

**Councillor Conduct Tribunal**

7 February 2022

Queensland Parliament

State Development and Regional Industries Committee

sdric@parliament.qld.gov.au

Dear Committee Secretary

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

I provide this submission on behalf of the Councillor Conduct Tribunal (the Tribunal) in response to your invitation to the Tribunal dated 19 January 2022 to comment on aspects of the Terms of Reference established for the Inquiry.

The current Councillor Complaints Framework (the Framework), commenced on 3 December 2018. Under the Framework the Tribunal has a narrow and specific role of determining, on the balance of probabilities, allegations of misconduct and inappropriate conduct that is connected to the misconduct referred to the Tribunal by the Independent Assessor (s150AJ). The Tribunal also has a limited investigatory and reporting function with respect to the investigation of inappropriate conduct complaints referred by the Local Council pursuant to the council's investigation policy and section 150AC(3)(a) of the Act.

The Tribunal is a quasi-judicial and independent decision-maker. The Tribunal's submission will focus on issues from the observations and experience of the Tribunal. These observations include aspects that impact on the operations of the Tribunal and may lead to unintended outcomes that are inconsistent with the intended goal to establish a "streamlined complaints system that is fairer, more efficient and more effective".¹

¹ Councillor Complaints Review, *A fair, effective and efficient framework*, Report by the Independent Councillor Complaints Review Panel (Dr D Solomon AM, N Playford OAM, G Kellar PSM), January 2017, [9].

From the Tribunal's perspective the Councillor Complaints Framework is experiencing some teething issues including delays in the processing and completion of misconduct matters referred to the Tribunal. **Table A** contains a summary of the number of matters that have come before the Tribunal.

The Tribunal has observed that a high percentage of matters referred to the Tribunal relate to alleged conflicts-of-interest including at council meetings. **Table B** sets out a summary of the types of matters that have come before the Tribunal.

The Tribunal as an impartial decision-maker jealously guards its independence from all stakeholders to ensure the conduct of hearings and its decisions are not tainted by bias.

The Tribunal and the Office of the Independent Assessor (OIA), by statute and in practice, are separate and independent entities. However, it may be accepted that for the Tribunal to fulfil its obligation to "act as quickly and informally as is consistent with a fair and proper consideration of the issues" that this requires communication and co-operation between the two entities at an administrative level. Communications do therefore occur between the OIA and the Tribunal registry at an administrative level to facilitate the exchange of applications and evidence and other documents.

To fulfil the functions of the regulatory scheme it is also unsurprising that some degree of administrative co-ordination and co-operation between the CCT registry and the OIA is necessary. Administrative arrangements, communications, emails, telephone discussions with the OIA and the CEO of Councils are conducted by the Tribunal Registrar from 1 William Street.

It is also reasonable to assume with respect to the operation and implementation of the Framework regarding some general operational procedures of the Tribunal the President may also participate in meetings and discussions with the IA and other stakeholders from time to time.

However, the Tribunal's independence must be maintained. Accordingly, the Tribunal does not propose to comment directly on the performance by the IA of its functions or whether the powers and resources of the IA are being applied in accordance with the public interest. Rather, the Tribunal's submissions focus on the Framework generally and in the context of the Tribunal's important role to hear and determine matters of misconduct within that Framework.

Whether the Framework is consistent with the intent of the local government complaints system

The Tribunal was established to hear misconduct applications and to '*act as quickly and informally as is inconsistent with a fair and proper consideration of the issues raised in the hearing*'.² However, the Tribunal's experience is that the requirement to be 'quick and informal' when resolving complaints is difficult to achieve in practice. From the Tribunal's perspective, these difficulties appear to stem from two issues including:

- a) the funding and resourcing of the Tribunal; and
- b) the provisions within the *Local Government Act 2009* relating to legal representation of parties before the Tribunal.

² *Local Government Act 2009*, s 213(1)(b).

The Tribunal's resources

The Tribunal membership consists of a President and 11 members appointed by the Governor in Council. (By contrast, the former RCRPs operated with 22 members).³ All member appointments are sessional, the Tribunal has no part-time member appointments, and most members are not available on a regular basis to undertake Tribunal cases.

The Tribunal does not have its own office or accommodation and has limited support staff. Tribunal members are expected to complete most of their work at home using a Departmental laptop. That work often requires members to undertake onerous and time-consuming administrative tasks in addition to the task of resolving complaints and allegations. The lack of resources, amongst other issues, has meant the Tribunal has continued to experience a high rate of member resignations since its commencement.

The Tribunal is resourced under the model that applied to the former LGCRP's by s 150DW for staff assistance together with the cost recovery process to Councils undertaken by the Department (s 150DU) in addition to other Departmental resources.

The efficient and effective management and operations of the Tribunal from the experience of all members has been difficult since the Tribunal was created.

The Tribunal received one hundred and eleven (111) misconduct and inappropriate conduct matters between 3 December 2018 to 30 January 2022: see **Table A**. The subject categories of these matters reveal that conflict-of-interest allegations represent the highest proportion (49.8%) of the misconduct cases: see **Table B**.

The Tribunal's resourcing model has had a direct impact on the Tribunal's capacity to perform its prime function to hear and determine matters of misconduct and to resolve the complaints and allegations in a *quick and informal* manner.⁴

Legal representation before the Tribunal

In the Tribunal's experience the presence of a legally qualified prosecutor (including barristers) as a party to all hearings (s150AN), in practice, creates an adversarial and formal process. Understandably, Councillors obtain legal advice and seek to be legally represented at all stages of the Tribunal hearing. Although the Tribunal has the power to refuse a Councillor's request for legal representation at a hearing, the Tribunal has yet to have a matter come before it where it considered that it would be fair and just to the Councillor to do so in circumstances where the Prosecutor is represented by legal counsel. The result is the Tribunal operates in practice with court like processes that are neither *quick nor informal*.

In the experience of some Tribunal members they have observed that hearing processes premised on an inquisitorial model where legal representatives are given a more limited role, could result in a quicker and less formal process and still remain consistent with the principles of natural justice.

³ Councillor Complaints Review Report, [77].

⁴ Some of these concerns are currently under review by the Department – (refer Executive Summary DSDILGP to Parliamentary Inquiry into the Functions of the IA 2021.)

The observations of the Tribunal is that the current system by comparison with the former inquisitorial system of the Local Government Review Panels (RCRPs) in place prior to December 2018 is more complex and time-consuming.

Any amendments to the *Local Government Act 2009* or changes to the functions, structures or procedures of the Framework for the more effective operation of the local government complaints system.

The Tribunal makes the following comments for the Committee's consideration.

Executive Summary - Analysis of the implementation of the Councillor Conduct Complaints Framework

The Committee Secretary directed the Tribunal's attention to the above publication by the Department. The Department has recommended that it take the lead training role for Councillors. The Tribunal notes the Department is well positioned to provide training and information to councillors. Recommendation 1(c) describes the Department as the 'point of truth' for advice on how the legislation operates.

The Tribunal considers Departmental policies and publications to be useful tools when resolving complaints. However, as an impartial decision-maker whose role is to consider the specific facts and circumstances of each matter, it is important to note the Tribunal is not and cannot be bound by these publications. The role of the Tribunal is to interpret the Act having regard to the provisions as they apply to the specific facts contained in each misconduct allegation and application.

The Department's recommendation 2(b) is that it 'reaffirm [] and strengthen [] its lead role in training and capability building activities to build local government integrity, and support councillors to meet their LGA obligations.' The Tribunal considers the Department is well positioned to provide training, prepare departmental policies and procedures and provide information to councillors.

Proposed amendments to the Local Government Act 2009

150AL – Conduct tribunal must conduct hearing

The IA has proposed (proposal 9) that a legislative amendment be made to permit the IA to withdraw matters from the jurisdiction of the Tribunal. This issue was considered by the Supreme Court of Queensland in the matter of *Independent Assessor v Councillor Conduct Tribunal and another* [2020] QSC 316 (Flanagan J). His Honour determined that the IA was unable to interfere with the jurisdiction of the Tribunal (s150AL). However, the IA could make an application to the Tribunal to seek leave to withdraw the matter.

In the Tribunal's experience this process is consistent with the local government principles of "transparent and effective processes, and decision making in the public interest..." (s 4(2)(a)).

The Committee may wish to consider an amendment to s 150AL to give the Tribunal discretion to summarily dismiss or discontinue matters in the public interest or for other exceptional circumstances.

150AS – Notices and publication of decisions and orders

The IA and the LGAQ has proposed a legislative amendment to s 150AS (2) to require the publication of Councillor Conduct decisions in full. They submit that this will assist Councillors to further understand the legislation.

The current arrangements permit the full written reasons for a decision to be provided to the Assessor, the Councillor, the Complainant, and the CEO of the relevant Council. In the Tribunal's view this is appropriate and consistent with the principles of transparency and accountability (s 4).

The Tribunal respectfully submits that such an amendment could place additional administrative burden on Tribunal members as they may be required to ensure the full written reasons in the report and the decisions are comprehensively redacted when allegations are not sustained. There is no requirement for redaction under the current system of any reports as the release of the reports containing the decision and the reasons is limited to those persons stated above.

Tribunal decisions and report may also address more than one allegation and in circumstance where some but not all allegations are sustained the Councillor has a legislative protection(s150AS(5)(b)) and right to have his/her name withheld from publication, this includes the removal of all identifying details throughout the report including references to identity contained, for example, in the evidence, the particulars of the allegation or witness statements.

In the Tribunal's experience the evidence relating to multiple allegations is often merged or overlaps with other allegations. The current system of public summaries allows a simple and efficient way to ensure that the published material for the summaries of the allegations that are not sustained, and required to be redacted (s150AS(5)(b)), can be separated by creating a separate and short summary of the facts and decision without revealing the identifying details of the councillor.

The Tribunal considers there may be more effective and efficient means of assisting Councillors to understand the legislation, in particular through coordinated training by appropriate education providers including utilization of the current summaries from the website along with the provisions contained in the statute and other education resources. The current website summary publication is intended to provide a simple clear analysis of the relevant legislation as it applied to the relevant facts of each matter.

150AT – Review by QCAT

The IA has proposed a legislative amendment to s 150AT so that the merits review by QCAT be replaced with a right of appeal on a point of law.

The Tribunal notes that the proposal by the IA is generally in accordance with the recommendations made in the Solomon report:⁵

'The Panel considers there should be a limited right of appeal in misconduct matters ... It considers such appeals should be limited to questions of law only, and the appeal should lie to the District Court...'

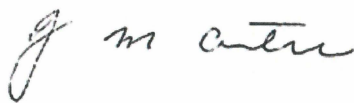
⁵ Councillor Complaints Review Report, 67.

Prior to 3 December 2018, Councillors had no appeal rights from the decisions made by the LGCRPs. The current legislation addressed that deficiency by the provision of extensive re-hearing rights. An application to appeal the Tribunal decision can be made by the Councillor/s or IA to QCAT in accordance with the procedures and the provisions of the QCAT Act.

The Tribunal does not propose to comment further on this proposal as many decisions of the Tribunal are currently listed with QCAT.

Should you require any clarification on the contents of this submission please contact the Registrar [REDACTED] or by email at cct@dlgrma.qld.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'June Anstee'.

June Anstee
President
Councillor Conduct Tribunal

Encl (2)

TABLE A

COUNCILLOR CONDUCT TRIBUNAL (CCT)

TOTAL MATTERS REFERRED TO CCT

3 DECEMBER 2018 TO 31 JANUARY 2022

Total received	111
Misconduct matters	85
Inappropriate conduct matters	26

PROGRESS STATUS APPLICATIONS and INVESTIGATIONS

Total matters finalised – 67

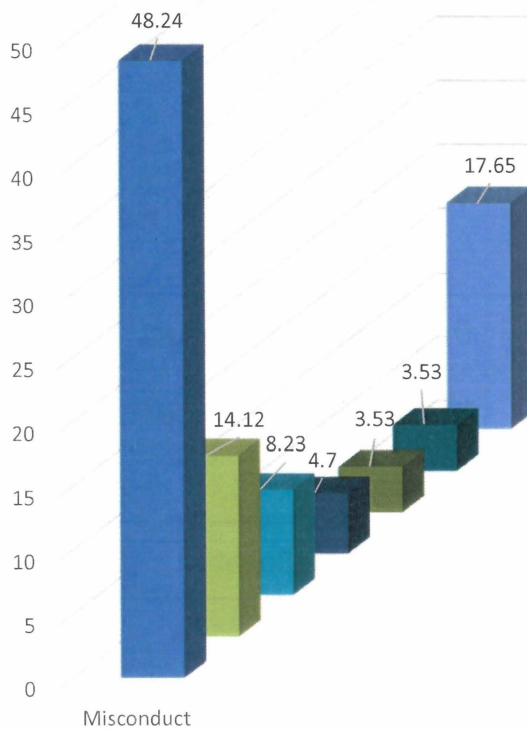
Misconduct		Inappropriate conduct	
Finalised	46	Investigations finalised	21
In progress	7	In progress	4
Matters unallocated	32	Matters unallocated	1

Pending decisions – other jurisdictions	
• Supreme Court, Townsville	1
• QCAT Merits review applications	12
• QCAT matters finalised	Nil

TABLE B

**Misconduct Matters referred to the Tribunal by subject category
3 December 2018 - 31 January 2022**

Misconduct matters by percentage



- Dealing with councillors' personal interests in local government matters, incl. conflict of interest at a council meeting
- Register of Interests
- Misuse of social media
- Release of information confidential to the local government
- Misuse of information
- Failure to comply with Acceptable Requests Guidelines
- Other