



Office of the Mayor
PO Box 3130 Bundaberg QLD 4670
mayor@bundaberg.qld.gov.au
1300 883 699
bundaberg.qld.gov.au

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

Email: sdric@parliament.qld.gov.au

Inquiry into the functions of the Independent Assessor and the performance of those functions

Thank you for the opportunity to make a submission to this Inquiry.

I support the intent of reforms introduced over the past four years to improve integrity and accountability in local government. However, I believe this should not be the sole responsibility of the OIA but should also be core business for the Department of Local Government and Councils themselves.

Accountability and checks and balances are very important to build trust in the community and devolution across local councils is needed to change the culture, as well as a contemporary understanding of community expectations.

The Office of the Independent Assessor (OIA) has for the most part improved the overall system of receiving and reviewing complaints. I hope through this inquiry that further enhancements will be made to clarify the operations of the OIA and their expectations flowing from the poorly drafted legislation the OIA currently operates under. This has resulted in too many broad interpretations, which I believe was not the intent of why the OIA was established and what the initial legislation sought to address.

This submission outlines my personal experiences with the OIA, based on which my recommendations are:

1. Set a time limit of 30 days for matters to be assessed as potential misconduct.
2. Cases identified as inappropriate conduct should be removed from the jurisdiction of the OIA.
3. Remove "breach of trust" as grounds for potential misconduct or provide clear definitions, e.g. "deliberately misleading".
4. Remove the requirement for details of dismissed complaints to be published.
5. Disallow anonymous complaints unless they involve corruption and refer these to the CCC.
6. Require confidentiality by all parties until a matter is determined.
7. Define examples of vexatious complaints (e.g. repetitive complaints and those of a political, personal or trivial nature), allow for one warning only and penalise infringements with fines.
8. There should be an oversight mechanism.



My primary concerns with the current legislation and how the OIA functions are:

- The complaints process is open to abuse.
- The OIA is slow to reach a decision in many cases.
- Responding to complaints is stressful, time consuming, distracting and unproductive.
- Natural justice is compromised when complainants publicly disclose their allegations.
- The OIA intrudes into areas outside its jurisdiction, and which Parliament never intended (e.g. social media management and freedom of speech).
- The OIA is sometimes inconsistent and unpredictable.
- There is a lack of focus on funding for research and education to improve culture.
- Vexatious complaints are not always dealt with appropriately.
- The publication of dismissed complaints is problematic.

I've had 30 complaints made against me since 2019 and many of these involve multiple allegations. Two matters are still pending a decision and the others have all been dismissed.

It's stressful, time consuming, unproductive and distracting me from the core business of local government, and my duties as Mayor, to deal with these complaints.

I have no issue with the OIA staff and how they conduct themselves. I'm concerned however the OIA lacks understanding of the political environment and how local government operates in a practical sense. In some cases, such as dealing with social media, the OIA has enforced rules which don't apply to state and federal elected members or in the broader community.

RECOMMENDATIONS

1) Set a time limit of 30 days for matters to be assessed as potential misconduct:

The OIA should make a speedy determination of potential misconduct or dismissal. If more than 30 days are needed, the OIA should outline the reasons and be required to make a final determination no later than 60 days or the matter lapses.

Effective triaging of complaints needs to be established and not be concealed across the overall number of complaints received and reported to the committee as an 'average' timeframe.

On 13 December 2018, the OIA received a complaint about my conduct in relation to the appointment of the Chief Executive Officer. Similar complaints have subsequently been made in different forms and related matters are still being dealt with today. I'll be defending the allegations vigorously, including appeals, if necessary, in which case the matter could take several years or more to resolve. The essence of the latest complaint is that I acted outside my authority, despite citing precedents and showing that I received no contrary advice from officers. I struggle to see how it's in the public interest for the OIA to pursue what's fundamentally an administrative matter as alleged misconduct over a period of three years.

2) Cases identified as inappropriate conduct should be removed from the jurisdiction of the OIA:

In my view, many cases of inappropriate conduct are simply errors and should be dealt with through education and mentoring, rather than punishment. The OIA has fielded several complaints about alleged breaches of Council's media policy. One matter took more than a year to be referred back to Council for internal investigation. The other matters were dismissed.

I propose the OIA should make a speedy assessment (within 30 days) whether a complaint is inappropriate conduct or misconduct, or if it should be dismissed. Where it's deemed to be inappropriate conduct, the matter should be referred to a panel of eminent persons (e.g. retired magistrates, mayors, CEOs, local government professionals) for counselling and training. If a councillor is found to have engaged in the same inappropriate conduct after counselling, it could be viewed as misconduct and be dealt with through the OIA.

This would provide a filtering process to change behaviour and culture in a positive way, while still maintaining the high standards expected by the community.

There is currently a disincentive for councillors to undergo training because the OIA clearly considers this adversely when deciding a councillor's culpability. The reality is that "training" might have simply involved a seminar or presentation. It doesn't allow for nuances or the pressure of making decisions quickly in a challenging environment. The aim should be to encourage and educate councillors.

I'm genuinely concerned over-technical enforcement, inconsistent interpretations and the "gotcha" nature of the complaints process stifles productivity and deters talented people from serving in local government compared with the private sector and other levels of government.

This is not a healthy outcome for the community.

3) Remove "breach of trust" as grounds for potential misconduct or provide clear definitions, e.g. "deliberately misleading":

Breach of trust is a "catch all" which encompasses anything and everything. It either needs to be defined with real examples (e.g. deliberately misleading) or be removed.

In December 2020 it was alleged that I made false and misleading statements to members of the community at a private meeting (nine months earlier) on 12 February 2020. The meeting occurred during the Council election campaign and I attended as a candidate for re-election. I believe the complaint was politically motivated and should have been immediately dismissed. Instead, the OIA investigated and later dismissed the complaint on 22 February 2021.

I don't believe the OIA should investigate statements or commitments made during the election period which are related to the election. The OIA doesn't have jurisdiction over candidates who aren't councillors.

In this example, the OIA complaint was made public through industry newsletters and social media before the matter was finalised.

4) Remove the requirement for details of dismissed complaints to be published:

Although the overwhelming majority of complaints against Bundaberg Regional Councillors have been dismissed, summaries are published on the Council website as required under Section 150DX of the Act. I believe that only complaints which are upheld should be published. It serves no public benefit to provide detail of complaints that are dismissed.

At the private briefing to this committee on 11 October 2021, the Independent Assessor Ms Kathleen Florian said the intent of the legislation is to “not identify the councillor directly or indirectly”. I submit that’s impossible to achieve in most local communities.

For instance, a complaint was made against a Bundaberg Regional Councillor that they were poaching staff to work in their business. That could only have been one of two councillors and the media could feasibly have contacted both of them. The allegation was arguably defamatory and the complaint was dismissed.

News Corp publications in the Wide Bay sometimes summarise the dismissed complaints in online articles. I struggle to see any public interest and suggest that only substantiated complaints should be placed on the register.

5) Disallow anonymous complaints unless they involve corruption and refer these to the CCC:

It’s too easy for people to anonymously make trivial, mischievous and vexatious complaints. Making a complaint should require a person to disclose their identity, with the option to not have this revealed, and strict penalties imposed if this is breached so the complainant has confidence in the integrity of the system. The OIA has a heavy workload and it will assist with processing other complaints in a timely manner if anonymous ones are declined.

I believe allowing anonymity for complaints also allows a potential vexatious complainant to use others to make similar or the same complaint effectively circumventing the ‘3 strikes’ policy.

6) Require confidentiality by all parties until a matter is determined:

As Ms Florian noted at the private briefing to the committee on 11 October, “there is no legislative impediment to a person making a complaint or a person who is the recipient of a complaint commenting on it in public unless the Public Interest Disclosure Act applies.” I’ve had several instances where complaints against me have been published in the media and social media. This is damaging to a councillor’s reputation and their wellbeing. In some cases I believe complaints were deliberately lodged against me for the specific purpose of then being able to gain media attention by revealing details that should have been kept confidential particularly prior to any determination.

On 4 June 2021, Ms Florian wrote to me, saying: “I am a strong advocate for the need for confidentiality to allow complaint matters to follow due process and for natural justice to be served. I have already raised this issue with the current Minister and will continue to advocate for it as a law reform issue.”

I thank Ms Florian for her support in relation to this and ask the committee to please recommend appropriate changes to the legislation.

7) Define examples of vexatious complaints (e.g. repetitive complaints and those of a political, personal or trivial nature), allow for one warning only and penalise infringements with fines:

At the private briefing, Ms Florian disclosed that only 34 out of more than 1000 complaints got to level two where a matter was dismissed as vexatious or lacking in substance and an offence warning was issued. I’m surprised the number is so low and suggest either the assessment process is flawed or vexatious complaints should be more clearly defined to assist the OIA in dealing with them.

On 3 February 2020 the OIA wrote to me, warning against vexatious complaints in the lead-up to the mayoral election in March 2020.

The OIA said it had received four complaints against one of the other mayoral candidates and eight against myself in two months since 19 November 2019. For the record, I had never made a complaint against any person then or since.

At several stages during 2021, I provided evidence to the OIA that a particular individual was making vexatious complaints against me, either directly or in collusion with other parties.

In a letter to me on 30 July 2021, the OIA acknowledged the person’s “repeated conduct in sharing correspondence from the OIA with third parties”.

On 17 August 2021, the OIA wrote that the person was raising “some issues which have supported a reasonable satisfaction that misconduct has been engaged in”.

In other words, the OIA is not considering motive when people make complaints. It appears they’re embarking on fishing expeditions, inspired by a person’s malice, to find “gotcha” moments and technical breaches. It also contradicts and invalidates the OIA’s warning on 3 February 2020 against vexatious complaints. It suggests that councillors are held to a higher threshold of behaviour when considering if complaints are vexatious.

I am also aware that one of the recommendations of the *Councillor Complaints Review: a fair, effective and efficient framework* report prepared by Messrs Solomon, Playford and Kellar in 2017 contained a recommendation that the legislation: —

... include a section making it an offence for a person to:

- (a) make repeated complaints about a councillor —
- (i) vexatiously; or

- (ii) not in good faith; or
- (iii) primarily for a mischievous purpose; or
- (iv) recklessly or maliciously; or
- (b) counsel or procure another person to make a complaint about a councillor as mentioned in point (a).

While I note the Government of the day did not accept this recommendation, I urge this Committee to reconsider it. Without such an amendment, myself, and other councillors, will continue to be the subject of multiple baseless, mischievous and/or malicious complaints.

8) There should be an oversight mechanism:

The OIA's treatment of councillors when assessing social media management holds them to an unreasonable standard compared with state and federal elected members and the general community. The OIA and LGAQ developed a social media guide and voluntary impressum for Facebook pages. The OIA has interpreted this to mean that councillors can't moderate their own Facebook pages to delete comments and block individuals unless they engage in specific forms of bad behaviour.

This doesn't include trolling (posting inflammatory, insincere, digressive, extraneous, or off-topic messages to provoke a reaction).

On 2 September 2021, the OIA advised me of its preliminary view that I was guilty of inappropriate conduct because comments were removed from my Facebook page. The complaint was later dismissed on a technicality. Prior to this in my reply, I rejected the OIA's view that removing a comment was a breach of the Human Rights Act.

The individual concerned had other avenues to express themselves on Facebook and directly to me by email or letter. I also produced evidence of collusion between the complainant and a political rival, which I believed should have resulted in a prosecution for the complaint being vexatious.

In my view, the OIA has exceeded its authority in seeking to micro-manage councillors' social media accounts. It's unilaterally imposing rules which don't apply to state or federal Members of Parliament and the broader community, and which wasn't intended by the legislation. I'm aware that a number of State Members have deleted comments from their Facebook pages which aren't defamatory. This is normal practice in social media management.

The OIA should only be interested in what Councillors say on their social media accounts, not how they manage them.

If a finding of inappropriate conduct had been made, the matter would most likely have been referred back to the Council, denying me rights of appeal. Instead of matters like this potentially going to the Councillor Conduct Tribunal or QCAT for a ruling, I submit that Councillors should be able to refer them to an oversight authority. This would allow for regular changes and improvements where valid issues are identified.

The CCT and QCAT should not be used to test the OIA's interpretation of the legislation.

CONCLUSION

Thank you for establishing this inquiry and for inviting public submissions. I would appreciate an opportunity to appear before the committee and answer questions. I understand my submission and the enclosed correspondence will be made public at the committee's discretion.

A handwritten signature in black ink, appearing to read 'Jack Dempsey', with a stylized flourish at the end.

Jack Dempsey

Mayor - Bundaberg Regional Council