

20 December 2021

Our ref: KB-OD

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

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

Dear Committee Secretary

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

Thank you for the opportunity to provide a submission to the Inquiry into the functions of the Independent Assessor and the performance of those functions.

This submission has been contributed to by the Queensland Law Society's (QLS) Occupational Discipline Law Committee whose members represent clients in matters investigated by the Office of the Independent Assessor (OIA) and in matters before the Councillor Complaints Tribunal (CCT or Tribunal). These members also act for other regulators and individuals in disciplinary matters.

These committee members have reported the following concerns regarding their interactions with the OIA and CCT which we consider should be scrutinised by the Committee in this Inquiry.

1. Type of complaints referred to the CCT

The Councillor Complaints Review – Report published in 2017¹ anticipated that the Independent Assessor would 'be responsible for assessing all complaints lodged in relation to councillor conduct and where necessary investigating and prosecuting misconduct complaints against councillors' (our emphasis).

However, in our members' experience, many of the complaints received by the OIA are referred to the CCT without sufficient assessment and investigation of the matter, leading to matters going before the Tribunal in circumstances where these are not in the public interest to prosecute.

The OIA as the 'independent assessor' should have a discretion to discontinue a matter, or not accept a complaint, where it is not in the public interest having regard to the circumstances and resources available.

¹ Independent Councillor Complaints Review Panel's Report 'Councillor Complaints Review: A fair, effective and efficient framework'.

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We note this has also been recommended by the OIA in its submission to the Inquiry. Under the heading, “Law and process reform”, recommendation 9 is that the *Local Government Act 2009 (LG Act)* be amended to allow the IA to withdraw matters referred to the CCT where there is a change in the circumstances that is relevant to the public interest in progressing the matter.

We have reviewed the decisions of the Tribunal since its establishment. A summary of these decisions has also been provided by the OIA in its submission. The penalties imposed by the Tribunal in these decisions included public admissions, pecuniary penalties, training and counselling requirements, as well as some others.

We make two points about these decisions which support our call for a better assessment and investigations of complaints. First, most of the pecuniary penalties ordered by the Tribunal were for amounts of \$100 or \$200. Section 150AR(1)(b)(iv) of the LG Act allows the Tribunal to make an order that the councillor pay to the local government an amount that is not more than the monetary value of 50 penalty units. Accordingly, most of the penalties imposed have been relevantly minor.

While it is important that any inappropriate conduct and misconduct is investigated and dealt with, we query whether better assessment and investigation practices by the OIA, as discussed more below, would lead to these matters being resolved earlier, with fewer costs for the CCT, OIA and the subject councillor and their staff.

Second, the imposition of counselling and training requirements may signal a need for more proactive education and training for councillors and their staff throughout their time in local government councils, not just in response to an issue. QLS previously made these submissions when the Government introduced a series of amendments to the Local Government legislation which changed reporting and other requirements for councillors.

The object of these laws and bodies should be compliance with regimes, rather than prosecution and penalty.

2. Failure to undertake proper investigations

Following on from these comments, our members advise that matters are often referred to the CCT with an insufficient investigation being undertaken by the OIA. Our members have reported instances where a matter had already been referred to the Tribunal, however the brief of the material provided after the referral revealed that certain key witnesses had never been spoken to by the OIA at the investigation stage. In one particular matter, it was discovered that a key witness had not been spoken to because the complainant had informed the OIA this was not necessary..

In another example provided, the receipt of the brief material identified witnesses who had been spoken to, but their interviews had not been recorded. This created difficulties in understanding and responding to the allegation.

A failure to appropriately investigate matters impacts on the resources of the CCT and ultimately the OIA, delays the progress of matters and leads to unnecessary costs and distress on the part of the respondent.

3. Providing brief material to the Tribunal and the respondent

This issue is two-fold. First, the OIA does not provide brief material to the councillor at the time a Notice to Respond to Allegations is given. The councillor is only provided with the allegation and a set of particulars. No other material (such as witness statements, recordings, records etc) is usually provided to a respondent. This is inconsistent with natural justice principles because the OIA is in possession of documents and information that the councillor, who must respond to allegations, does not have. This creates an understandable caution about responding to the allegations at that stage which leads to unnecessary costs and delays.

Second, the brief material is only provided to the councillor once the matter is referred to the CCT, and in fact, only after it has been filed in the CCT. The councillor does not see the contents of the brief before it is filed and is not afforded the opportunity to raise any objection as to the contents of the brief or the opportunity to request that additional material be included. There have been times where our members have received the brief material and considered that certain information contained therein should not have been included.

To resolve the issue, we consider that the parties should liaise, prior to filing, about the material that should comprise the brief material. We understand this is the procedure generally adopted in other discipline matters – for example, in medical matters involving the Office of the Health Ombudsman.

In addition, providing material to the respondent at an early stage would enable the respondent to give relevant information and clarify issues which may either lead to a decision that the matter does not need to be referred to the CCT, or at least, that the issues can be narrowed by, for example, the respondent agreeing to some of the allegations.

4. Timeliness

Our members report that upon receiving a Notice to Respond to Allegations from the OIA, they will regularly seek extensions of time of anywhere between 1 to 4 weeks (depending on the nature of the matter and the instructions received from their client). These members' applications for extensions of time are rarely agreed to in full and often, the OIA will only afford a matter of days or one week to provide responses. In contrast, once the OIA has received a response, it can be a matter of months (8 to 10 in certain cases) for the office to provide its reply.

This issue reinforces our submission about the need to ensure appropriate natural justice and procedural fairness is provided to respondents and that the OIA is undertaking its functions efficiently and effectively.

We note that the OIA's submission to this Inquiry provides:

Councillors are given the opportunity to respond to allegations, and their responses are considered before any decision is made by the IA to either dismiss the matter or refer it to either the relevant council or the Councillor Conduct Tribunal for a decision on the councillor's conduct.

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Our members' experience is that this does not occur in all cases, as the timeframe for response is sometimes insufficient. Further, as stated above, an "opportunity to respond to allegations" must include an opportunity to see and respond to the relevant material the OIA has based the allegations on.

The inquiry should consider the timeframes afforded to respondents to ensure that they practically allow for natural justice and procedural fairness.

5. Need for practice directions

There is a need for better guidance with respect to practice and procedure as it relates to the OIA and the CCT. Practice directions should continue to be developed in consultation with the OIA, CCT and relevant Council representative groups/QLS committees. We have identified a need for practice directions relating to:

- a. Timeframes for the filing of material;
- b. Timeframes for initial directions hearings; and
- c. Timeframes for the conduct of the hearing.

6. Relationship between the OIA and the CCT.

Our members have been involved in matters where they have had cause to have preliminary discussions with the OIA as to the progress of a matter. In one particular matter, the legal representative from the OIA directly emailed the CCT to advise of these preliminary discussions without the consent of the other solicitor. On another occasion, a solicitor contacted an OIA representative by phone and a CCT member answered the phone. We submit that the Committee should review the relationship and interaction between the OIA and CCT both from the perspective of the policies and procedures in place, and also having regard to examples provided by submitters about circumstances giving rise to a perception of a lack of separation between the two bodies.

The independence of these bodies from each other is fundamental to their purpose and it is critical that complainants, councillors, councils and the public have confidence in the system.

OIA's submission

We note the OIA's submission contains 13 recommendations for reform. We have not had the opportunity to comprehensively consider all of these at present, however, we wish to advise our preliminary support for the following:

- 5 – Removal of the requirement to record matters that have been dismissed or subject to no further action by the assessor in council conduct registers.
- 9 – Amend the LG Act to allow the IA to withdraw matters referred to the CCT where there is a change in the circumstances that is relevant to the public interest in progressing the matter.

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- 10 – Amend section 150AS(2) of the LG Act to require publication of Councillor Conduct Tribunal decisions in full.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [REDACTED] or by phone on [REDACTED]

Yours faithfully



Elizabeth Shearer
President