PARLIAMENTARY CRIME AND CORRUPTION COMMITTEE

Members present:
Mr JM Krause MP—Chair
Ms JM Bush MP
Mr MJ Crandon MP (virtual)
Mrs MF McMahon MP
Ms JC Pugh MP
Dr MA Robinson MP
Mr JA Sullivan MP

Counsel assisting:
Dr J Horton QC
Mr B McMillan

Staff of the Office of the Parliamentary Crime and Corruption Commissioner:
Mr M Woodford—Commissioner
Mr M Kunde—Principal Legal Officer

Staff present:
Ms E Jameson—Committee Secretary
Ms K Longworth—Assistant Committee Secretary
Ms M Cook—Evidence Officer
Mr S Finnimore—Principal Legal Officer

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

TRANSCRIPT OF PROCEEDINGS

THURSDAY, 21 OCTOBER 2021

Brisbane

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The committee met at 12.32 pm.

CHAIR: Good afternoon, everyone. I declare open this public hearing for the committee's inquiry into the Crime and Corruption Commission's investigation of former councillors of Logan City Council and related matters. I acknowledge the traditional owners of the land on which we meet today, elders past, present and emerging, whose lands, winds and waters we all now share. I am John Krause, member for Scenic Rim and chair of the committee. Joining me on the committee today are Mr Jimmy Sullivan, member for Stafford and deputy chair; Ms Jonty Bush, member for Cooper; Mrs Melissa McMahon, member for Macalister; Ms Jess Pugh, member for Mount Ommaney; Dr Mark Robinson, member for Oodgeroo; and Mr Michael Crandon who is joining us today via videoconference from the great electorate of Coomera.

The committee's proceedings here today are proceedings of the Queensland parliament and are subject to the standing rules and orders of the parliament. As parliamentary proceedings, under the standing orders any person may be excluded from the hearing at my discretion or by order of the committee. In line with general rules and practices relating to parliamentary proceedings, I remind witnesses to please refrain from using unparliamentary language even if directly quoting material.

The proceedings are being recorded by Hansard and broadcast live on the parliament's website. Media may be present and will be subject to the chair's direction at all times. Media rules endorsed by the committee are available from the committee staff if required. All present today should be mindful that they may be filmed or photographed during the proceedings and those photos may also appear on the parliament's website or social media pages. I urge everyone present to turn mobile phones off or to silent mode.

The committee resolved in May 2021 to hold a public inquiry into this matter owing to the gravity of a complaint made by the Local Government Association of Queensland and also owing to the powerful role of the CCC in Queensland. Today, in what is likely to be the last public hearing prior to the committee reporting, a public hearing is being held to hear from counsel assisting the inquiry about what findings are open to the committee—that is, what does the evidence indicate are conclusions that the committee could reach? Counsel for the Crime and Corruption Commission will then have the opportunity to make oral submissions to the committee in reply.

The committee has received written submissions from counsel assisting the inquiry and from counsel representing the CCC. Subject to the committee's agreement, I envisage these submissions will be published at some time in the future. As has previously been indicated, the committee is due to report to the Legislative Assembly on this inquiry by 30 November 2021. I will now ask counsel assisting the inquiry, Dr Jonathan Horton QC, who has been assisted in this process by Mr McMillan, to address the committee in relation to the submissions made to the committee about open findings for the committee for a period of no more than one hour. Dr Horton?

Dr HORTON: Thank you, Chair. We have made, as you have indicated, written submissions to the committee about the findings which are available and for possible measures at least which are open to you which you might consider. The CCC has responded, of course, to those detailed submissions in detailed submissions of their own. The CCC, as it did in oral evidence, resists any finding of wrongdoing. It positively asserts that what it did or did not do here was quite proper. It is not a case where the CCC has said in its written submissions that there is anything missing from the documentary record which was before you or that you ought to have further material that you did not otherwise have in the public hearings—that is, in our submission you can proceed on the oral evidence which was given before you in the hearings and on the material which was tabled or otherwise available.

The CCC encourages you to look at things differently from the way that we as counsel assisting submitted you should. It says you should look to context, you should pay regard to a summary of opinion by Mr Kerry O'Brien AM and to see explanations that the CCC's counsel give as good reason why the CCC acted as it did or as it did not, as might be the particular case. In one respect you are invited positively to endorse what the CCC did and that is in respect of the laying of charges. At paragraph 10 of its written submissions the CCC invites you to endorse that the evidence available

to it at the time the fraud charges were laid on 26 April was sufficient to support the prima facie cases that had reasonable prospect of success against the seven councillors and the former mayor and that the public interest favoured the laying of the charges.

It is our submission that the CCC submissions proceed on several misunderstandings and we will seek to identify that as we go through the material today. We do submit, being now the conclusion of the inquiry, that the CCC and each of its witnesses exhibited a resistance to scrutiny, a scrutiny which parliament gives to this committee, a scrutiny which the CCC otherwise does not have, a scrutiny which is demonstrably in the public interest and you, as the elected representatives of Queenslanders, bring to bear an external, detached perspective that underpins the oversight of a body with somewhat extraordinary powers. The CCC should no doubt understand that scrutiny, especially open scrutiny, is healthy and it is a necessary part of our constitutional system. No public official is exempt from scrutiny and the greater the powers the more their proper exercise calls for review and monitoring.

Section 9 of the CC Act gives to this committee a very special role. It is said that your committee is established with the 'particular responsibility for monitoring and reviewing the commission's performance.' The use of the word 'particular' is very important. It is a recognition that your role is unique, not otherwise being done by anyone else and, second, that you, as in our respectful submission you have, give it a particular focus in terms of your efforts and responsibilities.

What you have seen unfold in the evidence is, we regret to submit, a culture of institutional defensiveness, a resistance to correction and an unwillingness to recognise where errors have occurred. In the course of oral evidence there was a recognition by the chair of the CCC of administrative shortcomings and the written submissions have a limited recognition that certain conduct fell short of best practice. We have submitted to you this: that the CCC did not at all times act impartially, independently and fairly in the matters which you have scrutinised and it acted contrary to section 57 of its own act and, we have submitted, that the discretion to charge the mayor and seven councillors with fraud miscarried. In short, we have submitted the CCC overstepped the mark in these respects.

Could we begin first, committee, with submissions on the discretion to charge. I might, with your permission, read the five available findings which we say are open to the committee to conclude in this respect. The first is available finding 6. We have said there that in August 2018 the CCC gave consideration to charging criminal offences that would cause Logan City councillors to be disqualified and the Logan City Council to be dismissed and an administrator appointed. The purpose of that consideration, we have submitted, was to assist Ms Kelsey with reinstatement as CEO of the council.

Available finding 8 is this: the material prepared for and considered at the 30 January 2019 meeting fell short of what was required properly to assess whether the proposed charges against the mayor ought be laid.

Proposed finding 9 is: the memoranda prepared for the 24 April 2019 meeting to consider the commencement of criminal proceedings against the seven councillors and further proceedings against the mayor for fraud were inadequate for that purpose.

Proposed finding 10: the discretion to charge the mayor and the councillors with fraud miscarried because it was affected or infected by an improper purpose, namely, a desire to assist Ms Kelsey in her QIRC action and for her to be reinstated.

Finally on this, available finding 11: the discretion to charge the mayor and councillors with fraud miscarried also because all material considerations were not taken into account and weighed and because the decision-making about it was not impartial.

The CCC, as we have indicated, invites you to conclude and to positively endorse the charges that were laid. We respectfully differ. Reliance is placed on an opinion obtained in the course of the public hearings from Mr Kerry O'Brien AM. That summary of opinion comprises nine paragraphs on two pages and Mr O'Brien concluded that the bringing of the charges against the defendants in this matter was both appropriate and reasonable.

We have never submitted to you that the discretion to prosecute could never on any view have been exercised to achieve the result it did and we do not invite you to make a finding one way or the other about that. It is very difficult, years after the event, for you to put yourself in the position as a committee of the prosecutor and resolve one way or the other whether, properly exercised, that discretion could or could not have achieved that result. I hope we made clear from the outset in our opening that we were not going to invite the committee to go down that track. What we sought to do instead was to scrutinise the discretion which was, in fact, exercised in the circumstances and on the

material that it was, in fact, exercised. For that reason we have submitted the opinion of Mr O'Brien does not bear upon that particular task and on no view was Mr O'Brien asked those questions about whether in this particular case the discretion miscarried for the reasons we have identified.

The point the CCC seems to make is this: if the discretion could have been exercised to achieve the same result then somehow that is an answer to what we have submitted occurred here that was wrong. With respect, we submit that is a misunderstanding. In public administration, in public law, the law treats the exercise of discretion as something which ought follow certain fundamental obligations. Here we made that clear at the outset what we would submit—that is, with respect to taking into account all material considerations, not taking into account immaterial considerations, not being impartial and honestly turning one's mind to what was being done.

The difficulty here, as we have identified, is threefold: one, the decision to prosecute does seem to have been affected by an improper purposes. That is not to say the whole purpose was improper, but a weighty and substantial purpose seems to have been to assist Ms Kelsey with reinstatement. We have asked you, both as a matter of direct evidence and inevitable inference, we say, to achieve that conclusion. There was partiality evident in the decision to charge, and we have made that submission by reference predominantly to the material prepared by Detective Sergeant Francis and the particular language that was there used.

In any event, we submit this: once one identifies error in the exercise of a discretion is no answer to say it could have been exercised with the same result free from error—that is, the law treats those requirements of discretion as so important that the discretion, its result, would be set aside unless one has achieved adherence to those fundamental legal principles. Here we have submitted that discretion here fell short. That is our basis for submitting, as we have, in some detail in the written outline that the discretion here miscarried.

We know at the end of the day that the effects of what we have identified as the poor decision was undone by the Director of Public Prosecutions when the proceedings were much later ended. But, of course, by that time some significant damage was done—loss of jobs, loss of reputations, loss of livelihoods and in the course of it the dissolution of a democratically elected council and, indeed, the loss from the council of four councillors who were not charged with anything. The CCC has submitted to you that the effects of suspension and dissolution of the councillors and the council respectively are matters to which it did not have to expressly turn its mind. The reason seems to be this: that the Queensland legislature had imposed those consequences and it was not itself imposed by the CCC. With respect, that is a fundamental misunderstanding. A consequence is a consequence regardless of its origin.

Whether by reason of act of parliament or not, the consequence was that, by charging, councillors would be suspended and whether or not it was an act of parliament which brought about the appointment in due course of an administrator is, with respect, beside the point. It is rather concerning that, in the exercise of a discretion to take adverse action such as a prosecution, the prosecution authority would keep out of its mind, if you like, what was an important material consequence.

As we submitted to you along the way, it does not mean of course that one would inevitably not charge—but, in order to have faith and integrity in the prosecutorial discretion, one would expect to see the raw consequences, particularly the serious consequences, be taken into account not just in one's mind but active intellectual consideration given to it and a proper documentary record made of that having been done. Regrettably, of course, we see virtually no consideration being given to that, and the CCC submissions seem to maintain, even to you currently, that it was not a matter which needed to be taken into account.

We submitted to you that the timing of the charges here is important in terms of understanding the motivations for the laying of them. You will recall that there was an email about the need to pinch the mayor and a decent portion of the seven councillors prior to 2 May. We asked many witnesses to give an explanation of why 2 May was important if it were not the date upon which the QIRC was then scheduled to resume for the hearing of closing submissions. Those responses from those witnesses are of course before you, and *Hansard* records what they are, and we have drawn your attention to them.

In our submission, no believable explanation was given by any witness as to why 2 May was important if not for the reason that that was the day upon which the QIRC was convened to hear closing submissions. In many ways the explanations were unbecoming of the CCC in this respect: 2 May, in our submission, can only be referable now having regard to all the evidence to the fact that

the matter was to be heard by the QIRC on that day, and that was, at least at that stage, regarded as being the last opportunity of which there would be an opportunity to bring to the QIRC's attention that the councillors had been suspended and the council dissolved and an administrator appointed.

They are our submissions so far as a discretion to charge is concerned. What the CCC seems to say also is that its witnesses have denied in oral evidence the matters that were put to them in this regard. Can we address you briefly on the role and relevance of those denials?

You have before you a range of material. You have before you the oral evidence of course and you have before you the documentary record. You also have, of course, the experience of serving members of the PCCC and an understanding of how the CCC works in a general sense. Often people will deny quite honestly findings that are suggested could be made against them. But of course one, in our respectful submission, looks at the totality of the evidence—the documentary record, the things which circumstances compel or suggest, the inferences which one can or should make based upon firm factual foundations and the probity, if you like, or the probativeness, the cogency of the explanations which were given, about other explanations for why things might have been done.

We accept that there were denials by CCC witnesses of the matters put to them. They were put to them out of fairness and also for the purpose of exploring what the other possibilities were, particularly, for example, with respect to 2 May. You heard us perhaps on several occasions ask witnesses: 'What is the explanation other than that the matter was listed before the QIRC? What is your explanation for the timing?' It is for you as a committee to decide whether those denials seem correct in light of all the evidence—all the documentary evidence and all the explanations that were given.

Can we move to the next point, which is the provision of documents to the QIRC? We suggest five available findings in this respect.

Available finding 2: the shared interest, which we have suggested existed and was perceived in the CCC staffs' mind, included Ms Kelsey being reinstated as CEO which the CCC acted upon by involving itself in her proceeding and seeking to make documents it obtained under compulsion available to her in that proceeding.

Available finding 3: confidential documents including some subject to legal professional privilege were delivered to the 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 on 24 August 2018.

Available finding 4: the delivery on 3 October by Detective Sergeant Francis was improper conduct for the purposes of section 329 of the CC Act and should have been reported to you in accordance with that provision.

Available finding 5: confidential documents were delivered to the council on 19 November 2018 for a weighty and substantial purpose of making them available for Ms Kelsey's use, again, in her proceeding and, again, contrary to the ruling of Commissioner Black.

Available finding 7: the steps taken by the CCC to assist Ms Kelsey in her QIRC proceeding including with respect to her desire for reinstatement breached its duty to act at all times independently and impartially pursuant to section 57 of the Crime and Corruption Act.

The CCC submits these findings are not available because its witnesses denied a purpose other than one related to the Public Records Act. That is not entirely, with respect, correct. Mr Hutchings of course gave contrary evidence—that is, evidence which suggested the purpose at least or a purpose of the November delivery was for the purpose we have suggested. Ms McIntyre said it was a side effect or a purpose.

More widely, there is a problem placing reliance on the Public Records Act for this purpose. The CCC says two main things about it: one, the QIRC did not rule on those documents that were delivered because they were not examined or considered—paragraph 61 of the CCC's submissions; and, second, because the Public Records Act was engaged, the WhatsApp records were not documents obtained under compulsion. We deal with each of those. As to the first point, we, with respect, disagree. The QIRC ruling of 24 August 2018 at paragraph 25 contains these observations by Commissioner Black—

> The notice did not serve any legitimate forensic purpose because it seeks production of documents which will not be able to be admitted into evidence or used in the substantive proceedings arising from implied or express prohibitions on the use of the documents produced and because of the confidential and privileged status of documents obtained under compulsion.

With respect, it is wrong to characterise Commissioner Black's ruling as not having examined or considered those documents. They were squarely the subject of the ruling.

Second, whatever the effect of the act could never change this fact: the WhatsApp records were obtained under compulsion. That is an historical fact from which the CCC cannot escape. Whatever might be the subsequent construction of the character those records have under the Public Records Act could never change the fact that, as a matter of reality, as a matter of truth, they had been obtained under compulsion.

It is concerning, we have submitted, that the QIRC ruling is treated in this manner. It was an unchallenged ruling of a court, and there is, with respect, no basis for the CCC to put itself in a privileged position as not being bound and subject to that ruling.

In short, we submit that whatever be the position with the Public Records Act, it does not change the reality of the status of these documents for relevant purposes.

The committee might recall the letter of Mr Alsbury of 12 February 2019 which, after the event—at the end of events—urged the council to disclose the documents which had been delivered to it in the QIRC proceeding long after Ms Kelsey had herself abandoned the application for the disclosure of them. What is said there by the CCC is this: that by the time that letter was sent, circumstances had changed. That is correct. By the time that letter was sent, the Queensland State Archives had concluded itself that the documents were public records and the council had saved them in its system.

They are, of course, later facts, but neither of them is a justification for a change in position—that is, as we have explained, with respect, the documents were always ones obtained under compulsion and they were always ones which were subject to the QIRC ruling. So whatever those changed circumstances were, if they were as I have identified, they remained nevertheless protected in the sense of the ruling and we would ask you, and we would submit it is proper, to regard the CCC's submission in this respect as no answer at all to what was suggested to Mr Alsbury in respect of his February 2019 letter—that is, that the letter is reflective of the continuing desire of the CCC to have these documents put in the hands of the council for the purpose of their disclosure to Ms Kelsey in that proceeding.

Mr Alsbury, you might remember, agreed, when put to him, that these documents were, of course, ones which were perceived to be beneficial to Ms Kelsey and not to the councillors. In terms of delivery to the QIRC we, of course, have drawn your attention to wider circumstances: the preceding persistent request by Minter Ellison for the delivery of those documents to the council for the purpose of making them available to Ms Kelsey in disclosure; Mr Hutchings' evidence; Ms McIntyre's evidence of this being a side effect of the delivery; and having regard to the importance or otherwise of the Public Records Act and the reliance placed upon it.

Can we deal with a series of smaller topics, having dealt now with the charges and the discretion in laying them, with the documents provided to the QIRC. There are a number of other matters raised which do require some comment. One is the telephone call between Mr MacSporran and Ms O'Shea after Ms O'Shea had been appointed administrator. There is a difference on the evidence on the dates on which that might have occurred: the 17th or the 29th. The difference is immaterial, in our respectful submission.

The CCC rightly points out that telephone records were provided to you of Mr MacSporran's which show, on those records at least from those telephones, the call could not have occurred on the 29th. With respect, committee, you do not have to resolve that factual difference. The point was, with that evidence, this: firstly, that whoever called whomever and whatever day it occurred on, Mr MacSporran raised the issue of Ms Kelsey's reinstatement and, secondly, that occurred before the emails you have seen on 30 May when the police officer within the CCC made serious allegations internally about Ms O'Shea.

One does not have to trouble, in our respectful submission, with on which date it occurred. The date is immaterial. What is material is the content of the conversation and its consistency with the wider evidence. We have asked you to draw an inference arising from all the evidence that this was part of the evidence, if you like, of the CCC's desire to assist in the reinstatement of Ms Kelsey.

So too this follows the treatment of Ms O'Shea. We have submitted that the treatment of her internally was disgraceful. We note that 'disgraceful' is one of the terms used when describing improper conduct for the purpose of section 329. It is not the reason we have used it, but it is a notion that the act contemplates in a different context. It is concerning for this reason: that a pack or runaway culture is evident in the police officers with respect to their allegations against Ms O'Shea. They were entirely unfounded.

Fortunately, more senior managers stepped in and prevented them becoming anything more than internal communications. But it ought not go unnoticed. Section 329, in recognising the importance of disgraceful conduct, really aims to do this, in our respectful submission: the idea is that internally in the CCC when things occur, no matter how lowly—that is, amongst whatever seniority of staff—that it come to your attention. There is a reason for that. It is requiring managers in the CCC actively to look for, identify and be alert to improper or disgraceful conduct within their own organisation and to draw it to the attention of someone external—safe, i.e. private and external.

The same goes with the improper conduct with respect to the delivery of material on 3 October which we have submitted. The whole purpose of that provision is not only to subject it to the scrutiny of this committee, but also so that managers themselves are alert to the possibility of this occurring and are on the lookout for it and are diligent in reporting it and stopping the consequences of it.

We have suggested, as available finding 4, that the delivery on 3 October 2018 by Detective Sergeant Francis was improper conduct for the purpose of that provision, section 329, and should have been reported to you in accordance with that provision. You will recall that that material was not the subject of a dissemination authority and it contained material which, in the next delivery, was redacted on the basis of it being legally professionally privileged. We have made more detailed submissions about that.

Towards the end of our submissions we have identified two available findings of a serious kind. Available finding 12: Detective Sergeant Andrew Francis failed to properly, independently, impartially and fairly exercise his discretion to charge the seven councillors with fraud. In doing so he acted in dereliction of his duty as a police officer contrary to the requirements of the operational procedures manual and contrary to section 57 of the Crime and Corruption Act. That failure and his subsequent conduct in relation to Ms O'Shea reflect poorly on his fitness to serve as a police officer.

We are fully cognisant of the seriousness of that suggested finding and we have made detailed submissions about the support that is available on the evidence for a finding of that kind. You might recall, committee, the language of the 54-page memoranda which underpinned the charge and which used language which can only be read, in our respectful submission, as evidence of his personal feelings having motivated and being involved in the decision to charge—in the terms of the DPP guidelines, influenced the decision to charge.

That brings us to available finding 13: Mr MacSporran did not ensure that the CCC acted at all times relevant to the matters the subject of the resolution impartially, independently and fairly. We submit that that failing is serious and reflects poorly on his standing as the chair of the CCC. The concern we have identified in respect of the proposed measures in this respect is this: in our respectful submission, you have seen a problem of culture in the CCC exposed and problems of culture are necessarily problems of management. It is difficult often, but sometimes a temptation, to impose external legal remedies or reforms for what is in reality a culture or a management problem.

It is open to you to conclude that what you have seen here in the documents, in the oral evidence, in the attitude of the CCC witnesses, in the tenor of submissions that are now made, that the resistance to scrutiny and to accept error is a problem of leadership and you may not, as a committee, have the confidence that the chair can ensure the organisation's continued impartiality, independence and fairness. For that reason we have raised, for your consideration, the question of whether you would wish to make any recommendation to the Legislative Assembly in accordance with the provision in that respect—that is, a recommendation under section 236(4) of the Crime and Corruption Act.

We have proposed, humbly, only four proposed measures for this reason. These are matters on which you as a committee are far better apprised than counsel assisting to form views. You are the elected representatives, you are the committee, and you, by definition, are legislators. It is only you who have regular oversight of this commission and you who are best placed to know what measures, in a forward-looking sense, might be best formulated to ensure the fairness and impartiality of this organisation going forward and its proper scrutiny.

We proposed four measures. The first is seeking that you give consideration to a requirement that the CCC obtain the recommendation of the Director of Public Prosecutions or a senior independent legal adviser before exercising, through seconded police officers, the discretion to charge serious criminal offences in the exercise of its corruption function. There is a difficulty, in our respectful submission, with fusing the two roles of investigation and the exercise of the prosecutorial discretion, particularly in cases as serious as this and particularly where there is a human tendency for the verve or the rigour of an investigation to follow all too naturally into the laying of charges, when

the discretion to prosecute is something which the DPP guidelines and the law requires to be the subject of a separate, considered reflective discretion and one that may be inconsistent with the person having been very involved in the investigation from the outset.

In regard to proposed measure No. 2: the non-renewal of fixed terms, we respectfully submit that consideration be given to amending the act to provide for a single non-renewable appointment for the chair, ordinary commissioners and senior officers of the crime and commission not exceeding seven years. As we understand it, at least in part, the CCC does not seem to resist a measure of that kind.

In regard to proposed measure No. 3, we would ask that consideration be given to limiting the duration and repetition of secondments by police officers to the CCC. The committee has seen in the exchanges about Ms O'Shea, as only one example here, that there was a tendency for groupthink and a pack mentality with respect to certain matters, and one of them you will see evident in those emails. It took others above the police officers to stop what was otherwise completely unfounded behaviour; so, too, with the prosecution memoranda.

In terms of proposed measure No. 4, we would ask that consideration be given to imposing greater statutory limits on the dissemination of confidential and sensitive information by the CCC. The CCC does not accept, as we understand it, that the disseminations which occurred on 3 October or in November 2018 to the Logan City Council were in any way improper or in breach of the act. It is true that amendments were made to the Crime and Corruption Act in 2018, sections 60 and 62, to substantially widen the circumstances in which dissemination could occur. We would ask that consideration be given to whether the reinstatement of the provisions which were amended might be considered or some other appropriate limitation or structured discretion required before dissemination could occur.

They are the four measures, but we have made the comments we have with respect to culture, which cannot always be externally imposed and which are a matter of responsibility, integrity and competence of those who hold the positions rather than being something which the law can readily impose from the outside.

Finally, can we address this point: it is suggested that you must find and you must agree with the CCC witnesses who denied wrongdoing because it has not been suggested by counsel assisting that any were dishonest. For you not to believe someone does not mean you find they were dishonest. You will remember we examined witnesses on the basis of confirmation bias. The best humans—in fact all humans—have weaknesses. Confirmation bias is a recognition that, unless we be attentive to our own human weaknesses, we may well fall into error. The fact that we fall into error is a consequence of that human weakness, not necessarily of dishonesty. With respect, we see that having occurred here—a failure to step back, a failure properly to document, a failure to take and give active intellectual consideration to important matters, a failure to see things clearly, a failure to step back with detachment, impartiality and perspective to view the circumstances. It is as simple as becoming too close to the thing.

None of that has to be dishonest for you to disbelieve, if you like, the denials. That is, to see things clearly from the outside with detachment, as this committee is structured to do, you might see things differently from the witness and firmly disagree with them but find that they honestly believe what they did was right and, in fact, that the explanation they now give to you is a good one. It does not mean it has to be accepted. Of course, you have the benefit of all the documentary evidence and you have the benefit, of course, of a wider view of the CCC's activities. You have the benefit of coming to this inquiry as detached supervisors—very much the role the act gives you.

Denials are important and you should of course scrutinise the denials to see whether they are matters which you find persuasive, but we have not suggested dishonesty against the witnesses. It does not mean that we agree with them and it does not mean that they are free of human failings in making the denials they have.

Unless there are particular questions or particular topics you wish to me to cover, they are our submissions, really, in response to what the CCC says and to fill out a little those written submissions we have already given.

CHAIR: Thank you, Dr Horton and Mr McMillan, for your oral submissions to the committee today.

DUNNING, Mr Peter QC, Counsel, Crime and Corruption Commission

WILKINSON, Mr Matthew, Counsel, Crime and Corruption Commission

CHAIR: I will ask Mr Dunning and Mr Wilkinson to come to the table and ask you to address the committee for no more than an hour with your oral submissions.

Mr Dunning: Chair, Deputy Chair and members of the committee, might I open what I wish to say in this way: I am acutely alive to the privilege, properly so-called that it is, for a party to be entitled to make representations and submissions in a hearing like this, particularly to this committee. I thank you for it and I hope I use it wisely. In saying that, can I move to something that in my submission needs to be addressed right at the outset—that is, the submissions that are made by my side and those that have been made by Dr Horton as they bear upon the relationship between this committee and my client.

All of the criticisms that have been levelled at the CCC have been the subject of much consideration and much sober consideration. All commissioners of the CCC are here today, with the exception of Mr Williams QC, who, because of some professional commitments, is unable to be here. All of this is taken seriously. None of the criticisms were taken lightly. None of the responses were arrived at dogmatically, opportunistically or without a willingness to engage. It is easy for somebody like me to sit here and say that, because I have much experience in saying things like that. Let me give you a couple of examples just to make that proposition good. I am not one of the CCC's regular briefs, so it would be about 100 to one the number of times I have appeared against the CCC as opposed to the couple of occasions I have appeared for it. It is not really the sign of somebody who is unable to tolerate scrutiny.

Could I trouble you to consider Mr O'Brien's report. Mr O'Brien's report was prepared at my instigation, because when I came into the case the first thing I said was, 'Well, you're going to need somebody separate from the organisation to seriously assess the job you do, because allegations of the most serious kind are being made about your decision to charge.' I accept as just an ordinary member of the community, long before I was in the case, when I read it in the paper, the charges seemed to me to be a bit jarring—until you actually understand the facts. My suggestion was to go to somebody whose independence could not be questioned. There was a risk for the CCC in that. The retired judge might have taken a quite different view—he might have taken the view that Dr Horton has so firmly urged upon you—yet he did not. We did not shop around for opinions. We did not ask for anything. In fact, we went to the lengths of ensuring that not even commission staff spoke to Mr O'Brien so that there was not the slightest pressure to come to a different view.

When it comes to the suggestion that the CCC is resistant to scrutiny, it is one you should reject. Whatever other failings it might have had here, it is not frightened of scrutiny. It has not acted in the way of a party that is not willing to open itself up to criticism. We certainly push back on some of the criticisms and we do that because they are wrong. There is nothing inappropriate about that. In fact, that is exactly what the CCC should do in the course of the discharge of its important statutory function. That leads me then to turn to the relationship between the committee and the CCC.

In all of the submissions, the CCC has made it clear that it welcomes the inquiry and that it is willing to cooperate and, indeed, it has. The anti-corruption legislation in Queensland is amongst the most mature in the Commonwealth, rivalled only by the ICAC in New South Wales. It has proved an important template for the rest of the country in terms of the investigative bodies like this which it seems there is broad acceptance are necessary. You can readily assume that you cannot have a body like the CCC that has anything other than a proper and powerful oversight, which is why we welcome the scrutiny—why we have participated in the scrutiny but also why we reject that part of it which is wrong.

Can I then move to the more substantive submissions. We have made written submissions to you in writing in detail, and I will not rehearse them here. We have endeavoured to comprehensively deal with all of the criticisms that are levelled against the commission. Can I then touch on some of the more important of the matters. Can I first of all deal with the question of the decision to charge, because that was the basis upon which we were brought here and so it is said against my client the decision to charge was one that miscarried. Your Honour has heard that expression 'miscarry' about the charge many times—and I see Mr Krause smiling, because of course the lawyers or law enforcement officers among you will know—

CHAIR: I am just smiling because you promoted me to a judge of the Supreme Court! I understand that you used to be in court, Mr Dunning, but, sorry, I could not help myself. Perhaps go back to the beginning of that thought. My apologies for the mischievous interruption.

Mr Dunning: Not at all. As the lawyers among you will know, the discretion to prosecute is not amenable to judicial review. Your parliament, like all parliaments in Australia, makes that so. It makes it so for a very good reason: whilst administrative actions are properly the matter of judicial review—and that is the approach counsel assisting have taken, no doubt reflecting their administrative law background—that is not how we deal with criminal cases in this country, and for a good reason. Exactly as you see here, if you simply approach them in that typical judicial review fashion, you would almost inevitably run up against the fact that the decision to prosecute is made by a person who is both part of the investigation and part of the decision to prosecute. Inevitably it would lead to some of the criticisms you see here. That is why, if any one of us in the room were charged, we could not go and judicially review the decision of the police officer to lay the charge or of the prosecutor to pursue the matter in the Magistrates Court and present the indictment, in this case in the District Court. That is not to say that people are left without other protections, but there is a bespoke set of protections which applied here.

The councillors in question—and I do not for a moment fail to recognise the personal difficulty that the charges caused them—are in no different position to any other person in Queensland and to any of us in this room. In the event charges are laid, they have an opportunity to demonstrate at the committal proceeding that there is not a prima facie case—that is, one that could, not will, lead to a conviction—or, if necessary, get acquitted by a jury of their peers. Ultimately, what counsel assisting ask you to do is identify local authority councillors as in a different and privileged category to every other member of the community—strangely enough, members of the state parliament as well. In our respectful submission, that simply does not accord with ordinary community expectations.

Let us then look at what is the evidence about the decision to charge. It was the subject of careful analysis within the CCC. My client recognises the area in which the elemental analysis could have been better improved and has readily acknowledged as much, although I think I might fairly submit in its favour that there was only ever one issue in this case and that was dishonesty, which is always a values laden, facts heady, evaluative process. This was not a case, as you might have had in another fraud charge, where the nature of the prospective defendant or the role the defendant had might require careful analysis to work out whether you would fit within the section. This case was only ever going to be about the characterisation of the conduct. Again, as the lawyers or those with a law enforcement background among you will know, and indeed as we all know from our ordinary human experience, dishonesty is ordinarily somebody who does something irregular that they are intending to make look regular. That is why it is such a nuanced inquiry, because the dishonest person sets out to do something that an honest person might have done by clouding it or cloaking it in that appearance.

Where do we then get on the basis for the laying of the charges? A highly experienced police officer provides a lengthy memorandum in that regard. Now, we could all, I think, recount two or three sentences of the last two pages of that more-than-50-page document, but if you want to get a real sense of what the police officer thought and if you want to get a real sense of whether it was balanced or not balanced, look at the 52 pages that precede those two pages with a couple of sentences on it. I do not need to take you to it. When you go to have a look at it, it will jump out at you, frankly.

It then goes through a highly experienced criminal prosecutor in Mr Alsbury. He has prosecuted here and prosecuted abroad. He has undoubted experience in these matters. He did not slavishly come to the view that it was right. Instead, having initially had reservations, he critically analysed it, worked his way through and came to the view that there was a proper basis to charge. It then goes to the chair—in my time at the bar, the leader, or among the leaders, of the criminal bar in Queensland. He was not just a prosecutor; he did plenty of defence work as well. There was none of the groupthink or bias from only ever acting for one side there. He also comes to that view.

Then there is the prosecutor, Mr Green, a highly experienced prosecutor. He prepares the case and runs it for nine days. He ultimately comes to the view that they should not further continue it. That is potent evidence that there was always a proper basis to have charged and a proper basis to have continued until events took a certain course at the committal, which, as I submitted a little earlier, is how our system works. You do not go and judicially review, because you cannot, the decision to charge; you test that proposition in the committal proceeding.

The Director of Public Prosecutions then considers the matter. Again, I will not rehearse all the evidence. It is dealt with in detail in our written submissions. In deciding not to continue with the charges, he does so not on the basis that there was never a basis for charge, but as the circumstances then stood it was no longer appropriate to continue—again, potent evidence that there was a proper basis for charge. Then you see Judge O'Brien's report, himself a former prosecutor of high standing. When he retired a year or two year ago he was the longest serving judicial officer in

the country, a man of vast experience—that is, three decades of it—sitting as the impartial arbiter in criminal trials in this state and making sure that, as between the citizen and the state, the guilty were convicted and those who were not guilty received a fair trial to ensure that they were not convicted. His views are not limited to the fact that there was a proper basis to charge—again, potent evidence, independent of the commission.

Once you come to the view that there was a prima facie case, that leaves only the question of discretion: was this an appropriate case in which to exercise the prosecutorial discretion not to charge? Again, the only lawyers who seem to suggest that are, respectfully, the administrative lawyers. All of the criminal lawyers in the case are not saying that. All of those people I have just mentioned are not suggesting that the discretion miscarried.

Much was said about the director's guidelines. We would invite you to read them alongside the written submissions. They are an informative document. They are an informative document because they are a considered offering as to how you deal with that vexed consideration of the fact that some cases will be stronger than others and some cases might well admit a pathway to acquittal, which is why 'prima facie' means that a jury properly instructed could—not 'would' or 'should'—convict. As a society and for a very long time, we have decided to repose the trust on that question of criminality to a jury of our peers—I accept with some recent exceptions, but generally that is the manner in which we do it.

When you look at the director's guidelines and when you consider the nature of what was charged here, it is inconceivable that there would be circumstances in which the discretion would be exercised not to charge, outside near death—that would be an obvious one—where a potential accused's state of health was so poor that the community would not be served by bringing the potential offender to justice. Outside that, it is inconceivable to think that there would be a proper exercise of the discretion not to charge. When you read the director's guidelines, unsurprisingly you will see that effectively they say that.

Much has been said of the particular consequences of charging these councillors. There are really two critical things to be observed in that regard. The first is that this parliament made a legislative choice that in the event a councillor was charged that councillor would be suspended. Even though it is, in effect, not to the point to question why that legislative choice was made, the fact is that as a committee you are better apprised than most to understand the unique set of circumstances and the risks that had led the parliament to act prophylactically in that regard. To say that you should choose not to charge these people because that legislative provision would be engaged is, with the very greatest of respect to those who have submitted otherwise, to fail 'representative and responsible government 101'. The fact is: parliament having made that choice, it is not the role of the executive to say, 'Well, I think that's a bit tough, really, so I'm not going to charge so that section is not engaged.'

It is not just that it was not a high order discretionary consideration, as is urged by counsel assisting; it is that it is just wrong, with the greatest respect, to suggest that it should have been a consideration, because to do so would be to subvert the clear legislative intent of this House to say that there are a special set of risks that we are addressing in this particular way.

Even leaving aside the legislative schema, I am sure you will all remember that Detective Sergeant Francis was taxed on this by counsel assisting, effectively to say, 'Well, didn't you think it was a bit tough that if they got charged that's what would happen to them: they would be put out of their job?' As the detective sergeant pointed out, that is exactly what would happen to him. In fact, most of us in this room hold a job that the bringing of criminal charges would have immediate and deleterious effects on. But that is a function of the charges, and if we went about making special categories of people who cannot be charged we would do a lot to corrode the concept of equality of all before the law, because it would be equality of all before the law except if you are councillors and subject to that legislation.

In those circumstances, the positive findings that you were directed to at the outset are ones not of our urging but of necessity of how these proceedings have come to pass. We were brought here on Mr Hallam's assertion that these criminal proceedings were commenced for an ulterior purpose and with no basis. You have heard much evidence, and the strength of that evidence is that all of the criminal lawyers, numerous as they are, are of the view that there was a prima facie case, there was a proper basis to charge and the discretion favoured it. As a committee having resolved to inquire into that, it is inevitable in the face of that that, respectfully, that is the answer. We do not ask for anything special; we simply ask, having been told to come along, and happily come along, to acquit ourselves against the suggestion there was no basis to have charged in the first place. That issue now having been put to rest—and I can confidently make the submission 'put to rest' because,

whilst it was being pressed right through to the end of the first day of hearing that there were fundamental problems with the Crown case, as you heard a little earlier today, it is now accepted that there was a proper basis to charge and it was open to exercise the discretion to charge.

On the strength of those concessions, it inevitably follows that the principal basis that brought us here should be answered accordingly. That then really leaves only the ulterior purpose to charge, and by the time of final addresses—and we acknowledge the proprietary and the appropriateness of counsel assisting to do it—Dr Horton does not put that any higher than there was a consideration that was improper, accepting that there was a proper basis to have exercised the discretion. But that falls into the error of treating this like a typical judicial review. It falls into the error of not understanding that the person who is involved in the preferment of the charges has both an investigative and a decision-making role, which is why we have always kept them separate and provided another suite of protections, which operated here, effectively, as the law intended them to, to protect against that.

Members, can I then move to the second and other effectively substantive issue; that is, the conception that the charges were laid for the purpose of getting Ms Kelsey reinstated. This really emerges as it was becoming apparent that the assertion that there was no basis to charge was, as it were, breathing its last, but the difficulty with that thesis is that it is, with the greatest of respect, irrational. If what you wanted to do was get Ms Kelsey reinstated—if you were the CCC and as a committee or any of you were willing to buy this idea that all of—

Mr CRANDON: Chair, before we go into this next session, there are a couple of things that I would like to raise with Mr Dunning that I believe are relevant.

CHAIR: Member for Coomera, are you raising a question of relevance?

Mr CRANDON: No. I am raising questions in relation to the first part of Mr Dunning's verbal submissions today.

CHAIR: Could I suggest that you make a note of these and, if appropriate, we will come to them at the end of the address? We will allow Mr Dunning to conclude at the very least and then consider the matter further then. Please, let's allow counsel assisting the CCC to go through their address and then we will come to you.

Mr CRANDON: I will take your guidance there, Chair, thank you.

Mr Dunning: Thanks, Chair. Can I just inquire, to make sure I allow enough time to answer any questions anybody has, about when would you like me to finish, to keep within my hour?

CHAIR: 2.21 pm.

Mr Dunning: Sorry, to finish my address or to give some time for questions?

CHAIR: I think it will be just the member for Coomera. We will take this time off. Let's say 2.15 pm.

Mr Dunning: Very good. I will endeavour to be under that. Thanks, Chair.

This second idea that in fact this was some—my word but I think fair—elaborate attempt to have Ms Kelsey reinstated is just not rational. If you wanted to get Ms Kelsey reinstated in circumstances where there were four councillors who had made it clear they were supportive of her and unhappy with the way she had been treated, the one thing you would not do is what they did here. You would not charge all of those five councillors, render the council inquorate and then leave yourself in the hands of an administrator. If what you actually wanted to do and that was what was driving you—that is the case that is put against us—to get Ms Kelsey reinstated, you would charge enough of the councillors to leave the council quorate but with those four in the majority. You will have seen in our written submissions where we set out the legislative scheme and how that works. That is really the end of that point. It is a matter of regret, frankly, that it ever got raised, because it is irrational.

The committee will remember the email that talks about 'pinching Smithy' and a goodly number of councillors. If in reality what was activating the CCC at the time was this issue, that is exactly what they would have done. They would have charged some but not all of them and left the council quorate but in the majority of the four. Not only do they not do it, in the documentary evidence, all of which you have seen, there is not a hint of any intention to do so, yet, on that thesis, the CCC would have been highly motivated to do exactly that and would have had plenty of scope to, because one thing there does seem to be complete unanimity on is that among the individual councillors some cases were going to be stronger than others. Now, in the end, the commission takes the view that the conduct was sufficient in respect of all of them. Again, one can see the logic of that, because when you had the WhatsApp messages you would start to make fine distinctions between one and the other

but, in the proper exercise of discretion, you still nonetheless could have done it and left the council in the control of that four and Ms Kelsey reinstated. As a committee you should, respectfully, just in terms reject that proposition, because it is just not correct.

That really then deals with the two most significant charges, if I can put it that way, against the CCC. In my respectful submission, you should reject them and reject them for the reasons set out much more fully in our written submissions but epitomised by me over the last 20 to 30 minutes—in particular, the criticism offered of Detective Sergeant Francis. They are the gravest of allegations to make against a sworn police officer. It is a strange thing to say of a man who has given a life of service, not one without risk, that, because you can point to a couple of words—I am the first to say that he is probably unlikely to use those words again in any recommendations to charge—over a 50-something-page detailed analysis of the evidence, you should make such extraordinary findings against him. If, having heard the evidence, that is your view, you should act on it, because if as a police officer that is what he did you should act on it and you should make that finding. Then the Queensland Police Service in another forum will be able to test exactly the same evidence and come to their own view as to whether a police officer—who recommended charges approved by a senior prosecutor, approved by a silk of vast experience, prosecuted by a long-term prosecutor and later reviewed and said to be satisfactory by a retired District Court judge—behaved in the extraordinary way that is suggested of him.

For my part at least, I think it is highly unlikely that there would even be a basis to bring any administrative proceedings against DS Francis, yet the finding you are asked to make against him would inevitably provoke that inquiry. There is no basis for it and you should in terms reject it. Frankly, he sat here and gave clear, polite, cogent evidence over the most testing at times cross-examination that at best was at the limits of what might fairly have been suggested to him. That finding having been urged, he is entitled to have not only it not made but also the vindication of it being clear that it was not one that was open.

Can I then move to the question of the basis upon which you would make a finding because true it is, as a retired High Court judge used to say, 'High Court judges are not final because they are infallible but they are infallible because they are final.' In a sense you share with that with them. Your committee's report is not one that is itself open to review, but there is no doubt each of you go about it seriously, earnestly and conscientiously. It is said that we do not ask for any findings of dishonesty. Have a think about the recommendation you are being asked to make in respect of Detective Sergeant Francis and think of any universe in which that contemplates acting that way.

This whole case put against my client was about motive. The prospect of saying that somebody was honestly mistaken as to their motive is unrealistic. What you are offered is effectively this tightrope you are supposed to walk to make your way to these findings—to not find that any of my witnesses were dishonest yet somehow come to the view that they honestly intended to misconduct themselves in this way. What it lays bare is the difficulty of in any sensible way arriving at those conclusions.

Can I then move to some other matters. There is the question of the PID. If we may respectfully submit, the way the matter panned out, an important policy question in fact arises for you. The CCC is criticised for providing some assistance to Ms Kelsey as a PID. In effect, counsel assisting's position was to say it is binary: you either offer no assistance or you take over the running of the case for the PID. In our submission, that is not how the legislative provisions work. It would be an odd situation if they did. Practically, it would be an unhealthy situation, because if you are in the position of the CCC and you have a PID, provided you think the PID is in any way credible, the simplest thing to do would be to get an external firm of solicitors and say, 'Run this person's case. Only come back to me if at some point you form the view they are incredible.' That would not seem to be a desirable outcome of what has happened here. For so long as you want the CCC to be involved in managing PIDs, it is necessary to come to a landing on what is expected of it in how you do that.

In our submission, what occurred here was actually what you would want: somebody who applied their mind, accepted that there were difficult questions of judgement to be made, including questions upon which reasonable minds might differ as to how you provide the assistance, but, critically, to completely separate the function, so the PID was managed by people independent of the investigation. As I say, there is an element of the policy in this because you either say, 'Well, no, the CCC should exercise no judgement whatsoever in relation to the PID'—but once you accept, as in our submission you must when you read the relevant provisions, that must be so.

The only other submission I wanted to make in relation to the PID is this. You were invited to come to the view that there should be healthy scepticism of the PID. Short of some legislative enactment to say that, that is not the tenor of the legislation and it is not any ordinary reading of

provisions like that In fact, one would ordinarily think that the opposite applies—that if somebody presents as a PID you should make a proper assessment of whether that person fits within the ambit of the legislation and, if the person does, then respond accordingly.

Can I then move to the question of the documents, again, which occupied so much of our time. We have set out in detail in writing what we wish to say about the disseminations. It is right to say that the submission is that none of the disseminations were a breach, although in respect of one we make the submission that we might have, for other reasons, nonetheless taken some additional steps. But can I simply make these submissions that are applicable to all of this issue about the documents and really give it its context.

You will recollect from the evidence that overwhelmingly we are talking of the WhatsApp here. We are talking of documents, in that extended definition for these purposes, created on an employer supplied device for the conduct of critical employer related business—that is, the decision whether to terminate the CEO, endeavouring to do so in a surreptitious fashion so that they do not then make their way on to the records of the employer and then, finally, endeavouring to destroy them so they do not. Every aspect of the extensive evidence about documents in this case needs to be seen in that light.

The second matter to be observed that is applicable to all of this is: there is embedded in the criticism made of the CCC here an assumption that the CCC has an interest in ensuring that these documents were not available to Ms Kelsey. That seems to be a somewhat startling proposition. What role is it of any part of the executive to exercise its powers so that what are otherwise documents of the employer—and that is uncontroversial; these were at all times documents of the employer—are withheld in curial proceedings between two legal entities? It does not matter who they are. Respectfully, there is not a role for a government instrumentality to be exercising its powers to withhold the availability of documents other than for legitimate law enforcement, security type reasons, none of which applied here.

The CCC did not seek to do anything in the QIRC proceedings to subvert the order. What it did was, when it was asked in relation to the documents, make it clear it would only produce them to the commission, notwithstanding it had ample power, if it had wanted to, to simply provide them—again, not really the sign of somebody who is hell-bent on assisting somebody at all cost.

After that, though, the whole matter becomes ultimately moot, because it is really about ensuring that the employer's documents are returned to the employer so the employer can discharge a statutory function. To accept any of the criticism of the CCC is to say that it should not, as a body that is meant to promote integrity in public administration, have taken steps to ensure that that happened. That is ultimately what did happen.

Can I then move briefly to just a couple of other more minor matters. Related to that is the question of legal professional privilege. The legal professional privilege issue is not that privilege was breached; it is that there should have been a greater inquiry into it. The reality is that the likelihood of those documents containing anything privileged was remote, because even if anybody had legal advice they were not keeping it confidential. I accept that right on the fringes there might be some argument about common interest privilege, but it seems highly unlikely. Whatever criticisms might be made about legal professional privilege, the issue is not that privilege was interfered with but just not sufficiently considered.

It follows from that that, respectfully, you should reject the suggestion that the chair, Mr MacSporran, was delinquent in any way in his decisions in relation to charging—again, an allegation of the most serious and extraordinary kind to be made. If you genuinely believe it, act on it, but you will find no evidence to justify that assertion. What you actually see is a lot of consideration given to what everybody accepts were a difficult set of facts. Yes, we all know what the outcome in the committal was but, as you weigh all of that, have a think to yourself if it was anybody else in the community—and reflect on what Ms Hunter, that highly experienced public servant, said of Ms Kelsey. It is not my job to have a view on Ms Kelsey one way or the other but, when you come to the assess the conduct of the councillors in question, you cannot ignore the fact that Ms Kelsey's performance had been reviewed by Ms Hunter and, with the exception of her relationship with the mayor, was the subject of considerable praise by Ms Hunter.

By the time it gets to Mr MacSporran, there was a proper case for the laying of the charges. Once there was a proper basis for the laying of the charges, there were no relevant reasons not to prefer those charges. Frankly, it would have been a dereliction of duty not to. What it certainly was not was some act of partiality or desire to assist—and, as I have made the submission before, if what the commission wanted to do was to assist they would have taken a quite different course.

Can I also just deal with the position regarding Ms O'Shea. In a sense, the submissions you hear about Ms O'Shea are emblematic of the desire to characterise the CCC's conduct as at all times nefarious or, to put it another way, some pretty enthusiastic jumping at shadows. A couple of police officers sent an email between each other over a short period of time that was no more than, it seems, a thought bubble and possibly some intemperate remarks. It was never acted upon, no suggestion they were going to be acted upon and immediately stopped. The, if I might respectfully submit, somewhat overblown way in which the treatment of Ms O'Shea is dealt with is emblematic, really, of the approach to the commission in this matter.

There is another aspect of Ms O'Shea that is useful for the purpose of assessing the evidence. You were assured that you did not need to resolve the controversy regarding the date of the call—an easy concession to make, really, by my learned friend in circumstances where the resolution was so obvious given the objective evidence—but I would ask you to, when you weigh all of this, go back and have a look at the context in which Ms O'Shea's evidence was given and the basis upon which her statement was taken. You will see that a certain complexion was given to those events and to that timing. Take that timing out of it and much of the complexion goes with it.

There is just a small housekeeping matter. At the outset our learned friend Dr Horton referred to the fact that the commission does not complain the committee does not have all of the material. I take him to mean in those circumstances not only the material produced by counsel assisting but that additional material that has been produced by my side, in particular the report of Mr O'Brien, the chronology, our letter to the committee, the documents that have been referred to in our letter of 24 September and the material referred to in our outline of submissions.

Finally, can I deal with the question of timing. In one sense the question of timing is really gone, frankly, once you accept there was a proper basis to charge; that is, there was evidence to charge and there was no discretionary factor that would have stopped you. Mr MacSporran's evidence is that there were those who did wonder whether it would be better to try and find an appropriate time to charge, and rightly, in my submission, his experience came to the fore. That is always a fool's errand because there will never been a right or a wrong time or a better or a worse time. The appropriate thing to do is to, when you are ready to charge, if that is the view you have formed, act upon it.

Much enthusiasm is given to 2 May. And it might be that some people in their minds saw it as a prompt, but that is part of the reason we prepared the chronology we did, because to that extent you are asked to consider these things in isolation. If you work through that chronology you will see that you get to about that time for the charging and all of the enthusiasm about saying, 'Well, why did they pick the 2nd?' is not really the point. If that was about the time it was appropriate to charge because that was about the time that you had concluded your investigation and formed the view that you should charge, then whether it is the 1st, 2nd or 3rd is neither here nor there. Chair, subject to any questions, naturally, they are our submissions, thank you.

CHAIR: Thank you, Mr Dunning. Member for Coomera, it is your go.

Mr CRANDON: Mr Dunning, thank you.

Mr Dunning: A pleasure, member.

Mr CRANDON: I want to draw a couple of questions out of your statement here today. First of all, may I apologise to the committee and to those present for my nonattendance. It is on doctor's advice that I should not be there today but I was determined to be part of proceedings and I thank the committee for arranging to ensure that I was able to do that today.

Coming back to the beginning, Mr Dunning, in relation to your opening statements and 'the CCC has cooperated', I make the point that the CCC had no choice but to cooperate. We are the PCCC. We are the oversight committee. Indeed, there is no choice in the matter when it comes to the CCC cooperating. I am going to come back to that—

Mr Dunning: Mr Crandon, I accept that. I accept that my client was duty bound to cooperate. If I did not make that point then the point I was intending to make was that it did not just comply with its statutory obligations; it has gone about the topic sincerely.

Mr CRANDON: I will come back to that a little later. There were certain nuances in some of what you said in relation to the discretion to prosecute the charge of fraud. You did not seem to mention the actual term 'fraud' at any time in your submission, but the charge of fraud and the nuances around that I think are very important for the committee to consider and for the people of Queensland to consider.

Early in proceedings with DS Francis, DS Francis made it very clear that it was his decision to charge fraud in relation to the seven councillors and the mayor, but in later witness statements, particularly from Mr MacSporran, Mr MacSporran conceded, and in fact I believe Mr Alsbury also

conceded, that it was the two of them who came to the decision that the charge should be fraud. That is also supported by other police evidence where other police officers confirmed that it had never entered their thought process that fraud would be the case until it came back down from Mr Alsbury and Mr MacSporran. I would like you to make some comment on that before I go to a more substantive question in that regard.

Mr Dunning: Of course, Mr Crandon. Firstly, I might have used the expression 'dishonesty'. I did not mean to use anything different to fraud because the essence of fraud is the dishonesty of the conduct. That is what makes it fraudulent. That was the critical issue here: was the behaviour of the councillors dishonest or at the point of this inquiry—that is, the time we are talking of—was there sufficient evidence from which a jury could come to the view that they had acted dishonestly?

In relation to the synthesising of the available material through the CCC, can I make these submissions in response to what you have said. There was a lot of attention to what might have been charged but by the time it gets to Mr MacSporran and Mr Alsbury—obviously in the other order—the only things that are being considered are misconduct in public office, which would have had the same consequence for the councillors, and—

Mr CRANDON: Nowhere in that 54 pages does the word 'fraud' appear. I am going to come to a more substantial question in relation to that but I want to pick you up on that point.

CHAIR: Michael, let Mr Dunning finish now.

Mr Dunning: Mr Crandon, in my submission what actually happened there is what you would expect, because there is a careful analysis at the police officer level. That is taken to experienced prosecutors. The only things being considered had an element of dishonesty to them and would have had the same consequence for the councillors in terms of suspension. When it gets to the experienced litigation lawyers, they identify that the same conduct is amenable to another charge that has fewer elements. There is nothing wrong with deciding to charge something that is easier to prove. The reason I make that submission is this: again, it gets back to if you did not do that you would be subverting the legislative intent. If the parliament has decided that we are going to set certain norms of conduct for which, if they are breached, you will be amenable to criminal sanction, it is not for the prosecutor to say, 'I will choose the hardest of them.' It is for the prosecutor to exercise a discretion to charge appropriately. In my respectful submission, fraud was the appropriate charge against this set of facts because the behaviour was not in terms of the discharge of a particular function—for example, a person in authority who takes money to make decision A instead of decision B—but rather dishonesty in the face of the circumstances they knew about how they were bound to deal with Ms Kelsey. I accept they are contestable judgements and reasonable minds might differ as to which you would pursue, but ultimately it made no difference because the key issue of dishonesty was always there.

CHAIR: Member for Coomera, do you have another quick question?

Mr CRANDON: I do. Chair, if I may, it is necessarily a quick couple of questions. If I can go to a more in-depth question in relation to this: you have waxed lyrical, Mr Dunning, in relation to the 52 pages of the 54-page document: 'You should read it' and so forth. Both Mr Alsbury and Mr MacSporran, and I believe you today, have conceded that that document is left wanting. My question is: how do you defend no proper brief?

Mr Dunning: I do not consider the document was left wanting. The document is thorough.

Mr CRANDON: Just a moment. The question is this: how do you defend no proper brief being compiled and examined in a complex matter involving eight elected officials, seven of them being the councillors, which would result in the dismissal of an entire elected council? As accepted by Mr MacSporran, and in your written submission to this committee you have confirmed, it could have been done better, it could have had more detail, it could have had a great deal more detail, in fact, in some of your submissions around those matters. How do you defend that no proper brief—no proper brief—was provided to Mr MacSporran and Mr Alsbury for them to then come to a conclusion that fraud is the only way for you to go?

Mr Dunning: Mr Crandon, respectfully, I do not accept that it was not a proper brief. Obviously I have seen the brief myself and obviously I have seen plenty of other briefs over the years. The brief was adequate for its purposes. In particular, whatever its shortcomings might have been, the one thing that it was not short on was a detailed analysis of what was always going to be the one and only serious issue in that case. When you see it in those terms, whatever criticisms of form you might have had, as a matter of substance it was focused upon the issue that mattered.

I would very briefly say this: the other thing, Mr Crandon, is that the best way to test whether the brief was adequate or not is the improbability that two highly experienced lawyers would each consider the brief adequate to act upon and not say, 'No, I need more information,' which—

Mr CRANDON: Unless they had an ulterior motive. That is the crux of this.

CHAIR: Member for Coomera, I am going to go to the deputy chair, who has a question.

Mr SULLIVAN: I was not going to bring it up, Mr Dunning, but to follow on from your point—I do not want to verbal you but I think you said it is absolutely clear that that brief contained a detailed analysis of dishonesty. Obviously, in terms of prosecution or a successful prosecution, that requires the negativing of any defence that was going to be brought. Can you point to anywhere in discussions or anywhere in the papers where any detailed analysis of dishonesty in terms of what would need to be proved exists?

Mr Dunning: Certainly. No, it does not create, Deputy Chair, a dichotomy between, on the one hand, saying 'here is the evidence that tends to indicate dishonesty' and 'here is the evidence or the means by which one would infer that all innocent explanations can be negatived beyond reasonable doubt'. But if I might respectfully submit this, and perhaps to some extent it is a matter of approach: one of the features of fraud necessarily, or dishonesty, is that it is almost always conduct that is intended to look regular. That is what the dishonest person sets out to do.

I accept that you could make the dichotomy. I accept some might. What I would respectfully submit not to accept is that it is necessary to separate the two because, in the end, it is the one analysis to come to the view of whether that act was done for the stated purpose, or in this case no stated purpose, or whether it was done for the dishonest purpose. I accept the force of the point that you make, but might I respectfully submit that you have to weigh that against this: endeavouring to produce the clarity and the transparency that your question is, I think, directed at, you run the risk that you start to create an artificiality in the sense that there is one sort of evidence as to whether the person was dishonest and there is another sort of evidence to go to show that all innocent explanations can be negatived, yet often they are inextricably linked.

Mr SULLIVAN: I think you have just conceded that, one, there was absolutely evidence available because there were matters before another jurisdiction—

Mr Dunning: Yes.

Mr SULLIVAN:—for consideration and, two, the consideration or the detailed analysis that you have just described in those few minutes does not exist anywhere at the time of the decision to charge.

Mr Dunning: I would not respectfully agree with that. It does not appear in the format in the sense that it does not seek to separate those matters that go to show dishonesty from those matters that go to negative an innocent explanation. I accept there might be some cases where that is important, but in my submission that was not this case because, whether the conduct of the councillors was—I should not say 'the councillors'. Whether the conduct of an individual councillor ultimately was held to have been dishonest was inextricably linked with any potential exculpatory innocent explanation.

CHAIR: Thank you, members.

Mr CRANDON: Chair?

CHAIR: Yes, member for Coomera?

Mr CRANDON: I have one more question.

CHAIR: Member for Coomera, make it a quick one, please. This is the last one.

Mr Dunning: Chair, just before we go on, Deputy Chair, can I also give you a reference in our written submissions to 167 to 172. I do not need to take you to them now, but can I just supplement the answer I gave you with that reference as well. Thanks, Chair.

CHAIR: Member for Coomera, a quick one, please.

Mr CRANDON: No, I will withdraw the final question. I will leave that for another day, thank you.

CHAIR: Mr Dunning and Mr Wilkinson, thank you for your oral submissions to the committee here this afternoon.

Mr Dunning: Thank you for the opportunity to make them.

CHAIR: You are excused. As I noted earlier today, this is likely to be the last day of the public hearings. Mr Dunning and Mr Wilkinson, if you could take a step back that would be appreciated. Mr Horton, could you come back to the witness table, please? Mr Horton, you have five minutes. I know that there were a couple of points that you wanted to make.

Dr HORTON: Very briefly if I may, I have four points in reply. The first is about the term 'miscarry' in the sense of what we suggested to you about the discretion to charge. We deliberately cast it in those terms, that is, not legalistic terms. You are not a court. We have addressed you as parliamentarians, as reviewers and as committee members. We are not asking you to make a judicial ruling. We have used a term that is synonymous with 'inappropriate', so to speak. We are not seeking to create any special category or any special exemption for local council. The point is this: the more serious the consequence, whether imposed by a parliament or otherwise, the more rigour and the more clear should be the reflection upon it being visited upon someone.

Second: we have not suggested that there was no basis to charge in the first place; nor have we conceded it was open to charge. We simply ask you not to venture into that territory.

Third: it was said that there were a couple of words in the prosecution memorandum only upon which we had fixed. With respect, that is not the submission. The submission has been this: there is an absence of balance in the entire memorandum. It is infused with one-sidedness. Second, the findings in respect of Detective Sergeant Francis are not limited to the memorandum. We have made submissions at pages 23 to 24 that include Detective Sergeant Francis's conduct in relation to Ms O'Shea as a basis also for that finding.

Finally, it was said that there was a binary approach to the way we had considered public interest disclosers. We draw your attention to and remind you of what is said at paragraph 13 of our written submissions where we say it is important to remember that the CCC had pointed to public interest disclosures and those who make them as critically important to the performance of its functions. Second, again, we take up at paragraph 27 the point and readily accept and draw to your attention: the fact that the CCC delivered the material to the QIRC, the registrar, in response to the attendance notice to produce does demonstrate some conscious observation of the requirements of section 57 of its act. With respect, we have not approached it in a binary manner and we have recognised in our submissions the importance of public interest disclosures in that context at least.

Those were the very brief points we wanted to draw your attention to in reply.

CHAIR: Noted, Mr Horton. You are excused. Thank you Mr Horton, thank you other counsel and thank you members of the public who have been in attendance here today and, indeed, at the other public hearings. This is the 10th day of public hearings for this inquiry. In closing this afternoon, I acknowledge that this inquiry has not been an easy or comfortable process for all concerned, including the CCC. I wish to thank fellow committee members for their diligence as we exercise the parliament's oversight role to delve into these serious matters. I acknowledge the endeavours of the CCC to respond to the complaint inquiry and requests of the committee—there have been numerous requests—as we went about this task. Thank you to committee staff, the Parliamentary Crime and Corruption Commissioners—both past and present—and Hansard. Thank you to counsel assisting for your incisive work. The committee has really appreciated that, including in keeping the committee in sync and in line, and ensuring that we did not go off onto lines of inquiry that were of lesser relevance, which would have wasted the time of the committee.

The committee has set a reporting date of 30 November based on all of the evidence, written and oral, over 10 days of hearings, as I said, and thousands of documents. The committee will make findings about the complaint and other matters set out in its resolution of 28 May 2021. I am acutely aware and I am confident that all members of the committee are acutely aware of the implications of this report and also the impact this entire course of events has had on Logan City, its former councillors and the council itself, the CCC and the local government sector more broadly. While parts of the inquiry's proceedings have been robust, as they say, I believe the committee has afforded a fair go to all concerned.

The deputy chair has pointed out that all witnesses who have previously not been discharged are now discharged from the committee. With that, the proceedings are declared adjourned.

The committee adjourned at 2.36 pm.