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

By email: sdric@parliament.qld.gov.au

Dear Secretary

SUBMISSION: INQUIRY INTO THE FUNCTIONS OF THE OFFICE OF THE INDEPENDENT ASSESSOR AND THE PERFORMANCE OF THOSE FUNCTIONS

The Explanatory Notes that accompanied the *Local Government (Councillor Complaints) Other Legislation Amendment Bill 2018* (the Bill) set out the policy objectives on the Bill. These included:

- A fair, effective and efficient framework; and
- A simpler, more streamlined, system

for making, investigating and determining complaints about councillor conduct in Queensland.

As I will demonstrate through this submission, the reality of the system that has been implemented by the Office of the Independent Assessor (OIA), and the unsatisfactory legislation that binds it, is the antithesis of the policy objectives of the Government. This is causing significant financial and reputational damage to the system of local government that has now flowed on to the State Government requiring urgent intervention.

I am not opposed to an independent complaints process for local government Councillors and I support a system that removes the onus for investigations and decision making from local government CEOs who are placed in an invidious and arguably conflicted position. It is essential, however, that the system be implemented judiciously and relatively economically in the interests of the ratepayers and taxpayers of Queensland and in the interests of fairness for Councillors across Queensland, the vast majority of whom are committed to advancing their communities.

I will break my submission into two distinct sections to demonstrate as follows:

Part 1: the failings of the current system through the experiences of the Council of City of Gold Coast (City) – Queensland and Australia's second largest local government – since this legislation took effect on 3 December 2018; and

Part 2: the changes the Government should consider to fix the current system.

PART 1: CITY OF GOLD COAST COMPLAINTS EXPERIENCE SINCE 3 DECEMBER 2018

The following table, extracted from the City's Annual Reports, provides a summary of Councillor conduct complaints, decisions, orders or recommendations in the years immediately prior to the legislation change on 3 December 2018:

Year	Decision, Orders or Recommendations	Total Complaints Made
2015-16	0 findings of inappropriate conduct or misconduct	1
2016-17	0 findings of inappropriate conduct or misconduct	10
2017-18	1 allegation of inappropriate conduct sustained	2
2018-19*	1 allegation of misconduct sustained	1

* to 2 December 2018 under the previous complaints legislation

The table indicates that in the 3.5 years before the legislation change, a total of 14 complaints were made with two of those complaints against Councillors being sustained.

By contrast, the table below, extracted from the City's Councillor Conduct Register for the period of 3 December 2018 to the current date, shows an explosion in complaints:

Year	Decision, Orders or Recommendations	Total Complaints Made
2018-19*	0 findings of inappropriate conduct or misconduct	82
2019-20	3 allegations of misconduct sustained	46
2020-21	1 allegation of misconduct sustained	28
2021-22**	0 findings of inappropriate conduct or misconduct	11

* from 3 December 2018 when new legislation came into force
** from 1 July 2021 up to the date of this submission

What the tables indicate is that total complaints have increased approximately twelve-fold, from 14 to 167, for two additional findings of guilt when comparing, approximately, the three years before and after the current system was introduced. By any measure, this is a very poor return on the significant resources deployed by the OIA in investigating complaints, by the Councillor Conduct Tribunal (CCT) in determining misconduct complaints and by the City in both defending and deciding complaints.

Personally, as Mayor of the City, I have been the subject of 60 individual finalised complaints, not including being joined with other Councillors in group complaints, in just over three years. I still have several other complaints ongoing, some of which were raised approximately two years ago. Despite this huge volume of complaints, there have been zero findings of guilt against me.

These complaints come at great expense to the taxpayers of Queensland through OIA investigations and CCT hearings and at great expense to the ratepayers of the Gold Coast in the costs of legal advice and the significant processing and review time required by City staff. Of course, the complaints take a personal toll on Councillors and whilst some are more resilient than others, I have serious concerns that we will see fewer and fewer people putting their hand up to serve. This is demonstrated through the recent resignation of the highly respected Mayor of Rockhampton who advised that her departure was over OIA processes and decisions.

Under the current legislation, nine of the 167 complaints against Gold Coast Councillors since 3 December 2018 have made their way back to Council for a final decision on inappropriate conduct. These complaints have come at an estimated cost of $200,000 to the OIA and the City. Some of the costs internal to Council are captured in the nine reports that have been presented at Council and are on the public record.

Ultimately none of the complaints were upheld and when you look at the nature of the complaints you can only conclude that they have been an appalling waste of time and money given that the complaints were about, inter alia:

- A Councillor using the word "*frivolous*" in the incorrect context during a media conference;
- Facebook blocking;
- Incorrect moderation of a Councillor's Facebook page; and
- The Mayor saying "*I don't know what they're smoking*" in relation to a cohort of complainants during a media conference (i.e. the comment was not directed at any individual).

These are relatively minor matters that could have been resolved far more expeditiously at virtually no cost to ratepayers and taxpayers and the $200,000 spent investigating and determining the complaints have provided absolutely no return for the Gold Coast or Queensland. I look at this as approximately ten extra shade sails that I could have installed in parks across the City to protect and enhance the amenity of Gold Coast families and in that context, I resent the waste of money.

The detail of these nine matters can be reviewed in full in the published Council minutes on the City's website, but I wish to highlight just one of the matters (refer Council minutes of 13 June 2019) to provide context for the Committee. In this case, a resident complained that I had insulted them during a media conference when I used the phrase, "I don't know what they're smoking" in relation to a large cohort of complainants regarding a Council decision on a local property matter.

The resident suggested that he had been insulted by my suggestion that he was taking drugs even though I was clearly just using the common Australian vernacular to describe the complaints of dozens of people after Council had received advice that the position those people had taken in the matter was factually incorrect.

The OIA chose to entertain this complaint, including investigation and correspondence back and forth with my office which resulted in a formal decision that I had a case to answer for inappropriate conduct which caused me to seek legal advice in advance of the matter being the subject of a detailed report to Council for final determination. The matter dragged on for some months at significant cost before Council dismissed the complaint.

Whilst the "value" of that whole investigation is probably self-evident already, I take this opportunity to make a comparison to similar comments made by the Premier which <u>did not</u> lead to a lengthy and costly investigation wasting the time of the Premier.

On 19 October 2021, it was widely reported in media, including by the ABC as per the link below,

https://www.abc.net.au/news/2021-10-19/gold-coast-mayor-and-businesses-blast-palaszczuk-border-comments/100550794

that the Premier of Queensland said "*I don't know what planet Tom Tate is living on*" in relation to comments I had made about border reopening. Clearly the Premier thought I was out of touch in relation to this particular matter but my point is that this sort of use of the vernacular is part of robust political debate which should not be stifled by narrow laws that would only serve to stop elected people like Premiers and Mayors from ever giving non-robotic answers to the media.

Whilst I would never lodge a complaint about the Premier's comments in this matter, she is fortunate that she does not have to spend her time, and Queensland taxpayers' money, responding to such matters. As it stands under the current legislation and the OIA's interpretation of it, local government officials do have to put up with it.

It is also the case that these complaints are regularly made by people with clear political agendas, thereby weaponising the system for base political or personal motives to burden and distract Mayors and Councillors. Many people who have lodged OIA complaints against me have made vile, unfounded accusations and comments against my family and I in various social media.

My general response is to ignore that rubbish for what it is, but on occasions where these people go to my Facebook page and make personal comments off the topic of the thread, I may block those people from posting. Of course, this just leads such people to make further OIA complaints that they were unfairly blocked which the OIA regularly investigate and refer to Council. On one occasion, a complainant made the following Facebook post (which I have retained a screen shot of):

> *ATTENTION EVERYONE!*
> *I have an active complaint lodged with the OIA they have asked me to provide:*
>
> *"Any details you have of the other people who are allegedly blocked from the Mayor's Facebook page."*
>
> *The want to know who has been blocked and if possible the reason. They would like this by COB on Monday 24th.*
>
> *Please add to the comments section or if you want it kept private PM me.*

This is a classic example of an individual opposed to me personally, and/or to my policies, using the system to encourage complaints for base political purposes. I fail to see where this sort of activity furthers the goals and aspirations of the wonderful State of Queensland or its residents.

PART 2: PROPOSED LEGISLATIVE CHANGES AND CHANGES IN INTERPRETATIONS OF THE OIA

The following changes would, in my view, go a long way to fixing the current system:

1. **Amend Section 150K of the *Local Government Act 2009* (the Act) as follows:**

(1) The conduct of a councillor is inappropriate conduct if the conduct implicitly contravenes-
  (a) A behavioural standard; or
  (b) A policy, procedure or resolution of the local government.

This change would give the OIA the flexibility to ensure that only meaningful ("implicit") contraventions are investigated. The Code of Conduct for Councillors in Queensland sets out the behavioural standards which, as they stand, are quite broad and open to interpretation making decisions more difficult for the OIA. Policies and procedures can also be broad and might at times be inadvertently contravened in insignificant ways.
The addition of the word "implicitly" to Section 150K(1) of the Act would provide more capacity for the OIA to ensure that only meaningful breaches are investigated. If this proposal is not adopted, I suggest that the Government reviews the Code of Conduct for Councillors in Queensland to make the responsibilities and definitions clearer and more concise.

Consideration under Section 150K could also be given to provide a "three strikes" mechanism as exists in Section 150K(2)(b) and 150L(2)(a) for relatively minor alleged contraventions. For example, the OIA could take the approach of not investigating minor complaints (e.g. Facebook blocking) until three such complaints are made in one year.

In this case the OIA could write to the Councillor concerned advising that a complaint had been received about a particular matter but that it won't be investigated unless two further, or one further for an alleged second offence, complaint/s are received. This would allow the Councillor to consider their actions and an appropriate outcome could be reached for little or no cost.

2. **Make more judicious use of Section 150Y of the Act as follows:**

This proposal would be assisted by the implementation of proposal 1 above.

The OIA needs to make more judicious use of Section 150Y(a)(iii) of the Act to ensure the system is not bogged down with investigations of relatively minor matters. Where on initial assessment, the OIA determines that there may have been a minor or inadvertent breach of a behavioural standard or of a policy, procedure or resolution of the local government, but a full investigation consuming OIA and local government resources would not be in the overall public interest, the matter should end there.

In such cases a simple letter could be sent to the Councillor advising that the OIA has received a complaint but will not expend resources on the matter because the initial assessment is that it is minor in nature. A letter could be sent to the complainant advising that the matter will not be investigated but has been brought to the Councillors attention.

This would probably remove over 50% of current complaints from the system, whilst still providing relevant information to the Councillor to assist in the future. It would also save significant resources.

It is my view that the current legislation provides this facility for the OIA but they have chosen not to use it as often as they should.

3. **Make more judicious use of Section 150Z(3)(d) and extend the provisions further**

In my view, as outlined, there are many people lodging complaints for base political purposes. Whilst all citizens should have the right to complain, the people jamming the system with politically motivated and trivial complaints should be held to account for the unreasonable pressure and costs they are placing upon the system.

I therefore propose that Section 150Z(3)(d) be amended as follows:

(d) for a complaint dismissed because it is frivolous—advise the person who made the complaint that, if the person makes the same or substantially the same complaint to the assessor again at any time, or makes any other frivolous complaint within the next 12 months from the date of the notice, the person commits an offence punishable by a fine of up to 85 penalty units.

This amendment would remove many frivolous complaints from the system saving substantial public monies and dissuading politically motivated complainants from making other frivolous complaints.

It appears that the current system is unreasonably skewed in favour of complainants and making sure that they receive a "fair go". In my view, whilst people's right to complain should of course be protected, there should be more onus on complainants to be accountable for making only substantive complaints and there should be more onus on the OIA to enforce that standard. I note that Section 150AU provides protections for complainants where they have a reasonable excuse and this protection should be enough to safeguard genuine complainants.

4. **Amend Section 150AU of the Act in relation to the amendment proposed to Section 150Z(3)(d)**

The following changes are proposed in support of the change proposed to Section 150Z(3)(d):

(1) This section applies to a person who has been given a notice under section 150Z that advises the person that if the person makes the same or substantially the same complaint at any time, or makes any other frivolous complaint to the assessor again within the next twelve months from the date of the notice the person commits an offence.

(2) The person must not make the same or substantially the same complaint to the assessor again, or any other frivolous complaint within the next twelve months from the date of the notice unless the person has a reasonable excuse.

5. **Amend Part 5, Division 1, Subdivision 2 Office of the Independent Assessor**

It seems clear that there is a dearth of any real understanding of the day to day functions of local government, and the way local governments operate, within the OIA.

It is noted that Section 150CW of the Act allows a person to be appointed to the OIA if they have knowledge and experience in the areas of local government, investigations, law, public administration, or public sector ethics.

Whilst the primacy of legal qualifications is probably necessary for the Independent Assessor, I believe it is essential that this person is supported by people with genuine local government experience. Knowledge and experience in local government should be embedded within the OIA. This could be provided by people who have previously acted as Councillors or by people who have held senior appointments within a local government.

This requirement should be explicitly embedded within Part 5, Division 1, Subdivision 2 of the Act.

6. **Amend Section 150EB of the *Local Government Act 2009* (the Act) as follows:**

I also propose that the OIA be required to publicly report on the total number of complaints in each of the following categories at least once per year:

- frivolous or vexatious complaints
- complaints made other than in good faith
- complaints lacking substance or credibility.

This change would support the changes I have proposed in Sections 150Z(3)(d) and 150AU by adding the following clause to Section 150ES(2)(a):

viii. the number of notices issued about frivolous complaints
ix. the number of complaints assessed as being vexatious or made other than in good faith
x. the number of complaints assessed as lacking credibility or substance

This will provide some accountability for the OIA to ensure they are managing the system of local government complaints in a balanced way that seeks to minimise the number of complaints in the above categories.

SUMMARY OF PROPOSED CHANGES

Whilst I have endeavoured to identify precise changes to improve the legislation, and the way it is implemented by the OIA, I acknowledge that I am a "bush lawyer" and that others in Government will have more capacity to draft precise legislative changes. In summary though, I believe changes that would support the following outcomes are essential:

1. Remove relatively minor or technical alleged inappropriate conduct investigations from the system to save substantial time and public resources investigating insignificant complaints, many of which are ultimately dismissed anyway.

2. Make efforts to remove politically motivated complaints from the system by increasing the focus on frivolous and vexatious complaints, complaints made other than in good faith etc.

3. Ensure that the Independent Assessor is supported by persons within his / her office with significant local government Councillor or administration experience.

CONCLUSION

Whilst the Government's efforts to establish an independent body for Councillor complaints is understood and supported, the implementation of the new system has in fact achieved a system that is less efficient, simple and streamlined than the previous system. This directly contradicts the Government's stated objectives when the *Local Government (Councillor Complaints) and Other Legislation Amendment Bill 2018* was brought to Parliament.

The system can be significantly enhanced by removing minor, trivial inappropriate conduct complaints from the system via the measures I have proposed in this submission. This in turn will lead to millions of dollars in savings for the State and for local governments across Queensland.

Even more importantly, it will ensure that Queenslanders are not deterred from putting their hand up to represent the communities they love by seeking to become Mayors or Councillors. We already have evidence that this is occurring and if the complaints system is not fixed communities across Queensland will be the losers.

Yours sincerely

TOM TATE
MAYOR

City of Gold Coast