



Department of Local Government,
Racing and Multicultural Affairs

Our ref: DGC18/289

Your ref: A299084

22 MAR 2018

Mr Linus Power MP
Chair
Economics and Governance Committee
egc@parliament.qld.gov.au

Dear Mr Power

Thank you for your letter of 19 March 2018 seeking clarification on potential policy or drafting issues in the Local Government (Councillor Complaints) and Other Legislation Amendment Bill 2018.

As requested, please find enclosed a written response prepared by the Department of Local Government, Racing and Multicultural Affairs on the issues raised.

If you require further information, I encourage you to contact [REDACTED] Acting Director, Legislation Services in the Department on [REDACTED] or by email at [REDACTED]

Yours sincerely



Greg Chemello
Acting Director-General

Enc

1 William Street Brisbane
PO Box 15009 City East
Queensland 4002 Australia
Telephone +617 3452 7009
ABN 251 66 523 889

Local Government (Councillor Complaints) and Other Legislation Amendment Bill 2018

Response to potential policy/drafting issues raised by the Economics and Governance Committee

Potential issue	Departmental response
<p>Unsuitable meeting conduct</p> <p>The Bill provides that repeated instances of unsuitable meeting conduct or contravening an order to leave and stay away from a meeting place may become inappropriate conduct.</p> <p>Can you advise if there is a mechanism, as suggested by the Councillor Complaints Report, for the chair or the council to escalate serious conduct breaches that occur during council meetings (such as bullying or intimidation) that are inappropriate conduct but do not meet the definition of misconduct?</p>	<p>The Bill does not specifically provide for the escalation of serious breaches of the behavioural standards in a meeting as inappropriate conduct in the same way it provides for the escalation of repeated unsuitable meeting conduct as inappropriate conduct under new section 150K(2)(b).</p> <p>While the Government's response to the Independent Review Panel's Report supports that serious or repeated breaches of conduct in meetings be dealt with as inappropriate conduct (recommendation 5.7), the Government response also states the recommendation would need to be addressed in conjunction with the response to recommendations 5.6 and 5.8. The Government's response to recommendation 5.6 supports in principle that breaches of the codes be dealt with immediately in a manner similar to the role of the Speaker in Parliament.</p> <p>It was identified during drafting of the Bill that it would be difficult to legislate for the seriousness of breaches as it could be applied inconsistently across the 76 Local Governments and potentially misused.</p> <p>Accordingly, new section 150I provides that a contravention of a behavioural standard by a Councillor in a Local Government meeting is to be dealt with by the Chairperson in the meeting. This ensures that breaches of the Code of Conduct in meetings are dealt with quickly and efficiently so that the business of Local Government can continue.</p> <p>The Bill appropriately gives the Chairperson the discretion to match the seriousness of the conduct breach with the appropriate order. For example, for less serious breaches of the behavioural standards the Chairperson has the discretion to reprimand a Councillor and, for more serious breaches, the Chairperson may order a Councillor to leave the meeting and stay away for the rest of the meeting. Also, if a Councillor ordered to leave a meeting refuses to do so, the Councillor is taken to have engaged in inappropriate conduct.</p>

Potential issue	Departmental response
<p>The drafting would also appear to limit the mechanisms for dealing with the conduct of a chair during a meeting that contravenes a behavioural standard in the Code of Conduct. Conduct during a meeting is excluded from the definition of inappropriate conduct and must be dealt with by the chair.</p> <p>Can you please explain how the new framework is intended to operate in relation to unsuitable meeting conduct engaged in by the chair, particularly where the chair's conduct breaches the Code of Conduct but does not fall within the definition of misconduct?</p>	<p>A Chairperson presiding over a Local Government or committee meeting is undertaking a statutory role under the <i>Local Government Act 2009</i> and <i>Local Government Regulation 2012</i>. Part of that role is to manage the conduct of the participants (see section 12(4)(a) of the Act).</p> <p>As such, a Chairperson presiding over a meeting who breaches the behavioural standards, may be involved in misconduct (either not carrying out their functions honestly or impartially (new section 150L(1)(a)) or breaching the trust placed in the Chairperson (new section 150L(1)(b)(i)). In such instances, the conduct should be investigated by the Independent Assessor (on the receipt of a complaint) and, if appropriate, heard and determined by the Councillor Conduct Tribunal (CCT).</p>
<p><i>Grounds for dismissing a complaint or taking no further action</i></p>	
<p>New sections 150X and 150Y provide the circumstances in which the Assessor may decide to dismiss a complaint or take no further action. Under 150X the Assessor may dismiss a complaint if the conduct has already been or is being dealt with by another entity, but this is not a ground on which the Assessor may decide to take no further action.</p> <p>Can you please explain the rationale for this distinction and outline the reasons why another entity dealing with a matter is not grounds for the Assessor taking no further action?</p>	<p>In practice, there will be little difference in the outcome between the Independent Assessor deciding to dismiss a complaint under new section 150X or deciding to take no further action about a Councillor's conduct under new section 150Y. Both sections allow the Independent Assessor to take no further action in relation to a Councillor's conduct.</p> <p>Specifically, new section 150Y allows the Independent Assessor to decide to take no further action about a Councillor's conduct where an actual complaint has not been made or referred to the Independent Assessor under new section 150O or new section 150P.</p> <p>New section 150Y gives the Independent Assessor a broader discretion to take no further action in relation to a Councillor's conduct. The grounds for dismissal under new section 150X where the Independent Assessor is satisfied the conduct has already been, or is being, dealt with by another entity, can be dealt with in new section 150Y under the grounds of 'taking further action would be an unjustifiable use of resources'.</p> <p>Further, where another entity is already dealing with a complaint, such as the CCC, it is appropriate for the Independent Assessor to dismiss the complaint. Where a complaint is dismissed in this instance by the Independent Assessor, it is not "accepted" by the Independent Assessor for further consideration, meaning no analysis or consideration of the complaint occurs, other than to determine that another entity has the complaint under consideration and it is appropriate for that</p>

Potential issue	Departmental response
	entity to do so. Whereas, a decision under section 150Y requires the Independent Assessor to have analysed the conduct and made a decision that it does not warrant the taking of further action.
Definition of misconduct	
<p>The proposed new section 150L, defining misconduct may contain a drafting error. Section 150L defines misconduct to include councillors' conduct that '<u>involves or</u> adversely affects, directly or indirectly, the honest and impartial performance of the councillor's functions, or the exercise of the councillor's powers' [emphasis added]. This definition may result in conduct that involves the councillor honestly and impartially performing their functions and exercising their powers being categorised as misconduct.</p> <p>Can you confirm if there is a drafting error in proposed new section 150L, or explain how it is intended the provision be interpreted?</p>	The Department agrees the words 'involves or' appear to be an anomaly in the drafting.
<p>The definition of misconduct also includes a contravention of the council's acceptable request guidelines. As these guidelines provide the way in which a councillor may ask a council employee for advice to help them carry out their responsibilities, there is potentially a wide variety of ways in which the guidelines could be breached, ranging from an inadvertent oversight such as not using the prescribed form to an overtly improper request.</p> <p>Can you please explain why all contraventions of the guidelines irrespective of the severity of the breach have been defined as misconduct, and how it is intended that 'minor' breaches of the guidelines be dealt with?</p>	If the Independent Assessor considers that a Councillor contravened the acceptable request guidelines in a way that was minor or technical in manner, then the Bill provides the Independent Assessor with the discretion to take no further action in relation to the contravention because it would be an unjustifiable use of resources to refer the matter to the CCT for determination (new section 150Y(b)(iii)).
<p>Misconduct is also defined to include a course of conduct leading to the council taking action to discipline a councillor for inappropriate conduct on three occasions within one year. Under the proposed new section 150AG, if the council decides that a councillor has engaged in inappropriate conduct it must decide what action to take under 150AH, which includes taking 'no action'.</p> <p>For clarity regarding what constitutes 'taking action' and to ensure consistency in the application of the provisions, should section 150L(2)(a) mirror the terminology in 150S(1)(a) and state 'leading to the local government taking action <u>under section 150AG</u> to discipline the councillor for inappropriate conduct...'?</p>	The Department supports clarifying the provision.

<i>Distinction between a councillor and a mayor</i>	
<p>New sections 150P and 150R include definitions of a government entity and local government official respectively, which include 'a mayor' and 'a councillor'.</p> <p>As the definition of a councillor in the LG Act includes a mayor, can you please explain the rationale for distinguishing between a mayor and a councillor in these provisions? For clarity and to avoid any possible interpretation that a mayor is not a councillor, should the reference to 'a mayor' in these definitions be removed?</p>	<p>The Department considers there is no need to distinguish between 'a mayor' and 'a councillor' in new sections 150P and 150R.</p>
<i>Decisions of the tribunal</i>	
<p>If the Councillor Conduct Tribunal (CCT) conducts a hearing regarding alleged misconduct, the CCT must decide whether or not the conduct is misconduct, and if it is, decide what disciplinary action to take. However, there do not appear to be any provisions about what the CCT would do if it decided the conduct was not misconduct but was instead inappropriate conduct.</p> <p>Can you please explain how matters that the CCT finds are inappropriate conduct will be dealt with under the new framework?</p>	<p>The CCT is responsible for hearing and deciding alleged misconduct matters, including what action to take to discipline a Councillor if the CCT decides the Councillor has engaged in misconduct (new sections 150AL and 150AQ). These provisions only apply if the Independent Assessor is reasonably satisfied a Councillor has engaged in misconduct (new section 150AI) and applies to the CCT to decide whether the Councillor has engaged in misconduct (new section 150AJ).</p> <p>Under the Bill, the CCT has no jurisdiction to find a Councillor engaged in inappropriate conduct rather than misconduct. The CCT can decide a Councillor did not engage in misconduct or a Councillor did engage in misconduct and what action to take to discipline the Councillor.</p> <p>However, because the Independent Assessor is a party to, and present at CCT hearings, the Independent Assessor would be aware of any concerns the CCT may have about a Councillor's conduct where the threshold of misconduct is not met. Under section 150U of the Bill the Independent Assessor could then, on the Assessor's own initiative, investigate the conduct further.</p>
<i>Review of decisions by the Assessor</i>	
<p>Proposed new section 150CO provides that if an investigator decides to seize an object, the person who owns or had control of the object may apply to the Assessor for a review of that decision. As the Assessor is an investigator for the purpose of the Act, this could result in the Assessor reviewing their own decisions. Section 150CQ acknowledges the principle that decisions should not be reviewed by the person who made the original decision, but there appears to be nothing in the Bill to preclude the Assessor from reviewing their own decision and no alternative review options.</p>	<p>The policy intent is to streamline the process of reviewing the initial decision to seize a thing as part of the investigation process. This review would be done by the Independent Assessor, but the initial seizure would be done by an investigator. Any review therefore is automatically done by a person more senior to the original decision-maker.</p> <p>Under new section 150CR, if a person is unsatisfied with the outcome of the internal review, there is a right to go to QCAT for external review of the review decision by the Independent Assessor – significant streamlining opportunities in conducting the</p>

<p>Can you please explain the rationale for allowing the Assessor to review their own decisions, and whether in the interests of procedural fairness decisions of the Assessor should be reviewed by an independent reviewer?</p>	<p>internal review first. Creating another entity to independently review decisions made during the investigation process would create unnecessary duplication and complexity.</p> <p>New section 150CQ provides that an application for review is not dealt with by the person who made the original decision and must be done within 90 days of receiving the request for review, and the reviewer can also consider any other relevant material.</p>
<p>Secrecy and confidentiality</p>	
<p>The proposed new section 150EA provides that the Assessor, investigators and staff of the OIA must not make a record of, disclose, or improperly use confidential information. Confidential information is defined as information that is not publicly available - about a person's personal affairs or reputation, or that would damage the commercial activities of a person. This definition of confidential information appears to be largely directed at protecting the accused councillor and does not appear to prevent the disclosure of information about the complainant.</p> <p>Can you please advise whether the personal information of the complainant such as their name and address is intended to be protected by the secrecy provisions, or if such protection is provided elsewhere in the Bill?</p>	<p>All persons are protected under new section 150EA as the information privacy principles under the <i>Information Privacy Act 2009</i> would apply to any confidential information obtained by the Independent Assessor, an investigator, or a staff member of the Office of the Independent Assessor.</p>
<p>If the Assessor decides to dismiss a complaint or take no further action they must provide a notice to the complainant, the councillor and the council providing certain information. However, there appears to be no provisions preventing the disclosure of the complainant's identity in the notice.</p> <p>Can you please advise if it is intended to permit the complainant's identity being disclosed in circumstances where the complaint is dismissed or no further action is to be taken, and if so the rationale for allowing the disclosure?</p>	<p>The identity of a complainant is not information required to be included in a notice under new section 150Z and it is intended the Independent Assessor would protect the complainant's identity when providing a notice to the Local Government and subject Councillor.</p>
<p>The Bill provides that the Assessor must prepare an annual report, and that the report 'must be prepared in a way that does not disclose the identity of a person investigated'.</p> <p>Can you please advise why a similar protection is not included for complainants, or whether there should be a requirement that the report must be prepared in a way that does not disclose a complainant's identity?</p>	<p>The Department considers there is no need for a specific restriction as the information privacy principles under the <i>Information Privacy Act 2009</i> would apply to any information held by the Independent Assessor.</p> <p>However, for consistency with the specific protection provided in new section 150EB(3) for a person investigated, the Department supports a similar protection for complainants.</p>
<p>There also appear to be no confidentiality provisions applying to the council, councillors or the CCT regarding dealing with complaints.</p>	<p>Decisions of Local Governments are made by resolution in properly constituted meetings of the Council. Council meetings are open to the public unless the Local</p>

Can you please advise if there are provisions preventing the disclosure or improper use of information about a complaint or investigation by the council, councillors or the CCT?

Government decides that it is necessary to close the meetings because the issues relate to one of the criteria in section 275 of the *Local Government Regulation 2012*. However, even if the Local Government closes a meeting to discuss an issue under section 275 of the Regulation, it must still pass any resolution relating to the matter in open session. Accordingly, as decisions of Local Government are made in public it is not appropriate for these matters to be confidential.

Under new section 150CK, the Independent Assessor can issue a notice on a Councillor requiring them to keep matters relating to a complaint about a Councillor confidential during an investigation, and the Bill provides for a maximum penalty of 85 penalty units for Councillors that fail to maintain that confidentiality without a reasonable excuse. In addition, the Independent Assessor is able to make a recommendation to a Local Government about how it deals with a particular complaint and this could include taking reasonable steps to keep particular information confidential while deciding the matter (new section 150AC).

Also, the president of the CCT will issue practice directions under new section 150DV for the conduct of hearings and it is expected that most hearings of the CCT would be heard in public similar to how other courts and tribunals conduct their business so that justice is not only done but is also seen to be done. However, the practice directions may provide for a discretion for the CCT to close a hearing to the public in certain circumstances (i.e. such as when hearing evidence which may be distressing to the complainant).

Further, new section 150AS(5) provides the CCT must not give another entity any information that is part of a public interest disclosure under the *Public Interest Disclosure Act 2010* or include in a summary of the decision to be published on the Department's website, the name of the complainant or information that could reasonably be expected to result in identification of the complainant.

The following confidentiality provisions are included in the Bill in relation to a Councillor's Conduct Register, required to be kept by each Local Government under new section 150DX:

- for decisions about inappropriate conduct and misconduct – the name of the subject Councillor may be included only if the Local Government or CCT decided the Councillor engaged in inappropriate conduct or misconduct or the Councillor agrees to the Councillor's name being included; and, the name of a

	<p>person who made a complaint or information that could reasonably be expected to identify the person must not be included (new section 150DY)</p> <ul style="list-style-type: none"> for dismissed complaints – the name of the subject Councillor is not to be included unless the Councillor agrees to the Councillor’s name being included; and, the name of a person who made a complaint or information that could reasonably be expected to identify the person must not be included (new section 150DZ).
<p><i>Criminal history reports</i></p>	
<p>The Bill enables the Minister to request a criminal history report when deciding whether a person is qualified to be the Assessor, a member of the CCT or a commissioner, and that the Assessor, member of the CCT or commissioner must notify the Minister if they are convicted of an indictable offence. The Bill provides that the report must be destroyed when it is no longer needed however there is no equivalent provision to destroy a notice of a conviction for an indictable offence. Additionally, there appears to be no provisions protecting the disclosure or use of criminal history reports and notices of conviction.</p> <p>Can you please explain why the Bill contains a requirement to destroy criminal history reports but not notices of conviction, and provide the rationale for not providing protections limiting the use or disclosure of the reports or notices (protections have recently been included for similar provisions in the <i>Grammar Schools Act 2016</i> and the <i>Plumbing and Drainage Act 2002</i>)?</p>	<p>New section 260B includes an offence for non-disclosure of a notice of conviction. Should it be necessary to prosecute for a failure to notify, the original inaccurate notice would need to be retained and submitted as evidence of the breach. The retained notice would be kept confidential in accordance with the confidentiality and secrecy provisions in the Bill.</p>
<p><i>Protection from reprisal</i></p>	
<p>The Bill provides safeguards to protect councillors and council employees from reprisal if they make a complaint or a notification to the Assessor about a councillor’s conduct. However, the protection from reprisal does not extend to members of the public who make a complaint about a councillor’s conduct.</p> <p>Can you please explain the rationale for limiting the protection to councillors and council employees, and whether other protections from reprisal are afforded to members of the public?</p>	<p>If a Councillor takes an action against a member of the public that could be construed as reprisal, there are other avenues to take action against the Councillor, for example, making a complaint about alleged misconduct.</p> <p>It is not the intention to bring members of the public under new section 150AW as it is intended to protect employees from reprisal action, mirroring similar provisions in the <i>Public Interest Disclosure Act 2010</i>.</p>
<p><i>Notices provided to complainants</i></p>	
<p>The Bill provides that a complainant must be given a notice in a range of circumstances. Under the proposed new section 150Z the Assessor must give the complainant a notice of a decision to dismiss a complaint ‘if the assessor has the person’s contact details’. Other provisions requiring that the Assessor or the CCT</p>	<p>The Department supports providing clarity throughout the Bill.</p>

<p><i>must</i> give the complainant a notice (sections 150AS, 150P and 150Q) do not contain the caveat that they must do so only if they have the contact details.</p> <p>As complaints may be made anonymously, for clarity in drafting should the caveat under section 150Z also be included in sections 150AS, 150P and 150Q?</p>	
<p><i>Councils dealing with inappropriate conduct complaints</i></p>	
<p>Under the Bill the council deals with the inappropriate conduct of councillors referred to it from the Assessor, and unsuitable meeting conduct that becomes inappropriate conduct. There appear to be no express provisions prohibiting the councillor who has allegedly engaged in the inappropriate conduct from being involved in the investigation process, resolutions for how the investigation is to be conducted and decisions on how the matter is to be decided. This may be particularly relevant if the alleged conduct was engaged in by the mayor.</p> <p>Can you please advise if it is intended to exclude the councillor who has allegedly engaged in the inappropriate conduct from being involved in the matter within the council, and if so explain how it is intended this will be achieved?</p>	<p>A Councillor that is a party to a complaint (either as the complainant or the accused Councillor) will have at least a conflict of interest (and in the case of the accused Councillor a potential material personal interest) in the complaint and will not be allowed to participate in the investigation or Local Government decision about the complaint.</p> <p>Sections 172 and 173 of the <i>Local Government Act 2009</i> set out the processes for Councillors to declare and deal with material personal interests and conflicts of interests respectively. In addition, it is proposed that the model procedures for the conduct of Local Government meetings under new section 150F will also require that Councillors who are parties to a complaint do not participate in the handling of the complaint.</p> <p>Further, the Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018 is proposing additional amendments to the processes for dealing with material personal interests and conflicts of interests including an offence for Councillors trying to influence a decision about a matter they have an interest in.</p>
<p>The proposed new section 150AF provides that the council must conduct an investigation in a manner consistent with the Assessor's recommendations and the council's investigation policy, unless the council resolves otherwise.</p> <p>Can you please explain the rationale for allowing the council to conduct an investigation in a manner that is inconsistent with the recommendations of the Assessor and the council's investigation policy?</p>	<p>The Bill provides that Local Governments are responsible for the investigation and determination of alleged inappropriate conduct by one or more of its Councillors. As such, ultimately it is up to a Local Government to decide how it will carry out this function.</p> <p>While the Bill provides for the Independent Assessor to provide a recommendation(s) to a Local Government about how it may investigate or deal with the conduct (new section 150AC(3)), there may be circumstances where a Local Government is not able to comply with a recommendation of the Independent Assessor (for example, if the Independent Assessor recommends the Local Government seek advice from a particular person about the matter but the Local Government is unable to contact the person). In these cases, the Local Government</p>

	must pass a resolution stating why it is not willing or able to comply with the Independent Assessor's recommendation.
Constitution of the CCT and LGRC	
<p>The Bill provides that the CCT can be constituted by the president or up to three CCT members. Similarly, and Local Government Remuneration Commission can be constituted by the commissioner or up to three commissioners. Under the current arrangements the tribunal is made up of three persons and a review panel must have at least three members.</p> <p>Can you please provide the rationale for moving away from a panel system of at least three persons/members for decisions about councillor complaints and remuneration, and allowing decisions to be made solely by one member or commissioner?</p>	<p>Allowing for the CCT and the Local Government Remuneration Commission to be constituted by less than three members is consistent with the way the Local Government Change Commission is constituted under section 22(2) of the <i>Local Government Act 2009</i> to enable the entities to operate with maximum flexibility in carrying out their functions.</p> <p>Allowing the entities to be constituted with less than three members allows for the continuity of the entity during short term absences by members either because of leaves of absence or conflicts of interest. In addition, there may be occasions where an entity may be undertaking mainly administrative functions (such as setting a hearing date or agreeing to a potential witness list) where it may not be necessary for all members of the entity to be present to finalise.</p>
Public official for Crime and Corruption Act	
<p>Proposed new section 150CU provides that the Assessor is 'the public official responsible for dealing with a complaint about the corrupt conduct of a councillor for the purposes of consultation about, or a referral of, the complaint under the <i>Crime and Corruption Act 2001</i>'. However, the Bill does not appear to amend the current provision under section 182 of the LG Act that provides that a reference to a public official in the Crime and Corruption Act is a reference to the department's chief executive.</p> <p>Can you please advise how these two provisions are intended to operate, with both the Assessor and the chief executive being the public official for complaints about corrupt conduct?</p>	<p>Please note that section 182 of the <i>Local Government Act 2009</i> is removed by clause 17 of the Bill.</p>
Information notice and stay of decisions	
<p>The Bill provides that an information notice for a decision must include, among other things, 'how a stay of the operation of the decision may be applied for under this Act'. However, there doesn't appear to be any provision for the stay of a decision.</p> <p>Can you please advise the circumstances in which the operation of a decision may be stayed?</p>	<p>There is no need for a provision to include a right to apply for a stay of decision, as an overarching power to grant stays is held by the Queensland Civil and Administrative Tribunal (QCAT) in its appeal capacity. Any decision made under an Act or proceedings that falls within the appeal jurisdiction of QCAT will fall under QCAT's broad powers to grant injunctions.</p> <p>The Bill includes rights of appeal to QCAT.</p>

Operation of the City of Brisbane Act

Clause 4 seeks to clarify that the new councillor complaints system will not apply to the Brisbane City Council by providing that the City of Brisbane Act and not the Local Government Act provides for 'the way complaints about councillors of the Brisbane City Council are to be dealt with' (complaints are dealt with under Chapter 6, Part 2, Division 6 of the City of Brisbane Act). This clarification does not appear to capture the provisions under division 7, regarding managing conduct in meetings of the council or the committees.

Can you please advise if it is intended for the City of Brisbane Act provisions to continue to apply to the management of conduct in meetings, and if an amendment to section 5 of the City of Brisbane Act may be required to clarify this?

The *City of Brisbane Act 2010* will continue to provide for the management of conduct in meetings of the Brisbane City Council and its committees.

The Department supports clarifying the policy intent.