STATE DEVELOPMENT AND REGIONAL INDUSTRIES COMMITTEE

Members present:
Mr CG Whiting MP—Chair
Mr MJ Hart MP
Mr RI Katter MP (virtual)
Mr JE Madden MP
Mr JJ McDonald MP
Mr TJ Smith MP

Staff present:
Ms S Galbraith—Committee Secretary
Dr A Beem—Inquiry Secretary

PUBLIC BRIEFING—INQUIRY INTO THE FUNCTIONS OF THE INDEPENDENT ASSESSOR AND THE PERFORMANCE OF THOSE FUNCTIONS

TRANSCRIPT OF PROCEEDINGS

TUESDAY, 7 DECEMBER 2021

Brisbane

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The committee met at 10.00 am.

CHAIR: Good morning. I declare open this public briefing for the committee's inquiry into the functions of the Independent Assessor and the performance of those functions. My name is Chris Whiting. I am the member for Bancroft and chair of the committee. I would like to respectfully acknowledge the traditional custodians of the land on which we meet today and pay our respects to elders past, present and emerging. We are very fortunate to live in a country with two of the oldest continuing cultures in Aboriginal and Torres Strait Islander people, whose lands, winds and waters we all share.

With me here today are: Mr Jim McDonald, deputy chair and member for Lockyer; Mr Michael Hart, member for Burleigh; Mr Jim Madden, member for Ipswich West; and Mr Tom Smith, member for Bundaberg. Mr Robbie Katter, member for Traeger, will join us later this morning via teleconference.

This briefing is a proceeding of the Queensland parliament and is subject to the parliament's standing rules and orders. Only the committee and invited witnesses may participate in the proceedings. Witnesses are not required to give evidence under oath or affirmation, but I remind witnesses that intentionally misleading the committee is a serious offence.

I also remind members of the public that they may be excluded from the briefing at the discretion of the committee. I remind committee members that officers are here to provide factual or technical information. Any questions seeking an opinion about policy should be directed to the minister or left to debate on the floor of the House.

These proceedings are being recorded and broadcast live on the parliament's website. Media may be present and are subject to the committee's media rules and the chair's direction at all times. You may be filmed or photographed during the proceedings and images may also appear on the parliament's website or social media pages.

The committee is mindful that there may need to be discussion on confidential matters today. The committee will conduct these discussions in private. Should the need for private discussion arise, it will take place towards the end of the session. Individuals in the gallery will be asked to leave the room and the broadcast will be switched off. Thank you for your understanding on this matter.

Please note that the committee will adjourn for a short 10-minute break at around 11.30 am. Finally, please turn your mobiles phones off or to silent mode.

FLORIAN, Ms Kathleen, Independent Assessor, Office of the Independent Assessor

HODGKINSON, Ms Jane, Director, Media and Engagement, Office of the Independent Assessor

KOHN, Mr Charlie, Deputy Independent Assessor, Office of the Independent Assessor

CHAIR: I now welcome representatives from the Office of the Independent Assessor, who have been invited to brief the committee on the inquiry. I invite you to brief the committee, after which committee members will have some questions for you.

Ms Florian: Thank you for inviting us here today. The OIA welcomes the State Development and Regional Industries Committee's inquiry into the functions and the performance of the Office of the Independent Assessor, OIA. The OIA was established three years ago as part of a rollout of reforms in relation to the councillor conduct system. Three years is a good time to review any new system and legislation to see how it is working in practice.

Last financial year Queensland's 77 councils managed almost $130 billion in assets and received about $13 billion in revenue, and over the past five years, on average, they have spent approximately $7.7 billion on goods and services each year. Councillors consider development applications, approve infrastructure projects, award significant contracts for goods and services and make decisions about the allocation of Commonwealth and state funds. After a natural disaster they

disburse those funds through councils. Councils, more than any other level of government, are involved in high-value, high-volume and high-frequency decision-making. I might stop at this point and answer any questions that you have about that.

CHAIR: Do you mean any questions we have about that particular point?

Ms Florian: I am conscious that you do have a lot of questions. Rather than repeat what is already in our submission, it may be better to go to questions.

CHAIR: I appreciate that. I will start with the executive summary in your submission. You state that 'there is evidence that the new councillor complaints system is working'. You mentioned, in roundabout figures, that 10 years ago there were only two complaints about councillor conduct received by the department. Now, 10 years later, you are assessing approximately 1,000 complaints a year. Half of those are, from what I understand, councillors reporting each other—

Ms Florian: Twelve per cent of complaints are councillor-on-councillor complaints and 51 per cent of complaints are coming from the local government sector.

CHAIR: To be specific, they are coming from the local government sector itself. As I said, in rough figures, about half of those 1,000 a year are dismissed after a 21-day assessment.

Ms Florian: Yes—up to 63 per cent in the last quarter.

CHAIR: Could you explain further the evidence of how the new councillor complaints system is working? I have touched on some of the statistics there. Perhaps you could expand on how you see that it is working well.

Ms Florian: Firstly, the councillor complaints system which existed prior to 2018 was not effective. That was the subject of a significant review. Council chief executive officers were placed in the conflicted position of dealing with complaints about their employers. There was significant under-reporting, investigations were expensive and not many matters were referred to tribunals or sustained. The reasons for tribunal disciplinary decisions were not made public and there was no consistent integrity culture which existed across councils to identify and deter poor conduct. Criminal prosecutions of councillors and senior officers led to diminished public trust in local government. So a raft of reforms was introduced in 2018 to address that.

After three years of operation, there is evidence of where the new councillor complaints system is working. There is no longer significant under-reporting of councillor conduct, allowing a genuine focus on integrity and intervention to prevent conduct from escalating, and the number of complaints being made shows that people both inside local government and outside are more confident in raising issues with an independent body rather than with councils.

Ten years ago the local government department received just two complaints about the conduct of councillors across Queensland, while 162 complaints were lodged in the year before the OIA commenced. In the past two financial years, the OIA has received more than 1,000 complaints a year. These complaints have been centrally and consistently assessed with the same legislated and code of conduct standards fairly applied to all councils.

An increasing number of councillors are referring their own conduct. Prior to the establishment of the OIA, there were six self-referrals in six years. Since then, 57 councillors have referred themselves to the OIA. The number of complaints made by the local government sector has also risen from only 11 per cent of complaints in 2018-19 to 53 per cent of complaints in 2020-21. As I said, 12 per cent of those are councillor-on-councillor complaints. Significantly, this rise has been offset by a decrease in corruption allegations made to the Crime and Corruption Commission, whose 2020-21 annual report recorded a sharp drop in corruption allegations about local governments.

Following enhanced natural justice processes, more matters have been referred to the Councillor Conduct Tribunal by the OIA and more allegations are being sustained. In the last three years, 132 matters have been referred to the Councillor Conduct Tribunal, 61 matters have been decided—62 matters; there was one handed down yesterday but not published yet—and 80 per cent of matters have been wholly or partially sustained. In the 3½ years preceding the establishment of the OIA and the CCT, 42 matters were referred to the two tribunals that predated the CCT, 14 matters were decided and 37 per cent of matters were sustained.

Like other jurisdictions, where there is uncertainty about how standards apply, decisions of the Councillor Conduct Tribunal or on review provide that guidance to both councillors and the OIA. When the OIA began and the CCT, there were no published tribunal decisions, no history, no precedents for decision-making on councillor conduct. A body of decisions is now being built which will increasingly clarify how standards apply to different circumstances, facilitating greater understanding

amongst councillors and consistency in decision-making and advice. In this respect, matters which are not sustained by the tribunal are as important as matters which are. For the first time this is also starting to align councillor conduct decision-making with established case law relating to other disciplines and professions that have disciplinary schemes.

While complaint numbers have risen, the cost of handling complaints has dropped. In 2020-21, the average cost of an OIA misconduct investigation was $2,700, significantly less than the investigation expenses cited in the Solomon review and those which are still being incurred by some councils when lower level inappropriate conduct is investigated.

CHAIR: Ms Florian, we have talked a bit about the numbers—a decrease in the number of corruption allegations and an increase in the number of cases going to the tribunal and more sustained published decisions—and they are great statistics. What has been the feedback of the experience of going through the system? We hear a lot about the people who are drawn into it. What about the experience of the people who come out of it? What has the feedback been?

Ms Florian: Obviously this system is a disciplinary system. It is not a criminal system. The purpose of the system is to enforce compliance with legislated standards but also to deter other councillors, I suppose, from not complying with those standards. The balancing act in this system is that, if you are dealing with misconduct of an elected representative, you want a system which is going to be robust. If there is a finding of misconduct, you want to make sure that process is robust and councillors are satisfied that they have gone through a fair process with natural justice. That is what the Solomon review particularly highlighted. That is why the additional natural justice processes and procedure were put into the act.

At the end of the system, we have had 61 matters where there have been decisions. That is a significant increase on the number of matters that we have been able to identify were referred to previous tribunals. In particular, there is an increased number of sustained matters as well. One of my observations of the councillor conduct environment is that prior to 2019 there was no indication of decision-making from a previous tribunal, so no precedents or no consistency. One of the big challenges of this environment is the lack of capacity sometimes of councillors to make sure they understand what those standards are. It is really important to have a system which results in decision-making which increasingly will make those standards clear, particularly on how they apply to particular circumstances.

Because of the realities of the volume of complaints that we have received and the number of staff that we have, the process for dealing with complaints is that up to 65 per cent of complaints are rigorously assessed and dismissed on assessment, which is within 21 working days. In the last quarter we have been investigating 20 per cent of matters. After that, another process is gone through to determine what goes through a natural justice process. Then at the end of the natural justice process a decision is made about whether to refer a matter to the tribunal. It is the tribunal and the councils themselves who make decisions about whether inappropriate conduct or misconduct is made out.

CHAIR: You talked a bit about enhancing natural justice processes. There is a bit on that in your submission. Can you expand on that? Obviously it is an important part of people drawn into the system. They want to know that they have natural justice. Can you describe the enhanced natural justice processes or systems you have?

Ms Florian: One of the recommendations of the Solomon review—and I understand this was based on the feedback of councillors from the previous system—was that there were insufficient natural justice processes. When an investigation is complete, the process is that we have to issue a notice under section 150AA of the act. That is a requirement of the legislation that was introduced in 2018, and that is the opportunity for councillors to have their say. In that notice, we are required to set out what the allegation is, what the particulars are, what the facts are that support that allegation and why we say that it is potentially a breach of the act or what legislative standard. That amount of detail is required under the act, and it is necessary for a councillor to be able to respond fairly to that allegation.

After a councillor responds to that, we look at their response and then a decision is made whether to refer the matter to the tribunal or not. The threshold for referral is reasonable satisfaction that misconduct may have occurred. It is then a matter for the tribunal to determine whether misconduct has occurred or not. The act provides that the tribunal can make practice directions about how that is to occur. The tribunal have done that so we follow, as do the legal representatives or the councillors, those practice directions. They involve making submissions on fact or law in relation to a councillor matter. The tribunal then makes a decision on that. Most of the tribunal's decisions have

been decided on the papers, so there has not been a requirement for formal hearings. There is a backlog of matters before the tribunal, but that in my view is not a product of the process that is followed; it is a product more of being able to resource the matters before the tribunal.

CHAIR: Compared to other similar investigative bodies, the systems of natural justice that you have are substantial or more substantial than comparative bodies?

Ms Florian: No, they are very similar to comparative bodies. It is the same as what operates in the health context for registered or unregistered medical practitioners. It is the same that operates for police officers or other processes like that.

CHAIR: In your submission you said that the investigative powers have been set out under the Legal Profession Act 2007 and the Health Ombudsman Act 2013.

Ms Florian: That is right.

CHAIR: What is your view of your investigative powers? How do you perceive them?

Ms Florian: The history of the investigative powers is this. The Solomon review found that one of the reasons there were so few matters being investigated to a stage where they could be referred to a tribunal and so few matters were being sustained before a tribunal was that the department previously did not have the investigative powers to be able to obtain evidence in particular information or the evidence of witnesses. It was a recommendation of the Solomon review that the OIA be established with a level of investigative powers to make that process more efficient and effective. That in fact was what the legislation did. When the legislation was introduced, it is clear from the explanatory memorandum that that was the intent of the government—they were applying investigative powers that were necessary to conduct investigations in the public interest.

Those powers include: a power to require information, and that is one which is used most; a power to require people to attend and participate in an interview that is not on oath, and that interview is subject to privilege against self-incrimination which can be asked for; a power to require notices be confidential, which is in line with the legislative provisions which state that wherever practical we need to conduct investigations in a way that is confidential; and, finally, a power to conduct search warrants. That power is the most intrusive of all the powers that we were provided and the OIA has never executed a search warrant. Our powers have been used judiciously and carefully to obtain evidence where evidence is needed to be obtained to support councillor conduct investigations and to do that so that we can meet those standards that are applied by legislation—that is, to have a reasonable satisfaction that misconduct has been engaged in and then to support a tribunal making a finding against an elected official that misconduct has in fact been engaged in, if that is the case or not.

CHAIR: Are the practices that you bring to an investigation based on any other models or experience that your staff have previously had?

Ms Florian: I have 30 years experience in investigation. I am a lawyer but my experience is as an investigator. I have spent 30 years undertaking investigations in six agencies, including disciplinary matters. The powers that we have are very similar to other agencies and they are used in a way which is very similar to other agencies which are doing like functions.

CHAIR: In part of that model, investigation is done and it is passed over to another body for decision-making—in terms of police laying charges perhaps. It is an important distinction you made before that you are the investigator, the assessor, and you have another body which is the decision-maker. Would that be a correct way to characterise that?

Ms Florian: That is right. The OIA receives, assesses and investigates complaints. When a matter is referred to the tribunal, we bear the onus of proof but we are not the decision-makers. An independent tribunal makes a decision about whether misconduct is made out or not, or if it is inappropriate conduct then it is in fact the councillors themselves who are making that decision at present.

CHAIR: I have some other questions but I will hand over to the deputy chair.

Mr McDONALD: Thank you for being here today. You mentioned in your presentation that the cost of investigations dropped to $2,700 and the Solomon review talked about $30,000. Yesterday we heard from the Local Government Association of Queensland, which reported legal costs between $6,400 and $100,000 per council.

Ms Florian: Yes, I heard that.

Mr McDONALD: That is obviously not taking into consideration the $2,700 that it costs you for undertaking the investigation. That is a real cost to the community and certainly is in the public interest.

Ms Florian: As I understand it, that is the cost that the insurer for councillors meets for representing councillors on matters. Our cost of investigation is $2,700. A legal representative may become involved in a matter if a matter is referred to the tribunal. There are very few matters that have actually gone to hearing in the tribunal—probably a handful. The rest have been dealt with on the papers. I am a bit surprised that lawyers are charging up to $100,000 to represent councillors on matters. I do not know what that matter is but it seems like a lot of money to me.

CHAIR: Just to clarify that, as I did not quite catch it, that is the cost met by the professional body's own insurer?

Ms Florian: That is right.

CHAIR: For lawyers to appear at those hearings.

Ms Florian: That is right. It is not a requirement that lawyers appear at those hearings. A councillor can ask that a lawyer appear and they would be represented, but it is up to the tribunal whether that occurs or not. The tribunal will allow that if the circumstances of the matter suggest that for procedural fairness that is appropriate. There are probably about four or five matters that have gone to a hearing. The rest have been dealt with on the papers.

Mr McDONALD: As I said, the report came to us from the LGAQ from their member councils. I do not know how that occurred, whether it be an insurer, as you say—

Ms Florian: It is. Insurers who are linked to the LGAQ fund councillors if they appear before the tribunal, and they also fund councillors if they appear on review before QCAT. That money is not coming out of the pocket of councillors. That money is coming from insurers, as I understand it.

Mr McDONALD: But if it is coming from insurers, the community is still paying for it. We as the public are still paying for it one way or another, whether it be through premiums or costs.

Ms Florian: Yes.

Mr McDONALD: That is not taking into consideration the whole cost of the new systems. That is what I am coming at. There are obviously other costs rather than the $2,700.

Ms Florian: The $2,700 is the average cost of undertaking an investigation.

Mr McDONALD: I understand. We are looking at the whole system here. We have had comments from people that the Office of the Independent Assessor has taken a risk-averse approach when it comes to interpreting some of the definitions. How does your office interpret conflict, conflict of interest, inappropriate behaviour and misconduct? Is there a process or system in place on how you determine those things?

Ms Florian: Whenever it comes to a question of how legislation applies, you look at two things. Firstly, you look at the legislation itself and then you look at the explanatory notes or memoranda or the speeches in parliament because that dictates how legislative intent is determined. That is what we do. In any scheme, particularly a scheme where there is no history of decisions being made, how particular legislation applies to facts will only become clear when matters start going through the system and decisions start to be made in relation to that.

Wherever there have been uncertainties, the OIA has attempted to work with stakeholders to identify those issues up-front and to create resources and tools to assist councillors to know how the legislation applies and certainly how we would assess the broad range of circumstances that are referred to us in complaints. As I have said, we have received something in the order of 3,300 complaints.

Mr McDONALD: I appreciate that is the process. How is your interpretation of those matters communicated with all 77 councils, because there seems to be a big issue around consistency of interpretation?

CHAIR: We will just pause to welcome the member for Traeger via teleconference.

Mr KATTER: Thank you, Chair. Good morning.

Mr McDONALD: Ms Florian, do you want me to repeat the question?

Ms Florian: Yes, please.

Mr McDONALD: I appreciate the explanation of how you have come to the interpretation of each of those definitions because that is critical, whether they be right or wrong. Once you have come to that interpretation, how is that communicated to all 77 member councils so there is a consistent understanding of those interpretations?

Ms Florian: It is the role of the tribunal to determine whether misconduct is made out on the facts of particular matters or not. It is up to decisions of the tribunal. We have looked at opportunities to try to create greater clarity for councillors around particular matters when we had the function to

do so. For example, when issues first arose around social media, we worked with the LGAQ to make that position clearer for councillors. When issues have arisen around conflicts of interest, we have worked with stakeholders to create greater clarity to that. In an environment where there has been no previous decision or precedent, this is the process that is followed and this is the process that is followed in every other disciplinary system.

Mr McDONALD: I understand your point then was about the determinations of the tribunal, but there are a lot of matters that are dealt with before it even gets to the tribunal. How are those interpretations of conflict of interest, inappropriate behaviour or misconduct, before it even gets to the tribunal, determined in your organisation and then communicated?

Ms Florian: It is strictly in accordance with the legislation. All matters are dismissed obviously except for the matters which go to the tribunal, and they are the matters that are decided on. If we dismiss a matter, we provide a letter explaining the reasons for that dismissal and they are set out in detail. If an investigation has taken place and a decision is made not to refer a matter to a tribunal and it is dismissed, then that is in itself a really important outcome to explain why that matter did not go forward and the reasons for it.

Mr McDONALD: In your submission at page 14 you outline the summary of matters that have been dismissed or subject to no further action starting off at 46 per cent then 52 per cent, 52 per cent and 63 per cent—as reported in the last quarter. It outlines that most complaints are dismissed because the allegations do not raise a reasonable suspicion of inappropriate conduct or they may also be dismissed because of the unjustifiable use of resources.

Ms Florian: That is right.

Mr McDONALD: Even though there is quite a number that have been dismissed, it is just under half that have still continued. How many matters have been dismissed because it is not in the public interest, which is one of the sections set out in the legislation? How many matters have been dismissed because it is not in the public interest?

Ms Florian: There are two provisions in the legislation where you can dismiss or take no further action on matters. One is in relation to matters that have come from members of the public. One is in relation to matters that have come from the council themselves. The power to dismiss something that is not in the public interest only applies to one of those matters. It is not in the other provision. We generally dismiss on the basis that it is an unjustifiable use of resources. That is not to say that there is not potentially councillor conduct there but that it is not the best use of our resources to proceed with that particular matter because of the circumstances of it.

Mr McDONALD: Do you think it would be worthwhile or informative to the community—certainly to government—that that interpretation, that it is not in the public interest—

Ms Florian: Be in both provisions?

Mr McDONALD: Yes, but also even including that as an informative part of the process. Otherwise they say, 'You are not doing it because it costs too much.' If it is genuinely not in the public interest, which I agree many of those would be—and many others would not be in the public interest also—is that something you could consider?

Ms Florian: Yes, certainly.

Mr McDONALD: Is that information available? Can you look at those matters and say, 'Yes, those 100 were not in the public interest,' or is that information not available?

Ms Florian: We can look to see how many matters have been dismissed as not in the public interest or an unjustifiable use of resources. The public interest only applies under one provision. It is not available under the second provision. Generally matters are dismissed because they do not raise a reasonable suspicion of either inappropriate conduct or misconduct.

You would see from a reading of the act that we must investigate all matters that are referred to us and that after that investigation we can dismiss or take no further action. We have in fact inserted that early assessment or triage process, which does not exist in the legislation. We have built for ourselves a threshold of reasonable suspicion of misconduct which does not exist in the legislation and we apply that at the assessment stage. That is why between 51 per cent and 63 per cent of matters are dismissed within the first 21 working days.

Mr McDONALD: I appreciate that, but there are still quite a number that are left.

Ms Florian: Yes, and I am happy to talk you through that.

Mr McDONALD: There is the matter of Mayor Dillon. The investigation of that has been quite public. I think the allegation of misconduct was that his words in public were undermining the public confidence in the health organisation.

Ms Florian: I think that is what has been reported, yes.

Mr McDONALD: What is the status of that investigation? Has it been finalised?

Ms Florian: No, it has not. Because that matter was referred to in the terms of reference we considered the most appropriate course was to not take any further action on that matter until this committee has inquired into this matter generally.

CHAIR: Ms Florian, you said that those are the words that have been reported. Is there more clarity that you can deliver on that?

Ms Florian: Certainly. I wish to fully cooperate with the committee as there are many aspects of this matter which you should hear, but as this is a current matter I would request that that be in camera.

CHAIR: Do you want to come back to that?

Mr McDONALD: Sure.

CHAIR: We will come back to that in camera.

Mr MADDEN: When a matter is before the tribunal, how is the councillor referred to? Are they referred to as the respondent?

Ms Florian: They are, and that is what the legislation says. The legislation specifically makes a councillor the respondent in the matter.

Mr MADDEN: In your evidence today you referred to a number of matters being dealt with on the papers. I presume you mean that a respondent had a matter brought before the tribunal but they agreed to accept that there was transgression. Is that what you mean by it being dealt with on the papers?

Ms Florian: No. Matters where all the facts and circumstances are agreed to by the councillor are certainly dealt with on the papers but also matters where facts or circumstances may not be agreed can be dealt with on the papers.

Mr MADDEN: It is an unusual phrase: 'dealt with on the papers'. If the facts are not agreed to, there is no hearing?

Ms Florian: There is a capacity for a hearing but there is a requirement under the legislation that the matters be dealt with as quickly and as swiftly as consistent with natural justice. Natural justice is often provided by providing the opportunity to councillors to make submissions. If a councillor wants a hearing then they can make application for that.

Mr MADDEN: When you use the phrase 'dealt with on the papers', are there matters where the councillor accepts there was a transgression, there is no dispute of facts and they simply want the matter dealt with in a full hearing?

Ms Florian: That is right. In fact, to try to make the system as efficient as we possibly can, when we first advise a councillor of a complaint or an allegation that is being investigated we provide the councillor an opportunity to identify if it was a matter that they would like fast-tracked to the tribunal. If they do that then we also make submissions to the tribunal about their cooperation and that is taken into account in terms of any sanction or order that is applied.

In addition to that, and to try to make the system work as effectively as possible, when we first advise a councillor of an investigation we also invite that they make a proactive submission so we can identify what is agreed or what is not agreed. In those circumstances, sometimes we get information that allows us to deal with an investigation very quickly.

Mr MADDEN: How many matters have been referred to the tribunal but are yet to be heard?

Ms Florian: There are 71 matters that are before the tribunal at the moment.

Mr MADDEN: Are there any matters where they have been heard but the decision has not been brought down?

Ms Florian: Yes.

Mr MADDEN: How many?

Ms Florian: There is probably about four matters. That is a rough guess, but it is around that number.

Mr MADDEN: You addressed the LGAQ conference in October 2021. It is reported that you made this statement: 'I'm really keen to speak to that [implied right of free political speech] when the inquiry occurs'. I am giving you the opportunity to make comment on the issue of implied right of free political speech without referring to any particular matter.

Ms Florian: Sure. In Australia, unlike other jurisdictions, we do not have an express right to or freedom of political expression. Through various decisions the High Court has held, however, that an implied freedom of political communication exists as part of a system of representative government established by the Constitution. As the High Court has made clear, however, this is not a personal right that attaches to individuals. This is what is called a restriction on legislative power.

In the local government context that means that if the implied right to freedom of political expression occurs then it operates to restrict the extent to which the Local Government Act or the code of conduct could be applied. The High Court in the decision of Comcare v Banerji decided that in that case the implied right to freedom of political expression did not operate to restrict a code of conduct. We know that codes of conduct in some circumstances may override the implied right to freedom of political expression, but the test that is applied is a three-point test.

Ultimately, to date, the Councillor Conduct Tribunal has made no decision which has turned on the implied right to freedom of political expression. That is because we have not referred a matter to the Councillor Conduct Tribunal where that has been raised as the response and the issue at that time. We have in our submission made a recommendation that there may be value in proactively getting a constitutional opinion as to what extent the code of conduct and the relevant sections that account for local government principles and the councillors' responsibility in the act could be said to be limited by the implied right of freedom of political expression.

In any system, where there is not clarity on a point there are two ways that you can address that. The first way is through law reform. This review could potentially inform whether that is appropriate or not. It could compare the code of conduct for councillors to other systems involving elected representatives to see how it has been dealt with in other circumstances. Law reform is one option. The other option is referring matters, where there is an appropriate matter identified, to a tribunal to get a decision on that matter.

Mr MADDEN: It is an unusual phrase: 'political expression' or 'political speech'. How does that arise in a local government situation where the members are non-political?

Ms Florian: It is not. The implied right to freedom of political expression is not unique to politicians. It applies to all members of the community. It protects the system of representative government to ensure that politicians, whether they are state, federal or local, can participate in government and can talk critically about the sort of issue they need to on behalf of their communities to ensure the appropriate decisions are made. In my view the Sean Dillon matter was not that, but I can talk to you about that in more detail.

Mr McDONALD: I am not familiar with the Comcare case you mentioned. I understand it involved a business and an employee.

Ms Florian: Would you like me to explain?

Mr McDONALD: Sure.

Ms Florian: In that case it related to a Commonwealth public servant who had anonymously made a lot of comments on social media that were critical of the government and the opposition and particular politicians. That person was dealt with through the disciplinary scheme for public servants.

Mr McDONALD: So it was anonymous but they were then identified?

Ms Florian: In the investigation I gather they were identified. When that matter was dealt with, the argument was that the person was exercising their implied right to freedom of political expression so they could say whatever they wanted on social media. The court in that case considered whether the implied right of freedom of political expression should operate to read down that code of conduct which required that public servants remain apolitical. On the facts of that case, they said it does not read down the code of conduct. That person was dealt with on a disciplinary basis for that conduct.

CHAIR: We have talked previously about the terms of reference. The terms of reference adopted for our inquiry talk about whether performance is consistent with the intent of the local government complaint system, powers and resources and any amendments to the Local Government Act. We have not specifically mentioned in our terms of reference political expression, even though we do note that it is in the correspondence from the LGAQ, the Deputy Premier and the Council for Civil Liberties as well.

We are a bit perplexed as to why all of a sudden we are looking at this issue of freedom of political expression. We are very aware that it has wound its way through the highest courts in the land and now it has dropped into our laps here. Would I be correct in saying that this matter has now come up because of these two issues—the Dillon issue and the Fassifern issue? Why has this landed in our laps?

Ms Florian: The Fassifern issue I do not think has anything to do with the implied right of freedom of political expression. The Dillon matter is because in that case a councillor and the LGAQ and his legal representative have referred to a current investigation in the media and have referred to it in that context. That is why this matter—

CHAIR: We might deal with that further in camera as well, that issue of defence.

Ms Florian: I would just say that the reason we have made that recommendation is, because this has been such a subject of public discussion, to proactively deal with it. To get that review of that opinion up-front is one way of doing that.

Mr SMITH: As an easy question to start, could you please provide your definition of what is political expression?

Ms Florian: I would say political expression is being able to articulate and express your views on a political matter, either for or against.

Mr SMITH: So it is pretty important for a councillor to be able to express their political opinion.

Ms Florian: Yes, of course. It is absolutely critical to their function.

Mr SMITH: Absolutely. Could you please highlight where, in the act or the code of conduct, you believe that there is a restriction on councillors in terms on their political expression?

Ms Florian: There are two circumstances of freedom of speech, which is in the Human Rights Act, and the implied right of political expression. Both are subject to legislation and/or the code of conduct. How it may apply in certain circumstances can be raised in the code of conduct. For example, the code of conduct says, 'Treat people in a reasonable, just, respectful and non-discriminatory way.'

Mr MADDEN: What page is that?

Ms Florian: There is a copy of the code of conduct in the appendix. It is appendix 2, page 57. At 2.3 it says, 'Have proper regard for other people's rights, obligations, cultural differences, safety, health and welfare.' Those are examples that, at a minimum, apply.

Mr SMITH: To your way of thinking, those minimum standards in some way have a restriction on political expression?

Ms Florian: Any code of conduct could potentially have a restriction on political expression, depending on the circumstances. Let me give you an example. If a councillor said something about a matter of political interest but used really abusive or discriminatory terms, that would be a situation where legislation could potentially read down the implied right to freedom of political expression because there is other legislation that says, and the code of conduct says, that it is not appropriate to discriminate.

Mr SMITH: But you can still express a political viewpoint without being abusive in your wording.

Ms Florian: Absolutely, and that is great. There is no issue with that. This is entirely supported and appropriate.

Mr SMITH: So you do not have an issue with councillors expressing a political viewpoint or a political belief—

Ms Florian: Of course not.

Mr SMITH:—just as long as they are doing it in a non-obscene manner?

Ms Florian: That is one of the circumstances, but when you get 3,300 complaints there are a lot of different factual circumstances that arise.

Mr McDONALD: Ms Florian, you are talking about item 2 in the code of conduct. That is what you are relying on in terms of reducing the ability to speak?

Ms Florian: I want to make it very clear that I am not reducing anyone's ability to speak. It is critical to the role of councillors that they represent their communities and can do so by critically making points. Councillors do that across Queensland all the time. Although we have had complaints about such matters, no matters of that nature have ever been referred to the tribunal. Some factual circumstances raise a different issue. The Dillon matter is a good example. I look forward to sharing those circumstances with you.

Mr McDONALD: Section 2.1 says, 'Treat fellow Councillors, Council employees and members of the public with courtesy, honesty and fairness.' I have read the information provided regarding the matter. You are going to talk about it later in camera?

CHAIR: Yes, just make a note, please, Deputy Chair, of what you want to chat about.

Ms Florian: Yes, I am happy to do that.

Mr McDONALD: Going from the case that you talked about where you have an employer and employee making comments, that is a big stretch to an elected official of an area, in a pandemic, who is concerned for his community and wants to see vaccination rates—

Ms Florian: And I do not have any issue with any of that.

CHAIR: What has already been said is that we need to examine the circumstances for that. Obviously, what you are recounting is a version of those circumstances. I suggest that we leave that particular case until we go in camera. We are talking about the broader issue of freedom of political expression. I know it is a bit difficult. Member for Burleigh, do you want to add anything?

Mr HART: Ms Florian, I want to go back to your opening remarks around the setting of case law and precedent. Are you saying that the intent of the legislation is not clear enough to your office and that a lot of things are being referred on to the Councillor Conduct Tribunal to get a precedent so that you have a starting point? Are you saying that things will become clearer to your office from those precedents?

Ms Florian: I am saying that before 2018 there has been no decision-making or public guidance on how standards apply and the legislation has changed in some respects. We only refer to the Councillor Conduct Tribunal matters that raise a reasonable satisfaction of misconduct. When matters raise a reasonable satisfaction of misconduct and they are referred, and how the legislation is applied to different circumstances becomes clear before the tribunal—that information, you will have heard yesterday, the department takes into account then as part of their training and we take it into account as part of our assessment process.

Mr HART: Is the legislation not black and white enough that someone needs to determine the intent? If you are interpreting the intent, how are you doing that?

Ms Florian: The legislation is often not black and white because legislation cannot anticipate every circumstance. It sets out—sometimes at quite a high level; sometimes at a more prescriptive level—what misconduct may be or what conflict of interest may be. Then how that legislation applies to different circumstances is a question for decisions that are made by the authority that is responsible for making that decision. That is not the OIA; that is the tribunal. We dismiss a large amount of matters, but where a matter raises a reasonable satisfaction of misconduct we will refer it to the tribunal. We have taken as many active steps as we possibly can to assist councillors to understand the legislation and be able to apply it to their own circumstances.

Mr HART: Has your office gone back to the minister or the department to try to clarify the intent of these things or are you leaving it to a judicial system to interpret?

Ms Florian: No. The intent of legislation is interpreted in two ways: by looking at the legislation itself and by looking at the parliamentary explanatory notes. That is how you interpret legislation.

Mr HART: We know how that works. We are sitting on the other side of the fence. There are five members of parliament here who were present at the time the bill came through and we understand the intent of what was actually put to the parliament. Something else that you raised before was the implied right of freedom of speech with regard to public servants. Is there any clarity in the mind of your office regarding how that applies to the Public Service versus elected officials?

Ms Florian: Our concern is with the code of conduct as it exists at the moment. The code of conduct has a regulatory effect. It has been produced, it has been tabled in parliament and the legislation has been passed by parliament. We then apply that consistently.

Mr HART: When the code of conduct was amended—and I understand the department said yesterday that it had been amended a number of times—did your office have input into those amendments?

Ms Florian: As I understand it, it has been amended once. I am not aware if there was any opportunity for input.

Mr HART: One of the suggested reforms that you put—and I asked the department about this yesterday—is to review the code of conduct for councillors in Queensland and the Local Government Act to consider whether the implied right to freedom of political expression might operate as a limitation on legislative power. Can you explain what you are getting at there and what is the problem that you see?

Ms Florian: The implied right to freedom of political expression is not a personal right. The High Court has made that really clear. It operates to limit legislation and only insofar as it is necessary to limit that legislation for the purposes of protecting representative government. What I am suggesting there is to get ahead of the issue by proactively doing a review and getting a constitutional opinion on whether this is the best way to regulate the conduct of elected representatives or if there is a better way of doing it.

Mr HART: You are suggesting that the High Court has made a decision or that we get a legal opinion. What about changing the legislation?

Ms Florian: Absolutely.

CHAIR: You would need an opinion first.

Mr HART: We do not need an opinion to change legislation. Is that something that can be done at a state level or does it need to be done at the federal level? I do not know if you can answer that.

Ms Florian: The code of conduct is—

Mr HART: I realise that, but on the implied right to freedom of speech—or could we put that into the code of conduct in some fashion?

Ms Florian: The idea is that you would look at the code of conduct and you would look at the provisions in the Local Government Act and you would decide whether they are appropriate for elected representatives, and either keep them or modify them accordingly.

Mr HART: Do you have some structured view on how the legislation might be changed to reflect that? I think we all agree with that position.

CHAIR: I think there are some specific things in the submission about political freedom of speech.

Mr HART: There is that change to the reform but I am thinking about the actual way that works.

CHAIR: That is a big one: how you would change legislation. I think a more detailed investigation—

Mr HART: Have you discussed with the department or the minister about making these changes in this particular area?

Ms Florian: No, I have not. I think a good starting point is to look at codes of conduct for other elected representatives and how it has been dealt in other circumstances. For example, the code of conduct for state elected representatives approaches the issue very differently.

Mr HART: Absolutely. I can say exactly what Mayor Dillon said or appears to have said. There is no drawback on me saying that but there appears to be on him. I am happy with that.

CHAIR: We will deal with that further in camera. Member for Traeger, do you have a question?

Mr KATTER: No, I am good, thank you, Mr Chair.

CHAIR: On a different issue, we have talked about timely resolution of outstanding matters, but it took over two years to resolve one issue that we heard about yesterday. Are there aspects of the tribunal processes that are perhaps hindering a speedy resolution of some matters?

Ms Florian: If I could refer to that matter in particular that was referred to yesterday, a referral in relation to that matter was received on 24 June 2019. On 30 August the investigation in relation to that matter was completed, so it took two months for the investigation. It then went through a natural justice process. After that natural justice process it was referred to the tribunal on 9 March 2020—that is something in the order of about eight months—for an investigation. On 9 September 2021 the tribunal advised of a decision and provided reasons. That matter was actually before the tribunal for a lengthy period of time. It was investigated in a fairly short period of time and referred. I just wanted to make that clear.

CHAIR: Just clarifying, the investigation while it was referred to the tribunal took about eight months?

Ms Florian: No, the investigation took about eight months.

Ms Hodgkinson: I can clarify. The investigation and legal process within the OIA was about 8½ months. It was with the Councillor Conduct Tribunal for about a year and a half.

CHAIR: Is there a reason it took a year and a half?

Ms Florian: That is a matter for the tribunal to address in terms of its resources and ability to get through matters. We need to be able to support matters before the tribunal as well. Having a sufficient number of lawyers in order to do that is also an issue.

CHAIR: In what other ways do you support the tribunal?

Ms Florian: We do not support the tribunal at all, but having lawyers to deal with matters before the tribunal and exercise our onus of proof requires legal allocation and resources from our perspective. That is all I was saying.

CHAIR: I know that the department provides some administrative support to the tribunal. Is there any other support like that?

Ms Florian: Not at all.

CHAIR: I know that you are listed as respondents, obviously, to matters that are before the tribunal.

Ms Florian: Applicants, yes.

Mr McDONALD: I will come back to that matter of timeliness. I am just following another thought at the moment. You mentioned earlier that the matter of Dillon had been set aside pending the outcome of this because it was referred to in the papers. How and when was the matter of Dillon reported?

CHAIR: Let's deal with this in camera.

Mr McDONALD: When was the matter of Dillon reported to the office?

CHAIR: Deputy Chair, I have just said that we will deal with it in camera.

Mr McDONALD: I think it is important because it is not about the details; it is about the date, the 21 days and all that. I think it happened in February?

Ms Florian: 16 March.

Mr McDONALD: A review of the office was occurring—

CHAIR: Deputy Chair—

Mr McDONALD: I am going to a different line of questioning.

CHAIR: Okay, thank you.

Mr McDONALD: There was a review by the department of the Office of the Independent Assessor. Were you aware of that review happening earlier this year?

Ms Florian: Yes, we were aware that it was occurring.

Mr McDONALD: That was in the early part of 2021, and then the Deputy Premier has given us instructions to conduct a further review. Do you know why we got here, even though the department was already doing a review?

Ms Florian: I do not think I can really comment on that.

CHAIR: Just a moment. There was a request by the Deputy Premier; it was not an instruction. This committee decided what it was going to do.

Mr McDONALD: You were aware of the review by the department but did the office participate in the review?

Ms Florian: Yes. We were interviewed as part of the review.

Mr McDONALD: Then there were some outcomes of that, I imagine, and recommendations. Where did that process get up to before this inquiry was commenced?

Ms Florian: A series of recommendations were made. We were advised in correspondence of the recommendations. Those recommendations have been or are in the process of being implemented by the department. For example, we received notification from the minister about the revocation of a previous request by the minister under our act to be involved in broader training and capacity around misconduct and risks.

Mr McDONALD: Is that recently?

CHAIR: November?

Mr McDONALD: 21 November; is that right?

Ms Florian: We were notified that it was going to happen and then we received the letter in relation to it sometime afterwards, but from the time we were notified that it was going to happen we acted consistently with that, obviously.

Mr HART: How would you characterise your relationship with the department around this review?

CHAIR: You are asking for an opinion there. I will allow some latitude in the answer.

Ms Florian: We were advised that the intent of the review was to look at our resource situation because, as you will recall, we received quite a number of complaints. The number of resources that we have had has been an issue that we have obviously been in conversation with the department about for some time. The intent of the review was to review our resource situation; that was our understanding.

CHAIR: We will do some follow-up on that further on and maybe in camera.

Mr MADDEN: Following up on the issue regarding the Department of State Development, Infrastructure, Local Government and Planning, what is the format for you having communication with the department? Do you have regular meetings? Do they ask for opinions? Do you ask them for opinions? Can you give me a flavour of the interaction between you and that department?

Ms Florian: I have regular meetings with the deputy director-general of the department who has the responsibility for local government. My colleague the Deputy Independent Assessor also has regular meetings with a particular officer within the department. On a day-to-day basis we have quite frequent connection with the department in relation to particular matters.

Mr MADDEN: What sorts of matters are on the agenda when you have those meetings?

Ms Florian: Obviously law reform is an issue that is often on the agenda. There is training, more recently, because as we identify councils where there are capacity issues where a training intervention would seem to be the much better response in the public interest rather than undertaking misconduct investigations, we advise the department of that to allow the department to then do that training intervention.

Mr MADDEN: The issue of training has come up, as you would have seen yesterday. There are concerns about some councils declining the offer of training from the department. It is not a concern, but what about the LGAQ providing training? It might be outside the scope of your office, but what do you see as the scope of training for recently elected councillors? Can you give me some guidance?

Ms Florian: One thing we do if we do refer a matter to the tribunal is get information about what training a councillor has undertaken, because that is obviously relevant to the tribunal's consideration of a matter. Some councils do not keep records of training, which makes it difficult. Sometimes the training that a councillor has received has not addressed the issue, potentially, of why they are before the tribunal. We apply both to the councils and to the local government to get that information. It is certainly the case that even though training is provided it is not mandatory. Councillors do not necessarily need to attend that training.

Mr MADDEN: I do not want to ask you for an opinion, but in terms of the matters that are brought before you you have said that there is a lack of record keeping and that some new councillors do not get training. It appears to me that this is an area that needs to be reviewed.

CHAIR: That is clearly something you have been doing—talking to the department and the CCT about training.

Ms Florian: Capacity building for councillors is a crucial issue. We fully support any effort by the department to undertake capacity building for councillors, because obviously there is a turnover of councillors from time to time. The LGAQ statistics suggest that more councillors are being returned year on year, so they are not being dissuaded from representing their communities. The turnover of councillors, particularly in Indigenous and First Nations communities, is a particular concern for me. Capacity building is crucial, as is prevention of misconduct in the first place, because if you can prevent councillors from getting there in the first place that is a much better, greater outcome. That was the focus that we had. Our training, such that we did, was not broad; it was just focused on interventions around particular councils where issues were identified.

CHAIR: Capacity building and prevention lie at the centre of what we are trying to do here: create a better councillor complaints system and create confidence in the system. I just wanted to reaffirm that that is perhaps the central crux of that capacity building, in training and prevention.

Ms Florian: Yes.

Mr HART: You mentioned that your office talks to the department about particular matters. Does that go to particular cases as well?

Ms Florian: Yes.

Mr HART: What sort of feedback do you get from the department about particular cases?

Ms Florian: We do not get any feedback as such. We would speak to the department about particular matters where an issue has arisen. For example, a councillor might ring up and ask us for advice. It is not appropriate for to us give advice, so we would refer that matter on to the department and ring up the department to make sure there is a connection there.

Mr HART: You are not talking about disciplinary issues?

Ms Florian: No. It is not the case that the department has input into decision-making, if that is what you are saying.

Mr HART: Let us clarify that: you have never had any direction from the department about any particular case?

Ms Florian: No.

Mr HART: You mentioned record keeping. Has your office done anything to check with the State Archivist that records are being kept by councillors around conduct areas? They are obliged to keep records, aren't they?

Ms Florian: There is a Councillor Conduct Register which requires to be recorded in the register both complaints that have been made and dismissed as well as complaints that have been made and sustained, either by council or by the tribunal. Yes, they are required by legislation to make that. One of our recommendations is that the requirement to record matters that are dismissed may not be ultimately in the public interest. We have engagement with the public records office and we do not proactively audit whether councils are maintaining those records. That is because our focus is on dealing with the complaint numbers that we have.

Mr HART: In that conversation with the State Archivist, do you know whether they have looked at that matter?

Ms Florian: I do not know whether they have specifically looked at that matter.

Mr HART: Have you raised that with them as an issue, though?

Ms Florian: I am not aware that that is an issue. When a matter is dismissed, we write to councillors and to the CEO to facilitate them being able to update their register of interest. We do not have the time or the staff to then follow up to see whether or not that is updated.

Mr HART: Have you raised it with the State Archivist that they need to look at it?

Ms Florian: I am not aware that it is an issue that councils are not updating their register of interest. As far as I am aware, they are.

Mr HART: Maybe we should ask that question.

Mr McDONALD: Who would be responsible? The CEO?

Ms Florian: The CEOs are responsible, yes.

Mr SMITH: How many people to date have been issued a fine for vexatious complaints or continuous vexatious complaints?

Ms Florian: The way we deal with vexatious complainants is by a three-step, escalating process. The first step is that we receive a complaint and if we think it could be borderline vexatious we dismiss it as 'unjustifiable use of resources' or 'does not raise a reasonable suspicion' but give a warning to the complainant that that complaint is potentially vexatious. If we get another complaint from the same complainant—and we keep records of complainants—and it is again not a matter that is appropriate, then we will dismiss the matter as vexatious. That first-step warning for members of the public we have found is really effective in stopping further complaints, but in the last performance year 34 complainants went to that step 2. After that step 2 we warn them that if they continue to make complaints they may commit an offence and we would commence an investigation. Two complainants went to step 3 so we commenced two investigations which are still ongoing.

Mr SMITH: In regard to vexatious complaints, do we have a number of how many have been attributed to elected councillors?

Ms Florian: One of the law reforms that was introduced in 2018 is that councillors now have a mandatory obligation to report conduct which may indicate inappropriate conduct or misconduct. It is also potentially an offence for a councillor to make a vexatious complaint, but as a matter of practice that is going to be more difficult to address because councillors also have a statutory responsibility to report conduct which they think may indicate inappropriate conduct or misconduct. We have issued a number of councillors with warnings about vexatious complaints, including in the lead-up to elections.

Mr SMITH: Do we have a rough number of how many vexatious complaints are attributed to councillors?

CHAIR: Those are ones that have been deemed vexatious or is it just opinion?

Mr SMITH: Ones that have been deemed vexatious.

Ms Florian: We issue warnings to councillors. I am not aware of any that have been dismissed by a councillor as vexatious, but we need to bear in mind that councillors also have that statutory obligation and if they do not report that is in itself misconduct.

Mr SMITH: I guess the balance is, though, that most vexatious complainants are unelected members of the public, in general?

Ms Florian: I think the process for dealing with vexatious complaints from members of the public is quite an effective process. Let me say this: sometimes motivated complainants make a complaint that has substance and when that occurs we will not dismiss that as vexatious; we will deal with that complaint, obviously.

Mr SMITH: I guess where this is probably going to is a little bit obvious. Your annual report shows that since the OIA came into creation numbers of complaints have jumped quite significantly compared to the old model. I wonder how much of that is a culture that is a positive culture of knowing that there is an independent body there and that we can have faith in this independent body; how much is potential weaponising of this new body; and how much is maybe a bit of a social repercussion from what we have seen in local government in the media, so we look at Belcarra and so forth. What might be your opinion in terms ways people are weaponising and are there any recommendations that the OIA would have in terms of how to minimise those recommendations, the three-step process aside?

Mr HART: Do you want to re-word that?

CHAIR: Perhaps take out that motivated people are increasingly using this system.

Mr SMITH: What are some ways in which the OIA would be looking to reduce the amount of frivolous and vexatious complaints?

Ms Florian: Can I say firstly that my take on why there has been a significant increase in complaints is that I think that, without doubt, there was previous under-reporting of misconduct in local government. For there to have been only two complaints only 10 years ago indicates that this is an environment where there was significant under-reporting. A lot of the complaints that we received initially related to matters going back over a period of time because I think previously these matters were not seeing the light of day. I think also that at the time the OIA was established there was an increased focus on integrity in local government. I notice Ms Blagoev yesterday made the same comment, which I agree with.

I think people, both within council and outside of council, have felt more comfortable in making complaints to an independent body. The issue then is: with any complaints system there are going to be some people who misuse that complaints system by making complaints which are inappropriate or improper or vexatious. For members of the public, I think we have an effective process for dealing with that which stops a lot of that and deters a lot of that up-front. For councillors, I think there is that balancing policy consideration that on the one hand councillors have a mandatory reporting obligation and are very well placed to understand when there may be issues in terms of misconduct, but on the other hand obviously sometimes people may make complaints for political reasons. We are quite alert to the situation and I would suggest that the fact that up to 63 per cent of complaints are dismissed up-front indicates that over time we have developed a good radar for what is going on in particular councils. There will always be a handful of councils where there are quite vexed relationship dynamics between councillors.

Mr SMITH: Would you believe it would be acceptable in your mind under the terms of the OIA, if there are statistics coming in where one particular council is getting a relatively large number of council and councillor complaints, that the OIA flag that with the department, for the department to then go and maybe make a choice of some sort of intervention or training separate from the OIA? Is that something the OIA in the future would say to the department: 'We are getting a lot of complaints coming from this particular council. We are just flagging that with you,' and then the department can make its own decision?

Ms Florian: What kind of intervention are you anticipating there?

Mr SMITH: Let us say if the department were to get numbers and say, 'There is quite a large amount of complaints coming through from this council. Perhaps as a department we need to speak to the CEO and see if there is a need for further training to go on in that place,' but that would be for the department only. I am just wondering whether the OIA, if they were to gather over time large numbers from a particular council—

Ms Florian: We do do that. Where we identify that complaints are arising because of capacity issues, we pass that on to the department to do that training. A lot of the discussions that we have been having with the department more recently have been about those matters.

CHAIR: The tripartite forum that has been suggested: has that been established yet—that is, the department, the tribunal and yourselves?

Ms Florian: It is due to meet later this month.

CHAIR: Is that the first meeting for it?

Ms Florian: It is, yes.

CHAIR: Is that going to be the primary mechanism of ongoing communication?

Ms Florian: I imagine that I would continue to have meetings with the deputy director-general as well and my colleague would certainly continue to have those meetings, yes.

CHAIR: Certainly bringing the tribunal in to be a part of those regular communications would be a critical part of continuing to improve the system.

Ms Florian: Sure.

Mr McDONALD: I have two lines of questioning. The first one is in relation to the number of complaints that you have received and have come to light so far—I am sure more will come to light—about—and these are my words—the overreach or risk-averse interpretation by the office in regard to some matters. Is that something that you professionally consider and reflect on—the interpretations you are using—and how is your professional development in that place?

Ms Florian: Absolutely. We have made over 5,000 decisions since we have commenced. Obviously when you are making that amount of decisions on limited information and in short time frames you are always open to feedback and opportunities, but the reality is that we make decisions consistently and in the public interest and they are applied consistently to all councils. That was one of the issues that was identified with the previous system: there was tremendous inconsistency because decisions were being made by CEOs separately across a whole lot of local governments.

Mr McDONALD: It appears that the decisions may be consistent, but from many points of view, including my own, reading the Councillor Conduct Tribunal determinations and some of the outcomes of the office, the interpretation that you are placing is very risk-averse and putting people into a legalistic process, and many times the outcomes are training and perhaps capacity building or a part of a capacity-building process—all the legalistic process to get to that which, in my words, could be avoided. Who is giving you the feedback to say that you have the interpretation right and what ongoing professional development do you have in place to see that your interpretation remains or shifts to what is in line with the public and community's interpretation?

Ms Florian: The interpretation is the legislation and the legislation creates a disciplinary process for councillors because the legislature thought that was in the public interest to do. This is not a criminal situation; this is a disciplinary process. It is consistent with disciplinary processes which occur and the way they occur in a whole lot of other disciplines.

Mr McDONALD: That brings me to my second line of inquiry, which is consequence for action. We have good members of our community who put themselves forward as councillors and mayors and are elected, which is an honoured position and one that should have strong integrity. To see an allegation against them is a very big issue for them. They are required to report on it, they are required to do a lot of different things, and a delay in investigation and coming to an outcome is a consequence for those councillors and mayors. The timely resolution of these things is very important. Again I am concerned that many of the outcomes are actually a training or, using your words, a capacity-building process.

Ms Florian: That is the intent of a disciplinary system. It is not intended to be punitive; it is intended to be protective and to identify where councillors are not complying with the standards and get them back on track, often by training and counselling and other approaches like that. It is not a criminal system; it is a disciplinary system, and that is what happens in disciplinary systems across the board.

Mr McDONALD: The councillors are being required to admit that misconduct has occurred in a council or public forum, or some fashion of that, which is a very broad topic of misconduct and then have a capacity-building process. This is a really big issue for these people. I do not know if you are aware of the weight that the office actually has on these councillors.

Ms Florian: I am fully aware of the weight that it has on councillors, but the system has legislated standards and those standards are required to be applied by legislation. We do that consistently. We do it in the public interest and I think we have done it very reasonably, taking into account the circumstances of councillors. For example, after the last local government election we offered an amnesty for first-time councillors where we did not proceed with misconduct matters. After the local government election we reviewed something in the order of 85 matters that involved current investigations involving councillors who were no longer councillors and dismissed 56 of those matters, or something in that order. Wherever we identify systemic capacity and training issues, we divert them into a training and counselling response.

We are very conscious of the very difficult job that councillors have, but where legislated standards are applied—let us take an example, and these are some examples that were referred to yesterday by Mr Tim Fynes-Clinton, who is a principal of King & Company, who represents many councillors. One of the examples he referred to was a councillor who had not complied with their register of interests obligations. In that case there were two interests that had not been complied with for up to two years and eight months. The legislation said it was an offence to not keep your register of interests up to date. We elected to deal with that as misconduct. The reason is that in a disciplinary system we are there to try to get councillors to comply with the legislated standards, and unless you enforce the legislated standards that is not going to happen. For example, for registers of interest, while the way councillors are complying with the registers of interest is improving, there are significant issues around registers of interest. Unless you take those matters forward you are not going to deter other councillors from not updating their register of interests or dealing with that. In taking that matter forward we fully recognised the mitigating circumstances of the councillor in that situation and that was taken into account in the orders.

The second matter that was raised by Mr Fynes-Clinton yesterday related to a councillor who self-referred matters to us which resulted in us alleging 10 allegations of failing to declare a conflict of interest over a number of years. They related to decisions which allocated $9 million of funding to a donor, and I would suggest that those matters are in the public interest. As I said previously, I understand the very demanding role that councillors have, but councillors are making really important decisions around a lot of money so it is appropriate that there are systems which have standards and that those standards are enforced in the public interest. I also take into account that we need to be conscious of the demanding job that councillors have, and I think we have been very sensitive to that in terms of how we have dismissed matters and in terms of the role that we have tried to take in capacity building and encouraging the department to do that.

CHAIR: Sorry, member for Burleigh, we have hit 11.30. We are going to have an eight to 10-minute break and then we will come back in camera.

Proceedings suspended from 11.33 am to 12.24 pm.

CHAIR: Ms Florian, I am going to go straight back to talking about the legislative recommendations. We have barely touched on this so far, but I would like a bit of discussion on this. We will start off with recommendation No. 2. I understand why it would be attractive to deal with inappropriate conduct under a centralised system, but would this not effectively be creating another workload? Would it not be more effective to work with councils to increase their capacity to deal with this themselves instead of pushing it onto another body?

Ms Florian: Ultimately that is a matter of policy; that is for government.

CHAIR: Fair point.

Ms Florian: All I can say is that the inappropriate conduct scheme, as it is operating at the moment, is not as effective as it could be and councillors are regularly raising concerns with us about them having to deal with inappropriate conduct and sit on those decisions of other councillors. I think this particularly arises in that small group of councils which are really factionalised and there are really difficult relationships. In those circumstances, councillors making decisions about the inappropriate conduct of each other becomes quite difficult. It has resulted in some quite unfortunate outcomes.

CHAIR: Perhaps a better way of looking at it is to enhance councils' ability to deal with this perhaps by designing a template scheme that they all adopt and using that with better and more intense training of councillors and staff. They are the possibilities for that. I do not know of anyone else's opinion on that, but would they be possible remedies?

Ms Florian: Yes. All we are doing is highlighting that there is an issue with the inappropriate conduct scheme and that if that scheme were more effective there are options to divert some lower level misconduct into the inappropriate conduct scheme.

CHAIR: That comes to recommendation 3 and the suggestion about more discretionary powers for your body to turn misconduct complaints into inappropriate conduct. Shouldn't the department be closely involved in developing such a proposal?

Ms Florian: Turning inappropriate conduct—

CHAIR: Sorry, the discretion to realign some lower level misconduct into—

Ms Florian: Absolutely. The terms of reference for this inquiry raised potential law reform issues. Based on our experience of the scheme, we have identified areas where we think it would be more effective and a better use of resources. We are identifying those matters, but how those matters go forward or if they go forward is entirely up to the committee and up to the department as the policy agency with responsibility.

CHAIR: I turn to recommendation 5, altering the need to record in the council register matters that have been dismissed. Alternatively, would it not build more transparency and trust within the system to keep on recording those matters, even if they have been dismissed? If the members of the public who have had their issues dismissed can see that recorded, that will build up that trust and transparency in the system.

Ms Florian: Members of the public who make a complaint receive a letter and they receive a response with the outcome of that decision. They receive that response. The only time that a member of the public or anyone else would not get that letter is if it was an anonymous complaint. It is a question of weighing the public interest in particularising that information for matters which are dismissed, and the information that is required to be particularised is a summary of the complaint and a summary of the reasons the matter was dismissed. In our experience those registers are starting to be closely followed by people including media. There was recent media around an indication that the OIA required that Councillor Conduct Register to be inserted where the legislation requires that. I think it is just a matter of weighing the public interest. Is there a public interest in putting all of that information in a register for a matter that is dismissed?

CHAIR: I understand that. I have a number of other questions. I have grouped recommendations 8 and 9 together. Can we resolve those issues by improving how the tribunal works and by improving communications? Can we resolve those issues without having to resort to changing legislation? From a legislation point of view, we are looking at what alternative approaches are there. A couple of suggestions are improving how the tribunal works and improving communications.

Ms Florian: There is no alternative to addressing these matters without legislative amendment. In the first case, the legislation requires us to provide details of the day, time and date of a Councillor Conduct Tribunal hearing. We do not have that information. Later when we get that information we have to redo the process providing that information when the tribunal has already provided it. It is an example of a requirement in the legislation which is slowing us down and making things not terribly effective. There is no way around that other than legislative amendment.

With withdrawing matters, the act is silent on the question of whether the OIA can withdraw a matter. Following the local government election, we sought to withdraw two matters where councillors had not nominated for local government and where we thought in that circumstance there was no longer a public interest in progressing those matters. Because the legislation was silent on that issue and the tribunal's view was that once a matter is referred they must deal with it, we did review that matter in order to get some clarification on that point. That clarification was that we could not withdraw a matter. Again, that is a matter for legislative reform, if that is considered to be appropriate.

Mr HART: Where did you get that advice from?

Ms Florian: That was the Supreme Court.

CHAIR: They are usually reliable. We are talking about the recommendations. I invite members of the committee to ask questions about the recommendations advanced by the OIA.

Mr McDONALD: I will come back to the interpretation of inappropriate behaviour and conflicts of interest and how the Office of the Independent Assessor professionally considers those to know that you have that right. Do you have a record of those outcomes? How do you assess that you have those interpretations right? I think we will be here in another three years time unless there is an alignment of the interpretation versus the argument at the moment that you are taking a very risk-averse approach.

Ms Florian: We have made over 8,000 decisions. We make those decisions sometimes on limited information, we make them at the assessment stage and we dismiss matters. When we dismiss matters—and we dismiss many matters up-front and early—I would suggest that there is no issue with that. When we make a decision to investigate a matter or, more importantly, when we make a decision to refer a matter back to local government or to the tribunal—something like between eight per cent and 20 per cent of inappropriate conduct complaints are referred back to local government; again, that is a very rigorous process to reduce those numbers—it is those bodies who make the decision about whether misconduct is engaged in or not. That is how disciplinary systems apply across the board against every discipline. There is legislation, but where the legislation is not clear you apply it to different facts and you refer matters to the tribunal. If there is reasonable satisfaction and tribunals make decisions, then you use that information in your assessment process. The challenge in this environment is that there has been no system like that which existed before 2018, so we are building up that decision-making process and those decisions now.

Mr McDONALD: I understand that. Following your thoughts, 63 per cent—and I recognise there has been an increase in the clearance of 21 days—of people are happy and your people will learn from those decisions, I am sure, about what those standards are. For the others, is there a register of complaints? Is there professional consideration of the complaints that you receive? It is the complaints that in my mind as a manager I would be really interested in looking at to make sure my people are interpreting the legislation correctly. Is there a process in place for that?

Ms Florian: Yes. The same people assess all complaints. The same people are involved in looking at those matters—at all matters. In the process of doing that, you consider how other like matters have been dealt with. If they have been dismissed in other circumstances, then you would dismiss them in the same circumstance.

Mr McDONALD: If you are going to classify something as inappropriate or misconduct and somebody makes a complaint to say it should not be misconduct, do you consider that complaint or those complaints?

Ms Florian: Sorry, could you say that again?

Mr McDONALD: It is okay for the ones that are dismissed. Nobody is worried about those, except maybe the complainant. In terms of people who are facing inappropriate behaviour allegations or misconduct allegations—

Ms Florian: Misconduct allegations.

Mr McDONALD:—and they make a complaint, are those complaints considered by your office professionally to make sure your office and those assessing it are getting it right?

Ms Florian: What we are assessing is whether it is potentially misconduct, whether it reaches a reasonable suspicion of misconduct, and then whether the matter should be further investigated to determine whether that is the case or not. We are not referring a matter to the tribunal. That only happens when there is a reasonable satisfaction of misconduct. Any scheme requires these processes of determining, firstly, whether you invest your investigative resources in these matters at all. As I said, we have reduced the matters that we would investigate to 20 per cent of all complaints that are made about misconduct.

Mr McDONALD: It is easy to talk about percentages, but they are individual people who are subject to those complaints. It is a very distressing matter for many.

Ms Florian: It is and I understand that, but there is also a public interest in councillors who are making high-value, high-frequency, high-volume decisions involving literally cumulatively billions of dollars every year, that they are making those decisions according to legislated standards and that their conduct complies with legislated standards. The whole idea of a disciplinary scheme is to ensure that those standards are enforced. It is not a criminal scheme.

Mr McDONALD: No. You still have not answered my question in regard to the professional understanding of the office of the interpretation of your assessors. Do your assessors have meetings? Many of these things are subjective. You say, 'That does not meet the standard for misconduct but this does.' Is there professional learning in your organisation to make sure there is consistency?

Ms Florian: Assessments are undertaken by the same group on all matters and have been for the last three years so there is consistency in that approach. There are two assessment officers. There is the Deputy Independent Assessor. There is myself. There is sometimes an investigator. As a group we have assessed each matter and decided them consistently. That is how we ensure consistency. In the past you will recall that these matters were assessed in some cases by the department but in other cases by the CEOs in 77 different councils. The consistency of

decision-making in those circumstances obviously would have been all over the place. That is why a central assessment was considered to be the most appropriate course in the legislation that was introduced.

CHAIR: Are you asking whether they take the opportunity to bring in external advisers as part of that?

Mr McDONALD: No. I accept that there is a consistent approach to the assessment. I accept that because you have talked about that. You have three people. Has your standard of what is considered to be misconduct changed? Has that assessment of what is misconduct changed?

Ms Florian: Yes. It changes if you get a Councillor Conduct Tribunal decision which throws light on how the Councillor Conduct Tribunal would deal with a particular matter.

Mr McDONALD: At the moment you are considering things in a very risk-averse way until—

Ms Florian: I would not say that. I would say that we are dismissing a very large number of matters, including matters that could potentially amount to misconduct.

CHAIR: That is due to building precedents that are established through your decisions.

Ms Florian: It is about the resources that we have and focusing on those matters which raise a reasonable suspicion of misconduct when we assess a complaint or those matters which, because of their complexity, may require further investigation to determine whether that is the case or not. I would not say that it is a risk-averse process at all. I would say that we are actively, in the public interest, dismissing many matters at every stage.

Mr McDONALD: Are you considering complaints that you receive from people who believe that their behaviour was not misconduct?

Ms Florian: Complaints are from people who believe that a councillor has engaged in inappropriate conduct or misconduct.

Mr McDONALD: Yes, so then that councillor or mayor might respond to you with a complaint to say that their behaviour is not misconduct for various reasons.

Ms Florian: Yes.

Mr McDONALD: Do you learn from that process and consider the standard that you are applying to misconduct?

Ms Florian: When there is a decision to commence an investigation, we send a councillor a letter advising them of that, giving them the option to say that they either agree with the allegation and we fast-track it to the tribunal or disagree with the allegation. If they disagree with the allegation, we invite them to make a submission up-front as to why that is the case so we can address the matter as quickly as possible. Clearly we take into account—

CHAIR: I understand what you are trying to get at, Deputy Chair. I think you have your answer.

Mr SMITH: I refer to recommendation 5 to remove the requirement to record in council conduct registers matters that have been dismissed or subject to no further action by the assessor. The last sentence states, 'Removing this requirement would create significant efficiencies for both the OIA and councils.' Could you talk about the 'significant efficiencies'? Are they in terms of staffing hours? What are the efficiencies? Is it just time?

Ms Florian: For every matter we receive we have to write three letters and sometimes up to six letters. If we dismiss a matter then we write a letter to the CEO which sets out an outcome for the complaint and a summary for the reasons for dismissal so that they then have sufficient information to meet the legislative obligation to report that in the Councillor Conduct Tribunal. As a matter of public interest, my issue is: is that investment of time and resources in a matter which is dismissed a good use of time and resources in circumstances where in our annual report we do report overall on the matters that are dismissed?

Mr SMITH: This committee and other members have heard discussions of confidentiality. As much as the OIA tries to keep that record confidential, sometimes if there is only one business owner on a council and it is a matter referring to business, you can join the dots. Removing this in some way protects the confidentiality against someone who is maybe a victim of vexatious or frivolous complaints. Could this potentially see the number of those frivolous complaints drop because there is not that outcome of a possible connection of identity? Is that potentially foreseeable?

Ms Florian: I am not sure. I cannot really comment on that, I do not think.

Mr SMITH: No worries, that is fine. I will move onto social media a little bit later, as we are on recommendations at the moment. I spoke to some colleagues about how when I was in education we had an intranet. It is a one-stop shop. Teachers can go on there. You can do all of your professional development, see all of your hours, articles and so forth. Would the OIA be supportive and even contribute to a department-run intranet for councillors where they can log on, access further training, read articles and maybe even see some submissions by the OIA? Would you be supportive of that?

Ms Florian: I think that is a great idea. I think anything to build the capacity of councillors is a good idea, but our role is limited so we will not be providing the sort of guidance that we provided in the past. I am not sure what we could contribute to that other than to provide feedback to the department on whatever they are preparing.

Mr HART: It sounds like we probably need to talk to the Councillor Conduct Tribunal. Could we call them in to discuss this or are they spread all over the place?

CHAIR: They have a president.

Mr HART: Okay, that is fine. I want to talk about training for a minute. Who was doing the councillor training before the OIA stepped in and started doing some of it?

Ms Florian: The department has done all the induction and other training for councillors. The OIA did training only in very limited circumstances. When we received a complaint or a series of complaints about a council that raised a capacity issue with that council, we would go and work with that council to address that issue and bring them up to speed. Often that happened around conflict-of-interest issues. In some councils they have quite unique conflict-of-interest matters that arise around particular issues. The training and intervention with them would be tailored to the sorts of conflicts of interest that they were dealing with to build their capacity, both as individuals and as councillors, to identify and manage them.

Mr HART: You were using the learnings of your assessment to go back and train some of the councillors and that is no longer happening. Is your office giving information to the department?

Ms Florian: That is correct. We are providing that information to the department and the department is now doing those interventions.

Mr HART: Have you given them your training package or something like that?

Ms Florian: The department has a copy of previous training that we did. Our training tends to be much more detailed.

Mr HART: The first recommendation that you make is to extend the definition of 'unsuitable meeting conduct' to capture informal meetings and workshops.

Ms Florian: Yes.

Mr HART: What is the problem there and how do you see that working?

Ms Florian: At present, if a breach of the code of conduct occurs in a formal council meeting—and there is a definition of that in the Local Government Act—it is dealt with by the chair of that meeting as unsuitable meeting conduct. One anomaly that has arisen is that if there are workshops and other meetings that do not fit the definition of a local government meeting under the act, even though the conduct is occurring inside a meeting it has to be dealt with as inappropriate conduct rather than as unsuitable meeting conduct. The idea is to extend the definition of what is a local government meeting for the purpose of unsuitable meeting conduct so that more matters could be dealt with by the chairs of those meetings in those meetings.

Mr HART: Would social media be an informal meeting or workshop?

Ms Florian: No.

Mr HART: That was for you, member for Bundaberg.

CHAIR: Ms Florian, we have talked about the issue of the CCT that was raised by the member for Burleigh. Certainly we appreciate the suggestions you have made regarding legislative change. Would it perhaps be appropriate or useful for the CCT to make some suggestions about legislative change as well? Do we know if they have an opinion on this? It is a broad question.

Mr HART: Have you had any feedback from them on that?

Ms Florian: I am sure they would welcome an opportunity to input.

Mr SMITH: What is the OIA's position on the purpose of social media for a councillor?

Ms Florian: Councillors' official social media pages are an opportunity for councillors to interact with their constituents. It is an opportunity for councillors to provide information to their constituents on matters that are before council and are being decided and to potentially even debate policy issues with members of the community and to get a whole range of views from members of the community on matters that are relevant to local government.

Mr SMITH: When you say 'interact', does it have to be receptive to comments or can it just be information put out there, posted and comments disabled?

Mr HART: You mean a lack of response?

Mr SMITH: We will go back a little. Which elements of the code of conduct do you believe can be breached by a councillor deleting comments or blocking an account?

Ms Florian: When the OIA first commenced, there were a number of complaints about a councillor's conduct on social media which related to the blocking, in particular, of members of the public from participating on the councillor's official social media page. There were discussions with the LGAQ, which asked about that process and spoke about the difficulty some councillors have with dealing, on their social media, with people who are abusive or other issues that arise.

On the one hand, you want councillors on their official social media page to be able to interact with members of the public in ways that are open to different views and opinions; on the other hand, you do not want councillors to be subject to abuse or unacceptable conduct on their social media page. To address that issue and to try to create a balance, we worked on some social media guidelines together. That involved developing an impressum that assists councillors by putting the rules of the social media page up front and centre to make it clear that if people breach those rules then it is clear from the outset that people will have their comments hidden or deleted or the person may be blocked.

Mr SMITH: I will return to my question: which elements in the code of conduct are breached by a councillor who deletes a comment or blocks an account?

Ms Florian: It is the code of conduct, behavioural standard No. 2. If you look at the examples in behavioural standard No. 2, 2.3 states, 'Have proper regard for other people's rights, obligations, cultural differences, safety, health and welfare.' The Human Rights Act in Queensland provides a right of freedom of expression. That act requires all public officials in government to have regard to that legislation when making decisions.

Mr SMITH: If a councillor puts up a post and disables comments, are they now in breach of that code of conduct?

Ms Florian: No. If we get a complaint from a member of the public who says that they have been blocked from the councillor's official page on Facebook, we will write to the councillor under section 150AA, which is the legislative approach that gives the councillor their right to respond, and advise that that complaint has been received and ask if they have a screen shot of any of the material or can provide any information that they have about why that particular person has been blocked. We have received complaints of that nature on several occasions. We have gone through a 150AA process. The councillor has responded with the circumstances and those matters have been dismissed. No matter has been referred back to local government on that basis.

Mr SMITH: If a councillor removes a comment on their page then you believe they may be subject to 2.3, but if they put up a post and do not allow any comments at all that would be fine?

Ms Florian: No, that is not what I said. I said sometimes we receive complaints about people being blocked from the councillor's page and in those circumstances that is the process that we have followed—blocked.

Mr SMITH: Blocked only, not deleted comments?

Ms Florian: We have never referred a matter back to local government over deleted comments.

Mr SMITH: In terms of a divisional councillor, do they have the right to block an account of a resident who does not live in their division because they are not their constituent?

CHAIR: I guess it all depends on the circumstances.

Mr SMITH: What I am pointing out is that, where the OIA might see that social media is a form of interaction, the reality of social media for elected officials is that it is a way of advertising your role in the community and what you are doing. If you put up a billboard, you do not need to put up a right of reply on a billboard. In your impressum, you say that posts can be removed that attack someone

based on their age, gender, impairment or political beliefs. I suggest that 'political beliefs' is quite broad. Say a councillor says, 'Look at this, we've just put this money in for a new indoor sports centre,' and somebody comes onto their Facebook page and says, 'What a waste of money; you should've spent it on roads and rubbish.' That account is then deleted or blocked. Is that against the code of conduct?

Ms Florian: We have never received a complaint of that nature. We sometimes get complaints about members being blocked. I would argue that it is appropriate to assess those complaints and deal with them because a councillor's official Facebook page is how they engage with their constituents. They are elected representatives so their constituents do have a right to engage with them on local government issues unless they behave in a way that is unacceptable and inappropriate. In that case, we fully support councillors deleting and hiding comments or blocking people from social media. We have never referred a matter back to local government to deal with on that basis.

Mr SMITH: If a councillor does not return a call from a voice message and they have decided that they do not want to interact with that constituent, are they now in breach of the code of conduct?

Ms Florian: No.

Mr SMITH: If they decide to block and not engage on Facebook, they are not in breach of the code of conduct, are they?

Ms Florian: As I have said, a councillor's electorate page is a page where they engage with members of the community. If they block members of the community for good reason then that is fine. No matter has been referred back to the local government on this basis, but there is a public interest, in a democracy, in members of the community being able to engage with elected officials on matters of local government.

Mr SMITH: Chair, I think there is probably a longer line we could take as to what is the actual purpose of social media. Maybe that is for another time

CHAIR: I think it is another inquiry.

Mr SMITH: I think there are some inconsistencies there.

CHAIR: I thank you for the extensive answers on that, Ms Florian.

Mr MADDEN: In your submission you make recommendations for amendments. In No. 4 you talk about a review of section 150T of the Local Government Act that provides that the Office of the Independent Assessor must investigate the conduct of a councillor if a complaint on notice about the conduct of the councillor is made. You are seeking a review of that provision. Could you enlighten the committee as to why you believe that section should be reviewed?

Ms Florian: Section 150T of the Local Government Act provides that the IA must investigate the conduct of a councillor if a complaint or notice about the conduct of a councillor is made to or referred to the OIA. The effect of 150T being expressed in mandatory terms is that sometimes we receive complaints that, in our view, fall outside the jurisdiction of the OIA. Rather than just making contact with the complainant, saying that this is out of our jurisdiction and being able to deal with it potentially as an inquiry, if the complainant does not agree to that then we need to go through the process of making a formal decision, writing to the councillor, writing to the CEO and having the matter recorded in the Councillor Conduct Register. It seems to me that there would be value in amending 150T to recognise a broader discretion to deal with complaints on assessment up-front, in particular for complaints that in our view are out of jurisdiction.

Mr MADDEN: This would reduce your workload if that were reviewed?

Ms Florian: It would assist.

CHAIR: Obviously you have to investigate a complaint made by a member of the public and not just assess. It is almost a fine line. What is the difference between investigate and assess?

Ms Florian: The words 'assess' or 'assessment' do not appear in the legislation at all; it just contemplates investigation. We have interpreted that as: we do an initial triage or assessment process; we apply a standard of reasonable suspicion, which is not in the act; and on that basis we assess that up to 65 per cent of matters, for whatever reason—whether it is public interest, unjustifiable use of resources, does not raise a reasonable suspicion of inappropriate conduct or misconduct—are dismissed at that early point.

Mr HART: I just want to go back to a line of questioning of the member for Bundaberg. Correct me if I am wrong, but you said that a member of the public had an implied right to political expression in their comments and that that should not be interfered with?

Ms Florian: No.

Mr HART: Can you repeat what you said?

Ms Florian: The Human Rights Act provides that people have a right of freedom of expression and to express opinions without interference. The Human Rights Act requires all public officials in Queensland to have regard to the Human Rights Act when making decisions about all matters. The view is that members of the public should be able to engage with councillors on social media to express views in relation to local government matters but not in a manner which is offensive, inappropriate or unacceptable. We back councillors 100 per cent in circumstances where they are victimised on social media. We merely ask them for the information and the screenshots that demonstrate that that is the case. When we receive a complaint, we do not necessarily have an idea of that context. Until we get that response from the councillor, we cannot act on it.

Mr HART: So somebody can make an expression of political thoughts on social media but it appears as though a councillor cannot respond to that with their own thoughts?

Ms Florian: No.

Mr HART: Is that not what we were talking about before?

Ms Florian: No.

Mr HART: That a person could have an expression of political rights but maybe an elected official could not?

Ms Florian: No. Councillors, as part of their elected roles and responsibilities, need to be able to express views on local government matters, to represent their communities and to critically do that on occasion.

CHAIR: Before I go to the deputy chair, I want to talk about something else. We have talked a bit about the role of investigations in terms of decision-makers within the system. It is interesting that we have not heard or identified too much within the system where lies any power to conciliate or resolve problems. Initially we would have thought it resides within the CCT. Where in the system is that ability to sort out the problems, to conciliate, before it escalates to the point of legalisation?

Ms Florian: For inappropriate conduct complaints, which are lower level complaints, there is the ability in the system to have a conversation that brings together a complainant and the subject councillor and to have a discussion. That exists at that lower level. At the misconduct level, it is really a question of whether you think it is appropriate to be able to conciliate misconduct allegations away and who engages in that conciliation, because we are not the complainant. It is not appropriate for us to represent a complainant. At the misconduct level—at least at the present—the legislation says that that is to be dealt with with due process, with natural justice and procedural fairness, and that then an independent tribunal makes that decision. When you are making a misconduct finding against an elected representative, that level of process is not only appropriate but is duplicated in every other discipline system.

CHAIR: I agree that once you go to the issue of misconduct there are some broader issues involved that need definitive resolution. Certainly in terms of inappropriate conduct issues, we have said there is the opportunity to arrange that. Who has oversight? Is it something that the two parties involved have to do themselves?

Ms Florian: There is an investigation policy which is prepared by the department. In that investigation policy, the opportunity for alternative dispute resolution is an option. That would be a matter generally for the CEO, who could bring people together to deal with that.

CHAIR: We have heard in a previous question about the increasing use of lawyers. The one thing that is becoming clear is the question of how we de-escalate the overly legalistic turn that sometimes we see, so we do not get to lawyers at 12 paces.

Ms Florian: There are two perspectives on that. There is the perspective of the applicant before the tribunal, and the tribunal itself. The legislation has put in place that process. There is a natural justice process that we are required to follow by legislation. The legislation requires that there is an applicant and a respondent and that the tribunal can make practice directions. Then they can consider both perspectives and natural justice and come to a decision. The legislation has set out that process, and I gather that would be on the basis that that process is the suitable and appropriate process for determining misconduct in a scheme like this. It is similar to that in other professional disciplines. What is probably unusual about the local government context is that local government councillors have access, through their indemnity insurance schemes, to legal representation. They

can access that legal representation quickly and easily and engage in that—as we have heard in the evidence today—as early as an inappropriate conduct matter being sent back for a response from a councillor. That is a quite separate issue.

CHAIR: That access is something that most members of the public would not ordinarily have?

Ms Florian: No.

Mr McDONALD: There are two aspects that I am really concerned about. In your submission to us at page 14, it outlines the improvement in the percentage of total complaints dealt with—and we have talked about this a number of times—growing from 46 per cent to 63 per cent and 52 per cent in the past two years. That is 583 complaints. That is just on 52 per cent of 583 and 52 per cent of 558 in 2021 and then 238 in the short period so far, which is on track to achieve over that 500 mark again this financial year. We still are talking about a significant number of matters that are going past the assessment date of that.

Ms Florian: This is just misconduct matters. It is not including inappropriate conduct matters.

Mr McDONALD: It is total matters.

Ms Florian: Or is it total matters? Sorry, it is total matters.

Mr McDONALD: On the top of that page it states—

After assessment, complaints are dealt with in one of the following ways:

- Under the OIA's broad discretion, a complaint is dismissed or subject to no further action—

There is a summary there including: not a proper assessment, not in the public interest, vexatious or too much use of resources. Can you tell me why in your recommendations 2, 3 and 4 you talk about improvements to the assessment of inappropriate conduct and at 3 you talk about some lower level misconduct matters being reclassified and dealt with in the inappropriate conduct process, but at 4 it states 'Discretion not to deal with certain complaints'. Surely the broad discretion that you have now is sufficient, but I think it is just not being applied.

Ms Florian: Up to 63 per cent of matters are dismissed within 21 working days, so clearly that is being applied. Recommendation 4 is addressing the issue where we receive complaints that we consider to be out of jurisdiction. What we are seeking there is that we do not have to deal with them formally within the system as misconduct complaints, that we can just write to the complainant and say that it is out of jurisdiction in our view and refer them potentially to the Ombudsman's office.

Mr McDONALD: Surely that is done now?

Ms Florian: The requirement under the act is that we must deal with the complaints that we receive, and that includes writing to them, writing to the CEO, writing to the councillor, putting it in the Councillor Conduct Register. For these out-of-jurisdiction complaints, we want to be able to deal with that before you even get to that point so that we can weed those ones out of the system up-front.

Mr McDONALD: I am still confused as to why recommendations 2, 3 and 4 are actually even there given the remit that you already have.

Ms Florian: Recommendation 2 is there because the inappropriate conduct scheme needs to be more effective than it currently is. We have provided detailed feedback that has been received from councillors and the statistics of how inappropriate conduct matters have been dealt with when they have been referred back. If there is an effective inappropriate conduct scheme, there is the opportunity to deal with some lower level misconduct as inappropriate conduct, which then takes some of the pressure off the misconduct scheme.

Mr McDONALD: Isn't that what we were talking about before when I asked, 'How does the office assess inappropriate misconduct and how do you know if you have it right?' With this recommendation, it seems like you are asking for the powers to do that, but you have that ability already.

Ms Florian: No, that is not right. For example, one of the categories of misconduct at the moment is a breach of the acceptable request guidelines. If we receive a complaint that a councillor has breached the acceptable request guidelines then we will categorise that as misconduct because that is in the definition of misconduct and potentially, if there is a reasonable suspicion, we will investigate that matter and then potentially if that raises a reasonable satisfaction it will be referred to the tribunal. The question here is: is a breach of the acceptable request guidelines something that should be misconduct or is that something that could be more effectively dealt with as inappropriate conduct? The purpose of these recommendations is to identify more technical or lower level matters that come within the definition of misconduct and get rid of them into the inappropriate conduct scheme so we can focus our resources on the more serious misconduct matters.

Mr McDONALD: Was that a part of the review? Did you make that recommendation to the department in the review earlier this year?

Ms Florian: Yes.

Mr HART: Can I just clarify: you said before that you want the power to go back to people and say, 'This is outside our jurisdiction.' If it is outside your jurisdiction, is it not outside your jurisdiction and you still have to deal with it?

Ms Florian: Presently the act requires us to deal with all complaints that we receive under divisions 2 and 3. We dismiss those matters up-front, but that requires us to write three different letters and have the matter recorded in the Councillor Conduct Register when what we are asking to do is be able to say, 'This is out of jurisdiction,' just write to the complainant and potentially refer them to the Ombudsman's office. That would be the more appropriate course.

Mr HART: You still have to deal with it even if it is outside your jurisdiction?

Ms Florian: Obviously the complainants do not understand that it is outside the jurisdiction, so that is a process that we have to go through. Then everything else has to happen and then it goes in the Councillor Conduct Register. All of these recommendations are about streamlining the system so that we can remove some of the inefficiencies and make it work as effectively as possible.

Mr HART: Where are these practice directions stored?

Ms Florian: The practice directions are in a link in our submission. They are also accessible on the department's website.

CHAIR: It has been made clear that very few councillors complain when issues are dismissed but maybe the public do.

Ms Florian: Sometimes councillors do too because they would prefer that there was an investigation and that they had that outcome.

CHAIR: That is good to bear in mind as well. Bearing in mind that we want to create a system where the public has confidence in what we are doing, where do the public go or most complainants go? That could be other people in the public sector or local government sector. Where do they go? Could you outline for the people reading the transcript where they go if they are not happy with that decision.

Ms Florian: If they are not happy with the decision to dismiss a matter?

CHAIR: Yes, even if it is outside jurisdiction.

Ms Florian: The standard for complaint agencies requires that complaint agencies offer a review process. We offer an internal review process. Complainants can request an internal review of the decision to dismiss a matter. If it is made within time then I conduct those internal reviews. That is the process for dealing with that.

Mr HART: You do an internal review of your own decision?

Ms Florian: The decisions that are made on assessment are made by the Deputy Independent Assessor—unless it is a vexatious decision, and I make those decisions and there is no internal review on those matters.

CHAIR: Recommendation 7 talks about material in your possession from one investigation being used somewhere else. Bearing in mind some of the issues that emerged with the CCC report that has just come out, is there not a level of risk if you are able to use material you have gained in one investigation in another? Is there a level of risk in that now?

Ms Florian: I will explain the circumstances that led to that. We seek from the department information about the previous disciplinary history of a councillor, which is held by the department and which we do not have access to. We also seek from the department information about training that the department has provided to councillors, which is obviously an important circumstance that needs to be set out. The department requires a notice for us to obtain that information. A lot of the notices that we serve are, in fact, on the department. We cannot use the information that we obtain under one notice about training and disciplinary history if we deal with the same councillor in relation to another matter in six months time. In effect, it requires us to serve another notice on the department asking for the same information, which is not a good use of our time and not a good use of the department's time. That is the circumstance that led to that recommendation for an efficiency measure.

CHAIR: Thank you for clarifying that. It makes it a lot clearer.

Mr McDONALD: I have a simple question about the increase from 52 per cent of matters cleared in 2021—albeit 290 still to be dealt with—outside the 21 days to 63 per cent. Why the increase from the 52 to the 63?

Ms Florian: Generally I think as time goes on we have been more and more rigorous in trying to reduce the amount of matters that go through because of the strain on resources, both with investigations and before the tribunal. Because the legislation allows us to dismiss matters in some instances because they are not in the public interest, in other instances because they are not a justifiable use of resources, the rate at which we have dealt with those matters across a whole lot of measures has increased over time.

Mr McDONALD: There are 130 matters, or about that amount, that are still under investigation.

Ms Florian: Yes.

Mr McDONALD: Can you tell the committee how you triage those matters and what priority you give to them in order to investigate those?

Ms Florian: When we have matters which are under investigation, they are prioritised depending on whether they have been referred by the CCC as corrupt conduct that is potentially being dealt with as misconduct. Whether they raise an issue which really impacts on the council's ability to function will prioritise matters. Otherwise we will do it in date order.

Mr McDONALD: You said that you placed a more rigorous standard on the consideration of matters that might get referred based on the resources that you have. Is that a different way of saying that you are actually dismissing more things now than you did early on?

Ms Florian: Yes.

Mr McDONALD: Some of the things that were not dismissed early on might in today's environment, because of the greater understanding, be dismissed now?

Ms Florian: Because of the greater backlog and demand on resources.

Mr McDONALD: It should not be about the resources; it should be about the standard of what is inappropriate or the standard of what is misconduct. That is what I have been trying to get at all day: that standard. You are learning that these things are not inappropriate or not misconduct so you are dismissing more, and I think that is a welcome direction, because there has been a very risk-averse approach.

CHAIR: I understand what the member is driving at there. We have talked about the adoption of a triage system. That is one example of a change in process. Would that be correct? I notice you certainly have that projected annual—

Mr McDONALD: I do not think the witness needs your protection, Chair.

CHAIR: I am helping all of us. I am not protecting anyone. I want to understand this as well. Your annual number of complaints projected came in within 11 days of a certain change. I guess one of the things we are looking at is: that triage system was adopted in rapid response to that number of complaints coming through; would that be correct?

Ms Florian: Yes.

Mr HART: I think we just need to clarify this. The OIA just said that some of these cases are being dismissed because of a lack of resources. Do you want to confirm that?

CHAIR: That is not how I interpreted it.

Ms Florian: One of the grounds on which we can dismiss matters is because they are an unjustifiable use of resources. If misconduct is potentially more borderline or if there are circumstances—maybe it is a new councillor who is learning the ropes; maybe there are other mitigating circumstances—then we will look at whether a matter is an unjustifiable use of resources or if there are systemic issues. For example, we have dismissed 18 matters for new councillors because they were learning the ropes. We dismissed 56 matters for previous councillors who, after the local government election, were no longer councillors. We have dismissed numerous matters where we have identified systemic issues. We go way beyond just what meets the reasonable suspicion of misconduct.

Mr HART: That is a far better explanation.

Mr McDONALD: Were those 18 all part of the amnesty process?

Ms Florian: That is right.

CHAIR: Member for Ipswich West, you wanted something clarified?

Mr MADDEN: Just back to my question about section 150T, in your answer you said that 65 per cent of matters do not raise a reasonable suspicion. What I want to know is: what percentage of complaints are not within your jurisdiction that would apply if there was an amendment to 150T? Are we talking five per cent? 10 per cent?

Ms Florian: I would be guessing, but I would say probably between five and 10 per cent. We try to encourage complainants to make complaints through our web form because our web form deliberately tries to weed out complaints or redirect complaints that are not relevant to our jurisdiction and to send them to the correct place and the correct process. Notwithstanding that, sometimes people do continue with a complaint.

Mr MADDEN: About five to 10 per cent—the exact figure does not matter that much—would be removed if we amended 150T, but overall about 65 per cent do not raise the threshold of reasonable suspicion?

Ms Florian: They either do not raise the threshold of reasonable suspicion or we do not continue with them in the public interest. I have given you a number of examples where, even though that threshold is met, we have not progressed with matters.

CHAIR: Do we have any final questions?

Mr HART: What resources do you have in the OIA?

Ms Florian: We were established with 10 people. We now have funding for 19 people. Over 40 per cent of our staff are temporary staff. That means we have difficulty retaining staff. Recently, for example, we just got up to our 18 people and then we had someone resign straightaway because they got a permanent position.

CHAIR: There was one question taken on notice in camera. We will send the transcript on that particular matter to you.

Ms Florian: Thank you.

CHAIR: Are there any other final comments?

Mr HART: Well done today. It is difficult.

Mr McDONALD: I just had a discussion with the chair regarding the decision to hold some matters subject to the outcome of this inquiry. I am concerned that that is not showing procedural fairness and natural justice to the people subject to that. We will get some advice around that. We might be able to provide you with something.

CHAIR: It might be a question.

Ms Florian: I would welcome that.

CHAIR: That concludes this briefing. Thank you to everyone who has participated today. Thank you to our secretariat and thank you to our Hansard reporters. A transcript of these proceedings will be available on the committee's webpage in due course. I declare this public briefing closed.

The committee adjourned at 1.30 pm.