Submission in respect of PCCC report into Logan Councillors

Background

I was Chairperson of the CMC from February 2012 until March 2013, a time when my health failed. Previously I had been a senior officer for most of my career at the Office of the Director of Public Prosecutions (which commenced in 1980), including holding the post of Deputy Director immediately prior to my appointment as Chairperson. During my career I had spent some few years as a legal officer at both the Fitzgerald Inquiry and the Office of the Special Prosecutor. While at the ODPP I had conducted the prosecution of former Cabinet Minister [redacted], but also considered other briefs from the CMC. In July 2013, after surgical intervention, my health was substantially restored to me and since the beginning of 2014 I have been a professor at Griffith University Law School engaged in teaching and researching criminal law.

I apologise that this submission does not contain the level of scholarly analysis in many respects I would have liked it to. I have other pressing commitments, and have been beset by ill-health for some weeks now. Nevertheless, I imagine you might find useful my lived experience in matters relevant to your inquiry and so I am emboldened to offer my thoughts. Some of the things I say below are no doubt obvious. I say them to provide potentially an evidentiary basis for you should you care to consider what I have said.

I also face the difficulty that I no longer have access to relevant records and am forced to rely on my memory in many respects.

I use the term CCC generally in a compendious sense to include all its prior incarnations, unless there is some particular reason to refer specifically to a prior incarnation.

I have chosen not to use Griffith University letterhead in providing this submission. It is my practice not to do so when my correspondence reflects my own views and not officially those of the university.

General Observations

Robustness

Any organisation which investigates and prosecutes must do so robustly. That does not mean unethically. It means it must not treat the obligation of fairness as amounting to a mere excuse to do nothing and then congratulate itself on its virtue. I recall at various points in my career coming across prosecution-based organisations where a culture of finding over-refined fault in the briefs it was sent existed in some quarters. Instead of attempting to fix things, staff at the organisations tended to privately mock those sending the briefs, thereby allowing themselves to indulge in an air

of self-satisfaction. That effete (in the sense of ineffectual) attitude is the risk that looms at the opposite swing of the pendulum from over-zealousness. There are many who would want the CCC to be ineffectual. The ethical requirement to be fair is not an excuse merely to 'roll the arm over'. Robustness is not inconsistent with impartiality.

Community understanding

I have a sense that very many people in the community do not understand some very basic tenets of the criminal justice system. I am encouraged to say this because I see students (who are typically bright young people interested already in the law) regularly conflate the notion of being charged with that of being convicted until I persuade them otherwise. The decision to grant bail is confused with the decision to sentence, and so on. This matters because it may be that the ordinary processes of the courts, if they are not properly understood, are capable of leading to misapprehensions which can be exploited. This is further explored below.

The peculiar position of the CCC

Of course the CCC must have high standards for itself. For some reason, however, a common unspoken position taken by some commentators and others with respect to the CCC seems to be that, because it watches the watchers, it has proclaimed to the world that it is perfect and inerrant. Thus, any departure from perfection is treated in some (vocal) quarters as an Icarian fall. I never held the unrealistic view that the CMC was or could be perfect any more than any other human institution could be. But the apparent fact that this view is held seems to lead to some odd conclusions.

When an ordinary prosecution brought by the Queensland Police Service and prosecuted by the ODPP does not result in a conviction, there are no calls for the ODPP to be reviewed or for the Commissioner of Police to resign. Everyone seems to understand that the loss of a trial in that context is an ordinary event. But that is not so for the CCC. When an ordinary trial is lost, the accused is generally afforded by the media an opportunity to say his or her piece. Usually, the acquitted person has no media experience or training and says very little but to thank their lawyers or the like. But when a trial initiated by the CCC results in a jury acquittal, the acquitted person is often a person of substantial profile who is familiar with making statements to the media and loudly asserts that no prosecution should ever have been commenced, notwithstanding that a prima facie case was necessarily found (note what I said above about community understanding). There is also a loud assertion that the CCC needs to be reviewed or be brought under control in some fashion. I well recall when I first started as Chair, a case that had resulted in no particularly serious outcome against a politician resulted in that politician's views about the CCC being given the benefit of a two-page spread in the Courier-Mail, complete with mocking cartoon. Thus, the loss of a trial is an existential threat to the CCC in the way that is not so for other institutions.

To complain about this is pointless – it would be to ignore reality. But it has consequences.

This is amplified when it is recognised that there have been a number of attempts to review the CCC the results of which, or the processes of which, were capable of rational criticism. The Connolly-Ryan Commission was stopped by the Supreme Court for bias. The Callinan-Aroney review had relatively few of its major recommendations adopted in the end. This is of course not a complete list of criticisms levelled at the CCC.

It is against this background that allegations of 'defensiveness' are made. That word has a useful place in some contexts, denoting a reflexive posture of hostility to criticism. But before the label of defensiveness is useful, it must first be determined that the defence offered by the CCC is both wrong and unreasonably advanced. Where, historically, much criticism of the CCC has proved to be at least unwise or ill-informed, it is unsurprising that the CCC commonly has a basis for not accepting criticism at face value.

It is against this background that I hold the view that changes to the CCC should be modest rather than radical.

Secondment of police term of reference

Submissions to the PCCC inquiry roamed as far as suggesting that no serving police should ever be seconded to the CCC in any capacity[1] to the proposition (by Counsel Assisting) that secondments to the CCC should be time-limited.[2]

The use of police has been a vexed issue in the history of the CCC. The historical origin of the use of police is of course the model provided by the Fitzgerald Inquiry. I recall in the mid-2000s while I was at the ODPP an attempt being made at the CCC to engage people described as 'civilian investigators', that is people with some investigation experience who were nevertheless not sworn officers. These people tended to come from places such as ASIC. There are bound to be records of this at the CCC dating from those times.

I am not convinced that the experiment was successful. Police officers have specific powers under the *Police Powers and Responsibilities Act 2000.* They have specific training in, and specific powers related to, such unavoidable investigative issues as the obtaining of search warrants, conducting surveillance, controlled operations, issuing notices to financial institutions, obtaining monitoring orders, suspension orders, and the laying of charges (about which more below). Serving police

[1] Report No 108, 57th Parliament - Inquiry into the Crime and
Corruption Commission's
investigation of former councillors
of Logan City Council;
and related matters ('the PCCC report'), p152
[2] PCCC report (supra n1), 143 (see also p5 below for the text of this reference).

officers who work at the CCC in my experience also brought an aspect of police culture that is positive – a manifest willingness to be proactive in pursuing evidence, for the most part.

On the other side of the ledger, as Chairperson I found it very difficult to exercise any control over some police investigators with respect to such issues as timeliness of conclusions, etc., within the misconduct portfolio. Matters could drag on for reasons that no-one could satisfactorily explain to me. That is not to say that quick results were never available, but using the authority of my office did not seem to result in slow cases speeding up. I understand that this was a long-standing problem. I was not there long enough to resolve it.

The reason for this difficulty might be because the legislation requires the police to follow two leaders. Section 255(4) of the *Crime and Corruption Act 2001* provides that the efficient deployment of seconded police officers is to be the joint responsibility of the CCC's CEO and the senior police officer at the CCC. In the PCCC's report, this provision is paraphrased in one submission as a requirement that police 'follow rank'[3]. Although that might not be an entirely accurate paraphrase, in my experience, the police routinely turned for direction to their police superiors rather than listen to the lawyers. It may be that much depends on the attitude of the senior police officers at the CCC from time to time.

On balance, and based on my experience, there is no real way to avoid having police officers work at the CCC in both the crime and corruption portfolios. Without their powers and expertise, it is difficult to see how complex investigations involving the gathering of surveillance evidence and search evidence can be undertaken without their assistance. In any model that prevents the CCC from having seconded officers, it is not easy to imagine outsourcing such functions back to the QPS. That would involve creating Task Forces that were subject to even less control that exists at present and those Task Forces would involve such closely co-ordinated activity with CCC officers as to amount to secondment in everything but name.

Fine-tuning of the relationship between police and non-police such as lawyers is a matter of management in my view rather than a matter requiring statutory intervention.

As to the specific findings of the PCCC report, I have found it difficult to draw conclusions because of the liberal criticism of the 'culture' of police involvement without any greater evidence base than essentially one case. The concept of 'culture' is one that is readily recognised but difficult to define. Nevertheless, in order to frame changes, some idea of the breadth and depth of the asserted culture beyond one case would be desirable.

The PCCC report uses the expression 'culture' eighteen times in the course of its report (including repetitious references from summaries, etc).

[3] PCCC report (supra n1), 142.

There are three principle references that seem to focus on the police (avoiding repetition).

At p67, the following appears, in the context of dealings with the Logan City Council's Interim Administrator after charges against councillors had been laid:

> *Having regard to the communications with the interim Administrator and subsequent internal correspondence regarding her character, the committee finds the email correspondence on this issue to show a culture of partiality and bias that permeated across the various aspects of this matter in the CCC.*
>
> *…*
>
> *The failure by the CCC officers to accept there was anything wrong with this chain of correspondence and reflect on their actions – even now – is something the committee considers highly relevant to finding that the CCC's culture is one of resistance to institutional oversight and review. In relation to DS Francis, and other seconded police officers for that matter, their conduct and attitudes expressed in evidence was, an example of, and symptomatic of, the culture of the Crime and Corruption Commission.*

At p114, the following appears, in the context of the laying of fraud charges against the Logan City Councillors:

> *Counsel Assisting suggested an Available Finding was that:*
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> > *DS Andrew Francis failed to properly, independently, impartially and fairly exercise his discretion to charge the 7 Councillors with fraud. In doing so he acted in dereliction of his duty as a police officer, contrary to the requirements of the OPM and contrary to s57 of the CC Act.*
>
> …
>
> ***6.9.5.1 Committee comment***
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> *The committee notes Available Finding 12 submitted by Counsel Assisting. The committee is of the view that DS Francis' conduct in his work in preparation for the charging of the 7 Logan City Councillors with fraud in respect of Ms Kelsey's PID and her termination as CEO was fairly criticised by Counsel Assisting.*
>
> ***Finding 8***
>
> *The committee considers the conduct of Detective Sergeant Andrew Francis (that was rightly criticised by Counsel Assisting) to be an example of and symptomatic of the culture of the Crime and Corruption Commission.*

There is a reference at p140 of a general nature that does not add to what is said elsewhere.

At p143, the following appears:

> *Counsel Assisting suggested to the committee that the inquiry revealed a 'degree of "group think" or "pack" culture amongst the police officers connected with Operation Front' and suggested:*
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> > *The refreshment of members of such Operations by more regular rotations into and out of the CCC from the Police Service will serve to minimise this. By limiting the duration and repetition of secondments by police officers to the CCC, such 'group think' might be avoided, the propriety of the investigative and charging roles maintained, and the occasion for their confusion or abuse reduced. Counsel Assisting proposed the committee consider whether a limit should be placed on the duration and repetition of secondments by police officers to the CCC.*

It is an allegation of an adverse culture that appears to drive the suggestion that there should be reform of the police presence at the CCC. If DS Francis and others were overinvolved with Ms Kelsey's interests, there are not said to be any other cases where this occurred. To a degree, the CCC was right to turn its collective mind to whether Ms Kelsey was being intimidated. In ordinary police investigations not involving the CCC, police are alert to prevent witnesses from being intimidated. They will charge people who have already been charged with offences with further charges of attempting to pervert the course of justice in such cases. Attempts to silence complainants are commonly seen in, for example, sex cases, even if further charges of attempting to pervert the course of justice are not laid.

Of course it might be said that the failure of the CCC to curb the relationship with Ms Kelsey was itself proof of the existence of the criticised culture. But it seems that at the heart of the matter, the then-Chair of the CCC and other officers took a different view of the law from that of Counsel Assisting that was ultimately accepted by the PCCC. This is all discussed at 6.3.7 of the PCCC report at p62 et seq. I could find nothing in the PCCC report that indicated that that the view of the then-Chair as to the law was held in bad faith.

It is thus a combination of my experience at the CCC and the absence of evidence in the PCCC report indicating that the disparaged culture existed beyond the case at hand that leads me to the conclusion that the idea that police should play no role in the CCC should be rejected.

As to whether there should be term limits on the duration of any particular police officer's involvement, I am aware of one and perhaps more senior police officers working at the CCC for a very long time. Some of the original Fitzgerald Inquiry police finished their careers at the CCC, as I recall. There is a risk that imposing term limits that are too restrictive might throw the baby out with the bath water. On one view, maintaining corporate memory is a very important aspect of why at

least some police should be allowed to remain for an extended period. That, of course, is not a justification that applies to all police at the CCC.

In my view, some police positions might profitably be identified as being immune from time limits, assuming confidence in the police officer in that position is maintained and demonstrably justified. I have in mind some officers at the level of perhaps Inspector or Superintendent. That should not include the most senior police officer at the CCC. That officer should be encouraged and available to take his or her experience from the CCC up the promotional ranks and back into general policing. I would respectfully suggest that 3-4 years is about the maximum that any leader of the police contingent at the CCC should remain there. Such an officer is by definition already very senior and should have time after his or her CCC service to further develop his or her career. The CCC should not become a retirement home, but a routine placement for upcoming officers including senior officers.

As to more junior officers of the level of Sergeant and Inspector (for example) they might well have a cap of 3 years' service, subject to a potential extension to 5 years if, for administrative reasons such as completion of long investigations or pending trials there is good reason for them to stay. I note that an average of about that duration already seems to be achieved. I also note that in my experience police at the ranks I am currently talking about typically move on of their own motion. They want to polish their CV by prestigious work at the CCC with a view to further promotion later into more mainstream police work.

I am not convinced that such requirements as to term limits need to be encoded in statutes. Appropriate administrative instruments such as memoranda of understanding between the CCC and the QPS might create the flexibility necessary to give effect to the need for rotation, subject to the need to keep individuals for specific purposes.

Legislation etc in relation to charging term of reference

The submissions and discussion in the PCCC report reveal some apparent inconsistencies in ideas that warrant clarification.

Some submissions spoke of the prosecution process in such a way as to include the decision to charge. While that might be so in a general sense, in the present context in my view, it is better to consider charging separately from the subsequent prosecution of that charge.

In the paragraphs that follow, I endeavour to set out the principles that apply to the processes of charging and prosecuting offences. This is done at the risk of being obvious, but with an eye to aligning the CCC's processes with principle. Ultimately, I submit that the CCC's processes should align as far as possible, for the sake of consistency, with mainstream charging and prosecution processes.

The process of charging and then carrying that charge through to finality might be considered as engaging a series of filters generally of increasing restriction against the State in the sense that at each step, considerations come into play which make it more likely that a prosecution will come to an end.

The **first filter** is that the decision to arrest and charge may be made on the basis of 'reasonable suspicion'. See, for example, ss365 and 371 of the *Police Powers and Responsibilities Act 2000.* The concept of 'suspicion' is illustrated in such cases as *George v Rockett*[4]. In that case, in a joint judgment, members of the High Court said the following about the concept of suspicion (citations omitted):

> *Suspicion, as Lord Devlin said in Hussien v Chong Fook Kam, "in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.'" The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown. In Queensland Bacon Pty Ltd v Rees, a question was raised as to whether a payee had reason to suspect that the payer, a debtor, "was unable to pay [its] debts as they became due" as that phrase was used in s 95(4) of the Bankruptcy Act 1924 (Cth). Kitto J said:*
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> > *"A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to 'a slight opinion, but without sufficient evidence', as Chambers's Dictionary expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence. The notion which 'reason to suspect' expresses in subs (4) is, I think, of something which in all the circumstances would create in the mind of a reasonable person in the position of the payee an actual apprehension or fear that the situation of the payer is in actual fact that which the sub-section describes — a mistrust of the payer's ability to pay his debts as they become due and of the effect which acceptance of the payment would have as between the payee and the other creditors."*
> >
> > *The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture.*

The **second filter** is that the case must subsequently pass through a committal proceeding where the Magistrate should apply the prima facie case test. While committals have in general receded in significance since the passage of the *Civil and Criminal Jurisdiction and Modernisation Amendment*

[4] *George v Rockett* (1990) 170 CLR 104

Act 2010, they still have a function as is apparent from the lengthy committal which took place in the Logan Councillors matter. Prior to 1990, there was some controversy over what could be taken into account in determining the existence of a prima facie case, in particular, whether the credibility of a witness was legitimately a consideration in the exercise. In *Doney v R*[5] that controversy was put to rest. In essence, the High Court concluded that witness credibility could not be taken into account in determining the existence of a prima facie case on the implied premise that for a judicial officer to make a determination about credibility was to usurp the function of the jury. The High Court also made clear the distinction between the roles of a trial judge determining the existence of a prima facie case and a Court of Appeal determining whether a conviction was unsafe, indicating that the latter did not provide a basis for expanding the former.[6]

These propositions from *Doney* are potentially subject to what was said in *Purcell v Venardos No 2* [7]. That was a single judge decision of the Supreme Court of Queensland purporting to assert, apparently contrary to *Doney*, that a Magistrate conducting a committal could take the credibility of a witness into account in determining the existence of a prima facie case[8]. While the right result might well have been achieved in *Purcell*, it is difficult to see why the reasoning in *Doney* should not have applied. Why a Magistrate should have greater powers than a Supreme Court judge to stop a prosecution in this context is not an easy proposition to contemplate. The logic in *Doney* appears to commence from a consideration of the primacy of the function of the jury so that restrictions on the role of the court in determining a prima face case are derivative of that primacy. If that is so, then then, respectfully, it is difficult to see that any difference should apply to a trial judge determining the existence of a prima facie case compared with a Magistrate making the same determination.

There have been single Supreme Court judge decisions that have assumed the correctness of *Purcell* but none where critical re-analysis of it was called for[9], and there has been a decision where *Purcell* was distinguished[10].

Circumstances can change in the course of working through the prosecution process, so this filter can be revisited at the end of the Crown case at trial, as is apparent from *Doney*[11].

The **third filter** is that applied by the Director of Public Prosecutions, typically after committal. This engages a discussion of the DPP's Guidelines[12]. Some potential misunderstanding of their application seems to have arisen in discussion of them in the PCCC report. For reasons I will come to, and despite reference to initiating proceedings, the DPP's Guideline 4 in practice is really about

[5] *Doney v R* (1990) 171 CLR 207
[6] *Doney* (supra), 213-215
[7] *Purcell v Venardos No 2* [1997] 1 Qd R 317
[8] *Purcell* (supra, 320)
[9] *Re Singh, Miller and Brush* [2022] QSC 44; *Gant v Magistrate Kucks & Anor* [2013] QSC 285; *Chen v Diggle* [1999] QSC 181 (a decision of the same judge who decided *Purcell*);
[10] *R v Sica* [2012] QSC 428
[11] Supra, n5
[12] Director's Guidelines; https://www.justice.qld.gov.au/__data/assets/pdf_file/0015/16701/directors-guidelines.pdf

continuing proceedings that have already been brought. I note that the 2016 version of the DPP Guidelines is under review. Clarifying the terms of Guideline 4 in light of what I say below is, I think, desirable.

It is well-known that the DPP's Guidelines envisage a two-tiered test to decide whether to proceed. That appears in the DPP's Guidelines at Guideline 4[13]. The two tiers are expressed to be:

> *(i) is there sufficient evidence?; and*
>
> *(ii) does the public interest require a prosecution?*

Under Tier (i), this is the point at which it is appropriate to consider questions of credibility of witnesses. It is apparent from the DPP's Guidelines that much more than mere consideration of the existence of a bare prima facie case is necessary at this point.

As to Tier (ii), it is to be noted that there is reference in the DPP's Guidelines to the idea that in this respect they are consistent with the position in England and Wales.

A starting point for the consideration of this two-tiered approach is the very influential speech of then-Attorney-General Sir Hartley Shawcross (as he then was) in the House of Commons on 29 January 1951[14]. The language of Sir Hartley Shawcross carries the implication that the public interest decision *is a matter for the Attorney-General and the DPP*. In Queensland, the Attorney-General has a much more restricted role in prosecutions than is the case in the UK[15]. Transposing Sir Hartley's propositions to Queensland, the public interest test is a matter for the DPP. The idea that the public interest test was jealously retained by the DPP personally was made clear, at least within the ODPP, since at least the time of Miller QC's directorship. The time might come when the population of Queensland is so great that the DPP will have to delegate this function to someone in his office, but it would appear that that prospect has not yet arisen. I note the evidence of the current DPP referred to in the PCCC report as follows:

> *I know that particularly matters that have been referred to me were done because there was some uncertainty about the sufficiency of the evidence—so essentially asking for my opinion, for want of a better phrase. Or there might be matters where the public interest discretion might be exercised,* ***and that can only be exercised by me to discontinue a matter****.*(Emphasis added)[16].

Other parts of the DPP's Guidelines are at least consistent with the idea that it is not for an investigating agency to exercise the public interest discretion. In that regard see Guideline 26, noting in particular (iv):

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[13] Director's Guidelines (supra) n12, 2.
[14] https://api.parliament.uk/historic-hansard/commons/1951/jan/29/prosecutions-attorney-generals
[15] Contrast the speech of Sir Hartley Shawcross (supra n14) with the *Director of Public Prosecutions Act 1984* ss 10,10A, 11.
[16] PCCC report (supra n1), 158.

The advice must be provided by the Director in all matters.[17]

Other support for the general idea that the decision to prosecute must be exercised *by the prosecutor* is to be found in a speech by Dominic Grieve QC MP, former Attorney-General of the UK where he said:

> *In my strong view there is one fundamental truth that underpins a fair and just system and that is prosecutorial independence. The decision to prosecute must ultimately be one taken by the prosecutor acting independently of the investigator. That view is not based on some theoretical principle of the superior merits of lawyers but is based on the clear lessons to be learnt from history.*[18]

Mr Grieve QC's speech sets out a useful history of the development of prosecution practice in the UK. I note his reference to the way in which the Crown Prosecution Service in the UK has over time become the decision-maker with respect to whether charges should be initially laid. That is a point of difference with Queensland practice, about which more below.

The rationale for the retention of the public interest discretion to the DPP might be two-fold. First, considerations of consistency of application loom very large. One point of decision-making might well be thought desirable. Secondly, corruption can disguise malevolence as discretion. As was reportedly said by Sir Keir Starmer QC (former DPP of the UK):

> *"there are risks attached to the exercise of discretion. Whilst, in appropriate circumstances, it can be a force for good, poorly exercised discretion can mask corruption and malevolence. Let me offer an example: two cases of theft of a small amount of money are presented to the prosecutor. It may well be entirely correct for the prosecutor to decide to prosecute in one case but not in the other. But let us add some characteristics to our two fictional offenders. One is white; one is not. One is Christian; one is not. One is heterosexual; one is not. "It is the bad decisions which are taken on the basis of inappropriate factors – be they based on the offender, the victim, the offence, or indeed the personal views of the prosecutor – which may be hidden under the respectable cloak of discretion."*[19]

I apologise for the relatively weak citation of the above quote.

None of the above should be taken to be an assertion that charging officers do not have any discretion in laying charges at all. They might well have a parallel discretion to determine that a case is too trivial to trigger charging a suspect, or that the evidence is too weak to pass the bar of reasonable suspicion. I express no exhaustive view about the extent of a charging officer's discretion not to lay a charge after a proper investigation. But once the decision to charge has been made, the question of the public interest discretion should be one for the DPP solely.

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[17] Director's Guidelines (supra n12), 36.

[18] https://www.gov.uk/government/speeches/the-case-for-the-prosecution-independence-and-the-public-interest

[19] https://dpp.govmu.org/Documents/Publications%20and%20Communique/SirHartleyShawcross.pdf?csf=1&e=6cbKuu

Some confusion about this crept in to the by-play between Counsel Assisting and the former Chair of the CCC and his staff[20]. It may be that the introductory heading of the Guidelines indicating that they are directed to police led to the thought that they apply in their entirety in every case to all investigating authorities. But the QPS prosecutes to completion simple offences and regulatory offences without ever troubling the DPP. In those cases, it is appropriate for the police to exercise the discretions in Guideline 4. In dealing with indictable offences, however, I am of the clear view that it is not for an investigating agency to pre-empt the DPP's public interest discretion.

The **fourth filter** is something I mentioned above with reference to the Magistrate's role at committal proceedings, and that is the trial judge's obligation to stop a trial where no prima facie case exists. I will not discuss this further except to note that this is slightly anomalous in that the progression of filters tends to be progressively more restrictive in the sense that they are progressively more likely to result in the prosecution coming to an end. This filter is actually less restrictive at the point in time in which it arises than the decision mandated in DPP Guideline 4 for the reasons expressed in *Doney*[21].

The **fifth and final filter** is the jury's ultimate decision about whether the prosecution case has been proved beyond reasonable doubt (or as the case may be, bearing in mind occasional exceptions to the general rule of proof).

I noted above a difference in practice in Queensland from the UK about the involvement of the DPP in the initial decision to charge. In Queensland, police decide to lay charges independently of the ODPP. Perhaps a different way to put it is that the ODPP is independent of the police decision to lay charges.

The powers and functions of the DPP are set out in ss10, 11 and 12 of the *Director of Public Prosecutions Act 1984*. There, one can find reference to a function to 'institute criminal proceedings'. The term criminal proceedings is defined in s4 as (summarising) generally proceedings for indictable offences. Nevertheless, it is not the practice for the ODPP to 'institute' proceedings in the sense of laying charges or advising as to whether charges should be laid in general.

I recall a period late in my time at the ODPP where a loose practice had grown up whereby police might, with varying levels of formality, contact a senior ODPP officer for advice as to whether or not they should charge someone in marginal cases. The goal was the no doubt laudable one of avoiding protracted expense in continuing with investigations to no good end. The difficulty with this practice identified within the ODPP at the time was that the test the police applied with respect to charging was different to the test applied by the ODPP in deciding whether to continue with a prosecution. Often, no complete brief had been provided to the ODPP in pursuance of this practice. The back-and-forth byplay between police and the ODPP risked amounting to having ODPP officers involved in essence in the investigation at the peril of their independence. The view taken ultimately was that

[20] PCCC report (supra n2), 6.8.1 – 6.8.4, 104-108
[21] (Supra) n5, n6.

the risk of incongruent advice at different stages of the process arising because of the application of different tests on different information was such that advice to the QPS should be restricted. That is reflected in Guideline 26[22]. Note that that guideline only allows advice *after* police have charged a suspect. If police are concerned about the sufficiency of evidence prior to charging, they are free to seek their own advice of course, but it is apparent from Guideline 26 that the ODPP will not provide that advice.

I note the evidence of the current DPP, Mr Heaton QC, to the effect that on some small number of occasions during his directorship he has provided pre-charging advice to the CCC. I make no comment on the reasons for that. But I strongly suggest that the process should be regularised as I have indicated above.

I turn now in more detail to transposing the above ideas to the CCC. In doing so, I have tried to adopt the following principles.

First, the principles which apply to ordinary charges and prosecutions by the QPS should apply so far as is possible to the CCC.

Secondly, principles of equality before the law dictate that no-one should be in a privileged position so far as the procedures relating to the laying of charges and the continuation of prosecutions are concerned.

I note that with respect to that second point, submissions have been made to the effect that elected officials are subject to statutory suspension upon certain charges being laid against them, and that has a consequence that electors are disenfranchised upon that event.

The idea that the consequences of charging should take be taken into account at the time of charging by the charging authority seems to have been assumed to derive from the idea that the CCC must follow the public interest discretion set out in the DPP Guidelines[23]. For the reasons I mention above, I am unpersuaded that that is or ought to be the case. But whatever the source and content of the discretion to charge, the former Chair of the CCC made the point that the suspension of the councillors occurred by 'operation of law'.

It would seem he was referring to what I will call the 'tail wagging the dog' issue that arises where there has been a pre-existing process of the criminal law, and then Parliament attaches a consequence to the execution of that process that some assert is harsh. It is not generally for courts

[22] Director's Guidelines (supra n12), 36.
[23] See generally PCCC report (supra n1), 6.1 – Finding 12, pp 119-120.

or other decision-makers to take it upon themselves to defeat the will of Parliament and ameliorate that asserted harshness by unduly distorting the initial pre-existing process.

Examples of this are readily found. Chapter 3 of the *Criminal Proceeds Confiscation Act 2002* provides for confiscation of what otherwise might have been assets of the convicted person after they are convicted. To guard against the idea that the consequences that arise in Chapter 3 might be thought to be relevant to sentence and result therefore in a downward distortion of the sentence that might have been applied to offenders who face having property confiscated by operation of Chapter 3, that Act contains s9, which makes it clear that confiscation is not to be considered a sentence or punishment.

Another example is found in determining the appropriate sentence in a case to which the serious violent offence provisions of the *Penalties and Sentences Act 1992* apply. Those provisions had the consequence, when first introduced, of automatically triggering a requirement that a person affected by them had to serve 80% of their sentence in prison if the head sentence was 10 years or over. Courts made it plain that they should not distort the will of Parliament by reducing head sentences that were otherwise appropriate merely to avoid the mandatory consequences of those provisions. In *R v Bojovic*, the Court of Appeal made the following point in that regard:

> *Plainly the courts will not attempt to subvert the intentions of Part 9A by reducing what would otherwise be regarded as an appropriate sentence.*[24]

I also recall a similar principle applying to cases where the recording of a conviction might affect overseas travel, although I am struggling to find time to locate cases on the point. I recall that it is said in the authorities that courts are not there to deceive foreign immigration authorities, and the risk of the immigration consequences to an accused person should not impede the imposition of what would otherwise be an appropriate sentence.

Taking into account derivative statutory consequences in the charging of a class of suspects such as politicians should not unduly distort the process of charging itself or amount to a subversion of the will of Parliament. To do so is to invert reality and perversely risks the creation a class of citizen with greater protection from the operation of law than others. The decision to charge for an offence of, say, perjury, might well be thought by some to fall more harshly on a High Court judge than it would on an unemployed person with an extensive criminal history. The question of whether there is sufficient evidence to satisfy the test to lay a charge is independent of the consequences of laying it. Whatever the source and content of the discretion not to lay a charge, it will necessarily be cognate with the discretion in DPP Guideline 4, to the effect that:

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

[24] *R v Bojovic* [2000] 2 Qd R 183, 190 [27].

Indeed, the proper decision in most cases will be to proceed with the prosecution if there is sufficient evidence. Mitigating factors can then be put to the Court at sentence.[25]

It can be seen that the practical effect of taking into account the statutory suspension of councillors following charging will have very limited room for operation because in most cases, offences by such councillors will be prima facie serious (assuming sufficiency of evidence questions have been resolved separately).

Thus, my submission is that the following processes should apply to the CCC.

1. It is for the police at the CCC ultimately to decide to lay charges. This is necessary so that there is someone who can be called as a witness to take responsibility for bringing charges. It is parallel with the practice at the QPS. If the CCC thinks that there is merit in considering internally the legal position with respect to potential charges prior to their being brought so that the police officer's view has the benefit of that internal legal opinion, then that process is to be encouraged so long as it does not dilute unduly the decision of the police officer to undertake to charge an accused person.

2. The CCC has indicated that in future similar cases to the Logan Councillors case, it will seek outside advice before laying charges. That outside advice should come from appropriately senior counsel at the Bar, but that said, I strongly commend that approach. It will force the discipline of carefully creating written documents and briefs in such a way as to avoid the criticism of the documentation that was compiled in the Logan Councillors case.

3. For reasons I mentioned above, the ODPP should not be consulted for advice prior to charging. That is to maintain consistency with the practice that applies in ordinary QPS cases. Guideline 26 of the DPP's Guidelines might be amended to allow the CCC to avail itself of the same limited advice as the QPS, but only on the same conditions as to the existence of a pre-existing charge having already been laid.

4. There is room to clarify the DPP Guidelines in light of my observations above so that ambiguities therein are not misinterpreted, particularly with respect to the operation of Guideline 4. I adhere to the view that the public interest discretion is for the Director of Public Prosecutions alone. I adhere to the view that the question of consequences of charging should not unduly distort the process of charging itself and that any discretion in that respect will be driven by the seriousness of the charges first and a consideration of derivative consequences only after the issue of seriousness is resolved.

Section 49 of the *Crime and Corruption Act 2001 term of reference*

[25] Director's Guidelines (supra n12), 4.

The issue about s49 of the *Crime and Corruption Act 2001* largely turns on the 2018 removal of the CCC's capacity to refer briefs to the DPP for advice and decision. The PCCC articulated the practical views expressed by Mr M R Byrne QC, the former DPP, about the difficulties that emerged from having pre-charge referrals sent to the ODPP which explained the 2018 amendments. In particular, he spoke of the problems raised as a consequence of a series of High Court decisions[26] that had the effect of requiring trial prosecutors to be quarantined by 'Chinese walls' from knowledge of information obtained by compulsion. Briefs from the CCC can only go to very senior officers at the ODPP, of whom there are but a handful. I support his concerns about the practical problems that would arise if s49 should be returned to its former position.

I have attempted to articulate above further issues of principle and history that lead to the same conclusion and will not repeat them.

It is apparent that the High Court decisions referred to by Mr Byrne QC have the consequence that the prosecutor should not know about certain evidence. Nevertheless, it may be appropriate for some or all of that evidence to be disclosed to the defence. Obviously, the ODPP cannot make decisions about disclosure if it is not allowed to see the material. For that reason, and guided by outside counsel's advice sought by the CCC as indicated above (and outside counsel's advice should be sought on any disclosure issue) consideration should be given to amending the disclosure provisions of the *Criminal Code* (ss 590AB et seq) so that the CCC and cognate bodies with coercive powers take responsibility for disclosure in a way that is effective and yet does not compromise the ODPP's capacity to carry a matter.

Further, it may be that some of the material to which the prosecutor should not have access might be something upon which an accused person would seek to rely either at trial or in pre-trial submissions to the ODPP to persuade the ODPP not to proceed. For example, an accused person may have given no admissible account to police in the ordinary way explaining his conduct, but may have given an explanation under compulsion to the CCC upon which he or she seeks to rely as a basis for the prosecutor not to proceed. In those circumstances, I do not apprehend that the trio of cases referred to above goes so far as to allow the defence to conflict out the prosecutor merely by sending to the prosecutor material the prosecutor would otherwise not have seen that is thought by the defence to be to the advantage of the defence to reveal.

If my overall suggestion about disclosure being pushed back to the CCC is accepted, this will naturally have the consequence that the ODPP may not see all the material that exists in relation to a prosecution, and that is unusual but it is also a consequence of the High Court decisions above.

Alternatively, it might be possible, subject to staffing considerations referred to by Mr Byrne QC, to provide for the identification of a particular officer within the ODPP whose task it would be to consider disclosure issues and who is then insulated from the ultimate prosecution. That is an

[26] X7 v Australian Crime Commission (2013) 248 CLR 93; Lee v New South Wales Crime Commission (2013) 248 CLR 196; Lee v The Queen (2014) 88 ALJR 656.

administrative matter. But I adhere to the view that the ODPP should not give pre-charge advice to any investigating body for the reasons discussed above.

Professor Ross Martin QC