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Our reference: Matter: 20220066

Commission of Inquiry relating to the Crime and Corruption Commission
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Dear Sir/Madam

Submission regarding matters relating to Crime and Corruption Commission

I refer to the call for submissions with respect to matters set out in the Terms of Reference published by the Governor in Council on 31 January 2022.

Council of the City of Gold Coast (**Council**) is pleased to provide a submission to the Commission in respect of matters relevant to items 3(b) and 3(c) of the Terms of Reference. Council would be pleased to expand on these points further in a supplementary submission and/or at a public hearing, should the Commission require.

1. Introduction

- 1.1 The community has high expectations in terms of the standard of behaviour required of councillors and mayors when carrying out their roles and responsibilities as elected representatives for their communities. Adherence to these expectations, relevant legislation and the Code of Conduct for Councillors in Queensland, is vital to ensure public confidence in local government decisions.
- 1.2 The role of the CCC, as an effective, impartial and independent watchdog on public sector corruption and major crime, is an important one. Council generally supports the robust integrity framework established under the *Local Government Act 2009 (LGA)*, *Crime and Corruption Act 2001 (CC Act)* and related legislation and has previously expressed its support for increased accountability measures.
- 1.3 However, Council has concerns about the impact of certain aspects of the LGA and CC Act on councillors, which were most prominently illustrated by the experience of Logan City Councillors, as recently considered by the Parliamentary Crime and Corruption Committee (**PCCC**).¹
- 1.4 Council considers there is a need for review of the CCC's role in prosecuting councillors, particularly the current process by which the CCC determines to lay charges against councillors.

¹ See Parliamentary Crime and Corruption Committee, Parliament of Queensland, *Inquiry into the Crime and Corruption Commission's investigation of former councillors of Logan City Council; and related matters* (Report No. 108, 57th Parliament) (2021) (**PCCC Report**).

- 1.5 This is because, the effect of section 175K of the LGA is that a decision to charge a councillor for a "disqualifying offence" immediately results in his or her suspension as a councillor. In Council's experience, the broad range of offences under the LGA, which are prescribed as disqualifying offences has, despite the deterrents in the legislation, encouraged the weaponisation of complaints against councillors as a means of attempting to effectively end the career of a councillor through a long period of suspension, in the event they are charged.
- 1.6 It is against this background of concern that Council submits the following comments and proposed amendments to Chapter 6 of the LGA and the CC Act.

2 Submission

3(b) - The adequacy and appropriateness of legislation, procedures, practices and processes relating to the charging and prosecution of criminal offences for serious crime and corruption in the context of CCC investigations, including having regard to:

ii. the use and role of seconded police officers and the retention of their powers pursuant to sections 174 and 255 of the *Crime and Corruption Act 2001*;

- 3 Section 35 of the CC Act sets out how the CCC may perform its corruption functions. It enables the CCC, when conducting or monitoring investigations, to gather evidence for the prosecution of persons for offences or disciplinary proceedings.
- 4 As noted in the PCCC Report, once it is decided that there is sufficient evidence to charge a person, the CCC Chairperson approves a charge being made and which charges. A police officer seconded to the CCC is then provided the material and makes an independent decision as to whether to charge and what charges to make. Section 255(5) of the CC Act provides for police officers seconded to the CCC to have the functions and powers of a police officer (including the power to charge persons for relevant offences).
- 5 The practical effect is that the seconded police officer responsible for an investigation (in exercise of the powers under the CC Act), may then exercise their powers as police officer to lay the relevant charges.
- 6 This lack of separation between the exercise of powers of the seconded police officer under the CC Act, and exercise of police powers to charge, results in a lack of independent scrutiny as to whether the investigation has yielded sufficient evidence to support the laying of charges.
7. In Council's view, if the QPS is to retain a role in deciding whether to lay charges for disqualifying offences under the LGA, there must be a separation between the officers responsible for investigation, and the officers responsible for laying charges. Refer also to the submissions in respect to item 3(c) regarding the potential need to refer matters relating to disqualifying offences under the LGA to the Office of the Director of Public Prosecutions (ODPP) before charges are laid.

iii. the extraordinary nature of the CCC's powers and functions under the *Crime and Corruption Act 2001* and differences from police powers in the investigation, charging and prosecution of criminal offences, including provisions of the *Police Powers and Responsibilities Act 2000*;

- 8 As noted by the PCCC, the CCC is "entrusted with extraordinary powers",² including the ability to obtain evidence under compulsion and questioning under penalty of imprisonment if witnesses do not answer questions at compulsory hearings.³
- 9 The CC Act outlines that the CCC investigates matters and, if it considers there should be criminal charges following an investigation, refers the matter to a prosecuting authority.⁴ The CC Act does not provide the CCC with prosecutorial discretion in relation to potential criminal offences - although it has the discretion to prosecute *corrupt conduct* of an officer of a Unit of Public Administration, where there is evidence to support the start of disciplinary proceedings, at QCAT.⁵
- 10 There are difficulties in reconciling the above position with the ability of the CCC to charge through seconded police officers. Council considers that legislative clarification is needed about the CCC's role in prosecutions.

iv. the consequences arising from the laying of criminal charges as a result of a CCC investigation, including the provisions under section 175K of the *Local Government Act 2009* for a person to be automatically suspended as a councillor when the person is charged with a 'disqualifying offence'

- 11 Under section 175K of the LGA, when a councillor is charged with a "disqualifying offence", they are automatically suspended as a councillor. If convicted of a "disqualifying offence", the person automatically stops being a councillor.⁶ Section 153(6) identifies a "disqualifying offence" as being either a "treason offence", an "electoral offence", a "serious integrity offence" or "an integrity offence". The policy objective is to provide that a councillor is automatically suspended if the councillor is charged with an offence that would, on conviction, disqualify the councillor from being a councillor under section 153 of the LGA or the *City of Brisbane Act 2010*.⁷
- 12 The range of disqualifying offences under the LGA is broad.
- 13 A "treason offence" is defined by section 153(2) of the LGA as being an offence of treason, sedition or sabotage under the law of Queensland, another State or the Commonwealth.
- 14 An "electoral offence", is defined by section 153(3) of the LGA.⁸ It includes an offence that relates to an election of a member of an Australian parliament or local government, a referendum, for enrolment of a person on an electoral roll, and for which a penalty imposed included a sentence of imprisonment.⁹
- 15 A "serious integrity offence" is defined by section 153(4) of the LGA.¹⁰ It includes offences under a range of legislation including:

² PCCC Report, p 140.

³ See Chapter 3 CC Act.

⁴ s 49 CC Act.

⁵ s 50 CC Act.

⁶ s 153(6) LGA.

⁷ Explanatory Note to the Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018, p 3.

⁸ Defined as a disqualifying electoral offence under the Electoral Act; or an offence that would be a disqualifying electoral offence had the conviction been recorded after the commencement of the *Electoral and Other Acts Amendment Act 2002*.

⁹ Other than a sentence of imprisonment for non-payment of a fine, restitution or other amount.

¹⁰ Defined as being an offence against: (a) a provision of a law mentioned in schedule 1, part 1 if, for a circumstance stated for the offence (if any), the stated circumstance applies to the offence; or (b) a provision of a law of another State or the Commonwealth that corresponds to a provision mentioned in paragraph (a).

- (a) the LGA, being dishonest conduct of a councillor or councillor advisor (section 201D);
 - (b) the Criminal Code, including official corruption, misconduct in relation to public office, bribery, fraud (with a circumstance of aggravation), stealing (with a circumstance of aggravation) and perjury;
 - (c) the CC Act, being contempt of person conducting commission hearing (section 198(1));
 - (d) the *Criminal Proceeds Confiscation Act 2002*, being money laundering (section 250(1); and
 - (e) the *Electoral Act 1992* and *Local Government Electoral Act 2011*, including (under the latter) false or misleading information, bribery, forged electoral papers and schemes to circumvent prohibition on particular political donations.
- 16 An "integrity offence" is defined by section 153(5) of the LGA.¹¹ It includes offences under a range of legislation including:
- (a) the LGA, including taking action in reprisal for a complaint about the councillor's conduct, failure to deal with a prescribed conflict of interest at a meeting, taking retaliatory action where a councillor reports another's prescribed or declarable conflict of interest, and use of information acquired by a councillor to gain financial advantage or cause detriment;
 - (b) the Criminal Code, including influencing voting, voting if not entitled, publishing false information about a candidate, bribery, fraud and stealing (with no circumstance of aggravation);
 - (c) the Electoral Act, including acceptance of prohibited donations and providing false or misleading information when applying for a determination that a person or entity is not a prohibited donor;
 - (d) the Local Government Electoral Act, including failure to take all reasonable steps to operate a dedicated account, assisting illegal payments, engaging in group campaign activities and voting if not entitled.
- 17 As noted in the PCCC Report, the former Logan City Council councillors were charged with fraud under s 408C of the Criminal Code, including a circumstance of aggravation. As a consequence, the charge fell within the definition of "serious integrity offence", meaning that each of the councillors charged was, by virtue of section 175K of the LGA, automatically suspended from office. The effect of the charging was that, because more than half the Councillors were so suspended, the Council was dissolved.¹²
- 18 Those councillors were charged on 26 April 2019. The committal hearing concluded, with dismissal of the charges, on 14 April 2021.
- 19 The combination of these concepts being:

¹¹ Defined as an offence against a provision of a law mentioned in schedule 1, part 2 if, for a circumstance stated for the offence (if any), the stated circumstance applies to the offence.

¹² PCCC Report, p 43.

- (a) the broad scope of what constitutes a "disqualifying offence";
- (b) the automatic suspension of a councillor when they are charged with a disqualifying offence; and
- (c) the potentially significant period of delay between when a person is charged with a "disqualifying offence", and the time the person is committed to stand trial for that offence,

means a councillor can be subject to a what is effectively a career-ending suspension by virtue of being charged with a range of offences, including (relatively) minor matters through to very serious offences.

- 20 There are a range of offences under the LGA which constitute "integrity offences", including those set out at (a) above. In Council's experience, notwithstanding deterrents in the legislation, complaints have been made, for improper purposes, of conduct falling within these provisions.
- 21 Council notes a submission made to the PCCC to the effect that section 175K of the LGA should be amended so that the suspension of a councillor charged with a disqualifying offence does not occur until the earlier of:
- (a) a councillor advising a court of an intention to plead guilty to the charge; or
 - (b) a councillor being committed to stand trial over the charge.¹³
- 22 Council considers it would be untenable, in terms of community expectations, for a councillor to continue in office if they have been charged with certain types of "disqualifying offences", as that term is currently defined.
- 23 Council submits that the preferable option is for there to be greater safeguards in respect of the issuing of charges for a disqualifying offence - at a minimum, a requirement to seek advice from the ODPP or an external legal advisor before a charge is laid. This is discussed further below under item 3(c).
- 24 Council considers the scope of section 175K and related provisions should be reviewed and narrowed, by:
- (a) introducing an additional mechanism whereby a councillor cannot be charged with a disqualifying offence until the CCC has first obtained a recommendation from the ODPP, or a senior independent legal advisor, before police officers use their discretion to charge; and
 - (b) reviewing the scope of disqualifying offences.
- 25 Subsequently, Council considers it appropriate to review whether section 175K ought to be applied uniformly across all categories of "disqualifying offence". The range of "disqualifying offences" vary significantly in gravity. It would be possible for automatic suspension to occur

¹³ Submission of the LGAQ dated 22 July 2021 to the Inquiry into the Crime and Corruption Commission's Investigation of Former Councillors of Logan City Council and Related Matters, available at <https://documents.parliament.qld.gov.au/com/PCCC-8AD2/ICCCLCC-5502/submissions/00000013.pdf>.

only if a councillor is charged with a "treason offence" or "serious integrity offence", for example, and in the case of an "electoral offence" or "integrity offence", the councillor is only suspended following a committal hearing or advising of an intention to plead guilty, or a conviction.

3(c) - the adequacy and appropriateness of section 49 of the *Crime and Corruption Act 2001*, including consideration of:

i. relevant findings and recommendations of the Parliamentary Crime and Corruption Committee's (PCCC) Report No. 108, *'Inquiry into the Crime and Corruption Commission's investigation of former councillors of Logan City Council; and related matters'* and other previous relevant reports of the PCCC

26 In making its submission below, Council notes the following findings in the PCCC Report:

- (a) Finding 9: The committee finds that the material prepared for, and evidenced discussions of, the 24 April 2019 meeting of the CCC to consider commencing criminal proceedings against the 7 Logan City Councillors (and further proceedings against the Mayor) for fraud in respect of Ms Kelsey's public interest disclosure and termination as chief executive officer were inadequate for that purpose.
- (b) Finding 10: The committee finds that the discretion to charge the 7 Logan City Councillors and Mayor with fraud was affected by a desire to assist Ms Kelsey.
- (c) Finding 11: The committee finds that the discretion to charge the 7 Logan City Councillors and Mayor with fraud in respect of Ms Kelsey's public interest disclosure and termination as chief executive officer miscarried because all material considerations and evidence were not taken into account and weighed.

ii. the evolution of section 49, including the nature and purpose of amendments made in the *Crime and Corruption and Other Legislation Amendment Act 2018*;

27 Section 49 of the CC Act provides that, if the CCC investigates or assumes responsibility for the investigation of a complaint about corruption and decides that prosecution proceedings or disciplinary action should be considered, the CCC can report on the investigation to a prosecuting authority for the purposes of any prosecution proceedings the authority considers is warranted.¹⁴ A report must contain or be accompanied by all relevant information known to the Commission that (among other things) supports a charge that may be brought as a result of the report, as well as any defence that may be available.¹⁵

28 The *Crime and Corruption and Other Legislation Amendment Act 2018* removed the power of the CCC to refer corruption investigation briefs to the ODPP for the purposes of considering prosecution proceedings. Section 49(5), in its previous form, also allowed the DPP to require the CCC to undertake further investigative steps relevant to a prosecution.

¹⁴ ss 49(1)-(2) CC Act.

¹⁵ s 49(4) CC Act.

- 29 These amendments followed a recommendation of the PCCC based on concerns raised by the ODPP in 2015. The ODPP submitted that the referral process gave rise to time delays and budgetary issues, as well as resourcing issues (particularly in regards to compelled evidence):¹⁶

"The Commission must, pursuant to section 49(4) of the Act, provide all relevant information that, inter alia, supports a charge and supports a defence. Practically, that means that the compulsorily obtained information must be provided to this Office. That in turn means that the senior staff member who provides the initial advice has been exposed to the material and cannot prosecute the matter, should that be the result of the advice provided. The creation of "Chinese walls" around the prosecution results in a double handling of a brief which is usually complex and lengthy and is a further impost on the finite budget resources of this Office."

- 30 Section 49(5) of the CC Act¹⁷ now states that a prosecuting authority for that section does not include the DPP. The Explanatory Notes to the Crime and Corruption and Other Legislation Amendment Bill make clear that:

- (a) "the Commission may continue to report on a corruption investigation to other prosecuting authorities, for example, the QPS, for the purposes of any prosecution proceeding the authority considers warranted";¹⁸ and
- (b) the amendment would "not affect the ability for evidence gathered by the Commission during the course of its corruption investigation to be provided to the QPS and consequentially the ODPP as a part of the usual prosecutorial process."¹⁹

iv. the approach to review by, and the obtaining of advice from, respective Directors of Public Prosecutions in other jurisdictions of charges arising out of investigations by serious crime and corruption integrity bodies;

- 31 As noted in the PCCC Report,²⁰ the approach in the current form of s 49 of the CC Act differs from the approach in other jurisdictions:

- (a) in NSW, a Memorandum of Understanding (**MOU**) provides that ICAC NSW will furnish the ODPP with evidence in admissible form, outlining charges identified (but not laid) by ICAC and identifying any relevant legal and evidentiary issues. The ODPP provides written advice to ICAC NSW about charges. ICAC NSW is then responsible for serving a Court Attendance Notice upon the accused, which it does through ICAC NSW officers and not seconded police officers;
- (b) The Integrity Commission in Tasmania also has the power to refer briefs prior to charging. In addition to this, there is the power to refer matters to the Commissioner of Police and the ODPP at various points in the investigation process. The ODPP has the responsibility to charge;
- (c) ICAC NT also have the power to refer briefs to prosecuting authorities prior to charging. In the Northern Territory a MOU between ICAC and the ODPP indicates

¹⁶ Submission of the ODPP dated 28 July 2015 to the Review of the Crime and Corruption Commission, available at <https://documents.parliament.qld.gov.au/com/PCCC-8AD2/RCCC-01EB/submissions/00000024.pdf>, as reported in the PCCC Report, p 154.

¹⁷ As amended by the *Crime and Corruption and Other Legislation Amendment Act 2018*.

¹⁸ Explanatory Notes to the Crime and Corruption and Other Legislation Amendment Bill 2018, p 15.

¹⁹ Ibid p 6.

²⁰ PCCC Report, p 164-165.

the decision to charge is a matter for the Commissioner of ICAC NT. However, the Commissioner has stated that he considers the decision to charge is a matter for the ODPP or, where the prosecutor might be NT Police Force, the NT Police Force. The Commissioner stated that he intended to seek an amendment to the MOU in those terms.²¹

vi. whether there should be a requirement that the CCC obtain a recommendation from the DPP, or a senior independent legal advisor, before police officers use their discretion to charge serious criminal offences and implications for agencies associated with such a requirement;

32 The former section 49 enabled the obtaining by the CCC of advice from the DPP as to prosecution of criminal offences detected through a corruption investigation. Together with the process in section 49(4) for producing evidence, it was an important check on the ability to issue proceedings in corruption cases that no longer exists.

33 Council notes the findings of the PCCC that, in the decision to charge the former Logan Councillors:²²

"...The CCC did not refer the matter to the DPP for consideration prior to charging, but both the CCC and DPP advised this was not unusual under the current legislation.

The CCC submitted there was a prima facie case to support the charges being laid and proceeding to a trial. The DPP, after receiving the briefs and further exchanges of information, progressed to a committal hearing.

However, the committee notes the DPP's evidence that he 'always struggled with this being a 408C offence', and instead thought it was more appropriately an offence of retaliation under section 40 of the PID Act, which may still have been a charge that lacked sufficient evidence."

34 Council makes no comment as to the appropriateness of the charges laid and ultimately dismissed. However, the above extract demonstrates the potential in complex corruption investigations for a difference of opinion as regards the appropriate charge.

35 Council notes the advice of the CCC to the PCCC that "the Commission does not typically refer matters to the DPP for advice prior to laying charges."²³ As noted above, the effect of section 175K of the LGA is that a councillor is automatically suspended on being charged with a "disqualifying offence". This is a serious consequence that does not occur when charges are laid in the typical course. Nor does it occur for members of the Queensland Parliament.²⁴

36 Given the unique impacts of section 175K, Council recommends that section 49 of the CC Act be amended so that where a disqualifying offence charge is being considered, the CCC be required to obtain from the ODPP or an independent legal adviser or body:

(a) approval or a recommendation to lay the charge; or

²¹ PCCC Report, p 165.

²² PCCC Report, p 126-127.

²³ PCCC Report, p 146.

²⁴ Under s 72 of the *Parliament of Queensland Act 2001*, a member's seat is vacated if the member is convicted of certain offences, including any offence for which the member is sentence to more than 1 years' imprisonment.

(b) at a minimum, advice on the charge.

37 Council would also support, in principle, a requirement that the above occurs before the CCC exercises (through a seconded police officer) the discretion to charge serious criminal offences more broadly or to require that only the ODPP (to the exclusion of the QPS) exercise discretion to charge.

38 Council also notes the comments of the DPP, Mr Carl Heaton QC, as reported in the PCCC Report, as regards the practical considerations if the relevant statutory provisions were amended such that the CCC could only refer matters through the DPP:²⁵

"It would definitely raise a resourcing consideration. I think it also tends to obscure the independence of the DPP as a prosecuting authority..."

39 Council notes that in other jurisdictions, such as NSW, the Northern Territory and Tasmania, integrity bodies have the power to refer briefs to prosecuting authorities before charging.²⁶ As noted above, in NSW the ODPP provides written advice to ICAC NSW about whether to charge and what charges. In determining whether to include a statement in a report that consideration should be given to obtaining the advice of the ODPP with respect to a prosecution, ICAC NSW has regard to whether there is sufficient admissible evidence to justify referral to the ODPP.²⁷

40 In Council's view, consideration should be given to adopting a similar approach in Queensland.

Thank you for the opportunity to make this submission to the Commission.

If you would like to discuss this submission further, please contact the [REDACTED], via email at [REDACTED] or telephone on [REDACTED]

Yours faithfully,

[REDACTED]

Tim Baker

Chief Executive Officer

Council of the City of Gold Coast

²⁵ PCCC Report, p 148.

²⁶ And the Tasmanian Integrity Commission does not have the power to charge.

²⁷ PCCC Report, p 163.