QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

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Watching Them While They're Watching You

07 April 2022

[redacted]
Executive Director
Commission of Inquiry relating to the Crime & Corruption Commission
Email: ExecutiveDirector@cccinquiry.qld.gov.au

Dear [redacted]

RE: **Commission of Inquiry - Crime and Corruption Commission**

Thank you for the invitation to submit in respect of your review of the Queensland Crime and Corruption Commission.

The CCC in 2022 compared to 1990:

When the Criminal Justice Commission was set up in 1990 it had, effectively, a role to enquire into and conduct investigations in respect of the following:

- corruption and problems with maladministration in the public sector;
- a specific and major role in dealing with complaints against police;
- a limited organised crime role.

Over time the role of the CCC has significantly morphed so that its current major focus is its 'super police force' role in pursuing investigations in conjunction with the QPS. This has become its organised crime fighting role.

It is our submission that the organised crime fighting role has grown and developed over time so that it is now the primary focus of the CCC particularly to the detriment of its role of investigating complaints against the police.

The CCC's role in investigating corruption and maladministration within the public sector has been maintained at an appropriate level.

Organised Crime Function:

The CCC's role in using its compulsory powers in conjunction with the QPS to investigate and prosecute organised crime has grown substantially over the last 30 years in a manner that was never intended in terms of the recommendations of the Fitzgerald Report.

The Investigative Hearings role of the CCC is now being used in respect of some QPS investigations which are clearly not organised crime matters.

It is difficult to obtain information as to the nature of the criminal offences in respect of which Investigative Hearings are conducted because of the secrecy attaching to them. Unlike 'ordinary' police investigations and court cases fellow criminal law practitioners do not discuss what is the subject of Investigative Hearings because of the provisions of the Act that effectively make such discussion a criminal offence.

Therefore the knowledge of the extent to which Investigative Hearings are used in non organised crime matters is restricted to the experience of an individual criminal defence practitioner.

The effect of the expanded role of the Investigate Hearing process is that it has had a significant negative effect on the right to silence in that the ever expanding hearing days of the CCC's Investigative Hearing process has the effect that more and more people under investigation are required to submit to compulsorily answering questions as to their role in a particular criminal investigation.

While the CCC Act provides that the answers given in an Investigative Hearing cannot be used directly against an attendee in a later criminal trial the threat of perjury proceedings undermine the right to silence.

Further, the compulsory answering of questions at an Investigative Hearing enables the Police and the CCC to know what a person's defence at trial will be thereby giving investigators an opportunity to gather evidence to pre-emptively 'box in' an accused's person's defence at trial.

Supreme Court Supervision of Investigative Hearings:

While the CCC Act provides a person can challenge certain aspects of the manner in which Investigative Hearings are conducted in reality that is an illusory protection primarily because of the costs consequences that flow when a person is unsuccessful in a CCC challenge in the Supreme Court.

It is submitted that the CCC Act should be changed so that a Supreme Court challenge does not attract a costs order against an individual litigant.

It is submitted that the current regime only permits Supreme Court challenges for those people who have the resources to not only who fund their own lawyer but also to be able to pay a costs order if they are unsuccessful.

The Decision to Prosecute:

It is recognised that this Inquiry had been prompted by the discontinuance of the prosecution in respect of the so-called Logan 8.

The evidence given by senior CCC personnel at the Parliamentary Committee Hearings strongly suggests that there was a motivation at the senior level of the CCC to maintain the prosecution even at a stage when the DPP were expressing reservations about the lack of a case. The motivation to maintain the prosecution by the CCC appears to derive from a stance within that organisation that they wanted the prosecution to be continued because of the significant resources that had been put into the investigation and because of the 'image' problem that would attach to the CCC if the prosecution was discontinued.

One of the Inquiry's terms of reference relates to whether before the CCC institutes a prosecution the decision to prosecute should be made by an external body. The QCCL submits that the decision to prosecute should not be made by the CCC. In this regard the argument put up by the CCC and its proponents namely that 'ordinary' prosecutions are undertaken on a daily basis by the QPS without any external oversight of the decision to prosecute is no answer to the fundamental problem of the CCC instituting prosecutions without appropriate supervision.

In respect of the Commonwealth Director of Public Prosecutions that body is regularly called upon by a number of Commonwealth law enforcement agencies such as the ATO to review a brief for the purpose of deciding whether a prosecution should ensue. A similar process should apply to the CCC in respect of a decision to prosecute in respect of all its investigations.

The question to be determined is who/what should be the body that carries out a review of the evidence to decide whether a prosecution should ensue.

There are obvious resource issues involved in giving the task to review a brief of evidence to the Queensland DPP before a decision to prosecute is made in respect of a CCC investigation.

The Inquiry may well need to look at the CDPP's role in resourcing issues in that regard to decide the extent to which additional resources need to be provided to the DPP (Qld) if it is given the additional role of being briefed to advise whether there is a sufficient basis to prosecute.

Allied to giving the DPP the role of advising whether there is a basis for prosecution is the test that should be applied namely whether it is to be the very low level test applied by a Magistrate in making a decision to commit for trial or whether it is the higher test that is supposed to be applied by a Prosecutor in the decision to present an indictment.

It is this Council's submission that the test that should be applied is the higher test of assessing the evidence for the purpose of presentation of an indictment.

If the DPP (Qld) is to be given the role of advising as to whether there is a basis for a prosecution the 'run it and see how it turns out' approach of far too many DPP prosecutors needs to be addressed.

In this regard there is a disconnect between the theory of sufficiency of evidence to present an indictment and how that decision making process works in practice.

Far too often DPP (Qld) prosecutors run cases that are weak and unmeritorious on the basis that they do not want to be criticised by complainants for not continuing with a case and the associated fear that that complainant may go to the Courier Mail to publicise their story.

The point that is being made in this regard is that the so-called independence of the DPP (Qld) often is non-existent in practice in respect of day to day decisions to prosecute particularly in respect of sexual offences. The too frequent attitude that a prosecutor is to run a matter as a trial

even if it is a particularly weak case for the purposes of heading off criticisms of a complainant is a well entrenched problem in the DPP (Qld). In this regard see the heading below dealing with 'Costs'.

In order to deal with unmeritorious prosecutions, the law should be changed so as to allow a Trial Judge to rule that there is no case to answer. This was once a reasonably effective countermeasure against a prosecution decision to run an unmeritorious case. Since this corrective measure disappeared with the Doney case there have been no measures available to control and, in appropriate cases, stop an unmeritorious prosecution.

It has been suggested that an alternative to the DPP advising whether there is a proper basis for a prosecution to be instigated is that an appropriately qualified and experienced member of the Qld Bar could be briefed to advise on whether a prosecution should be instituted. While on first examination this is an attractive proposition there are problems with this alternative.

One of the problems is that if the CCC get to choose who is briefed from the Qld Bar to advise as to whether a prosecution should be instigated experience suggests that the CCC will choose a barrister who is likely to recommend a prosecution.

There is also the risk that an individual barrister may not be sufficiently rigorous in making the decision as to whether a prosecution should be brought because the barrister would be hoping for further briefs in that regard from the CCC in the future.

There is also the problem that a barrister to be briefed would not only have to be relatively senior in experience but should also have a background in criminal law. That may significantly limit the number of barristers available to perform this task.

Costs:

It is not only anomalous but it is absurd that costs can be, and are, ordered against the police if the most minor of charges on the statute book such as Public Nuisance is unsuccessfully prosecuted yet costs are not available in respect of, say, the discontinuance of the Logan 8 prosecution. The threat of a costs order is a very effective bar against unmeritorious prosecutions in summary matters.

It is understood that there is a QPS committee presided over by at least an Inspector that reviews summary matters where costs are ordered.

Individual police prosecutors are alert to the fact that this committee can be critical of a decision to institute and maintain an unjustified prosecution and that can result in a prosecutor being prepared to accept a submission that a charge should be discontinued.

The fact that there is a no costs regime in indictable matters in Queensland results in the absurd situation that an unmeritorious indictable matter can be run through to a jury acquittal without any costs consequences to the prosecution where a unsuccessful prosecution of a summary matter in the Magistrates Court attracts an order for costs.

It is respectfully suggested that the costs regimes as they exist in some of the other States should be examined with a view to instituting a costs regime in indictable matters particularly prosecutions instituted by the CCC.

In this regard it is noted that there was a recent article in the Age newspaper that Cardinal Pell's lawyers were seeking a costs order in respect of the ultimately unsuccessful prosecution of Pell resulting from his High Court acquittal.

The long espoused argument against costs orders in criminal matters namely that it would discourage police from instituting prosecutions is not longer tenable, if it ever was.

That argument developed at a time in the sixties and seventies where Police were the only investigative and prosecuting agency. This argument pre-dated the establishment of the Crime Commission.

Apart from the fact that it is fundamentally unfair that an accused person has to shoulder a very high costs bill even when acquitted the fact is that the prosecution of summary matters by police shows that a costs order is taken seriously by most police prosecutors and acts in many, but not all, cases as an effective device to filter out unmeritorious prosecutions.

It is submitted that costs orders should be open in respect of Crime Commission prosecutions including in respect of committal proceedings in the Magistrates Court.

Further, the criteria for the proposed costs orders to apply to Crime Commission prosecutions should not be as strict as those that are applied in the Magistrates Court flowing from the case of Latoudis v Casey.

The CCC and its role in investigating complaints against Police:

Over time the CCC's role has completely changed from that envisaged in the Fitzgerald Report of being the primary body investigating complaints against police to the CCC's current position of a significant amount of its resources being devoted to the pursuit of so called organised crime cases.

It has already been noted in this submission that the CCC's role in Investigative Hearings is not limited to organised crime. There are an unacceptable number of cases where Investigative Hearings are conducted in relation to investigations that do not have an organised crime component.

It is submitted that Queensland should adopt the New South Wales procedure for investigating complaints against police namely that there should be a standalone body separate from the QPS and the CCC to investigate complaints against Police.

An examination of the Annual Report of the CCC shows a decreasing emphasis being given to the CCC's role in investigating complaints against police.

While high level corruption or other serious police offending is investigated and prosecuted from time to time by the CCC all other cases are handed back to the QPS with a so-called monitoring role by the CCC.

It is this Council's position that the monitoring role by the CCC is ineffective both in respect of individual cases and in dealing with trends in relation to complaints against police.

There have recently been cases where police have significantly failed to follow the disclosure obligations laid out in the Criminal Code in respect of Judge and Jury trials. Complaints that have been made in that regard to the CCC have been handed back to the police. There have been

cases where those complaints have been investigated by a more senior officer at the very station where the officer was based in respect of cases where disclosure has not only not been complied with but where the non-compliance has been deliberate.

In those cases the outcome of the police investigation is unsatisfactory and the CCC have declined to overrule the ultimate decision not to discipline the relevant police for failure to comply with Criminal Code disclosure obligations.

An examination of recent Annual Reports of the CCC indicate an almost total failure of the CCC to investigate trends in relation to complaints against police. In this regard it is to be noted that the principal stimulus for the Fitzgerald Inquiry was the 4 Corners program 'Moonlight State' which focussed largely on the activities of the then QPS Licencing Branch.

It is clear from the Fitzgerald Inquiry and its report that if there had been an analysis of trends within the Licencing Branch over a period of time by a body such as the CCC, the corruption and misuse of police powers within that Branch could have been identified and dealt with before it became a systemic problem.

There are no indications in recent CCC Annual Reports that there is an examination of trends in relation to complaints against police.

When Alan MacSporran QC became the Chair of the CCC Annual Reports early in his approximate 6 year period as Chairperson did concentrate on the problem of police assaults but that as a 'trend' issue fell away after 2 or 3 years.

It is axiomatic that if trends in respect of police complaints are not properly identified and dealt with not only individually but on a 'trends' basis police complaints end up being dealt with on a 'siloed' basis with little regard to the underlying culture or other factors that would demonstrate trends that could be properly addressed.

Nowhere is this more obvious than in the growing problem of police failing to comply with their disclosure obligations under the Criminal Code.

The Qld Court of Appeal case of Ernst demonstrates the problem of disclosure. Since Ernst there have been a number of cases where police have failed to comply with their disclosure obligations yet complaints to the CCC about those cases and trends arising have been poorly and inadequately dealt with.

It is therefore this Council's submission that the CCC have failed in its role of properly dealing with complaints against police and the only way that this failure can be addressed is to establish a separate body such as exists in New South Wales in respect of investigating complaints against police.

Recent criticisms of the Victorian IBAC similarly demonstrate problems with that organisation in dealing with complaints against police notwithstanding the considerable success which IBAC demonstrated in investigating background matters that led to the Lawyer X recent Royal Commission.

The Role of Police Personnel in the CCC:

The long running debate about police being seconded to the CCC as investigators continues particularly having regard to the role of police in the Logan 8 prosecution. However the

Parliamentary Committee's report about the Logan 8 reveals that the failure by supervising lawyers to rein in the one sided nature of the police investigation was the real problem in that case including the Committee's finding of "group think".

While this Commission of Inquiry clearly needs to revisit the issue of whether there is a better model than seconding police as investigators it is this Council's view that police generally are better investigators than lawyers.

Tenure of CCC Staff:

The issue of the length of tenure of the senior staff of the CCC has long been a contentious issue. It is a legitimate observation that the longer staff remain at the Senior Executive Service level at the CCC the greater the risk that the organisation becomes increasingly inward looking and stultified.

On the other hand if there is not an adequate career structure for especially senior personnel at the CCC it will be difficult to attract and retain competent people to fill those roles.

The Commission of Inquiry clearly needs to address this difficult and long running unresolved issue.

Conclusion:

It would be appreciated if once the Commission of Inquiry reaches preliminary views as to its ultimate recommendations to the Government that those views would be able to be circulated to submitters including this Council for confidential commentary.

I apologise for the lateness of this submission.

Regards
QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

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TERRY O'GORMAN
VICE-PRESIDENT