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Committee Secretary  
State Development and Regional Industries Committee  
Parliament House  
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BRISBANE QLD 4000

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**RE: SUBMISSION – Inquiry into the functions of the Independent Assessor and the Performance of those Functions.**

The Balonne Shire Council welcomes the review of the Office of the Independent Assessor (OIA) currently before the State Development and Regional Industries Committee (the Committee). Council resolved to submit a submission at its ordinary meeting on 18 November 2021. The submission is based on the committee's terms of reference, as follows:

- **whether the performance by the Independent Assessor of the Independent Assessor's functions is consistent with the intent of the local government complaints system**

Council submits that the performance of the OIA's functions should be consistent with the intent of the local government complaints system and the relevant local government principles of the *Local Government Act 2009* (LG Act)—

- (a) transparent and effective processes, and decision-making in the public interest; and
- (d) good governance of, and by, local government; and
- (e) ethical and legal behaviour of councillors, local government employees and councillor advisors.

The complaints process however, lacks timeliness, and is not well defined in the LG Act or *Local Government Regulations 2012* (LG Regs). The OIA may also initiate its own investigations if it has reason to suspect misconduct or inappropriate conduct. In either case reasonable timeframes should be a legislative amendment to the LG Act to finalise an investigation and maintain communication with the complainant, subject councillor and relevant Council.

For example, the OIA provide their complaints process on their website <https://www.oia.qld.gov.au/complaints-process> noting that during an investigation *the complainant* will receive an update every three months on the progress, unless the investigation is finalised earlier. The OIA acknowledge that it is difficult to predict how long it will take to deal with a complaint, however this should not stop regular communication on the status of a matter to all relevant parties. In Balonne Shire's experience there was no feedback or action until the subject Councillor raised concerns with the OIA direct. The impact of the significant delays and lack of communication are substantial for the subject councillor – professionally, personally and financially.

The complaints process should take into consideration the likely increase in complaints in the lead up to a

local government election. Delays could impact/influence the result of a local government election where outstanding matters are unknown during an election period. For Balonne Shire the complaint of February 2019 was dismissed. The own motion investigation commenced in April 2019, the referral to the Councillor Conduct Tribunal (CCT) was not until 9 March 2020 with the election held on 28 March 2020. The final outcome of the CCT was not known until 9 September 2021 despite being handed down on 30 June 2021. These timeframes do not appear to be consistent with a reasonable complaints management process.

- **whether the powers and resources of the Independent Assessor are being applied in accordance with the public interest**

The OIA include an assessment workflow and guidelines for referral of matters to the CCT on their website. Within the OIA guidelines for referral of matters to the CCT it states:

*Any decision by the IA to make an application to the CCT should be made with the following two concepts in mind:*

- *Given the evidence available, are there reasonable prospects of the application being sustained?*
- *Is it in the public interest to make the application?*

The powers and resources of the OIA should be applied in accordance with the public interest as stated within the OIA guidelines and summarised on their own website as shown below:

### *3.2. Public interest considerations*

*The exercise of a disciplinary function by the IA will be guided by whether the exercise of that function will be in the public interest. The IA (or delegate) may consider the following public interest considerations (this is a non-exhaustive list):*

- *the seriousness of the alleged misconduct.*
- *are there any mitigating or aggravating circumstances?*
- *the availability and effectiveness of any alternatives to making an application to the CCT.*
- *the subject councillor's history of compliance with their obligations under the Act, particularly the local government principles in section 4 of the Act.*
- *is the alleged breach a continuing or subsequent offence?*
- *how often, misconduct of this kind occurs and whether there is a need for deterrence.*
- *the length of time since the alleged misconduct occurred.*
- *the age and physical or mental health of the subject councillor.*
- *the length and expense of any misconduct hearing.*
- *if the alleged misconduct is sustained, what are the possible sanctions available.*
- *the need to maintain public confidence in the administration of justice by the OIA.*
- *can further proceedings be commenced against other persons as a result of the same incident.*

Council submits that the OIA referral to the CCT, is not always consistent with the public interest factors and suggests the following factors have not been considered or taken into account by the OIA in some instances:

- *the seriousness of the alleged misconduct; the availability and effectiveness of any alternatives to making an application to the CCT; the subject councillor's history of compliance....; is the alleged breach a continuing or subsequent offence; if the alleged misconduct is sustained, what are the possible sanctions available*

Where matters of a minor or procedural or technical nature result in penalties such as an apology or training, the cost and time taken to investigate far outweighs the public interest to proceed. The onus of proof is on

the assessor to prove that the councillor has engaged in misconduct, based on the balance of probabilities. When an allegation is sustained as misconduct there can be disparity between the definition of misconduct as an offence and the sanctions applied. For example, in criminal proceedings you can have a finding of guilt with no conviction recorded. For an allegation sustained as misconduct in the CCT with a sanction of training or other minor penalty it is suggested could include some leniency (as in criminal matters), where appropriate or increase powers of the OIA to order the minor sanctions.

The overall impact of a finding of misconduct even with a minor penalty of training equates to front page headlines and damage to reputation. The IA could take into account the financial and resource implications on councils and subject councillors where misconduct could be dealt with more effectively and efficiently by way of a recommended course of action, such as training without the expense of a lengthy and delayed investigation process and tribunal hearing.

- *the length of time since the alleged misconduct occurred; • the length and expense of any misconduct hearing.*

In many cases the length of time since the alleged misconduct occurred and the final decision has been 2 ½ years. There is substantial cost to Council and individual councillors, despite professional indemnity insurance that covers all senior executive and elected members. In addition, the OIA and CCT can seek reimbursement of costs to conduct the tribunal hearing. Council has legal costs for its own advice, for any employee witnesses and/or in defence of subject councillors (with the presumption of innocence). The resource implications include provision of information and responding to requests for information, preparing affidavits and supporting documentation.

- *are there any mitigating or aggravating circumstances? • the subject councillor's history of compliance with their obligations under the Act, particularly the local government principles in section 4 of the Act. • is the alleged breach a continuing or subsequent offence?*

There have been significant changes to the LG Act and LG Regs with rolling reforms over the past three years. The Local Government Electoral (Implementing Stage 1 of Belcarra) and other Legislation Amendment Act 2018; the Local Government Electoral (Implementing Stage 2 of Belcarra) and other Legislation Amendment Act 2019; and a range of different interpretations and terminology relating to conflicts of interests, material personal interests, prescribed conflicts of interest and declarable conflicts of interest - along with how to declare/disclose and deal with them.

Training was provided as changes were introduced however created more confusion and uncertainty and questions left unresolved. This has led to a recent proposal to change or clarify conflict of interest legislation with the Department of State Development, Infrastructure Local Government & Planning (DSDILGP) suggesting this will be considered in 2022 by Parliament. These rolling changes and confusion should have been considered as a mitigating or aggravating circumstance when OIA consider referral to the CCT and/or when considering a complaint. In the Balonne Shire matter there was no history of breaches, complaints or offences.

- **any amendments to the Local Government Act 2009 or changes to the functions, structures or procedures of the Independent Assessor that the committee considers desirable for the more effective operation of the Independent Assessor and/or the local government complaints system.**

Council submits that the Committee consider amendments to the LG Act and changes to the functions, structures or procedures of the OIA for the more effective operation of the OIA and/or the local government complaints system as follows:



- a) Reasonable timeframes be added to the OIA as a legislative amendment to the Local Government Act 2009 to finalise an investigation and maintain communication with the complainant, subject councillor and relevant Council.
- b) the OIA should be appropriately resourced to avoid these lengthy delays;
- c) legislative changes to the structure of the penalties for minor or procedural matters and options for a more effective operation of the OIA to order an apology and/or training for misconduct without the need for a lengthy tribunal proceeding and cost;
- d) regulations and clarification of an ordinary business matter is currently being revised by the DSDILGP to remove ambiguity and is welcomed by Balonne Shire;
- e) the ability to seek advice from the Integrity Commissioner or similar service would be a welcomed return to provide elected members with an opportunity for independent and sound advice on integrity matters.

Council suggests an amendment to the LG Act S150AR that where the CCT may decide a sanction consistent with 150AR (1)(b)(i) to (iii) that consideration be given to leniency in sustaining an allegation OR that the OIA may make such a finding an initiate disciplinary action against a Councillor for a misconduct offence.

#### 150AR - Disciplinary action against councillor

(1) For section 150AQ(1)(b), the conduct tribunal may decide—

(a) that no action be taken against the councillor; or

(b) to make 1 or more of the following orders or recommendations—

(i) an order that the councillor make a public admission that the councillor has engaged in misconduct or inappropriate conduct (or both);

(ii) an order reprimanding the councillor for the conduct;

(iii) an order that the councillor attend training or counselling to address the councillor's conduct, including at the expense of the councillor;

Council notes that all or part of its submission may be published and publicly available. If the Committee requires any additional information please contact Mrs Michelle Clarke, Director Finance & Corporate Services at [REDACTED] or phone [REDACTED]

Yours sincerely,



Matthew Magin

CHIEF EXECUTIVE OFFICER