

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

CRIME AND CORRUPTION COMMISSION'S SUBMISSION DATED 26 JULY 2021

1. These submissions are provided in response to an invitation for submissions by the Parliamentary Crime and Corruption Committee ("the PCCC") dated 6 July 2021.
2. The submissions are organised as follows:
 - (a.) first, a chronological overview is provided of the Commission's investigation, the laying of fraud charges against councillors of the Logan City Council ("the Council"), and the discontinuance of those charges after a nine-day committal hearing by the Director of Public Prosecutions ("the DPP");
 - (b.) second, the allegations made in the complaint lodged with the PCCC by the Local Government Association of Queensland ("the LGAQ") on 5 May 2021 are addressed; and
 - (c.) third, to the extent they are not canvassed in preceding sections, other issues the subject of the inquiry's terms of reference are addressed.
3. In the interests of transparency and accountability, the Commission is committed to participating and cooperating fully in the inquiry process. The Commission has produced to the PCCC at its request extensive records held by it in relation to the investigation and other matters. As previously agreed with the PCCC, it is anticipated that further documents will also be provided concurrently with these submissions on 26 July 2021.
4. The Commission recognises the important function which the PCCC has under *the Crime and Corruption Act 2001* (Qld) ("the CC Act") in monitoring and reviewing the performance by the Commission of its statutory functions. The Commission also welcomes the prospect that the inquiry process may result in mutually beneficial improvements in the way that the Commission performs its statutory functions, including its interactions with other entities (such as the PCCC and the DPP) which are in the interests of all stakeholders.

5. The focus of this inquiry is on the performance of the Commission's functions and for that reason the main part of these submissions summarises the events in a chronological and neutral way, providing comment only where necessary to explain the basis of an action by the Commission. However, in the light of some comments made about the Commission's conduct, it is necessary to refer at the beginning to some important matters.
6. First, public interest disclosures, and those who make them, are critically important to the performance of the Commission's corruption function, as they are an essential source of information as to the existence of corruption, which is by its nature insidious and difficult to detect. If the Commission is to effectively perform its corruption function, both in this case or prospective cases, it must act upon public interest disclosures seriously and be seen to be taking them seriously. Those who may make public interest disclosures, and the public more generally, must have confidence that the Commission will carefully consider and investigate public interest disclosures. Otherwise, there will be a practical deterrent to people making such disclosures. It follows that it would be counter-intuitive to measure the response the Commission made when it received the disclosure against whether, and to the extent, that disclosure was ultimately vindicated.
7. Secondly, 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; namely the destruction of evidence in circumstances where they had been warned by the Commission about an ongoing investigation and the consequences of taking an alleged reprisal, and the manner of the termination of Ms Kelsey's employment which offered no explanation for the termination, and none being offered until their evidence in the QIRC. 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.
8. Moreover, the DPP has never suggested, including at the time of deciding not to proceed with the charges, that there did not exist a prima face case against the Councillors, or that they should not have been charged. Put another way, even at the time of writing these submissions, none of the experienced criminal lawyers involved - including the Director of Public Prosecutions for Queensland and the Chairperson of the Commission, each of whom has decades of

experience in the prosecution and defence of criminal charges, and has over that time often advised the State on the continuance or otherwise of criminal proceedings – formed the view that there was not a case fit to be put to a jury, nor that a jury could never convict. Rather, the difference, which emerged only after the commencement of the committal, was whether the prospects of that were sufficient to justify continuing with the prosecutions.

9. Thirdly, it is important that the Commission acts consistently in the performance of its functions. In the context of local government, the Commission must act consistently in its treatment of elected members and those employed by councils. Two matters of relevance emerge in that respect:

- (a.) One is that when matters of concern are raised the Commission's response must be consistent, as it was here, both prior to responding to the allegations against the Council, in the Commission's response to like allegations regarding the Fraser Coast Regional Council, and subsequently in relation to the Maranoa Regional Council. The LGAQ as a voluntary organisation is at liberty to, as it has here, support (indeed urge) the Commission acting on such allegations regarding the Fraser Coast Regional Council, but oppose it acting on like allegations regarding the Council. Self-evidently, given its statutory framework and functions, the Commission is not at liberty to act in that way. This is a significant context in which the LGAQ's allegations need to be considered.

- (b.) The other is there 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 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.

10. Fourthly, the submissions address in detail the process by which the Commission produced documents to the QIRC. As far as possible the Commission left it to the QIRC to determine the question of the admissibility of the information. In this respect, the Commission 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.

11. Fifthly, the Commission does not agree that the timing of the fraud charges on 26 April 2019 was inappropriate. 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.

OVERVIEW OF THE INVESTIGATION

12. The following summary provides a brief overview of the Commission's investigation commenced in November 2017; the charging of Mr Smith and the seven councillors in April 2019; and the discontinuance of the charges by the DPP in April 2021 after a committal hearing.

Events leading to the commencement of "Operation Front"

13. In September 2016, the Commission commenced a corruption investigation code-named "Operation Belcarra". Operation Belcarra began after allegations were made about the conduct of candidates for several local councils, including Logan City Council ("the Council"). The investigation focussed on determining whether candidates committed offences under the *Local Government Electoral Act 2011* (Qld) and which could constitute "corrupt conduct" under the CC Act.
14. Between April and June 2017, the Commission conducted public hearings for Operation Belcarra. Mr Timothy Luke Smith ("Mr Smith") was one of the witnesses called to give evidence. Mr Smith was at the time the Mayor of the Council. He gave evidence on 13 June 2017.
15. After Mr Smith's evidence, the Commission received several notifications raising allegations of corrupt conduct against him.

Ms Kelsey's employment at the Council

16. On 27 June 2017, Ms Kelsey commenced as the CEO of the Council. Her employment was subject to a probation period.
17. Ms Kelsey arranged to, and did, meet with the Chairperson, Mr MacSporran, on 11 September 2017 to introduce herself as the Chief Executive Officer of the Council. This was the first occasion that Mr MacSporran had met Ms Kelsey.

18. On 25 September 2017 and 11 October 2017, Ms Kelsey sought legal advice about her concerns regarding the conduct of Mr Smith.
19. On 10 October 2017, a probationary review process in relation to Ms Kelsey began with Mr Smith and some members of the Council. The Commission's investigations later revealed evidence supporting the conclusion this probationary review process was biased.
20. By letter dated 12 October 2017 sent by her solicitors, Ms Kelsey made a public interest disclosure ("the PID") under the *Public Interest Disclosure Act 2010* (Qld) ("the PID Act").

The Commission is notified of the PID and commences "Operation Front"

21. The Commission was notified of the PID by letter from Ms Kelsey's solicitors dated 12 October 2017.
22. On 16 October 2017, the PID was recorded in the Commission's "Compass" database.
23. Between 16 October 2017 and 3 December 2017, the Commission received further notifications relating to the PID from the Council and other councillors of the Council.
24. On 31 October 2017, the Commission's "Matters Assessment Committee" resolved to refer the allegations of suspected corrupt conduct to the Commission's Corruption Operations unit to investigate.
25. The Corruption Operations unit is within the Commission's Corruption Division. Corruption Operations is overseen by a Detective Superintendent of Police, who is currently referred to in the Commission's structure as the Executive Director, Corruptions Operations. At the time the allegations were referred to the Corruption Operations unit, the position of Executive Director, Corruption Operations was held by then Detective Superintendent Mark Ainsworth, who left the Commission on 11 May 2018. Then Detective Acting Superintendent Stephen Loth acted in the role from 12 May 2018 to 3 September, 2018, at which time Detective Superintendent Mark Reid commenced in the position. He currently holds the position. They all reported to Mr Paul Alsbury, who is the Senior Executive Officer (Corruption). Mr Alsbury is responsible to the Chairperson for the Commission's corruption functions, including the investigations undertaken by the Corruption Operations unit.
26. On 8 November 2017, a corruption investigation code-named "Operation Front" commenced.

27. Mr Smith was initially identified as the primary person of interest of Operation Front. The allegations of corrupt conduct subject to the investigation included:

- (a.) Mr Smith allegedly agreeing to receive a boat in return for him allegedly using his position to influence the reduction of height restrictions on a 15 storey development lodged with the Council;
- (b.) Mr Smith allegedly using his position as Mayor of the Council to influence the decision-making process relating to development applications lodged by development companies that donated to his electoral campaign;
- (c.) Mr Smith allegedly failing to disclose on his electoral return amounts of \$15,000.00 and \$25,000.00;
- (d.) Mr Smith allegedly providing false testimony at public hearings conducted by the Commission in relation to Operation Belcarra;
- (e.) Mr Smith allegedly using his position to interfere in the recruitment, selection, and remuneration process for the position of Director, Innovation and City Transformation at the Council to favour an unqualified applicant with whom he allegedly had a personal relationship;
- (f.) Mr Smith allegedly commencing a biased performance appraisal on Ms Kelsey in response to Ms Kelsey commencing a performance management process for a Council employee, being the abovementioned Director, Innovation and City Transformation; and
- (g.) Mr Smith allegedly failing to record his financial interest in the boat in his register of interests.

28. On 26 March 2018, Mr Smith was charged in relation to the allegations at sub-paragraphs 27(a.), 27(a.), 27(g.), and 27(d.) with the following offences:

- (a.) two counts of perjury (s123, *Criminal Code 1899* (Qld));
- (b.) one count of official corruption in relation to the boat (s87(1)(a), *Criminal Code 1899* (Qld)); and

(c.) one count of failure to correct his register of interests (s171B(2), *Local Government Act 2009* (Qld)).

Mr Smith has been committed to stand trial on these charges.

29. On 14 April 2021, Mr Smith was also committed to stand trial on two counts of misconduct in relation to public office (s92A, *Criminal Code 1899* (Qld)), in relation to subparagraphs 27(e) and (f).
30. The DPP currently has carriage of the prosecution of these offences.

Ms Kelsey's employment is terminated by the Council

31. On 1 December 2017, Ms Kelsey had commenced proceedings ("the QIRC Proceeding") against the Council and Mr Smith in the Queensland Industrial Relations Commission ("the QIRC"). Ms Kelsey alleged a contravention of section 285 of the *Industrial Relations Act 2016* (Qld) and sought injunctive relief under the PID Act to restrain an alleged reprisal against her (i.e. the probationary review process).
32. The PID Act permits the QIRC and the Supreme Court of Queensland to issue injunctions to restrain alleged reprisals made against persons who, like Ms Kelsey, make a public interest disclosure under the PID Act. Section 48 of the PID Act permits certain persons (including an employee and the Commission) to apply to the QIRC for an injunction about a reprisal if the reprisal has caused or may cause detriment to an employee and involves or may involve a breach of the *Industrial Relations Act 2016* (Qld) or an industrial instrument under that Act.
33. The Commission was not a party to the QIRC Proceeding though for reasons which are explained further in these submissions, it had a relevant interest, pursuant to its statutory functions, in the matters the subject of the QIRC Proceeding, namely the restraining of an alleged reprisal against a person who had made a public interest disclosure to the Commission.
34. On 1 February 2018, the QIRC restrained Mr Smith from taking part in any resolution of the Council in relation to Ms Kelsey's employment, or from having any involvement, direct or indirect, in the development or provision of information for any such resolution of the Council.
35. On 7 February 2018, the Council terminated Ms Kelsey's employment at a Special Council Meeting.

36. The vote on the decision to terminate was seven councillors in favour and five councillors against the decision. The seven councillors who voted to terminate Ms Kelsey's employment were (herein referred to as "the Councillors"):

- (a.) Ms Cherie Dalley;
- (b.) Mr Russell Lutton;
- (c.) Mr Stephen Swenson;
- (d.) Mr Laurence Smith;
- (e.) Mr Phillip Pidgeon;
- (f.) Ms Trevina Schwarz; and
- (g.) Ms Jennifer Breene.

37. The Councillors did not give any reasons for the termination of Ms Kelsey's employment at the time. The "rules of debate" for the decision were used by the Councillors such that not only were no reasons given by them, but there was no debate at the meeting about the proposed decision. The Councillors gave reasons for their decisions for the first time in the QIRC Proceeding.
38. On 15 February 2018, Ms Kelsey met with Ms MacSporran, and the Commission's then CEO, Mr Forbes Smith. At the meeting Ms Kelsey discussed her concerns regarding the alleged conduct of Mr Smith.

The Commission's use of powers in the investigation

39. Thus, in terms of the chronology of the relevant events, Operation Front commenced *before* the Council's decision to terminate Ms Kelsey's employment. After the termination, a focus of Operation Front became whether the evidence proved or disproved that Ms Kelsey's employment was terminated because she had lodged the PID on 12 October 2017. In other words, one focus of the investigation was whether the Councillors had taken an unlawful reprisal against Ms Kelsey for terminating her employment because she had lodged the PID.
40. During the investigation, the investigative powers exercised by the Commission included:

- (a.) notices to attend hearings under section 82 of the CC Act, which resulted in closed investigative hearings conducted under section 176 of the CC Act (11 witnesses in total were called to a hearing);
 - (b.) notices to discover information under section 75 of the CC Act;
 - (c.) search warrants issued under section 87 of the CC Act;
 - (d.) surveillance device warrants issued under section 330 of the *Police Powers and Responsibilities Act 2000* (Qld); and
 - (e.) telecommunications interception warrants issued under the *Telecommunications (Interception and Access) Act 1979* (Cth).
41. The Commission issued Notices to Discover under section 75 of the CC Act to Ms Kelsey, as the then CEO, on 7 December 2017, 14 December 2017, and 7 February 2018.
42. On 4 December 2017, the Commission executed a search warrant issued under section 87 of the CC Act at Ms Kelsey's office at the Council. A further search warrant was executed on 30 January 2018.
43. Mr Smith was provided with an opportunity to attend at the Council to assist in the execution of the search warrants but he declined. On 6 December 2017, Mr Smith, Ms Kirby Orr (his chief of staff), and other Council officers departed Australia to the United States of America for a trade mission.
44. On 17 December 2017, Ms Orr returned to Australia in possession of Mr Smith's electronic devices. Mr Smith remained overseas. The devices were seized during an examination by Australian Border Force officers of the luggage of Ms Orr at Commission's request. Commission officers later seized Mr Smith's electronic devices, being two iPhones, an iPad, and a USB drive from the Australian Border Force.
45. The Commission's examination of Mr Smith's electronic devices uncovered information and evidence that, despite the orders of the QIRC, Mr Smith colluded with the Councillors who had voted to terminate Ms Kelsey's employment. As a result, the Councillors became subjects of the investigation in addition to Mr Smith.
46. During the investigation, it became apparent that Mr Smith and six of the Councillors (excluding Mr Lutton) had used encrypted communications apps, such as "WhatsApp" and

“Telegram” to communicate regarding Council decisions and the potential termination of Ms Kelsey’s employment in a group conversation titled “Fab 7”.

47. The communications in the “Fab 7” group conversation showed Mr Smith and six of the Councillors discussing Ms Kelsey’s probation process and decisions to be made in relation to it.
48. By the analysis of lawfully intercepted communications, the Commission obtained evidence that some of the Councillors had or intended to delete the “Whatsapp” application. This gave rise to the suspicion such deletion was for the purpose of destroying evidence relevant to the Commission’s investigation which was at that time, to the Councillors’ knowledge, was on foot.
49. On 25 January 2018, the Commission issued Notices to Discover under section 75 of the CC Act to Ms Dalley, Mr Lutton, Mr Laurence Smith, Ms Breene, Mr Swenson, and Mr Pidgeon. The Notices sought, among other things, electronic communication or files in the persons’ possession between or authored by them and Mr Smith about Ms Kelsey’s probationary review or any matter connected to Ms Kelsey’s probationary review.
50. The Commission also executed search warrants:
 - (a.) against the Council in March and May and June 2018; and
 - (b.) against the Councillors on 6 June 2018 to seize mobile telephones used by each of the Councillors and which were owned by the Council.
51. A forensic examination of the Councillors’ mobile devices failed to recover “WhatsApp” communications except for Ms Dalley’s mobile telephone device. An examination of those communications evidenced communications which occurred from 4 December 2017 and after Mr Smith’s electronic devices being seized by Australia Border Force on 17 December 2017. The communications extracted from Ms Dalley’s mobile devices appear to have occurred up to and following the vote to terminate Ms Kelsey’s employment on 7 February 2018. The communications however did not reveal the identities of the people sending and replying to messages. The Commission conducted closed investigative hearings between 11 June 2018 and 3 July 2018 with each of the Councillors attending a closed investigative hearing.. Two further closed investigative hearings were conducted on 24 July 2018 (with Ms Dalley) and on 11 September 2018 (with Mr Swenson).

52. During Operation Front, the investigating team would meet weekly to discuss the progress of the investigation. The progress of Operation Front was reported to the Commission's "Executive Leadership Team" ("the ELT") each month and to the Commission.
53. The investigating team's reports provided to the ELT between 19 February 2018 and 16 January 2020 have been produced by the Commission to the PCCC in response to the PCCC's Summons dated 11 June 2021.
54. The first ELT Report is dated 19 February 2018. The Terms of Reference are stated in that document (and the other ELT Reports) as:
 - To investigate and obtain sufficient evidence to prove or disprove the allegations that the subjects and/or others are involved in corrupt conduct within the meaning of s.15 of the *Crime and Corruption Act 2001*.
 - If criminality is detected, to obtain sufficient evidence to prosecute the subjects and/or any other person identified as being involved in corrupt conduct within the meaning of s.15 of the *Crime and Corruption Act 2001*.
 - If corrupt conduct is detected, obtain sufficient evidence to enable the institution of disciplinary proceedings against the appropriate subject officer/s.
 - To identify the potential for confiscation and proceeds of crime action and if so, institute such action against the subject officers and/or any other involved persons.
 - To identify corrupt conduct prevention, systemic and procedural issues relevant to the alleged misconduct.
55. The Commission's focus was to "investigate and obtain sufficient evidence to prove or disprove the allegations". The Commission did not pursue the investigation with a closed mind.
56. As is its usual practice, the Commission also frequently reported to the PCCC about Operation Front at meetings of the PCCC, including in relation to operational matters. The PCCC will have, and be aware of, the detail of those reports and communications. The Commission seeks the PCCC's permission to refer to those communications at the inquiry, including, if necessary, in any hearings.

Mr Smith and the Councillors are charged with fraud – 26 April 2019

57. The Commission's investigations from 8 November 2017 to April 2019 resulted in a decision to recommend the consideration of charges against the Councillors on 24 April 2019.
58. The Commission has produced to the PCCC the material which it gathered during its investigation which supported the charges, some of which is summarised above.
59. On 24 April 2019, a meeting was held at the Commission between the following persons:
 - (a.) the Chairperson;
 - (b.) Mr Paul Alsbury, Senior Executive Officer (Corruption);
 - (c.) Mr Mark Reid, Executive Director, Corruption Operations;
 - (d.) Mr David Beattie, Detective Sergeant;
 - (e.) Mr Mark Andrews, Detective Senior Sergeant, Operations Leader;
 - (f.) Detective Inspector David Preston, Operations Coordinator, Corruption Operations;
and
 - (g.) Mr Andrew Francis, Detective Sergeant.
60. The purpose of the meeting was to discuss the evidence and prospects of success of fraud charges against Mr Smith and the Councillors and whether it was in the public interest to pursue the charges.
61. At the meeting, the Chairperson of the Commission approved the recommendation to refer the matter to a seconded police officer to consider criminal charges against the Councillors.
62. Although the Commission conducted the investigation, the charge was laid by a sworn police officer seconded to the Commission who ultimately must also be satisfied the charges were appropriate. In the present case, the arresting officer was Detective Sergeant Francis ("DS Francis"), who was also the case officer for the investigation. In accordance with the Chairperson's approval on 24 April 2019, the brief of evidence was referred to DS Francis for consideration of charges against Mr Smith and the councillors.
63. The following material was provided to the Chairperson for consideration, prior to the meeting on 24 April 2019:

- (a.) the Chairperson's cover sheet dated 23 April 2019;
 - (b.) advice from Mr Paul Alsbury dated 23 April 2019;
 - (c.) a memorandum entitled "Consideration to commencement of proceedings – Operation Front" dated 25 March 2019 and prepared by DS Francis;
 - (d.) a statement of Ms Kelsey dated 22 March 2019;
 - (e.) a statement of Cr Darren Power dated 21 March 2019;
 - (f.) an unsigned statement of Ms Andrea Milberry-Smith, who was Mr Smith's wife, though separated. The statement was unsigned pending the completion of other proceedings. The statement was signed on 10 May 2019;
 - (g.) an outline of closing submissions prepared on behalf of Ms Kelsey dated 19 March 2019 which had been filed in the QIRC; and
 - (h.) a memorandum entitled "Operation Front – approval to commence further charges against several Logan City Councillors" dated 26 March 2019 and prepared by Detective Inspector Preston.
64. Each of these documents has been produced by the Commission to the PCCC on 21 June 2021.
65. The memorandum referred to in sub-paragraph 63(c) above contains a detailed summary of the evidence including evidence of the Councillors' use of "WhatsApp" to communicate with each other about Ms Kelsey's employment and other matters. A summary of important evidence also appears in the Queensland Police Service Court Briefs dated 30 April 2019 which have been produced by the Commission to the PCCC.
66. On 26 April 2019, DS Francis arrested and charged Mr Smith and the Councillors.
67. The charge for each of the Councillors was for the offence of fraud under section 408C(1)(e);(2A)(a) of the Criminal Code (Qld) for dishonestly causing detriment to a person (namely, the dismissal of Ms Kelsey's employment) for a value of at least \$100,000. 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]
68. The facts relating to the charges are summarised in the Queensland Police Service Court Briefs dated 30 April 2019 which have been produced by the Commission to the PCCC. The essence

of the case against the Councillors was that they had terminated Ms Kelsey's employment because she had made a PID on 12 October 2017. The alleged dishonesty arose from their knowledge that they could not terminate her employment for that reason.

69. Operation Front concluded on 8 July 2020.

The Director of Public Prosecutions takes over conduct of the prosecutions

70. The charges against the Councillors were handled by the DPP as the prosecuting agency. This is the usual practice for charges of this nature in Brisbane. From that point the DPP had the conduct of the matter.

71. On 28 June 2019, a partial brief of evidence was delivered by the Commission to the DPP.

72. On 5 August 2019, an updated brief of evidence was delivered by the Commission to the DPP. The full brief of evidence could not be delivered at this time because several statements were being considered by legal representatives of the witnesses. Some of the Council's other councillors who were providing statements had raised issues of legal professional privilege.

73. On 11 September 2019, the remainder of the brief of evidence was delivered by the Commission to the DPP. The brief consisted of 44 statements and 284 exhibits.

74. The DPP from time to time requested further material from the Commission which was supplied by the Commission. Those records have been produced by the Commission to the PCCC. 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.

The committal hearing beginning on 30 November 2020

75. The committal hearing for the charges against the Councillors was due to start on 30 November 2020.

76. On 23 November 2020, the Commission received a draft outline of submissions from the DPP in anticipation of "no case" submissions being made by each of the defendants at the committal hearing. At the time it was received, it was understood by the Commission to be an appropriate step to prepare for a committal of this size and complexity where it might be expected to be made at the conclusion of the committal hearing.

77. The committal hearing began on 30 November 2020. Hearings were held over nine days from 30 November 2020 to 10 December 2020. Eighteen witnesses gave evidence. Ms Kelsey gave evidence on 7 December 2020 and 8 December 2020 and was subject to cross-examination on those days.

The DPP discontinues the charges after the committal hearing

78. On 10 December 2020, DPP prosecutors met with Mr Alsbury and others from the Commission. During the meeting, the prospects of a successful prosecution were discussed in the light of the committal hearing.
79. The DPP prosecutors identified the following concerns:
- (a.) credibility issues regarding Ms Kelsey and other Crown witnesses; and
 - (b.) the ability to exclude innocent hypotheses about the reasons the Councillors voted to terminate Ms Kelsey's employment.
80. In December 2020, the DPP received submissions on behalf of each of the Councillors which requested that the prosecution not proceed further. On 12 January 2021, the submissions were provided to the Commission.
81. On 2 February 2021, the Commission made a submission to the DPP which explained its view that the prosecution ought to continue because there were reasonable prospects that the Councillors would be convicted.
82. On 6 April 2021, the Commission received from the DPP a memorandum dated 6 April 2021 from the Director of the DPP, Mr Carl Heaton QC. 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 eight defendants (i.e. the Councillors and Mr Smith). The memorandum stated that the charges would be discontinued against each defendant.
83. On 9 April 2021, the Chairperson of the Commission and Mr Alsbury met with Mr Heaton QC. The purpose of the meeting was to discuss the DPP's decision to discontinue the fraud charges.
84. On 14 April 2021, the fraud charges were discontinued by the DPP. No further evidence was offered. The charges were dismissed and the accused Councillors were discharged.

The Local Government Association of Queensland's complaint dated 5 May 2021

85. As the PCCC is aware, on 5 May 2021, the LGAQ lodged a complaint dated 5 May 2021 with the PCCC ("the Complaint").
86. In the Complaint, the LGAQ alleges in summary that:
- (a.) the Commission attempted to improperly influence the QIRC Proceeding; and
 - (b.) that the laying by the Commission of fraud charges against Mr Smith and the Councillors was inappropriate and the purpose of laying them was to intentionally benefit Ms Kelsey in the conduct of the QIRC Proceeding.
87. The matters raised in the Complaint are addressed below.
88. Certain legislative provisions of the CC Act and the PID Act relating to the protection given to those who make public interest disclosures under the PID Act are relevant. These legislative provisions confer a statutory role and responsibility on the Commission in relation to the protection of those who make public interest disclosures, including to apply to the QIRC or the Supreme Court for injunctive relief to protect public officer employees from alleged reprisals.

The Public Interest Disclosure Act 2010 (Qld)

89. The main objects of the PID Act (section 3, PID Act) are to:
- (a.) promote the public interest by facilitating public interest disclosures of wrongdoing in the public sector;
 - (b.) ensure that public interest disclosures are properly assessed and, when appropriate, properly investigated and dealt with;
 - (c.) ensure that appropriate consideration is given to the interests of persons who are the subject of a public interest disclosure; and
 - (d.) afford protection from reprisals to persons making public interest disclosures.
90. Uncontroversially, on 12 October 2017 Ms Kelsey made a public interest disclosure under the PID Act (s13, PID Act). The QIRC accepted that the 12 October 2017 letter constituted a PID (*Kelsey v Logan City Council & Ors* (No 8) [2021] QIRC 114, [62], [153]). Ms Kelsey was

therefore entitled to the statutory protection afforded to her under the PID Act, and entities such as the Commission were bound to provide.

91. Chapter 4 of the PID Act deals with protection given to those who make public interest disclosures. A person who makes a public interest disclosure is not subject to any civil or criminal liability or any disciplinary action for making the disclosure (s36, PID Act).
92. Under section 40 of the PID Act, a person must not cause, or attempt to conspire to cause detriment to another person because, or in the belief that the other person or someone else has made, or intends to make, a public interest disclosure. If a person does so they have taken a reprisal which is an indictable offence with a maximum punishment of 2 years imprisonment (s41, PID Act).
93. The Commission is given 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. Consequently, the QIRC Proceeding was not a purely industrial or civil matter about which the Commission did not have an interest. The Commission had a statutory obligation in relation to alleged reprisal actions against public officer employees such as Ms Kelsey or proceedings related to such alleged reprisals on foot in the QIRC. The Commission has a statutory function which enables it to *act in the interests of public officer employees*, including taking direct action in the QIRC and the Supreme Court. Thus, the Commission was under a statutory obligation to consider whether and to the extent it intervened on Ms Kelsey's behalf.
94. In the present case, Ms Kelsey was a "public officer" under the PID Act.
95. Under section 48 of the PID Act, a person may apply to the QIRC for an injunction about a reprisal if the reprisal has caused or may cause detriment to an employee and involves or may involve a breach of the *Industrial Relations Act 2016* (Qld) or an industrial instrument under that Act.
96. Section 48(2)(c) of the PID Act gives the Commission power to apply for the injunction "acting in the employee's interests with the employee's consent" if the employee is a public officer and the reprisal involves or may involve an act or omission that the Commission may investigate.
97. Under section 49 of the PID Act, the Commission may apply to the Supreme Court for an injunction about a reprisal "acting in the person's interests with the person's consent" if the

person is a public officer, and the reprisal involves or may involve an act or omission that the Commission may investigate.

98. Under section 51 of the PID Act, the QIRC or the Supreme Court may grant an injunction if satisfied that a person has engaged, is engaging or is proposing to engage, in conduct amounting to:
- (a.) a reprisal; or
 - (b.) attempting a reprisal; or
 - (c.) aiding, abetting, counselling or procuring a reprisal; or
 - (d.) inducing or attempting to induce, whether by threats, promises or otherwise, a reprisal; or
 - (e.) being in any way, directly or indirectly, knowingly concerned in, or party to, a reprisal.

The Crime and Corruption Act 2001 (Qld)

99. The Commission has important statutory functions under the CC Act to prevent and investigate corruption; gather evidence for the prosecution of offences, and to protect persons who assist the Commission from victimisation or other adverse consequences.
100. One of the main purposes of the CC Act is to continuously improve the integrity of, and to reduce the incidence of corruption in, the public sector (s4(b), CC Act). The CC Act's purposes are to be achieved primarily by establishing the Commission (s5(1), CC Act).
101. The Commission is to help units of public administration (such as the Council) to deal effectively and appropriately with corruption by increasing their capacity to do so (s5(4), CC Act).
102. The Commission has a prevention function to help prevent major crime and corruption (s23, CC Act).
103. The Commission performs its prevention function by, among other things (s24, CC Act):
- (a.) providing information to, consulting with, and making recommendations to units of public administration (including the Council);

- (b.) using information it gathers from any source in support of its prevention function;
- (c.) generally increasing the capacity of units of administration (including the Council) to prevent corruption by providing advice and training; and
- (d.) ensuring that in performing all of its functions it has regard to its prevention function.

104. The Commission has a corruption function, which includes (s33, CC Act):

- (a.) raising standards of integrity and conduct in units of public administration (including the Council);
- (b.) ensuring a complaint about, or information or matter involving, corruption is dealt with in an appropriate way having regard to the CC Act; and
- (c.) to investigate whether corrupt conduct may have happened, may be happening, or may happen.

105. The Commission has an overriding responsibility to promote public confidence in the integrity of units of public administration (including the Council) (s34(d), CC Act).

106. The Commission performs its corruption function by, among other things, assuming responsibility for, and completing, an investigation and gathering evidence for the prosecution of persons for offences (ss34(g), 34(h), CC Act).

107. A public official (which includes Ms Kelsey) who reasonably suspects that a complaint, or information or matter involves, or may involve, corrupt conduct **must** notify the Commission (s38, CC Act).

108. The Commission has primary responsibility for dealing with complaints about, information or matter involving corrupt conduct (s45, CC Act).

109. The Commission has an interest in assisting and protecting those people who have helped it to carry out its statutory functions, most notably public interest disclosers. 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.

110. 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,

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

111. The notification by Ms Kelsey of corrupt conduct to the Commission under section 38 of the CC Act falls within providing help to the Commission in performing its functions and, as noted in paragraph 107, this discharges her obligation under section 38 of the CC Act. Ms Kelsey was entitled to the protection afforded by section 212 of the CC Act.
112. Under section 343 of the CC Act, a person who discloses information to the Commission for the performance of its functions does not become liable to disciplinary action.
113. Under section 344 of the CC Act, the Commission may apply to the Supreme Court of Queensland for an injunction on the ground that a person, has engaged, or is proposing to engage, in conduct that constitutes or would constitute an offence, or an attempt to commit an offence against section 212 of the Act (i.e. the victimisation prohibition referred to above)..

The QIRC Proceeding

114. On 1 December 2017, Ms Kelsey commenced the QIRC Proceeding.
115. The QIRC gave judgment dismissing Ms Kelsey's application in the QIRC Proceeding on 1 April 2021. She has since filed an application to obtain leave to appeal the that judgment.
116. The relief sought by Ms Kelsey included relief under section 48 of the PID Act, being the same section which empowered the Commission to apply for injunctive relief in Ms Kelsey's interests and with her consent.
117. On 1 February 2018, Ms Kelsey obtained injunctive orders from the QIRC that Mr Smith was prohibited from taking part in any resolution by the Council in respect of her employment.
118. On 5 February 2018, the Commission wrote to each of the Council's councillors informing them of the penalties involved in taking action against a person because they had made a public interest disclosure. The Commission informed the councillors that it had commenced an investigation into allegations of suspected corrupt conduct by Mr Smith and, since its

commencement, had received additional information about Mr Smith's conduct from other disclosers.

119. The 5 February 2018 letter was an appropriate way for the Commission to perform its corruption function under the CC Act. The Commission had previously written in similar terms to the Fraser Coast Regional Council on 14 June 2016 . The Commission has since also written to the Maranoa Regional Council in May 2020 regarding the protection from reprisals given to persons who make public interest disclosures.
120. The letter to the Fraser Coast Regional Council was written after Mr Greg Hallam AM of the LGAQ contacted the Chairperson on 14 June 2016 to alert him to a motion to remove the CEO at that council.
121. After the Chairperson had sent the letter to the Council on 5 February 2018, Mr Hallam AM telephoned the Chairperson to complain about it.. On 9 February 2018, the LGAQ subsequently complained about the Commission's conduct to the PCCC. The LGAQ complained that the Commission had exceeded its powers and had involved itself in a significant industrial relations dispute. The Commission sent a letter dated 3 April 2018 to the PCCC which addressed the matters raised in the complaint. As the PCCC is aware, this was investigated and by letter dated 12 June 2018, the PCCC advised the Commission that the Commission had acted appropriately in its dealings with the Council and on 14 June 2018 issued a media release to that effect.
122. After Ms Kelsey's employment was terminated 7 February 2018, she amended her application in QIRC to include the Councillors (who had voted to terminate her employment) as respondents in the proceeding.

Ms Kelsey files the Notice to Produce in the QIRC

123. The Commission's investigation had begun on 8 November 2017. Ms Kelsey and all the Councillors were aware of the investigation and that the Commission had exercised its powers to seize evidence and gather information.
124. By the end of June 2018, the investigative steps which had been taken by the Commission included the following:
 - (a.) issuing several Notices to Discover under section 75 of the CC Act to Ms Kelsey;
 - (b.) executing several search warrants issued under section 87 of the CC Act at Ms Kelsey's office at the Council;

- (c.) issuing Notices to Discover under section 75 of the CC Act to Ms Dalley, Mr Lutton, Mr Laurence Smith, Ms Breene, Mr Swenson, and Mr Pidgeon which sought electronic communications related to Ms Kelsey's probationary review;
 - (d.) executing several search warrants against the Council;
 - (e.) executing search warrants against the Councillors to seize mobile telephones; and
 - (f.) conducting closed investigative hearings with all the Councillors except for Ms Breene (whose hearing was held on 3 July 2018).
125. On 12 April 2018, Ms Kelsey's solicitors wrote to the Commission in a letter dated 12 April 2018 asking for its assistance in the QIRC Proceeding under the PID Act and the CC Act.
126. On 15 May 2018, Ms Kelsey's solicitors wrote to the Commission asking for it to provide to Ms Kelsey:
- "1. documents evidencing any alignment between the Mayor and Councillors Dalley, Lutton, Swenson, L. Smith, Pidgeon, Schwarz and Breen (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
 - 2. 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".
127. The Commission could have lawfully disseminated information to Ms Kelsey under section 60 and/or section 62 of the CC Act. The Commission decided not to do so, but rather take a neutral position as between Ms Kelsey and the Council. Dissemination of information to Ms Kelsey would have been consistent with the performance of the Commission's corruption function. The question whether the Commission had the power to disseminate information to Ms Kelsey under section 60 and/or section 62 of the CC Act is separate from the question about the use to which Ms Kelsey could have made of that information.
128. On 26 June 2018, Mr Rob Hutchings, Director, Legal Services, informed Mr Dan Williams of Minter Ellison by telephone that the Commission would prefer to produce any material to the QIRC, rather than to the parties directly. 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.

129. On 28 June 2018, Ms Kelsey filed in the QIRC:

(a.) a Form 32 (Request for attendance notice); and

(b.) a Form 32B (Attendance notice to produce) (“the QIRC Notice to Produce”).

130. The correspondence dated 28 June 2018 from Ms Kelsey’s solicitors to the QIRC registry was copied to the legal representatives of all the parties.

131. The QIRC Notice to Produce was issued by the QIRC and was served on the Commission by letter dated 29 June 2018 from Ms Kelsey’s solicitors.

132. The QIRC Notice to Produce sought production by 6 July 2018 of the documents and things described in the schedule, as follows, which were required to be produced to the QIRC registry:

“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”.

133. On 29 June 2018, McInnes Wilson Lawyers (who acted for six of the Councillors) wrote to the Commission and objected to the Commission producing documents in response to the QIRC Notice to Produce. McInnes Wilson Lawyers also:

(a.) stated that Ms Kelsey was improperly using the Commission’s broad investigative powers to assist in the prosecution of a civil action; and

(b.) asked “how it may have lawfully become known to Ms Kelsey that the CCC may be in possession of such information”.

134. On 3 July 2018, Mr Alsbury of the Commission responded to McInnes Wilson Lawyers by letter dated 3 July 2018. The letter stated, in part:

“The *Crime and Corruption Act 2001*, in sections 60 and 62, gives the CCC powers to disseminate information and/or documents. 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. I note further that, in the first instances, any 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.

I note the query in the last sentence of the third-last paragraph of your letter. 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”.

135. At the time in July 2018, section 60 of the CC Act was in the following terms:

“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.
- (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.”

136. Section 60 of the CC Act has now been amended. It is now in the following terms:

“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.”

137. Section 62 of the CC Act is now repealed. As at July 2018, it was as follows:

“62 Restriction on access

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

138. Though section 62 of the CC Act is now repealed, it is generally reflected in the amended section 60 of the CC Act (referred to above at paragraph 136).

139. On 5 July 2018, the Commission delivered documents to the QIRC registry in response to the QIRC Notice to Produce. The documents were produced on strict conditions which are addressed further below. The Commission's letter dated 5 July 2018 to the QIRC stated, in part:

“The CCC has gathered the enclosed material in a corruption investigation into conduct of Logan City Councillors which is related to the conduct alleged in QIRC matter no PID/2017/3. In assessing the material provided in response to the notice, the CCC has considered the likely prejudice which might occur to the investigation. The CCC may possess other material which is strictly within the terms of the Notice, but we decline to produce that material on the grounds that it will be subject to a claim of public interest immunity.

In relation to the third category of documents produced (transcripts), the transcribed proceedings include evidence given by various of the Respondents in PID/2017/3. That evidence was given under orders restricting the use which can be made of that evidence (pursuant to s197 of the *Crime and Corruption Act 2001*). Section 197(2) of the Act provides that an answer, document, thing or statement is not admissible in evidence against the individual in a civil criminal or administrative proceeding. I raise this as it may have some impact on the future use which may be made of the information produced, although the question of admissibility is one for the Commission, and it does not bear on the production of the information under the Notice.”

140. The Commission produced the material on conditions which included:

- “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 to matter PID/2017/3 and their legal representatives for the purpose of that matter.”

141. Those conditions were 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.

142. Also on 5 July 2018, the Commission prepared the following documents:

- (a.) an “Authority to give information documents or thing to another entity or person” under s62 of the CC Act dated 5 July 2018 and signed by Mr Alsbury; and
- (b.) a “Statement concerning request for release of information, document or thing” dated 5 July 2018. This document summarises the Commission’s reasons for disseminating the information and its views on the questions of the admissibility of the information (which were for the QIRC to determine).

143. The admissibility and use of the information produced by the QIRC was a matter for the QIRC to determine. The Commission was not a party to the QIRC proceedings and 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. Had the Commission exercised its statutory prerogative to have taken the proceedings on Ms Kelsey's behalf it would in fact have had a role in that argument.

144. On 10 July 2018, Mr Alsbury sent a letter dated 10 July 2018 to the solicitors for all parties. In the letter the Commission explained its reasons for delivering the documents to the QIRC registry in response to the QIRC Notice to Produce. Mr Alsbury also confirmed that it had not advised Ms Kelsey, or her representatives, of the existence of the documents the subject of the QIRC Notice to Produce.
145. At the time in July 2018, the Commission explained to the PCCC what actions it had decided to take and the reasons for them. This information was provided as an update to the PCCC after it had determined in June 2018 not to take any action in relation to the LGAQ complaint made in February 2018 and had requested that updates be provided. On 23 July 2018, the Commission wrote to the then Chairperson of the PCCC by letter dated 23 July 2018. The letter stated, in part:

“After the CCC's investigation got under way, Ms Kelsey's solicitors, Minter Ellison, requested assistance in her application in the Queensland Industrial Relations Commission (QIRC). She requested that the CCC either intervene in her proceeding, or provide evidence which would assist in proving the assertions she was making in the QIRC about the conduct of councillors which might amount to a reprisal under the *Public Interest Disclosure Act 2010*. At that stage of the investigation it was premature to determine which of those courses, if any, should be adopted.

In the investigation a number of councillors were called to the hearings. In pursuing those lines of inquiry, evidence was obtained which was potentially relevant to the question of whether the 7 councillors who voted in favour of terminating Ms Kelsey's employment did so as a reprisal against her notifying the CCC of suspected corrupt conduct of the Mayor, or because they were directed or influenced to do so by the Mayor.

By late June 2018 the hearings planned in this matter were largely complete and an assessment was made of material which might assist Ms Kelsey in her action by providing evidence of collusion, reprisal and acting at the direction of the Mayor. Around this time Minter Ellison made contact with the CCC and asked for advice on whether the CCC would consider providing material gathered in the investigation in response to a Notice to Produce.

Usually, Notices to Produce are issued at the request of a party in the QIRC and material is produced to that party. The CCC is not obliged to produce any material in

response to a subpoena (see s.213(4) CC Act) but indicated it would consider complying with a Notice to Produce if it required production of material to the QIRC registry.

Ultimately, such a Notice was issued by the QIRC and the CCC decided it was in the public interest to provide certain material in response to it. The material was provided to the QIRC in the required timeframe and the parties are now engaged in legal argument about the validity of the Notice and the admissibility of the material in the QIRC proceeding. The CCC is not presently involved in those arguments in the QIRC, but may be required to involve itself in future.

In summary therefore, 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.

If I can assist further please do not hesitate to contact me.”

146. In August 2018, the QIRC set aside the QIRC Notice to Produce.
147. The Commission did not seek to admit any information into evidence in the QIRC Proceeding. In response to the QIRC Notice to Produce, it decided to produce documents to the QIRC registry on strict conditions that the QIRC was to decide its admissibility in the QIRC Proceeding.
148. 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. As demonstrated by the above summary of the provisions of the PID Act (see paragraphs 89 to 98 above), the Commission had the power, if it wished, to take direct action in the QIRC “in the interests” of Ms Kelsey. Ultimately, the Commission decided not to commence its own proceeding in the QIRC because it considered that there was a greater public interest in the Commission focussing on the serious criminal investigation in its ongoing Operation Front (which had commenced before the QIRC proceeding).
149. Specifically, on 23 July 2018 the Commission informed the PCCC about the steps it had taken in relation to the QIRC Notice to Produce, including that:

“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”.
150. By letter dated 24 August 2019, the then Chairperson of the PCCC replied to the Chairperson’s letter dated 23 July 2018. The letter stated, in part:

“the Committee notes your advice that the CCC has determined to assist Ms Kelsey’s case in the Queensland Industrial Relations Commission by providing certain evidence gathered to the tribunal.

The Committee would appreciate continuing to be kept informed of this matter.”

151. 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.

The October 2018 documents

152. The Complaint alleges that the Commission acted improperly by delivering documents to the Council on 3 October 2018. It is said that the Commission’s conduct was unfair and was designed to avoid and evade a decision of the QIRC.
153. These allegations are not supported by the evidence.
154. In June 2018, it was apparent that some of the Councillors who had been using the encrypted WhatsApp messaging app to communicate with each other had deleted the app and its messages. In addition to evidencing an intention by those Councillors to frustrate or obstruct a Commission corruption investigation which was to their knowledge on foot, it also raised the issue whether the Council had been properly complying with its obligations under the *Public Records Act 2002* (Qld) (“the PR Act”) and whether some of the Councillors had unlawfully disposed of public records.

The Public Records Act 2002 (Qld)

155. The main purposes of the PR Act are to ensure (s3, PR Act):
- (a.) the public records of Queensland are made, managed, kept and, if appropriate, preserved in a useable form for the benefit of present and future generations; and
 - (b.) public access to records under the PR Act is consistent with the principles of the *Right to Information Act 2009* (Qld) and the *Information Privacy Act 2009* (Qld).

156. A public record includes a record received or kept by a public authority (such as the Council), in the exercise of its statutory, administrative, or other public responsibilities or for a related purpose (s6, PR Act).
157. The Council must make and keep full and accurate records of its activities (s7(1), PR Act). The chief executive officer of the Council must ensure the Council complies with its obligation in s7(1), PR Act (s7(2), PR Act). The Council is responsible for ensuring the safe custody and preservation of records in its possession (s8(1), PR Act).
158. Under section 13 of the PR Act, a person must not dispose of a public record unless the record is disposed of under an authority given by the State Archivist, or under some other legal authority, justification, or excuse.
159. The State Archivist and an office called the Queensland State Archives were established under section 21 of the PR Act. The functions of the State Archivist are stated in section 24 of the PR Act. They include making decisions about the disposal of public records; managing, keeping and preserving records for public authorities; and to give advice about the making managing, keeping, and preserving of public records.
160. The issue of the use of private email accounts to conduct public business, and in particular concerns that raises regarding the importance of preservation of public records had been a matter of concern for the Commission since 2017 when it investigated the use of private emails by the Honourable Mark Bailey, Minister for Transport and Main Roads.

The delivery of documents to the Council on 3 October 2018

161. On 25 September 2018, Detective Inspector David Preston, Operations Coordinator Corruption Operations, met with members of the Queensland State Archives.
162. An internal email dated 25 September 2018 (12.01pm) sent by Detective Inspector Preston to the investigation team including DS Francis states, in part (emphasis added):

“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.

They advised that they have placed a Disposal Freeze on Ipswich and Logan City Councils and are willing to assist in any other councils we may be looking at to

prevent destruction of the documents. Under Section 13 of the Public Records Act, any breach of the section such as destruction of records or failing to keep the record can receive up to 165 penalty units (at \$165 per unit that is Max \$22,000). Councillors do not come under the act, with the exception that if they are using council phones or discussing council business, then they are required to provide council with those records for storage. In the case of Logan CC it would appear that any of the councillors who have deleted their WhatsApp have breached the Act and could be prosecuted.

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 LCC 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 that section.”

163. The State Archives office subsequently clarified that there was no disposal freeze on the Council at that time.
164. On 3 October 2018, DS Francis and Detective Sergeant Troy Newman attended the Council and delivered to its acting CEO (Mr Silvio Trinca) extraction reports of WhatsApp group communications which the Commission had extracted from the mobile telephone devices of Mr Luke Smith and Ms Dalley. On 10 September 2018, the Commission had also delivered copies of these documents to Mr Smith’s lawyers and copies were also given to Ms Dalley under cover of letter from Mr Alsbury dated 10 September 2018. On 13 December 2018, in response to a request by Ms Dalley’s lawyers, the Commission consented to Ms Dalley disclosing the WhatsApp group communications that had been delivered to her for the purposes of the QIRC proceedings.
165. 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 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.
166. DS Francis’ interactions with Mr Trinca on 3 October 2018 were audio recorded and a transcript of the recording has been produced to the PCCC. The transcript is consistent with the matters just described.
167. DS Francis thereafter liaised with the Council and its legal representatives in relation to investigations about section 13 of the PR Act and the potential destruction of Council’s public

records. These records have been produced by the Commission to the PCCC and support the nature of the investigations then being undertaken in relation to the PR Act.

168. On 15 October 2018, the Council's solicitors contacted DS Francis by telephone. The conversation is recorded in DS Francis' official police diary and an email dated 15 October 2018 (4.39pm) sent to the investigating team. Both documents have been produced to the PCCC. The email states (emphasis added):

“Mr Tim Fynes-Clinton (King and Co - LCC Lawyer) rang this afternoon in regards to the material left with SiMio (Fab 7, Hallam chat, Spiro chat, Dalley data). **I again reiterated our interest in the material obtained from LCC phones was with respect to s13 of the Public Records Act.** I also confirmed I had requested a statement from Silvo as A/CEO with regards to the nature of the dialogue contained in the Whatsapp discussion, specifically if the dialogue was work related, which it obviously is. I re-affirmed the confidential nature of the information and Mr Fynes-Clinton confirmed no copies had been made. Mr Tim Fynes-Clinton:

- Indicated that the material may well be work related, and therefore a disclosable public record, however a firm view on this will be obtained for the CCC by COB this week in full and thorough consideration to the relevant legislation
- Requested context to the provided information. I indicated the material was obtained from LCC phones seized virtue CCC search warrants on Border Force (LS phone) and on Crs (Dalley's phone)
- Inquired if the CCC had disseminated the material to any other party to which the records relate, and when I confirmed it had been disclosed to persons (or their legal representatives), Mr Fynes-Clinton expressed an interest as to why then the material had not yet found its way into the QIRC. He was perhaps only thinking out loud, but his amazement that the material had yet to be disclosed was obvious. **I re-iterated our interest was only with respect to s13 and a related investigation.**
- Inquired if the CCC had forensically examined the phones of the other Cr's (after executing a CCC search warrant for the phones), and when I confirmed we had, stated the obvious inference was then that the material must have then been deleted (given the absence of records from those involved in the Whatsapp discussions). Perhaps Mr Fynes-Clinton was appreciating the consequences related to the Fab 7 Cr's deleting the material from their phones with respect to s13 of the PR Act.
- Indicated that he was aware that LCC might well be required to disclose the material in other relevant proceedings.”

169. The above email which records the contents of DS Francis' discussion on 15 October 2018 is consistent with the bona fide investigation then being undertaken by the Commission into the

Council's (and some of the Councillors') treatment of alleged public records. DS Francis was investigating whether there was a case against the Councillors for alleged misconduct relating to their use of WhatsApp and the deletion of the messages, particularly in the face of an ongoing Commission corruption investigation.

Ms Kelsey files a disclosure application against the Council in the QIRC Proceeding

170. On 24 October 2018, Ms Kelsey's solicitors filed an application for disclosure by the Council in the QIRC Proceeding.

171. Ms Kelsey sought disclosure against the Council of all documents which relate to, evidence or otherwise reveal the contents of communications sent between the Councillors via social media applications including WhatsApp in the period 1 January 2017 to 14 February 2018.

172. On 1 November 2018, the Council's solicitors sent an email (4.03pm) dated 1 November 2018 to DS Francis. The email advised, among other things, that:

“until such time as the QIRC has resolved the issue of the discoverability (and admissibility) of the material you left with him on 3 October 2018, it would be inappropriate for Mr Trinca to make any determination in relation to which parts of that material are “public records”, and entered into Council's system. Making such a determination and entering parts of those documents into Council's records system at this point in time, potentially enabling the Applicant to gain access to same, will likely result in the substantive QIRC proceedings being permanently stayed if the QIRC subsequently rules that the material delivered by you to Mr Trinca on 3 October 2018 is inadmissible”.

173. On 7 November 2018, the State Archivist notified DS Francis that if a councillor uses a communication platform, such as WhatsApp, for council business then the record is a “public record” under the PR Act.

174. On 8 November 2018, DS Francis contacted Mr Trinca to “make arrangements to take back possession of the documents I provided to you”.

175. On 9 November 2018, the documents were returned to the Commission. The Commission had identified that the documents produced to Mr Trinca contained information subject to legal professional privilege which required redaction and had raised the question of whether a written dissemination authority was required for the production of the documents to the Council. These matters were addressed before the documents were returned to Mr Trinca in November 2018 (addressed below).

176. The delivery of the documents to the Council on 3 October 2018 was not “inappropriate and unfair conduct designed to avoid and evade” the decision of the QIRC which had set aside the QIRC Notice to Produce.

The “November 2018 documents”

177. On 15 November 2018, Ms Kelsey’s solicitors sent a letter to the Commission dated 15 November 2018. The letter stated in part:

“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.”

178. The letter dated 15 November 2018 was copied to the Council’s solicitors.
179. On 16 November 2018, Ms Kelsey’s solicitors sent an email to Mr Hutchings of the Commission (2.15pm) which stated:

“We refer to the correspondence from our office of 15 November 2018.

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.”

180. On 19 November 2018, the Commission hand delivered a letter from Mr Alsbury to the Council dated 19 November 2018 which enclosed “extraction reports” documents to the Council, some of which had been redacted for the reasons set out in paragraph 175.

181. Before producing the documents, the CCC had prepared a “Request and authority to disclose information (other than CCC hearing information) to an appropriate entity” document signed by Mr Alsbury on 19 November 2018. The document records the Commission’s reasons why it was appropriate to disclose the information to the Council.

182. In the Complaint, the LGAQ alleges:

- (a.) the documents were delivered to the Council on 19 November 2018 “for the sole or predominant reason that their delivery was requested by Minter Ellison”; and
- (b.) that the Commission “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.”

183. The LGAQ further alleges in the Complaint that the Commission provided “two separate false explanations” as to why the documents (the “October 2018 documents” and the “November 2018 documents”) were delivered to the Council.

184. Contrary to these allegations, the Commission delivered documents to the Council in October 2018 in pursuit of a bona fide investigation into the potential destruction by the Councillors of the Council’s public records in contravention of the PR Act and in the face of an ongoing Commission corruption investigation.

185. The Commission delivered documents to the Council in November 2018 for the reasons recorded in Mr Alsbury’s letter dated 19 November 2018 and the “Request and authority to disclose information (other than CCC hearing information) to an appropriate entity” document dated 19 November 2018.

186. 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.

187. In December 2020, Ms Kelsey’s disclosure application was ultimately withdrawn.

The Commission disseminates information to the State Archivist

188. Mr Alsbury’s letter dated 19 November 2018 had stated, in part:

“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 [Local Government Act]”.

189. As foreshadowed in the letter dated 19 November 2018, on 12 December 2018, Mr Alsbury wrote to Mr Mike Summerell of the Queensland State Archives and enclosed extraction reports of messages sent between Mr Smith and some of the Councillors stated in the letter.
190. The Commission requested that the State Archivist advise:
- (a.) whether the messages were public records;
 - (b.) whether the disposal of the messages was without appropriate authorisation;
 - (c.) whether the actions of the individual councillors breach the PR Act;
 - (d.) what actions should be taken in response to a breach of the PR Act?
191. The State Archivist produced a final report on 5 February 2019.
192. By letter dated 7 February 2019, Mr Alsbury wrote to the Council and provided a copy of the State Archivist's report together with copies of those extraction reports which evidence the communications that were identified by the State Archivist as containing public records.
193. On 27 February 2019, the Commission received a reply from the Council, being a letter dated 25 February 2019 which explained the steps taken by the Council in response to the report produced by the State Archivist, including saving any messages that were public record messages in the Council's document management system.
194. The Commission focus on the Council's obligations under the PR Act was not false or contrived. The matters summarised above from paragraph 152, together with the documents produced by the Commission to the PCCC, demonstrate the Commission's bona fide interest in the Council's obligations under the PR Act. It should be re-emphasised, in particular, that some of the Councillors had deleted public records in the face of a current Commission corruption investigation of which they were aware.
195. On 3 July 2019, as part of its prevention function, the Commission and the Queensland State Archives published a joint advisory entitled “Council records: A guideline for mayors, councillors, CEOs and council employees”. The Commission and the Queensland State

Archives had agreed in September 2018 to republish a joint publication specifically for local government regarding records management.

The State Archivist also sent a letter to all Queensland councils, co-signed by the Chairperson of the Commission, to reinforce the importance of maintaining public records.

The Chairperson's request for financial support to be given to Ms Kelsey

196. On 6 August 2018, the Chairperson of the Commission and Mr Alsbury met with Ms Kelsey. Ms Kelsey provided an update to the Commission on the status of the QIRC Proceeding and explained the difficulties she was having about funding. Ms Kelsey was advised that the Commission had previously assessed whether to join the QIRC Proceeding (i.e. pursuant to its powers under the PID Act).
197. By letter dated 7 August 2018, the Chairperson of the Commission wrote to the Honourable Mr Stirling Hinchliffe MP, Minister for Local Government. For the reasons expressed in the letter, the Chairperson requested that the government consider funding Ms Kelsey's representation by way of a special payment under the *Financial Accountability Act 2009* (Qld). The Chairperson and Mr Alsbury also met with the Minister on the same day to discuss the letter dated 7 August 2018.
198. The government declined to provide funding to Ms Kelsey.
199. By letter to the PCCC dated 12 September 2018, the Chairperson of the Commission stated:

“On 6 August 2018 I met with Ms Kelsey. She updated the CCC on the status of the QIRC proceedings. She explained she had reached the limit of her resources to fund the action. She advised that all parties to the proceedings, except her, are indemnified by the Logan City Council's publicly-funded insurance scheme. Given the number of parties involved, she is at a distinct disadvantage in such expensive litigation.

In light of these serious matters I sought a meeting with the Minister for Local Government, Minister for Racing and Minister for Multicultural Affairs. In that meeting we discussed a number of matters:

- Ms Kelsey's precarious financial position;
- The status of the litigation in the QIRC;
- 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.

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."

200. The LGAQ allege in the Complaint that the Commission had thus "taken sides" in civil litigation to which it was not a party and that its conduct was "inappropriately partisan".
201. For the reasons stated in the Chairperson's letter dated 7 August 2018, the Commission acted appropriately in meeting with Ms Kelsey on 6 August 2018, sending the Chairperson's letter dated 7 August 2018 to the Minister and meeting with the Minister on 7 August 2018. 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.

The laying of fraud charges against the Councillors

202. The LGAQ allege in the Complaint 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" against the Councillors.
203. The Commission has produced to the PCCC its investigative materials and the brief of evidence given to the DPP. The brief of evidence did not contain evidence given by the charged Councillors in hearings conducted by the Commission under compulsion.
204. The Commission carefully considered the evidence gathered during the investigation. The charges were laid because the evidence gathered by the Commission's investigation demonstrated to the Commission's satisfaction that there were reasonable prospects of success in relation to the fraud charges against Mr Smith and the Councillors and that there was reasonable and probable cause to bring them. The Commission stands by this decision.
205. There is nothing remarkable about the fact that criminal charges are discontinued at or after a committal hearing. The purpose of the committal hearing is to determine whether there exists a prima facie case against the accused to be tried by a jury. Not every matter for which there is a prima facie case is prosecuted; the prosecutor must make its own assessment about whether to continue to prosecute charges in the public interest and having regard to scarce resources and the prospects of success.

206. The Commission is an investigatory body and is *not* the prosecutor. 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.
207. However, 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.
208. 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.
209. As the documents produced by the Commission to the PCCC show, the charges were laid against the Councillors with the benefit of internal legal advice and careful consideration by experienced lawyers, including the Chairperson of the Commission. The Commission acknowledges the heavy responsibility borne by it in recommending the consideration of criminal charges against accused persons. The decision to charge Mr Smith and the Councillors was carefully considered and not taken lightly.
210. 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.

211. The Commission 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.
212. In this case, as is obvious, after referral of the charges to the DPP for prosecution, the DPP conducted the prosecution of a nine-day committal hearing. In other words, the DPP agreed with the Commission's careful assessment and prosecuted the charges through to a committal hearing.

The process by which the Commission considers and determines whether to refer matters to the DPP

213. Prior to the passage of the *Crime and Corruption and Other Legislation Amendment Bill* in 2018, section 49 of the CC Act provided that after the Commission investigates a corruption matter, it could report on the investigation to the DPP for the purposes of any prosecution proceedings.
214. The legislative changes followed a recommendation in the PCCC Report No. 97 "Review of the Crime and Corruption Commission, June 2016" which noted:

"5.3.4 Referral of briefs to the Office of the Director of Public Prosecutions

The Office of the Director of Public Prosecutions (ODPP) raised concerns in relation to the practical application of the operation of section 49. Mr Byrne QC advised that the ODPP had raised similar concerns with the PCMC in past reviews.

Section 49 of the CC Act provides that if the Commission investigates a corruption matter it may report on the investigation to the ODPP for the purposes of any prosecution proceedings.

Mr Byrne noted that in 2014-15 the ODPP received two such briefs and eleven in 2013-14. Such briefs may sit for some time in the ODPP before advice is provided back to the Commission.

Aside from the impost on the office and the delays caused, Mr Byrne considered that recent High Court decisions provided further reasons why the power of referral to the ODPP is undesirable. Mr Byrne stated:

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 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.

Therefore, the ODPP submitted that section 49 be amended to remove the availability of this procedure.

In May 2016, the Commission advised the Committee that they saw no reason why such an amendment could not be made, based on Mr Byrne's submission.

5.3.5 Comment

The Committee considers that for the reasons articulated by the ODPP, removing the availability of this procedure is worthy of consideration."

215. The Commission notes that the PCCC's most recent "Review of the Crime and Corruption Commission's activities Report No. 106, 57th Parliament Parliamentary Crime and Corruption Committee June 2021" includes a recommendation (rec 25) that the issue of prosecutorial practices and interaction of the Commission and the DPP be reported on as part of this inquiry. Adopting the reasons described by the former DPP Mr Byrne QC set out in the paragraph above, the Commission submits that no compelling reason arises from this Inquiry to change the status quo.

216. Since 18 November 2019, the process by which the Commission currently considers and determines whether to refer corruption matters 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 CCC²⁸⁵, 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 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?"

217. 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" (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.

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."

218. 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.

The Commission's interactions with the DPP, including relating to information sharing

219. The Commission enjoys a highly professional and positive working relationship with the DPP.
220. 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.
221. In this respect, the relationship is like that which exists between the Queensland Police Service and the DPP.
222. 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.
223. 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.

224. 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.
225. The Chairperson of the Commission and Mr Alsbury have always been welcomed to meet with the DPP and senior staff to discuss individual prosecutions.

Conclusion

226. The Commission is willing to elaborate further at the inquiry upon any matter raised in these submissions.