³⁷

⁵³⁴ Public hearing transcript, Brisbane, 17 August 2021, p 55.

⁵³⁵ Public hearing transcript, Brisbane, 17 August 2021, p 56.

⁵³⁶ Public hearing transcript, Brisbane, 7 September 2021, pp 21-22.

⁵³⁷ Outline of submissions by Counsel Assisting, 29 September 2021, p 17, para 64.

The CCC stated:

The charges were not laid on 26 April 2019 to assist Ms Kelsey. The Commission recommends considering the laying of charges when the evidence supports them. It has a duty to recommend the consideration of charges at that point. There are few reasons to depart from that starting point, and none were present in this case.⁵³⁸

The CCC also stated that the evidence of Mr MacSporran QC was consistent with what he had told the committee in private session as early as 3 May 2019, one week after the charges were laid:

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 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.⁵³⁹

6.10.3 Committee comment

Finding 9

The committee finds that the material prepared for, and evidenced discussions of, the 24 April 2019 meeting of the CCC to consider commencing criminal proceedings against the 7 Logan City Councillors (and further proceedings against the Mayor) for fraud in respect of Ms Kelsey's public interest disclosure and termination as chief executive officer were inadequate for that purpose.

(Based on Counsel Assisting Available Finding 9)

Finding 10

The committee finds that the discretion to charge the 7 Logan City Councillors and Mayor with fraud was affected by a desire to assist Ms Kelsey.

(Based on Counsel Assisting Available Finding 10)

Finding 11

The committee finds that the discretion to charge the 7 Logan City Councillors and Mayor with fraud in respect of Ms Kelsey's public interest disclosure and termination as chief executive officer miscarried because all material considerations and evidence were not taken into account and weighed.

(Based on Counsel Assisting Available Finding 11)

⁵³⁸ Submission 25, p 4, para 11.

⁵³⁹ Private meeting transcript, Brisbane, 3 May 2019, pp 5-6.

6.11 Impact of the charges

6.11.1 Suspension of councillors and dismissal of the Logan City Council

By virtue of the operation of then recent amendments to the Local Government Act, the Logan City Councillors were automatically suspended from office upon being charged.⁵⁴⁰ Further, given the number of Logan City Councillors charged, the Logan City Council ceased to be able to form a quorum and was therefore unable to carry out its functions. The then Minister dismissed the Logan City Council on 4 May 2019.⁵⁴¹ Thus all Logan City Councillors were dismissed, not just those charged.

In turn, the Minister appointed an Administrator to the Logan City Council on 4 May 2019. The Administrator remained in place until the finalisation of the elections held in March 2020. As at the date of those elections, all the charged Logan City Councillors were still the subject of the charges, and could not stand for election.

The committee heard from Mr Lutton and Ms Schwarz about the profound personal, professional and financial impacts of this sequence of events upon them.⁵⁴²

6.11.2 Knowledge of impacts of charges

In its submission, the CCC acknowledged the personal impacts on the councillors this way:

.. the Commission respectfully acknowledges the emotional, social, and financial impact that the laying of criminal charges_has on those charged with serious criminal offences, including the Councillors. Such an impact is the inevitable consequence when criminal charges are laid against individuals in our justice system. But, with respect, the actions of the Councillors, and some in particular, in the present case necessarily aroused a heightened level of suspicion, even by the standards of a corruption investigation...in those circumstances the Commission was bound to investigate the conduct and to treat it seriously; it would have been derelict in the discharge of its statutory function to have acted otherwise.⁵⁴³

The CCC relied in part on what it saw as aggravating factors regarding taking the alleged 'reprisal' action in the face of the 'warning' from the CCC, and the concerns the CCC had regarding destruction of evidence.

In responding to a question from the committee, Mr MacSporran QC put it this way:

... the careers of seven people, as you put it, were brought to an end because they were charged on evidence which was sufficient to render a prima facie case of fraud which also revealed sufficient prospects of the matter going to a jury and a jury being able to, but not necessarily would, convict of that offence. The fact that they lost their livelihoods as councillors was just an inevitable consequence not determined by the CCC or the police at the CCC but by your parliament, our parliament, the Queensland parliament.⁵⁴⁴

As to the wider impact on the dismissal of the council, Mr MacSporran QC, when asked about the effect on 'an elected body ..., including four people who have not been charged with anything', responded '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'.⁵⁴⁵

⁵⁴⁰ *Local Government Act 2009*, s 153, s 175K, schedule 1 part 2.

⁵⁴¹ *Local Government Act 2009*, s 123.

⁵⁴² Mr Lutton, public hearing transcript, Brisbane, 26 August 2021, pp 49-54; Ms Schwarz, public hearing transcript, Brisbane, 26 August 2021, pp 55-63.

⁵⁴³ Submission 25, p 2, para 7.

⁵⁴⁴ Public hearing transcript, Brisbane, 7 September 2021, p 25.

⁵⁴⁵ Public hearing transcript, Brisbane, 6 September 2021, p 64.

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.

6.11.3 Committee comment

It is the duty of any charging authority, including the CCC, to know the material consequences of any decision to lay a charge. The consequences of laying the fraud charge – whatever their source – are ones which ought to have been squarely confronted in the documents prepared as part of considering whether to lay the charges. So much was required by the Director's Guidelines.

Much of what follows from the laying of a charge is 'a product of the law' (to use Mr MacSporran QC's phrase). But it is no less a consequence for having that character. The CCC had done research into the consequences. The CCC was therefore aware of them, but they were almost entirely omitted (Mr Alsbury's memorandum aside, and even then its treatment of the consequences was incomplete and cursory) from the documents in which they ought to have appeared.

It was a deficiency in the charging process that all the inevitable consequences of preferring the charges of fraud were not confronted and dealt with in the various memoranda.

Finding 12

The committee finds that in August 2018 the Crime and Corruption Commission gave consideration to charging criminal offences that would cause Logan City Councillors to be removed, and the Logan City Council to be dismissed and an Administrator appointed.

(Based on Counsel Assisting Available Finding 6)

6.12 Referral to Director of Public Prosecutions

6.12.1 Legislation, policy and practice regarding referrals to the Director of Public Prosecutions

Prior to the passage of the *Crime and Corruption and Other Legislation Amendment Act 2018*, section 49 of the CC Act provided that after the CCC investigates a corruption matter, it could report on the investigation to the Director of Public Prosecutions (DPP) for the purposes of any prosecution proceedings. The report had to contain, or be accompanied by, all relevant information known to the CCC that supported a charge, or that supported a defence that may be available to any person liable to be charged as a result of the report.

The CC Act was amended by the *Crime and Corruption and Other Legislation Amendment Act 2018* to remove the power of the CCC to refer reports to the DPP for the purposes of any prosecution proceedings.

Further examination of the statutory provisions and stakeholder views' regarding the 2018 amendments, are explored further at section 0 of this report.

While the CCC has policies and procedures regarding charging and prosecutions (which are further explored at section 9.1 of this report,, Mr Heaton QC advised he was unaware of any memorandum of understanding or CCC policy about what matters would be referred to him as DPP. Mr Heaton QC stated:

Prior to seeing that material [provided by the CCC], I was not aware that there was any structure around what was or was not; nor was I able to discern that there was any structure about what was or was not referred to me.⁵⁴⁶

⁵⁴⁶ Public hearing transcript, Brisbane, 3 September 2021, p 16.

DI Preston told the committee the CCC Chairperson makes the decision as to whether a matter goes to the DPP or returns to the police officer for charging.⁵⁴⁷

The CCC advised that once charges are laid by a seconded police officer and a brief has been referred to the DPP, 'There is typically interaction between DPP officers and the Commission's investigating officers and legal officers about the management of prosecutions, including disclosure requests and arrangements with witnesses', similar to the interactions between the QPS and the DPP.⁵⁴⁸ The DPP usually seeks the views of the CCC about decisions in individual prosecutions, including whether to commence or discontinue a prosecution, and the acceptances of pleas from defendants. The CCC advised that while it does not always agree with the decisions made by the DPP, it respects and accepts them.⁵⁴⁹

In regards to the Logan City Council matter in particular, the CCC stated:

The evidence was not referred to the DPP or external counsel prior to the charges being laid. There is nothing remarkable about that. In Queensland, charges are routinely laid by the Queensland Police Service without prior consultation or approval from the DPP. There was a much more rigorous process adopted by the Commission in charging Mr Smith and the Councillors with fraud than is commonly followed, for example, by the Queensland Police Service on an ordinary charge.⁵⁵⁰

When asked if he would prefer the ODPP to have been involved earlier in the process regarding the charging of the former Logan City Councillors, Mr Heaton QC advised:

In framing it as a preference, it assumes that the checks and balances that exist within the structure of the CCC, with the office of the chair of the commission having the ultimate responsibility and opportunity to oversee and exercise a similar discretion to that which, I guess, I would exercise in that same situation. History might reflect that if it had come to the DPP—although, again, I cannot speak for Mr Byrne, but if it had come to me at that point in time then the matters that I saw as being significant might have been highlighted at an earlier point in time. Perhaps others might have preferred that it came to me beforehand, but in many ways this was just another matter. This was just another case. Of course there were serious implications. Sometimes matters that involve serious implications have come to me to consider before charging. Clearly in this case they did not.⁵⁵¹

6.12.2 Prosecution of fraud charges and decision to discontinue charges against the former councillors by the Director of Public Prosecutions

Following the charges of fraud being laid by the CCC, a partial brief of evidence was provided by the CCC to the DPP on 28 June 2019, followed by an updated brief of evidence on 5 August 2019 while the CCC waited for several witness statements. The remainder of the brief of evidence was delivered to the DPP on 11 September 2019.⁵⁵²

According to the CCC, the DPP 'from time to time requested further material from the Commission which was supplied by the Commission'.⁵⁵³

The committal hearing began on 30 November 2020, with the hearings held over 9 days, to 10 December 2020. After the evidence in the committal hearing had concluded, the Prosecutor sought an adjournment.⁵⁵⁴ The CCC advised that on 10 December 2020, DPP prosecutors had met with CCC staff where 'the prospects of a successful prosecution were discussed in the light of the committal

⁵⁴⁷ Public hearing transcript, Brisbane, 25 August 2021, p 44.

⁵⁴⁸ Submission 25, p 44, para 220.

⁵⁴⁹ Submission 25, p 44, para 223.

⁵⁵⁰ Submission 25, p 39, para 210.

⁵⁵¹ Public hearing transcript, Brisbane, 3 September 2021, p 10.

⁵⁵² Submission 25, p 14, paras 71-73.

⁵⁵³ Submission 25, p 14, para 74.

⁵⁵⁴ Public hearing transcript, Brisbane, 3 September 2021, p 4.

hearing'.⁵⁵⁵ The DPP raised concerns about the credibility of Ms Kelsey and other Crown witnesses, and the ability to exclude innocent hypotheses about the reasons the former Logan City Councillors voted to terminate Ms Kelsey's employment.⁵⁵⁶

Following this meeting, the DPP received submissions in December 2020 on behalf of each of the former Logan City Councillors, which requested that the prosecution not proceed further. These submissions were subsequently provided to the CCC, who then made a submission to the DPP explaining its view that the prosecution ought to continue because there were reasonable prospects that the former councillors would be convicted.⁵⁵⁷

The ODPP prepared an advice for Mr Heaton QC, who then prepared a memorandum based on that advice (as outlined in more detail at section 5.7 of this report). The memorandum summarised Mr Heaton QC's views that, after the committal hearing, there were 'insufficient prospects of success to justify continuing' with the charges of fraud against each of the 8 defendants (ie the Logan City Councillors and Mr Smith), and that the charges would be discontinued against each defendant.⁵⁵⁸ The memorandum was sent to Mr MacSporran QC on 6 April 2021.⁵⁵⁹

Mr Heaton QC's memorandum stated:

This was always going to be a challenging case to prove.

...

The Crown was necessarily setting out to prove that the valid reasons that they may have had for voting to terminate her employment were not the actual reasons—

...

The evidence demonstrates that prior to the making of the PID and in the 4 months afterwards, there were issues which, in the subjective view of each of the councillor defendants, undermined her suitability for the position of CEO.⁵⁶⁰

The memorandum also stated:

A 'full' committal hearing was conducted with cross examination of many of the proposed crown witnesses, including Ms Kelsey and the five other councillors who did not vote to terminate her employment. Ms Kelsey in particular, was cross-examined at length. The assessment of the senior prosecution team who conducted the committal was that the councillors were not particularly impressive witnesses and that in particular, Ms Kelsey was a poor witness.

...

The assessment of the prosecutors was made known to them [the CCC] and the flaws in the case were discussed.

...

Particularly, the inability to exclude other rational reasons for the decision to vote to terminate Ms Kelsey's employment, and credibility issues with Ms Kelsey. Whilst I accept that the case does not rest entirely on the credibility of Ms Kelsey, the reasonableness or otherwise of the various reasons advanced by the councillors will rest to some extent on what a jury might make of Ms Kelsey. Her lack of credibility

⁵⁵⁵ Submission 25, p 15, para 78.

⁵⁵⁶ Submission 25, p 15, para 79.

⁵⁵⁷ Submission 25, p 15, paras 80, 81.

⁵⁵⁸ Submission 25, p 15, para 82.

⁵⁵⁹ Public hearing transcript, Brisbane, 3 September 2021, pp 4-6.

⁵⁶⁰ Public hearing transcript, Brisbane, 17 August 2021, pp 63-64.

will work against any conclusion that the reasons advanced by the Councillors were not rational reasons which operated on the minds of the individual councillors when the time came to vote.⁵⁶¹

Despite a meeting with the CCC Chairperson and Mr Alsbury on 9 April 2021 to discuss the DPP's decision to discontinue the fraud charges, on 14 April 2021 the DPP offered no further evidence and discontinued the fraud charges. The charges were dismissed and the accused former councillors were discharged.⁵⁶²

6.12.2.1 Stakeholder views on prosecution of charges and decision to discontinue by the Director of Public Prosecutions

The CCC argued that there was a prima facie case to support the charges being laid and proceeding to a trial, and this was evidenced by the DPP pursuing the charges through to a committal hearing, submitting 'The DPP did not at any time up to the commencement of the committal hearing raise any concern with the Commission that there were not reasonable prospects of a successful conviction against Mr Smith and the Councillors for the fraud charges'.⁵⁶³ The CCC also submitted that after referral of the charges to the DPP for prosecution, the DPP conducted the prosecution of a 9 day committal hearing, stating, 'in other words, the DPP agreed with the Commission's careful assessment and prosecuted the charges through to a committal hearing'.⁵⁶⁴ At the public hearing, Mr MacSporran QC stated:

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 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.⁵⁶⁵

Mr MacSporran QC also told the committee about submissions made by the Crown prosecutors for the committal hearing, advising:

'The Crown produced seven or eight written outlines by the prosecutors to say, 'Here's why the matter should proceed to a jury.' Consistently with Mr Heaton's memo, there was never a question to the DPP that there was no case to answer or that it had no prospects. It proceeded until nine days into the committal when the situation changed, as Mr Heaton's memo reveals.⁵⁶⁶

Mr MacSporran QC advised the committee that he took comfort from the fact that when the DPP at the time, Mr Byrne QC, received the brief, it did not cause him to have any reservations about running the case.⁵⁶⁷

However, Mr Heaton QC told the committee that he was not certain that Mr Byrne QC had turned his mind to this particular matter upon receiving the brief, that the brief was assessed by senior lawyers within the office, and that a detailed analysis of the matter was not done until months later.⁵⁶⁸

⁵⁶¹ Public hearing transcript, Brisbane, 17 August 2021, p 62.

⁵⁶² Submission 25, p 15, paras 83, 84.

⁵⁶³ Submission 25, p 14, para 74.

⁵⁶⁴ Submission 25, p 40, para 212.

⁵⁶⁵ Public hearing transcript, Brisbane, 17 August 2021, p 44.

⁵⁶⁶ Public hearing transcript, Brisbane, 18 August 2021, p 8.

⁵⁶⁷ Public hearing transcript, Brisbane, 17 August 2021, p 63.

⁵⁶⁸ Public hearing transcript, Brisbane, 3 September 2021, p 3.

In terms of the contents of his memorandum, Mr Heaton QC explained that his memorandum reflected a point-in-time analysis that occurred after the evidence had been given:

I guess it is important to put my decision in its proper context in that, as I said earlier, this was the first time that I was asked to consider the sufficiency of the evidence. The conclusion that I came to was that, at that point in time, there was insufficient evidence to continue the prosecution. Mr Green and Mr Bain, who had had some long-time involvement in this case and had prosecuted it through the committal, of course had assessed the evidence prior to the committal. My recollection is that the comment about what would or would not be said in court when the charges were discontinued was said by Mr Green. I recall that Mr Green expressed himself in terms of 'no longer sufficient', reflecting 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.

...

As a result of the evidence that had been heard and the way things had transpired in the committal, Mr Green's assessment of the sufficiency of the evidence had certainly changed, and that was when they came to me. So in expressing myself in the way that I did in my memorandum, I am reflecting the decision that I made, not reflecting what decisions and what prosecutorial discretion may have been exercised by others before that point in time.⁵⁶⁹

Mr Heaton QC referred to the effect and importance of the committal process in terms of the critical assessment of evidence:

What might appear to have persuasive strength in written form and in a statement taken by police officers does not always reflect how the evidence comes across when given orally. That is the very great benefit of a committal, testing that evidence and giving the defence the opportunity to cross-examine the key witnesses prior to trial not only from their point of view of being able to identify what matters they might like to exploit but also from our point of view in terms of making that critical assessment of the persuasive strength of the evidence and whether or not in exercise of the prosecutorial discretion the matter has sufficient prospects as to warrant that important step of making the decision to go to trial.⁵⁷⁰

Mr Heaton QC also provided the following on how he assessed the information given to him by staff:

At that meeting with Mr Green and Mr Bain, they explained to me the significance of the evidence that had unfolded during the committal and briefed me in more detail about the nature of the allegations, the charges, the particulars that we were setting out to prove—

...

Credit [of the witness] is certainly an issue, but it was not necessarily the only issue. In exercising certainly my discretion, I am always mindful of not only whether there is technically an offence there but what the persuasive strength of the evidence is in terms of it being accepted by a jury. In that sense, credibility does come into play. If it becomes apparent that actions were done for a particular purpose to achieve a particular agenda, even if there might technically be an offence there, a jury might view all of that with some scepticism or indeed not give it perhaps the weight. I am always mindful of how the evidence might come across to a jury and, on that point, similarly with the particular charge and how you might be able to intellectually articulate that the circumstances, the evidence, fits a particular charge. But if a jury is going to struggle to understand it, we are unlikely to succeed.⁵⁷¹

Mr MacSporran QC told the committee he disagreed with Mr Heaton QC's view that, after cross-examination of Ms Kelsey and others at the committal proceedings, there were no longer sufficient

⁵⁶⁹ Public hearing transcript, Brisbane, 3 September 2021, p 6.

⁵⁷⁰ Public hearing transcript, Brisbane, 3 September 2021, p 10.

⁵⁷¹ Public hearing transcript, Brisbane, 3 September 2021, p 13.

prospects to warrant continuing, stating 'I thought it was still worth pursuing; it was a matter for a jury'.⁵⁷² The CCC's submission built on this, stating:

...in the Commission's respectful view, after the committal hearing there remained a prima facie case against Mr Smith and the Councillors for the fraud charges which, if pressed by the DPP, would not have been prevented from proceeding to trial before a jury and which had also had reasonable prospects for a successful conviction.

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. This is so even if the strengths or weaknesses of the prosecution evidence depends on the views taken of a witnesses' reliability or credit.⁵⁷³

During Mr Heaton QC's meeting with Mr MacSporran QC on 9 April 2021 to discuss the memorandum, one of the issues discussed was the significance of the QIRC evidence. Mr Heaton QC provided the following information about his assessment of that evidence:

When we met we discussed the significance of the QIRC evidence. Initially, it had not been provided to me because it was, I guess, quarantined and there were questions about its admissibility, whether or not it was, strictly speaking, coerced and so, therefore, whether or not, in knowing about the contents of it, that might then conflict Mark Green, for example, the prosecutor, out of being able to continue in it. So there were issues about that. It had initially not been provided to me.

When my—and I cannot remember the time line, but undoubtedly it is a matter of record that I can check. At some point I had a conversation with Mr MacSporran where he told me that he was going to send that material to me. At that point he knew that my view was that there was insufficient evidence. So I agreed to receive it on the basis that there is insufficient evidence without it and if there is sufficient evidence with it then it would only be on the basis that it was admissible in some way in the prosecution so then the conflict issue was not so important.

I received it and I considered it. Mr Alsbury is entitled to his opinion, but I can say we discussed it. Both of them, Mr Alsbury and Mr MacSporran, had the opportunity to explain how they saw the significance of it to me, to Mr Green, to Mr Bain, who were all present for that meeting. Nothing that they explained changed my view as to the effect of that evidence in terms of the prospects of success.

In fact, if anything it made it worse.⁵⁷⁴

In support of his decision to discontinue the charges, Mr Heaton QC read from the transcript of the court proceedings on 14 April 2021, which stated:

MR GREEN: Yes. Thank you, your Honour. And thank your Honour for allowing the time for the Crown to consider the material. And after a thorough review of the matter the Crown has determined that there is insufficient evidence to continue with the fraud charge where all eight are charged and so therefore will be offering no evidence on that charge and ask for it—

...

them to be discharged.

HIS HONOUR: I will be careful with my language—- ...

HIS HONOUR:—but from what I saw and heard in those two weeks in November I think that's a—that a proper decision.⁵⁷⁵

⁵⁷² Public hearing transcript, Brisbane, 17 August 2021, p 62.

⁵⁷³ Submission 25, p 16, para 208.

⁵⁷⁴ Public hearing transcript, Brisbane, 3 September 2021, pp 15-16.

⁵⁷⁵ Public hearing transcript, Brisbane, 3 September 2021, p 9.

On the handling of the matter by the DPP, the CCC submitted:

The Commission did not have control over the prosecution of the Councillors and the conduct of the committal hearing, and the final decision about whether to continue the charges at the committal hearing remained with the DPP. It is difficult to predict the way a witness will perform in evidence. 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.⁵⁷⁶

On the decision to charge the Logan City Councillors with fraud, rather than a different offence, Mr Heaton QC advised:

I always struggled with this being a 408C offence. I have had discussions with lawyers within my office about it and at least one officer can see how you can make it a 408C offence, but that as I understand it is more a 'how can I' rather than 'whether I should' consideration. As far as I can see, this was a section 40 PID Act offence of retaliation, and even then on the evidence I think there would be insufficient evidence to prove that offence. But at least that goes to the heart of what was done—what was alleged to have been done—that this was a retaliation for the public interest disclosure. A jury can understand that. Dishonestly causing a detriment—that is a bit more convoluted.⁵⁷⁷

When questioned about whether he would have expected the relevant police officers to have read the evidence or the submissions that were made by the applicants during the QIRC process (who would ultimately become the defendants in the fraud charge), Mr Heaton QC stated:

I would have thought that any evidence which might paint a full picture of what it is you are dealing with and where your vulnerabilities are and what answer might be advanced to an allegation would be important information to know when deciding whether or not you have sufficient evidence to charge or to prosecute.

...

I guess there was an element of predictability as to where the vulnerabilities were, what answers might be advanced, what reasons might be advanced for the actions that were taken. I would have thought an objective and critical assessment of sufficiency of your evidence at every stage—be it investigation or prosecution—would be of benefit to the task of critically assessing the sufficiency of your evidence and exercising the discretion as to whether or not there was sufficient.

...

I would have thought that that would give very telling insight into where the problems might be in the case and in the evidence, bearing in mind we are trying to prove what a state of mind was. Unless they tell us, we can only do it by inference, so all of the evidence that might tend one way or the other to support a conclusion I would have thought would be valuable evidence to consider in exercising any discretion.⁵⁷⁸

6.12.3 Conclusion on the evidence

The CCC provided a partial brief to the DPP 2 months after charging, and the full brief almost 6 months after charging. The CCC did not refer the matter to the DPP for consideration prior to charging, but both the CCC and DPP advised this was not unusual under the current legislation.

The CCC submitted there was a prima facie case to support the charges being laid and proceeding to a trial. The DPP, after receiving the briefs and further exchanges of information, progressed to a committal hearing.

⁵⁷⁶ Submission 25, p 39, para 206.

⁵⁷⁷ Public hearing transcript, Brisbane, 3 September 2021, p 14.

⁵⁷⁸ Public hearing transcript, Brisbane, 3 September 2021, p 14.

However, the committee notes the DPP's evidence that he 'always struggled with this being a 408C offence', and instead thought it was more appropriately an offence of retaliation under section 40 of the PID Act, which may still have been a charge that lacked sufficient evidence.

Counsel Assisting commented on the charging process more broadly, and suggested the committee may wish to consider that, before charges are laid which involve serious consequences (such as the suspension of elected officials and the dissolution of elected bodies which also affects non-charged elected representatives) the CCC be required to obtain approval or a recommendation to do so from the DPP or some independent senior legal advisor.⁵⁷⁹ This proposal is further explored at section 9.4.7 of this report.

Recommendation 3

The committee recommends the Queensland Government review section 49 of the *Crime and Corruption Act 2001*. Furthermore, consideration should be given to a requirement that the Crime and Corruption Commission obtain the recommendation of the Director of Public Prosecutions, or a senior independent legal advisor, before exercising (through seconded police officers) the discretion to charge serious criminal offences (including disqualification offences under the Local Government Act 2009) in the exercise of its corruption function.

(Based on Counsel Assisting Proposed Measure 1)

6.13 Reporting to the committee

As part of the inquiry, the committee considered the adequacy of the disclosure by the CCC to the committee regarding the investigation into former Logan City Councillors of Logan City Council.

On 9 February 2018, the committee received a complaint about the CCC from LGAQ in relation to Logan City Council and Operation Belcarra. This matter was also reported in the media in February 2018.⁵⁸⁰

As part of the examination of the complaint, the committee requested and considered a report from the CCC with respect to the matters raised by the LGAQ, and questioned the CCC in private hearings.

On the basis of the information before it, the committee determined that it was satisfied that the CCC acted appropriately in its dealings with Logan City Council (as raised in LGAQ's complaint) and determined to take no further action in relation to the complaint.⁵⁸¹

Following the committee's determination about the complaint, the CCC continued to provide updates to the committee. This included a letter on 12 September 2018 in which the CCC outlined it had met with Ms Kelsey on 6 August 2018 to discuss her QIRC proceeding, where she raised 'she had reached the limit of her resources to fund the action' and 'advised that all parties to the proceedings, except her, are indemnified by the Logan City Council's publicly-funded insurance scheme'.⁵⁸² The letter also advised that the CCC Chairperson had met with the Minister for Local Government to discuss Ms Kelsey's 'precarious financial position', the status of the QIRC proceeding, and 'Ms Kelsey's self-funded status and her inability to access financial backing for her action for reinstatement despite, prima facie, being a public interest discloser'.⁵⁸³

⁵⁷⁹ Outline of submissions of Counsel Assisting, 29 September 2021, pp 5-6.

⁵⁸⁰ 'Queensland Crime and Corruption Commission chairman Alan MacSporran under scrutiny', *The Australian*, 19 February 2018.

⁵⁸¹ Mr Tim Nicholls MP, Chair of the Parliamentary Crime and Corruption Committee, 'Local Government Association of Queensland complaint finalised', media release, 14 June 2018.

⁵⁸² CCC, correspondence, 12 September 2018, p 1.

⁵⁸³ CCC, correspondence, 12 September 2018, p 2.

In regards to the CCC's further involvement in the matter, the CCC advised the committee:

Although the CCC is entirely sympathetic to Ms Kelsey's position, we have resolved not to attempt to involve ourselves in the QIRC proceedings given our position as investigating body and the possibility of criminal charges.⁵⁸⁴

A file note of a discussion between CCC officers dated 11 September 2018, provided to the committee pursuant to the summons issued to the CCC, suggested there had been discussion about how much detail to provide the committee in the update.⁵⁸⁵ Evidence also showed that the CCC held concerns about the 'agenda' of the former PCCC Chair Mr Nicholls MP, Member for Clayfield, and Mr Crandon MP, Member for Coomera.

'On this matter, it is not the role of the CCC to imply that its oversight body, the committee, has an 'agenda'. To do so fails to appreciate that the oversight body has been vested with the discretion to choose what it considers appropriate to review and monitor. To engage in such speculation does tend to support the view that the CCC would wish to characterise scrutiny of it as pursuit of a particular 'agenda' rather than of the critically important general function that the Queensland Parliament has vested in this committee. This inquiry only serves to reinforce the need for such oversight as the committee, not the CCC, deems fit.

Further brief updates on Ms Kelsey's matter were provided to the committee, in private meetings. On 15 February 2019, the CCC Chairperson advised the committee that at that stage 'All indications publicly from the reporting of that case indicate that it has gone fairly well for Ms Kelsey, I must say, and that would seem to us, on the evidence that we are aware of, appropriate'.⁵⁸⁶ The CCC also advised the committee in relation to its intentions in the QIRC proceedings:

Although we have a right to apply to be joined to that proceeding—and in some ways we carefully considered that many months ago—we decided that, because of the fact that we were investigating serious corrupt conduct independently of those proceedings, in the public interest it would not be appropriate for us to join those proceedings, but we have done what we can to make sure that Ms Kelsey is not otherwise disadvantaged.

...

Anyway, it looks as though the hearing has gone reasonably well and we will just wait to see what happens.⁵⁸⁷

The CCC wrote to the committee on 26 April 2019, the day the former Logan City Councillors were charged with fraud, advising the committee of the imminent charges.

On 3 May 2019, the CCC spoke to the matter in a public meeting with the committee and spoke to the timing of the laying of charges and the QIRC proceeding:

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.

⁵⁸⁴ CCC, correspondence, 12 September 2018, p 2.

⁵⁸⁵ Volume 2, p 53, PCCC-2522.

⁵⁸⁶ Private meeting transcript, Brisbane, 15 February 2021, p 6.

⁵⁸⁷ Private meeting transcript, Brisbane, 15 February 2021, p 6.

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.⁵⁸⁸

Further updates were provided to the committee at a private meeting on 19 June 2020 and public and private meetings on 14 May 2021.

At the public meeting on 14 May 2021, one month after the fraud charges against the former Logan City Councillors were dismissed by the Brisbane Magistrates Court, the CCC was asked about the dismissal and the related QIRC proceeding. The CCC Chairperson noted that the charges had been discontinued 'because the Director of Public Prosecutions determined that there were no longer sufficient prospects of success that justified running the committal further' and stated the CCC had:

... determined, after careful consideration, through lawyers, police and the multidisciplinary team that we had gathered the evidence, that there was, firstly, sufficient evidence of a prima facie nature in respect of each element of the offence charged and, applying the same DPP test, we determined that not only was there a prima facie case but also, in our view, there were reasonable prospects of a successful prosecution ensuing.⁵⁸⁹

The CCC maintained it had 'at all times acted transparently and pursuant to its statutory functions, including by informing the PCCC of its actions and reasons for them'.⁵⁹⁰

6.13.1 Section 329 notifications

The CCC is required under section 329 of the CC Act, to notify the committee and Parliamentary Commissioner about conduct by CCC officers, the CCC Chairperson, the CCC CEO or CCC Commissioners that the notifier suspects involves, or may involve, improper conduct. Improper conduct is defined as:

- (a) disgraceful or improper conduct in an official capacity; or
- (b) disgraceful or improper conduct in a private capacity that reflects seriously and adversely on the commission; or
- (c) conduct that would, if the person were an officer in a unit of public administration, be corrupt conduct; or
- (d) disclosure of confidential information without the required authorisation, whether or not the disclosure contravenes an Act; or
- (e) failure to ensure—
 - i. a register kept by the commission under an Act is up to date and complete; or
 - ii. all required documentation is on a file kept by the commission and correctly noted on a register kept by the commission under an Act; or
- (f) exercise of a power without obtaining the required authorisation, whether inadvertently or deliberately; or
- (g) noncompliance with a policy or procedural guideline set by the commission, whether inadvertently or deliberately, that is not of a minor or trivial nature; or
- (h) exercise of a power conferred on the person under this or another Act in a way that is an abuse of the power.⁵⁹¹

⁵⁸⁸ Public meeting transcript, Brisbane, 3 May 2019, p 6.

⁵⁸⁹ Public meeting transcript, Brisbane, 14 May 2021, pp 3-4.

⁵⁹⁰ Submission 25, p 28, para 148.

⁵⁹¹ CC Act, s 329(4).

6.13.1.1 Delivery of documents to Logan City Council in October

The CCC is empowered by the CC Act to give 'intelligence information or other information to any entity the commission considers appropriate'.⁵⁹²

Prior to amendment to the CC Act on 9 November 2018, the CCC was able to provide information 'to a unit of public administration if the commission considered that the unit has a proper interest in the information for the performance of its functions'.⁵⁹³ Section 62 of the CC Act provided:

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.⁵⁹⁴

As noted above, this section was repealed by amendments which took effect on 9 November 2018.

The CCC's dissemination of documents to the Logan City Council in October 2018 (as outlined in section 6.5 of this report) raised consideration as to whether a notification should have been made to the committee pursuant to section 329 of the CC Act.

The documents were delivered by the CCC to the Logan City Council on 3 October 2018, then retrieved by the CCC on 9 November 2018 before substantially the same documents were re-delivered on 19 November 2018.

The CCC had not prepared a dissemination authority for the October 2018 delivery, but did so for the subsequent delivery in November 2018. The CCC also noted that the November 2018 delivery included the redaction of material that the CCC had identified as potentially subject to legal professional privilege.⁵⁹⁵

Lack of dissemination authority

The CCC had a particular policy and procedure for the dissemination of material. According to the relevant policy, disseminations require a CCC officer requesting a dissemination, to use a form which is assessed and approved by authorised officers of the CCC.⁵⁹⁶

Ms Makeeta McIntyre, in her role as principal lawyer, was the applicant for most disseminations as part of Operation Front.⁵⁹⁷ Ms McIntyre outlined the circumstances in which a dissemination authority would be required to release information from the CCC to an external party:

Information can be referred or disseminated to a person outside the organisation if it is to be used for that entity, if it is going to a particular entity. At that time a formal dissemination would be required. If it is the case that we are providing information to an entity or a person for the sole purpose of them assisting us with our investigation, there would be no requirement of a formal dissemination.⁵⁹⁸

Ms McIntyre had been involved in communications about disseminating documents to the Logan City Council before going on leave in early October 2018.⁵⁹⁹ After returning from leave Ms McIntyre asked CCC officers whether the documents delivered to the Logan City Council on 3 October 2018 had been the subject of written approval or formal dissemination, and was told 'that they were provided for the

⁵⁹² CC Act, s 60(2).

⁵⁹³ CC Act [Reprint current from 5 June 2017 to 8 November 2018]

⁵⁹⁴ CC Act, s 62(1) [Reprint current from 5 June 2017 to 8 November 2018].

⁵⁹⁵ Submission 25, p 33, para 175.

⁵⁹⁶ CMC, Dissemination Process (Procedure), version 3, September 2013, p 2.

⁵⁹⁷ Public hearing transcript, Brisbane, 19 August 2021, p 49.

⁵⁹⁸ Public hearing transcript, Brisbane, 19 August 2021, p 49.

⁵⁹⁹ Public hearing transcript, Brisbane, 19 August 2021, p 65; PCCC 0375.

purpose of having the acting CEO at that time to make a determination as to whether the WhatsApp material contained public records'.⁶⁰⁰

In an email to DS Francis and A/DI Mark Andrews on 16 October 2018, Ms McIntyre noted documents had been provided to the Logan City Council and she was aware of discussions about whether the information breached the *Public Records Act 2002*, but advised she was 'not aware there was any decision made for this material to be provided'.⁶⁰¹ Ms McIntyre expressed her view that 'if it was considered there was a breach of the Public Records Act, this material should have been formally disseminated'.⁶⁰²

When asked at the public hearing whether she thought the delivery of documents should have been accompanied by a dissemination authority Ms McIntyre stated:

No, because my understanding was that the material was being provided for the acting CEO at that time to provide a statement to say whether the material that was provided—the WhatsApp material—contained public records and that was to progress our investigation, and our view is that if information is being provided to a party or an entity to assist with our investigation no formal dissemination is required.⁶⁰³

Ms McIntyre explained that her view in her email of 16 October 2018 'had changed once I was told that the information went over for the specific purpose of Mr Trinca assisting our investigation'.⁶⁰⁴

Counsel Assisting queried whether a dissemination authority would be required if the documents had been delivered not for the 'public records purpose' but to assist Ms Kelsey in her litigation in the CCC, to which Ms McIntyre agreed in that situation a formal dissemination would need to be provided.⁶⁰⁵

The CCC stated a written dissemination authority was not required by the CC Act, but acknowledged DS Francis recorded his attendance and delivery of documents to the Logan City Council.⁶⁰⁶

Mr Alsbury acknowledged 'it would have been preferable' to have written approval or written acknowledgment of the dissemination but was of the view that 'technically there was no need for one'.⁶⁰⁷ Mr Alsbury explained that 'in most circumstances if you are performing a function of the commission you do not need a dissemination authority' and the dissemination would have been authorised by section 62 of the CC Act which at the time, provided:

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 317.⁶⁰⁸

⁶⁰⁰ Public hearing transcript, Brisbane, 19 August 2021, p 65.

⁶⁰¹ Volume 1, p 375, PCCC-0375.

⁶⁰² Volume 1, p 375, PCCC-0375.

⁶⁰³ Public hearing transcript, Brisbane, 19 August 2021, p 69.

⁶⁰⁴ Public hearing transcript, Brisbane, 19 August 2021, p 69.

⁶⁰⁵ Public hearing transcript, Brisbane, 19 August 2021, p 69.

⁶⁰⁶ CCC, correspondence, 2 September 2021, Chronology, p 28, item 113.

⁶⁰⁷ Public hearing transcript, Brisbane, 18 August 2021, p 25.

⁶⁰⁸ CC Act, current to 8 November 2018. S 60 of the CC Act was replaced and s 62 was omitted by the *Crime and Corruption and Other Legislation Amendment Act 2018* which received assent on 9 November 2018.

Mr Alsbury contended that as the documents provided to the Logan City Council on 3 October 2018 were provided for the purpose of determining whether they were public records, this was 'performing a function of the commission' and so a dissemination authority was not required.⁶⁰⁹

The CCC also provided relevant policy and procedure. The policy in effect at 3 October 2018 required all disseminations to be 'completed in a professional manner and the process from the moment when material is requested or identified as being suitable for sending has to be auditable to ensure that legislative and policy requirements are met'.⁶¹⁰

The procedure document referred to the power under the CC Act to disseminate material and applied to 'all CMC [CCC] officers who have a need to disseminate information, evidence and/or intelligence information to another entity and the managers/supervisors/team leaders of those officers'.⁶¹¹ The procedure outlined what material could be disseminated, including 'material that does not need to be formally disseminated'.

The categories of material 'held by the CMC [CCC] that may be passed to external entities or persons from time to time but which does not need to be sent in accordance with the dissemination policy and procedures' were:

- transfer of information/intelligence information to the Australian Crime Commission Activity Targeting Organised Crime
- sharing of information with Police Taskforces / Joint Operations
- provision of information to the Parliamentary Crime and Misconduct Committee
- responses to subpoenas, right to information requests, requests for discovery and other legal compulsive processes
- material dispatched pursuant to Sections 24, 26, 46, 49, 116, 135 and 145 of the Act
- return of material, where a person or agency has supplied material to the CMC and requests that the material be returned
- material intended for public consumption or already in the public domain, such as the Annual Report or other CMC reports prepared for public release
- responses to Requests by External Agencies for Probity Checks.⁶¹²

Material containing legal professional privilege

In Ms McIntyre's email to DS Francis and A/DI Andrews on 16 October 2018, Ms McIntyre noted the WhatsApp extraction reports provided to the Logan City Council on 3 October 2018 related to communications between parties which were subject to legal professional privilege and the material had not been redacted.⁶¹³

On 18 October 2018 A/DI Andrews emailed Detective Superintendent Reid, then Executive Director, Corruption Operations about the dissemination and noted that he had spoken to Ms McIntyre who said 'we should have had a formal dissemination to do what we did & she gave me the impression that she was going to get that sorted'.⁶¹⁴

⁶⁰⁹ Public hearing transcript, Brisbane, 18 August 2021, p 24.

⁶¹⁰ CMC, Dissemination Process (Procedure), version 3, 3 September 2013, p 2.

⁶¹¹ CMC, Dissemination - Template (procedure), version 3, 3 September 2013, p 2.

⁶¹² CMC, Dissemination - Template (procedure), version 3, 3 September 2013, pp 2-4.

⁶¹³ Volume 1, p 375, PCCC-0375.

⁶¹⁴ Volume 1, p 379, PCCC-0378.

On 19 November 2018 a 'Request and authority to disclose information (other than CCC hearing information) to an appropriate entity under section 60(2) of the CC Act' was prepared and signed by Mr Alsbury.⁶¹⁵ Documents were then delivered to the Logan City Council.

Ms McIntyre agreed that the documents delivered to Logan City Council on 3 October 2018 contained aspects of legal professional privilege and that the material 'deemed as legal professional privilege should have been redacted'.⁶¹⁶

Ms McIntyre disagreed that the 3 October 2018 delivery without a formal dissemination authority should have been reported as a section 329 notification:

There was no official claim of LPP [Legal Professional Privilege] made over that material by the Logan City Council or Mayor Smith at that time. We took the, I suppose, more cautious approach to say that that is LPP. I do not believe that a 329 should have been reported with regard to that because it was a decision that we had made that there was possible LPP that could be claimed in relation to certain conversations within those documents.⁶¹⁷

The CCC Chairperson said the following about the provision of material to the Logan City Council subject to legal professional privilege:

... on that issue the lawyer took a very conservative view that there should be material redacted without actually making the assessment as to whether there needed to be redactions, if that makes sense. There was no actual assessment undertaken; there was just a conservative global view taken that there should not be the possibility of LPP being released considered. Normally you would do an assessment and if you are comfortable, having assessed the matter, that there was LLP present, you would then take steps to make sure it was not disclosed. This was just a blanket, as I understand it—I might be wrong; this is my assessment of the material I have seen—a blanket assessment—sorry, a blanket conservative approach taken rather than an assessment of whether LPP was in the material.⁶¹⁸

When asked more generally about the potential for a section 329 notification regarding the 3 October 2018 delivery the CCC Chairperson told the committee:

I understand, I think, the question but I think that, if I remember what Mr Alsbury said about this topic, he maintained—I think quite properly, frankly, and accurately—that it was not a matter that would be, in his view, reportable as a 329 because he maintains the dissemination authority was not needed in October and the one that was given in November was accurately constructed.

...

From what I have seen in the evidence and in the documentation, I think Mr Alsbury is right about no dissemination being needed and, therefore, it is not a 329 issue. In any event, can I add for completeness that, not because of this case but more generally, since these events, in the last number of years, we have improved governance in the commission, we have put in place procedures, we have an operations manual that covers many things including, I think, this aspect and so on. The issue that you may be concerned about—and this is a matter for evidence down the track, I think, and perhaps submissions, but the 329 issue you might be concerned about I think is now, not because of this case but as it currently exists in the commission, in fact addressed, hopefully to your satisfaction, but that is a matter we can deal with.⁶¹⁹

⁶¹⁵ CCC, correspondence, 2 September 2021, Chronology, p 29, item 120.

⁶¹⁶ Public hearing transcript, Brisbane, 19 August 2021, p 73.

⁶¹⁷ Public hearing transcript, Brisbane, 20 August 2021, p 38.

⁶¹⁸ Public hearing transcript, Brisbane, 6 September 2021, p 39.

⁶¹⁹ Public hearing transcript, Brisbane, 6 September 2021, pp 39-40.

6.13.1.2 *Conclusion on the evidence*

Counsel Assisting suggested that it was open for the committee to find that DS Francis' 3 October 2018 delivery of documents containing potentially legal professional privileged material without a dissemination authority was 'improper conduct' for the purposes of section 329 of the CC Act and should have been reported to the committee in accordance with that section.⁶²⁰ Counsel Assisting asserted:

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.⁶²¹

In response, the CCC argued that DS Francis' purpose in delivering the documents on 3 October 2018 'was for a purpose of the Commission and was proper in all respects'.⁶²² The CCC submitted that a written dissemination authority under section 62 of the CC Act was not required for the dissemination on 3 October 2018,⁶²³ and as such 'there was no unauthorised disclosure of confidential information which would trigger the requirement to notify pursuant to s329 of the CC Act'.⁶²⁴ The CCC emphasised that the purpose of the delivery of the documents 'is clearly connected to the purposes of the corrupt conduct investigation and obtaining a statement from Mr Trinca, the acting CEO of the Council'.⁶²⁵

The CCC asserted that it had not been established that the documents disseminated on 3 October 2018 'contained material that was in fact (or was likely to be) subject to legal professional privilege'.⁶²⁶ The CCC did however, accept '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'.⁶²⁷

In summary, the CCC accepted 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'.⁶²⁸ The CCC maintained however, that this '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'.⁶²⁹

6.13.1.3 *Committee comment*

The process by which the documents were delivered by the CCC to the Logan City Council on 3 October 2018, then retrieved by the CCC on 9 November 2018 before being re-delivered (substantially the same material) on 19 November 2018, appears unusual.

The committee notes the CCC's assertion that a dissemination authority was not required for the delivery of documents on 3 October 2018 under section 62 of the CC Act. The CCC did, however, accept it would have been 'best practice' to provide one, and to have had the material assessed by a lawyer for potential legal professional privilege before being delivered to the Logan City Council.

⁶²⁰ Outline of submissions of Counsel Assisting, 29 September 2021, p 8.

⁶²¹ Outline of submissions of Counsel Assisting, 29 September 2021, p 9.

⁶²² CCC, Outline of submissions, 15 October 2021, p 20, para 94.

⁶²³ CCC, Outline of submissions, 15 October 2021, p 20, para 95.

⁶²⁴ CCC, Outline of submissions, 15 October 2021, p 20, para 98.

⁶²⁵ CCC, Outline of submissions, 15 October 2021, p 17, para 78.

⁶²⁶ CCC, Outline of submissions, 15 October 2021, p 20, para 99.

⁶²⁷ CCC, Outline of submissions, 15 October 2021, p 20, para 93.

⁶²⁸ CCC, Outline of submissions, 15 October 2021, p 20, para 100.

⁶²⁹ CCC, Outline of submissions, 15 October 2021, p 20, para 100.

The committee acknowledges section 329 of the CC Act is broad and can capture what appear to be administrative and minor matters, including for example, where a person has inadvertently sent an email to an incorrect recipient by mistyping a letter in the email address. In these situations there can be very minor consequences for the CCC, but the actions are nonetheless reported to the committee.

Given the other types of circumstances where matters of a minor nature (with no or limited consequences) are routinely reported to the committee, the committee questions why the dissemination of documents including legally privileged material without a formal written authority, in a case as 'exceptional' as the investigation into the Logan City Council, was not considered by the CEO of the CCC as potential improper conduct pursuant to section 329 of the CC Act.

At the least, the fact that questions were raised by the principal lawyer about whether a dissemination authority was provided, should have been enough for serious consideration at higher levels of the CCC about the need for a section 329 notification.

The committee asserts that the CCC did 'disseminate' material to the Logan City Council when it provided the WhatsApp material (which was in its possession) on 3 October 2018.

Further, the committee does not consider the WhatsApp material provided to the Logan City Council on 3 October 2018 fits into one of the exempt categories of the dissemination procedure of the CCC. The dissemination should have therefore complied with procedural requirements including the recording and filing of disseminations.⁶³⁰ On the evidence before it, the committee is doubtful DS Francis complied with the consistent and usual process of recording and filing disseminations, and the full policy and procedure applying to disseminations.

Finding 13

The committee finds that Crime and Corruption Commission officers should have reported the absence of a dissemination authority for the delivery of documents to the Logan City Council on 3 October 2018, to the chief executive officer (CEO) of the Crime and Corruption Commission, and that the CEO should have notified the committee pursuant to section 329 of the *Crime and Corruption Act 2001*.

(Based on Counsel Assisting Available Finding 4)

⁶³⁰ CMC, Dissemination of Intelligence Information, Information and Evidence, version 3, 3 Sep 2013, p 1.

7 Complaint by the Local Government Association of Queensland

The complaint by the LGAQ to the committee, dated 5 May 2021, raised numerous allegations about various aspects of the CCC's investigation into former Logan City Councillors, namely the:

- CCC's intervention in civil proceedings, and
- inappropriate laying of fraud charges against local government councillors.

7.1 Allegations relating to inappropriate intervention in civil proceedings

7.1.1 Evidence submitted to the Queensland Industrial Relations Commission

The LGAQ complaint raised significant concerns about the evidence submitted by the CCC to the QIRC, with the LGAQ expressing the view that the CCC did so in an attempt to 'improperly influence the civil proceedings'.⁶³¹

The LGAQ referred to the principles enunciated in *Flori*⁶³² and *R v Leach* [2018] QCA 131 which it asserted 'state that material obtained by the CCC by use of its coercive powers in relation to its criminal or corruption investigations, cannot be used in unrelated civil proceedings'.⁶³³ The LGAQ concluded the application of these principles 'precluded Ms Kelsey's unrestricted access to materials and the use of materials obtained by the CCC under compulsion'.⁶³⁴

The complaint noted the ruling by Black IC in *Kelsey v Logan City Council & Ors* [2018] QIRC 108 which set aside the Attendance Notice to Produce filed by Ms Kelsey on 28 June 2018 (directed to the CCC). Black IC's judgment included the following conclusions:

- (a) general legal principles and common law principles enunciated in *Flori* and *R v Leach* preclude the applicant's unrestricted access to materials and the use of materials obtained under compulsion;
- (b) having regard to such principles, I am satisfied that an implied limitation emerges out of the structure and purposes of the CC Act to the effect that material obtained by the CCC by use of its coercive powers cannot be used in the applicant's proceeding;
- (c) the implied limitation, consistent with the reasoning in *Williams v Keelty*, extends to a prohibition on the derivative use of the material, including use by the applicant in the preparation of her case;
- (d) if material obtained under compulsion cannot be disclosed to the applicant or to the applicant's lawyers, and cannot be used by the applicant in the substantive proceedings, and cannot be tendered into evidence, it can serve no legitimate forensic purpose and, save for a consideration of material other than material obtained by compulsion, the notice must be set aside;
- (e) the use by the applicant of material obtained under compulsion may jeopardise the fair conduct of the substantive proceedings and risk interfering with the administration of justice;
- (f) dissemination of material obtained under compulsion for use by the applicant in the substantive proceedings is not consistent with the performance of the CCC's functions; and
- (g) neither s 60(2) of the CC Act, nor s 62(1) of the CC Act expressly authorise the giving of information by the CCC to the QIRC for use by the applicant in the substantive proceedings.⁶³⁵

The LGAQ suggested the content of the documents delivered by the CCC to the Logan City Council after Black IC's ruling in October 2018 and November 2018, 'appeared to strongly suggest that they match the description of the documents previously ruled by Black IC as being inadmissible in the

⁶³¹ LGAQ, correspondence, 5 May 2021, p 2.

⁶³² *Flori v Commissioner of Police* [2014] QSC 284

⁶³³ LGAQ, correspondence, 5 May 2021, p 2

⁶³⁴ LGAQ, correspondence, 5 May 2021, p 12.

⁶³⁵ *Kelsey v Logan City Council & Ors* [2018] QIRC 108 at [155].

proceedings'. The LGAQ inferred that the documents were delivered 'so as a ruse or a device to circumvent the ruling of Black IC and to advantage Ms Kelsey in her civil litigation against the Council and the councillors, in a most partisan and unfair way'.⁶³⁶

The LGAQ submitted that the way the documents were produced by the CCC to the registry of the QIRC 'bespeaks conduct by the CCC that is entirely inconsistent with section 57 of the Crime and Corruption Act which requires the CCC to "at all times, act independently, impartially and fairly having regard to the purposes of this Act and the importance of protecting the public interest".'⁶³⁷

7.1.1.1 Consideration of the evidence

Section 6.4 of this report outlines the committee's consideration of the CCC's disclosure of documents to the QIRC.

7.1.2 Delivery of documents by the Crime and Corruption Commission in October 2018 and November 2018 to Logan City Council

In its complaint, the LGAQ alleged the CCC's delivery of documents to the Logan City Council on 3 October 2018 and 19 November 2018 was done 'for the purposes of having them disclosed in the QIRC proceeding'.⁶³⁸

The LGAQ contend:

In this context it is impossible to avoid the conclusion that of the CCC delivered the November documents to the Council in response to the request by Minter Ellison, in their capacity as a solicitor for one of the parties in civil proceedings, at the time and for the reason nominated by Minter Ellison. The only plausible reason for the CCC having complied with such a curious request from the solicitors acting for Ms Kelsey, is that the CCC was acting entirely outside its remit, by delivering the October, and then the November, documents to the Council for an improper purpose. It could not be said to be doing so as part of its anti-corruption or other legitimate purpose, but rather the inescapable inference is that it was doing so as a ruse or a device to circumvent the ruling of Commissioner Black and to advantage Ms Kelsey in her civil litigation against the Council and the councillors, in a most partisan and unfair way.⁶³⁹

...

Against all these considerations it is now clearly open to inference that the CCC participated in an artifice or a scheme in which they attempted to misuse confidential material obtained by coercive means, which they knew was not admissible in evidence in the civil proceedings, at the request of one of the parties. The misuse involved the unilateral and uninvited delivery of the previously rejected material to an unsuspecting intermediary (who was a party to the proceedings), so that the material could be uplifted by means of a disclosure order by another party. This scheme was accompanied by two separate false explanations on the part of the CCC as to why the prescribed material was being delivered unannounced to the Council on two different occasions.⁶⁴⁰

7.1.2.1 Consideration of the evidence

Sections 6.5 and 6.6 of this report outline the committee's consideration of the CCC's delivery of documents to the Logan City Council in October 2018 and November 2018.

⁶³⁶ LGAQ, correspondence, 5 May 2021, p 17.

⁶³⁷ LGAQ, correspondence, 5 May 2021, p 13.

⁶³⁸ LGAQ, correspondence, 5 May 2021, p 13.

⁶³⁹ LGAQ, correspondence, 5 May 2021, p 17.

⁶⁴⁰ LGAQ, correspondence, 5 May 2021, p 20.

7.1.3 Crime and Corruption Commission's support to Ms Kelsey

The LGAQ raised concerns about the support provided by the CCC to Ms Kelsey, in regards to seeking funding from the State Government for Ms Kelsey, and in what it describes as 'a position of unquestioning support of Ms Kelsey'.⁶⁴¹

The LGAQ submitted that the CCC's actions in asking the then Minister for Local Government for financial assistance for Ms Kelsey's QIRC proceedings:

... constitute further evidence that the CCC, in relation to this matter, had "taken sides" in the civil litigation to which it was not a party, and was acting where it could to advance the interests of Ms Kelsey and to damage the interests of the councillors who had voted to terminate the employment of Ms Kelsey and who had been convicted of no offence and who had not been found to have contravened any other law whether criminal, civil or industrial.⁶⁴²

7.1.3.1 *Consideration of the evidence*

Section 6.3 of this report outlines the committee's consideration of the CCC's assistance and support to Ms Kelsey.

7.2 Laying of fraud charges

The LGAQ argued the decision of the CCC to lay fraud charges against the former councillors was inappropriate.⁶⁴³

It was noted by the LGAQ that the decision of VP O'Connor in the QIRC proceeding found 'no wrongdoing on their [former councillors] part in relation to the manner and circumstances in which they voted to terminate Ms Kelsey's employment in accordance with the terms of her employment contract'.⁶⁴⁴ VP O'Connor also did not accept all of Ms Kelsey's evidence and stated:

Overall, I did not find Ms Kelsey to be an impressive witness. She was unwilling to accept or to contemplate that there may have been some room for improvement or that on reflection she may have done something differently, or not at all. Throughout her evidence she had a tendency to deflect responsibility onto others and not to take responsibility in relation to what was submitted to Council for consideration. The manner in which Ms Kelsey gave her evidence was such that it was difficult to determine whether the response to a question was a matter of reconstruction or recollection.⁶⁴⁵

It was the LGAQ's view that 'a proper review of the evidence which the CCC had gathered would have resulted in the view that there were no prospects at any time of obtaining a conviction for fraud'.⁶⁴⁶

7.2.1.1 *Consideration of the evidence*

Sections 6.7 to 0 of this report outlines the committee's consideration of the CCC's charging of former Logan City Councillors.

⁶⁴¹ LGAQ, correspondence, 5 May 2021, p 22.

⁶⁴² LGAQ, correspondence, 5 May 2021, p 22.

⁶⁴³ LGAQ, correspondence, 5 May 2021, p 23.

⁶⁴⁴ LGAQ, correspondence, 5 May 2021, p 24.

⁶⁴⁵ *Kelsey v Logan City Council & Ors (No.8)* [2021] QIRC 114 at [821].

⁶⁴⁶ LGAQ, correspondence, 5 May 2021, p 25.

7.3 Complaint summary

In summary, the LGAQ submitted that:

... the CCC substantially exceeded its remit by overtly and covertly entering into the conduct of the industrial dispute and proceedings that were already before the correct legal body for resolution- the QIRC. Its actions in subsequently laying criminal charges against those councillors who were then also required to respond to the civil proceedings, and at a very critical stage of those proceedings, resulted in the dismissal of the whole of the sixth largest local government in Australia. This occurred because the gravity of the charges themselves was sufficient under Queensland law for those persons charged to be excluded from the office as a member of the Council, irrespective of whether the charges had any substance or whether they were convicted or acquitted of the charges.

...

There was no legal reason given why the councillors should have been charged at the time that they were, in circumstances where the facts and circumstances concerning their actual conduct in relation to the employment of Ms Kelsey were in the final stages of being determined by the appropriate industrial tribunal. The unseemly haste with which the charges were laid, the timing of those charges, the absence of anything approaching sufficient probative evidence (as was ultimately accepted by the OPP and the Magistrates Court), and the likely effect of those charges upon the QIRC proceedings, raises very serious questions as to whether the true motivation for the bringing of charges of that kind against those councillors, at the time selected, has yet been revealed by the CCC.⁶⁴⁷

7.3.1 Committee comment

The allegations made by the LGAQ in its complaint to the committee on 5 May 2021 were extremely concerning. The committee has made a number of findings about the CCC's actions and related matters in this report that deal comprehensively with the LGAQ complaint.

⁶⁴⁷ LGAQ, correspondence, 5 May 2021, p 26.

8 Broader allegations of the Crime and Corruption Commission's conduct

8.1 Conduct of the Crime and Corruption Commission and its officers

The committee examined the conduct of the CCC in its handling of the Logan City Council matter, including the conduct of the CCC Chairperson and other individual officers of the CCC. This examination included consideration of the totality of evidence before the inquiry.

The CCC – the modern incarnation of important anti-corruption bodies that have evolved over time but stem from the Fitzgerald inquiry – is entrusted with extraordinary powers. These extraordinary powers include the ability to obtain evidence under compulsion and questioning under penalty of imprisonment if witnesses do not answer questions at compulsory hearings. With these extraordinary powers comes enormous responsibility in how, if, or when, those powers should be utilised. This is crucial to ensure the CCC acts in accordance with the law – in particular the statute at the foundation of the CCC. It is a requirement to act on an objective basis, independently, impartially, fairly and in the public interest, at all times and in all matters.

At the heart of this inquiry is the endeavour to ensure on behalf of the people of Queensland that Queensland's preeminent crime and corruption body performs in a way that can rightly maintain public confidence in what is a crucial institution in a modern, open and transparent Queensland system of government.

In our system, by definition, Parliament has set legislative parameters for the CCC. Any framework or rules found in legislation, however, can only go so far in providing direction and culture of a statutory organisation. Necessarily, there is a great deal of trust that Parliament places in the institution that is the CCC, on behalf of all Queenslanders. For they are ultimately who the Parliament and the CCC are bound to serve.

The committee considers that the CCC throughout this inquiry process has shown a want of significant self-awareness or contrition in relation to the serious matters raised.

Some CCC witnesses, including the CCC Chairperson, appeared before the committee in a manner that could be described as defensive – not able or not willing to concede suggestions of mistakes made, as put to them by Counsel Assisting.

It is the committee's view that the matters exposed by this inquiry and the findings and recommendations of the committee, should see a more reflective, responsive and accountable CCC into the future. Queenslanders deserve such an outcome.

Finding 14

The committee finds that as Chairperson, Mr Alan MacSporran QC, did not ensure that the Crime and Corruption Commission acted, at all times relevant to the matters the subject of the inquiry resolution, independently and impartially. That failing is serious and reflects poorly on the Crime and Corruption Commission.

(Based on Counsel Assisting Available Finding 13)

8.2 Culture of the Crime and Corruption Commission and tenure of senior officers

Counsel Assisting raised concerns with the culture of the CCC and the tenure of senior officers.

It was suggested to the committee that:

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.⁶⁴⁸

...

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.⁶⁴⁹

The committee has outlined above its concerns about the CCC being resistant to scrutiny. In this context, the committee was extremely concerned during the conduct of the public hearings with the evasiveness of some witnesses or their unwillingness to provide information that, the committee considers, surely would have been within the capacity of their memory to deliver. The committee considers that this reflects poor preparation by the CCC officers involved, which was not to the standard expected by the committee.

The committee notes with particular concern the inability of some officers to recall details. The committee notes that the phrase 'I don't recall', 'I don't remember' or similar phrases was provided as an answer to many questions put by the committee. Research by the Parliamentary Library shows that this answer was provided at least 60 times by DS Francis, and at least 57 times by the CCC Chairperson.⁶⁵⁰ In total, the answer was provided no less than 274 times by all CCC witnesses. The committee makes no conclusion, in this report, about the frequency of this answer being provided to the committee.

In relation to tenure of senior officers, Counsel Assisting noted the committee had considered this matter in its Report No. 106, 57th Parliament - *Review of the Crime and Corruption Commission's activities* (2021 Review Report), following its five-year review of the CCC's activities in 2021. In that report the committee noted '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'.⁶⁵¹

The committee recommended:

...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.⁶⁵²

Counsel Assisting stated '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'⁶⁵³ and suggested consideration should be given to amending the CC Act to provide for single non-renewable appointments for Senior Officers of the CCC as well as the CCC Chairperson and Ordinary Commissioners.⁶⁵⁴

⁶⁴⁸ Outline of submissions of Counsel Assisting, 29 September 2021, p 30, para 109.

⁶⁴⁹ Outline of submissions of Counsel Assisting, 29 September 2021, p 31, para 111.

⁶⁵⁰ See Additional Volume.

⁶⁵¹ 2021 Review Report, p 16.

⁶⁵² 2021 Review Report, p 17. Note: As at 24 November 2021 the Queensland Government is yet to provide a final response to the recommendations made in that report.

⁶⁵³ Outline of submissions of Counsel Assisting, 29 September 2021, p 28, para 103.

⁶⁵⁴ Outline of submissions of Counsel Assisting, 29 September 2021, p 28, Proposed Measure 2.

The CCC now agrees with the recommendation of the committee in Report No. 106 in respect of the CCC Chairperson and Ordinary Commissioners, including the CCC Deputy Chairperson.⁶⁵⁵ It maintains its previous position that there should be no term limit on senior officers within the CCC.⁶⁵⁶

8.2.1 Committee comment

The committee notes its recommendations in its 2021 Review Report, which may go some way to addressing cultural issues within the CCC. Noting the committee's discussion of issues in section 6.3 of this report, and the committee's finding 8 [in relation to DS Francis] the committee makes the following two recommendations.

Recommendation 4

The committee recommends that the Crime and Corruption Commission engage in reform of culture (including seeking external advice) to assist in creating a best practice organisational culture that aligns with the purpose, functions and goals of the Crime and Corruption Commission under the *Crime and Corruption Act 2001*, and to enhance public confidence in the organisation.

Recommendation 5

The committee recommends the Department of Justice and Attorney-General consider issues regarding the tenure of senior officers, and take into account the Crime and Corruption Commission's (CCC) adoption of the committee's position in relation to single, non-renewable appointments for the CCC Chairperson, Deputy Chairperson and Ordinary Commissioners, in conjunction with its consideration of relevant recommendations of the committee's Report No. 106, arising from the five-year review, tabled on 30 June 2021.

(Based on Counsel Assisting Proposed Measure 2)

8.3 Police seconded to the Crime and Corruption Commission

Stakeholders and Counsel Assisting raised concern with the role of seconded police officers at the CCC.

The QLS submitted that 'the role of a seconded police officer [at the CCC] is unclear and may require better regulation to ensure that the independence of the Commission is not compromised'.⁶⁵⁷

Former Logan City Councillors submitted:

Police officers seconded in this way maintain their powers at common law and under the Police Powers Responsibilities Act 2000 (PPRA): s 255(5) CC Act. Due to the frequency with which they conduct arrests, serving police officers will be familiar with the Operational Procedures Manual (OPM) which describes the decision to institute proceedings in similar terms to that which is discussed in the DPP's Guidelines; first, sufficiency of admissible evidence to prove the charge, and second, the public interest favours prosecution.

...

The evidence at the committal in this case strongly suggests that a decision by a seconded police officer to the CCC to charge someone is essentially as directed by the executive of the CCC or the Chair himself. A police officer will make recommendations about charges that might be open but not make the final call. Where the police officer is not the most senior police officer seconded to the CCC, he or she is also to follow rank: s 255(4).

This has implications for accountability for decisions to prosecute. It has long been accepted at common law that it must be the arresting officer who forms the requisite satisfaction, to ensure accountability in

⁶⁵⁵ CCC, Outline of submissions, 15 October 2021, p 55, para 271.

⁶⁵⁶ CCC, Outline of submissions, 15 October 2021, p 55, para 273.

⁶⁵⁷ Submission 35, p 4.

light of the compromise between the values of individual liberty and public order. The effect of the internal, rather complicated process of charging within the CCC will often be that the person who made the final decision is not a witness at trial.⁶⁵⁸

Counsel Assisting suggested to the committee that the inquiry revealed a 'degree of "group think" or "pack" culture amongst the police officers connected with Operation Front' and suggested:

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.

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.⁶⁵⁹

Counsel Assisting proposed the committee consider whether a limit should be placed on the duration and repetition of secondments by police officers to the CCC.⁶⁶⁰

The CCC advised that its current arrangement with the QPS 'has resulted in the shortest average secondment tenure in the history of the organisation: 2.56 years'.⁶⁶¹ The relevant policy agreed between the CCC and QPS facilitates transition of non-specialist police after 3 to 5 years at the CCC back to the QPS.⁶⁶² The CCC noted that specialist police (surveillance and witness protection officers) can have a tenure at the CCC for up to 8 years.⁶⁶³

These rotations are much more limited than previous policies which applied prior to 2015 in which 62 officers seconded to the CCC were returned to the QPS after an average tenure of 9.13 years, and up to 20 years for some officers.⁶⁶⁴

The CCC submitted:

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.

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.⁶⁶⁵

8.3.1 Committee comment

The committee acknowledges the submissions of the CCC and Counsel Assisting, and the average secondment period set out by the CCC. The committee has already commented in this report in respect of the culture of the CCC and these submissions of the CCC and Counsel Assisting lend further support to the committee's recommendation to enact cultural change in the CCC as recommended at section 6.3.7.4 of this report.

⁶⁵⁸ Submission 27, pp 21, 23.

⁶⁵⁹ Outline of submissions of Counsel Assisting, 29 September 2021, p 28, Proposed Measure 2.

⁶⁶⁰ Outline of submissions of Counsel Assisting, 29 September 2021, p 28, Proposed Measure 2.

⁶⁶¹ CCC, Outline of submissions, 15 October 2021, p 55, para 276.

⁶⁶² CCC, Outline of submissions, 15 October 2021, p 55, para 276.

⁶⁶³ CCC, Outline of submissions, 15 October 2021, p 55, para 276.

⁶⁶⁴ CCC, Outline of submissions, 15 October 2021, p 56, para 277.

⁶⁶⁵ CCC, Outline of submissions, 15 October 2021, p 56, paras 279-280.

9 Broader policy matters and related matters

The sections below relate to broader policy matters, as outlined in the inquiry terms of reference items (g) to (k).

9.1 Referral of matters by the Crime and Corruption Commission to the Director of Public Prosecutions

9.1.1 Background

The terms of reference for the inquiry include examining the process by which the CCC considers and determines whether to refer matters to the DPP.⁶⁶⁶

The interaction between the CCC and DPP is an aspect that is frequently examined by the committee and has been discussed at various meetings with the CCC and by other stakeholders who participated in the recent reviews of the CCC's activities.⁶⁶⁷

The referral of matters by the CCC to the DPP is governed by legislation, policy and practice including the following:

- CC Act, specifically section 49
- CCC Operations Manual
- Director's Guidelines as at 30 June 2016 (issued by DJAG and publicly available online)
- CCC's Prosecution Protocol (effective from 10 February 2016).

Each of the above are discussed in more detail below.

9.1.1.1 *Statutory provisions*

Section 35 of the CC Act provides for how the CCC may perform its corruption functions. It enables the CCC, when conducting or monitoring investigations, to gather evidence for the prosecution of persons for offences.⁶⁶⁸

Section 49 of the CC Act provides that, if the CCC investigates or assumes responsibility for the investigation of a complaint about corruption and decides that prosecution proceedings or disciplinary action should be considered, the CCC can report on the investigation to a prosecuting authority (such as the QPS), for the purposes of any prosecution proceedings the authority considers is warranted.⁶⁶⁹ Section 49(5) of the CC Act, which was added as a new provision in 2018, however, explicitly states that a prosecuting authority for that section does not include the DPP.

The CCC has the discretion, at section 50 of the CC Act, to prosecute *corrupt conduct* of an officer of a UPA, where there is evidence to support the start of disciplinary proceedings, at QCAT. The CC Act does not, however, provide the CCC with any explicit prosecutorial discretion in relation to potential criminal offences.

The decision as to whether to prosecute an individual for a criminal offence sits with the QPS or DPP for more serious offences.

9.1.1.2 *Crime and Corruption Commission Operations Manual*

The CCC has a number of policies and procedures to provide guidance and regulate the way its officers conduct their activities. This includes the CCC's Operations Manual which provides a consistent

⁶⁶⁶ Inquiry terms of reference, item (g).

⁶⁶⁷ 2016 Review Report, pp 33-34; 2021 Review Report, p 87.

⁶⁶⁸ CC Act, s 35(h)(i).

⁶⁶⁹ CC Act, s 49(2)(a).

framework for policies and procedures relating to complaints handling and investigations, including associated support activities.

During the course of its inquiry, the committee was provided with Part 2, Section 2 of the CCC Operations Manual, which relates to matter briefs in the context of matter management. Item 1 of this section of the CCC Operations Manual, which came into effect on 18 November 2019,⁶⁷⁰ provides that:

The purpose of this policy and procedure is to outline the requirements for the compilation and management of briefs of evidence, including those relating to criminal, disciplinary and confiscation proceedings.⁶⁷¹

The policy applies to all CCC officers involved in preparing briefs of evidence, including criminal briefs which are required for all criminal matters listed for committal proceedings.⁶⁷²

Relevant excerpts of the prosecution protocol were referred to by the CCC at the public hearing and are outlined below.

9.1.1.3 *Director's Guidelines*

Director's Guidelines are issued by the DPP under section 11(1)(a) of the *Director of Public Prosecutions Act 1984*. The most recent Director's Guidelines are dated as at 30 June 2016. They are specified to be guidelines to all staff of the ODPP and others acting on behalf of the DPP, and to police.⁶⁷³ The Director's Guidelines provide:

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.⁶⁷⁴

Director's Guidelines cover various topics including:

- duty to be fair⁶⁷⁵
- fairness to the community⁶⁷⁶
- the decision to prosecute⁶⁷⁷
- the decision to prosecute particular cases⁶⁷⁸
- termination of a precaution by ODPP⁶⁷⁹

The Director's Guidelines is a public document available from the Department of Justice and Attorney-General's website.⁶⁸⁰

⁶⁷⁰ Submission 25, p 42, para 216; Volume 2, p 427, PCCC-4152.

⁶⁷¹ Volume 2, p 427, PCCC-4152.

⁶⁷² Volume 2, p 428, PCCC-4152.

⁶⁷³ ODPP, *Director's Guidelines*, p 1, PCCC-TP0130.

⁶⁷⁴ ODPP, *Director's Guidelines*, p 1, PCCC-TP0130.

⁶⁷⁵ ODPP, *Director's Guidelines*, p 1, PCCC-TP0130.

⁶⁷⁶ ODPP, *Director's Guidelines*, p 1, PCCC-TP0130.

⁶⁷⁷ ODPP, *Director's Guidelines*, p 2, PCCC-TP0130.

⁶⁷⁸ ODPP, *Director's Guidelines*, p 5, PCCC-TP0130.

⁶⁷⁹ ODPP, *Director's Guidelines*, p 26, PCCC-TP0130.

⁶⁸⁰ ODPP, *Director's Guidelines*, https://www.justice.qld.gov.au/data/assets/pdf_file/0015/16701/directors-guidelines.pdf

9.1.1.4 Prosecution Protocol

During the course of its inquiry, the committee was provided with the CCC's Prosecution Protocol (Version 3, February 2016) which is a confidential document that 'outlines the process within the CCC of the referral of corruption investigation matters for prosecution action'.⁶⁸¹ Relevant excerpts of the prosecution protocol were referred to by the CCC at the public hearing and are outlined below.

9.1.2 Crime and Corruption Commission comment

9.1.2.1 Referral by the Crime and Corruption Commission to the Director of Public Prosecutions generally

In the context of the referral by the CCC to the DPP, the CCC provided the committee with the following information in its written submission:

The Commission does not typically refer matters to the DPP for advice prior to laying charges. The evidence was not referred to the DPP or external counsel prior to the charges being laid. There is nothing remarkable about that. In Queensland, charges are routinely laid by the Queensland Police Service without prior consultation or approval from the DPP. There was a much more rigorous process adopted by the Commission in charging Mr Smith and the Councillors with fraud than is commonly followed, for example, by the Queensland Police Service on an ordinary charge. This is not intended to be a criticism of the Queensland Police Service with whose members the Commission enjoys a highly professional relationship. Rather it is a function of the fact that the Commission has available to it comparatively greater resources than a sworn police officer laying charges and the Commission made appropriate use of them.⁶⁸²

9.1.2.2 Operations Manual provisions relevant to the referral process

The CCC also provided the committee with the following information in its written submission about the provisions of the Operations Manual which currently apply to the referral process:⁶⁸³

Since 18 November 2019, the process by which the Commission currently considers and determines whether to refer corruption matters [sic] to the DPP is stated in the Commission's Operations Manual under 'MM02 Matter Briefs':

4.2.2 Criminal briefs in Corruption Matters

If the CCC decides in a Corruption matter that prosecution proceedings should be considered by a police officer seconded to the CCC, the Chairperson, Deputy Chairperson, or the delegate of the Chairperson, may refer the matter to an appropriate police officer seconded to the CCC. That police officer, who maintains all the powers of a police officer while seconded to the CCC, will consider the matter and, if warranted, issue the appropriate charge(s).

Full Brief of evidence

In such cases, consistent with the requirements of sub section 49(4) of the CC Act, all relevant information known to the Commission that supports a charge and supports a defence that may be available to the person should be provided to the Chairperson or the Deputy Chairperson to allow a proper assessment of the matter.

The same information must be provided to the seconded police officer selected to consider if charges should be issued.

In effect, this means a full brief of evidence containing all relevant evidence should be provided to the Chairperson or Deputy Chairperson and to the relevant seconded police officer. In some circumstances, it may not be possible to prepare a full brief of evidence that complies in all respects

⁶⁸¹ Volume 2, p 419, PCCC-4153. A portion of the Prosecution Protocol is reproduced in submission 25, pp 43-44, para 217.

⁶⁸² Submission 25, pp 39-40, para 210.

⁶⁸³ Note that this version of the Operations Manual was not in effect at the time the Mayor and the relevant Logan City Councillors were charged.

with the requirements outlined in the following section. Any non-compliance must be approved by the Executive Director, Corruption Operations, or the Senior Executive Officer (Corruption) prior to the brief being finalised.

Seconded Police Officer

The seconded police officer selected to decide if charges should be issued will have the appropriate rank and experience required to fulfil the function. In deciding whether to lay charges, the seconded police officer should apply the same two tiered test that the DPP applies in determining whether to commence a criminal prosecution, namely:

1. is there sufficient evidence?, and
2. does the public interest require a prosecution?⁶⁸⁴

9.1.2.3 Prosecution Protocol provisions relevant to the referral process

The CCC provided the committee with the following information in its written submission about the provisions of the CCC's Prosecution Protocol which applied during the relevant time:

At the time the fraud charges were laid on 26 April 2019, the Commission's policy was in similar terms [to the current Operations Manual] and was stated in the "Prosecution Protocol" (effective from 10 February 2016) as follows:

Policy statement

At the conclusion of a corruption investigation, the CCC may decide whether prosecution proceedings should be considered.

The Executive Director, Corruption or the Director, Corruption Operations will determine if a corruption investigation, or a matter which the CCC has assumed responsibility for, should be referred to a delegated officer for a decision pursuant to section 49(2)(a).

If the CCC decides that prosecution proceedings should be considered, the CCC has two options for commencing prosecution action pursuant to section 49(2)(a) of the *Crime and Corruption Act 2001* (the CC Act):

1. Refer the matter to the Office of the DPP; or
2. Refer the matter to an appropriate prosecuting authority, including an appropriate police officer seconded to the CCC for consideration of the appropriate charge/s.

Option 1 - Briefs to the DPP

If the CCC decides that prosecution proceedings should be considered by the DPP, the CCC has developed a protocol with the DPP whereby the CCC will report to the DPP under section 49(2)(a) of the CC Act where the matter reported upon is:

- likely to attract considerable public interest;
- one where the circumstances may warrant the DPP exercising the discretion not to prosecute although sufficient evidence exists;
- one on which the CCC seeks the DPP's advice for any reason.

There are also certain offences that require the approval of the DPP before a prosecution can be commenced – notably secret commissions pursuant to Chapter 42 of the Criminal Code (Qld).

Full Brief of evidence

In any report to the DPP under 49(2), it is both a requirement and best practice to provide a full brief of evidence containing all relevant evidence to the DPP.

This is required under section 49(4) of the CC Act, which provides that all relevant information known to the Commission that supports both a charge and a defence must be included in the brief.

⁶⁸⁴ Submission 25, p 42, para 216.

If not, the DPP can ask the CCC to undertake further investigations (section 49(5) of the CC Act).

Similarly, the DPP's guidelines require Police to provide a full brief of evidence when seeking advice from the DPP.

....

Liaising with the DPP

In the situation where the Commission seeks the DPP's advice on a matter that is likely to attract considerable public interest, the Chairperson will undertake to liaise with the DPP prior to referring such a matter.

In the situation where the circumstances may warrant the DPP exercising a discretion not to prosecute, or where the CCC seeks the DPP's advice for any reason, the Chairperson, the Executive Director, Corruption or the Director, Corruption Operations will undertake to liaise with the DPP prior to referring such a matter.⁶⁸⁵

9.1.3 Stakeholder comment

During the hearing, the DPP, Mr Heaton QC, was asked about whether he was aware of the Prosecution Protocol which was originally entered into between the DPP and the CMC in June 2006, to which he stated:

If there is, it is not a document that I have personally seen. I saw that referenced in the material in relation to section 49 that was in the submission by the CCC, referred to as a memorandum of understanding. If such a document exists it is probably buried in amongst, and maybe should not be. The policy that was also referred to—the CCC policy that was referred to in their material about what matters will or will not be referred to me—was also news to me. Prior to seeing that material, I was not aware that there was any structure around what was or was not; nor was I able to discern that there was any structure about what was or was not referred to me.⁶⁸⁶

Regarding the accessibility of Director's Guidelines and the relevance to a charging officer, Mr Heaton QC agreed that the guidelines should be applied by that officer with direct focus upon key matters and noted that 'the guidelines are an outward-facing document available to anybody. They are a public document'.⁶⁸⁷

In response to a question from the committee Chair about the purpose of the Director's Guidelines, Mr Heaton QC provided the following testimony:

The guidelines simply articulate what should be done in every case in critically analysing not just the evidence in favour but the evidence that might also tend to suggest not proceeding. This is certainly a message that I get out to staff. The question is not how but whether you should when considering a charge or considering conduct. There needs to be that critical assessment at every stage.⁶⁸⁸

9.1.3.1 Statutory provisions

During the hearing, Mr Heaton QC was asked his opinion on the practical considerations that would arise if, hypothetically, there was a policy change, which would require an amendment to the relevant statutory provisions, such that the CCC could only refer matters, for example, through the DPP. Mr Heaton QC told the committee:

I anticipate that that would lead to an increase in the work coming to us. It might simply involve the work being put into the critical analysis of a case at an earlier point in time. It is done at the very perhaps latest just before the committal. It might be done at an earlier point before charging in that scenario. But it is

⁶⁸⁵ Submission 25, pp 43-44, para 217.

⁶⁸⁶ Public hearing transcript, Brisbane, 3 September 2021, p 16.

⁶⁸⁷ Public hearing transcript, Brisbane, 3 September 2021, p 9.

⁶⁸⁸ Public hearing transcript, Brisbane, 3 September 2021, p 11.

difficult to know how much extra might come to us. I do not know what is going on at the CCC in terms of what decisions are being made.

...

It would definitely raise a resourcing consideration. I think it also tends to obscure the independence of the DPP as a prosecuting authority. That is not to say that we as the office and the lawyers within it are not sometimes approached by police for advice on legal matters that might guide investigations, but that happens on a very ad hoc and informal basis and is otherwise the subject of one of the guidelines in the director's guidelines. We have fairly strict constraints around offering advice and then, according to the guidelines, only after charges are laid.⁶⁸⁹

9.2 Crime and Corruption Commission's interaction with the Director of Public Prosecutions more broadly (Terms of Reference, item (h))

Terms of reference, item (h) for the inquiry included examining the CCC's interaction with the DPP more broadly, including existing information sharing and other processes that facilitate interaction and whether the current processes and guidelines are appropriate.⁶⁹⁰

9.2.1 Stakeholder comment

In the context of the interaction by the CCC with the DPP more broadly, the CCC provided the committee with the following information in its written submission:

The Commission enjoys a highly professional and positive working relationship with the DPP.

The Commission provides to the DPP briefs of evidence in relation to the prosecutions conducted by the DPP. There is typically interaction between DPP officers and the Commission's investigating officers and legal officers about the management of prosecutions, including disclosure requests and arrangements with witnesses.

In this respect, the relationship is like that which exists between the Queensland Police Service and the DPP.

The Commission respects the independence of the DPP and that the DPP is required to make decisions in individual prosecutions, including whether to commence or discontinue a prosecution, and the acceptances of pleas from defendants.

The DPP usually seeks the views of the Commission about these issues before a decision is made. As stated above, whilst the Commission does not always agree with the decisions made by the DPP, the Commission respects and accepts them.

The Commission and the DPP have from time to time conducted joint training sessions, and representatives have met to discuss topical cases and law reform. From time to time, staff are seconded between the DPP and the Commission.

The Chairperson of the Commission and Mr Alsbury have always been welcomed to meet with the DPP and senior staff to discuss individual prosecutions.⁶⁹¹

During the public hearing, the DPP spoke about the relationship between the CCC and the ODPP:

... the office is fiercely independent and needs to be, and particularly from the investigating agency—most commonly the QPS, of course, but the CCC or indeed other agencies that filter matters that are indictable through to us. The decision to prosecute and the appropriateness of the charge are all matters about which the prosecution discretion needs to be very particularly focused.

...

⁶⁸⁹ Public hearing transcript, Brisbane, 3 September 2021, p 8.

⁶⁹⁰ Inquiry terms of reference, item (h).

⁶⁹¹ Submission 25, pp 44-45, paras 219-225.

Other jurisdictions elsewhere in the world have a different model where prosecutors are more directly involved in the investigation process. That is not our model. For the sake of argument, police investigate matters. They exercise different discretions. They have different states of mind. They have different conclusions in order to exercise the powers that they have under the Police Powers and Responsibilities Act. Our obligation is ultimately to the court, to the questions of justice, and so there are times when those two objectives come into conflict. Having an independent prosecuting agency ensures that the ethical obligations on prosecutors, who are essentially barristers and officers of the court, are strictly adhered to and that there is a reduced risk of any interference of some perhaps agenda or perspective of the investigating agency or the people involved in it.⁶⁹²

The LGAQ submitted however, that it considered current processes and guidelines to be inappropriate:

Having regard to the ultimate outcome of the prosecution of the fraud charges against the former councillors of the Logan City Council, it is the LGAQ's submission that the current processes and guidelines identified in this term of reference (of which the LGAQ has no direct knowledge) are inappropriate.⁶⁹³

9.3 Crime and Corruption Commission's role in charging persons with an offence arising from its investigation (Terms of Reference, item (j))

9.3.1 Background

The terms of reference for the inquiry included examining the CCC's role in charging persons with an offence arising from its investigations.⁶⁹⁴

The role of the CCC in charging persons with an offence arising from an investigation is governed by legislation, policy and practice, including the following:

- CC Act, specifically sections 35(1)(h) and 255(5)
- Director's Guidelines as at 30 June 2016 (issued by DJAG and publicly available online)

The specific actions taken by the CCC in charging persons in the context of the investigation of former Logan City Councillors were discussed in detail by the CCC in its submission,⁶⁹⁵ and is examined earlier in this report.

In the broader context of CCC's role of charging persons, the committee commented as follows in the 2021 Review Report:

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.⁶⁹⁶

⁶⁹² Public hearing transcript, Brisbane, 3 September 2021, pp 8-9.

⁶⁹³ Submission 13, p 4, para 13.

⁶⁹⁴ Inquiry terms of reference, item (j).

⁶⁹⁵ Submission 25, pp 38-40, paras 202-212.

⁶⁹⁶ 2021 Review Report, p 93.

Although the CCC conducts the investigation, any charges are laid by a sworn police officer seconded to the CCC who ultimately must also be satisfied the charges are appropriate.⁶⁹⁷ In exercising the discretion to charge and preparing material in support of it, sworn police officers are obliged to comply with the Director's Guidelines.

9.3.2 Stakeholder comment

The CCC submitted that it 'employs highly experienced lawyers and (via secondment) sworn police officers who are experienced and capable of providing appropriate advice as to whether charges should be considered'.⁶⁹⁸ It highlighted that although a police officer seconded to the CCC laid charges, 'the final decision about whether to continue the charges at the committal hearing remained with the DPP'.

The CCC provided the committee with the following information in its written submission about the provisions of the Director's Guidelines which are relevant to the decision to charge:

In relation to a decision to charge, the Commission adopts the test described in Section 4 of the DPP "Guidelines" as at 30 June 2016 relating to a decision to prosecute.⁶⁹⁹

An extract of section 4 of the Director's Guidelines is provided below:

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?⁷⁰⁰

Section 4 of the Director's Guidelines also provides guidelines on what constitutes (i) sufficient evidence, (ii) public interest criteria, and (iii) impartiality.⁷⁰¹

In relation to terms of reference, item (j), the LGAQ submitted:

Having regard to: -

- a. The very serious and career-ending injustice inflicted on the former councillors of the Logan City Council;
- b. The detailed reasons provided in the LGAQ's letter of complaint dated 5 May 2021; and
- c. The further reasons provided above in response to term of reference i, it is the LGAQ's submission that the CCC should not be permitted to charge councillors with any "disqualifying offence", as that term is defined in section 153(6) of the *Local Government Act 2009*.⁷⁰²

⁶⁹⁷ CC Act, s 255(5); submission 25, pp 39-40, para 210.

⁶⁹⁸ Submission 25, pp 38-40, para 204-212.

⁶⁹⁹ Submission 25, p 44, para 218.

⁷⁰⁰ ODPP, *Director's Guidelines*, p 2, PCCC-TP0130.

⁷⁰¹ ODPP, *Director's Guidelines*, pp 2-5, PCCC-TP0130.

⁷⁰² Submission 13, p 5, para 17.

The submission from the former Logan City Councillors, co-ordinated by McInnes Wilson Lawyers, recommended the CC Act 'be amended to ensure that no serving police officers are engaged by, or seconded to, the CCC in any capacity as with ICAC in New South Wales'.⁷⁰³ It was submitted:

The second area of legislative amendment concerns the inclusion of an express limitation upon the capacity of any police officers seconded to the CCC to charge elected officials with integrity offences, within the meaning of the LG Act, unless the matter has been approved by the DPP.

The effect of a person being charged with an integrity offence (or indeed a serious integrity offence as here) is that they are immediately suspended from office. This means that their constituents are disenfranchised from the democratic process. The extent of executive interference in democratic processes such as the election of councillors for local governments, should be kept to the minimum necessarily required. In circumstances where the CCC has demonstrated such grave misjudgement as occurred the current case, the power should be expressly removed from it.⁷⁰⁴

9.3.3 Submissions by Counsel Assisting

Counsel Assisting suggested to the committee that it may wish to consider whether there should be 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.⁷⁰⁵ It was suggested this measure:

... 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.⁷⁰⁶

9.3.4 Committee comment

Refer to recommendation 3 at section 6.12.3 of this report.

9.4 Section 49 of the *Crime and Corruption Act 2001* (Terms of Reference, item (i)) and prosecutorial discretion

9.4.1 Background

Terms of reference, item (i) for the inquiry included examining whether current provisions enabling the CCC to report on an investigation to particular entities under section 49 of the CC Act is appropriate and sufficient.

Section 49 of the CC Act currently provides that, if the CCC investigates or assumes responsibility for the investigation of a complaint about corruption and decides that prosecution proceedings or disciplinary action should be considered, the CCC may report on the investigation to a prosecuting authority (such as the QPS), for the purposes of any prosecution proceedings the authority considers warranted.⁷⁰⁷ However as noted above and also discussed in more detail below, in 2018, section 49 was amended to include section 49(5) in the CC Act which provides that a prosecuting authority for that section does not include the DPP.⁷⁰⁸

The issue of whether the CCC has and exercises prosecutorial discretion, has been examined by the committee in former meetings with the CCC, inquiries and reviews.

⁷⁰³ Submission 19, p 16.

⁷⁰⁴ Submission 27, p 35, paras 181-182.

⁷⁰⁵ Outline of submissions of Counsel Assisting, 29 September 2021, p 25, Proposed Measure 1.

⁷⁰⁶ Outline of submissions of Counsel Assisting, 29 September 2021, p 27, para 100.

⁷⁰⁷ CC Act, s 49(2)(a).

⁷⁰⁸ *Crime and Corruption and Other Legislation Amendment Act 2018*, s 12.

9.4.2 History of section 49 of the *Crime and Corruption Act 2001*

9.4.2.1 *Original provision*

From the commencement of the CC Act in 2001, until amendments made by the *Crime and Corruption and Other Legislation Amendment Act 2018* (2018 amendments) took effect, the CCC was authorised but not required, to report on a misconduct investigation (and then 'corruption' complaint) to the DPP (or other appropriate prosecuting authority), 'for the purposes of any prosecution proceedings the director or other authority considers warranted'.⁷⁰⁹

9.4.2.2 *2016 Review*

During the 2016 Review, the ODPP raised concerns about the practical application of the operation of section 49 of the CC Act (the ability to refer briefs to the ODPP). The ODPP submitted that the process gave rise to time delays and budgetary issues, as well as practical resourcing issues (particularly in regards to compelled evidence).⁷¹⁰

During a public hearing for the 2016 Review, Mr Byrne QC, then Acting DPP, further explained:

Experience dictates that the briefs received from the Crime and Corruption Commission almost always—not always, but almost always—contain compelled evidence. The effect of section 49, where a referral is made, is that senior and experienced prosecutors are effectively taken out of the pool of possible prosecutors if the matter proceeds to a criminal prosecution. It also affects the resort that may be had to legal and other support staff at the consideration stage under section 49 for the same reasons.

...

This is creating an impost on the finite resources that are available in government and available to the Office of the Director of Public Prosecutions.

...

The policy of the office is and has been now for some years however that it is only senior prosecutors who assess these matters so that any time that is taken in that assessment is significant and draws the prosecutors away from court based advocacy and other aspects of their duties.⁷¹¹

The following extract from the DPP submission to the 2016 Review provides assistance with understanding the DPP's concerns with the original version of section 49 in existence prior to the 2018 amendments:

Similar issues to that which I raise herein were noted in a submission dated 4 April 2003 by the then Director General of the Department of Justice and Attorney-General, Dr Ken Levy, to the Three Yearly Review of the Crime and Misconduct Commission conducted by the Parliamentary Crime and Misconduct Committee. I note that the report of the PCMC resulting from that review, Report No. 64, contained recommendations numbered 14 - 16 that would likely have alleviated many of the concerns raised.

The Government declined to follow those recommendations. Whilst I respect the decision of the Government to not implement those recommendations, some recent decisions of the High Court of Australia have made it timely to again raise the concerns that were voiced in 2003 by way of submission to your committee's review.

Section 49 of the Act is contained within the legislative division concerned with the Commission's corruption function. The provision of briefs for consideration as to whether any prosecution proceedings are warranted is limited to those corruption investigations. Whilst I acknowledge that in the 2014/15 financial year the ODPP received only two such briefs, there were eleven the previous financial year. I do not know how many corruption investigations resulted in prosecutions which were not referred to the ODPP for consideration.

⁷⁰⁹ 2001 reprints of the CC Act, s 49(2).

⁷¹⁰ 2016 Review Inquiry, submission 24, p 2.

⁷¹¹ 2016 Review Inquiry, public hearing transcript, Brisbane, 9 November 2015, pp 14-16.

As a matter of practice, senior legal staff are usually required to consider the brief and provide advice to the Director. As the former DPP, Mrs Leanne Clare (as her Honour then was) said the briefs can be complex and/or lengthy. Anecdotal evidence strongly suggests that all briefs are now at least lengthier, if not more complex since the earlier submission was made. The reality is that due to competing priorities, they regularly languish for months in the ODPP before a proper advice can be provided back to the Commission. The undesirability of the finalisation of a criminal investigation and/or prosecution being delayed for that period of time is obvious and affects the public confidence in the administration of the criminal justice system in general and in respect of the Commission in particular.

The referral of an investigation for advice prior to charging is a procedure not afforded to other investigative bodies in this State, other than in rare circumstances - see Director's Guideline 26 issued under the *Director of Public Prosecutions Act 1984*. It has the effect of bridging the divide between the investigative function and the independent prosecutorial function. The Commission employs lawyers and has sworn police officers attached to it. They, amongst others employed there, have the experience to and are capable of providing appropriate advice as to whether charges should result from an investigation or not.

The ODPP is not specifically funded to undertake this work which, due to the sensitivity, size and sometime complexity of the material is usually time consuming. It is an undesirable impost on the finite budgetary resources of this Office.

The matters that I have mentioned thus far are in effect the same as those raised in 2003. More recently the High Court of Australia has delivered three judgments which create, from a practical perspective, further reasons why the power of referral under section 49 is undesirable.

The trilogy of decisions, namely *X7 v Australian Crime Commission* (2013) 248 CLR 93, *Lee v New South Wales Crime Commission* (2013) 248 CLR 196 and *Lee v The Queen* (2014) 88 ALJR 656, apply to investigations during which a defendant (whether charged at the time or later) is required to answer questions or otherwise provide evidence in the investigation. For present purposes, examples of that compulsion can be found in notices issued under section 74 of the Act and in the course of hearings conducted under Chapter 4 of the Act where the witness declines to answer questions and is directed to do so.

The decisions mean, from a practical perspective, that where a prosecution is commenced against a witness who was earlier compelled to provide evidence and the prosecution relates to the same subject matter about which the compelled evidence was obtained, the prosecution cannot proceed where there is to be any reliance on the compulsorily obtained evidence. Further and importantly for the purposes of this submission, it is very likely that the prosecution of any such person will not be permitted to proceed where any witness and/or any member of the prosecution team has been exposed to the compulsorily obtained evidence, even though that evidence is not to be relied upon in the prosecution.

The effect of these decisions on the manner in which briefs referred under section 49 of the Act are considered by this Office is considerable.

The Commission must, pursuant to section 49(4) of the Act, provide all relevant information that, *inter alia*, supports a charge and supports a defence. Practically, that means that the compulsorily obtained information must be provided to this Office. That in turn means that the senior staff member who provides the initial advice has been exposed to the material and cannot prosecute the matter, should that be the result of the advice provided. The creation of "Chinese walls" around the prosecution results in a double handling of a brief which is usually complex and lengthy and is a further impost on the finite budget resources of this Office.⁷¹²

⁷¹² 2016 Review Inquiry, submission 24, pp 1-3.

In its 2016 Review Report, the committee outlined the issues raised by the ODPP and stated that 'for the reasons articulated by the ODPP, removing the availability of this procedure is worthy of consideration'.⁷¹³ The committee also made the following recommendation in its 2016 Review Report:

The Committee recommends that the government give consideration to amending section 49 of the CC Act to remove the power for the Commission to refer corruption investigation briefs to the ODPP for the purposes of considering prosecution proceedings.⁷¹⁴

9.4.2.3 2018 Amendments

The 2018 amendments to the CC Act removed the power of the CCC to refer corruption investigation briefs to the ODPP for the purposes of considering prosecution proceedings by amending section 49 of the CC Act to, among other things, include section 49(5) in the CC Act which states that a prosecuting authority for that section does not include the DPP.⁷¹⁵ The explanatory notes for the Crime and Corruption and Other Legislation Amendment Bill 2018 stated the amendment would 'not affect the ability for evidence gathered by the Commission during the course of its corruption investigation to be provided to the QPS and consequentially the ODPP as a part of the usual prosecutorial process'.⁷¹⁶

9.4.3 2021 Review

The issue of whether the CCC has prosecutorial discretion and the appropriate use of such a discretion has been raised on multiple occasions with the committee, including during the 2021 Review.⁷¹⁷ Specifically, the issue of whether the CCC has a prosecutorial discretion was raised with the CCC at public meetings with the committee on 19 October 2018, 23 August 2019 and 7 February 2020.

At the public meeting on 7 February 2020 held by the committee during its review of the CCC, in response to a question as to whether the CCC has discretion in relation to prosecution, the CCC Chairperson stated that:

Not really. We do not prosecute. It is just a quirk of fate that we have police officers from the QPS seconded to us. When they are seconded to us, they retain their normal police powers, which include powers of arrest and charge and so forth. What we do, just for convenience, is once we decide, through our chain of command, including up to me, that there is sufficient evidence to charge someone, we then give that material to an independent police officer at the commission and say, 'Would you mind looking at this and exercising your discretion as to whether you think it is one you would be happy to charge or not?' That is how the charge is laid if we lay it. When I say 'we', it is really the police officer. It is then handed over to the DPP.

...

Yes, we never prosecute, yes.⁷¹⁸

In response to further questioning about whether the CCC has ever prosecuted or holds a prosecutorial authority, the CCC Chairperson stated:

We have no power to [prosecute].

...

Yes, we never, ever prosecute ourselves, no

...

⁷¹³ 2016 Review Report, p 34.

⁷¹⁴ 2016 Review Report, recommendation 5, p 34.

⁷¹⁵ *Crime and Corruption and Other Legislation Amendment Act 2018*, section 12.

⁷¹⁶ Crime and Corruption and Other Legislation Amendment Bill 2018, explanatory notes, p 6.

⁷¹⁷ 2021 Review Report, pp 85-87.

⁷¹⁸ Public meeting transcript, Brisbane, 7 February 2020, p 12.

If it is a simple offence, the police prosecutor goes to the QPS and Police Prosecutions do it. If it is an indictable offence, it goes to the DPP. The DPP then, under its own guidelines, has the ability to not present an indictment or, if one has been presented by them or a previous DPP, to discontinue it with *nolle prosequi*.⁷¹⁹

The CCC Chairperson acknowledged that previously the CCC had prosecutorial authority, and would provide information to the DPP before laying a charge, and stated:

In the old days we used to always go to the DPP before we gave it to a police officer to see if they were comfortable with it. We still do it occasionally for more controversial cases. That is just to save the DPP the embarrassment of having to say, 'Well, we don't agree and we don't think this has got legs,' and so forth. Most often the police officer lays the charge and then the brief goes to the DPP. The DPP then has the ultimate say as to whether or not it is a case they feel comfortable prosecuting. If they are not, they don't. That is the first safeguard.⁷²⁰

In response to a question regarding whether the CCC is acting as an arbitrator when determining whether to refer a matter to DPP, the CCC Chairperson stated:

We are making the call as to whether we should commence the proceedings, whether we think there is sufficient evidence. We have a body of senior lawyers, including myself, in the organisation that have a clear interest in that. We make the determination or judgment to give it to a police officer who then exercises their police discretion as to whether or not to charge. If they charge, it then goes to either the police prosecution corps or the DPP who then have the final say.

...

There is nothing stopping anyone from making a complaint to the QPS, or even to go directly to the DPP, but they would say, 'Where is the evidence?'

...

Yes. For all of the ones in the public arena, particularly, there is nothing stopping anyone making a referral or an official complaint to the QPS which then has to deal with it. They might have come to us and said, 'Can we have all the material you have gathered to make our decision?' 'Yes, here it is. That is the purpose we disseminate,' and so on.⁷²¹

9.4.4 Stakeholder comment

In the context of whether the current provision enabling the CCC to report on an investigation to particular entities under section 49 of the CC Act is appropriate and sufficient, the CCC noted the history of section 49 of the CC Act in its written submission, including the comments by the former DPP, Mr Byrne QC, during the 2016 Review. The CCC also noted that in the 2021 Review Report, the committee had included a recommendation that 'the issue of prosecutorial practices and interaction of the Commission and the DPP be reported on as part of this inquiry'.⁷²²

In its submission to the committee for this inquiry, the CCC stated 'Adopting the reasons described by the former DPP Mr Byrne QC ... the Commission submits that no compelling reason arises from this Inquiry to change the status quo'.⁷²³

Other stakeholders however, held differing views on legislation providing the ability for the CCC to report to the DPP.

⁷¹⁹ Public meeting transcript, Brisbane, 7 February 2020, pp 12-13.

⁷²⁰ Public meeting transcript, Brisbane, 7 February 2020, pp 12-13.

⁷²¹ Public meeting transcript, Brisbane, 7 February 2020, p 13.

⁷²² Submission 25, p 41.

⁷²³ Submission 25, p 41, para 215.

The QLS submitted:

... some of our members report occasions where the CCC has pursued a prosecution in circumstances where this should have, or at least ordinarily would have, been referred to the QPS or DPP. We consider that the appropriateness of these actions needs to be reviewed, including whether legislative clarification is needed about the CCC's role in prosecutions.⁷²⁴

Further, in the context of prosecutorial discretion, the QLS recommends the committee:

investigate these issues further, including by seeking feedback from individuals on instances where the CCC has taken an active role in the prosecutions;

recommend clarification of the role of seconded police officers, including in relation to their involvement in decisions to refer matters for prosecution;

recommend legislative clarification or at least better guidance for all CCC officers in referring matters to prosecuting authorities.⁷²⁵

The LGAQ noted that, had section 49 not been changed by the 2018 amendments, a report from the CCC to the DPP would have detailed all relevant information known to the CCC that supported the laying of the charges along with a defence that may be available to any person liable to be charged.⁷²⁶

The LGAQ submitted:

As noted at paragraph 55 of the LGAQ's letter of complaint dated 5 May 2021, at the time of dismissing the criminal charges (as a consequence of the DPP's offering no further evidence in relation to same), the Magistrate stated words to the effect that based on what he heard in evidence during the committal hearing [in late 2020], the DPP's decision to withdraw the charges was the proper decision. Further, and as noted at paragraph 56 of the LGAQ's letter of complaint dated 5 May 2021, it is the LGAQ's submission that a proper prior review by the DPP of the evidence which the CCC had gathered, would have resulted in the charges never having being laid in the first place.

Accordingly, in response to this term of reference, it is the LGAQ's submission that section 49 is not appropriate and sufficient and should be amended to prevent what happened to the former councillors of Logan City Council from ever occurring again. At the very least, from the LGAQ's perspective, section 49 should be amended to require an intended CCC decision to lay criminal charges for a "disqualifying offence" (see section 153(6) of the *Local Government Act 2009* - discussed further in response to term of reference k below) to be first subject to a report to, and review by, the DPP, prior to such charges being laid.⁷²⁷

The submission from the former Logan City Councillors, co-ordinated by McInnes Wilson Lawyers, also argued for:

... the inclusion of an express limitation upon the capacity of any police officers seconded to the CCC to charge elected officials with integrity offences, within the meaning of the LG Act, unless the matter has been approved by the DPP.⁷²⁸

While it was noted that the CC Act allows for seconded police officers to charge persons with an offence (rather than CCC officers) it suggested police officers were 'essentially as directed by the executive of the CCC or the Chair himself' which 'has implications for accountability for decisions to prosecute'.⁷²⁹ It was submitted:

⁷²⁴ Submission 35, p 4.

⁷²⁵ Submission 35, p 4.

⁷²⁶ Submission 13, pp 4-5, paras 14, 15.

⁷²⁷ Submission 13, pp 4-5, paras 14-16.

⁷²⁸ Submission 27, p 35, para 181.

⁷²⁹ Submission 27, pp 23-24, paras 103-104, 107-111.

...up until 9 November 2018, the CC Act permitted the CCC to report on corruption investigations to the DPP or other appropriate prosecuting authority, for the purposes of prosecution proceedings: s 49(2)(a). Section 49(4) required that the report contain all relevant information known to the CCC that supports a criminal charge, supports a defence or supports a disciplinary process. Section 49(5) allowed the DPP to require the CCC to undertake further investigative steps to that end.

However, following amendment recommended by this Committee on the basis of the DPP's concern about receiving compelled evidence when it should not, s 49 was amended to remove that power.

Whilst it was not mandatory, what s 49(2)(a) facilitated was the obtaining by the CCC of advice from the DPP as to prosecution of criminal offences detected through a corruption investigation. Together with the process of producing evidence, as envisaged in s 49(4), it was an important check on the power to issue proceedings in corruption cases that no longer exists.⁷³⁰

The importance of there being an independent prosecutorial discretion in Queensland was highlighted by former Logan City Councillor Jennie Breene, in her submission made to the inquiry through her lawyers, Anderson Legal:

In Queensland, the Office of the Director of Public Prosecutions (ODPP) has an important role in the criminal justice system. A well-resourced and independent prosecution service not only has the ability to deliver just outcomes for victims of crime and the wider community, it also has the capacity to fearlessly decline to prosecute if there is a lack of evidence or public interest in charges proceeding.

It is open for this Inquiry to find that greater oversight of proposed charges by the CCC, such as by the ODPP, may provide an important safeguard against disastrous outcomes of the kind experienced in this case.⁷³¹

Ms Breene suggested 'greater oversight of proposed charges by the CCC, such as by the ODPP, may provide an important safeguard against disastrous outcomes of the kind experienced [in the CCC's investigation of Logan City Council]'.⁷³²

The DPP, Mr Heaton QC, provided insight into the impact of changing the legislation to again allow the CCC to report to the DPP under section 49 of the CC Act. With regards to a discussion about whether the work done by the ODPP once referred the matter, is the same work that would be done if the ODPP was consulted prior to charges being laid, Mr Heaton QC advised:

To some extent. That is why I say I do not know what is going on in terms of what analysis has been done before matters come to us. I know that particularly matters that have been referred to me were done because there was some uncertainty about the sufficiency of the evidence—so essentially asking for my opinion, for want of a better phrase. Or there might be matters where the public interest discretion might be exercised, and that can only be exercised by me to discontinue a matter. So if it appears to a decision-maker at the CCC that that might arise in a particular case, then before charging referring it to the DPP will get, I guess, some insight into how that issue might be dealt with from a public interest point of view.

...

I think in some ways, and I am absolutely all for front-ending. As I was explaining earlier, if we were given the responsibility of considering matters before charge, then at that point we could develop a clear understanding of what evidence was admissible, what the appropriate charge was, what our case theory was, how the matter would proceed. But bearing in mind at that point there is no contradictor so we do not have the benefit of defence making submissions to us—sometimes informally, sometimes formally—that might give some insight into where the vulnerabilities are in our case. So all we can do is look at the material on the face of the documents and, perhaps based on our experience, anticipate where the vulnerabilities might be in the evidence. It is necessarily going to be a flawed process, but that is a process that is undertaken now by others already. So having done that work at that point, if a charge is then laid and then proceeds, then we might have to do the work a second time in anticipation of the committal.

⁷³⁰ Submission 27, pp 23-24, paras 103-104, 107-111.

⁷³¹ Submission 26, p 18, para 89.

⁷³² Submission 26, p 18, para 90.

And if that is months, as is usually the case—months, maybe even a year or more later—then I am guessing that at least 60 per cent of that work will have to be done again to get the person's mind back up to be on top of all of the material. Then if the matter gets through committal, then again when the matter comes to trial further down the 12 or 18 months or two years of the process, the work will have to be done a third time. If the same officer is involved in the beginning as at the end, then the amount of work that is done is minimised. But invariably with the passage of time people move on or move into different roles, so it is unlikely that the person that is involved in those initial decisions will be the person who ultimately takes it to trial. Sometimes that happily happens but not always. So there will necessarily be some duplication along the way. It is a matter for others to determine whether that duplication is a necessary benefit.⁷³³

When Mr Heaton QC was asked hypothetically about the practical considerations if the legislation was changed so that the CCC could only refer matters through the DPP, Mr Heaton QC advised:

I guess it is difficult to say with certainty. I anticipate that that would lead to an increase in the work coming to us. It might simply involve the work being put into the critical analysis of a case at an earlier point in time. It is done at the very perhaps latest just before the committal. It might be done at an earlier point before charging in that scenario. But it is difficult to know how much extra might come to us. I do not know what is going on at the CCC in terms of what decisions are being made.

...

It would definitely raise a resourcing consideration. I think it also tends to obscure the independence of the DPP as a prosecuting authority. That is not to say that we as the office and the lawyers within it are not sometimes approached by police for advice on legal matters that might guide investigations, but that happens on a very ad hoc and informal basis and is otherwise the subject of one of the guidelines in the director's guidelines. We have fairly strict constraints around offering advice and then, according to the guidelines, only after charges are laid.⁷³⁴

Refer to Recommendation 3 of this report at section 6.12.3.

9.4.5 Separation between investigatory body and prosecutorial body

Stakeholders raised concern in particular, with the need to have a separation between investigatory body and prosecutorial body.

In this regard the QLS submitted:

The Act, when read as a whole, together with information publicised about the Commission clearly outlines that it investigates matters and, if it considers there should be criminal charges following an investigation, refers the matter to a prosecuting authority. This is explicitly provided for in section 49.

While there is a specific provision in section 50 outlining when the CCC can prosecute a matter, section 49 necessitates that a prosecution following a corruption investigation should be undertaken by a prosecuting authority and not by the CCC itself.

We note that a Western Australian inquiry recommended that there be a separation between the investigation of serious misconduct and the prosecution of criminal offences. This is how similar criminal and corruption oversight commissions were designed.⁷³⁵

Ms Breene's submission noted the importance of independent prosecutorial discretion⁷³⁶ and current and former Councillors of the Ipswich City Council submitted:

To ensure a clear separation of powers of its current investigative and prosecutorial roles in practice by using seconded serving police officers, the power of the CCC to institute criminal proceedings through any means be removed from the CCC – as well as by any persons seconded to the CCC – and vested in

⁷³³ Public hearing transcript, Brisbane, 3 September 2021, p 12.

⁷³⁴ Public hearing transcript, Brisbane, 3 September 2021, p 8.

⁷³⁵ Submission 35, p 3.

⁷³⁶ Submission 26, p 18.

the Director of Public Prosecutions (DPP), to ensure full public confidence in the CCC, considering the many sensitive inquiries and investigations which it conducts.⁷³⁷

or alternatively:

...that the CCC be authorised to commence legal proceedings only by way of a Notice to Appear rather than through the arrest and notorious CCC public parades of individuals who are supposed “innocent until proven guilty”, except in the gravest of cases such as persons attempting to flee the jurisdiction.⁷³⁸

These issues were also discussed by the Clerk of the Queensland Parliament, Mr Neil Laurie, in his submission to the 2021 Review, which stated:

I think there needs to be some clarity provided about the role of the CCC as an investigator and reporter and whether it is also a prosecution agency. Generally there is a separation between investigators and prosecutors. There are sound reasons for this separation. This separation is particularly important for the exercise of prosecutorial discretion, which refers to when a prosecutor has the power to decide whether or not to charge a person for a crime (despite there being a prima facie case), and which criminal charges to file or discontinue. It is also when there are serious and complex charges which may be issued in a matter.⁷³⁹

Mr Laurie also spoke to these issues during a public hearing held as part of the 2021 Review:

At a meeting with the PCCC on 19 October 2018 Mr MacSporran QC stated—

What we used to do before my time was routinely and certainly in the more contentious matters refer under that section a report of the investigation with our recommendation and observations to the director's office to allow him or her to assess the evidence and make a decision as to whether the charges should be laid. My view was, and my commissioners supported me in this, that given who we are and the staffing we have, which includes senior lawyers, including myself, and commissioners, we thought that was a bit of an unnecessary aspect to the way we operate. We took the view that where the evidence in our view was sufficient we should and could lay charges ourselves and then hand the prosecution itself over to the prosecuting authority, which would either be the police if it was a simple offence or the Director of Public Prosecutions if it was an indictable offence. It is then a matter for the director as to whether they think the matter should proceed.

I strongly submit that this was a poor decision. There are very sound reasons that investigators generally should not be prosecutors. Investigators can lose objectivity. They get too close to the case. They see evidence in terms of how it contributes to the case; they do not necessarily see that the evidence can be viewed in a different light. Nicholas Cowdery, the former director of public prosecutions in New South Wales and past president of the International Association of Prosecutors, talking about the New South Wales DPP, stated—

Again in simple terms: we prosecute ... and conduct court proceedings (appeals and other proceedings of various kinds). We do not conduct investigations—that is done by the Police Force and other investigative agencies that have the resources and the abilities to carry them out. We do give advice to police and other investigators, but limited to the sufficiency of evidence to prove offences and the appropriateness of particular charges—we do not give operational advice to police or direct or engage ourselves in their investigations.

Later he says—and this is the important part—

There is a profound problem of principle in having investigators conduct prosecutions, especially if they are not officers of the court: ie. qualified legal practitioners. It is perhaps an example of the separation of powers not being observed, in the sense that police have one foot in the executive and the other in the operation of the judiciary ... More importantly, it weakens the confidence that the community should have that prosecutions are run and prosecution decisions are made completely independently of executive considerations.)

Independence is the watchword of DPP—independence in decision making in the course of the prosecution process and related legal proceedings. It is partly for that reason that we do not become involved in investigations. When the result of an investigation—the evidence—is supplied to us, we need to be in a position

⁷³⁷ Submission 19, p 16. The councillors party to the submission were Paul Tully, David Pahlke, Charlie Pisasale, David Morrison, Sheila Ireland, Cheryl Bromage, Kerry Silver, Wayne Wendt and David Martin.

⁷³⁸ Submission 19, p 16.

⁷³⁹ 2021 Review, submission 36, p 15.

to assess it objectively, impartially and according to law and that would be not assisted if we had already made some personal investment in the investigation process, as police do.

I would suggest to you that many of the words he is using about police also, in the context of the CCC, apply to the lawyers within the CCC itself. It is a necessary human failing that investigating matters will tend to lead to the loss of objectivity. That is why the DPP is there.

In October 2018 Mr MacSporran QC indicated that the policy change was due to resourcing and time issues with the DPP. In my strong submission, the DPP, the CCC and the Attorney-General should work to solve those issues. The policy that was adopted should be abandoned and the spirit of the Act, which provides that reports are to be provided to the DPP, should be followed.⁷⁴⁰

The CCC maintained however that it 'is an investigatory body and is *not* the prosecutor',⁷⁴¹ and stated in its submission to this inquiry:

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.⁷⁴²

9.4.6 Submissions by Counsel Assisting

Counsel Assisting suggested 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'.⁷⁴³

In response, the CCC submitted:

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.

...

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.⁷⁴⁴

9.4.7 Committee comment

During the course of this inquiry, the committee has considered in detail:

- the process by which the CCC considers and determines whether to refer matters to the DPP (terms of reference, item (g))
- the CCC's interaction with the DPP more broadly, including existing information sharing and other processes that facilitate interaction, and whether the current processes and guidelines are appropriate (terms of reference, item (h))
- whether current provisions enabling the CCC to report on an investigation to particular entities under section 49 of the CC Act is appropriate and sufficient (terms of reference, item (i)) and prosecutorial discretion
- the CCC's role in charging persons with an offence arising from its investigations (terms of reference, item (j)).

⁷⁴⁰ 2021 Review, public hearing transcript, Brisbane, 14 May 2021, p 2.

⁷⁴¹ Submission 25, p 39, para 206.

⁷⁴² Submission 25, p 39, para 206.

⁷⁴³ Outline of submissions of Counsel Assisting, 29 September 2021, p 26, para 95.

⁷⁴⁴ CCC, Outline of submissions, 15 October 2021, p 54, paras 267-277.

In considering the above terms of reference in relation to this inquiry, the committee has had cause to consider many factors. The inquiry has revealed serious shortcomings in the CCC processes, in particular the CCC's process for charging individuals.

In this regard, the committee notes that the CCC's advice referenced above in relation to future charging processes.⁷⁴⁵

The committee acknowledges the continued concern about 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. This structure of the CCC is as it was envisaged by the Fitzgerald Inquiry, the recommendations of which were enacted 'lock, stock and barrel' by then Premier, Hon. Mike Ahern, in 1989. Any change to the CCC's ability to lay charges through its seconded police officers would be a significant policy shift and impact on the processes of the CCC. All benefits and possible issues would need to be thoroughly explored.

The committee also recommends in view of the many and varied concerns raised by stakeholders including the QLS, the Clerk of the Queensland Parliament, and others, about investigatory bodies also taking part in the charging and prosecution process, the Queensland Government instigate a review on this matter to be undertaken as a Commission of Inquiry or similar, to be headed by senior counsel of standing sufficient to consider this structural basis of the CCC that has its roots in the Fitzgerald Inquiry.

Recommendation 6

The committee recommends the Queensland Government instigate a review of the Crime and Corruption Commission's (CCC) structure in regards to its investigatory and charging functions, and the role of seconded police officers at the CCC, as a Commission of Inquiry or similar, to be headed by senior counsel of sufficient standing to consider this structural basis of the CCC that has its roots in the Fitzgerald Inquiry.

(Based on Counsel Assisting Proposed Measure 3)

Refer also to Recommendation 4 of this report at section 6.12.3.

9.5 Other jurisdictions

9.5.1 Other State and Territory integrity bodies

The work of other Australian State and Territory integrity bodies may paint a broader picture in which to consider the work of the CCC. These comparisons may be informative when considering the extent and utilisation of the CCC's current powers. To this end, the committee wrote to the integrity body in each State and Territory in Australia, inviting them to provide information relevant to the inquiry. In particular, information was sought addressing the following matters:

1. Does the integrity body's legislation allow it to charge and/or prosecute?
2. If the integrity body does not have the power to charge and/or prosecute, does it think that it should have this power?
3. If the integrity body does not have the power to charge and/or prosecute, which agency undertakes this process on behalf of the integrity body and how effectively does it work?
4. Whether police can be seconded to the integrity body?
5. If so, do seconded police officers have the power to charge on behalf of the integrity body?

⁷⁴⁵ CCC, Outline of Submissions, 15 October 2021, p 54, para 267-268.

6. Who is responsible for deciding to charge (e.g. seconded Police Officer, outside police officer, internal lawyers, or any other agency or authority)?
7. Does the integrity body have power to refer briefs to prosecuting authorities before charging?
8. Who is responsible for deciding to prosecute (e.g. the integrity body, the relevant prosecuting authority or both?)
9. Who is responsible for prosecuting? If this is a prosecuting authority, what is the integrity body's role in assisting the prosecuting authority (e.g. does the integrity body only provide evidence at the start or is the body more involved in the prosecution of the matter?)
10. Any other relevant information relating to the ability of the integrity body to charge and prosecute in their jurisdiction or about the relationship between the integrity body and the relevant prosecuting authority, including the process of information sharing.

Responses were received from the Independent Commission Against Corruption in NSW (ICAC NSW), the Integrity Commission in Tasmania and the Independent Commission Against Corruption in the Northern Territory (ICAC NT).⁷⁴⁶ A table illustrating their responses is at Table 1, after section 9.5.11.

It is noted that each of these integrity bodies differ in jurisdiction and function from the CCC in Queensland and are therefore limited in comparability to the CCC. For example, in NSW the ICAC focuses on corruption matters while there is a separate crime commission for major crime (NSW Crime Commission). However, ICAC NSW does have a role in relation to criminal matters arising out of corruption. The Tasmanian and Northern Territory integrity bodies focus on corruption matters only.

9.5.2 Does the integrity body's legislation allow it to charge and/or prosecute?

The three responses in relation to ability to charge and prosecute differed somewhat from the process in Queensland. In Queensland the CCC Chairperson has the power to make a recommendation about whether it is appropriate to proceed to a charge. A police officer seconded to the CCC then makes a decision independently about whether or not to charge. The ODPP then facilitates the prosecution as the prosecuting authority and the ODPP may request assistance from the CCC throughout the prosecution.

While ICAC NSW also makes a recommendation to charge, the ODPP in NSW then provides written advice to ICAC NSW about whether to charge and what charges.⁷⁴⁷ In NSW, in determining whether to include a statement in a report that consideration should be given to obtaining the advice of the ODPP with respect to a prosecution, ICAC NSW has regard to whether there is sufficient admissible evidence to justify referral to the ODPP.⁷⁴⁸

In both Tasmania and the Northern Territory, legislation does not allow their integrity body to charge or prosecute.

9.5.3 If the integrity body does not have the power to charge and/or prosecute, does it think that it should have this power?

The Tasmanian and the Northern Territory bodies do not have the power to charge or prosecute. The Integrity Commission in Tasmania however, stated that on occasion it may have been useful to have that power but not to the extent that they have felt it necessary to request this power. The Tasmanian body emphasised that their jurisdiction is significantly different to the CCC in Queensland, in particular

⁷⁴⁶ Independent Commissioner Against Corruption NSW (ICAC NSW), correspondence, 21 September 2021; Integrity Commission Tasmania, correspondence, 22 September 2021; Office of the Independent Commissioner Against Corruption Northern Territory (ICAC NT), correspondence, 6 September 2021.

⁷⁴⁷ ICAC NSW, correspondence, 21 September 2021, p 10.

⁷⁴⁸ ICAC NSW, correspondence, 21 September 2021, p 10.

they do not usually deal with criminal matters. Accordingly, they noted that if they acquired this power, they would need additional specific resources.⁷⁴⁹

The ICAC NT stated that it was a matter of public policy for the Parliament.⁷⁵⁰

9.5.4 If the integrity body does not have the power to charge and/or prosecute, which agency undertakes this process on behalf of the Integrity body and how effectively does it work?

The process for charging and prosecuting in Queensland and NSW have been described above. In Tasmania and the Northern Territory however, different agencies undertake these processes. In Tasmania the ODPP undertakes this process and they have referred a number of criminal matters to the ODPP and Tasmania Police. The ODPP or police then pursue the matter, with Tasmania Police undertaking any necessary criminal investigation.⁷⁵¹

In the Northern Territory a Memorandum of Understanding (MOU) was entered into in July 2021 between ICAC NT, ODPP and the Northern Territory Police Force. In accordance with that agreement, upon delivery of a brief of evidence to the ODPP, it is for the ODPP to provide advice on the question of charges. If ICAC NT decides that a charge should be laid then the Northern Territory Police Force facilitate the laying of the charges.⁷⁵²

9.5.5 Whether police can be seconded to the integrity body?

Police officers are able to be seconded to the relevant Integrity body in all four jurisdictions.

9.5.6 If so, do seconded police officers have the power to charge on behalf of the integrity body?

The power of a seconded police officer to charge on behalf of the integrity body varies between jurisdictions. In Queensland it is the seconded police officer's role to charge on behalf of the Integrity body. Conversely, in NSW officers of ICAC NSW have this power and accordingly police officers are not seconded for the purpose of commencing criminal prosecutions.⁷⁵³

The Integrity Commission in Tasmania stated that this is a complicated but largely theoretical issue that they have not tested. Under their legislation a seconded police officer is technically authorised under written notice from the CEO, however, there are no powers in the legislation for an investigator to charge on behalf of the Commission.⁷⁵⁴ While their response indicates there is no settled view on this point, they stated it unlikely that a seconded police officer could charge a person on behalf of the Integrity Commission.

ICAC NT advised its legislation is also silent on the issue. The Northern Territory response indicates they would not expect a seconded police officer to charge on behalf of ICAC NT as such action would be contrary to their MOU outlined above.⁷⁵⁵

9.5.7 Who is responsible for deciding to charge (e.g. seconded police officer, outside police officer, internal lawyers, or any other agency or authority)?

The inquiry has revealed detail about the responsibility for charging in the CCC. In the CCC the CCC Chairperson approves a charge being made and which charges. A police officer seconded to the CCC then makes an independent decision as to whether to charge and what charges to make. This differs from the process in NSW where the ODPP provides written advice to ICAC NSW about charges. ICAC

⁷⁴⁹ Integrity Commission Tasmania, 22 September 2021, p 1.

⁷⁵⁰ ICAC NT, correspondence, 6 September 2021, p 1.

⁷⁵¹ Integrity Commission Tasmania, 22 September 2021, p 2.

⁷⁵² ICAC NT, correspondence, 6 September 2021, p 1.

⁷⁵³ ICAC NSW, correspondence, 21 September 2021, p 12.

⁷⁵⁴ Integrity Commission Tasmania, 22 September 2021, p 2.

⁷⁵⁵ ICAC NT, correspondence, 6 September 2021, p 1.

NSW is then responsible for serving a Court Attendance Notice upon the accused, which it does through ICAC NSW officers and not seconded police officers.

In Tasmania the ODPP has the responsibility to charge while in the Northern Territory it is less clear. In the Northern Territory their MOU indicates the decision is a matter for the Commissioner of ICAC NT. However, the Commissioner is of the opinion that the decision is a matter for the ODPP or, where the prosecutor might be NT Police Force, the NT Police Force. The Commissioner stated that he intended to seek an amendment to the MOU in those terms.⁷⁵⁶

9.5.8 Does the integrity body have power to refer briefs to prosecuting authorities before charging?

In Queensland the CCC does not strictly have the power to refer briefs to the ODPP, for the purpose of considering prosecution proceedings, before charging. As outlined in the committee's 2021 Review Report:

The Crime and Corruption and Other Legislation Amendment Act 2018 removed the power of the CCC to refer corruption investigation briefs to the ODPP for the purposes of considering prosecution proceedings. The explanatory notes for the Crime and Corruption and Other Legislation Amendment Bill 2018 stated the amendment would 'not affect the ability for evidence gathered by the Commission during the course of its corruption investigation to be provided to the QPS and consequentially the ODPP as a part of the usual prosecutorial process'.⁷⁵⁷

Although there is no longer the ability to formally refer a brief to the ODPP prior to the CCC charging in Queensland (pursuant to legislation), the DPP, Mr Heaton QC, stated that it was practice for the CCC to on occasion informally or formally seek advice from the ODPP prior to laying a charge. Mr Heaton QC told the committee that 'sometimes matters that involve serious implications have come to me to consider before charging'.⁷⁵⁸

Mr Heaton QC agreed that this occurred even after the 2018 amendment removing the formal process, advising 'if it comes to me formally, I will do a formal response in a memorandum that would look very much like the one that is in this'.⁷⁵⁹

Accordingly, it appears that although the CCC does not have an express power to refer briefs prior to charging, there is an informal information sharing and advisory process that may occur on an ad hoc basis between the CCC and ODPP prior to charging.

In NSW, the MOU provides that ICAC NSW will furnish the ODPP with evidence in admissible form, outlining charges identified (but not laid) by ICAC NSW and identifying any relevant legal and evidentiary issues.⁷⁶⁰ The Integrity Commission in Tasmania also has the power to refer briefs prior to charging. In addition to this, there is the power to refer matters to the Commissioner of Police and the ODPP at various points in the investigation process.⁷⁶¹ The Northern Territory response indicates ICAC NT also have the power to refer briefs to prosecuting authorities prior to charging.⁷⁶²

⁷⁵⁶ ICAC NT, correspondence, 6 September 2021, p 1.

⁷⁵⁷ 2021 Review Report, p 87.

⁷⁵⁸ Public hearing transcript, Brisbane, 3 September 2021, p 10.

⁷⁵⁹ Public hearing transcript, Brisbane, 3 September 2021, p 10.

⁷⁶⁰ ICAC NSW, correspondence, 21 September 2021, pp 5, 10.

⁷⁶¹ Integrity Commission Tasmania, 22 September 2021, p 2.

⁷⁶² ICAC NT, correspondence, 6 September 2021, p 2.

9.5.9 Who is responsible for deciding to prosecute (e.g. the integrity body, the relevant prosecuting authority or both?)

In Queensland the decision to charge rests with the CCC by way of a seconded police officer. The Queensland ODPP is the prosecuting authority who then facilitate the prosecution.

In NSW, the ICAC NSW theoretically has the power to commence criminal proceedings contrary to ODPP advice but this has never occurred in practice.⁷⁶³ The ODPP decides whether or not to prosecute in Tasmania. In the Northern Territory there is currently a lack of clarity on this point due to a difference between what is stated in the MOU and the Commissioner's opinion stated at section 9.5.7 of this report. As mentioned above, the Commissioner is seeking an amendment to the MOU on this point.⁷⁶⁴

9.5.10 Who is responsible for prosecuting? If this is a prosecuting authority, what is the Integrity body's role in assisting the prosecuting authority (e.g. does the integrity body only provide evidence at the start or is the body more involved in the prosecution of the matter?)

There are some similarities across jurisdictions in relation to responsibility for prosecuting. In Queensland the ODPP has carriage of the prosecution with the CCC giving a brief of evidence at the start as well as assisting the ODPP with provision of information when requested.

In NSW the ODPP is responsible for prosecuting and ICAC NSW provides ongoing assistance to the ODPP in relation to the conduct of the prosecution.⁷⁶⁵ Similarly, in Tasmania the ODPP has responsibility for prosecuting and in practice the Tasmanian Integrity body only provides evidence at the start.⁷⁶⁶

The Northern Territory differs from the other jurisdictions in that ICAC NT plays no role in the prosecution aside from any further investigation activities or response to requisitions from the ODPP.⁷⁶⁷

9.5.11 Any other relevant information relating to the ability of the Integrity body to charge and prosecute in their jurisdiction or about the relationship between the integrity body and the relevant prosecuting authority, including the process of information sharing.

The integrity bodies in NSW and Tasmania both provided additional information relating to various powers, relationships with prosecuting authorities and the process of information sharing. ICAC NSW was quite detailed and indicated that whilst ICAC NSW has extensive powers, the use of those powers does not necessarily result in evidence that is admissible in a criminal prosecution. NSW ICAC gave an example where there may be cases where admissions made by witnesses provide the basis for an adverse factual finding but if admissions were made under objection (for example, as they may incriminate the witness), they are not available to be used for the purpose of a prosecution.⁷⁶⁸

The Integrity Commission in Tasmania noted the Commission's ability to refer matters to the ODPP following the Commission's investigation can be affected by coercive evidence gathered under their legislation. Accordingly, if a matter may be criminal, the ODPP is consulted before undertaking coercive interviews, to avoid prejudicing any potential criminal investigation.⁷⁶⁹

⁷⁶³ ICAC NSW, correspondence, 21 September 2021, p 12.

⁷⁶⁴ ICAC NT, correspondence, 6 September 2021, p 1.

⁷⁶⁵ ICAC NSW, correspondence, 21 September 2021, p 12.

⁷⁶⁶ Integrity Commission Tasmania, 22 September 2021, p 2.

⁷⁶⁷ ICAC NT, correspondence, 6 September 2021, p 2.

⁷⁶⁸ ICAC NSW, correspondence, 21 September 2021, p 8.

⁷⁶⁹ Integrity Commission Tasmania, 22 September 2021, p 3.

Table 1: Charging and prosecution practices across Australian jurisdictions

	Does the Commission's legislation allow it to charge &/or prosecute?	Which agency undertakes charge /prosecution function?	Can police be seconded to Commission?	Do seconded police officers have power to charge on behalf of Commission?	Who is responsible for deciding to charge?	Does the Commission have power to refer briefs to prosecuting authorities before charging?	Who is responsible for deciding to prosecute?	Who is responsible for prosecuting? What is Commission's role in assisting the prosecution authority?	Any other relevant information?
NSW	Commission makes recommendation to charge. ODPP then provides written advice to ICAC about whether to charge and what charges.	ODPP	Yes	Police officers are not seconded for this purpose as ICAC officers have this power.	ODPP provides written advice to ICAC about charges. ICAC is responsible for serving CAN upon the accused.	MOU provides that ICAC will furnish ODPP evidence in admissible form, outlining charges identified by ICAC and identifying any relevant legal and evidentiary issues.	In theory it has the power to commence criminal proceedings contrary to ODPP advice but this has never occurred in practice.	ODPP is responsible. ICAC provides ongoing assistance to ODPP in relation to the conduct of the prosecution.	Whilst ICAC has extensive powers, the use of these powers does not necessarily result in evidence that is admissible in a criminal prosecution. E.g. There may be cases where admissions made by witnesses provide the basis for an adverse factual finding but if admissions were made under objection, they are not available to be used for purpose of a prosecution.

Tas	No	ODPP and Tasmanian Police	Yes	No settled view but unlikely that a seconded police officer could charge a person on behalf of Commission.	ODPP	Yes. Also can at various points in investigation refer matters to Commissioner of Police and ODPP.	ODPP	ODPP. Commission only provides evidence at the start.	It is noted that Commission's ability to refer matters to ODPP following Commission's investigation can be affected by coercive evidence gathered under the IC Act. Accordingly, if a matter may be criminal, ODPP is consulted before undertaking coercive interviews.
NT	No	ODPP and NT Police	Yes	The Act is silent on this issue but it would be contrary to MOU.	The MOU indicates that it is the Commissioner. However, the Commissioner is of the view that it is for the ODPP or NT Police and Commissioner seeking amendment of MOU to this effect.	Yes	The MOU indicates that it is the Commissioner. However, the Commissioner is of the view that it is for the ODPP or NT Police and Commissioner seeking amendment of MOU to this effect.	ODPP. Commission plays no further role apart from further investigative activities or responding to requisitions from ODPP.	N/A

10 Abbreviations

2016 CC Act Amendments	Amendments made by the <i>Crime and Corruption Amendment Act 2016</i>
2016 Review	Parliamentary Crime and Corruption Committee, Review of the Crime and Corruption Commission's activities, to June 2016
2016 Review Report	Parliamentary Crime and Corruption Committee, Report No. 97, 55th Parliament, <i>Review of the Crime and Corruption Commission</i> , June 2016
2018 amendments	Amendments made by the <i>Crime and Corruption and Other Legislation Amendment Act 2018</i>
2021 Review	Parliamentary Crime and Corruption Committee, Review of the Crime and Corruption Commission's activities, to June 2021
2021 Review Report	Parliamentary Crime and Corruption Committee, Report No. 106, 57th Parliament, <i>Review of the Crime and Corruption Commission's activities</i> , June 2021
AAT	Administrative Appeals Tribunal
Black IC	Former Industrial Commissioner Black of the QIRC
CC Act	<i>Crime and Corruption Act 2001</i>
CCC	Crime and Corruption Commission
CEO	Chief Executive Officer
CMC	Crime and Misconduct Commission
Commission	The Commission is comprised of: <ul style="list-style-type: none"> • a full time Commissioner who is the Chairperson of the CCC • a part-time Commissioner who is the Deputy Chairperson of the CCC • 3 part-time Commissioners who are Ordinary Commissioners.⁷⁷⁰
committee / PCCC	Parliamentary Crime and Corruption Committee
Council	Logan City Council
Counsel Assisting	Counsel Assisting the committee: Dr Jonathan Horton QC and Mr Ben McMillan
CRC	Crime Reference Committee
Criminal Code	<i>Criminal Code Act 1899</i> (Qld)
DILGP	Former Department of Infrastructure, Local Government and Planning
DJAG	Department of Justice and Attorney-General
DPP	Director of Public Prosecutions
DPP Guidelines	Director's Guidelines
ELT	Executive Leadership Team

⁷⁷⁰ CC Act, s 223.

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

Fab 7	Former Logan City Councillors: Cherie Dalley, Russell Lutton, Stephen Swenson, Laurence Smith, Phillip Pidgeon, Trevina Schwarz and Jennifer Breene.
<i>Flori</i>	<i>Flori v Commissioner of Police</i> [2014] QSC 284
Former PCCC	Parliamentary Crime and Corruption Committee of the 56 th Parliament, or earlier
ICAC (NSW)	Independent Commission Against Corruption (NSW)
ICAC (NT)	Independent Commissioner Against Corruption (Northern Territory)
inquiry	Inquiry into the Crime and Corruption Commission's investigation of former councillors of Logan City Council; and related matters
LGAQ	Local Government Association of Queensland
Local Government Act	<i>Local Government Act 2009</i>
Minister for Local Government	Minister for Local Government, Minister for Racing and Minister for Multicultural Affairs
MOU	Memorandum of Understanding
NSW	New South Wales
NT	Northern Territory
ODPP	Office of the Director of Public Prosecutions
OIA	Office of the Independent Assessor
Operation Belcarra	CCC investigation into several councils following Queensland local government elections on 19 March 2016. An investigation to: <ul style="list-style-type: none"> • determine whether candidates committed offences under the <i>Local Government Electoral Act 2011</i> that could constitute corrupt conduct • examine practices that may give rise to actual or perceived corruption, or otherwise undermine public confidence in the integrity of local government, with a view to identifying strategies or reforms to help prevent or decrease corruption risks and increase public confidence.
Operation Front	CCC investigation into Logan City Council which commenced in November 2017. An investigation of: <ol style="list-style-type: none"> (a) allegations against Mayor Smith directly related to matters under consideration in Operation Belcarra; (b) allegations against Mayor Smith (and others) made by Ms Kelsey; and (c) alleged recriminations against Ms Kelsey's PID.
Parliamentary Commissioner	Parliamentary Crime and Corruption Commissioner
PID	Public Interest Disclosure
PID Act	<i>Public Interest Disclosure Act 2010</i> (Qld)
POQA	<i>Parliament of Queensland Act 2001</i>

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

PPRA	<i>Police Powers and Responsibilities Act 2000</i>
Public Records Act	<i>Public Records Act 2002</i>
PSC	Public Service Commissioner
QCAT	Queensland Civil and Administrative Tribunal
QIC	Queensland Industrial Court
QIRC	Queensland Industrial Relations Commission
QLS	Queensland Law Society
QPS	Queensland Police Service
QSA	Queensland State Archives
Terms of reference	The terms of reference as resolved by the committee on 28 May 2021 which are set out at the start of this report.
TI	telecommunications interception
TI Act	<i>Telecommunications Interception Act 2009 (Qld)</i>
TIA Act	<i>Telecommunications (Interception and Access) Act 1979 (Cth)</i>
UPA	Unit of Public Administration
VP O'Connor	Vice President O'Connor of the QIRC

Appendix A – Submitters to Review

Sub #	Submitter
001	Number not allocated
002	Dr Kathy Ahern
003	Chrissie Schwarz
004	Kendall Hall
005	David Kenny
006	CONFIDENTIAL
007	CONFIDENTIAL
008	Kylie Shea
009	Garry Begley
010	Danielle Hall
011	David Pahlke
012	Jacob Pidgeon
013	Local Government Association Queensland
014	Lorraine Soich
015	Jacqui Ballington
016	Linda Hoggart
017	CONFIDENTIAL
018	CONFIDENTIAL
019	Current and former Ipswich City Councillors (Paul Tully, David Pahlke, Charlie Pisasale, David Morrison, Sheila Ireland, Cheryl Bromage, Kerry Silver, Wayne Wendt and David Martin)
020	Number not allocated
021	Bill Haggard and Roberta Drew
022	Number not allocated
023	ANONYMOUS
024	CONFIDENTIAL
025	Crime and Corruption Commission
026	Jennie Breene
027	Former Logan City Councillors (Cherie Dalley, Trevina Schwarz, Russell Lutton, Phil Pidgeon, Steven Swenson, Lawrence Smith, Jennifer Breene)

028	Independent Assessor
029	Trevina Schwarz
030	John Mickel
031	Ron and Debbie Hill
032	Donald Clarke
033	Lynette Clarke
034	Number not allocated
035	Queensland Law Society

Appendix B – Witnesses at public hearings

Tuesday, 17 August 2021	Mr Alan MacSporran QC (Chairperson, Crime and Corruption Commission)
Wednesday, 18 August 2021	Mr Alan MacSporran QC (Chairperson, Crime and Corruption Commission) (continued) Mr Paul Alsbury (Senior Executive Officer, Corruption, Crime and Corruption Commission) Mr Rob Hutchings (former Commission Officer, Crime and Corruption Commission)
Thursday, 19 August 2021	Mr Rob Hutchings (former Commission Officer, Crime and Corruption Commission) (continued) Ms Makeeta McIntyre (Principal Lawyer, Corruption Division, Crime and Corruption Commission)
Friday, 20 August 2021	Detective Sergeant Andrew Francis (former secondee from the Queensland Police Service to the Crime and Corruption Commission) Detective Inspector David Preston (former secondee from the Queensland Police Service to the Crime and Corruption Commission) Detective Senior Sergeant Mark Andrews (former secondee from the Queensland Police Service to the Crime and Corruption Commission) Detective Sergeant David Beattie (former secondee from the Queensland Police Service to the Crime and Corruption Commission)
Wednesday, 25 August 2021	Detective Sergeant Andrew Francis (former secondee from the Queensland Police Service to the Crime and Corruption Commission) Detective Inspector David Preston (former secondee from the Queensland Police Service to the Crime and Corruption Commission) Detective Senior Sergeant Mark Andrews (former secondee from the Queensland Police Service to the Crime and Corruption Commission)
Thursday, 26 August 2021	Detective Sergeant David Beattie (former secondee from the Queensland Police Service to the Crime and Corruption Commission) Ms Tamara O'Shea (Former Interim Administrator of Logan City Council) Mr Russell Lutton (Former Logan City Councillor) Ms Trevina Schwarz (Former Logan City Councillor)

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

Friday, 3 September 2021	Mr Carl Heaton QC (Director of Public Prosecutions) Mr Alan MacSporran QC (Chairperson, Crime and Corruption Commission)
Monday, 6 September 2021	Mr Alan MacSporran QC (Chairperson, Crime and Corruption Commission)
Tuesday, 7 September 2021	Mr Alan MacSporran QC (Chairperson, Crime and Corruption Commission)
Thursday, 21 October 2021	Dr Jonathan Horton QC (Counsel Assisting) Mr Ben McMillan (Counsel Assisting) Mr Peter Dunning QC (Counsel Assisting, Crime and Corruption Commission) Mr Matthew Wilkinson (Counsel Assisting, Crime and Corruption Commission)