



STATE DEVELOPMENT AND REGIONAL INDUSTRIES COMMITTEE

Members present:

Mr CG Whiting MP—Chair
Mr MJ Hart MP
Mr RI Katter MP
Mr JE Madden MP
Mr JJ McDonald MP
Mr TJ Smith MP

Staff present:

Ms S Galbraith—Committee Secretary
Mr B Smith—Assistant Committee Secretary

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

TRANSCRIPT OF PROCEEDINGS

THURSDAY, 28 APRIL 2022

Brisbane

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The committee met at 2.02 pm.

CHAIR: Good afternoon. 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 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 fortunate to live in a country with two of the oldest continuing cultures in Aboriginal and Torres Strait Islander peoples, whose lands, winds and waters we all share. With me today are committee members Mr Jim McDonald, deputy chair and member for Lockyer; Mr Jim Madden, member for Ipswich West; Mr Michael Hart, member for Burleigh; Mr Tom Smith, member for Bundaberg; and Mr Robbie Katter, member for Traeger.

This hearing 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. 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. Could everyone please turn their mobile phones to silent or turn them off.

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

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

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

CHAIR: Good afternoon, and thank you for appearing before the committee today. Would you like to make an opening statement? Then committee members will have some questions for you.

Ms Florian: Thank you, Chair, for the opening and the welcome. I do not have an opening statement today. We could just go to questions.

CHAIR: One of the things that has been talked about in the submissions and the hearings is the issue of anonymous complaints. A lot of stakeholders have talked about it. Could you perhaps take us through that process of people putting in a complaint? When it is anonymous, how is it dealt with? Can you speak to the importance of anonymity at certain points? We would like you to perhaps step us through what happens in making an anonymous complaint.

Ms Florian: We encourage people to, as much as possible, make complaints via our online system. The reason we do that is that the system has been constructed in such a way as to try and identify people whose complaints do not fall within our jurisdiction and then redirect them to other jurisdictions. People who make anonymous complaints will do so through our online system. There is an option to make an anonymous complaint if that is the preference. We ask people if they fear reprisal. That is often the case if it is a council employee who is making the complaint.

We see inconsistent patterns of anonymous complaints across councils across Queensland. We tend to see a lot of anonymous complaints from First Nations communities. My sense of that is because of the remoteness of those communities and how small those communities are and concerns about making complaints in those communities—the tensions that could give rise to. We see anonymous complaints as a feature at particular councils, but overall our rate of anonymous complaints I think is in the order of 11 per cent. I will be corrected.

CHAIR: That is a figure that we have heard before.

Ms Florian: Yes. For some councils our experience is that it is a lot higher. For some councils it is a lot lower, but on average it is 11 per cent.

Public Briefing—Inquiry into the functions of the Independent Assessor and the performance of those functions

Our experience with anonymous complaints is that a lot of them are quite high-level and general in nature. When it is an anonymous complaint, there are no inquiries that you can make to follow up on that complaint. Anonymous complaints do tend to be subject to early dismissal. Sometimes you get anonymous complaints that are very detailed in their nature. They can tend to be more from a council employee or someone who has firsthand experience and knowledge of what it is they are making the complaint about. Not many anonymous complaints are investigated or go through to the tribunal. The ones that do tend to fall into that latter category.

Mr MADDEN: I have seen the form that is online and I know there is a box you can tick 'anonymous', but below that is name, address and all that. With anonymous complaints, are they anonymous to you or completely anonymous in that there is no name or address?

Ms Florian: Mostly they are completely anonymous to us. On some occasions we have had someone who has ticked 'anonymous' but has also provided details. Our response to that situation is: if you have indicated that you want the complaint to be anonymous, we will receive the complaint and deal with it but you will not get any update, outcome letter or anything of that kind because you have elected to go anonymous.

Mr MADDEN: Thank you for clarifying that.

Mr KATTER: With anonymous complaints, is there any notable correlation with insufficient detail or a deficit in the detail? I would have thought that would be the tendency. If you do not want to say too much about it and keep it anonymous, you are less likely to give more information. Do you find that?

Ms Florian: Absolutely. We often see that case. Anonymous complaints do tend to be quite high-level and non-specific. Even if they raise questions, you have no-one to follow it up with or you may have no reasonable avenues of inquiry. It is for those sorts of reasons that anonymous complaints are rarely investigated or go further, unless they are very specific.

Mr McDONALD: With regard to complaints, a complainant, as I understand, is kept confidential albeit they are a named complainant and the matter is dealt with; is that accurate?

Ms Florian: The complainant is kept confidential unless a matter is referred to the Councillor Conduct Tribunal or unless a matter is referred and dealt with as inappropriate conduct, because you cannot undertake a natural justice process if they do not know where the complaint has come from, unless it is a public interest disclosure. Under the act there may be a requirement.

Mr McDONALD: I recognise the crossover there. My thoughts in this process were that if somebody were to tick the box as being anonymous then really, in practice, that process is exactly the same now up until that point of referral or issue?

Ms Florian: Correct.

Mr McDONALD: The committee has had a lot of conversation about anonymous complaints. One of the things going through my head, and linking the two together, is the request for a fee for service. I think that fee for service is really around this issue of anonymity and vexatiousness and trying to stop that from happening as a process. Could you comment on that at all?

Ms Florian: I think the fee-for-service question has come out of the Mount Isa City Council. I said previously that there are some councils where anonymous complaints feature and some councils where they do not at all, so it is not a similar experience across Queensland. I do not support a fee for service. I think that unreasonably discriminates against people who may have legitimate complaints but not the money to lodge them. I know that the proposal was that it would be refunded if they were successful. If a matter is dismissed because it is not in the public interest, that does not mean it is unsuccessful—or that it is an unjustifiable use of resources. How do you refund? An employee would be required to give their details in order to get a refund. It raises a whole range of issues which I do not think are consistent with an effective, transparent complaints process.

Mr McDONALD: Just going back to the anonymous complaint and the named complainant, although remaining anonymous up until a point in time, how is an anonymous complaint dealt with through that same pathway? Is there a point in time when you need to identify that person?

Ms Florian: No, there is not. If someone lodges an anonymous complaint, they essentially give up all right to be updated or to have an outcome. In most cases, we would not know who they are to start with.

Mr McDONALD: Through the investigation process you would have to gain evidence from other sources.

Ms Florian: Exactly. That is the why these sorts of high-level anonymous complaints go nowhere, because these high-level statements are not susceptible to investigation. The more specific it is, the more avenues of inquiry you potentially have.

Mr McDONALD: Potentially, a witness in one of those anonymous matters could be the original anonymous complainant?

Ms Florian: Potentially.

CHAIR: If it goes to the tribunal level.

Mr SMITH: Is there a number or a breakdown of how many anonymous complaints have made it through to the CCT?

Ms Florian: There is. We will find that for you and get it to you. It is a bit higher than I would have anticipated, but that is because there was one matter when we received 30-odd complaints about one councillor. That was referred to the CCT. A number of those complaints were anonymous, but we also had complaints from identified members of the public. It is probably not the best example, but we will get for you the statistics of how many matters have gone to the CCT that are anonymous.

Mr SMITH: Your answer to this question might have to be more anecdotal. Is the nature of anonymous complaints that do not make it through that they are largely vexatious and frivolous, or is it just that there is not enough evidence to carry through?

Ms Florian: We would not dismiss an anonymous complaint as vexatious or frivolous because there is no warning to give to anyone. There is no follow-up that we could do on that. We would generally be more likely to say that it was lacking in substance or—

Mr SMITH: Does a letter still go to the councillor about whom the complaint was made saying, 'An anonymous complaint has been made against you. However, it does not have enough legs to carry forward'?

Ms Florian: It may, yes, if that becomes necessary to explain it. I guess my observation is that a lot of councillors jump to the conclusion that a matter is anonymous when it is not in fact anonymous.

Mr KATTER: Could you offer some comment on the vetting stage? We had the online form mentioned before. Would there be any benefit in having some prompt or encouragement for them to do a bit more work than just offering the comment? I do not have any good ideas on how you would refine that to be more precise in my question, but would you see benefit in forcing the person to provide a bit more detail?

Ms Florian: Absolutely, and our form is designed to do that, member for Traeger. For example, we include with the complaint that they can click on some examples of what are properly specified complaints. We ask them to give consideration to whether there are any particular witnesses or documents that may assist us. We give them the instructions on how to link that material to their complaint. We provide the advice that the more detail that can be provided up-front the quicker we can move through to an assessment of that matter. If it is very high level but maybe has enough information to conduct inquiries then that is our worst case scenario in a lot of respects, because it then uses up our time trying to run things down to get enough information to properly assess the matter.

Mr KATTER: If they are anonymous, you are unable to go back to them to say, 'Can you provide us with more detail?'

Ms Florian: Exactly, yes.

Mr KATTER: I think I am reiterating what you are saying, but that is more or less saying that the opportunity is there for them to provide more detail but if it is not there then you reserve the right to be able to vet it or say, 'We are going to cast that one aside because there is not enough.'

Ms Florian: That is right.

CHAIR: We will now introduce another issue.

Mr MADDEN: I have looked at the website for the Councillor Conduct Tribunal and there are only three reported decisions for 2022. Would you know how many matters you referred to the tribunal are yet to be heard? You may have to take that on notice.

Ms Florian: I think about 72 matters are currently before the tribunal. The oldest matter is two years and four months.

Mr MADDEN: It has been suggested that when you write your initial letter to a councillor when there has been an allegation of misconduct there is very little information provided as to the nature of it. Is that the case?

Ms Florian: We provide what information we can at that time. We may not have a great deal of information. As the councillors present would understand, sometimes complaints that arise in the local government context are quite complex. We provide as much information as we can, and that will include an overview of the complaint, the particulars as we have them and also the particular conduct provision that it is alleged may have been breached.

The councillor is provided with two options at that point. They may look at that and say, 'That's a fair cop and I just want to deal with this as soon as possible.' We have almost—like the member of Lockyer's—an ex officio process for councillors who want to take up that opportunity to have a matter dealt with quickly or more quickly. Alternatively, we will undertake a full investigation. If we undertake a full investigation, at the conclusion of that investigation if there is a reasonable satisfaction the councillor will get a statement of fact that sets out in detail all the facts and circumstances and particulars and allegations and how it is said to constitute misconduct. That is part of the natural justice process that they respond to.

We have taken on board the feedback we have heard during the inquiry about those letters, which seem to cause some excitement and concern. Our letters are drafted to follow the legislation because the legislation says what has to be in the letters. However, we have been starting a process—and you would have seen it in our submission No. 3—of redrafting those letters to try to reduce that sense of apprehension that is there.

Mr MADDEN: With regard to that, the phrase that you used was 'fair cop'. That is early on.

Ms Florian: Yes.

Mr MADDEN: If a councillor chose to go down that route and not have the full investigation, how do you determine the penalty or if there is a penalty?

Ms Florian: What we initially did—and this again was our thinking in the early part, to try to reduce that sense of apprehension—was discuss with the president of the tribunal, when the OIA and the CCT were set up, whether we could negotiate with the councillor and their legal representative and come up with a penalty or a range of penalties that could take the heat out of it at that point. We thought that if we could get to that point at the statement-of-fact stage then that might help things go through the tribunal much more quickly. The difficulty is that, because there have not been a lot of tribunal matters, there is no visibility of tribunal matters in the past and there is no pattern of orders or sanctions, so our attempts to do that did not work for the tribunal in the first instance. I think that is something that we could look at again down the track, but we were definitely trying to look at ways to reduce that apprehension from the outset. Having said that, I think it would be very clear now to councillors the sorts of orders that they are seeing from the tribunal and the fact that the tribunal is very much focused on a disciplinary scheme that is intended to intervene and train and give the councillor the opportunity to learn the lesson and move on and is not intended to be punitive or to penalise.

Mr MADDEN: Could you give an example? Say somebody makes a mistake and it is a fairly low level thing. What is an example of what you would recommend in response to them saying, 'Yes, I did something wrong and I don't want the matter heard'?

Ms Florian: Often we will have cases—increasingly now—where councillors self-refer matters. That is a new feature. That was not a thing that you really saw before the OIA and the tribunal came into being. We are seeing every year an increase in the number of councillors who self-refer. If they are young and inexperienced councillors and they self-refer, in the public interest we are more likely to dismiss it and not take it to the tribunal at all. If they self-refer and it is a more serious matter or it is a very experienced councillor or they have some disciplinary history, we would take it to the tribunal still but we would make it clear up-front that the councillor has self-referred, that they have fully cooperated and that that should be taken into account as part of any sort of order that comes out of it. In many respects we would say something like 'an admission only' or, depending on the seriousness of the matter, a low-level reimbursement of costs or something.

Mr MADDEN: You would make that recommendation to the tribunal and the tribunal would make that order?

Ms Florian: Yes. Both parties make recommendations, but what we tried to do in the first instance was come together—us and the councillors—and agree on what we thought would be a good outcome, just to try to reduce that apprehension and get things moving through.

CHAIR: Thank you. That is quite clarifying.

Mr SMITH: How far along the process is it before the councillor knows what the likely penalty would be for misconduct or inappropriate conduct? Through our hearings it has been a bit either way. Some councillors have said, 'I have no idea what the penalty is going to be and I have spent thousands of dollars on legal fees,' but at the end the day they are fined \$250. At what point along that journey are they informed, 'This is the likely penalty that we will recommend to the CCT'?

Ms Florian: The penalties are set out in the legislation. You will see from the legislation that there are some quite serious potential penalties, including suspension or termination, none of which have ever resulted. The first time the councillor may become aware from us what the likely penalty would be is when we put in our first submission before the tribunal where we say that. It is not our experience that when we do that that changes things at all. For councillors who are legally represented, their legal representatives, particularly ones who appear before the tribunal all the time, would be well aware of the sorts of penalties the tribunal delivers. Anyone who looks on the tribunal website would be quite well aware of the sorts of penalties the tribunal delivers.

Mr SMITH: In your letter when you say, 'We believe you may have breached section X of the act,' do you include in your letter, 'The maximum penalty for that under the act is'—

Ms Florian: No.

Mr SMITH: So the onus is on the councillor to look up the act and find what the likely maximum penalty is?

Ms Florian: We would not be suggesting what a maximum penalty is. If you are talking about when we send out a letter about an investigation, we are just saying that we are investigating a matter. We are not saying that there is any reasonable satisfaction that that is actually going to be misconduct at the end of the day. We are just saying, 'We have this complaint. On the face of it, it is something we need to undertake further inquiries on.' There is no way that we are talking about a penalty at all at that point.

Mr SMITH: That would only come if you feel there is a need to go to the CCT and then you would write to the councillor?

Ms Florian: Exactly.

CHAIR: To clarify, after they have the 150AA letter and you are putting together the statement of facts, at that stage it would be communicated and that is before it goes to the tribunal. Is that the stage at which you would communicate to the councillor what potential penalties may be?

Ms Florian: There is the investigation letter; we do not communicate there. The 150AA: we do not communicate it there. We used to. We tried to do that as part of that process but it did not work. The first submission that we do when a matter is before the tribunal is where we communicate.

Mr SMITH: What do you mean by 'did not work' in the 150AA letter?

Ms Florian: In the 150AA letter we used to not only set out all the facts but also set out potential penalties, or a range of penalties, and try to agree them with the councillor or the councillor's legal representative up-front. Some legal representatives were opposed to that because they said it is not part of the facts and it should not be there. When we went before the tribunal—because there is not that history of decisions and those decisions are not visible and communicated, there is not a range of penalties like you might see with other tribunals, so the tribunal was not comfortable with us getting together with the councillor or the legal representative up-front and saying that we thought this would be the appropriate penalty range. They understandably wanted to set that from the outset.

CHAIR: Obviously it is their area. The penalties can only be imposed by that tribunal.

Ms Florian: That is right.

Mr HART: I am sorry: I had to step out for a minute there.

CHAIR: Did you want to talk a bit more on the issue of communication of penalties or are you happy with that at the moment?

Mr HART: Yes, but I have some other subjects to talk about.

CHAIR: We will finish pursuing this and then come to you, member for Burleigh.

Mr McDONALD: Ms Florian, I am interested in seeing part of the new system where people can recognise that they have made a mistake and use an educative process through identifying that, whether it be themselves or the CEO in a meeting or through some natural process. They identify and report—not just make the decision but report—as an early disclosure a mistake of inappropriate behaviour or a mistake of misconduct and then they see an educative process attached to that. Does the legislation allow for that now or are there some improvements that you could suggest to the committee?

Ms Florian: The legislation does not allow for that now. Provided there was some structure built around that and there was some recordkeeping around that, that is potentially a good outcome.

Mr McDONALD: I think that is a really important point. Chair, is the issue of misconduct relevant now because it is penalty related? Can I ask a question on that?

CHAIR: Yes. If we are talking on issues of penalty, let us continue with that before we go to the member for Burleigh.

Mr McDONALD: I am really concerned about the term 'misconduct' and the range of penalties associated with misconduct. People are being investigated, reported and complained about on matters of misconduct that, from our discovery through this process, are never going to end up in the sacking of that councillor as provided in a penalty. Do you have some suggestions on how that could be improved as a communication to the councillors or mayors involved in that?

Ms Florian: As in a different name?

Mr McDONALD: No, in terms of the penalty for misconduct and the range of penalties. I understand that a range of penalties is outlined to those subject to the complaint, but that is regularly causing an enormous amount of distress when they see that included in the range of penalty for misconduct is termination.

Ms Florian: Our suggestions have been twofold. The first is that you look at the definition of misconduct and determine whether all of it should be there. Our recommendation has been that breaches of the acceptable request guidelines, for example, in my view should not be misconduct; that should be inappropriate conduct.

Our second recommendation is that for lower level misconduct there should be a discretion to refer that back to be dealt with as inappropriate conduct. I think that is a much better outcome than just dismissing them. Otherwise you end up with this group of matters that are not dealt with at all. You have inappropriate conduct that is dealt with publicly and there is an order. You have serious misconduct that is dealt with publicly and there is an order. If we do not deal effectively with lower level misconduct—we cannot presently refer it back as inappropriate conduct; the pressure is on us to dismiss those matters, even though those matters are made out—that is not a good outcome in the public interest and that is not achieving the objectives of the act, in my view.

Mr McDONALD: Thank you for that and I accept that. In terms of misconduct itself, though, even if the government were to adopt those recommendations, you would still have the term 'misconduct' having a range of penalties from apology penalty units through to dismissal. Is any consideration being given to being able to communicate that range of penalties to councillors who are the subject of the complaints?

Ms Florian: We do not communicate the range of penalties for that reason—that we do not want people to get focused on that, because it takes away from what we are trying to achieve. I think there is potentially a law reform option. You could look at the penalties for misconduct or you could look at breaking it down into different categories of misconduct which would attract different penalties. I think there are a number of different options that you could look at to try to reduce that.

To my way of thinking, what we are seeing here is that there has been significant under-reporting historically in relation to councillor conduct. This new system has come in which has raised the bar, and all of a sudden we have this large volume of complaints. There are not many matters that are going to the tribunal. There is four per cent. In other words, 96 per cent of matters are not going anywhere near the tribunal, but that four per cent of 3,500 is still substantially more than has ever been near a tribunal in the past. More are being sustained because it is a much more formal process that the act requires now and the standards to prove things are much higher.

It is a culture shock. Councillors have not experienced this in the past. They have only had this for three years and it is a significant shock. This is something that we have discussed a lot—that a key issue is how you reduce that apprehension and how you make them understand that while we do not want people to engage in misconduct, because that is not great, but at the end of the day it is not the end of the world and it is an opportunity to learn a lesson, pick up and move on. Many councillors who have been through the system I think are more likely to feel more comfortable with that—that they have seen that, at the end of the day, this has not turned into something which has destroyed their election prospects and they have not been pilloried in the public.

To some extent, I think there is a cultural factor at work here and there is an adjustment which needs to happen, but because we are so backlogged before the tribunal there are all these matters that are out there that have been investigated and are before the tribunal and are sitting there—71 or 72 matters—and that builds the tension but is not helping to address it.

Mr McDONALD: I accept your answer in that regard, but I can tell you from many witnesses and advice to us that the fear of losing their position or being dismissed is real to those people facing even low-level misconduct matters. That is real. Do you accept that?

Ms Florian: Absolutely I accept it, because I see it too. I do not understand it and we try to do what we can to reduce it. I say it every time I get the opportunity, but I accept it.

Mr McDONALD: Training may be a big option.

CHAIR: Very much so. In the testimony from one of the Western Queensland mayors they said that once people find out it is misconduct they see it immediately as akin to corruption. This is what we are talking about here—that fear when that word ‘misconduct’ is mentioned.

Mr HART: I am sorry if you covered some of this when I was out of the room. Did you get a chance to watch any of our inquiries with the councillors?

Ms Florian: Yes.

Mr HART: We had councillors in tears as they were telling us about their experience. A lot of them were very concerned that they did not know they were under investigation until very late in the investigation. Would there be councillors who are under investigation now who would not even know about it?

Ms Florian: Yes, there would. Most councillors who are under investigation would know from the outset. There would be a small number of cases where a councillor does not know from the outset. That is because it may be necessary to speak to particular witnesses who are sensitive, for example, in the first instance before a councillor is made aware. In some instances, doing that allows us to deal with a matter and dismiss it quickly. There are a small number of matters where a councillor, for operational reasons, is not advised at the outset. Certainly they are advised if a matter gets to the point where a reasonable satisfaction arises.

Mr HART: In the process of investigating some of those types of cases, do you talk directly to council officers without the knowledge of their CEO? What happens when the CEO figures it out and talks to the councillor? I imagine you get a few inquiries from some councillors saying, ‘I’m being talked about in the back offices. What’s going on?’ Is that the case?

Ms Florian: Our approach is to always go to the CEO in the first instance. There are two occasions where we do not do that. The first occasion is where an allegation involves the CEO as somehow being a part of the conduct in question, so that clearly would be inappropriate. The second occasion is where it is a type of conduct which involves a witness who is a council employee where you have to get the direct evidence of that council employee. I will give you an example. A breach of the acceptable request guidelines will often be reported in circumstances where a council employee has received a communication from a councillor asking them to do something which is not in accordance with those guidelines. Those sorts of matters often turn on the words that were actually used. We will not speak to the CEO and say, ‘What were the words that were used to X?’ We will speak to X, the council employee, so we can then make an assessment based on their direct information. They are the two circumstances where we would go to a council employee.

Mr HART: How do you get on with talking to X if they do not know who they are talking to at the other end of the phone?

Ms Florian: We would explain where we came from. For a breach of the acceptable request guidelines, for example, it is part of the guidelines that if it is breach they must report it to the CEO and then the CEO sends it on. There is probably a reasonable expectation in those matters that they may end up having a call.

Mr HART: We had a few CEOs and mayors raise concerns with us that their staff had been talked to by somebody who identified themselves as coming from the Office of the Independent Assessor but they could not be 100 per cent sure that is who they were talking to. That must be a problem on some level. That is just a statement; there is no question there.

Ms Florian: Can I also make this point. In the regional hearings that you undertook you heard from representatives out of six of eight councils that account for 33 per cent of all of our complaints and 46 per cent of all matters that are referred to the CCT. Could I suggest that you have not had a representative view of how the councillor conduct complaint system is working. Our experience is that at any given time there will be a handful of councils where things are not working well, where relationships are quite dysfunctional—between either councillors or council officers or CEOs. In those circumstances, where there are certain indicators of dysfunctionality, we get a significantly increased number of complaints.

Public Briefing—Inquiry into the functions of the Independent Assessor and the performance of those functions

I have watched with great interest as you have gone through and spoken to various witnesses and I have noticed the point that you have picked up about municipal monitors. I think it is an excellent idea because we have done some research into how that operates in Victoria. When you consider that it is a small number of councils where we are getting a disproportionate amount of work, if you could have an effective intervention in there through someone like a municipal monitor, I recommend that.

Mr HART: That is good to hear. I think we noted the same thing on our tour. If you can give us a list of other councils you think we should talk to—

CHAIR: Can I just say that we are certainly well aware that if we have public inquiries asking for submissions—

Mr HART: We are going to get the troublesome ones.

CHAIR: We are going to attract the attention of those who are looking to ventilate their issues.

Mr HART: There is another subject that really raised some concern with me. We heard from CEOs and mayors that they feel obliged to make a complaint if they are in any doubt whatsoever. We heard from one particular mayor that he or she may have been told by your office that they had been too sensitive. The exact words were that 'their standards were too high'. Do you have any comments about that? If you see this is an issue, how does it get fixed?

Ms Florian: This is something that we have put a lot of thought into. There is mandatory reporting, as you are aware, and the threshold for that reporting is quite low. I will try to get the exact wording for you, but from memory it says that if you have a complaint or information that may indicate that a councillor conduct standard has been breached it has to be referred. The exact words are 'aware of information indicating a councillor may have engaged in conduct that would be inappropriate conduct or misconduct'. We have had one council that takes—and the member for Lockyer would like this—a more risk-averse approach to that.

Mr McDONALD: I appreciate that term.

Ms Florian: We have spoken to that council and talked about that standard and where we would see that standard applying, but ultimately if it is their view and their reporting obligation we cannot compel them to report or not report. We can just point out that. One option may be to insert a reasonable suspicion, but my concern about that is that there are not many councils where that is an issue. There are more councils where that is perhaps a problem. You get a whole lot of complaints about some councils, and with other councils it seems remarkable that you see very little at all. That could be a good thing but it may not be a good thing. I am just cautious about raising a standard for the benefit of one council or a small council where it may not be the appropriate thing for all.

Mr HART: From your comments it appears to me you have been paying close attention to what we have been talking about. Is there anything else? You mentioned municipal monitors. Is there anything else that has come up in our hearings that we have not asked you about that you would like to highlight to us?

Ms Florian: I am not sure whether this is of benefit, but I have been concerned about the suggestion that we would only refer serious misconduct to the tribunal because of this problem that it creates for us that nothing would happen for lower level misconduct. I think that is not a good outcome. That has been my main concern. From a public interest perspective, I have noticed the submissions suggest perhaps an ability to articulate the public interest in greater detail. I would like to reinforce again that only four per cent of our matters go to the tribunal; four per cent of the matters go as inappropriate conduct to councils. That is not high; it is a large number as a percentage of the large number of complaints that we get.

For misconduct matters we consider the public interest at two stages. The first stage is on assessment. For new and inexperienced councillors we have applied a three-month amnesty for low-level misconduct to allow time for learning and development. For systemic capacity issues involving all councillors in a local government we dismiss and send them to a training intervention. None of this is in the legislation. This is what we do from a public interest perspective. Where legislation has changed but the councillor has not had the opportunity to receive training, we dismiss as not in the public interest. Where a councillor has obtained legal advice before the conduct and followed that advice in good faith, even if we do not think that advice is right we dismiss, because clearly they have tried to do the right thing in good faith. Where the councillor has since retired and the conduct is low-level misconduct, we dismiss in the public interest. Where the councillor is facing more serious charges such as criminal charges, we dismiss. Where there are failures to update registers of interest where the period of time the register was inaccurate or the interest omitted was not significant and the councillor has since updated their register, we dismiss. Where a councillor

refers themselves for a relatively minor conduct and demonstrates insight and learning, particularly if the councillor is inexperienced, we dismiss. Where a councillor has demonstrated that they have followed in good faith guidance that the OIA previously provided, such as social media guidance or the conflict-of-interest guidance which allows them to print off a date and timestamp of when they have interrogated the conflict-of-interest app—so if they can show that the night before the council meeting they did it—we dismiss, because they have in good faith tried to comply with their obligations. Where, having regard to other particular circumstances of the matter, there is not a public interest, we dismiss.

When we get to the natural justice process we look at public interest again. The considerations that we look at at that point are in our policy, which is online, and they include: the seriousness of the alleged misconduct; any mitigating or aggravating circumstances; the experience of the councillor; the availability and effectiveness of alternatives to making application to the CCT; their disciplinary history; whether the alleged breach is continuing or a subsequent breach; how often misconduct of this kind occurs and if there is a need for general deterrence; the length of time since the alleged misconduct; the physical or mental health of the councillor; the length and expense of any misconduct hearing; if the alleged misconduct is sustained what are the possible sanctions; and the need to maintain public confidence in the councillor conduct framework.

We are considering public interest at two points. We are clearly dismissing a lot, because only four per cent is going to the tribunal or only four per cent is going back to local government. In my humble submission, dismissing more matters is not the answer. The answer is to either adequately resource or take a look at what is misconduct and what is the system and how it can be diverted and look at it from that perspective. I think one or the other has to come out of this so we have a change and we are not in this position moving forward.

Mr HART: I think we are considering that. In relation to the list you read out before on what you dismiss, what sort of proof would a councillor need to justify you dismissing a case, say in the case of seeking legal advice or stepping through the conflict of interest? Is a diary note enough? The second part of that question is: do councillors know that?

Ms Florian: Let's take some examples. If there is a conflict of interest and we receive a complaint, we tell the councillor of the complaint and we invite them to make a submission up-front. If there is information that we are not aware of—and we specifically say that in our letter—then if they advise they have taken legal advice we will ask for a copy of that legal advice, and once we see that we would dismiss the matter. We have dismissed matters on the basis of verbal advice if it is confirmed by the CEO. When we developed the conflict-of-interest app with the LGAQ, we built into that app the capability for them to print off, for their own benefit, a date- and time-stamped proof that they had been through that app and what they had put into the app and what they got out of it so they could produce that at the relevant time.

Mr HART: I did not get any of this feedback from the inquiries we have gone through. I do not remember anybody saying that.

CHAIR: This is one of the reasons we have the OIA in now, to get this information which we have not had before.

Mr HART: That is interesting.

Mr McDONALD: Ms Florian, is the list you read out first—the first opportunity for natural justice—available and promoted to councils on thresholds or standards?

Ms Florian: The second list is, because that is part of our policy for referral. For referral we are looking at two things: is there a reasonable satisfaction; and is it in the public interest to refer? We publish that list on our website, and lawyers in the past have certainly addressed that when they are making submissions. The first we do not publish—some we do. For the amnesty we went out with a media release saying that new councillors need time to get their feet under the table. We do not publish the list as a whole, no.

Mr McDONALD: I am thinking that may be a good opportunity to close the gap between your statement earlier about the intentions of lower level matters to be resolved and the fear that councillors truly feel for having an alleged misconduct.

Ms Florian: We can take that on board.

Mr MADDEN: This is really a follow-up question to previous questions where I asked you about matters that had been referred to the CCT that have not been heard. Would you know the number of matters you referred to the CCT where there has been an admission and you simply want the CCT to impose a penalty? Do you know that number?

Ms Florian: I do not, but we could find that out.

CHAIR: Take that on notice.

Mr MADDEN: My second question is: is there an ability in the CCT to expedite the hearing of those matters?

Ms Florian: That would be a matter for the president.

Mr MADDEN: If the president was agreeable, it could be expedited and you can make that request, I presume; is that right?

Ms Florian: I could.

Mr MADDEN: Are those matters reported as matters that are heard or reported? The CCT publishes its decisions. I presume they do report those matters, but could you just confirm that they report those matters?

Ms Florian: Yes, they do report those matters. They are required to report all matters under the act.

Mr MADDEN: I just wanted to confirm that. Those are my questions, Chair.

Mr KATTER: I am actually going back over old ground. The scope with which you receive complaints will focus on councillor misconduct. If, for instance, it was highly evident from that that there was something worth referring, say, from the CEO's conduct or anyone outside that involved the interaction of the council—you know the saying that if there's smoke, there's fire and you can see there is clearly a problem but it is not within your remit. I tried to ask this question before although perhaps not as accurately: what is your ability or appetite to have anything to do with that issue?

Ms Florian: I can see where you are coming from. If as part of a complaint we get about councillor conduct there is a concern raised about the conduct of the CEO and it raises a reasonable suspicion of corrupt conduct, we are required to report that to the CCC. We have done that in the past. If a complaint raises a question about the functionality of council and issues to that effect or whether there are issues where if you could get in there quickly and resolve them it may be of assistance, we write to the department and set out what we can about that information, based on what it is we can share, but we encourage them to go to the CEO. Sometimes the department is already aware there is an issue. I think that is potentially where that municipal monitor concept would come in, too.

CHAIR: We still have a few issues. I am going to extend the time by 15 minutes, if that is okay?

Ms Florian: Sure.

Mr SMITH: I suppose my next line of questioning goes to the implied right to freedom of political expression in the code of conduct. Are there any particular elements of the code of conduct that make your assessment in terms of interpreting the code of conduct difficult in terms of whether there has been inappropriate conduct or misconduct? Are there any particular elements of the code of conduct that are difficult for you to interpret?

Ms Florian: It is not just the code of conduct; it is also the responsibilities in section 12 of the Local Government Act and the local government principles in section 4. They are all expressed quite broadly. For misconduct, a breach of trust in a councillor is related to a breach of either one of those local government principles or responsibilities, so in that situation it can also pick that up as an issue.

Our recommendation has been to try to get ahead of this issue of the implied right to freedom of political expression. Our recommendation is to look at the code of conduct and potentially those other broad provisions to see what happens in other jurisdictions that have elected representatives. It seems to me there are two options. One is to structure provisions or codes of conduct that are more specific to the role of an elected representative. The second option is to keep it broad but to develop guidance that sits alongside it.

In our submission No. 3 we forwarded to the committee an example of what the Local Government Association in England does in that regard. Clearly they have had the same issues that we have, because if you read the paragraph that goes into that they talk about the need to make sure the code of conduct is understood consistently, is applied consistently and recognises the rights or the obligations of an elected representative.

I think those are the two options. If you look at the code of conduct at present, behavioural standards 1, 2 and 3 are very broad. The items that sit under that are examples that, at a minimum—do you have the code of conduct there?

Mr SMITH: Yes, I am looking at it now.

Public Briefing—Inquiry into the functions of the Independent Assessor and the performance of those functions

Ms Florian: If you look at the code of conduct, 1 states—

Carry out RESPONSIBILITIES conscientiously and in the best interests of the Council and the community

For example, Councillors will, at a minimum, have the following responsibilities:

Those are just minimum examples. It is very broad. We have taken a consistent approach to applying the code of conduct. Other people take a different view. I am sure the LGAQ would take a different view and others would take a different view. We have tried to take a consistent approach. The alternatives are: do something more specific or, I think, provide guidance to create that consistency that is accepted more broadly and has that buy-in.

Mr SMITH: It has definitely been something that has come out through councillors with the code of conduct. Under principles and values, point 3 states—

In representing and meaningfully engaging with the community, Councillors will:

and the third dot point is—

- accept and value differences of opinion.

I have put this question to councillors for whom it is very hard, because they might accept that someone has a difference of opinion but they do not value that. If they express that they do not value that opinion, does that make it difficult for you and your team in assessing whether or not they have breached the code of conduct?

Ms Florian: That is not something that we would go with at all. The approach is that, as elected representatives, they need to be having robust discussions and they are going to have significant differences of opinion. You would expect that there are robust discussions in the council chamber. It is if they become disrespectful that potentially it could be inappropriate conduct.

Mr SMITH: I am glad you say that, because there is very much a disconnect that seems to be happening with councillors who are telling us that they are fearful to engage or disagree with members of the public because of what is in the code of conduct so I appreciate that you have put that forward.

Ms Florian: We would absolutely support a councillor having robust discussions with the community and community representatives; just make sure they are respectful and there is no swearing or name calling.

CHAIR: I think we can all recognise that how you say things can become an issue of breaching the code, not what you are saying.

Ms Florian: Exactly.

Mr SMITH: If a review of the code of conduct was to occur by the department and the department were to draft, would the OIA appreciate seeing an early draft of the code of conduct and provide feedback as to the challenges and difficulties that may face the OIA into the future?

Ms Florian: Absolutely, yes.

CHAIR: Regarding expression and obviously the overlap with social media, I think it was Councillor Jared Cassidy who said that the OIA regard the social media accounts of councillors as official council channels. Is that correct or is there some clarity about the status of those pages? Does that need to be confirmed?

Ms Florian: If there is an official councillor page, we would regard that as the official page of the councillor if they are identified on their page as 'councillor from division 10' or whatever.

CHAIR: Certainly in the Brisbane City Council there is councillor and council, which can be a very different entity. That situation would not be replicated across Queensland. I think that is the point that was trying to be made—that the councillor's page is theirs but it would not be an official council channel because of the party differences within that council.

Ms Florian: I see. It is certainly the case with Brisbane City Council that there are some significant differences in their operation to other councils across Queensland around approving property developments, which does not occur in the Brisbane City Council. It is quite a different operational context—

CHAIR: This may be something that you want to confirm later, but to clarify: the official page of the councillor is the official page of the councillor and not one of the council itself?

Ms Florian: No, of the councillor. The OIA is a public entity within the meaning of section 9 of the Human Rights Act so we have to have regard to the rights of councillors and members of the public when we assess matters. That is why all our letters will say that that is one of the things we have had regard to. Behavioural standard 2 of the code of conduct says that it is inappropriate conduct

Public Briefing—Inquiry into the functions of the Independent Assessor and the performance of those functions

if a councillor does not respect the rights of others. That is how we have ended up in this space about moderation of councillor pages, because we received a number of complaints about councillors blocking members of the public from their official councillor page. That is why we proactively worked with the LGAQ to try to address that issue up-front. I fully appreciate they have walked well away from it now but at that time the LGAQ fully endorsed that. That was that, in short, we supported members of the public engaging on official councillor pages in ways that may be positive, neutral or negative—unless the councillors were being abused or trolled, in which case we fully support a councillor deleting and blocking that member of the public. At the time those media guidelines were released, in April 2019, the then minister said—

Social media is an important communication tool for councillors that allows people to participate in open and constructive conversation.

But it shouldn't be used by councillors to shut down debate or block users they consider a nuisance.

Councillors should never have to tolerate trolling or abuse, and by following these guidelines they can both protect themselves and minimise the risk of complaints.

That is the process that we have tried to put in place to address that. After we released that guidance, those social media complaints dropped off. They dropped off to such an extent that we no longer were tracking them as social media complaints within our system. It was only in the lead-up to this inquiry and the media reporting around this that it jumped again.

CHAIR: The direction on that has been established and that has worked.

Mr HART: It seems to me to be problematic where, on Facebook for instance, you have profiles. People may set up a profile on 'Councillor Michael Hart for Burleigh' but I may also have a profile page. I change my normal profile as I am now the councillor for Burleigh. How do you segregate those two things? I may have blocked 100 people last week and become a councillor this week.

Ms Florian: The right that we have to consider under the Human Rights Act is the right to participate in public discourse and freedom of speech. If you block someone from your private page, you are not impacting anyone's rights to participate in free speech or community conversations. We are not interested in anyone who you may be blocking or who a councillor may be blocking from their private page. It would only be their formal councillor page.

Mr HART: So the advice to councillors is probably, 'Don't have a councillor page. Have a private page.' You can work around these things. That is my point.

Ms Florian: It is a tricky area; it really is. I do not think we are the only ones who are experiencing issues.

Mr HART: No, but we do not have that problem as state members. That is what confuses me.

Mr McDONALD: It comes to the point of interpretation. A couple of times I have used the term 'point of truth'. What I am really looking at is the consistency of the interpretation of legislation. If the minister is charged with putting the legislation into the House and the department is charged with putting that legislation across the board then training should be consistent, as should the interpretation of that, both through yourself in the OIA and the CCT, albeit with different nuances. Have you given any consideration to how that consistency of interpretation can be assured going forward from this process?

Ms Florian: Philosophically, this has been one of the key issues that has underlined this inquiry. I think the difference between the government's intent or the policy intent or the legislative intent have been terms that have been used interchangeably when really they are not the same thing at all. The legislation is what we must follow. To the extent that the legislation is not clear then it is not for me to decide how it should apply. It is for the Councillor Conduct Tribunal to decide how that should apply if a matter raises a reasonable satisfaction of misconduct and it is referred to the Councillor Conduct Tribunal. That is the situation across the board with all agencies.

Let us take Justice and Attorney-General, for example. They have policy responsibilities for criminal justice matters. They develop all that legislation and they implement that legislation. However, the QPS does not go to Justice and Attorney-General asking, 'How should I enforce this legislation?' The courts do not go to Justice and Attorney-General and ask, 'How do I interpret this legislation now that it has been enacted?' The issue here is that we have not had those decisions in the background so we do not have the clarity that other jurisdictions automatically have. We have to get that increased level of clarity. It has to be consistent but, in my view, it has to come from decisions of the Councillor Conduct Tribunal or on appeal or review—whatever the case may be.

Mr HART: You are saying that the intent of the parliament when we write legislation is to be interpreted by somebody else?

Ms Florian: No. I think legislation is often very clear. To the extent that it is not clear then it is a question for the tribunal or the courts to interpret that.

Mr HART: Wouldn't it be a question of coming back to parliament to be rectified?

Ms Florian: Absolutely.

Mr McDONALD: As well.

Ms Florian: When you have uncertainty about something, you have two options: you amend the law or you get certainty through the process.

Mr HART: Is the problem here that the legislation was put in place and then the OIA was instigated and not the other way around?

Ms Florian: No, I do not think so. It happened at the same time.

Mr McDONALD: And then there was new legislation as well. In terms of that interpretation, I understand your point about referring things to the CCT. Throughout this I have a sense, from the responses from the department and responses even just now from yourself, that there is not actually a meeting of minds on that interpretation. That is a concern in terms of legislative interpretation, training and then interpretation at the next level. Is there any opportunity for you to go back to the department or seek clarity from the department around interpretation before referring to the CCT, remembering that a councillor, mayor or somebody else is having their life impacted by the complaint?

CHAIR: That is a tricky one, invoking the separation of powers as well. It is a legitimate question and I am sorry to interrupt. Ms Florian, continue.

Ms Florian: I think there is potential for some greater clarity in this area as well. I have looked for any document that has been produced by the public service commission or that sets out the roles and responsibilities of policy agencies versus regulatory agencies versus tribunals and courts. I could not find any such document in Queensland. I have made a submission to the Coaldrake inquiry that I think it would be useful to have that sort of guidance so that whichever way it falls we all understand.

Mr HART: On that subject, the Coaldrake review says that they have not talked to you yet. The interim report says they have not dealt with the OIA yet.

CHAIR: I think Ms Florian said that they have made a submission. Obviously it is up to them where they are in that process.

Mr HART: How long ago did you make that submission?

Mr SMITH: Point of order, Chair. Are we not straying into another area?

Mr HART: No, I am sorry: the OIA raised that. How long ago did you make that submission?

CHAIR: Wait. Member for Burleigh, I am uncomfortable with straying into an area that is certainly not what we are dealing with.

Mr HART: I will not ask any further questions. I just want to know when—

CHAIR: I understand. It may be that Ms Florian can give us more on that. I certainly do not want to overlap on what the Coaldrake inquiry is doing.

Mr SMITH: On that point of order, I ask you to rule on the relevance of that question to this particular inquiry.

Mr HART: It was raised by the OIA, Chair.

CHAIR: The point of order is right insofar as it is not relevant to our terms of inquiry, but we can ask the Independent Assessor to give some more clarity. The Independent Assessor can give some clarity in any degree that she feels appropriate.

Mr SMITH: It is out of order.

CHAIR: It is out of order, but I am giving some guidance.

Mr HART: It was a week ago, so it would not be in the interim report. I am happy.

CHAIR: Thank you.

Mr McDONALD: You might like to take this on notice, Ms Florian. In terms of additional resources that were announced by the Deputy Premier last year, can you update the committee regarding the performance criteria of the Office of Independent Assessor concerning the percentages of matters dealt with? I just remember the report you gave us early in the year or late last year. Can you update that report for us?

Ms Florian: I am prepared to give you an update on all of that as at 26 April. Ninety per cent of complaints have been assessed within 21 working days so far this financial year. Sixty-five per cent of complaints have been dismissed or been subject to no further action on assessment. One hundred and twenty-six new misconduct investigations have been commenced, which equates to 18 per cent of complaints received. Two hundred and sixty-two investigations have been finalised, including investigations commenced in the previous financial year. The OIA currently has no investigations that are currently on hold. This time last year we had 89 investigations which were on hold. This gives us the opportunity now to start pulling in those time frames.

As of 26 April, Legal were undertaking a natural justice process on 32 matters involving 19 councillors and 27 allegations. That roughly equates to six per cent of all complaints going to that stage. Currently there are 72 matters involving 33 councillors and 128 allegations before the Councillor Conduct Tribunal. Approximately four per cent of matters go to that stage. There are currently 16 matters that are the subject of a full merits review before QCAT. No hearing has been held on any of those matters yet. The oldest of those matters is more than two years old.

CHAIR: I will put this question on notice. In relation to your recommendations about redirecting some misconduct matters to inappropriate conduct and wanting the statutory discretion to do so, you made a recommendation about 'acceptable requests'. Can you be more specific about what kinds of misconduct cases you think would come under that discretion and what kind of discretion? I am looking for more detail on that particular recommendation—as fulsome as possible so we can deal with that as well.

Ms Florian: Maybe some examples of matters that we could deal with that way?

CHAIR: Yes. Indeed. That would be great.

Ms Florian: Sure. I can answer the question about the anonymous complaints referred to the CCT. There were four councillors with nine matters referred. One of those matters has been decided and three are before the CCT at the moment. That is the status of the anonymous complaints before the CCT.

Mr SMITH: My question relates to anonymous complaints as well. Beyond the answer of 'because there may have been a wrongdoing done by a councillor', why is it important for the OIA to accept anonymous complaints?

Ms Florian: There will be a small percentage of anonymous complaints made by people, particularly council employees or other councillors, who are rightfully concerned about reprisal. It is appropriate in any complaints system that you create pathways for people who have legitimate complaints to be able to make those in a way that allows investigations to occur—and potentially outcomes to occur—whilst preserving the anonymity of vulnerable persons in that process.

CHAIR: We will go to questions on notice in a moment. Do we have any final questions?

Mr McDONALD: Given that Ms Florian raised the issue of the submission to the Coaldrake review, I wonder if it would be appropriate for us to receive a copy of that. It is not confidential, is it?

CHAIR: I would get a copy of that after they have dealt with it. If we get it before they are dealing with it, we are pre-empting some of the work of the Coaldrake one. Certainly after they have dealt with it it would be an interesting one, but I do not want to, as I said, get something—

Mr HART: How do we go through that process?

CHAIR: We will write a letter to the Independent Assessor asking, at an appropriate time, to get a copy of that—after the Coaldrake inquiry has finished with it.

Mr McDONALD: Should we write to Coaldrake and ask if there is anything from the submission that could be used in this process?

CHAIR: We will have to chat about this in private. I know where you are going with this one.

Mr SMITH: We have had ample opportunities to ask as many questions as we like of the OIA. Maybe we can leave our questions for the OIA in the OIA.

Mr McDONALD: Perhaps this would be a matter for the OIA. If there are any other matters we have not received that you feel you should advise the committee of, we would be happy to hear about it in a letter.

CHAIR: If it is something for the Coaldrake inquiry, let them do their work first. Let's not jump the gun on what they have to do. We will in due course, at an appropriate time, write to you. That may well be something that is published by the Coaldrake commission. Who knows?

Public Briefing—Inquiry into the functions of the Independent Assessor and the performance of those functions

In terms of the questions on notice, the member for Ipswich West asked about the number of instances where there has been an admission of wrongdoing that has gone to CCT for penalty. I asked for more details—examples et cetera—about exercise of statutory discretion to refer some low-level conduct cases back to councils as inappropriate behaviour. Is there anything else on notice?

Mr HART: In terms of the last letter the Independent Assessor sent us, I would not mind asking some questions about that at some stage in the future.

CHAIR: Certainly. All of us need to fully go through that. If we have some questions, I think a letter asking for some clarification would be the best. I would not want to have you here for another hour and a half anyway. We appreciate your time.

Ms Florian: We thank the committee for your commitment in going through all of the issues that have been raised in this inquiry in such detail, for providing a listening board to people who have legitimate inputs across Queensland and for listening and hearing about our experience of the councillor complaints process.

CHAIR: Thank you for that.

Mr HART: Well done.

CHAIR: The committee would appreciate answers to the questions on notice be provided by Wednesday, 11 May 2022. We will be in contact with you to clarify those. That concludes this public briefing. Thank you to everyone who has participated today. Thank you to Hansard and thank you to our secretariat. A transcript of these proceedings will be available on the committee's webpage in due course. I declare this briefing closed.

The committee adjourned at 3.24 pm.