



Queensland Integrity Commissioner

Encouraging confidence in public office & public institutions

Submission to the State Development and Regional Industries Committee,
'Inquiry into the Functions of the Independent Assessor and the Performance of those Functions'



About this Submission

The Queensland Integrity Commissioner (QIC) welcomes the opportunity to make this submission to the Parliamentary State Development and Regional Industries Committee (the Committee) regarding its 'Inquiry into the Functions of the Independent Assessor and the Performance of those Functions' (the Inquiry).

The QIC notes that the Committee has specifically invited submissions regarding:

- i. whether the performance by the Independent Assessor of the Independent Assessor's functions is consistent with the intent of the local government complaints system,
- ii. whether the powers and resources of the Independent Assessor are being applied in accordance with the public interest, and
- iii. 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.

In this submission the QIC offers general observations that are limited to those aspects of the Inquiry which fall or fell under the functions of the QIC.

Key observations of this submission

- Mayors and councillors perform a very important community role.
- Public perception of the effectiveness of the Queensland integrity system and the local government regulatory structure is a critical factor in evaluating any framework which seeks to enhance public confidence in decision-making.
- From late 2017 onward, there has been much greater and more intense public scrutiny of the conduct of mayors and councillors. Under such circumstances it was to be expected that agencies with responsibility for receiving complaints about local government activities, including the Crime and Corruption Commission and the Office of the Independent Assessor (once established), would experience a greater volume of complaints than historical levels as a result. Further, whilst not a complaints agency, the QIC experienced unprecedented levels of demand for advice once mayors and councillors were nominated as 'designated persons' in February 2018.
- There have been a number of substantial reforms introduced over the past four years. Mayors, councillors, and council staff more generally have had to come to terms with complex legislative changes, and changes to processes and procedures, over a relatively short period of time. It should be noted that this undertaking would likely have had a disproportionate impact on mayors and councillors who perform their elected roles on a part-time basis only.

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- The most recent changes as a result of the *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019* may have introduced further uncertainty to an environment where enhanced ethics capacity and improved standards of practice were growing but were not yet fully embedded.
- Given the frequency and extent of change and reform in the local government sector over the past four years, it should be expected that there will be differing views regarding the interpretation and application of new legislation, codes, and standards. In the experience of the QIC, dissent even amongst key stakeholders regarding the application of the reforms is not uncommon particularly where there are no or few precedents to rely on.
- Any further reforms, schemes, resources and training programs, including those which set out each councillor's statutory obligations regarding their conduct, must have regard to the unique differences between local governments; the diverse backgrounds, skills and knowledge of mayors and councillors; and the crucial role they play. They must not be so ambiguous or complex as to make it harder for mayors and councillors to fulfill their obligations. This is not in the public interest.
- In that regard, training and guidance materials developed for mayors and councillors need to be as comprehensive, specific, and practical as possible to ensure that ambiguity and uncertainty about intent, or application of laws, standards, and codes are minimised so as to avoid placing mayors and councillors at risk of committing an offence which might see them facing prosecution.

Background to this submission

The Solomon Review and subsequent Crime and Corruption Commission (CCC) Operation Belcarra (Belcarra Report)¹ identified that undisclosed or poorly managed conflicts of interest are key corruption risks in local government. In part, as identified in the Belcarra Report, this is because councillors are least likely to have expertise in the area of conflicts of interest;² particularly regarding matters that relate to the three key areas of corruption: undisclosed or poorly managed conflicts of interest, acceptance of inappropriate gifts and hospitality, and personal favours.

In response to various reviews and reports, there have been a number of substantial local government reforms introduced over the past four years. Mayors and councillors, and councils more generally, have had to come to terms with substantial and complex changes to processes, procedures, and legislation over a relatively short period of time, whilst also performing their duties faithfully, noting the constraints for many mayors and councillors who are performing their elected roles on a part-time basis only.

Additionally, since late 2017, there has been a more intense public scrutiny of the conduct of mayors and councillors, and in part, this was heightened due to the media reporting of the findings of the Belcarra Report and widely held concerns, including by Parliament, that reforms were needed. It was generally viewed that public confidence in local government decision-making had diminished and therefore the overall objective of reforms was to restore public confidence in the local government sector.

In response to Recommendation 28 of Belcarra Report, all Queensland Mayors and Councillors were nominated as 'designated persons' under the 15(1)(h) of the *Integrity Act 2009* (Integrity Act) in February 2018.

Following the nomination in February 2018, the Queensland Integrity Commissioner (QIC) became the primary ethics advisor to local governments until the substantial amendments to the conflict of interest provisions in the *Local Government Act 2009* (Qld) (LGA) and *City of Brisbane Act 2010* (CBA) in October 2020.³

The Office of the Independent Assessor (OIA) was established in December of 2018, part-way through a (now) four-year period in which, including as a result of the Belcarra report, substantial local government reforms were introduced and implemented and then amended or replaced.

¹ Crime and Corruption Commission Queensland, 'Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government' (October 2017): <http://www.ccc.qld.gov.au/corruption/operation-belcarra/operation-belcarra-reforming-local-government-in-queensland>

² Ibid.

³ The QIC was the primary ethics advisor from February 2018 to October 2020. As a result of the *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019*, after October 2020 requests by local government were largely not met with advice as how the new conflict of interest scheme ought to be applied was largely a matter of legal interpretation. Further, the QIC did not have adequate resources to meet the substantial demand from local government.

Due to the substantial level of change and reformation, and the intense public scrutiny of the conduct of mayors and councillors from late 2017 onward, it was to be expected that agencies with responsibility for receiving complaints about local government activities, including the CCC, and OIA once established, would experience a greater volume of complaints than historical levels as a result.

Similarly, whilst not a complaints agency, given the reasonably turbulent environment, the heightened public scrutiny, and the extent of the reformations, the QIC experienced extremely high levels of demand for advice from mayors and councillors once the nomination was made in February 2018.⁴

Functions of the QIC

The QIC is an independent officer of the Queensland Parliament, reporting through the Economics and Governance Committee.

The QIC was initially established in 1999 under the *Public Sector Ethics Act 1994*. The *Integrity Act 2009* (the Integrity Act) transferred and updated the provisions of the *Public Sector Ethics Act 1994* concerning the QIC, with expanded responsibilities.

The QIC has four functions under the Act:

- to give written advice to current and former designated persons about ethics and integrity issues
- to meet with and give written or oral advice to Members of the Legislative Assembly about interest issues
- to keep the lobbyists register and have responsibility for the registration of lobbyists, and
- to raise public awareness of ethics and integrity issues by contributing to public discussion of these issues.

Advice Functions

All Queensland mayors and councillors were nominated as ‘designated persons’ under the advice functions of the Integrity Act in February 2018.

In providing advice, the QIC is obliged to consider any standards or codes that are relevant. It is also open to the QIC, pursuant to section 21(b) of the Integrity Act, to adopt any standards or codes the QIC deems relevant. The range of such materials is diverse and prone to amendments and updates. Keeping abreast of changes to the relevant standards and codes is a time consuming but essential element of the advice function.

To maintain a high quality of the advice service, including consistency of advice relating to standards and codes, the QIC routinely undertakes research into particular areas of best practice; develops and updates materials

⁴ The high levels of requests continued until mid to late 2020 when the QIC notified local governments that advice would not continue to be provided once the new conflicts of interests’ scheme was introduced in late 2020.

that set out the process, tests and factors relied on when providing advice; and publishes these materials on the website of the QIC. This approach serves to enhance trust in public officials and public authorities by ensuring that standards and codes are known and applied universally, and aims to reduce any public perceptions of unfairness, discrimination, favouritism or bias. The materials also serve as a useful point of reference for advisees in the event that they wish to understand more about best practice standards.

With regard to the QIC's recent involvement as an ethics advisor in the local government setting, the advice jurisdiction of the QIC did not extend to include local government until the nomination of all Queensland mayors and councillors in February 2018.

In the months that followed the nomination, and in the absence of clear and available standards and practical guidance, pursuant to section 21(b) of the Integrity Act, the QIC undertook a body of original research and developed materials for local government to aid in the practical application of the conflict of interest provisions of the *Local Government Act 2009* (Qld)(LGA) and *City of Brisbane Act 2010* (Qld) (CBA).

The materials developed by the QIC, which were later adopted as part of the collaborative work between the QIC and the OIA,⁵ provided a comprehensive practical structure for mayors and councillors to use as they sought to apply and comply with legislation, and over-arching principles, standards, and codes. The materials were detailed, for example, they set out the tests and factors to apply in each case to assess materiality of interests, and threshold questions for councillors and council to consider.

The materials were also used by the QIC in every advice the QIC provided to mayors and councillors to ensure that local government could be assured that advice provided by the QIC was consistent and to a high standard, with tests and factors fairly applied by the QIC.

The development and application of these materials was not without controversy and the QIC at that time was routinely required to defend particular positions the QIC had taken in advices. However, the QIC is obliged to resolve matters in the public interest, and in the absence of alternative practical guidance materials or legal objections, took the view that guidance to mayors and councillors needed to be as specific and practical as possible to ensure that mayor and councillor advisees were not at risk of committing an offence which might see them facing prosecution.

Between February 2018 and October 2020, mayors and councillors sought advice from the QIC on 395 occasions.⁶ Further, it was common for advisees to seek advice on multiple occasions and to refer other councillors to the service.

The highest number of requests were received in the first year after nomination with up to 41 requests received per month in the first year of the nomination. To provide context, for the years 2003-2017, the QIC received on average just 60 advice requests in total, annually.

⁵ The materials, advices, factors, and tests have also been referenced in various Local Government Tribunal decisions.

⁶ As well as a further 30 requests received since then.

The volume of requests and the propensity for repeat requests anecdotally indicates that users of the advice service were satisfied with the service and found it useful.

Overwhelmingly, oral and written communication from mayors and councillors to the QIC indicated a strong desire for clarity and certainty around the standards expected of them particularly in light of the consequences of committing an offence. Mayors and councillors indicated that they were seeking guidance and resources that were as practical as possible, given the variety of backgrounds, skills and knowledge of councillors. Further, mayors and councillors frequently expressed the view that they were committed to ensuring public confidence in the local government sector was not further diminished, however, it was difficult to navigate the complex and changing local government landscape. The expression of this sentiment was particularly noticeable in the mid to later months of 2018 due to the growing, intense public scrutiny of the conduct of mayors and councillors, which in part arose following media reporting of the findings of the Belcarra Report.

Primarily, the QIC provided advice to councillors on properly managing and disclosing material and other interests (including requisite levels of disclosure); the acceptance or not, of gifts and hospitality; and the perception or presence of influence, on a case-by-case basis.

In providing advice for the local government sector, the QIC's aim was always to provide clear guidance and thresholds, with regard to any relevant law, standards, or codes (including the LGA and CBA) as required under the Integrity Act.⁷

Further, as raised earlier, when providing advice the QIC has the unique benefit under the Integrity Act of being able to take into account '*... other ethical standards the integrity commissioner considers appropriate*'.⁸ This provision is useful in that it enables the QIC to have regard to a myriad of standards and expectations to form a view when providing advice that is not solely reliant on decision-making by an external party such as a tribunal, or existing standards or precedents. Instead, the advice is intended to guide the advisee to not merely meet a minimum legal standard so as to avoid committing a breach or offence, but instead to strive to achieve the highest ethical standard, as expected by the public, in the way that the advisee manages that particular matter.⁹ This provision also has the additional benefit of not making the QIC reliant on decisions of the Courts or Local Government Tribunal for guidance on untested matters, which is not the case for the OIA.

Notwithstanding the nomination of February 2018 which still stands, the role of the QIC in the local government sector was reduced when the LGA and CBA were amended in October 2020, with a new scheme introduced for identifying, assessing, and managing, interest issues.

In this regard, the QIC raised concerns about the effectiveness and complexity of the new scheme in a submission and further submission provided to the Parliamentary Economics and Governance Committee

⁷ *Integrity Act 2009*, s 21(a).

⁸ *Integrity Act 2009*, s 21(b).

⁹ The QIC applies the same approach to all advisees irrespective of the class of designated person under the Integrity Act.

(Committee) on the *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019* (the Bill), which was introduced to Parliament on 28 November 2019 and was referred to the Committee for consideration and report. The QIC also appeared before the Committee.

Relevantly for this submission, the QIC's submissions on that occasion made reference to the following key points:

- The strong public focus on the potential for personal interests to give rise to bias in public officials is well founded as research shows that the most common element in cases of corruption and misconduct is a personal interest involving a decision-maker.¹⁰ Any deficiencies in the way that councillors identify and manage personal interest issues has the capacity to affect public confidence in decision-making at local government level.
- Interest issues generally, including at local government level, are increasing in complexity as well as becoming 'more varied and less visible'.¹¹
- The proposed (now adopted) interest provisions are complex and highly nuanced and this would lead to greater uncertainty in a sector already impacted by substantive and frequent change in recent years.
- Further, as the interest provisions were novel and untested, there is limited case law to guide how the provisions ought to be applied and interpreted by local government, lawyers, the OIA and the Local Government Tribunal. For example, threshold questions as to what does and what does not constitute an offence.
- The amendments would restore the burden of assessing and deciding whether a personal interest constitutes a 'conflict of interest' (either 'prescribed' or 'disclosable') to the individual with a vested interest in the (their) decision.
- Most councillors have diverse backgrounds and discharge their roles on a part-time basis. The amendment would require councillors to potentially make decisions regarding complex issues, often with limited notice, on their own.

The Bill passed and the amendments were introduced in 2020.

As the conflict of interest provisions are now complex, highly nuanced, and reasonably untested, the QIC has declined to provide advice to individual councillors on how the provisions might apply. The QIC is of the view that the interest issues of mayors and councillors are no longer substantively an 'ethics or integrity' issue but rather a matter of legal interpretation.

¹⁰ Deloitte, 'One step ahead- Obtaining and maintaining the edge' (Deloitte, 2017); Independent Commission Against Corruption, *Corruption and Integrity in the NSW Public Sector: an assessment of current trends and events* (December 2018) Independent Commission Against Corruption, New South Wales Government, 1-84.

¹¹ S. Young, 'The Evolution of Bias: Spectrums, Species and the Weary Lay Observer' (2017) 41(2) *Melbourne University Law Review* (advance).

In the QIC's view, the conflict of interest scheme that existed prior to October 2020 aligned with the Belcarra Report and enabled non-conflicted councillors to remain empowered to decide, collectively and transparently, whether a conflict of interest exists, why, and how it should be managed. As well as building capacity in councillors in terms of their understanding of interest issues, a significant flow-on effect from the past scheme was that councils were able to set standards that were transparent, and then be publicly held to these standards. The scheme, the QIC, and the OIA, also had the benefit of being able to review and rely on the Local Government Tribunal decisions decided on the standards at the time.

Further, the most recent changes as a result of the *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019* may have brought additional uncertainty to an environment where enhanced ethics capacity and improved standards of practice were growing and beginning to flourish but were not yet fully embedded.

As well, the complexity and newness of the current scheme inherently means that, in the case of many complaints, relevant threshold questions, key principles, and relevant facts and factors, in a specific set of circumstances, are yet to be determined, for example, by the Local Government Tribunal. It follows then that these determinations, once made, will inform the assessment of complaints made to the OIA and, presumably, further, specific training to be provided by the Department of Local Government.¹²

It should not be unexpected that there are differing views on the interpretation and application of legislation, codes, and standards given the relative newness of the current scheme, and the frequency and extent of reform and changes in the local government sector over the past four years. In the experience of the QIC, in this regard, there is seemingly dissent even amongst experts.

Public Awareness Function

Regarding the QIC's statutory obligation to '*raise public awareness of ethics or integrity issues by contributing to public discussion of these issues relevant to the integrity commissioner's functions*',¹³ within the local government context, this involved public speaking, councillor training, and the development of publicly available resources.

Once the OIA was established in December of 2018, the QIC, in conjunction with the OIA, sought to enhance local government integrity and ethics capacity by publishing a range of materials for use by councillors to assist them to manage their obligations and raise awareness of public expectations as to the conduct and performance of those in public office. During 2019-2020, these materials were widely used resources for local government.

Additionally, together with the OIA, and at times the CCC, the QIC was involved in jointly conducted education and training sessions across the local government sector regarding identifying and managing corruption risks,

¹² Noting education and training is no longer provided by the OIA or the QIC.

¹³ *Integrity Act 2009*, s 7(1)(d).

including risks associated with undeclared or poorly managed conflicts of interest. In developing training and resources for the local government sector, the aim of the QIC and OIA was to empower local government by raising capacity among councillors, including by providing training developed to take into account any specific local requests, issues, or concerns.

Written feedback by councils regarding the joint sessions was routinely collected and collated by the QIC as part of quality assurance. Councils reported the session as being highly regarded and viewed as useful by councillors. However, due to jurisdictional changes for the QIC and OIA, neither agency continues to provide such training at local government level.

Regulation of lobbying activity

Section 7(1)(c) of the Integrity Act states that it is a function of the QIC to keep the lobbyists register and have responsibility for the registration of lobbyists. The express provisions are set out in 'Chapter 4 Regulation of lobbying activity' of the Act.

Whilst the QIC may no longer provide services to local government under the advice functions of the Integrity Act, where relevant, the jurisdiction of the QIC's lobbying functions within the local government sector have not altered.

General comments

Mayors and councillors are elected by the community to make decisions on behalf of their community's interests, and they make a tremendous contribution to their local communities and to Queensland more broadly. They come from a diverse array of backgrounds, with different skills, knowledge, and expertise.

Further, mayors and councillors often hold their role on a part-time basis only, and smaller local governments may not have the same level of access and/or funding for advice and training as larger local governments.

However, irrespective of whether a mayor or councillor is elected on a part-time or full-time basis, and irrespective of resources and setting, each mayor and councillor is held to the same high statutory and codified obligations.

Taking into account the unique differences between councillors and between local governments, any reforms, schemes, and training programs, including those which set out each councillor's statutory obligations regarding their conduct, must have regard to the unique differences between local governments, the diverse backgrounds of mayors and councillors, and the crucial role they play. They must not be so ambiguous or complex as to make it harder for mayors and councillors to fulfill their obligations. This is not in the public interest.

In that regard, training and guidance materials developed for mayors and councillors need to be as comprehensive, specific, and practical as possible to ensure that ambiguity and uncertainty about intent, or the application of law, standards, and codes, are minimised so as to avoid placing mayors and councillors at risk of committing an offence which might see them facing prosecution. This is not in the public interest.

As a final comment, with reference to the QIC's work with the local government sector generally, the QIC was pleased that mayors and councillors were nominated to be 'designated persons' as this occurred at a time of great change and uncertainty for local government.

The QIC and her team viewed the opportunity to work closely with mayors and councillors, as they sought to serve their communities, as a unique and valued privilege.

The Queensland Integrity Commissioner, Dr Nikola Stepanov, will be able to address any matters contained in this submission if required.