

Queensland Police Union of Employees

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4 April 2022

The Honourable Tony Fitzgerald AC QC
Chairperson and Commissioner

and

The Honourable Alan Wilson QC
Commissioner

Commissioner of Inquiry relating to the
Crime and Corruption Commission
State Law Building
50 Ann Street Brisbane
GPO Box 4001 Australia

via submissions@cccinqury.qld.gov.au

Re: Commission of Inquiry into specific matters relating to the Crime and Corruption Commission

Dear Mr Fitzgerald AC QC and Mr Wilson QC,

Thank you for consulting with the Queensland Police Union ("QPU") in relation to the Commission of Inquiry into specific matters relating to the Crime and Corruption Commission ("CCC"). The QPU represents over 12,500 police officers, watchhouse officers, liaison officers and band members throughout Queensland.

Terms of Reference 3 a – the adequacy and appropriateness of the structure of the Crime and Corruption Commission (CCC) in relation to use of seconded police officers:

1 – Role of the CCC

The QPU believes the role of the Crime and Corruption Commission as a standing Royal Commission, has reached its use-by date. That is not to say that its corruption functions should be abolished, rather, the CCC itself should be restructured to perform a proper public sector anti-corruption role.

Queensland has come a long way since the dark days of the late 1980's and the 'Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct' (Fitzgerald Report). There can be no serious contention that systemic or widespread corruption now, or indeed in the last 20+ years, infects any department, let alone the Queensland Police Service ("QPS").

The QPU believes the CCC should be restructured to remove both the witness protection and crime functions. Instead, those functions should be properly placed within the State Crime Command of the QPS.

A -The Crime Function

In respect to the Crime function, it would be appropriate for an independent Crime Commissioner to be vested with the existing powers held by the CCC in respect to its current crime function. Those powers could then be exercised as need arose. Under current arrangements the CCC's crime function is largely discharged by sworn police officers on secondment to the CCC. This leads to a duplication of roles, investigations, and expenditure. In reality, the CCC crime function is performed by police officers.

The QPU is also concerned key learnings from Fitzgerald Report seem to have been overlooked in the establishment of the CCC. Whilst there may have been valid reasons at the time, it is the QPU's position that times have now changed. It seems reprehensible for the same body to hold extensive compulsive powers for the investigation of serious crime, and to also be responsible for the investigation of misconduct. The ability for extended and covert powers to be abused is self-evident. An appropriate and independent watchdog is required to ensure that does not occur. The CCC is the watchdog. It should not be watching itself though in terms of performing the crime function.

Appropriate legislation could be promulgated which establishes an independent crime commissioner who could work with the QPS' State Crime Command. The crime commissioner could be independent of the QPS Commissioner, and convene investigative hearings as warranted, subject to the same approval process as currently exists for the CCC hearings. This would allow clear access to extended investigative powers for serious crimes such as murder, paedophilia and targeting organised crime

gangs. It would remove the current duplication which exists between the CCC and QPS.

An independent Crime Commissioner with compulsive hearing powers could be established, or alternatively, the CCC could have the power to perform such hearings as the QPS Commissioner requests, again subject to the same existing safeguards on the use of such powers.

In the Fitzgerald Report it was noted that Police in specialist squads are also more exposed to the temptation of and opportunity for misconduct.¹ The sentiment is the same today, in the face of the expanded function of the CCC the QPU believes this risk still exists in the CCC itself. The QPS is not the same entity after the Fitzgerald Report, and it is hard to fathom why major criminal investigations should be run by the corruption body (unless they are corruption related) when the QPS can do so. It has, and also will be the function of the police to investigate crime.

B -The Corruption Function

The role of the CCC should be limited to the scope of a corruption watchdog, responsible for overseeing public sector corruption allegations and assisting departments to investigate corruption allegations as required. This body should have the ability to take over investigations or initiate their own when a formal request comes from Departments, or the allegations amount to high level and/or systemic corruption issues.

The various Directors-General (including the Police Commissioner) are appointed by the Government. In making those appointments it should be presumed the Government has selected the best person for the respective position, and that that person holds the Government's confidence in their ability to discharge their duties. In the case of the Police Commissioner, not only does he/she have to hold the Government's confidence, but also must hold that of the Chair of the CCC. The *Police*

¹(1989) at page 240

Service Administration Act 1990 ('PSAA'), requires the Chair to sign off on the appointment of the Commissioner.²

The QPS itself has established an independent, well-funded and resourced internal investigation arm in the form of the Ethical Standards Command ("ESC"). Those officers are specially selected and vetted detectives who are trusted to investigate police misconduct allegation, not only on behalf of the Commissioner, but also the Office of the State Coroner.

The QPU believes it is a waste of Government resources for the CCC to involve itself in minor disciplinary matters or matters of corruption which are investigated properly by units of public administration.

The Directors-General are responsible for the proper and efficient administration of their respective Departments. This includes the discipline of their Department. In the case of the Commissioner of Police, she is required to report to the CCC on all matters of misconduct, and the CCC is also able to (and does) overview misconduct investigations. There can be no suggestion, particularly in the case of the QPS, matters are not investigated properly, or that "cover ups" exist from "Caesar investigating Caesar". The CCC has ample power to direct further, or additional investigations be undertaken.

Further, the CCC now also holds the power to not only review disciplinary sanctions to QCAT but also management decisions about police officer conduct, also to QCAT.³

Instead, the QPU submits, the CCC's role should be limited to over-viewing matters within the principle of devolution. The CCC should only intervene in the Director-General's investigation of matters, and disciplining of their staff, where the corruption is of a nature to warrant dismissal and the Director-General has not undertaken dismissal action, or the corrupt conduct is of such a serious or systemic nature as to warrant independent investigation and action by the CCC. In the latter case this would

² Section 4.2

³ Section 219 CC Act, Sch 1 Col 1.

only occur where the conduct involved executive officers (necessitating a public perception of unbiased investigation), or wide spread corruption within a Department (suggesting a failure by the Director-General to discharge her/his responsibilities to maintain discipline within the Department), or because the Department's own capacity for the type of investigation is simply insufficient to properly undertake it.

Surely any failure by a Director-General to maintain appropriate standards would impact on that Director-General's tenure, and potentially, in and of itself, constitute the type of corruption investigation warranted by the CCC. Otherwise, Director-Generals should be trusted to run their own Departments; after all it is what the public expects of them, and what the Treasury pays them for.

C -The Witness Protection Function

It is the QPU's position this function should also return to the QPS. It could be appropriately placed within the Intelligence Command area. It is currently staffed by police officers on secondment to the CCC. There is no reason which justifies the CCC performing this function where appropriate safeguards and confidentiality provisions can be imposed regardless of which agency is responsible for witness protection. Currently in Queensland the QPS runs dignitary protection for the Governor, Premier and others, this function could be expanded to include witness protection. Officers attached to the Intelligence Command are trusted with national security matters, such as counter terrorism, and have appropriate security clearances.

D -The Research Function

It is the QPU's position that the CCC is not the best placed organisation to investigate impartially the methods of operation of the QPS or the powers (and their use) by police. Nor is it best placed to make policy recommendations to Government regarding crime prevention and reduction. The CCC has a corruption investigative function which, in the QPU's view, has potential to sway such research and undermines its independence.

The research function should be properly outsourced to a university. For example, Griffith University hosts the ARC Centre of Excellence in Policing and Security (CEPS). The centre is aimed to boost policing and security research capacity in

Australia. A body external to government within the university sector allows the best academic minds to make policy proposals which are well researched and balanced is needed. It is the QPU's position, the research function should be outsourced to the university sector.

It is the QPU's position there is no place within what should be, the State's premier anti-corruption body, for a crime commission, witness protection or research function.

2 – Seconded Police – Status as Officers

We note one of the CCC's recommendations from the 2021 Review stated:

Recommendation 7:

Amendment of internal disciplinary powers

The CCC recommends that the disciplinary provisions set out in Division 9 of the Act are amended to ensure that disciplinary action taken by the CCC in respect of seconded officers can operate with the same effect as if the officer were employed directly by the CCC (including sanctions such as demotion and termination), and that powers may be exercised in respect of officers engaged under section 256.

The QPU believes this recommendation should be rejected. The police discipline system has just gone through major reform. It is a robust and rigorous scheme. All police, whether on secondment or not should face the same disciplinary processes as a matter of fairness.

If police are to be seconded to the CCC, those police should not have any role in the decision to criminally charge a person from a misconduct investigation. See further submissions below in this regard.

Preserving the Independence of the DPP

The power (informally) the CCC currently displays over the DPP, and pressure placed upon them to pursue prosecutions is compromising the integrity of the criminal justice system in Queensland.

The matter is then quite rightly dismissed

by the court or acquitted by a jury. The compromised independence of the DPP must stop immediately.

The *CC Act* should make it clear the CCC and the DPP are independent of each other and should impose an obligation on records being kept of any directions or communications between the DPP and senior officers including the Chair of CCC. In designing this obligation, section 4.7 of the *PSAA* could be the model. Section 4.7 imposes an obligation on the Police Commissioner to keep records of communications with the Police Minister. This will ensure the CCC does not simply impose its will on the independent prosecutor.

The QPU believes these changes are important to preserve the independence of the DPP. There should not be a risk of the DPP becoming a mouthpiece for the CCC and to do its bidding. The QPU believes these changes would allow for more true independence between the agencies, as well as a public perception of independence. The DPP for instance should not require the CCC's approval to discontinue a prosecution.

There should also be a legislative requirement for the DPP to discontinue any CCC prosecution where the DPP is not satisfied there is a reasonable prospect of conviction on the admissible evidence. The DPP is best placed to make these decisions and the CCC should be required to abide by these decisions.

4. Senior Officers and the Chair of the CCC

The QPU believes Senior Officers and the Chair of the CCC should be limited to a maximum tenure of five years in any ten-year period. Our belief is the five years should cover a person working as Chair or as a Senior Officer, regardless of which senior officer position they occupy.

The QPU is aware of situations where senior officers are shuffled to other senior positions to avoid tenure issues. There needs to be renewal of senior staff inside the CCC to ensure fresh minds, cultural change and independence.

The QPU is concerned about the risk of institutionalised power inside the CCC, it should never be the case that anyone working for the CCC should feel like they are bigger than the goals of the organisation. The anti-corruption focus of the CCC can be effectively delivered via statutory direction and policies and turn over of staff is not an impediment to this function.

Terms of Reference 3b the adequacy and appropriateness of legislation, procedure, practices and processes relating to the charging and prosecution of criminal offences for serious crime and corruption in the context of CC investigations.

The QPU believes that the CC Act should make it clear that the CCC is a corruption investigation body only and cannot commence or conduct any prosecution, outside of the discipline sphere under s50. It was never intended that CCC would evolve into to an independent 'prosecuting authority'.

The Crime and Corruption Act 2001

The CCC currently have the power to commence corrupt conduct proceedings pursuant to section 50 of the Act. There are examples where police officers have remained suspended from duty for up to five years as they wait for the CCC to even commence proceedings under this provision. It is concerning there is no statute of limitations. The basis of an effective discipline system is that it is conducted in a timely manner. The QPU submits there should be a statute of limitation placed upon corrupt conduct proceedings of 12 months from the time it comes to the knowledge of the investigating authority.

We have seen this in the police discipline system in recent times. It was an archaic system taking many years for an officer to be dealt with. With the 2018 reforms police discipline is now dealt with within 12 months. The CCC's usual response of 12 months is not enough time to investigate, should be outrightly rejected. The QPS also made these same self-serving excuses in the past, yet now, two years on they are meeting these timelines and the scheme is operating in an efficient way. The QPU submits this is a crucial aspect of legislative reform regarding the CCC's powers.

The QPU has several concerns with the CC Act. In particular the extended definition of corrupt conduct in section 15, and the retrospective and unlimited operation of section 16.

Section 15 was amended to remove a requirement for the CCC to prove that an act which is alleged to be corrupt conduct was done dishonestly with intent to cause a detriment or a benefit. It beggars' belief that a discipline offence alleging corrupt conduct does not necessarily require an element of dishonesty.

The QPU believes the repealed requirement of dishonest intention should be re-inserted into the definition of corrupt conduct as an element. This could be done by requiring proof of a dishonest intent to benefit or cause detriment, or if the section was to be left wider, by amending the current s15(1)(c)(i) and 15(2)(c)(i) from the current term "criminal offence" (which can extend to any offence on the statute books, including a parking infringement) to an indictable offence involving dishonesty.

Section 16 currently applies corrupt conduct to any conduct whenever it occurred. There is no statutory time limitation. Arguably an individual could be prosecuted for corrupt conduct which occurred at the beginning of a 40 year and otherwise stellar career.

Terms of Reference 3c the adequacy and appropriateness of section 49 of the Crime and Corruptions Act 2001.

These types of issue were explored in some depth in the Western Australia. The scheme in both Western Australia and Queensland are very similar in nature. We refer the Inquiry to the Western Australian Court of Criminal Appeal in *A v Maughan*.⁴

1. In *Maughan*, Martin CJ, considered the legislative schemes in jurisdictions across Australia, and concluded that the *Crime and Corruption Act 2001* (Qld) empowers the CCC to refer matters investigated, and information gathered, in the course of investigations to other agencies, including prosecuting agencies.

⁴ (2016) 50 WAR 262; See page 107 of CRG -01.

Further, His Honour observed that the Queensland legislation did not confer upon the Queensland CCC the express power to prosecute matters arising from their investigations.⁵

2. The position determined by the Western Australian Court of Criminal Appeal went on to be considered as part of a government inquiry – “*Joint Standing Committee on the Corruption and Crime Commission: The ability of the Corruption and Crime Commission to charge and prosecute 2016.*”⁶
3. During that inquiry the then chairperson of the Queensland CCC provided evidence in the form of a submission. The inquiry published Mr MacSporran’s evidence at page 36 of the report⁷ where Mr MacSporran explicitly accepted that the ratio in *Maughan* applied to the Queensland CCC:

Queensland - Crime and Corruption Commission

The Queensland Crime and Corruption Commission’s (QCCC) statutory corruption functions and powers are broadly similar to those of the CCC’s. QCCC provided a submission to the inquiry where they report that its power to prosecute its own charges are “very limited”. The QCCC’s Chairperson, Mr Alan MacSporran QC, states that “criminal charges and disciplinary matters in respect of corrupt conduct, police misconduct or misconduct are prosecuted independently of the Qld CCC.”

Under the *Crime and Corruption Act 2001* (QLD) the QCCC is responsible for:

- dealing with complaints about, or information or matters involving, corrupt conduct; and
- monitoring how the Commissioner of Police deals with police misconduct.

In explaining the QCCC’s prosecution powers, the Chairperson, Mr Alan MacSporran QC said:

⁵ *Maughan* at [133]

⁶ See page 157 of CRG - 01.

⁷ See page 212 of Exhibit CRG-01

In respect of its corruption function, the Qld CCC may take disciplinary action for 'corrupt conduct' in the Queensland Civil and Administrative Tribunal. Otherwise, the Qld CCC is not empowered to prosecute any public official for a criminal offence; or to take disciplinary action against a public official on any grounds.

Where sufficient evidence exists, criminal offences arising from corruption investigations are prosecuted by the Queensland Director of Public Prosecutions, or another prosecuting authority.

Similarly, disciplinary actions for 'police misconduct', or 'misconduct', are taken against Queensland police officers, or other public officials, by the Queensland Police Commissioner or the chief executive officers of the other agencies...

The QCCC Chairperson said that he considers separating the power to investigate and the power to prosecute "is important in maintaining public confidence in the Qld CCC and the prosecuting authorities."

4. The inquiry went on to make a formal finding (Finding 24), clearly based upon the Queensland statute and the evidence of Mr MacSporran that criminal charges arising from investigations undertaken by the Queensland CCC are prosecuted by either the Commissioner of Police or the Director of Public Prosecutions.⁸

Of further interest in this regard are the proceedings before the PCCC on 7 February 2020:

Mr CRANDON: Reflecting on your comments earlier about the discretion being in the Director of Public Prosecutions, the CCC has discretion in relation to prosecution?

Mr MacSporran: Not really. We do not prosecute. It is just a quirk of fate that we have police officers from the QPS seconded to us. When they are seconded to us, they retain their normal police powers, which include powers of arrest and charge and so

⁸ Report at page 37, CRG-01 at 213

forth. What we do, just for convenience, is once we decide, through our chain of command, including up to me, that there is sufficient evidence to charge someone, we then give that material to an independent police officer at the commission and say, 'Would you mind looking at this and exercising your discretion as to whether you think it is one you would be happy to charge or not?' That is how the charge is laid if we lay it. When I say 'we', it is really the police officer. It is then handed over to the DPP.

Mr CRANDON: Would you always hand it over to the DPP?

Mr MacSporran: Yes, we never prosecute, yes.

Mr CRANDON: You have never prosecuted?

Mr MacSporran: We have no power to.

CHAIR: Do you not hold a prosecutorial authority? I think you have said in this committee before, Mr MacSporran, that you hold a prosecutorial authority.

Mr MacSporran: I used to. I used to have the commission to prosecute years and years ago, but that is just for other purposes.

CHAIR: I am sorry. I understood you to have a prosecutorial authority because it came up in relation to the Premier matter in relation to the review of the guidelines of the Office of the Director of Public Prosecutions. You do not hold it yourself, so you always refer to the DPP in that respect?

Mr MacSporran: Yes, we never, ever prosecute ourselves, no.

CHAIR: Oh, terrific. I misunderstood that previously then. Thank you.

Mr MacSporran: If it is a simple offence, the police prosecutor goes to the QPS and Police Prosecutions do it. If it is an indictable offence, it goes to the DPP. The DPP then, under its own guidelines, has the ability to not present an indictment or, if one has been presented by them or a previous DPP, to discontinue it with nolle prosequi.

CHAIR: So it is discretionary under the hands of the DPP?

Mr MacSporran: Yes.

CHAIR: You are subject to the vagaries of the DPP and their office in that sense?

Mr MacSporran: Yes, absolutely.

CHAIR: Yes.

Mr MacSporran: In the old days we used to always go to the DPP before we gave it to a police officer to see if they were comfortable with it. We still do it occasionally for more controversial cases. That is just to save the DPP the embarrassment of having to say, 'Well, we don't agree and we don't think this has got legs,' and so forth. Most often the police officer lays the charge and then the brief goes to the DPP. The DPP then has the ultimate say as to whether or not it is a case they feel comfortable prosecuting. If they are not, they don't. That is the first safeguard.

The second one would be a mandated statutory requirement that a charge cannot be laid at all until the DPP consents. There are some offences in the code that have that. A private prosecution cannot start without consent. There are some others. That is a safeguard. Whilst we thought that was too big a step to take—and we said that in our submissions—I can understand from a political point of view how you might want another layer of comfort if this became a criminal offence, or these became criminal offences.

That is one way you can achieve it, by having the need for the director's actual consent before a charge could ever be laid.

Mr CRANDON: Following on from that, are you acting therefore as an arbitrator as to whether or not, if that is the right word, to pass it on? If you do not pass it on to the DPP, it goes nowhere?

Mr MacSporran: It goes nowhere.

Mr CRANDON: You are making the call as to whether or not to prosecute?

Mr MacSporran: Yes.

Mr CRANDON: At your level, anyway.

Mr MacSporran: We are making the call as to whether we should commence the proceedings, whether we think there is sufficient evidence. We have a body of senior lawyers, including myself, in the organisation that have a clear interest in that. We make the determination or judgment to give it to a police officer who then exercises their police discretion as to whether or not to charge. If they charge, it then goes to either the police prosecution corps or the DPP who then have the final say.

Mr CRANDON: If you choose not to pass it on, is there any avenue for someone else to take it up?

Mr MacSporran: There is nothing stopping anyone from making a complaint to the QPS, or even to go directly to the DPP, but they would say, 'Where is the evidence?'

This evidence of the then Chairperson is at odds with the actual practices being adopted. We saw in evidence during the prosecution of the Logan City Councilors that the arresting officer advised the court during cross-examination at committal although he commenced the charges, he had no say in if a person was to be charged or with what charges a person was to be charged. This CCC practice could only ever be described as 'shady' at best.

Although there does not seem to be any ambiguity to the plain reading of section 49 of the Act the CCC clearly has been applying a contorted interpretation. When the

explanatory notes from the Criminal Justice Commission (CJC) Act, Crime and Misconduct (CMC) Act, Crime and Corruption (CCC) Act and the amendments from the Crime and Corruption and Other Legislation Amendment Bill 2018 are examined it was never the intention of the legislator for the watchdog to be a prosecuting authority in its own right. Sections 4, 5 35 and 49 are all consistent with such an interpretation. It was always an investigative, referral and oversight body. That should not change.

5. In Queensland there are two types of prosecutions:
 - a) a public prosecution which are commenced by a person authorised by law to commence proceedings on behalf of the State in the performance of their official duties such as a police officer, council officer, fisheries officer etc. Those prosecutions are then prosecuted in a court by the relevant prosecuting authority authorised by law. For instance, see section 10.24 *Police Service Administration Act* for police officers to appear in police prosecutions. No such provision exists for the CCC to prosecute their own matters; to the contrary the CCC powers are restricted to a referral for criminal matters (s49(2)) and the prosecution of corrupt conduct proceedings in QCAT (s50).
 - b) a private prosecution which is brought by a private individual pursuant to Part 5 Division 2 *Justices Act*. If a police officer is not commencing proceedings with authority in his or her official capacity the result is the proceedings would in fact be a private prosecution brought by a police officer in his or her private capacity.

There was good reason for s49 to be amended with the DPP being omitted. That is because the CCC were referring matters to the DPP with only favorable evidence being disclosed by the CCC for consideration of criminal prosecution with the Director recommending charges. However, upon criminal charges being commenced, the court processes of disclosure would be engaged and the unfavorable evidence, previously no disclosed to the DPP, would cause the prosecutions to fail. The director at the time quite rightly wanted prosecutions from misconduct investigations to follow the usual course, namely:

1. Police decide if criminal charges are to be preferred.
2. The Magistrates Court manages the brief of evidence and disclosure obligations of investigators.
3. The Magistrate Courts, through the committal processes, then scrutinizes if a case to be answered exists; and
4. If so, the matter is committed to the higher courts, and it is at that time the DPP become involved.

The CCC believed their compliance with section 49 rested with referring the matter to a junior ranking police officer, who had been seconded to the CCC and was answerable to the CCC. This clearly is not what was intended by section 49.

We have an example where a police officer was charged with a criminal offence. Our lawyers wrote to the DPP asking who from that department had carriage of the prosecution before the court. The DPP advised they did not have carriage of the matter. Our lawyers then wrote to the Commissioner of Police asking who from the QPS had carriage of the prosecution before the court and the Commissioner also advised no one from the QPS had carriage of the matter. What our lawyers worked out was the CCC had engaged a private barrister with an inhouse lawyer from the CCC instructing that private barrister to prosecute the criminal charge with absolutely no involvement from the DPP or the QPS. Upon making an application to the court that the situation was an abuse of process, and in essence a private prosecution rather than a public prosecution, the CCC asked the director of DPP to resume control of the prosecution. Again, an example of undesirable practices by the CCC which should not ever be repeated.

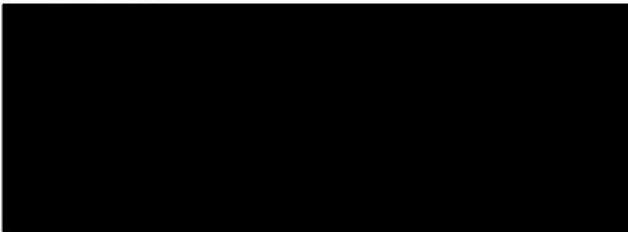
It is the QPU submission section 49 should be amended to make clear, the CCC must refer its investigation (all materials favorable and unfavorable) directly to the Commissioner of Police to consider if criminal charges should be commenced. It is then for the Commissioner of Police to delegate that task to a suitable person either internally or externally. For example: If the referral relates to allegations of sex offences the Commissioner could refer it to the Sex Offences Unit or the CPIU. If the referral relates to drug trafficking it could be referred to the Drug Squad. If the referral

relates to the actions of a serving police officer, the Commissioner could refer the matter to the QPS Ethical Standards Command or even a lawyer from the private bar.

Conclusion

The QPU believes the time has come for the CCC to be restructured as a standalone anti-corruption agency with no additional responsibilities. Its role should be limited to supporting Departments by providing education, training, and investigatory assistance in circumstances where a Department lacks its own capacity, or the misconduct alleged is systemic or involves high level employees at the SES level.

The QPU requests there be a recommendation for clarity around the CCC not being a prosecution authority in Queensland and that clarity to come from reform to s49 of the CC Act.



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