

Local Government (Councillor Conduct) and Other Legislation Amendment Bill 2023

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Councillor Conduct Tribunal

28 September 2023

Queensland Parliament

The Hon. Mr C Whiting

State Development and Regional Industries Committee

C/- Committee Secretary

Parliament House

Brisbane Qld 4000

sdric@parliament.qld.gov.au

Dear Committee Secretary,

**'Parliamentary Inquiry into the Independent Assessor and the councillor complaints system '-
Report No 28 of the 57th Parliament.**

**Local Government (Councillor Conduct) and Other Legislation Amendment Bill 2023, introduced
into Queensland Parliament 13 September 2023 (the Bill).**

The Tribunal's response to the Bill followed the receipt of an email from the Secretary of the SDRIC on 15 September 2023 to the President inviting a response.

The response incorporates the collective views of 5 from the total of 6 Tribunal members.

The SDRIC Inquiry into the Independent Assessor and its report arising from the inquiry report (No 28) containing 40 recommendations was tabled in the Legislative Assembly. The Tribunal was invited to make an initial submission regarding aspects of this Inquiry. A submission was provided to the Inquiry and the Tribunal President appeared as a witness with member Troy Newman before the Committee on 7 February 2022. A further written response to 16 of the 40 recommendations formulated by the Committee was provided by the Tribunal President.

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The establishment of the Councillor Conduct Tribunal

The current Councillor Complaints Framework (the Framework), had its origins in the Local Government Act of 2009 whereby a principles based disciplinary framework was established.

The Local government amendments of 3 December 2018 reinforced the fundamental principle of 'public trust' placed in elected councillors to act in the public interest.

The amendments of 2018 established the Tribunal and arose from the Independent Councillor Complaints Review Panel's Report '*A Fair effective and efficient framework*'¹. *The goal of this report was to make recommendations to provide "a streamlined complaints system that is fairer, more efficient and more effective."*

Tribunal Response to some aspects of the Amendment Bill 13 September 2023.

This response acknowledges the Government's intention to progress only misconduct matters to the Tribunal that are "aligned with the public interest"² and that cannot be resolved by other means.

The Tribunal, like other State and Territory jurisdictions, is established by statute for public purposes. The Tribunal decides matters as the original decision-maker concerning allegations of misconduct. A determination of misconduct affects the reputation of the individual councillor and disciplinary sanctions and penalties may be applied to the councillor depending on the circumstances of each case.

The Tribunal considers all misconduct applications filed by the Independent Assessor who is a party to the misconduct proceedings. In exercising its functions and powers the Tribunal's final decision becomes binding on the parties (the Applicant (IA) and the Respondent councillor), subject to merits review by QCAT, if applicable.

(1). The Bill Amends the definition of Misconduct.

What is Misconduct - Amendment of Section 150L (1)(b)(i) –

The Bill deletes from the definition of misconduct "*breach of the trust placed in the councillor either knowingly or recklessly.*" This broad principle is replaced with the phrase –

"non-compliance with an Act by a councillor."

Misconduct -Section 150L (1)(b)(i) - The current definition provides:

(1) The conduct of a councillor is misconduct if the conduct –

(b) is or involves - (i) **A breach of the trust placed in the councillor**, either knowingly or recklessly

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].

² Deputy Premier - Introductory Speech 13 September 2023.

The inter-relationship between the public interest and the principle of ‘breach of the trust placed in the councillor.’

This principle requires councillors to observe high standards of conduct while holding the position of an elected representative. The deletion of the concept of ‘breach of the public trust from the misconduct definition’ appears to diminish the high standards of conduct expected by constituents from their elected local government representatives.

The reasons for the amendment to the misconduct provision are not clear. The SDRIC recommendations do not refer to this proposal, the introductory speech and the Explanatory notes do not refer to this amendment.

From the stakeholder consultation briefing (September 2023) it was to be presumed the intention of the new provision clarifies that any act of non-compliance by a councillor will be deemed misconduct. It is not clear from the new provision, having removed ‘breach of the trust placed in the councillor’, whether the local government principles (s4) remain enforceable by this new definition of misconduct to the assessment of councillor misconduct.

The deletion of the breach of trust principle may have arisen from the broad nature and scope of the public interest obligations and/ or reference to some Tribunal cases regarding misconduct findings and a breach of the trust by the councillor.

The Introductory speech - 13 September 2023 – referred to the public interest.

The Introductory speech by the Hon. S J Miles (Deputy Premier, Minister for State Development, Infrastructure, Local Government and Planning and Minister Assisting the Premier on Olympic and Paralympic Games Infrastructure) said:

*The Committee found that the current system of councillor conduct ... “needs to be more closely and efficiently aligned with the intent of the legislation **and the public interest**”[Emphasis added]*

The Tribunal considers the public interest is aligned with and fundamental to the principle of the trust placed in the councillor.

The Explanatory Notes – are silent in relation to the withdrawal “of a breach of the trust placed in the councillor either knowingly or recklessly” from the definition of misconduct.

The 40 recommendations of the SDRIC are also silent with respect to the withdrawal of a breach of the trust from the definition of misconduct.

The Purpose of the Local Government Act 2009(s3)

These amendments by the Bill are to be understood by reference to the Purpose of the Local Government Act (s3) and the principles that underpin the Act, together with the principle of the public trust (interest) upon which representative government is based.

Chapter 1 section 3, Purpose of the Act provides for –

- a. *“The way in which a local government is constituted and the nature and extent of its responsibilities and powers; and*
- b. *A system of local government in Queensland that is accountable, effective and sustainable.”*

Local Government Principles underpin the Act (section 4) provides -

(1) *“To ensure the system of local government is accountable effective and sustainable, Parliament requires –*

- a. *anyone who is performing a responsibility under this Act to do so in accordance with the local government principles; and*
- b. *any action taken under this Act to be taken in a way that*
 - (i) *is consistent with the local government principles; and*
 - (ii) *provides results that are consistent with the local government principles ...*

A fundamental principle of the Act section 4(2)(a) provides for **“Transparent *and effective processes, and decision making in the public interest;*”** (Emphasis and underlining added)

The Public Interest- underpins the Act and is a concept fundamental to the system of democratic government and public administration. The obligations and responsibilities of members of Parliament [obligations that equally apply to local government councillors] have been generally considered by the High Court in Days case.³ Public interest is focused on the constituents and relates to the interests of members of the community.

The term public interest and the concept of a breach of the trust provides a discretion to decision makers when assessing conduct. Not every alleged contravention of the Act will result in findings of misconduct and breach of the public trust. An assessment of whether the conduct was or was not undertaken in the public interest (the principle of the public trust), will depend on the assessment of the circumstances of each case.⁴

Tribunal Recommendation - Definition of Misconduct

The fundamental principle of upholding the public trust by elected officials remain in the definition of misconduct s150L(1)(b)(i); or alternatively

Section 150L(1)(b)(i) of the Bill be amended to read -

‘Non–compliance with this Act or another Act; and non–compliance with the local government principles in this Act by a councillor.’

³ Re Day [No 2] [2017] HCA 14.”

⁴ McKinnon v Secretary Department Treasury [2005] FCA FC 142 per Tamberlin at 245.

(2) The Bill amends section 150AM – Constitution of the Tribunal

Amendment s150AM (a) introduces One Member Panels-

The current provision provides - *“for the hearing of a matter about the conduct of a councillor at least two (2), but not more than three members of the Tribunal chosen by the President”*.

The amendment deletes the requirement for a minimum of two members to hear misconduct matters. The deletion of this provision in effect means that any misconduct matter can be heard by one member only.

It is the current practice of the Tribunal for non-contested matters to be heard by two members, with up to three members for disputed matters.

The Tribunal Practice Direction for Expedited (non-contested) Hearings was published in July 2022. Five non-contested applications were filed and each matter was heard and determined by two Tribunal members between July 2022 and July 2023. (See attached Table A- Tribunal case numbers).

Although the Tribunal supports in principle the constitution of one member Panels, this support extends to non-contested hearings and only in circumstances where a second member is not available to participate.

The Tribunal acknowledges the SDRIC recommendation (8), and the stated intention for one member panels for non-contested matters to speed up the processing of misconduct matters. However, the provision in the Bill permits any misconduct matter (minor or complex) to be conducted by one Tribunal member only.

The Tribunal considers this is not conducive to a thorough consideration of the evidence and circumstances of each matter and to requirement to provide natural justice to the parties during the hearing process. A balanced and shared decision-making process by 2-3 Tribunal members all having a variety of skills and professional experience, for example, members with previous administrative and disciplinary Tribunal decision-making experience, or with extensive local government and senior management experience or extensive advocacy experience, promotes a fair and impartial process and outcome for both the councillor and the applicant.

The proposal to allocate only one member to hear contested and complex hearings is not supported by the Tribunal. The appointment of sufficient numbers of Tribunal members together with the provision of Tribunal office accommodation is the preferable and practical solution to address the backlog of misconduct cases.

The Tribunal supports a one-member panel process for Expedited or non-contested hearings only and only in circumstances where a second member is not available.

Section 150AM(a) as drafted appears to remove the existing minimum requirement for “at least two members” to conduct hearings and it can be interpreted to mean that all matters, contested or non-contested, may be conducted by one Tribunal.

Tribunal Recommendation

The Tribunal does not support the new provision as amended by the Bill as a way of clearing the backlog of cases or speeding up the misconduct hearing process.

The Tribunal proposes the provision be re-drafted to read -

150AM(a) *'for hearing a non-contested matter about the conduct of a councillor one or two members; and for hearing contested misconduct matters – 'at least 2 members, but not more than 3 members chosen by the President'*

(3) New provision s150 AKA- withdrawal of matters at any time the from the Tribunal

The provision reads - **Withdrawing application -**

s150AKA(1) *'The assessor may at any time before the application has been decided, withdraw the application, in whole or in part, [from the Councillor Conduct Tribunal] if the assessor is satisfied the withdrawal is in the public interest.'*

The Tribunal's jurisdiction is triggered when the assessor files the misconduct application. Before this application can be filed the assessor is required to have made a public interest assessment.

The Tribunal hearing process commences and costs are incurred once the Tribunal panel is constituted. The assessor becomes a party to the process upon filing the application. Considerable progress towards hearing and deciding the matter may have occurred before the assessor decides to withdraw the matter on public interest grounds following this second and later assessment.

In such circumstances it would be appropriate and in the interests of transparency, accountability and in the public interest for the assessor as a party to the Tribunal proceedings to request by written application the matter be withdrawn or dismissed by the Tribunal.

Section 150DU Costs considerations – new provision 150AKA does not address the issue of costs required to be recovered from the Council for misconduct matters withdrawn or dismissed in the public interest. By section 150DU these costs remain recoverable.

Tribunal Recommendation s150AKA

The Tribunal proposes that a matter may be withdrawn or dismissed by the Tribunal in the public interest upon the receipt of an application with reasons filed by the assessor.

The Tribunal proposes that the provision in the Bill be amended to grant the Tribunal power to dismiss /withdraw a matter in the public interest.

The Tribunal partially supports recommendation 12 by the SDRIC Report *"that the Councillor Conduct Tribunal can decide to discontinue a matter in the public interest."*

Yours sincerely



June Anstee
President
Councillor Conduct Tribunal

Encl (1)

TABLE A

COUNCILLOR CONDUCT TRIBUNAL (CCT)

**TOTAL MATTERS REFERRED TO CCT
3 DECEMBER 2018 TO 27 September 2023**

Total received	174
Misconduct matters (inc Expedited applications)	137 (5)
Inappropriate conduct investigations	37

PROGRESS MISCONDUCT APPLICATIONS and INAPPROPRIATE CONDUCT INVESTIGATIONS

Total Misconduct and Inappropriate conduct matters finalised – 123

Misconduct		Inappropriate conduct	
Finalised	86	Investigations finalised	37
Expedited apps received & finalised	5		
In progress/pending decision	9	In progress	0
Matters unallocated (includes 1 suspended /Court of Appeal)	42	Matters unallocated	0

Pending decisions – other jurisdictions	
<ul style="list-style-type: none">• Court of Appeal Supreme Court.• Judicial Review of app misconduct filed with CCT• QCAT Merits review applications	1 1 16