



Local Government (Councillor Complaints) and Other Legislation Amendment Bill 2018

**Report No. 5, 56th Parliament
Economics and Governance Committee
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Economics and Governance Committee

Chair	Mr Linus Power MP, Member for Logan
Deputy Chair	Mr Ray Stevens MP, Member for Mermaid Beach
Members	Ms Nikki Boyd MP, Member for Pine Rivers Mr Sam O'Connor MP, Member for Bonney Mr Dan Purdie MP, Member for Ninderry Ms Kim Richards MP, Member for Redlands

Committee Secretariat

Telephone	+61 7 3553 6637
Fax	+61 7 3553 6699
Email	egc@parliament.qld.gov.au
Technical Scrutiny Secretariat	+61 7 3553 6601
Committee webpage	www.parliament.qld.gov.au/egc

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Contents

Abbreviations	iii
Chair's foreword	v
Recommendations	vi
1 Introduction	1
1.1 Role of the committee	1
1.2 Inquiry process	1
1.3 Policy objectives of the Bill	1
1.4 Government consultation on the Bill	2
1.5 Should the Bill be passed?	2
2 Background to the Bill	3
2.1 Local government and standards of conduct	3
2.2 Existing councillor complaints framework	3
2.2.1 Categories of conduct	3
2.2.2 Making a complaint	4
2.2.3 Preliminary assessment	5
2.2.4 Disciplinary action	5
2.2.5 Inappropriate conduct in a meeting	6
2.2.6 Appeals	7
2.2.7 Overview of the key roles in the current councillor complaints framework	7
2.3 Councillor Complaints Review	8
3 Examination of the Bill	9
3.1 Key roles and functions in the new councillor complaints framework	9
3.1.1 Independent Assessor	9
3.1.2 Investigators	10
3.1.3 Councillor Conduct Tribunal	11
3.1.4 Local Government Remuneration Commission	13
3.2 Codes, procedures and policies	15
3.2.1 Code of conduct	15
3.2.2 Meeting procedures	16
3.2.3 Investigation policy	16
3.3 Categories of conduct	16
3.3.1 Unsuitable meeting conduct	16
3.3.2 Inappropriate conduct	17
3.3.3 Misconduct	20
3.4 Making a complaint	22
3.4.1 Notifying the Assessor of particular conduct	24
3.5 Preliminary investigation by the Assessor	25
3.5.1 Decision to dismiss or take no further action	27
3.5.2 Decision to refer suspected inappropriate conduct	29
3.5.3 Decision to make application to the CCT	30

3.6	Council investigation and decision regarding inappropriate conduct	30
3.7	CCT hearing and decision regarding misconduct	35
3.8	Councillor conduct register	37
3.9	Investigation powers	38
3.10	Offences	38
3.10.1	Secrecy	38
3.10.2	Improper complaints	40
3.10.3	Protection from reprisal	41
3.11	Reviews and appeals	42
3.12	Administrative, technical and clarifying amendments	45
4	Compliance with the <i>Legislative Standards Act 1992</i>	46
4.1	Fundamental legislative principles (FLP)	46
4.1.1	Rights and liberties of individuals	46
4.1.2	Institution of Parliament	53
4.2	Explanatory notes	54
Appendix A – Submitters		55
Appendix B – Witnesses at public briefing and public hearing		56
Appendix C – Recommendations from Councillor Complaints Report		57
Appendix D – Offences under the Bill		64

Abbreviations

Bill	Local Government (Councillor Complaints) and Other Legislation Amendment Bill 2018
BCC	Brisbane City Council
BCC-CCRP	Brisbane City Council - Councillor Conduct Review Panel
Belcarra Report	Crime and Corruption Commission's Report ' <i>Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government</i> '
CC Act	<i>Crime and Corruption Act 2001</i>
CCC	Crime and Corruption Commission
CCT	Councillor Conduct Tribunal
CEO	chief executive officer of a council
chief executive	chief executive of the Department of Local Government, Racing and Multicultural Affairs
COB Act	<i>City of Brisbane Act 2010</i>
code of conduct	code of conduct prescribed by the Local Government (Councillor Complaints) and Other Legislation Amendment Bill 2018
committee	Economics and Governance Committee
council	an elected body responsible for the good rule and local government of its prescribed local government area
councillor	a member of the council, including the mayor
Councillor Complaints Report	Independent Councillor Complaints Review Panel's Report ' <i>Councillor Complaints Review: A fair, effective and efficient framework</i> '
council meeting	a meeting of the council or its committees
department	Department of Local Government, Racing and Multicultural Affairs
FLP	fundamental legislative principle
Gecko	Gecko Environment Council Association Inc
ICCRP	Independent Councillor Conduct Review Panel
LACSC	former Legal Affairs and Community Safety Committee
LG Act	<i>Local Government Act 2009</i>
LGAQ	Local Government Association of Queensland
LGCC	Local Government Change Commission
LGMAQ	Local Government Managers Association Queensland Inc
LGRDT	Local Government Remuneration and Discipline Tribunal
LS Act	<i>Legislative Standards Act 1992</i>

QCAT	Queensland Civil and Administrative Tribunal
QLS	Queensland Law Society
RCRP	Regional Conduct Review Panel

Chair's foreword

This report presents a summary of the Economics and Governance Committee's examination of the Local Government (Councillor Complaints) and Other Legislation Amendment Bill 2018.

The committee's task was to consider the policy to be achieved by the legislation and the application of fundamental legislative principles – that is, to consider whether the Bill has sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

On behalf of the committee, I thank those organisations who made written submissions. I also thank our Parliamentary Service staff and the Department of Local Government, Racing and Multicultural Affairs for their assistance.

I commend this report to the House.



Linus Power MP
Chair

Recommendations

Recommendation 1 2

The committee recommends the Local Government (Councillor Complaints) and Other Legislation Amendment Bill 2018 be passed.

Recommendation 2 14

The committee recommends the Bill be amended to provide that:

- the Councillor Conduct Tribunal must be constituted by at least two members for the purpose of conducting a hearing about whether a councillor has engaged in misconduct
- the Local Government Remuneration Commission must be constituted by at least two commissioners for the purpose of making decisions establishing the categories of councils, determining which category each council belongs to and the maximum amount of remuneration payable to councillors in each category.

1 Introduction

1.1 Role of the committee

The Economics and Governance Committee (the committee) is a portfolio committee of the Legislative Assembly.¹ The committee's areas of portfolio responsibility are:

- Premier and Cabinet, and Trade
- Treasury, and Aboriginal and Torres Strait Islander Partnerships, and
- Local Government, Racing and Multicultural Affairs.²

The committee is responsible for examining each bill in its portfolio areas to consider the policy to be given effect by the legislation and the application of fundamental legislative principles.³

1.2 Inquiry process

The Local Government (Councillor Complaints) and Other Legislation Amendment Bill 2018 (the Bill) was introduced into the Legislative Assembly and referred to the committee on 15 February 2018. The committee was required to report to the Legislative Assembly by 9 April 2018.

A previous version of the Bill was introduced into the 55th Parliament on 10 October 2017, and referred to the former Legal Affairs and Community Safety Committee (LACSC). The former LACSC had not completed its inquiry into the 2017 version of the Bill when the Parliament was dissolved on 29 October 2017. The 2017 Bill lapsed when the 55th Parliament was dissolved.

The Department of Local Government, Racing and Multicultural Affairs (the department) advised the committee that 'only minor drafting amendments have been made by the Office of the Queensland Parliamentary Counsel to the Bill since the 2017 Bill was introduced last year'.⁴

During its examination of the Bill, the committee:

- invited written submissions from the public, identified stakeholders and subscribers; a list of the 12 submissions received and accepted by the committee is at **Appendix A**
- received a public briefing from the department on 5 March 2018; a list of witnesses who appeared at the briefing is at **Appendix B**
- held a public hearing on 19 March 2018; a list of witnesses who appeared at the hearing is at **Appendix B**, and
- requested and received written advice from the department on the Bill and issues raised in submissions.

Copies of the material published in relation to the committee's inquiry, including submissions, correspondence from the department and transcripts are available on the committee's webpage.

1.3 Policy objectives of the Bill

The primary objective of the Bill is to implement the Government's response to the Independent Councillor Complaints Review Panel's Report *Councillor Complaints Review: A fair, effective and efficient framework* (the Councillor Complaints Report) by amending the *Local Government Act 2009* (LG Act) and the *Public Service Act 2008* to provide for a 'simpler, more streamlined system for making, investigating and determining complaints about councillor conduct in Queensland'.⁵

¹ The committee was established on 15 February 2018 under the *Parliament of Queensland Act 2001* (POQA) section 88 and the Standing Rules and Orders of the Legislative Assembly (Standing Orders), SO 194.

² POQA, s 88; Standing Orders, SO 194, sch 6.

³ POQA, s 93(1).

⁴ Department, Briefing for the Economics and Governance Committee, p 15.

⁵ Explanatory notes, p 1.

1.4 Government consultation on the Bill

The explanatory notes state that consultation on a draft Bill was undertaken with the Local Government Association of Queensland (LGAQ), Local Government Managers Australia Queensland Inc (LGMAQ), the Queensland Civil and Administrative Tribunal (QCAT) and the Crime and Corruption Commission (CCC).⁶

The explanatory notes indicate the LGMAQ supported the amendments, particularly those removing the councils' chief executive officers (CEO) from the process of deciding councillor conduct complaints, and that the LGAQ supported the intent of the amendments, although 'it reserved its position about the definition and disciplinary process for unsuitable meeting conduct until the code of conduct and the model procedures are made'.⁷

1.5 Should the Bill be passed?

Standing Order 132(1) requires the committee to determine whether or not to recommend that the Bill be passed.

After examination of the Bill, including the policy objectives it is intended to achieve, and consideration of the information provided by the department, submitters and witnesses, the committee recommends that the Bill be passed.

Recommendation 1

The committee recommends the Local Government (Councillor Complaints) and Other Legislation Amendment Bill 2018 be passed.

⁶ Explanatory notes, p 3.

⁷ Explanatory notes, p 34.

2 Background to the Bill

2.1 Local government and standards of conduct

In Queensland, local government is established and governed principally by the LG Act and the *City of Brisbane Act 2010* (COB Act). The LG Act defines a local government (council) as an elected body responsible for the good rule and local government of its prescribed local government area, and empowers councils to do anything necessary or convenient to fulfil that responsibility.⁸ The COB Act has similar provisions for the good rule and local government of Brisbane.⁹

Under the LG Act and COB Act, councillors must represent the current and future interests of the residents of the council area, and ‘must serve the overall public interest of the whole local government area’ when performing a responsibility.¹⁰ The Independent Councillor Complaints Review Panel (ICCRP) stated:

*Councillors hold positions of authority that have significant potential to influence the wellbeing of their local government area. How they conduct themselves, and how they are seen to behave, matters to both their own constituents and the local government sector as a whole.*¹¹

The LG Act and COB Act establish standards of conduct expected of councillors through a range of provisions such as:

- *local government principles*, including transparent and effective processes and decision-making in the public interest, and ethical and legal behaviour of councillors¹²
- *councillor responsibilities*, including providing high quality leadership to the council and community, participating in council meetings and decision-making for the benefit of the local government area and being accountable to the community for the council’s performance¹³
- *councillor obligations*, including the proper use and protection of ‘insider’ information, maintaining a correct register of interests and declaring and dealing with material personal interests and conflicts of interests,¹⁴ and
- *councillor conduct and performance*, including dealing with alleged inappropriate conduct, misconduct and corrupt conduct by councillors.¹⁵

There is no statutory code of conduct for councillors in Queensland. However, the Brisbane City Council (BCC) voluntarily maintains a code of conduct for councillors carrying out official duties.¹⁶

2.2 Existing councillor complaints framework

The LG Act and COB Act provide the current framework for complaints about councillors’ conduct.

2.2.1 Categories of conduct

There are currently three categories of conduct that may result in disciplinary action for councillors; inappropriate conduct, misconduct and corrupt conduct.

⁸ LG Act, ss 8 and 9; ICCRP, *Councillor Complaints Report*, January 2017, p 18.

⁹ COB Act, ss 9 and 11.

¹⁰ LG Act, s 12; COB Act, s 14.

¹¹ ICCRP, *Discussion Paper*, August 2016, p 7.

¹² LG Act, s 4; COB Act, s 4.

¹³ LG Act, s 12; COB Act, s 14.

The mayor has extra responsibilities such as leading and managing council meetings including the conduct of participants, directing the chief executive officer and representing the council at functions.

¹⁴ LG Act, ss 169-173; COB Act, ss 169-175.

¹⁵ LG Act, Chapter 6, Division 6; COB Act, Chapter 6, Division 6.

¹⁶ ICCRP, *Discussion Paper*, August 2016, p 10.

Inappropriate conduct is broadly defined as behaviour that is ‘not appropriate conduct ... but is not misconduct’.¹⁷ Examples include, failing to comply with a council’s procedures, or behaving in an offensive or disorderly way in a council meeting.¹⁸

Misconduct is defined as councillor conduct, or a conspiracy or attempt to engage in conduct, that:

- adversely affects, or could adversely affect, the honest and impartial exercise of power or performance of responsibilities
- involves exercising power or performing responsibilities in a way that is not honest or impartial
- involves a breach of the trust placed in a councillor, or a misuse of information acquired in discharging their responsibilities
- involves failing to comply with a direction to leave a meeting or refusing to comply with a direction or order of a Regional Conduct Review Panel (RCRP) or the Local Government Remuneration and Discipline Tribunal (LGRDT)
- is a repeat of inappropriate conduct that was ordered be referred to an RCRP, or
- constitutes a failure to declare or deal with a conflict of interest in a council meeting.¹⁹

Corrupt conduct is relevantly defined as conduct that adversely affects the performance of functions or exercise of powers of a councillor or a council in circumstances where the conduct:

- results in the performance of functions or exercise of power in a way that is not honest and impartial, involves a breach of trust placed in the councillor or a misuse of information
- is engaged in for the purpose of providing a benefit or causing a detriment to a person,²⁰ and
- would either be a criminal offence,²¹ or a disciplinary breach providing grounds for dismissal.²²

As there is not a prescribed disciplinary standard under the LG Act for dismissing a councillor (dismissal is a discretionary matter for the Minister and Governor in Council), corrupt conduct for the purpose of investigation by the CCC is restricted to conduct that would amount to a criminal offence.²³

2.2.2 Making a complaint

Under the LG Act and COB Act, any person may lodge a complaint about councillor conduct to the council, the department or the CCC. The legislation does not prescribe a particular format for complaints or require the provision of supporting evidence. Complaints may be made anonymously.²⁴

Timeframes

There is no prescribed time within which a complaint must be made, however a complaint may only be made about a former councillor if it is made within two years after they stopped being a councillor.²⁵

There is also no prescribed time within which a complaint must be dealt with.

¹⁷ LG Act, s 176(4); COB Act, s 178(4).

¹⁸ LG Act, s 176.

¹⁹ LG Act, s 176(3); COB Act, s 178(3).

²⁰ The committee notes the Crime and Corruption and Other Legislation Amendment Bill 2018 proposes to remove the requirement that conduct must have been engaged in for the purpose of providing a benefit or causing a detriment.

²¹ A criminal offence includes a simple offence such as a breach of the offence provisions of the LG Act.

²² *Crime and Corruption Act 2001*, ss 15, 20, 21; ICCRP, *Discussion Paper*, August 2016, p 13.

²³ ICCRP, *Discussion Paper*, August 2016, p 13.

²⁴ LG Act, s 176B; COB Act, s 179; ICCRP, *Councillor Complaints Report*, January 2017, p 21.

²⁵ LG Act, s 176A; COB Act, s 178A; ICCRP, *Councillor Complaints Report*, January 2017, p 21.

2.2.3 Preliminary assessment

On receipt of a complaint a preliminary assessment is undertaken to decide whether the complaint is about a frivolous matter, was made vexatiously or is lacking in substance, or is about inappropriate conduct, misconduct, corrupt conduct or another matter. A preliminary assessment is generally undertaken by the CEO. However, if the complaint is about the mayor or deputy mayor, or is made by the mayor or CEO, the preliminary assessment is undertaken by the chief executive of the department (the chief executive).²⁶

If the preliminary assessment concludes that the complaint is about a frivolous matter, was made vexatiously or is lacking in substance, the complaint will not proceed. If the assessment concludes that the complaint has substance it is referred for further action:

- if the complaint is about inappropriate conduct, it is referred to the mayor for disciplinary action (if the complaint is about the mayor or deputy mayor, or was made by the mayor or CEO it is dealt with by the chief executive)²⁷
- if the complaint is about misconduct, it is referred to the chief executive if the preliminary assessment was done by the CEO, or the RCRP or LGRDT if the assessment was done by the chief executive²⁸
- if there is a reasonable suspicion of corrupt conduct, the matter is referred to the CCC.²⁹

After making a preliminary assessment decision a written notice must be given to the complainant and the councillor who is the subject of the complaint. The notice must state the type of complaint or conduct the assessor has determined the complaint to be and the action proposed to be taken. If the preliminary assessment concludes the complaint is about a frivolous matter, was made vexatiously or is lacking in substance, the notice must include a statement that it is an offence, punishable by a fine of up to \$1,261 (10 penalty units), to make another complaint that is substantially the same.³⁰

2.2.4 Disciplinary action

Inappropriate conduct

Where a preliminary assessment determines the conduct complained of is inappropriate conduct, the mayor is responsible for making a decision about any action required. However, where the complaint involves the inappropriate conduct of the mayor or deputy mayor, or the complaint was made by the mayor or the CEO, the chief executive is responsible for deciding what action is required.³¹

The mayor or chief executive may make an order reprimanding the councillor and/or an order that any repeat of the conduct will be treated as misconduct and referred to an RCRP.³² If the mayor or chief executive makes three orders about the same councillor within one year, the repeated conduct must be referred to an RCRP or the LGRDT.³³

Where inappropriate conduct is about a BCC councillor, the complaint is referred to the Brisbane City Council - Councillor Conduct Review Panel (BCC-CCRP).³⁴

²⁶ LG Act, s 176B; COB Act, s 179.

²⁷ If the complaint is about a BCC councillor it is referred to the BCC - CCRP: COB Act s 180(3).

²⁸ If the complaint is about a BCC councillor it is referred to the BCC - CCRP.

²⁹ LG Act, s 176C; COB Act, s 180; ICCRP, *Councillor Complaints Report*, January 2017, pp 21-22.

³⁰ LG Act, s 176C(7); COB Act, s 180 (6). A penalty unit has a value of \$126.15: Penalties and Sentences Regulation 2015, s 3.

³¹ LG Act, s 176C(3).

³² LG Act, s 181(2).

³³ LG Act, s 181(3).

³⁴ COB Act, s 180(3).

Misconduct

Where a preliminary assessment determines the conduct complained of is misconduct, the matter is referred to the chief executive, who may:

- decide that, despite the preliminary assessment, the complaint should be dismissed because it is frivolous, vexatious, misconceived, lacking in substance or otherwise an abuse of process, is about inappropriate conduct rather than misconduct, or that no further action be taken in relation to the complaint, or
- agree the conduct is misconduct and refer the complaint to an RCRP or the LGRDT.

The chief executive must give written notice of the decision or referral to an RCRP or the LGRDT to the complainant, the CEO and the councillor who is the subject of the complaint.³⁵

Where a matter involving misconduct is referred to an RCRP or the LGRDT, at least seven days before the hearing the chief executive must give the councillor a written notice about the hearing. The notice must state the alleged misconduct and the date, time and place of the hearing.³⁶

If at the hearing it is decided the councillor engaged in misconduct, an RCRP (or BCC-CCRP) may order that the councillor make an admission of error or an apology, be counselled about the misconduct and how not to repeat it, participate in mediation, reimburse the council, and/or pay the council up to \$6,307 (50 penalty units).³⁷ An RCRP (or BCC-CCRP) may also recommend that the chief executive monitor the councillor or the council, or that the CCC or police commissioner investigate the conduct further. If an RCRP considers more serious disciplinary action should be taken, the RCRP must report the matter to the LGRDT for it to take disciplinary action.³⁸

The LGRDT can make any order or recommendation it considers appropriate. For example, in addition to the orders or recommendations that may be made by an RCRP, the LGRDT may order that the councillor forfeit an allowance, benefit, payment or privilege, or recommend to the Minister that the councillor be suspended from performing particular functions or be dismissed.³⁹

Corrupt conduct

Where a preliminary assessment concludes that the complaint is about corrupt conduct the complaint is referred to the CCC, which may decide to take action or to refer it to the department. The department may consider prosecution through the courts, or in less serious cases refer the matter to an RCRP or the LGRDT.⁴⁰

2.2.5 Inappropriate conduct in a meeting

If a councillor engages in inappropriate conduct in a meeting of the council or a council committee meeting (referred to collectively as a council meeting in this report), the chairperson may make an order that the councillor's conduct be noted in the minutes and/or that the councillor leave and stay away for the rest of the meeting. If the councillor fails to comply with an order to leave and stay away, the chairperson may make an order that the councillor be removed.⁴¹

³⁵ LG Act, s 177.

³⁶ LG Act, s 178; COB Act, s 181.

³⁷ A penalty unit has a value of \$126.15: Penalties and Sentences Regulation 2015, s 3.

³⁸ LG Act, s 180(2), (3).

Where the conduct is about a BCC councillor, the BCC-CCRP may also make a recommendation to the Minister that the councillor be suspended (COB Act, s 183(2)(f)), matters relating to BCC councillors are not referred to the LGRDT.

³⁹ LG Act, s 180(4), (5).

⁴⁰ LG Act, s 176C(5); ICCRP, *Councillor Complaints Report*, January 2017, p 23.

⁴¹ LG Act, s 181(5).

2.2.6 Appeals

A decision about a councillor's conduct 'cannot be appealed against, challenged, reviewed, quashed, set aside, or called into question in any way', including under the *Judicial Review Act 1991*.⁴²

2.2.7 Overview of the key roles in the current councillor complaints framework

CEO - The CEO undertakes a preliminary assessment of all complaints relating to councillor conduct, unless the complaint is about the mayor or deputy mayor, or is made by the mayor or CEO.⁴³

Mayor - The mayor (excluding the Lord Mayor) decides what, if any, disciplinary action is required where the councillor conduct complained of is inappropriate conduct.⁴⁴

Chief executive - The chief executive undertakes a preliminary assessment of all complaints about the mayor or deputy mayor and complaints made by the mayor or CEO. The chief executive also decides what action is required where the CEO makes a preliminary assessment that conduct is misconduct; if they agree the conduct is misconduct the complaint is referred to an RCRP or the LGRDT.⁴⁵

RCRP and LGRDT - An RCRP hears and decides most complaints about misconduct by councillors.⁴⁶ The LGRDT hears and decides the most serious complaints of misconduct, and is also responsible for establishing categories of councils, and deciding which category each council belongs to and the maximum amount of remuneration payable to councillors in each category.⁴⁷

BCC-CCRP - The BCC-CCRP hears and decides complaints about inappropriate conduct and misconduct by BCC councillors.⁴⁸

Minister - The Minister may recommend to the Governor in Council that a councillor be suspended or dismissed if the LGRDT makes such a recommendation, or the Minister reasonably believes the councillor has seriously or continuously breached the local government principles or is incapable of performing their responsibilities. The Governor in Council may give effect to the Minister's recommendation under a regulation.⁴⁹

CCC - The CCC has jurisdiction to investigate suspected corrupt conduct where the alleged conduct would amount to a criminal offence; allegations involving a reasonable suspicion of corrupt conduct by councillors must be referred to the CCC.⁵⁰

Queensland Ombudsman - The Queensland Ombudsman may investigate administrative action taken by councils and the department, including how they deal with complaints.⁵¹ The Ombudsman is not authorised to investigate councillor conduct or administrative action taken by an RCRP or the LGRDT including any disciplinary orders made.⁵²

⁴² LG Act, ss 176(9), 244; COB Act, ss 178(8), 226.

⁴³ LG Act, s 176B; COB Act, s 179.

⁴⁴ LG Act, s 176C.

Decisions about disciplinary action for inappropriate conduct by a BCC councillor are made by the BCC-CCRP.

⁴⁵ LG Act, s 177.

⁴⁶ LG Act, ss 176(6), 189.

⁴⁷ LG Act, ss 176(7), 183.

⁴⁸ COB Act, s 178, 187.

⁴⁹ LG Act, s 122; ICCRP, *Councillor Complaints Report*, January 2017, pp 23-24.

These powers were used in February 2018 to dismiss Councillor Chris Loft as Mayor of the Fraser Coast Regional Council (Local Government (Fraser Coast Regional Council—Dismissal of Councillor) Amendment Regulation 2018).

⁵⁰ CC Act, ss 15, 21; ICCRP, *Discussion Paper*, August 2016, pp 13, 23.

⁵¹ *Ombudsman Act 2001* s 14; ICCPR, *Councillor Complaints Report*, January 2017, p 23.

⁵² *Ombudsman Act 2001* s 16(2); ICCPR, *Councillor Complaints Report*, January 2017, p 23.

2.3 Councillor Complaints Review

In April 2016 an independent panel was appointed to review the arrangements for dealing with complaints about the conduct of councillors, and to recommend ‘policy, legislative and operational changes to achieve better results’.⁵³

The review was initiated in response to concerns raised by the LGAQ and LGMAQ about the effectiveness of the existing councillor complaints framework, including concerns about the inability to seek a review of decisions, the need to better ensure natural justice for all parties, and the potentially conflicted role of the CEO in the complaints process.⁵⁴

The independent panel examined the councillor complaints provisions under the LG Act and COB Act.⁵⁵

During the review process the panel:

- sought preliminary input from all councils, the LGAQ, LGMAQ, CCC, Auditor-General, Queensland Ombudsman and Integrity Commissioner; twenty-two submissions were received
- released the *Discussion paper: Issues and options for Queensland's councillor conduct complaints policy, legislation and operations* (the Discussion Paper), seeking submissions on options for improving the system; 115 formal submissions were received from stakeholders including councils, councillors, community groups and members of the public
- held meetings with key stakeholders to discuss the operation of the current system and options for how it could be improved, and
- held a seminar at the 2016 LGAQ Annual Conference.⁵⁶

The independent panel provided its report, the Councillor Complaints Report, on 31 January 2017. The report made 60 recommendations (see **Appendix C**).

The Government response, developed in consultation with the LGAQ and LGMAQ, supports, partially supports or supports in principle 50 of the recommendations.⁵⁷ The Bill gives effect to the government's response to the Councillor Complaints Report.⁵⁸

While the Councillor Complaints Report recommended amendments be made to both the LG Act and the COB Act,⁵⁹ the Bill amends only the LG Act. In introducing the Bill the Minister for Local Government, Minister for Racing and Minister for Multicultural Affairs, Hon Stirling Hinchliffe MP, stated:

*At this time, amendments are not proposed to the City of Brisbane Act 2010... The government will review the new framework for dealing with councillor conduct within six months of its commencement to determine whether the Brisbane City Council would benefit from adopting the new system.*⁶⁰

⁵³ ICCRP, *Discussion Paper*, August 2016, p 5.

⁵⁴ Department, correspondence dated 26 February 2018, *Briefing for the Economics and Governance Committee: Local Government (Councillor Complaints) and Other Legislation Amendment Bill 2018*, p 1.

⁵⁵ Explanatory notes, p 1.

⁵⁶ ICCPR, *Councillor Complaints Report*, January 2017, p 25.

⁵⁷ Queensland Government, *Queensland Government response to the report by the independent councillor complaints review panel, 'Councillor Complaints Review: A fair, effective and efficient framework'* (Response to Councillor Complaints Report), January 2017.

⁵⁸ Explanatory notes, p 1.

⁵⁹ ICCPR, *Councillor Complaints Report*, January 2017, p 92 (recommendation 12.12).

⁶⁰ Record of Proceedings, 15 February 2018, p 145.

3 Examination of the Bill

3.1 Key roles and functions in the new councillor complaints framework

3.1.1 Independent Assessor

The Bill provides for the establishment of an Independent Assessor (the Assessor), appointed by the Governor in Council for a term of up to five years.⁶¹ To be appointed as the Assessor a person must have extensive knowledge of, and experience in, local government, investigations, law, public administration or public sector ethics.⁶²

To decide if a person is qualified to be the Assessor, the Bill allows the Minister to obtain a criminal history report. If the Assessor is convicted of an indictable offence during their appointment they must give notice of the conviction to the Minister.⁶³ The requirements regarding criminal history reports and conviction notices are discussed in detail in chapter 4 of this report.

The functions of the Assessor include:

- investigating and dealing with alleged inappropriate conduct and misconduct, and corrupt conduct matters referred by the CCC
- providing advice, training and information to councillors, council employees and others about dealing with alleged inappropriate conduct, misconduct or corrupt conduct
- prosecuting conduct offences
- performing other functions under the Act, and
- investigating other matters decided by the Minister.⁶⁴

The Assessor is not subject to another's direction about the way they exercise their powers to conduct an investigation or the priority given to investigations.⁶⁵

If the Assessor has an interest that may conflict with the fair and impartial investigation of a councillor's conduct, the Assessor must not take part, or must cease taking part, in considering the matter. As soon as practicable after they become aware they have a conflict of interest the Assessor must advise the Minister, who must then nominate another person to act as the Assessor in relation to the matter. The Assessor taking part in an investigation in which they have a conflict of interest, or failing to advise the Minister of a conflict of interest, is an offence punishable by up to \$4,415 (35 penalty units).⁶⁶ The penalties for conflict of interest offences are discussed in detail in chapter 4 of this report.

The Bill also establishes an Office of the Independent Assessor (OIA) to assist the Assessor to perform their functions.⁶⁷ The Assessor is required to prepare an annual report about the operation of the OIA, which must be given to the Minister by 30 September each year. The report must include:

- a description of the complaints made or referred to the Assessor, the investigations conducted, complaints dismissed, decisions made to take no further action, suspected corrupt conduct notified to the CCC, suspected inappropriate conduct referred to councils and decisions made by the Councillor Conduct Tribunal (CCT) about whether councillors engaged in misconduct
- details about the number of times each investigation and enforcement power was exercised, and
- details of other functions performed by the Assessor.

⁶¹ Bill, cl 12 (ss 150CT, 150CV, 150CX); Explanatory notes, p 3.

⁶² Bill, cl 12 (s 150CW).

⁶³ Bill, cl 30; Explanatory notes, p 29.

⁶⁴ Bill, cl 12 (s 150CU); Explanatory notes, p 4.

⁶⁵ Bill, cl 12 (s 150DE); Explanatory notes, p 3.

⁶⁶ Bill, cl 12 (s 150DB). A penalty unit has a value of \$126.15: Penalties and Sentences Regulation 2015, s 3.

⁶⁷ Bill, cl 12 (ss 150DG, 150DH); Explanatory notes, p 4.

Proposed new section 150EB provides that the annual report must be prepared in a way that does not disclose the identity of any councillor investigated.⁶⁸

Stakeholder views

Submitters and witnesses generally expressed support for the establishment of the Assessor and OIA.⁶⁹ For example, the CCC submitted:

*The CCC is generally supportive of the Bill's proposed model for dealing with councillor complaints, including the establishment of the Independent Assessor.*⁷⁰

Similarly, Kelvin Chin Fat representing the Moreton Bay Regional Council stated:

*You will see from our submission that we are broadly in support of the bill, particularly the role of the Independent Assessor.*⁷¹

However, it was noted by some submitters that the OIA would need to be appropriately resourced. For example, Gecko Environment Council (Gecko) recommended:

*...the Committee gives careful consideration to the budgetary implication of appointing an OIA and an Independent Commissioner as lack of adequate resourcing will impede the ability of the OIA to carry out its work.*⁷²

Committee consideration and comment

OIA annual report

The committee noted that proposed new section 150EB requires the annual report for the OIA to be prepared in a way that does not disclose the identity of any councillor investigated, but does not contain a requirement to not disclose the identity of any complainants. The committee sought advice from the department about the different protections for the identity of councillors and complainants. The department advised that:

*...for consistency with the specific protection provided in new section 150EB(3) for a person investigated, the Department supports a similar protection for complainants.*⁷³

The committee notes the department's advice and suggests that this be clarified in the Bill.

3.1.2 Investigators

The Bill provides that the Assessor may appoint appropriately qualified investigators to conduct investigations.⁷⁴ The functions of the investigators include:

- undertaking preliminary investigations of councillors' conduct
- investigating whether an offence has been committed against the conduct provisions
- investigating whether circumstances justify the exercise of the investigator's powers in relation to a conduct provision, and
- enforcing compliance with 'conduct provisions'.⁷⁵

⁶⁸ Bill, cl 12 (s 150EB); Explanatory notes, pp 20-21.

⁶⁹ See for example submissions 1, 2, 3, 5, 7, 9.

⁷⁰ Submission 5, p 1.

⁷¹ Public hearing transcript, Brisbane, 19 March 2018, p 7.

⁷² Submission 1, p 5.

⁷³ Department, correspondence dated 22 March 2018, *Response to potential policy/drafting issues raised by the Economics and Governance Committee*, p 5.

⁷⁴ Bill, cl 12 (s 150AX); Explanatory notes, p 4.

⁷⁵ Bill, cl 12 (s 150AY); Explanatory notes, pp 4-5.

'Conduct provisions' include making a frivolous or otherwise improper complaint, taking detrimental action in reprisal for a complaint or notification, failing to disclose a material personal interest during a council meeting, obstructing or impersonating the Assessor, an investigator or a member of the CCT, using information obtained as a councillor to gain a financial advantage, failing to comply with a requirement to help an investigator, and providing false or misleading information to the Assessor, staff at the OIA, an investigator or a member of the CCT.⁷⁶

3.1.3 Councillor Conduct Tribunal

The Bill provides for the establishment of the CCT.⁷⁷ The members of the CCT are the president and casual members, appointed by the Governor in Council for a term of up to four years. The Governor in Council may appoint as many casual members as it considers appropriate.⁷⁸

To be appointed as a member of the CCT a person must have extensive knowledge of, and experience in, local government, investigations, law, public administration or public sector ethics. A person may not be a member of the CCT if they:

- are a councillor, a nominee for election as a councillor or accept an appointment as a councillor
- are an employee, contractor or consultant of a council
- are a member of an Australian Parliament or a nominee for election as a member of an Australian Parliament
- are a member of a political party, or
- have a conviction for an indictable offence that has not expired, are an insolvent under administration, or are a person prescribed by regulation.⁷⁹

The Bill also allows the Minister to obtain a criminal history report for the purpose of deciding if a person is qualified to be a member of the CCT. If a member is convicted of an indictable offence during their appointment they must give notice of the conviction to the Minister.⁸⁰ Criminal history reports and conviction notices are discussed in detail in chapter 4 of this report.

The functions of the CCT are to conduct hearings about whether a councillor has engaged in misconduct, to investigate (at the request of a council) the suspected inappropriate conduct of a councillor and make recommendations about dealing with the conduct, and to perform other functions under the Act.⁸¹ The president may issue practice directions for the way hearings are conducted.⁸²

The CCT is constituted by the president or up to three members chosen by the president. The president may choose a member of the CCT to investigate the suspected inappropriate conduct of a councillor and make recommendations about dealing with the conduct.⁸³

Councils must pay the costs⁸⁴ of the CCT to conduct hearings about whether a councillor has engaged in misconduct and to investigate, at a council's request, the suspected inappropriate conduct of a councillor.⁸⁵

⁷⁶ Bill, cl 12 (s 150AY).

⁷⁷ Bill, cl 12 (s150DK); Explanatory notes p 5.

⁷⁸ Bill, cl 12 (ss 150DM, 150DN, 150DP); Explanatory notes pp 5-6.

⁷⁹ Bill, cl 12 (ss 150DO).

⁸⁰ Bill, cl 30; Explanatory notes, p 29.

⁸¹ Bill, cl 12 (s150AL, 150DL); Explanatory notes, pp 5-6.

⁸² Bill, cl 12 (s 150DV).

⁸³ Bill, cl 12 (ss 150DL(2), 150AM).

⁸⁴ Costs include the remuneration, allowances and expenses paid to a member of the CCT.

⁸⁵ Bill, cl 12 (s 150DU); Explanatory notes, p 6.

If a member of the CCT has an interest that may conflict with the fair and impartial hearing of a councillor's conduct, they must not take part, or must cease taking part, in considering the matter. As soon as practicable after they become aware they have a conflict of interest the member must advise the president (or the Minister if the president has a conflict of interest). If the president has a conflict, the Minister must nominate another a casual member to act as the president for the matter. Taking part in a hearing in which the member has a conflict of interest, or failing to advise the president (or Minister) of a conflict of interest is an offence punishable by up to \$4,415 (35 penalty units).⁸⁶ The penalties for conflict of interest offences are discussed in detail in chapter 4 of this report.

Stakeholder views

The majority of submitters and witnesses expressed general support for the new councillor complaints framework including the establishment of the CCT.⁸⁷ However, Redlands2030 raised a concern about the establishment of the CCT, submitting that the names of the CCT members 'should be disclosed to the complainant, and be publicly available', noting that currently:

*...information about membership of the Regional Conduct Panels is kept secret from complainants and the community which undermines public confidence in the councillor complaints process.*⁸⁸

Committee consideration and comment

Conflicts of interest in an investigation

The committee noted that proposed new section 150DT imposed requirements on members of the CCT in relation to interests that may conflict with the fair and impartial hearing of a councillor's conduct. However, there are no similar requirements relating to interests that may conflict with the fair and impartial investigation of suspected inappropriate conduct of a councillor.

To reflect the fact that the impartiality of the CCT is critical to maintaining public and council confidence in the new councillor complaints system, the committee is of the view that the conflict of interest requirements should also apply to a member of the CCT undertaking investigation of suspected inappropriate conduct. The committee suggests that the Minister for Local Government, Minister for Racing and Minister for Multicultural Affairs address this issue in his second reading speech.

Adjudication by a single member of the CCT

The committee noted the Bill proposes to allow the president or a single member of the CCT to conduct hearings about whether a councillor has engaged in misconduct, changing the current panel-based consideration of councillors' conduct to a sole arbitrator. The committee sought advice from the department regarding this change for how the body considering councillors' conduct is to be constituted.

The department advised:

Allowing for the CCT ... to be constituted by less than three members is consistent with the way the Local Government Change Commission is constituted

*Allowing the entities to be constituted with less than three members allows for the continuity of the entity during short term absences by members either because of leaves of absence or conflicts of interest. In addition, there may be occasions where an entity may be undertaking mainly administrative functions (such as setting a hearing date or agreeing to a potential witness list) where it may not be necessary for all members of the entity to be present to finalise.*⁸⁹

⁸⁶ Bill, cl 12 (s 150DT). A penalty unit has a value of \$126.15: Penalties and Sentences Regulation 2015, s 3.

⁸⁷ See for example submissions 1, 2, 3, 5, 7.

⁸⁸ Submission 8, p 2.

⁸⁹ Department, correspondence dated 22 March 2018, *Response to potential policy/drafting issues raised by the Economics and Governance Committee*, p 7.

The committee notes the department's advice that constituting the CCT by a single member is consistent with the Local Government Change Commission (LGCC). However, the committee understands that the LGCC and the CCT have very different functions and that unlike decisions of the CCT, assessments undertaken by the LGCC are not implemented until they are given effect by the Governor in Council.

The committee also notes the department's advice that allowing the CCT to be constituted by a single member facilitates the efficient performance of administrative functions and allows flexibility to manage member absences or conflicts of interest. While the committee acknowledges that there is little benefit in more than one member being involved in administrative functions, such as scheduling a hearing, the committee is of the view that there may be substantial benefit in retaining a panel-based approach for hearings about councillors' conduct.

Requiring hearings to be conducted by a panel of at least two members, while allowing other administrative functions to be performed by individual members, may appropriately balance efficiency considerations with the importance of maintaining public and council confidence in the decisions of the CCT. The committee notes that the Governor in Council may appoint as many casual members as it considers necessary for the performance of the functions of the CCT, which may assist with managing members for a panel-based approach.

The committee recommends the Bill be amended to provide that for the purpose of conducting a hearing about whether a councillor has engaged in misconduct the CCT must be constituted by at least two members, one of whom may be the president of the CCT. Refer to section 3.1.4 of this report for a joint recommendation regarding how the CCT and LGRC are constituted.

3.1.4 Local Government Remuneration Commission

The Bill provides for the establishment of the Local Government Remuneration Commission (LGRC),⁹⁰ comprised of the chairperson and casual commissioners, appointed by the Governor in Council for a term of up to four years. The Governor in Council may appoint as many casual commissioners as it considers appropriate.⁹¹

To be appointed as a commissioner a person must have extensive knowledge of, and experience in, local government, community affairs, industrial relations, public administration or public finance, or have other knowledge or experience the Governor in Council considers appropriate. A person may not be commissioner if they:

- are a councillor, a nominee for election as a councillor, or accept an appointment as a councillor
- are an employee, contractor or consultant of a council
- are a member of an Australian Parliament or a nominee for election as a member of an Australian Parliament
- are a member of a political party, or
- have a conviction for an indictable offence that has not expired, are an insolvent under administration, or are a person prescribed by regulation.⁹²

The Bill allows the Minister to obtain a criminal history report for the purpose of deciding if a person is qualified to be a commissioner. If a commissioner is convicted of an indictable offence during their appointment they must give notice of the conviction to the Minister.⁹³ Criminal history reports and conviction notices are discussed in detail in chapter 4 of this report.

⁹⁰ Bill, cl 18 (s 176); Explanatory notes, p 7.

⁹¹ Bill, cl 18 (ss 178, 180, 182); Explanatory notes, p 7.

⁹² Bill, cl 18 (s 181).

⁹³ Bill, cl 30; Explanatory notes, p 29.

The functions of the LGRC are to establish categories of councils and decide which category each council belongs to, decide the maximum amount of remuneration payable to councillors in each category, and other functions directed by the Minister related to the remuneration of councillors.⁹⁴

The LGRC is constituted by the chairperson or up to three commissioners chosen by the chairperson for a matter.⁹⁵

Committee consideration and comment

Decisions by a single member of the LGRC

The committee noted that the Bill proposes to allow the LGRC to be constituted for a matter by the chairperson or a single commissioner, changing the current panel-based performance of functions relating to the remuneration of councillors to a sole decision-maker. The committee sought advice from the department regarding the change for how the body considering councillors' remuneration is to be constituted. The department advised:

Allowing for ... the Local Government Remuneration Commission to be constituted by less than three members is consistent with the way the Local Government Change Commission is constituted ...

Allowing the entities to be constituted with less than three members allows for the continuity of the entity during short term absences by members either because of leaves of absence or conflicts of interest. In addition, there may be occasions where an entity may be undertaking mainly administrative functions (such as setting a hearing date or agreeing to a potential witness list) where it may not be necessary for all members of the entity to be present to finalise.⁹⁶

In relation to the constitution of the LGRC, the committee had similar views to those noted in relation to the constitution of the CCT (refer to section 3.1.3 of this report).

Consequently, while the committee notes the department's advice, the committee is of the view that there may be substantial benefit in retaining a panel-based approach for decisions establishing the categories of councils and determining which category each council belongs to and the maximum amount of remuneration payable to councillors in each category.

Requiring these decisions to be made by a panel of at least two members, while allowing other administrative functions to be performed by individual members, may appropriately balance efficiency considerations with the importance of maintaining public and council confidence in the decisions of the LGRC.

The committee recommends the Bill be amended to provide that decisions establishing the categories of councils and determining which category each council belongs to and the maximum amount of remuneration payable to councillors in each category, must be made by at least two commissioners of the LGRC.

Recommendation 2

The committee recommends the Bill be amended to provide that:

- the Councillor Conduct Tribunal must be constituted by at least two members for the purpose of conducting a hearing about whether a councillor has engaged in misconduct
- the Local Government Remuneration Commission must be constituted by at least two commissioners for the purpose of making decisions establishing the categories of councils, determining which category each council belongs to and the maximum amount of remuneration payable to councillors in each category.

⁹⁴ Bill, cl 18 (s 177); Explanatory notes, p 7.

⁹⁵ Bill, cl 18 (s 179); Explanatory notes, p 7.

⁹⁶ Department, correspondence dated 22 March 2018, *Response to potential policy/drafting issues raised by the Economics and Governance Committee*, p 7.

3.2 Codes, procedures and policies

3.2.1 Code of conduct

The Bill provides that the Minister must make a code of conduct setting out the standards of behaviour for councillors performing their functions, and including anything the Minister considers ‘necessary for, or incidental to, the standards of behaviour’.⁹⁷

The Code takes effect when it is approved by regulation. Once approved it must be tabled in the Legislative Assembly and published on the department’s website.⁹⁸

The introduction of a code of conduct for councillors implements part of recommendation 5.1 of the Councillor Complaints Report:

There should be a uniform, mandatory Code of Conduct for local government councillors in Queensland...⁹⁹

The Councillor Complaints Report also recommended that the declaration of office under the Local Government Regulation that councillors are required to make before assuming office ‘be amended to include a statement that the councillor will abide by the Code of Conduct’.¹⁰⁰

Stakeholder views

Submitters and witnesses generally expressed support for the development of a code of conduct.¹⁰¹ For example, Gecko submitted that it strongly supported a code of conduct and suggested the code ‘needs to be sufficiently rigorous to ensure fair dealings between councillors’, and should also ‘encompass a way a Councillor deals with members of the public’.¹⁰² Gecko also suggested that councillors be required to make a declaration that they will abide by the code of conduct.¹⁰³

Comparably, the Qld Local Government Reform Alliance (QLGRA) supported the development of a uniform code of conduct, to be ‘in place prior to this Bill being acted upon’, but noted:

In the interests of consistency, councils should not have the option to write their own Code of Conduct but instead all councils should operate under one set of rules to circumvent any confusion.¹⁰⁴

The department’s response to issues raised in submissions included advice that:

...changes are proposed to s254 of the Local Government Regulation 2012 to require Councillors to declare that they will abide by the Code of Conduct as part of their declaration of office.¹⁰⁵

And:

...a uniform and mandatory Code of Conduct will apply to all Local Government Councillors in Queensland (proposed new s150D) and will set consistent and very clear standards of behaviour. Subject to the Bill being passed, it is proposed the approved Code of Conduct will be in place on commencement of the new Councillor complaints system.¹⁰⁶

⁹⁷ Bill, cl 12 (s 150D); Explanatory notes, p 18.

⁹⁸ Bill, cl 12 (s 150E); Explanatory notes, p 18.

⁹⁹ ICCRP, *Councillor Complaints Report*, January 2017, p 85.

¹⁰⁰ ICCRP, *Councillor Complaints Report*, January 2017, p 85.

¹⁰¹ See for example submission 1, 4, 10.

¹⁰² Submission 1, p 5.

¹⁰³ Submission 1, p 5.

¹⁰⁴ Submission 10, p 2.

¹⁰⁵ Department, correspondence dated 16 March 2018, *Department of Local Government Racing and Multicultural Affairs’ response to submissions*, p 3.

¹⁰⁶ Department, correspondence dated 16 March 2018, *Department of Local Government Racing and Multicultural Affairs’ response to submissions*, p 13.

3.2.2 Meeting procedures

The Bill provides that the chief executive must make model procedures, published on the department's website, for the conduct of council meetings including how the chairperson may deal with unsuitable meeting conduct (refer to section 3.3.1 of this report) and how suspected inappropriate conduct of a councillor referred to the council by the Assessor (refer to section 3.3.2 of this report) must be dealt with at a council meeting.¹⁰⁷

Councils must either adopt the model procedures, or prepare and adopt other meeting procedures that are consistent with the model procedures.¹⁰⁸

The introduction of model meeting procedures implements part of recommendation 5.1 of the Councillor Complaints Report that there should be a 'model code of meeting procedure',¹⁰⁹ and broadly gives effect to recommendation 5.5 that 'Councils be required to adopt meeting standing orders, based on the model code of meeting procedure'.¹¹⁰

To allow for 'flexibility with councils of different sizes and compositions' the proposed amendments do not mandate the adoption of the model procedures and allow councils to instead adopt meeting procedures that are consistent with the model procedures.¹¹¹

3.2.3 Investigation policy

The Bill requires councils to adopt an investigation policy, published on the council's website, about how they deal with suspected inappropriate conduct of a councillor referred to the council by the Assessor (refer to section 3.6 of this report). The investigation policy must be consistent with the principles of natural justice, include a procedure for investigating the suspected inappropriate conduct and the circumstances in which another entity may investigate the conduct, and require that the councillor and complainant be given notice about the outcome of an investigation.

The investigation policy may allow the council to ask the CCT president to investigate suspected inappropriate conduct and make recommendations about how to deal with the conduct.¹¹²

3.3 Categories of conduct

The Bill proposes to introduce a fourth category of conduct, 'unsuitable meeting conduct' and to amend the definitions of inappropriate conduct and misconduct. The Bill does not propose changes to corrupt conduct under the *Crime and Corruption Act 2001* (CC Act).

3.3.1 Unsuitable meeting conduct

The Bill defines unsuitable meeting conduct as councillors' conduct during a meeting that contravenes a behavioural standard in the code of conduct.¹¹³

If the meeting chairperson reasonably believes a councillor's conduct during a meeting is unsuitable meeting conduct they may make an order - reprimanding the councillor, requiring the councillor to leave the meeting place and stay away for the rest of the meeting, or removing the councillor if they fail to comply with an order to leave. Details of any order regarding unsuitable meeting conduct must be recorded in the meeting minutes.¹¹⁴

¹⁰⁷ Bill, cl 12 (s 150F); Explanatory notes, p 19.

¹⁰⁸ Bill, cl 12 (s 150G); Explanatory notes, p 19.

If a council's model procedures are inconsistent with the model procedures, the council is taken to have adopted the model procedures to the extent of the inconsistency.

¹⁰⁹ ICCRP, *Councillor Complaints Report*, January 2017, p 85.

¹¹⁰ ICCRP, *Councillor Complaints Report*, January 2017, p 86.

¹¹¹ Queensland Government, *Response to Councillor Complaints Report*, January 2017, p 5.

¹¹² Bill, cl 12 (s 150AE); Explanatory notes, p 19.

¹¹³ Bill, cl 12 (s 150H); Explanatory notes, p 10.

¹¹⁴ Bill, cl 12 (s 150I); Explanatory notes, p 10.

The introduction of this category of conduct gives effect to recommendation 5.6 of the Councillor Complaints Report:

Breaches of a meeting code or code of conduct in a meeting should not be classified as inappropriate conduct. Such conduct breaches should be dealt with immediately by the chair of the meeting (council or committee) who, as appropriate, should be able to require a withdrawal (of words said), an apology (for what had been said or done) or to remove the offending councillor from the remainder of the council or committee meeting.¹¹⁵

Stakeholder views

Some stakeholders raised concerns about the chairperson of a meeting being able to improperly use ‘unsuitable meeting conduct’ as a mechanism to disempower councillors not in agreement with their position. For example, Gecko raised concerns about the potential for a chairperson to exclude a councillor from a meeting without reasonable cause:

While there may be no actual misconduct or inappropriate conduct occurring at a meeting there remains too much scope for a Chairperson to exclude a Councillor from a meeting...¹¹⁶

Similarly, Mr John Burns also raised the issue of the chairperson being able to use unsuitable meeting conduct improperly, stating:

The Mayor being chair of council meetings has the choice of whether a councillor is out of order at a meeting. Declaring a councillor out of order, can stop a debate that the mayor does not want to continue.

...a councillor who is out of favour, not of the same political persuasion as the mayor, or totally against a development proposal could be penalised for objecting strenuously.¹¹⁷

In response to the issues raised regarding unfair treatment of councillors at meetings, the department advised:

The Bill further provides that any Councillor who experiences bullying or harassment by another Councillor/s may make a complaint to the IA without the fear of reprisal. Further, the introduction of a uniform Code of Conduct aims to help address the behaviour.¹¹⁸

3.3.2 Inappropriate conduct

The Bill proposes to amend the definition of what constitutes inappropriate conduct. Inappropriate conduct is redefined as councillors’ conduct that contravenes a standard of behaviour in the code of conduct or a policy, procedure or resolution of the council. Conduct that is unsuitable meeting conduct, misconduct or corrupt conduct does not fall within the definition of inappropriate conduct.¹¹⁹

However, the Bill does provide that unsuitable meeting conduct may become inappropriate conduct if the councillor contravenes an order to leave the meeting and stay away, or three orders are made against a councillor for unsuitable meeting conduct within one year.¹²⁰

The amended definition of inappropriate conduct broadly gives effect to recommendation 5.8 of the Councillor Complaints Report:

The definition of ‘inappropriate conduct’ in s. 176(4) of the LG Act be amended as follows. The two examples (a) and (b) be deleted and in their place be inserted:

- (a) *Serious or repeated conduct contrary to the code of conduct or meeting practice in formal meetings.*

¹¹⁵ ICCRP, *Councillor Complaints Report*, January 2017, p 86.

¹¹⁶ Submission 1, p 4.

¹¹⁷ Submission 4, p 1.

¹¹⁸ Department, correspondence dated 16 March 2018, *Department of Local Government Racing and Multicultural Affairs' response to submissions*, p 2.

¹¹⁹ Bill, cl 12 (s 150K).

¹²⁰ Bill, cl 12 (ss 150J, 150K(2)).

- (b) A failure by the councillor to comply with a direction to leave a meeting of the local government or its committees by the chairperson presiding at the meeting.
- (c) Failure to comply with the council's other policies, codes or resolutions.
- (d) Offensive or disorderly behaviour as a councillor that happens outside formal council meetings.
- (e) Failure to work respectfully and constructively with other councillors or staff.
- (f) Exerting or attempting to exert inappropriate influence over staff.
- (g) Repeated unreasonable requests for information (contrary to council guidelines).
- (h) Exercising, or purporting to exercise, an unauthorised power, duty or function.¹²¹

The Bill does not incorporate paragraphs (f) and (h) of recommendation 5.8 as:

...the government does not support the addition of paragraphs (f) and (h), as these aspects of the definition are covered by the definition of 'corrupt conduct' and must be referred to the CCC.¹²²

The amended definition of inappropriate conduct also partially gives effect to recommendation 5.7 of the Councillor Complaints Report:

A council may determine that a councillor's serious or repeated contrary conduct in meetings or committee meetings should be treated as inappropriate conduct and dealt with as such.¹²³

Committee consideration and comment

The committee noted that the definitions of unsuitable meeting conduct and inappropriate conduct are mutually exclusive; conduct contravening a behavioural standard in the code of conduct that occurs during a council meeting is unsuitable meeting conduct and is not inappropriate conduct.

Serious contraventions of the code of conduct during meetings

The Bill provides that repeated instances of unsuitable meeting conduct or contravening an order of the chairperson to leave and stay away from a meeting place may become inappropriate conduct, however there are no provisions that allow serious contrary conduct in council meetings to be treated as inappropriate conduct.

The committee sought advice from the department about mechanisms for the chairperson to escalate serious conduct breaches during council meetings. The department advised:

It was identified during drafting of the Bill that it would be difficult to legislate for the seriousness of breaches as it could be applied inconsistently across the 76 Local Governments and potentially misused.

Accordingly, new section 150I provides that a contravention of a behavioural standard by a Councillor in a Local Government meeting is to be dealt with by the Chairperson in the meeting. This ensures that breaches of the Code of Conduct in meetings are dealt with quickly and efficiently so that the business of Local Government can continue.

The Bill appropriately gives the Chairperson the discretion to match the seriousness of the conduct breach with the appropriate order. For example, for less serious breaches of the behavioural standards the Chairperson has the discretion to reprimand a Councillor and, for more serious breaches, the Chairperson may order a Councillor to leave the meeting and stay away for the rest of the meeting. Also, if a Councillor ordered to leave a meeting refuses to do so, the Councillor is taken to have engaged in inappropriate conduct.¹²⁴

¹²¹ ICCRP, *Councillor Complaints Report*, January 2017, p 86.

¹²² Queensland Government, *Response to Councillor Complaints Report*, January 2017, p 6.

¹²³ ICCRP, *Councillor Complaints Report*, January 2017, p 86.

¹²⁴ Department, correspondence dated 22 March 2018, *Response to potential policy/drafting issues raised by the Economics and Governance Committee*, p 1.

The committee notes the department's advice that the intent of the provisions is for the chairperson to deal immediately with poor meeting conduct, and that the chairperson has discretion to match the seriousness of the councillor's conduct with the appropriate disciplinary order. However, the committee also notes that the chairperson is limited in the disciplinary orders they may make, and that more severe action may be taken in relation to inappropriate conduct.

While the committee acknowledges that prescribing degrees of seriousness in legislation would be difficult, the committee believes this difficulty may be circumvented by providing the chairperson with discretion to escalate serious contraventions of the code of conduct during a meeting for investigation by the Assessor. Providing the chairperson with such a discretion would be consistent with the discretion currently proposed for the chairperson to determine the appropriate disciplinary action, and concerns about inconsistency across the councils could be mitigated by the Assessor investigating the conduct and providing advice and information to chairpersons and councillors.

The committee acknowledges the intention for the government to undertake a review of the new councillor complaints framework one year after it is implemented to determine 'whether a specific purpose appeals process is merited'¹²⁵ for inappropriate conduct decisions. The committee suggests that this review be expanded to also consider whether the new councillor complaints framework is operating as intended regarding unsuitable meeting conduct.

Inappropriate conduct by the chairperson

The committee noted that excluding conduct during a meeting that contravenes the code of conduct from the definition of inappropriate conduct may improperly limit the mechanisms to deal with the behaviour of a chairperson. The committee sought advice from the department about how unsuitable meeting conduct engaged in by the chairperson would be dealt with under the new framework, particularly where the chairperson's behaviour breached the code of conduct but did not constitute misconduct.

The department advised:

A Chairperson presiding over a Local Government or committee meeting is undertaking a statutory role under the Local Government Act 2009 and Local Government Regulation 2012. Part of that role is to manage the conduct of the participants (see section 12(4)(a) of the Act).

As such, a Chairperson presiding over a meeting who breaches the behavioural standards, may be involved in misconduct (either not carrying out their functions honestly or impartially (new section 150L(1)(a)) or breaching the trust placed in the Chairperson... In such instances, the conduct should be investigated by the Independent Assessor (on the receipt of a complaint) and, if appropriate, heard and determined by the Councillor Conduct Tribunal (CCT).¹²⁶

While the committee notes the department's advice that a chairperson who breaches the behavioural standards may be involved in misconduct, the committee understands that not all breaches of the behavioural standards in the code of conduct would constitute misconduct. For example, the department advised that it is proposed that the code of conduct will include behavioural standards such as 'treating people with dignity and respect'.¹²⁷ Therefore, failing to treat someone with dignity and respect would constitute inappropriate conduct, as a breach of the behavioural standards, but may not amount to misconduct (failing to carry out functions honestly and impartially, or breaching the trust placed in them as a councillor).

¹²⁵ Department, correspondence dated 16 March 2018, *Department of Local Government Racing and Multicultural Affairs' response to submissions*, pp 2-3.

¹²⁶ Department, correspondence dated 22 March 2018, *Response to potential policy/drafting issues raised by the Economics and Governance Committee*, p 2.

¹²⁷ Department, correspondence dated 16 March 2018, *Department of Local Government Racing and Multicultural Affairs' response to submissions*, p 3.

The committee suggests that the planned review of the new councillor complaints framework also consider whether the framework is operating effectively where a chairperson breaches the code of conduct during a meeting.

3.3.3 Misconduct

The Bill proposes to amend the definition of what constitutes misconduct. Misconduct is redefined as councillor's conduct that:

- involves or adversely affects, directly or indirectly, the honest and impartial performance of the councillor's functions, or the exercise of their powers
- is or involves - a breach of the trust placed in them, a misuse of information for their benefit or the benefit or detriment of another person, or a release information they know, or should know, is confidential to the council
- contravenes the requirement to deal with a real or perceived conflict of interest in a transparent and accountable way, including by failing to inform the meeting of a personal interest in a matter and how they intend to deal with the real or perceived conflict of interest¹²⁸
- contravenes an order of the council or CCT, or the requirement to advise the Assessor if they become aware of information indicating another councillor may have engaged in inappropriate conduct or misconduct
- involves improperly giving a direction to a council employee
- contravenes the acceptable requests guidelines of the council or a council policy about reimbursement of expenses.

A councillor's conduct is also misconduct if it is part of a course of conduct resulting in action to discipline the councillor for inappropriate conduct on three occasions within one year, or is of the same type of conduct stated in an order that if they engage in again will be dealt with as misconduct.¹²⁹

The amended definition of misconduct broadly gives effect to recommendations 6.1 and 6.2 of the Councillor Complaints Report. Recommendation 6.1 states:

The definition of misconduct (s. 176(3)(b) of the LG Act) should encompass:

- (i) *The performance of the councillor's responsibilities, or the exercise of the councillor's powers, in a way that is not honest or is not impartial.*
- (ii) *A breach of the trust placed in the councillor.*
- (iii) *A misuse of information or material acquired in or in connection with the performance of the councillor's responsibilities...*
- (iv) *Unauthorised use of council staff or resources for private purposes.*
- (v) *Use of information obtained as a councillor to the financial detriment of the council or the public interest.*
- (vi) *Failure to cooperate with the council, CAC or Tribunal member during inappropriate conduct proceedings or to comply fully with a penalty for inappropriate conduct.*
- (vii) *Third or subsequent finding of inappropriate conduct during council term.*
- (viii) *Bullying or harassment.*
- (ix) *Failure to declare and resolve conflict of interest at a meeting in a transparent and accountable way.*
- (x) *Seeking gifts or benefits of any kind.*
- (xi) *Improper direction or attempted direction of staff.*
- (xii) *Deliberate release of confidential information.*

¹²⁸ The committee notes that the Local Government (Implementing Stage 1 of Belcarra) and other Legislation Amendment Bill 2018 proposes to omit these provisions regarding dealing with conflicts of interest.

¹²⁹ Bill, cl 12 (s 150L); Explanatory notes, p 15.

Recommendation 6.2 states:

A further clause should be added to s. 176(3) of the LG Act to provide that an offence against ss. 171(1), 171A(2) and (3), 171B(2), 172(5) and 176C(8) may be dealt with as misconduct.¹³⁰

Committee consideration and comment

Honest and impartial performance of duties

The committee noted that the proposed new section defining misconduct may contain a drafting error that could result in conduct that involves a councillor honestly and impartially performing their functions and exercising their powers being categorised as misconduct. The committee sought advice from the department about the drafting of this section. The department advised that it ‘agrees the words ‘involves or’ appear to be an anomaly in the drafting’.¹³¹

The committee notes the department’s advice and suggests that this drafting error be corrected.

Contraventions of the acceptable request guidelines

The committee noted that the proposed definition of misconduct includes a contravention of a council’s acceptable request guidelines. As the guidelines provide the way a councillor may ask a council employee for advice to help them carry out their responsibilities, there is potentially a wide variety of ways in which the guidelines could be contravened, ranging from not completing the correct form¹³² to an improper request compromising an employee’s integrity.¹³³ The committee sought advice from the department about categorising all contraventions of the guidelines as misconduct. The department advised:

If the Independent Assessor considers that a Councillor contravened the acceptable request guidelines in a way that was minor or technical in manner, then the Bill provides the Independent Assessor with the discretion to take no further action in relation to the contravention because it would be an unjustifiable use of resources to refer the matter to the CCT for determination...¹³⁴

The committee notes the department’s advice that referring a councillor to the CCT for a minor or technical contravention of the acceptable request guidelines may be an ‘unjustifiable use of resources’ and the Assessor may therefore decide to take no further action in relation to the matter. However, the committee also notes that including all contraventions of the guidelines within the definition of misconduct obligates councillors and council employees to notify the Assessor of minor and technical contravention as suspected misconduct, and the Assessor must then investigate the conduct. If all contraventions of the acceptable request guidelines are not of a nature that justifies consideration by the CCT as misconduct, it is suggested that the definition of misconduct be revised to reflect this position.

¹³⁰ The provisions in recommendation 6.2 relate to using information acquired as a councillor to gain a financial advantage or cause detriment to the council, causing the purchase or sale of an asset if the councillor has inside information that would likely influence a reasonable person in deciding whether or not to buy or sell the asset, or causing inside information to be provided to another person who may use the information in deciding whether to buy or sell an asset, using inside information acquired as a councillor, failing to declare an update to the register of interests within 30 days after the interest arises or the change happens failing to declare a material personal interest in a council meeting, and making multiple frivolous complaints; ICCRP, *Councillor Complaints Report*, January 2017, p 88.

¹³¹ Department, correspondence dated 22 March 2018, *Response to potential policy/drafting issues raised by the Economics and Governance Committee*, p 3.

¹³² See for example Quilpie Shire Council *G.08 Acceptable Request Guidelines Policy*.

¹³³ See for example Cook Shire Council *Councillors Acceptable Request Guidelines Policy*.

¹³⁴ Department, correspondence dated 22 March 2018, *Response to potential policy/drafting issues raised by the Economics and Governance Committee*, p 3.

3.4 Making a complaint

The Bill provides that any person may make a complaint about councillor conduct to the Assessor, and that if a complaint is made to another entity, such as a council, a councillor or the department, that entity must refer the complaint to the Assessor.¹³⁵

Form of a complaint

Complaints may be made orally or in writing, and may be made anonymously.¹³⁶

The Councillor Complaints Report recommended:

Complaints against councillor conduct should be made on a standardised form that requests the complainant to provide details of any supporting evidence, and/or witnesses and such other material as the Independent Assessor specifies...

The standard form should contain a declaration that the complainant is acting in good faith and has provided information that is correct and true to the best of their knowledge. It should contain a warning that it is an offence to provide any information to the Independent Assessor that the complainant knows is false or misleading in a material particular.

...

*The LG Act should be amended to allow the form to be prescribed by the Independent Assessor.*¹³⁷

While the government supported developing a standardised form,¹³⁸ and the Bill provides that the Assessor may approve forms for use in relation to councillor complaints,¹³⁹ the government did not support the mandatory use of a standardised form and the Bill does not prescribe that a particular form must be used to make a complaint.¹⁴⁰

Stakeholder views

Submitters and witnesses presented differing views about the form a complaint should take.

Some expressed a preference for a standardised form. For example, Redland City Council submitted:

*Council strongly supports the recommendation from the Independent Councillor Complaints Review Panel that a standardised form is developed, including a declaration that the complainant is acting in good faith and has provided information that is true and correct to the best of their knowledge. Council believes this will further deter frivolous and vexatious complainants and also reduce the amount of unsubstantiated complaints received.*¹⁴¹

In contrast, Redlands2030 submitted:

*Any suggestions that complaints should have to be made in the form of signed statements or as statutory declarations should be viewed with great concern as such proposals would likely be intended to make it more unlikely that complaints would be submitted.*¹⁴²

¹³⁵ Bill, cl 12 (ss 150O, 150P).

¹³⁶ Bill, cl 12 (s 150O); Explanatory notes, p 43.

¹³⁷ ICCPR, *Councillor Complaints Report*, January 2017, p 84 (recommendations 4.3 and 4.4).

¹³⁸ Queensland Government, *Response to Councillor Complaints Report*, January 2017, p 1.

¹³⁹ Bill, cl 12 (s150EC).

¹⁴⁰ Queensland Government, *Response to Councillor Complaints Report*, January 2017, p 1; Explanatory notes, p 7.

¹⁴¹ Submission 2, p 2.

¹⁴² Submission 8, p 2.

In response to the submissions about the form a complaint may take, the department advised that consistent with the government's response to the Councillor Complaints Report:

*Government supports developing a standardised form (not incorporating a declaration) that can be used for the making of written complaints. Despite this, the Government wants to foster a culture that encourages complaints to be made, and thereby wishes to ensure that the way a complaint can be made is consistent with the way the CCC and Ombudsman allow complaints to be made. This includes making a complaint in writing, by phone, by fax, email or in person.*¹⁴³

Submitters and witnesses also presented differing views about allowing anonymous complaints.

For example, Redlands2030 stated at the public hearing:

*... it depends. A person who has an issue who prefers to make their complaint by disclosing their identity is probably going to have greater credence with the people making the assessment. I can quite easily imagine some hypothetical situations where a person might have evidence of some misbehaviour or wrongdoing or criminal activity and, for any kind of reason, they choose not to get involved...*¹⁴⁴

In contrast, when asked whether they supported anonymous complaints, the LGAQ responded 'Not anonymous complaints, no'.¹⁴⁵

In correspondence to the committee, the Queensland Law Society advised that 'the procedure in most states is that the personal details of the complainant are given at the time of making a complaint', and:

*As stated at the public hearing, a complaint under this Bill can be dismissed if there is insufficient evidence to substantiate it, which practically may render many anonymous complaints incapable of being progressed. Nevertheless, our view is that it is appropriate that the person making a complaint identify themselves unless there are reasonable grounds to withhold this information on the basis of risk of harm to the complaint or other persons or in circumstances where doing so would otherwise breach a law.*¹⁴⁶

Timeframes

The Bill does not prescribe a time within which a complaint must be made, and removes the current restriction that complaints about former councillors must be made within two years after they stopped being a councillor.¹⁴⁷

The Councillor Complaints Report recommended reducing the timeframe for complaints about former councillors to 'within six months of the person ceasing to be a councillor'.¹⁴⁸ However, the government:

*...does not support imposing a blanket time limitation on when a complaint may be made as complaints about serious conduct issues, such as misconduct or corrupt conduct, might warrant investigation even if they come to light sometime after the person ceases to be a councillor.*¹⁴⁹

The Bill also does not prescribe a time within which a complaint must be dealt with.

Stakeholder views

Submitters and witnesses presented differing views on the need for legislated timeframes for the consideration of councillor complaints.

¹⁴³ Department, correspondence dated 16 March 2018, *Department of Local Government Racing and Multicultural Affairs' response to submissions*, p 6.

¹⁴⁴ Public hearing transcript, Brisbane, 19 March, p 12.

¹⁴⁵ Public hearing transcript, Brisbane, 19 March, p 2.

¹⁴⁶ QLS, correspondence dated 20 March 2018, p 1.

¹⁴⁷ Bill, cl 12 (s 150M).

¹⁴⁸ ICCPR, *Councillor Complaints Report*, January 2017, p 88 (recommendation 6.3).

¹⁴⁹ Queensland Government, *Response to Councillor Complaints Report*, January 2017, p 12; Explanatory notes, p 42.

Some supported the introduction of legislated timeframes, for example Redlands2030 submitted ‘timeframes should be written into the legislation to ensure complaints are resolved expeditiously’:

- *A person making a complaint should receive advice within 20 business days as to whether the complaint will be investigated or not, and who will be doing the investigation.*
- *Any complaint about inappropriate conduct should be resolved within a further period of 20 business days.*
- *Complaints about misconduct should be resolved within a further period of 60 business days.*¹⁵⁰

Acknowledging that some flexibility may be required, at the public hearing Redlands2030 suggested:

*In the first instance, the initial decision on what sort of treatment the complaint gets should be able to be made within a certain time frame. If the person doing the assessment—the Independent Assessor—finds it particularly complex or problematic, there should be a process of them requesting more time to deal with the matter.*¹⁵¹

The QLS indicated general support for a legislated timeframe, stating at the public hearing:

*We have noted that some of the other submissions requested that the bill be amended to provide for certain time frames. We would generally support that as it would provide certainty in those respects.*¹⁵²

However, other submitters did not support the introduction of timeframes. For example, Redlands City Council advised:

*...there will be reasons why I think a statutory time limit might be difficult to achieve... I think sometimes investigations and information are difficult to obtain, such as a witness could be overseas. There are circumstances where I am not sure that you can just put a number of days to finalise an investigation...Our preference would be sooner rather than later, but we would not like to see it rushed to compromise an outcome.*¹⁵³

In response to the recommendation that timeframes for resolving complaints be legislated, the department advised:

*The Bill does not prescribe timeframes for the investigation and determination of Councillor conduct complaints. This reflects the fact that every complaint is different, some being resolved quickly and easily and others requiring a fuller investigation.*¹⁵⁴

3.4.1 Notifying the Assessor of particular conduct

A councillor and CEO must notify the Assessor if they become aware of information indicating a councillor may have engaged in inappropriate conduct or misconduct (other than unsuitable meeting conduct that becomes inappropriate conduct, or conduct that is the subject of a complaint already referred to the Assessor).¹⁵⁵

The council must also give the Assessor notice of a councillor’s conduct if the council has taken action to discipline them for inappropriate conduct on three occasions within one year, or it suspects the councillor has engaged in the type of conduct that the council has previously made an order stating that if they engage in that conduct again it will be dealt with as misconduct.¹⁵⁶

¹⁵⁰ Submission 8, p 1.

¹⁵¹ Public hearing transcript, Brisbane, 19 March, p 11.

¹⁵² Public hearing transcript, Brisbane, 19 March, p 15.

¹⁵³ Public hearing transcript, Brisbane, 19 March, p 5.

¹⁵⁴ Department, correspondence dated 22 March 2018, *Response to potential policy/drafting issues raised by the Economics and Governance Committee*, p 11.

¹⁵⁵ Bill, cl 12 (s 150R).

¹⁵⁶ Bill, cl 12 (s 150S).

Stakeholder views

The majority of submitters and witnesses did not make specific representations regarding the requirement for councillors and CEOs to notify the Assessor of suspected inappropriate conduct or misconduct. However, Moreton Bay Regional Council submitted:

*Council notes that the threshold of ‘becoming aware of information’ is so low that a duty may arise to act without any credible basis. This requirement should be revised to make the obligation more concrete.*¹⁵⁷

At the public hearing, Moreton Bay Regional Council further explained:

*We think that is a very low threshold that may capture things such as innuendo or rumour, third- or fourth-hand information that gets passed through.*¹⁵⁸

In response to Moreton Bay Regional Council’s concerns, the department advised:

*One of the functions of the IA is to provide advice and information to Councillors and Local Government employees about dealing with alleged or suspected inappropriate conduct, misconduct or corrupt conduct. As such, a Local Government official may seek clarification from the IA about their obligation under s150R.*¹⁵⁹

Committee consideration and comment

The committee noted the concerns regarding the threshold for when a councillor or the CEO has a duty to notify the Assessor about a councillor’s conduct. The committee also noted that the proposed threshold for a councillor to report another councillor’s conflict of interest under the Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018 is that the councillor ‘believes, or suspects, on reasonable grounds’.

The committee believes there may be benefits in aligning the thresholds for when a councillor (and CEO), has a duty to report the conduct of another councillor and when a councillor has a duty to report a conflict of interest of another councillor. This would ensure the same threshold is applied to obligations to report matters about councillors. The committee suggests that the Minister for Local Government, Minister for Racing and Minister for Multicultural Affairs address this issue in his second reading speech.

3.5 Preliminary investigation by the Assessor

The Assessor must investigate councillors’ conduct that is the subject of a complaint, a notice from another councillor or the CEO, information obtained by a council in the course of an investigation (refer to section 3.6 of this report), a matter referred by the CCC.¹⁶⁰ The Assessor may also self-initiate an investigation¹⁶¹ if they are aware of information indicating a councillor may have engaged in inappropriate conduct or misconduct, that is not likely to involve corrupt conduct, and it is in the public interest to investigate the conduct.¹⁶²

¹⁵⁷ Submission 7, p 1.

¹⁵⁸ Public hearing transcript, Brisbane, 19 March, p 2.

¹⁵⁹ Department, correspondence dated 16 March 2018, *Department of Local Government Racing and Multicultural Affairs’ response to submissions*, p 10.

¹⁶⁰ Bill, cl 12 (s 150T).

¹⁶¹ The power for the Assessor to self-initiate investigations gives effect to recommendation 4.10 of the Councillor Complaints Report.

¹⁶² Bill, cl 12 (s 150U).

The preliminary assessment of all complaints by the Assessor gives effect to recommendation 4.1 of the Councillor Complaints report:

*The LG Act be amended to provide that the 'preliminary assessment' of any complaint against a councillor should be made by an Independent Assessor, and not by a council CEO, or the Department's chief executive.*¹⁶³

The Assessor may conduct an investigation in any way considered appropriate, and make any inquiries they consider appropriate. However, the Assessor must to the extent practicable conduct investigations in a way that ensures they are kept confidential.¹⁶⁴

If the information provided in a complaint is not sufficient to properly investigate the conduct, the Assessor may request that a complainant provide further information. If the complainant does not provide additional information, or if after additional information is provided there is still insufficient information to properly investigate the conduct, the Assessor can decide to not investigate the complaint. The Assessor must give the complainant a notice advising that due to insufficient information the complaint will not be investigated.¹⁶⁵

Providing that the Assessor may not investigate a complaint where there is insufficient information gives effect to recommendation 4.5 of the Councillor Complaints Report:

*Only those anonymous complaints that provide enough information to action a complaint against a councillor for possible inappropriate conduct or misconduct should be dealt with under the complaints process. Where the complaint cannot be actioned without further information, it should be dismissed.*¹⁶⁶

After conducting an investigation the Assessor may decide to dismiss the complaint, take no further action, refer suspected inappropriate conduct to the council, or make application to the CCT about conduct they are reasonably satisfied is misconduct.¹⁶⁷

Before making a decision to refer a councillor's conduct to the council, or to make an application to the CCT, the Assessor must give the councillor a notice:

- stating that they received a complaint, notice or information about the councillor's conduct or, investigated the conduct on their own initiative
- describing the nature of the conduct
- stating that they are considering making a decision to refer the conduct to the council or to make an application to the CCT
- advising that the councillor may give a statement or information to the Assessor, within the stated period, about the conduct and why the Assessor should not make the decision.

The Assessor must consider any statement or information given by the councillor before making a decision about their conduct.¹⁶⁸

¹⁶³ ICCRP, *Councillor Complaints Report*, January 2017, pp 84.

¹⁶⁴ Bill, cl 12 (s 150V).

¹⁶⁵ Bill, cl 12 (s 150Q); Explanatory notes, p 9.

¹⁶⁶ ICCRP, *Councillor Complaints Report*, January 2017, p 84.

¹⁶⁷ Bill, cl 12 (s 150W).

¹⁶⁸ Bill, cl 12 (s 150AA); Explanatory notes, p 9.

Stakeholder views

The majority of submitters and witnesses expressed general support for the preliminary assessment of complaints about councillor's conduct being conducted by the Assessor. For example, the LGAQ submitted that it:

...is particularly supportive of the establishment of the independent assessor which is expected to address the biggest shortcoming of the current system, namely the lack of filtering of complaints at the front end which results in the system being overloaded with complaints that are ultimately found to be unsubstantiated and unable to deal with genuine complaints in a timely fashion.¹⁶⁹

Similarly, Moreton Bay Regional Council submitted that the Assessor undertaking initial assessments:

...alleviates the requirement under the current provisions for the Chief Executive Officer to determine the nature of complaints about councillors (apart from complaints in respect of corrupt conduct) which, in turn, determines how and by whom the complaint is dealt with.¹⁷⁰

3.5.1 Decision to dismiss or take no further action

The Assessor may dismiss a complaint if satisfied:

- the conduct is not inappropriate conduct or misconduct, or it has already been or is currently being dealt with by another entity
- the complaint is frivolous, vexatious, lacks credibility, or was not made in good faith
- dealing with the complaint would not be in the public interest or would be an unjustifiable use of resources.¹⁷¹

The Assessor may decide to take no further action in relation to conduct that is the subject of information obtained by a council in the course of an investigation (refer to section 3.6 of this report), a matter referred by the CCC or a self-initiated investigation, if the Assessor is satisfied:

- there is insufficient information to properly investigate the conduct or determine whether the conduct is inappropriate conduct or misconduct
- the conduct is not inappropriate conduct or misconduct
- taking further action would be an unjustifiable use of resources.¹⁷²

If the Assessor decides to dismiss a complaint or take no further action, the Assessor must give a notice of the decision to the complainant (if applicable), the councillor and the council. The notice must:

- briefly summarise the conduct and, if applicable, state the date the complaint was made
- briefly state the decision and the reasons for it
- state, if the complaint was dismissed because it was frivolous, that if the complainant makes the same complaint again they will commit an offence punishable by a fine of up to \$10,722 (85 penalty units).¹⁷³

¹⁶⁹ Submission 3, p 1.

¹⁷⁰ Submission 7, p 2.

¹⁷¹ Bill, cl 12 (s 150X).

¹⁷² Bill, cl 12 (s 150Y).

¹⁷³ Bill, cl 12 (s 150Z).

Committee consideration and comment

Protecting a complainant's identity

The committee noted that the requirement for the Assessor to provide a notice to the councillor and council if they decide to dismiss a complaint or take no further action, does not prevent the disclosure of the complainant's identity in the notice. As it does not seem appropriate for the complainant's identity to be disclosed to the councillor or the council in these circumstances the committee sought advice from the department about whether their identity should be disclosed in the notice. The department advised:

The identity of a complainant is not information required to be included in a notice under new section 150Z and it is intended the Independent Assessor would protect the complainant's identity when providing a notice to the Local Government and subject Councillor.¹⁷⁴

The committee notes the department's advice that the intention is to protect the complainant's identity when providing a notice about a decision to dismiss a complaint or take no further action in relation to a councillor's conduct.

Grounds for taking no further action in relation to conduct and dismissing a complaint

The committee also noted that the proposed new section 150Y, outlining the grounds on which the Assessor may decide to take no further action about a councillor's conduct, does not include as a ground that the conduct 'has already been, or is being, dealt with by another entity'. As the primary factor in whether the Assessor dismisses a complaint or takes no further action is the source of the information (a complaint is dismissed while no further action is taken in relation to a notification from a council, councillor or council employee or a self-initiated complaint), the committee sought advice from the department about why another entity dealing with the matter was not a prescribed ground to take no further action.

The department advised:

The grounds for dismissal under new section 150X where the Independent Assessor is satisfied the conduct has already been, or is being, dealt with by another entity, can be dealt with in new section 150Y under the grounds of 'taking further action would be an unjustifiable use of resources'.

Further, where another entity is already dealing with a complaint, such as the CCC, it is appropriate for the Independent Assessor to dismiss the complaint. Where a complaint is dismissed in this instance by the Independent Assessor, it is not "accepted" by the Independent Assessor for further consideration, meaning no analysis or consideration of the complaint occurs, other than to determine that another entity has the complaint under consideration and it is appropriate for that entity to do so. Whereas, a decision under section 150Y requires the Independent Assessor to have analysed the conduct and made a decision that it does not warrant the taking of further action.

The committee notes the department's advice that the Assessor may decide to take no further action in relation to conduct being dealt with by another entity on the grounds that 'taking further action would be an unjustifiable use of resources'. However, the committee also notes that this distinction may create inconsistencies and confusion regarding the reasons for a decision.

¹⁷⁴ Department, correspondence dated 22 March 2018, *Response to potential policy/drafting issues raised by the Economics and Governance Committee*, p 5.

For example, where the Assessor becomes aware of a single instance of councillor conduct by way of both a complaint from a member of the public and a notification from a council employee and that conduct is being considered by the CCC - the provisions would necessitate decisions about the same conduct being made on different grounds depending on how the Assessor became aware of the conduct. The Assessor would dismiss the complaint on the ground that it is being dealt with by another entity and decide to take no further action in relation to the conduct notified by the council employee on the ground that further action would be an unjustifiable use of resources (because it is being dealt with by another entity). The potential for confusion as to the basis for decision may be further compounded by the requirement to record decisions to dismiss the complaint and take no further action, and the reasons for making the decisions, in the councillor conduct register.

3.5.2 Decision to refer suspected inappropriate conduct

If the Assessor reasonably suspects a councillor has engaged in inappropriate conduct, they may refer the conduct to the local government to deal with. The referral notice must include details of the inappropriate conduct, details about the complaint (if applicable), a statement about why the Assessor reasonably suspects the councillor engaged in inappropriate conduct, and information about the facts and circumstances forming the basis of the Assessor's decision. The Assessor may also make a recommendation about how the council may investigate and deal with the councillor's conduct.¹⁷⁵

As soon as practicable after referring a matter to a council, the Assessor must give the councillor a notice that states the conduct has been referred to the council to deal with and includes a copy of the referral notice.¹⁷⁶

Stakeholder views

A number of submitters recommended that inappropriate complaints be dealt with by the Assessor and not be referred to council. For example, Redlands City Council recommended:

*...all complaints be dealt with independently (except in meeting) by the independent assessor and no complaints are referred to the local government to be dealt with.*¹⁷⁷

Similarly, Moreton Bay Regional Council submitted:

*...it is inappropriate and impractical for the local government to deal with, investigate, and make decisions in respect of suspected inappropriate conduct by councillors... This will be especially pertinent in the case of a referral of inappropriate conduct involving the mayor. It is untenable for the local government to deal with such a circumstance.*¹⁷⁸

Moreton Bay Regional Council suggested 'the more appropriate and practical arrangement is for complaints and referrals of inappropriate conduct to be dealt with by parties external to the local government'.¹⁷⁹

In response to these issues, the department advised:

*Local Governments will not deal with serious complaints under the Bill such as misconduct and corrupt conduct but because inappropriate conduct involves allegations of breaches of the Code of Conduct or other policies, procedures or resolutions of a Local Government, it is considered appropriate for Local Governments to take responsibility for dealing with inappropriate conduct complaints locally so that they may be resolved quickly and effectively.*¹⁸⁰

¹⁷⁵ Bill, cl 12 (ss 150W(b), 150AC); Explanatory notes, pp 12, 13.

¹⁷⁶ Bill, cl 12 (s 150AD).

¹⁷⁷ Submission 2, pp 1-2.

¹⁷⁸ Submission 7, p 2.

¹⁷⁹ Submission 7, p 2.

¹⁸⁰ Department, correspondence dated 16 March 2018, *Department of Local Government Racing and Multicultural Affairs' response to submissions*, pp 10-11.

And:

*Neither the Independent Review Panel's Report or the Government's response contemplates the Office of the IA managing the Councillor complaints process in its entirety.*¹⁸¹

3.5.3 Decision to make application to the CCT

If the Assessor is reasonably satisfied a councillor has engaged in misconduct, the Assessor may apply to the CCT for a decision as to whether the conduct was misconduct. The application must include details of the alleged misconduct, details about the complaint (if applicable), a statement about why the Assessor is reasonably satisfied the councillor engaged in misconduct, and information about the facts and circumstances forming the basis of the Assessor's decision.

The Assessor must take all reasonable steps to give the councillor a copy of the application at least seven days before the hearing.¹⁸²

Stakeholder views

The LGAQ raised a concern regarding the minimum notice period for councillors about a hearing, submitting:

*...potentially giving a councillor only 7 days' notice of a tribunal hearing is an unacceptably short notice period. In the LGAQ's view, that notice period should be at least 21 days, if not 28 days.*¹⁸³

The QLS indicated general support for an increased notice period, stating at the public hearing:

*...21 days in this particular instance would also allow for people to obtain legal advice and to be properly prepared for any hearing.*¹⁸⁴

In response to the concern about the minimum notice period, the department advised:

*The Bill does not change the minimum timeframe under the LGA for notifying a Councillor about a hearing of a complaint of misconduct, i.e. at least 7 days before the hearing. DLGRMA considers that the notification period does not need to be extended. It is imperative that complaints are dealt with swiftly. Nothing in the Bill prevents a councillor from seeking an extension of relevant timeframes from the Tribunal, which the Tribunal may decide on a case by case basis.*¹⁸⁵

3.6 Council investigation and decision regarding inappropriate conduct

The council must investigate councillors' conduct referred to it by the Assessor. The investigation must be conducted:

- in a way that is consistent with any recommendation of the Assessor and with the council's investigation policy (to the extent the policy is not inconsistent with the Assessor's recommendations), or
- in another way decided by resolution of the council.¹⁸⁶

If during the course of an investigation the council obtains information that the councillor may have engaged in misconduct rather than inappropriate conduct, the council must give the information to the Assessor and take no further action in investigating the conduct.¹⁸⁷

¹⁸¹ Department, correspondence dated 16 March 2018, *Department of Local Government Racing and Multicultural Affairs' response to submissions*, p 3.

¹⁸² Bill, cl 12 (ss 150W(c), 150AJ, 150AK); Explanatory notes, p 16.

¹⁸³ Submission 3, p 2.

¹⁸⁴ Public hearing transcript, Brisbane, 19 March, p 18.

¹⁸⁵ Department, correspondence dated 16 March 2018, *Department of Local Government Racing and Multicultural Affairs' response to submissions*, p 7.

¹⁸⁶ Bill, cl 12 (s 150AF).

¹⁸⁷ Bill, cl 12 (s 150AF).

After conducting an investigation the council must decide whether the councillor engaged in inappropriate conduct, and if it decides the conduct was inappropriate conduct, what disciplinary action to take. The council may decide that no action be taken against the councillor, or may make an order:

- that the councillor make a public admission that they engaged in misconduct
- reprimanding the councillor
- that the councillor attend training or counselling to address their conduct
- excluding the councillor from a council meeting
- that the councillor be removed or must resign from a position representing the council
- that if the councillor engages the same type of conduct again it will be treated as misconduct
- that the councillor reimburse the council for costs arising from the misconduct.¹⁸⁸

Stakeholder views

Submitters and witnesses raised a number of concerns regarding the provisions about councils investigating and taking action for inappropriate conduct.

Confidentiality

Moreton Bay Regional Council raised some concerns regarding potential confidentiality issues:

Given... the clear intent of section 150DY(3) is that the name of the councillor should not be included within the publicly available Councillor Conduct Register without a finding of inappropriate conduct by the local government or by consent of the councillor, it seems incongruous that by section 150AF(2) a local government acting through a meeting of the Full Council could make a resolution naming the councillor and determining the way the investigation into the councillor's conduct will be conducted in a meeting that is open to the public.

...

*Likewise, under section 150AG what if the local government decides that consideration of the investigation report and a decision in respect of that inappropriate conduct investigation should be at a meeting of the Full Council which is open to the public? How does this interact with section 150DY(3) if the Council decides that the councillor has not engaged in inappropriate conduct?*¹⁸⁹

Fair and consistent of outcomes

The LGAQ raised concerns regarding the potential for unfair or inconsistent outcomes, submitting it:

*...remains concerned about the potential that the responsibility to investigate inappropriate conduct allegations and determine disciplinary action could be abused or applied inconsistently between councils depending on the make-up of the council and working relationships between councillors.*¹⁹⁰

The LGAQ recommended:

*That the Bill be amended to empower the assessor to recommend the type of sanction to impose or require the assessor to include in the referral notice information about the types of disciplinary action taken by other local governments in relation to similar instances of inappropriate conduct, and to introduce a requirement for the local government to inform the independent assessor of the outcomes of its investigation.*¹⁹¹

¹⁸⁸ Bill, cl 12 (s 150AH); Explanatory notes, p 13.

¹⁸⁹ Submission 7, p 2.

¹⁹⁰ Submission 3, pp 1-2.

¹⁹¹ Submission 3, p 2.

In response to this recommendation, the department advised:

The Bill does not specifically provide for the IA to recommend to a Local Government the type of sanction to be imposed for inappropriate conduct or require the IA to include information in the referral notice about the types of disciplinary action taken by other Local Governments for similar instances of inappropriate conduct.

In relation to introducing a requirement for Local Governments to inform the IA of the outcomes of investigations, DLGRMA is of the view that imposing such an obligation is unwarranted given the Bill already requires such information to be included in a Local Government's Councillor Conduct Register.¹⁹²

Delegation to the mayor or a standing committee

A number of submitters raised concerns about councils being permitted to delegate investigations and decisions about inappropriate conduct to the mayor or a standing committee. For example, Redlands2030 submitted 'Matters referred to council should be determined by the full council, not the mayor',¹⁹³ and Ken Park submitted 'any investigation of a councillor by a mayor is 100% inappropriate'.¹⁹⁴

Similarly, the Queensland Local Government Reform Alliance submitted:

Referring complaints back to the sole discretion of the Mayor is counter productive and leaves the complaints process open to abuse.

Documented conflicts between Mayors and Councillors could see a Councillor being unfairly dealt with purely based on personal dislike.

If matters are required to be "referred", then such matters should be referred to the entire council for a decision based on fact and consensus of the majority.¹⁹⁵

In response to these submissions, the department advised:

...a Local Government may, by resolution, delegate responsibility for deciding suspected inappropriate conduct to the Mayor or a Standing Committee of the Local Government if considered appropriate. In cases where several Councillors are involved in an allegation, it would not be appropriate for the complaint/s to be dealt with by the full Local Government. The delegation is designed to mitigate perceptions of bias or conflicts of interest in dealing with a complaint, or to avoid a situation where a majority of Councillors are the complainant and those Councillors would then be making the decision about their own complaint.¹⁹⁶

In contrast to submitters who raised concerns regarding delegation to the mayor, the LGAQ submitted that its 'preferred position is not to have inappropriate conduct complaints referred to the council, as this is a significant departure from the current regime ... which requires the mayor (not the council) to deal with allegations of inappropriate conduct'. However the LGAQ noted that allowing councils to 'delegate inappropriate conduct decisions to the mayor' goes some way towards addressing the concern.¹⁹⁷

¹⁹² Department, correspondence dated 16 March 2018, *Department of Local Government Racing and Multicultural Affairs' response to submissions*, p 7.

¹⁹³ Submission 8, p 3.

¹⁹⁴ Submission 6, p 4.

¹⁹⁵ Submission 10, p 2.

¹⁹⁶ Department, correspondence dated 16 March 2018, *Department of Local Government Racing and Multicultural Affairs' response to submissions*, p 13.

¹⁹⁷ Submission 3, p 2.

Disciplinary actions

The QLS raised a concern about imposing an order that a councillor make a public admission that they engaged in inappropriate conduct,¹⁹⁸ submitting:

*Requiring a person to make an admission is a breach of a fundamental tenant (sic) of our justice system. We consider that it is appropriate to make a finding public, and for the person to have to disclose this finding, however we do not consider it is appropriate to require someone to make a non-genuine admission.*¹⁹⁹

In response to this concern, the department advised that the LG Act currently ‘allows an order to be made that a Councillor make an admission of error or an apology’.²⁰⁰

Committee consideration and comment

Councillor involvement in the process

The committee noted that the Bill does not expressly prohibit a councillor whose conduct is the subject of investigation by a council, or who complained about another councillor’s conduct, from being involved in the investigation or decisions on how the matter is to be decided. The committee sought advice from the department regarding whether it was intended that councillors be excluded from involvement in the council’s consideration of matters involving them. The department advised:

A Councillor that is a party to a complaint (either as the complainant or the accused Councillor) will have at least a conflict of interest (and in the case of the accused Councillor a potential material personal interest) in the complaint and will not be allowed to participate in the investigation or Local Government decision about the complaint.

Sections 172 and 173 of the Local Government Act 2009 set out the processes for Councillors to declare and deal with material personal interests and conflicts of interests respectively. In addition, it is proposed that the model procedures for the conduct of Local Government meetings under new section 150F will also require that Councillors who are parties to a complaint do not participate in the handling of the complaint.

*Further, the Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018 is proposing additional amendments to the processes for dealing with material personal interests and conflicts of interests including an offence for Councillors trying to influence a decision about a matter they have an interest in.*²⁰¹

The committee notes the department’s advice that a councillor who is a party to a complaint would have a conflict of interest and would not be permitted to participate in the investigation and decision. However, the committee understands that sections 172 and 173 of the LG Act, dealing with material personal interests and conflicts of interest apply only if ‘a matter is to be discussed at a meeting of a local government or any of its committees’. Therefore these sections may not apply to participation in an investigation outside a meeting, or where the council has delegated consideration and decisions about inappropriate conduct to the mayor and no meetings occurred. Similarly the model procedures for meetings proposed by the Bill would only apply in the context of council meetings.

¹⁹⁸ The QLS raised the same concern regarding disciplinary action for misconduct.

¹⁹⁹ Submission 12, p 1.

²⁰⁰ Department, correspondence dated 16 March 2018, *Department of Local Government Racing and Multicultural Affairs’ response to submissions*, p 16.

²⁰¹ Department, correspondence dated 22 March 2018, *Response to potential policy/drafting issues raised by the Economics and Governance Committee*, p 8.

The committee also notes that under the current provisions regarding conflicts of interest that while a councillor with a conflict must deal with it in a ‘transparent and accountable way’ they are not prohibited from staying and participating in the meeting. Issues regarding how councillors deal with declared conflicts of interest was a consideration of the Belcarra Report, and the committee notes the department’s advice that the Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018 is proposing additional amendments regarding dealing with conflicts of interest. However, these amendments will not prohibit a councillor from staying and participating in a meeting about their conduct if other councillors at the meeting decide they ‘may participate in the meeting in relation to the matter, including by voting on the matter’.²⁰²

Recognising that under the proposed new framework it is not intended that councillors who are party to a complaint be allowed to participate in the investigation or decision-making process, the committee suggests that the planned review of the new councillor complaints framework consider whether the framework is operating as intended in this respect or if more specific restrictions on councillors’ involvement are required.

Process for investigation

The committee also noted that the proposed new section 150AF provides that the council may resolve to conduct an investigation regarding a councillor’s conduct in a manner that is inconsistent with the Assessor’s recommendations and the council’s own investigation policy. The committee sought advice from the department regarding the rationale for allowing investigations to be conducted other than as recommended by the Assessor or required by council policy. The department advised:

...ultimately it is up to a Local Government to decide how it will carry out this function.

*While the Bill provides for the Independent Assessor to provide a recommendation(s) to a Local Government about how it may investigate or deal with the conduct (new section 150AC(3)), there may be circumstances where a Local Government is not able to comply with a recommendation of the Independent Assessor... In these cases, the Local Government must pass a resolution stating why it is not willing or able to comply with the Independent Assessor’s recommendation.*²⁰³

While the committee notes the department’s advice that there may be circumstances in which the council cannot comply with a recommendation of the Assessor, the committee has some concerns regarding allowing a council to not comply with its investigation policy.

The Bill provides that a council’s investigation policy must be consistent with the principles of natural justice, embedding these principles into investigation procedures, and must require notice of the outcome of the investigation to be given to the councillor and complainant. By allowing a council to decide to conduct an investigation in a way that is inconsistent with the recommendations of the assessor and that is inconsistent with its investigation policy, the elements prescribed by the Bill as necessary parts of the investigation policy may not be applied.

The committee suggests that the planned review of the new councillor complaints framework consider whether allowing a council to conduct an investigation in a way that is not consistent with its investigation policy is operating effectively and as intended.

²⁰² Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018, cls 6 (s 177E), 24 (s 175E).

²⁰³ Department, correspondence dated 22 March 2018, *Response to potential policy/drafting issues raised by the Economics and Governance Committee*, p 8.

3.7 CCT hearing and decision regarding misconduct

The CCT must conduct a hearing if the Assessor makes an application for a decision as to whether a councillor engaged in misconduct. If the Assessor and councillor agree or the CCT considers it is appropriate, the hearing may be conducted on the documents brought before the CCT, without the Assessor, councillor or witnesses appearing.²⁰⁴ The burden of proof is on the Assessor to prove the councillor engaged in misconduct, and the standard of proof is ‘the balance of probabilities’.²⁰⁵

After conducting a hearing the CCT must decide whether the councillor engaged in misconduct, and if it decides the conduct was misconduct, what disciplinary action to take.²⁰⁶ The CCT may make a recommendation to the Minister that the councillor be suspended or dismissed from office, decide that no action be taken against the councillor, or make an order:

- that the councillor make a public admission that they engaged in misconduct
- reprimanding the councillor
- that the councillor attend training or counselling to address their conduct
- that the councillor pay the council up to \$6,307 (50 penalty units)
- that the councillor reimburse the council for costs arising from the misconduct
- that the councillor not act as the deputy mayor or chairperson of a committee
- excluding the councillor from up to three council meetings
- that the councillor be removed or must resign from a position representing the council
- that the councillor forfeit an allowance, benefit, payment or privilege provided by the council
- that the councillor forfeit access to equipment or a facility provided by the council.²⁰⁷

The CCT must keep a written record of decisions about whether a councillor engaged in misconduct, and any disciplinary orders or recommendations made. A notice of the decision and the reasons for it must be given to the Assessor, councillor, council, and complainant (if applicable). A summary of the decision and the reasons for it, excluding the name of the any complainant and any information that could reasonably identify a complainant, must be given to the chief executive for publication on the department’s website.²⁰⁸

Stakeholder views

The majority of submitters and witnesses expressed support for the CCT considering councillor conduct matters.²⁰⁹

However, the QLS raised concerns regarding the provisions allowing the CCT to conduct a hearing on the documents brought before it, submitting:

...we consider that in accordance with the principles of natural justice and procedural fairness, the councillor ought to be given the opportunity to present his or her case and respond to submissions made by the assessor whether this be in written or oral form.²¹⁰

²⁰⁴ Bill, cl 12 (ss 150AL, 150AP).

²⁰⁵ Bill, cl 12 (ss 150AN, 150AP); Explanatory notes, p 16.

²⁰⁶ Bill, cl 12 (s 150AQ).

²⁰⁷ Bill, cl 12 (s 150AR); Explanatory notes, p 16.

²⁰⁸ Bill, cl 12 (s 150AS).

²⁰⁹ See for example submissions 1, 2, 3, 5, 7.

²¹⁰ Submission 12, p 2.

Some submitters also raised concerns regarding the disciplinary orders that the CCT may make. For example, the LGAQ also raised a concern about an order that the councillor is not to act as the deputy mayor, submitting:

*This is not a type of disciplinary action available to the tribunal under the current Act, and starkly conflicts with the council's own right to appoint and remove its deputy mayor... The LGAQ opposes this particular type of disciplinary action.*²¹¹

The QLS raised a concern about imposing an order that a councillor make a public admission that they engaged in misconduct,²¹² submitting:

*Requiring a person to make an admission is a breach of a fundamental tenant of our justice system. We consider that it is appropriate to make a finding public, and for the person to have to disclose this finding, however we do not consider it is appropriate to require someone to make a non-genuine admission.*²¹³

In response to the concerns raised by the QLS and LGAQ, the department advised that the LG Act currently 'allows an order to be made that a Councillor make an admission of error or an apology'²¹⁴ and:

*Recommendation 6.4 of the Independent Review Panel's Report proposed numerous penalties for misconduct, including an order of the CCT that a Councillor may not remain as or become Deputy Mayor or the Chairperson of a Local Government committee for the remainder of the Councillor's term. The Bill implements the Government's response to recommendation 6.4.*²¹⁵

Committee consideration and comment

The committee noted that after the CCT conducts a hearing about alleged misconduct it is required to decide whether or not the conduct was misconduct, but that there are no provisions that permitted the CCT to decide the alleged misconduct was in fact inappropriate conduct and to deal with the matter. The committee sought advice from the department about how such matters are intended to be dealt with under the new framework. The department advised:

Under the Bill, the CCT has no jurisdiction to find a Councillor engaged in inappropriate conduct rather than misconduct. The CCT can decide a Councillor did not engage in misconduct or a Councillor did engage in misconduct and what action to take to discipline the Councillor.

*However, because the Independent Assessor is a party to, and present at CCT hearings, the Independent Assessor would be aware of any concerns the CCT may have about a Councillor's conduct where the threshold of misconduct is not met. ...the Independent Assessor could then, on the Assessor's own initiative, investigate the conduct further.*²¹⁶

The committee suggests that the planned review of the new councillor complaints framework also consider whether benefits may be gained by allowing the Councillor Conduct Tribunal after hearing a matter to decide that the conduct was inappropriate conduct and make an order or recommendation to finalise the matter.

²¹¹ Submission 3, pp 2-3.

²¹² The QLS raised the same concern regarding disciplinary action for inappropriate conduct.

²¹³ Submission 12, p 1.

²¹⁴ Department, correspondence dated 16 March 2018, *Department of Local Government Racing and Multicultural Affairs' response to submissions*, p 16.

²¹⁵ Department, correspondence dated 16 March 2018, *Department of Local Government Racing and Multicultural Affairs' response to submissions*, p 7.

²¹⁶ Department, correspondence dated 22 March 2018, *Response to potential policy/drafting issues raised by the Economics and Governance Committee*, p 4.

3.8 Councillor conduct register

The Bill provides that councils must keep an up to date register, published on the council's website and available for inspection at the council office, about:

- orders made about unsuitable meeting conduct
- decisions about suspected inappropriate conduct referred to the council by the Assessor
- decisions of the CCT about whether councillors engaged in misconduct
- decisions by the Assessor to take no further action
- complaints dismissed by the Assessor.²¹⁷

The register must include the date of the decision and a summary of the decision and reasons for it, for decisions made by:

- a chairperson to make an order against a councillor for unsuitable meeting conduct
- a council about the suspected inappropriate conduct referred by the Assessor, and any action to discipline the councillor
- the CCT about misconduct and any action to discipline the councillor
- the Assessor to take no further action.

The name of the councillor whose conduct is the subject of the decision must be included on the register if the council or CCT decided the councillor engaged in inappropriate conduct or misconduct, or the councillor agrees to their name being included.²¹⁸

For a complaint that was dismissed by the Assessor the register must include the date the complaint was made, a summary of the complaint and a statement about why the complaint was dismissed. The name of the councillor may only be included if the councillor agrees.²¹⁹

A summary of a decision or complaint included in the register must not include the name of the complainant or information that could reasonably be expected to identify the complainant.²²⁰

Stakeholder views

The majority of submitters and witnesses did not make specific representations regarding the councillor conduct register.

Redland City Council submitted that 'only the outcome of substantiated and finalised complaints is disclosed on the department's website or be made available for public viewing'.²²¹

In response to this recommendation the department advised:

...for decisions made by the Councillor Conduct Tribunal (CCT) ... the CCT must give a summary of the decision, including reasons for the decision, to the Department's Chief Executive for publication on the Department's website...

...for decisions about inappropriate conduct and misconduct, the name of the subject Councillor may be included in the Councillor Conduct Register only if the Local Government or CCT decided the Councillor engaged in inappropriate conduct or misconduct or the Councillor agrees to the Councillor's name being included...

...for dismissed complaints ... the name of the subject Councillor is not to be included in the Councillor Conduct Register unless the Councillor agrees...²²²

²¹⁷ Bill, cl 12 (s 150DX); Explanatory notes, p 20.

²¹⁸ Bill, cl 12 (s 150DY); Explanatory notes, p 20.

²¹⁹ Bill, cl 12 (s 150DZ); Explanatory notes, p 20.

²²⁰ Bill, cl 12 (ss 150DY, 150DZ); Explanatory notes, p 20.

²²¹ Submission 2, p 2.

²²² Department, correspondence dated 16 March 2018, *Department of Local Government Racing and Multicultural Affairs' response to submissions*, pp 5-6.

3.9 Investigation powers

The Bill provides investigators with a range of powers to support the performance of their functions. These powers, which the Assessor may also exercise, include the power to:

- enter a place by consent or under the authority of a warrant, or a place that is open to the public
- after entering a place, to search, inspect, examine or film the place or anything at the place, to take something for examination, to take a copy of a document, or to produce an image from an electronic document
- seize evidence under prescribed conditions
- require a person to give the investigator information or to attend a meeting and answer questions.²²³

Where an investigator intends to exercise a power requiring a person give them information or attend a meeting and answer questions, the Assessor may give that person a notice stating that the information or requirement for them to attend a meeting is confidential and must not be disclosed excepted in prescribed circumstances, such as to obtain legal advice.²²⁴

Investigators must be issued identification cards that must be displayed or produced before exercising the investigator's powers.²²⁵

Stakeholder views

The QLS indicated general support for the provisions regarding the powers of investigators:

*We commend the drafters of the bill for modifying the provisions which impose the powers given to these investigators to the extent that they do not allow entry to a place that is not a public place without consent or a warrant and, that they do not seek to abrogate the right to claim privilege against self-incrimination.*²²⁶

However, Redlands2030 raise concerns regarding the confidentiality notices, submitting:

*Any suggestion that people be prohibited from disclosing that they have made a complaint and penalised if they do so, should be viewed with great concern. Such restrictions would conflict with the principles of free speech which underpin our democratic form of government.*²²⁷

3.10 Offences

3.10.1 Secrecy

The Bill provides that the Assessor, staff of the OIA, and investigators must not use, to cause a benefit or detriment to a person, or make a record of or disclose confidential information obtained in the course of performing their functions (other than in performing their functions, with the consent of the person the information is about, or as otherwise required or permitted by law).

Confidential information is defined as information that is not publicly available about a person's personal affairs or reputation, or that would likely damage the commercial activities of the person to whom the information relates.

Improperly using, making a record of or disclosing confidential information is an offence punishable by up to \$12,615 (100 penalty units).²²⁸

²²³ Bill, cl 12 (pt 4 div 1); Explanatory notes, p 5.

²²⁴ Bill, cl 12 (ss 150AX, 150BD, 150BE); Explanatory notes, p 5.

²²⁵ Bill, cl 12 (s 150CK).

²²⁶ Submission 12, p 1.

²²⁷ Submission 8, p 2.

²²⁸ Bill, cl 12 (s 150EA); Explanatory notes, p 28. A penalty unit has a value of \$126.15: Penalties and Sentences Regulation 2015, s 3.

Committee consideration and comment

The committee noted that the definition of confidential information in proposed new section 150EA appeared to primarily be directed at protecting the privacy of the councillor, and sought advice from the department about whether the personal information of the complainant would also be protected by the secrecy provisions. The department advised:

All persons are protected under new section 150EA as the information privacy principles under the Information Privacy Act 2009 would apply to any confidential information obtained by the Independent Assessor, an investigator, or a staff member of the Office of the Independent Assessor.²²⁹

Secrecy provisions for the council, councillors and CCT members

The committee noted the secrecy provisions under the proposed new section 150EA apply only to the Assessor, staff of the OIA, and investigators. The committee sought advice from the department as to whether similar provisions should also apply to the council, councillors and members of the CCT to protect confidential information about councillor conduct matters from improper use or disclosure.

In relation to the council and councillors, the department advised:

Decisions of Local Governments are made by resolution in properly constituted meetings of the Council. Council meetings are open to the public unless the Local Government decides that it is necessary to close the meetings because the issues relate to one of the criteria in section 275 of the Local Government Regulation 2012. However, even if the Local Government closes a meeting to discuss an issue under section 275 of the Regulation, it must still pass any resolution relating to the matter in open session. Accordingly, as decisions of Local Government are made in public it is not appropriate for these matters to be confidential.²³⁰

In relation to the CCT the department advised:

...the president of the CCT will issue practice directions under new section 150DV for the conduct of hearings and it is expected that most hearings of the CCT would be heard in public similar to how other courts and tribunals conduct their business so that justice is not only done but is also seen to be done. However, the practice directions may provide for a discretion for the CCT to close a hearing to the public in certain circumstances (i.e. such as when hearing evidence which may be distressing to the complainant).²³¹

While the committee notes the department's advice that decisions of the councils are made in public and it is intended that CCT hearings would occur in public, the committee also notes that confidentiality provisions generally do not prevent the use or disclosure of information in the performance of a person's functions. However, safeguards for confidential information, with appropriate penalties for noncompliance, may be important to ensure confidential information is not improperly used or disclosed.

²²⁹ Department, correspondence dated 22 March 2018, *Response to potential policy/drafting issues raised by the Economics and Governance Committee*, p 5.

²³⁰ Department, correspondence dated 22 March 2018, *Response to potential policy/drafting issues raised by the Economics and Governance Committee*, pp 5-6.

²³¹ Department, correspondence dated 22 March 2018, *Response to potential policy/drafting issues raised by the Economics and Governance Committee*, p 6.

3.10.2 Improper complaints

The Bill proposes to substantially increase the penalties for making frivolous complaints. If a person makes a second or subsequent complaint that is substantially the same as a complaint that has previously been dismissed by the Assessor, the Bill proposes to increase the maximum fine from \$1,261 (10 penalty units) to \$10,722 (85 penalty units).²³²

The Bill similarly proposes to increase the maximum fine for complaints that are vexatious or not made in good faith from \$1,261 (10 penalty units) to \$10,722 (85 penalty units). However, for complaints that are vexatious or not made in good faith the Bill also provides that the making of every such complaint is an offence punishable by up to \$10,722, removing the current ‘warning’ for the first improper complaint and imposing penalties only for making second or subsequent complaints.²³³ The penalty for frivolous or otherwise improper complaints is discussed in detail in chapter 4 of this report.

The Councillor Complaints Report made the following recommendations regarding frivolous or otherwise improper complaints

The offence in s. 176C(8) – a person must not make a complaint about the conduct of a councillor if the complaint is substantially the same as a complaint the person has already made and the person has been warned not to repeat it – be deleted. In its place the Act be amended to 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).*²³⁴

...

*That the maximum penalty that the Tribunal can impose be 50 penalty units.*²³⁵

The explanatory notes acknowledge that the maximum penalties are higher than what was recommended by the Councillor Complaints Report but state the penalties are:

*...considered proportionate and reasonable to deter these kinds of complaints in view of the possible reputation damage to a councillor by a frivolous or improper complaint.*²³⁶

Stakeholder views

Submitters and witnesses presented differing views about the proposed offences for frivolous or otherwise improper complaints.

Redlands2030 submitted:

*Provisions in the proposed laws aimed at preventing frivolous and/or vexatious complaints appear to be adequate.*²³⁷

²³² Bill, cl 12 (s 150AU); Explanatory notes, p 27; LG Act, s 176C. A penalty unit has a value of \$126.15: Penalties and Sentences Regulation 2015, s 3.

²³³ Bill, cl 12 (s 150AV); LG Act, s 176C. A penalty unit has a value of \$126.15: Penalties and Sentences Regulation 2015, s 3.

²³⁴ ICCRP, *Councillor Complaints Report*, January 2017, pp 84.

²³⁵ ICCRP, *Councillor Complaints Report*, January 2017, pp 85.

²³⁶ Explanatory notes, p 27.

²³⁷ Submission 8, p 2.

Conversely, the QLS raised concerns regarding the proposed offences for frivolous and otherwise improper complaints, submitting:

In our opinion, there are more effective, fair and just ways to discourage frivolous or improper complaints and such action does not warrant the imposition of an offence.

*Further, any steps taken to prevent frivolous or improper complaints should not deviate from an individual's ability to make a complaint about a councillor or public official.*²³⁸

At the public hearing Ken Taylor of the QLS further advised:

*The court system itself does not create an offence when we have vexatious litigants. If somebody is filing repeated vexatious court matters, they can be declared a vexatious litigant and then have to go through a process before they are allowed to proceed with any more claims or actions. There is no actual offence created in that process, so we do not see why it should be an offence here. We are also concerned with the vast increase in the penalty in that respect...*²³⁹

In response to the submission from the QLS, the department advised:

*...the offence provision in proposed new s150AU only applies if a complainant has been given a notice under proposed new s150Z that if the person makes the same or substantially the same complaint that has been dismissed by the Independent Assessor because it was frivolous. In relation to improper complaints under proposed new s150AV, there needs to be a sufficient deterrent to prevent these types of complaints being made.*²⁴⁰

3.10.3 Protection from reprisal

The Bill proposes to introduce some protections from reprisal for complaints or notifications about a councillor's conduct. A councillor who takes detrimental action against another councillor or a council employee in reprisal for them making, or intending to make, a complaint or notification about the councillor's conduct commits an offence punishable by up to \$21,067 (167 penalty units) or 2 years imprisonment.²⁴¹ The Bill also prescribes the offence as an integrity offence, resulting in the councillor being disqualified from being a councillor for four years (if convicted).²⁴²

Stakeholder views and department's response

The majority of submitters and witnesses did not make specific representations regarding the proposed offence for councillors who take detrimental action in reprisal for complaints or notifications.

Redland City Council indicated that it supported the introduction of the offence but recommended:

*...the Bill be amended to include any person making, assessing, providing information and/or deciding complaints in the protected person definition. This protects any person from reprisal both internal and external to an organisation or agency.*²⁴³

²³⁸ Submission 12, p 2.

²³⁹ Public hearing transcript, Brisbane, 19 March 2018, p 16.

²⁴⁰ Department, correspondence dated 16 March 2018, *Department of Local Government Racing and Multicultural Affairs' response to submissions*, p 17.

²⁴¹ Bill, cl 12 (s 150AW); Explanatory notes, pp 27-28. A penalty unit has a value of \$126.15: Penalties and Sentences Regulation 2015, s 3.

²⁴² Bill, cl 13; LG Act, s 153.

²⁴³ Submission 2, p 2.

In response to Redland City Council's recommended change the department advised:

A notification about a Councillor's conduct to the IA [Assessor] is ... relevant to the Mayor, Councillor and Local Government CEO only, all of whom are protected from reprisal under s150AW. For a complaint about a Councillor's conduct, the new reprisal offence in the Bill is specifically tailored to protect those in the field of Local Government, i.e. Councillors and Local Government employees, from detrimental action such as reputational damage and loss of employment and to encourage the reporting of inappropriate conduct and misconduct.²⁴⁴

Committee consideration and comment

The committee noted that the safeguards to protect councillors and council employees from detrimental action in reprisal for complaints do not apply to members of the public who make complaints about councillors' conduct. The committee sought advice from the department regarding the rationale for not extending the offence provisions to cover complainants outside of the council, and whether other protections from reprisal are afforded to members of the public.

The department advised that the intention of the new provision is to 'protect employees from reprisal action, mirroring similar provisions in the *Public Interest Disclosure Act 2010*' and that:

If a Councillor takes an action against a member of the public that could be construed as reprisal, there are other avenues to take action against the Councillor, for example, making a complaint about alleged misconduct.²⁴⁵

While the committee acknowledges the department's advice about the intended limited application of the provision, the committee also notes the importance of providing safeguards for complainants other than councillors and council employees. The committee has some concerns about requiring a person experiencing detrimental action in reprisal for making one complaint to have to make another complaint to deal with the councillor's retaliatory action. However, the committee notes the department's advice that the intent of the provision is to mirror similar provisions in the *Public Interest Disclosure Act 2010*.

3.11 Reviews and appeals

The Bill proposes to remove the declaration under the LG Act²⁴⁶ that a decision under the councillor complaints framework is not subject to appeal. The Bill introduces a right for the councillor or the Assessor to apply to the Queensland Civil and Administrative Tribunal (QCAT) for a review of a decision of the CCT, other than a decision recommending a councillor's suspension or dismissal.²⁴⁷

The Bill does not provide a right for a merits review of decisions made by a council in relation to inappropriate conduct, or a decision of the chairperson in relation to unsuitable meeting conduct.²⁴⁸ A review of these decisions is available under the *Judicial Review Act 1991*, which is limited to an examination of whether the council had the power or jurisdiction to make a decision and whether the power was lawfully exercised.²⁴⁹

The Bill provides that if an investigator, who may be the Assessor,²⁵⁰ decides to seize an object, the person who owns or had control of the object may apply to the Assessor for a review of the decision.²⁵¹

²⁴⁴ Department, correspondence dated 16 March 2018, *Department of Local Government Racing and Multicultural Affairs' response to submissions*, p 4.

²⁴⁵ Department, correspondence dated 22 March 2018, *Response to potential policy/drafting issues raised by the Economics and Governance Committee*, p 4.

²⁴⁶ LG Act, s 176(9).

²⁴⁷ Bill, cl 12 (ss 150AS(3), 150AT); Explanatory notes, p 21.

²⁴⁸ Explanatory notes, p 14.

²⁴⁹ *Judicial Review Act 1991*, s 20.

²⁵⁰ The Assessor is an investigator for the purposes of the Act: Bill, cl 12 (s 150AZ); Explanatory notes, p 21.

²⁵¹ Bill, cl 12 (s 150CO); Explanatory notes, p 21.

Proposed new section 150CQ provides that unless the Assessor made the original decision the review should not be undertaken by the person who made the original decision or a person in a less senior position than the original decision maker.²⁵² If the person is not satisfied with the review decision they may apply to QCAT for a review of the Assessor's review decision.²⁵³

Stakeholder views

Submitters and witnesses presented differing views regarding the proposed changes to the review and appeal provisions. For example, the QLS supported the amendments providing that councillors have a right of review in relation to decisions of the CCT, but submitted the right should apply to all decisions.²⁵⁴ At the public hearing, the QLS advised:

*On our principles of natural justice we believe that people should always have the right of review. It is not fair on anyone to be restricted in any particular areas—in one area have a right of review and another area not have a right of review. We think the right of review should extend everywhere to take into account if there are any particular errors or if people have something wrong in their decision or if something has not been given particular weight that it should have. It gives another safety net for the provision of natural justice to all concerned.*²⁵⁵

Similarly, Gecko raised the issue that 'the Bill does not provide a merits review of a decision by a local government in relation to inappropriate conduct' and recommended that:

*...an aggrieved Councillor should have the ability to refer the matter to the Independent Assessor for review.*²⁵⁶

Gecko also expressed concern about the lack of opportunity for review in relation to actions taken by the chairperson of a meeting for unsuitable meeting conduct:

*...there remains the potential for unfair treatment of Councillors to occur in a manner that would not necessarily be able to be redressed through the Office of the Independent Assessor should a Councillor wish to take the matter further.*²⁵⁷

Conversely, Moreton Bay Regional Council submitted that the proposed amendment to allow judicial review of inappropriate conduct decisions made by councils should not be progressed if decisions regarding inappropriate conduct remain with councils.²⁵⁸

At the public hearing, Moreton Bay Regional Council further advised:

If these matters are quite minor and they have already passed a fairness test by going to the assessor and the assessor asking many questions, we feel that natural justice needs to be built in at that stage. Then if it is bounced back, that should be the end of the matter, bearing in mind that these things have to be balanced with the remedies available to the decision-maker... We feel the risk is low for the removing of that kind of remedy for the accused.

...

*We would be arguing that closure of the process would actually let council move on quicker... If you cut off appeal rights and they do not have those appeal rights then everyone just gets on with it at that stage.*²⁵⁹

²⁵² Bill, cl 12 (s 150CQ).

²⁵³ Bill, cl 12 (s 150CR); Explanatory notes, p 21.

²⁵⁴ Submission 12, p 2.

²⁵⁵ Public hearing transcript, Brisbane 19 March 2018, pp 15-16.

²⁵⁶ Submission 1, p 2.

²⁵⁷ Submission 1, p 3.

²⁵⁸ Submission 7, p 3.

²⁵⁹ Public hearing transcript, Brisbane 19 March 2018, pp 9-10.

In response to the concerns regarding review rights for decisions regarding inappropriate conduct and unsuitable meeting conduct, the department advised:

While the Bill does not provide a merits review of a decision by a Local Government in relation to inappropriate conduct, if a Local Government acts outside the limits of its power there may be grounds to seek a review on the basis of jurisdictional error. Further, the Bill removes the prohibition on judicial review of an administrative decision of a Local Government.

In addition, all Local Governments are required under the LGA s268 to adopt a process for dealing with complaints made by affected persons about decisions of the Local Government. If an affected person remains dissatisfied with the Local Government's response, the person may seek the assistance of the Queensland Ombudsman or seek legal advice to resolve their issue.²⁶⁰

The department also advised that a review of the way councils have been adjudicating inappropriate conduct would be undertaken after one year 'to determine whether a specific purpose appeals process is merited'.²⁶¹

Committee consideration and comment

Merit based review of inappropriate conduct and unsuitable meeting conduct

The committee noted that the department would undertake a review of the way councils have been adjudicating inappropriate conduct after one year. The committee suggests that the review also consider whether a specific purpose appeals process is merited for disciplinary action for unsuitable meeting conduct.

Review of decisions to seize objects

The committee noted that the Bill provides for decisions by investigators to seize objects to be reviewed by the Assessor, and also that as the Assessor is an investigator for the purpose of the Act, this could result in the Assessor reviewing their own decisions. The committee sought advice from the department about potential issues with procedural fairness in allowing the Assessor to review their own decisions.

The department advised:

The policy intent is to streamline the process of reviewing the initial decision to seize a thing as part of the investigation process. This review would be done by the Independent Assessor, but the initial seizure would be done by an investigator. Any review therefore is automatically done by a person more senior to the original decision-maker.

Under new section 150CR, if a person is unsatisfied with the outcome of the internal review, there is a right to go to QCAT for external review of the review decision by the Independent Assessor – significant streamlining opportunities in conducting the internal review first. Creating another entity to independently review decisions made during the investigation process would create unnecessary duplication and complexity.

New section 150CQ provides that an application for review is not dealt with by the person who made the original decision...²⁶²

²⁶⁰ Department, correspondence dated 16 March 2018, *Department of Local Government Racing and Multicultural Affairs' response to submissions*, pp 2-3.

²⁶¹ Department, correspondence dated 16 March 2018, *Department of Local Government Racing and Multicultural Affairs' response to submissions*, pp 2-3.

²⁶² Department, correspondence dated 22 March 2018, *Response to potential policy/drafting issues raised by the Economics and Governance Committee*, p 4.

While the committee acknowledges that generally the original decision would likely not have been made by the Assessor, the committee understands that the Bill does provide the Assessor with the powers of an investigator, and notes that the Bill recognises that the Assessor may make the original decision as the review provision states:

Unless the assessor made the original decision personally, [emphasis added] the assessor must ensure the application is not dealt with by—

- (a) *the person who made the original decision; or*
- (b) *a person in a less senior office in the Office of the Independent Assessor than the person who made the original decision.*²⁶³

The committee supports the procedural fairness protections afforded by the provision in preventing the original decision maker from reviewing a decision and requiring a senior officer to undertake the review, and believes that these protections should apply in circumstances where the Assessor makes the original decision. The committee notes that this may be achieved in practice if the Assessor does not make the original decision to seize objects.

3.12 Administrative, technical and clarifying amendments

The Bill proposes a range of amendments that seek to improve the operation and administration of the legislation, clarify existing requirements or support the new councillor complaints framework including:

- listing the Assessor, staff of the OIA, an investigator or the CCT information as persons to who it is an offence to give information that is known to be false or misleading in a material particular²⁶⁴
- clarifying that a councillor's office does not become vacant if a councillor is absent for two or more consecutive council meetings in compliance with disciplinary order of the CCT, council or chairperson of a meeting the councillor²⁶⁵
- adding the Assessor, investigators and members of the CCT to the list of persons it is an offence to obstruct and providing that it is an offence to impersonate the Assessor or an investigator²⁶⁶
- amending cross references²⁶⁷
- establishing transitional arrangements for dealing with complaints about councillors' conduct made but not finalised prior to the commencement of the new framework.²⁶⁸

²⁶³ Bill, cl 12 (s 150CQ).

²⁶⁴ Bill, cl 25.

²⁶⁵ Bill, cl 14.

²⁶⁶ Bill, cl 24.

²⁶⁷ See for example Bill, cl 4, 6, 7, 15, 16, 31.

²⁶⁸ Bill, cl 32; Explanatory notes, p 23.

4 Compliance with the *Legislative Standards Act 1992*

4.1 Fundamental legislative principles (FLP)

Section 4 of the *Legislative Standards Act 1992* (LS Act) states that FLPs are the ‘principles relating to legislation that underlie a parliamentary democracy based on the rule of law’. The principles include that legislation has sufficient regard to the rights and liberties of individuals, and the institution of Parliament.

The committee has examined the application of the fundamental legislative principles to the Bill, and brings the following to the attention of the Legislative Assembly.

4.1.1 Rights and liberties of individuals

Criminal history reports and conviction notifications

Clause 30 of the Bill provides that the Minister may obtain a criminal history report about a prospective or existing Assessor, CCT member or LGRC commissioner, including a summary of the circumstances of any conviction mentioned in the report. Clause 30 also introduces a requirement for the Assessor, CCT member or LGRC commissioner who is convicted of an indictable offence during their term of appointment to immediately disclose the conviction to the Minister. Failing to disclose a conviction, without reasonable excuse, would carry a maximum penalty of \$12,615 (100 penalty units).

Two proposed caveats on the Minister’s power to obtain a criminal history report act as safeguards against potential abuse of the power. Firstly, the prospective or existing Assessor, CCT member or LGRC commissioner must give their written consent for the report to be obtained. While refusing to provide consent may adversely affect the Minister’s consideration of whether the person is qualified to be the Assessor, CCT member or LGRC commissioner, they could refuse to provide consent if they were strongly opposed to a report being obtained by the Minister. Secondly, the Minister must ensure the report is destroyed as soon as practicable after it is no longer needed for consideration in deciding whether a person is qualified to be the Assessor, a CCT member or an LGRC commissioner.

Safeguards are not proposed in the Bill to protect information about a conviction during the term of the Assessor, CCT member or LGRC commissioner’s appointment. There is no requirement that the information be destroyed as soon as practicable after it is no longer needed, nor is there an offence for the unauthorised disclosure of information regarding conviction for an indictable offence.

Providing the Minister with the power to obtain a criminal history report for a prospective or existing Assessor, CCT member or LGRC commissioner, and requiring an Assessor, CCT member or LGRC commissioner to disclose a conviction during their appointment potentially breaches the FLP regarding the person’s right to privacy with respect to their personal information.

The explanatory notes acknowledge the potential FLP breach in relation to obtaining a criminal history report and provide the following justification:

...it is considered justified because the Minister may make the request only if the person has first given the Minister written consent for the request. The Bill includes a safeguard about the use of a person’s criminal history by requiring the Minister to ensure the report is destroyed as soon as practicable after it is no longer needed for the purpose for which it was requested.²⁶⁹

The explanatory notes do not address the potential FLP breach in relation to the requirement to disclose a conviction.

²⁶⁹ Explanatory notes, p 32.

Committee consideration and comment

The committee noted the proposed new section includes the following safeguards with respect to information obtained about a criminal history report - the report may only be obtained with the person's written consent and must be destroyed when no longer required for the purpose it was obtained. The committee also noted that if a person does not wish for their criminal history report to be obtained by the Minister, they can simply not give their consent.

However, the committee identified that the Bill does not appear to provide any limits on the disclosure of criminal history reports and there is no offence for the unauthorised disclosure of such information. The committee also identified that the Bill does not propose safeguards to protect information disclosed by the Assessor, CCT member or LGRC commissioner regarding conviction for an indictable offence during the term of their appointment. The committee sought advice regarding these potential issues from the department, which advised:

New section 260B includes an offence for non-disclosure of a notice of conviction. Should it be necessary to prosecute for a failure to notify, the original inaccurate notice would need to be retained and submitted as evidence of the breach. The retained notice would be kept confidential in accordance with the confidentiality and secrecy provisions in the Bill.²⁷⁰

While the committee acknowledges the advice from the department, the committee also notes the secrecy provisions in the Bill apply only to the Assessor, staff of the OIA and investigators, and considers that additional protections could be introduced to ensure the privacy of a prospective or existing Assessor, CCT member or LGRC commissioner. Such protections would be consistent with other legislation, such as the *Grammar Schools Act 2016* and *Plumbing and Drainage Act 2002*, that provides express safeguards for criminal history reports obtained in relation to becoming a member of a board or trade council and for criminal history information required to be disclosed during their appointment.

Powers of investigators

As outlined in section 3.9 of this report, the Bill provides investigators with a range of powers including the power to enter a place by consent or under the authority of a warrant, to search, inspect, examine or film the place, seize evidence under prescribed conditions, and require a person to give the investigator information or to attend a meeting and answer questions.²⁷¹

Providing investigators, including the Assessor, with these powers potentially breaches the FLP regarding the conferral of power to enter premises, and search for or seize documents or objects.²⁷²

The explanatory notes acknowledge the potential FLP breach and provide the following justification:

Adequate investigative powers are essential to ensure the integrity of the new councillor complaints system. The Bill provides sufficient safeguards so that the scope of investigators' powers is considered reasonable and proportionate having sufficient regard to the rights and liberties of individuals.²⁷³

Notice of confidentiality

As noted in section 3.9 of this report the Bill provides that where an investigator intends to exercise a power to require a person to give an investigator information or to attend a meeting and answer questions, the Assessor may give that person a notice stating the information or requirement to attend a meeting is confidential and must not be disclosed.²⁷⁴

²⁷⁰ Department, correspondence dated 22 March 2018, *Response to potential policy/drafting issues raised by the Economics and Governance Committee*, p 7.

²⁷¹ Bill, cl 12 (pt 4 div 1); Explanatory notes, p 5.

²⁷² LS Act, s 4(3)(e); OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, January 2008, p 44.

²⁷³ Explanatory notes, p 25.

²⁷⁴ Bill, cl 12 (ss 150AX, 150BD, 150BE); Explanatory notes, p 5.

Restricting a person from disclosing the information stated in the notice potentially breaches the FLP regarding individuals' rights and liberties and the undue restriction of ordinary activities. An activity should be lawful unless there is a sufficient reason for it to be declared unlawful.²⁷⁵

The explanatory notes acknowledge the potential FLP breach and provide the following justification:

The Bill includes safeguards on the exercise of the power by providing that the notice may only be given if the Independent Assessor reasonably believes the notice is necessary to prevent the commission of an offence or to ensure the investigation of a councillor's conduct is kept confidential. Further, the Independent Assessor must give the notice personally and may not delegate this power...²⁷⁶

Penalties for offences

The Bill provides for the introduction and amendment of a range of offences (see Appendix D).

The introduction and amendment of offences potentially breaches the FLP that consequences imposed by legislation should be proportionate and relevant to the actions to which the consequences are applied. Penalties must be proportionate to the offence.²⁷⁷

The explanatory notes acknowledge the potential FLP breach and provide the following justifications.

- Frivolous and otherwise improper complaints:

The maximum penalties are higher than those recommended in the Councillor Complaints Report but are equivalent to the maximum monetary penalties under the CC Act. This is considered proportionate and reasonable to deter these kinds of complaints in view of the possible reputational damage to a councillor by a frivolous or improper complaint.²⁷⁸

- Conflicts of interest:

The penalties are considered proportionate and appropriate to reflect the importance of maintaining public confidence in the councillor complaints system.²⁷⁹

- Protection from reprisal:

The maximum penalty for the offence, and its inclusion as an integrity offence, is significant but is considered reasonable and proportionate to maintain public confidence in the councillor complaints system, deter councillors from taking reprisals and encourage the reporting of inappropriate conduct and misconduct.²⁸⁰

- Offences relating to investigators:

These offences are similar to other offences applying to other investigators, including in the LGA, the CC Act and the Legal Profession Act 2007. The proposed maximum penalties of 50 penalty units for these offences are higher than the penalties applying under the LGA but lower than those applying under the CC Act and the Legal Profession Act 2007. This is considered proportionate and reasonable with regard to the seriousness of investigating conduct complaints and offences against the conduct provisions committed by councillors.²⁸¹

- Secrecy and notices of confidentiality:

The maximum penalties for the new offences in new sections 150CK and 150EA (85 penalty units and 100 penalty units respectively) are considered proportionate and appropriate in light of the maximum penalties that apply to other similar offences.²⁸²

²⁷⁵ LS Act s 4(2)(a); OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, January 2008, p 118.

²⁷⁶ Explanatory notes, p 26.

²⁷⁷ LS Act, s 4(2)(a); OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, January 2008, p 120.

²⁷⁸ Explanatory notes, p 27.

²⁷⁹ Explanatory notes, p 29.

²⁸⁰ Explanatory notes, p 28.

²⁸¹ Explanatory notes, p 28.

²⁸² Explanatory notes, p 28.

- Disclosure of criminal convictions:

*The offence and its maximum penalty of 100 penalty units is considered proportionate to ensure that persons investigating and deciding councillor conduct matters or deciding local government remuneration continue to remain qualified throughout the term of their appointment and reinforces the expectation that these persons should observe ethical and legal behaviour in carrying out their functions.*²⁸³

Committee consideration and comment

The committee notes that the proposed amendments substantially increase the penalties for frivolous or otherwise improper complaints, and remove the first ‘warning’ for complaints that are vexatious or not in good faith, meaning any complaint that is vexatious or not in good faith could incur a substantial penalty (85 penalty units).

The committee acknowledges the intention of the significant penalty increase is to deter such complaints. However, when considering the range of offences the Bill proposes to introduce (see Appendix D), the committee is of the view that making a frivolous or otherwise improper complaint may not be substantially more serious than the Assessor or CCT member investigating a complaint in which they have a conflict of interest (maximum penalty of 35 penalty units), or a person failing to comply with a requirement of an investigator or tampering or interfering with a restriction imposed by an investigator (maximum penalty of 50 penalty units).

The committee also noted that the proposed maximum penalties for:

- the Assessor taking part in an investigation in which they have a conflict of interest or failing to advise the Minister of a conflict of interest (35 penalty units)
- a member of the CCT taking part in a hearing in which they have a conflict of interest or failing to appropriately declare of a conflict of interest (35 penalty units)

may not reflect the seriousness of the offence when compared to the other offences the Bill proposes to introduce (see Appendix D) and other offences under the LG Act.

The committee is of the view that the Assessor taking part in an investigation in which they have a conflict of interest or failing to advise the Minister of a conflict of interest, or a CCT member taking part in a hearing in which they have a conflict of interest or failing to appropriately declare a conflict of interest, could be comparable in seriousness to a councillor failing to declare a conflict of interest (100 penalty units) or the Assessor or CCT member failing to disclose a criminal conviction (100 penalty units).

The committee suggests that the Minister for Local Government, Minister for Racing and Minister for Multicultural Affairs review the maximum penalties for offences proposed in the Bill to ensure penalties are proportionate and addresses the proportionality of penalties in his second reading speech.

Disciplinary orders

As outlined in section 3.6 and 3.7 of this report, the Bill provides that a council and the CCT may make a range of orders as disciplinary action for councillors’ conduct.

The power to impose disciplinary orders potentially breaches the FLP that consequences imposed by legislation should be proportionate and relevant to the actions to which the consequences are applied. Sanctions must be proportionate to the conduct.²⁸⁴

²⁸³ Explanatory notes, p 29.

²⁸⁴ LS Act, s 4(2)(a); OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, January 2008, p 120.

The explanatory notes acknowledge the potential FLP breach and provide the following justification:

The purpose of providing for a range of orders to be made is to provide flexibility for the local government and the conduct tribunal to impose orders that are appropriate and proportionate in the circumstances and in light of the seriousness of the conduct.

...

By providing for a broader range of orders, a local government will be better equipped to ensure that the order is proportionate to the conduct.

...

The Bill provides a broad range of options for orders or recommendations for misconduct and specifies in new section 150AQ that, in deciding what disciplinary action to take, the conduct tribunal may consider any previous misconduct of the councillor and any allegation made in the hearing that was admitted or not challenged provided the tribunal is reasonably satisfied the allegation is true. This will also ensure that any order or recommendation imposed by the tribunal is appropriate and proportionate in light of past behaviour and cooperation during the hearing.²⁸⁵

Immunity from civil liability

Clause 27 includes the Assessor, investigators, CCT members and LGRC commissioners in the list of persons who are not civilly liable for acts or omissions performed honestly and without negligence in an official capacity. Civil liability would attach to the State.²⁸⁶

The proposed amendment protecting the specified parties from civil liability potentially breaches the FLP regarding conferral of immunity. Legislation should not confer immunity from proceeding or prosecution without adequate justification.²⁸⁷ ‘If protection is needed for persons administering Queensland legislation ... it is usually declared to be shifted to the State’.²⁸⁸

The explanatory notes acknowledge the potential FLP breach and provide the following justification:

The immunity from civil liability for the Independent Assessor, investigators, commissioners of the remuneration commission and members of the conduct tribunal is considered justified to ensure that these persons are not exposed to liability and the accompanying financial risk for carrying out their duties. Current section 235(4) of the LGA provides that, where civil liability is prevented from attaching to a State administrator, it will attach instead to the State. This safeguard ensures that an aggrieved party will be able to seek relief from the State.²⁸⁹

More than one process from single act

The Bill provides for three levels of conduct under the LG Act, unsuitable meeting conduct, inappropriate conduct and misconduct. Clause 12 of the Bill provides that where a councillor is disciplined three times in one year for unsuitable meeting conduct, that conduct taken together will be inappropriate conduct and similarly where a councillor is disciplined three times in one year for inappropriate conduct that conduct taken together will be misconduct.

Subjecting a councillor to more than one disciplinary action for the same conduct potentially breaches the FLP regarding the person’s right not to be subject to more than one court or tribunal process for a single act or omission.

²⁸⁵ Explanatory notes, p 30.

²⁸⁶ Bill, cl 27.

²⁸⁷ LS Act, s 4(3)(h).

²⁸⁸ OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, January 2008, p 62.

²⁸⁹ Explanatory notes, pp 30-31.

The explanatory notes acknowledge the potential FLP breach and provide the following justification:

Where conduct at the two lower levels is repeated during a one year period, it is considered appropriate to deal with these ongoing issues at a higher level.

It is considered that this approach provides for a disciplinary order proportionate and commensurate to the seriousness of the conduct and is aimed at discouraging repeated instances of unsuitable meeting conduct or inappropriate conduct by councillors.²⁹⁰

Review of councillor conduct decisions

As outlined in section 3.11 of this report, the Bill provides that the councillor and Assessor, may apply to QCAT for a review of a decision of the CCT, other than a decision recommending the councillor's suspension or dismissal.²⁹¹ However, the Bill does not provide for a merits review of decisions made by a chairperson about unsuitable meeting conduct or by a council about inappropriate conduct.²⁹²

Denying councillors a right of review for decisions about unsuitable meeting conduct and inappropriate conduct potentially breaches the FLP regarding administrative power being subject to appropriate review.²⁹³ For legislation affecting individual rights and liberties 'a merits-based review is the most appropriate type of review'.²⁹⁴

The explanatory notes acknowledge the potential FLP breach and provide the following justification:

It is considered appropriate that a review by QCAT is available for the most serious level of conduct but not available otherwise given the lower level of orders that may be made by the chairperson of a local government meeting about unsuitable meeting conduct or by a local government about inappropriate conduct.²⁹⁵

Committee consideration and comment

As outlined in section 3.11 of this report, the committee suggests that the planned review of the way councils have been adjudicating inappropriate conduct be expanded to also consider unsuitable meeting conduct. The review should consider whether a specific purpose appeals process is merited for decisions relating to either or both of these categories of conduct.

Unambiguous legislation drafted in a clear and precise way

Legislation should be unambiguous and drafted in a sufficiently clear and precise way.²⁹⁶ The wording must withstand attempts by readers to find unintended interpretations:²⁹⁷

It is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it.²⁹⁸

If the meaning or application of a statutory definition is unclear, there is a serious risk of confusion in the interpretation of provisions.²⁹⁹

Statutory interpretation of the following sections of the amended Act may result in interpretations inconsistent with the intended outcomes.

²⁹⁰ Explanatory notes, p 31.

²⁹¹ Bill, cl 12 (ss 150AS(3), 150AT); Explanatory notes, p 21.

²⁹² Explanatory notes, p 14.

²⁹³ LS Act, s 4(3)(a).

²⁹⁴ OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, January 2008, p 18.

²⁹⁵ Explanatory notes, p 32.

²⁹⁶ LS Act, s 4(3)(k).

²⁹⁷ OQPC, *Principles of good legislation: OPQC guide to FLPs, Clear Meaning*, paras 1-2.

²⁹⁸ *Re Castioni* [1891] 1 QB 149, pp 167-168, cited in OQPC, *Principles of good legislation: OPQC guide to FLPs, Clear Meaning*, para 2.

²⁹⁹ OQPC, *Principles of good legislation: OPQC guide to FLPs, Clear Meaning*, para 59.

Inconsistency of provisions regarding taking action to discipline a councillor

Under the proposed new section 150AG, if the council decides a councillor has engaged in inappropriate conduct it must decide what action to take under 150AH. Action that may be taken is prescribed under section 150AH and includes an order that no action be taken. The proposed definition of misconduct in proposed new section 150L includes a course of conduct leading to a council taking action to discipline a councillor for inappropriate conduct on three occasions within one year. Proposed new section 150S provides that a council must notify the Assessor of misconduct in relation to a course of conduct leading to the council taking action under section 150AG to discipline a councillor for inappropriate conduct on three occasions during one year.

As the different drafting approach in sections 150L and 150S may result in an inconsistent application of the provisions the committee sought advice from the department regarding the inconsistent wording of the provisions.

The committee acknowledges the department's advice that it 'supports clarifying the provision'.³⁰⁰ For clarity in the interpretation of what constitutes 'taking action' to discipline a councillor for the purpose of considering whether a councillor has engaged in misconduct, and to ensure consistency in the application of the provisions, the committee suggests that proposed new section 150L(2)(a) be amended to align with the terminology in 150S to state that the conduct:

is part of a course of conduct leading to the local government taking action under section 150AG to discipline the councillor for inappropriate conduct on 3 occasions during a period of 1 year.

Distinctions between a councillor and a mayor

Proposed new section 150P includes a definition of a 'government entity' which is defined to include a local government, a mayor, a councillor, and the chief executive officer of a council. Similarly, proposed new section 150R includes a definition of a 'local government official' which is defined to mean a mayor, a councillor and a chief executive officer of a council. The committee noted that the existing definition of councillor in the LG Act includes the mayor, and sought advice from the department about the rationale for distinguishing between a mayor and a councillor in proposed new sections 150P and 150R. The department advised:

The Department considers there is no need to distinguish between 'a mayor' and 'a councillor' in new sections 150P and 150R.³⁰¹

The committee notes the department's advice and suggests, for clarity and to avoid any possible interpretation that a mayor is not a councillor, that the reference to 'a mayor' be removed from the definition of a government entity in new section 150P and the definition of a local government official in new section 150R.

Providing notices to complainants

The Bill provides that the Assessor or CCT must give a complainant a notice in a range of circumstances. Under the proposed new section 150Z the Assessor must give the complainant a notice of a decision to dismiss a complaint 'if the assessor has the person's contact details'. However, proposed new sections 150AS, 150P and 150Q, which require the Assessor or CCT to give the complainant a notice, do not contain the caveat that they must do so only if they have the person's contact details.

As complaints may be made anonymously, the committee sought advice from the department as to whether the caveat under section 150Z should also be included in sections 150AS, 150P and 150Q.

³⁰⁰ Department, correspondence dated 22 March 2018, *Response to potential policy/drafting issues raised by the Economics and Governance Committee*, p 3.

³⁰¹ Department, correspondence dated 22 March 2018, *Response to potential policy/drafting issues raised by the Economics and Governance Committee*, p 4.

The committee notes the department's advice that it 'supports providing clarity throughout the Bill',³⁰² and suggests that for clarity and consistency in drafting proposed new sections 150AS, 150P and 150Q include a proviso that a notice be provided to a complainant only if the Assessor or CCT has the person's contact details.

Operation of the City of Brisbane Act

Clause 4 seeks to clarify that the new councillor complaints system will not apply to the Brisbane City Council by providing that the COB Act and not the LG Act provides for 'the way complaints about councillors of the Brisbane City Council are to be dealt with' (complaints are dealt with under Chapter 6, Part 2, Division 6 of the COB Act).³⁰³

The committee noted this clarification did not capture the provisions under division 7 of the COB Act, regarding conduct in council meetings, and sought advice from the department, which advised:

The City of Brisbane Act 2010 will continue to provide for the management of conduct in meetings of the Brisbane City Council and its committees.

The Department supports clarifying the policy intent.³⁰⁴

The committee notes the department's support for clarifying the intent of the Bill regarding the BCC, and suggests that the Bill be amended to clarify that the COB Act and not the LG Act provides for the management of councillors' conduct in council meetings.

4.1.2 Institution of Parliament

Delegation of legislative power

Legislation must have sufficient regard to the institution of Parliament. The delegation of legislative power should be allowed only in appropriate cases and to appropriate persons.³⁰⁵

The Bill provides that a range of matters may be prescribed by regulation:

- new sections 150BA, 150BB, 150DO and 181 propose to allow a regulation to prescribe matters relating to the appointment of investigators, members of the CCT and commissioners of the LGRC
- new section 150CN proposes to allow a regulation to prescribe matters relating to a determination of whether it is just to order compensation for loss incurred as a result of the exercise of an investigator's power
- the amendment to section 270 proposed to allow a regulation to be made about the processes of the CCT and the LGRC.

The explanatory notes state:

It is appropriate to provide that these matters may be delegated to subordinate legislation to provide for flexibility in dealing with particular issues under the LGA [LG act]. Further, a regulation when made, will sufficiently subject the exercise of delegated legislative power to Parliamentary scrutiny.³⁰⁶

The Bill also requires the making of a code of conduct, model meeting procedures and investigation policies and allows for the making of practice directions.

³⁰² Department, correspondence dated 22 March 2018, *Response to potential policy/drafting issues raised by the Economics and Governance Committee*, p 7.

³⁰³ Bill, cl 4.

³⁰⁴ Department, correspondence dated 22 March 2018, *Response to potential policy/drafting issues raised by the Economics and Governance Committee*, p 10.

³⁰⁵ LS Act, ss 4(2)(b), 4(4)(a).

³⁰⁶ Explanatory notes, p 34.

The code of conduct, setting out behavioural standard for councillors, will not take effect until approved by regulation. The approved regulation must also be tabled in the Legislative Assembly.

The explanatory notes state:

*These safeguards will ensure that this delegated legislative power is subject to the scrutiny of the Legislative Assembly.*³⁰⁷

The model meeting procedures, investigation policies and practice directions will outline procedural and administrative matters. The explanatory notes state these matters ‘are not appropriate to deal with in legislation’, and:

*It is considered that these detailed matters are appropriate for delegation and that the delegation will be exercised by appropriate persons.*³⁰⁸

4.2 Explanatory notes

Part 4 of the LS Act requires that explanatory notes be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information the explanatory notes should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are reasonably detailed and contain the information required by Part 4 and a reasonable level of background information and commentary to facilitate understanding of the Bill’s aims and origins.

³⁰⁷ Explanatory notes, p 33.

³⁰⁸ Explanatory notes, p 33.

Appendix A – Submitters

Sub #	Submitter
001	Gecko Environment Council Association Inc
002	Redland City Council
003	Local Government Association of Queensland
004	John Burns
005	Crime and Corruption Commission
006	Ken Park
007	Moreton Bay Regional Council
008	Redlands2030 Inc
009	Confidential
010	Queensland Local Government Reform Alliance
011	Pat Coleman
012	Queensland Law Society

Appendix B – Witnesses at public briefing and public hearing

Public briefing

5 March 2018

Department of Local Government, Racing and Multicultural Affairs

- Bronwyn Blagoev, Acting Deputy Director-General, Local Government and Regional Services
- Josie Hawthorne, Acting Director, Legislation Services
- Tim Dunne, Manager, Governance

Public hearing

19 March 2018

Local Government Association of Queensland

- Sarah Buckler, General Manager, Advocate
- Mark Leyland, Principal Advisor, Finance and Governance

Redland City Council

- John Oberhardt, General Manager, Organisational Services

Moreton Bay Regional Council

- Kelvin Chin Fat, Senior Legal Officer

Redlands2030

- Chris Walker, Secretary

Queensland Law Society

- Ken Taylor, President
- Kate Brodnik, Senior Policy Solicitor
- Binari De Saram, Acting Advocacy Manager

Appendix C – Recommendations from Councillor Complaints Report

Assessment, investigation and hearing of complaints

Recommendation 4.1

The LG Act be amended to provide that the ‘preliminary assessment’ of any complaint against a councillor should be made by an Independent Assessor, and not by a council CEO, or the Department’s chief executive.

Recommendation 4.2

The Panel does not recommend any additional involvement of the Ombudsman in the complaints handling process. However it notes that the Ombudsman may review complaints about the administrative actions of a council dealing with inappropriate conduct matters.

Recommendation 4.3

Complaints against councillor conduct should be made on a standardised form that requests the complainant to provide details of any supporting evidence, and/or witnesses and such other material as the Independent Assessor specifies. It should also explain the purpose and scope of the complaints system and explain the appropriate ways in which complaints about matters other than councillor conduct may be made.

The standard form should contain a declaration that the complainant is acting in good faith and has provided information that is correct and true to the best of their knowledge. It should contain a warning that it is an offence to provide any information to the Independent Assessor that the complainant knows is false or misleading in a material particular.

Recommendation 4.4

The LG Act should be amended to allow the form to be prescribed by the Independent Assessor.

Recommendation 4.5

Only those anonymous complaints that provide enough information to action a complaint against a councillor for possible inappropriate conduct or misconduct should be dealt with under the complaints process. Where the complaint cannot be actioned without further information, it should be dismissed.

Recommendation 4.6

The offence in s. 176C(8) – a person must not make a complaint about the conduct of a councillor if the complaint is substantially the same as a complaint the person has already made and the person has been warned not to repeat it – be deleted. In its place the Act be amended to 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).

Recommendation 4.7

The Councillor Conduct Tribunal (the Tribunal) also be given jurisdiction in relation to this offence. That the maximum penalty that the Tribunal can impose be 50 penalty units. An order can also be made for reimbursement of costs of the Independent Assessor and the Tribunal.

Recommendation 4.8

On assessing a complaint about a councillor, the Independent Assessor should notify the relevant council about the complaint.

Recommendation 4.9

The Independent Assessor be given the same powers as an investigator is given in s. 214 of the Act, subject to the same requirements of s. 213 to provide natural justice.

Recommendation 4.10

The Independent Assessor may initiate own-motion investigations of councillor conduct if sufficient cause arises during the course of another investigation, or if the Independent Assessor considers it in the public interest to do so.

Recommendation 4.11

The Tribunal may provide the Independent Assessor with information about a councillor's conduct that the Tribunal considers should be brought to the attention of the Independent Assessor for possible investigation by the Independent Assessor.

Recommendation 4.12

The Independent Assessor be given a statutory guarantee of independence in relation to decision-making and:

- Be responsible for assessing whether complaints against councillors are trivial, vexatious or frivolous, or for another reason, should be dismissed.
- Refer corruption complaints to the CCC, and investigate such complaints that are referred back by the CCC.
- Investigate allegations of inappropriate conduct and misconduct, armed with appropriate powers to do so.
- Be able to initiate investigations into possible misconduct.
- Have an appropriate complaints management system, including provision for internal review of decisions.
- Refer allegations of inappropriate conduct to councils.
- Prosecute allegations of misconduct.

Inappropriate conduct

Recommendation 5.1

There should be a uniform, mandatory Code of Conduct for local government councillors in Queensland and a model code of meeting procedure.

Recommendation 5.2

A Code of Conduct should be developed by the Local Government Liaison Group and approved by the Minister.

Recommendation 5.3

Regulation 254 of the LG Reg, the declaration of office that s. 169 of the LG Act requires councillors to make before assuming office, be amended to include a statement that the councillor will abide by the Code of Conduct.

Recommendation 5.4

The Department, LGAQ and LGMA should develop the model code of meeting procedure.

Recommendation 5.5

Councils be required to adopt meeting standing orders, based on the model code of meeting procedure.

Recommendation 5.6

Breaches of a meeting code or code of conduct in a meeting should not be classified as inappropriate conduct. Such conduct breaches should be dealt with immediately by the chair of the meeting (council or committee) who, as appropriate, should be able to require a withdrawal (of words said), an apology (for what had been said or done) or to remove the offending councillor from the remainder of the council or committee meeting.

Recommendation 5.7

A council may determine that a councillor's serious or repeated contrary conduct in meetings or committee meetings should be treated as inappropriate conduct and dealt with as such.

Recommendation 5.8

The definition of ‘inappropriate conduct’ in s. 176(4) of the LG Act be amended as follows. The two examples (a) and (b) be deleted and in their place be inserted:

- (a) Serious or repeated conduct contrary to the code of conduct or meeting practice in formal meetings.
- (b) A failure by the councillor to comply with a direction to leave a meeting of the local government or its committees by the chairperson presiding at the meeting.
- (c) Failure to comply with the council’s other policies, codes or resolutions.
- (d) Offensive or disorderly behaviour as a councillor that happens outside formal council meetings.
- (e) Failure to work respectfully and constructively with other councillors or staff.
- (f) Exerting or attempting to exert inappropriate influence over staff.
- (g) Repeated unreasonable requests for information (contrary to council guidelines).
- (h) Exercising, or purporting to exercise, an unauthorised power, duty or function.

Recommendation 5.9

Section 181 of the LG Act be deleted and in its place the new s. 181 should recognise:

- That complaints about inappropriate conduct are to be determined by the council.
- That the council may seek advice from a council Conduct Advisory Committee (CAC) established under the LG Reg or from a member of the Tribunal selected by the president of the Tribunal.
- That councils consider the formation of a CAC to provide it with advice, when requested by the council, when an inappropriate conduct complaint against a councillor has to be determined by the council.
- A councillor whose conduct is being considered must cooperate with the council, the committee or the Tribunal member. Failure to do so could result in a misconduct complaint.

Recommendation 5.10

That the council, if it decides to take disciplinary action against the councillor, may make one or more of the following orders that it considers appropriate in the circumstances:

- Censure of the councillor.
- Formal reprimand.
- Requirement for an apology.
- Mandatory training or counselling.
- Councillor to be excluded for up to two meetings of the council.
- Councillor removed from any position representing the council, and not to chair or attend committees or other specified meetings for up to two months.
- Payment of costs attributed to the actions of the councillor.
- An order that any repeat of the inappropriate conduct be referred to the Tribunal as misconduct.

Where an order is made that the councillor be excluded from council meetings, such absence shall not trigger a vacancy under s. 162(1)(e) of the LG Act.

Recommendation 5.11

That councillors against whom a complaint of inappropriate conduct has been upheld may not participate in council or committee meetings until any disciplinary order imposed has been paid or otherwise discharged. Section 162 of the LG Act (When a councillor’s office becomes vacant) would apply in relation to such resulting non-attendance.

Recommendation 5.12

Section 153 of the LG Act (Qualifications of councillors) be amended to disqualify for four years a person who as a result of their failure to comply with an order of the council following a finding of inappropriate conduct has ceased to be a councillor as a result of the operation of s. 162(1)(e) of the LG Act. Councils to have process for dealing with inappropriate conduct complaints 5.12 Councils develop and include a process for dealing with inappropriate conduct in their complaints management system. This should be in accordance with the principles of natural justice.

Recommendation 5.13

The Independent Assessor, when referring a complaint about inappropriate conduct to the council, should indicate how serious the inappropriate conduct might be, whether any further information needed to be obtained before the complaint could be dealt with, whether mediation might be appropriate and by whom.

The Independent Assessor should also recommend to the council whether it should deal with the matter itself, refer it for advice to its CAC, or refer it for advice (and possible further investigation) to a Tribunal member.

Recommendation 5.14

Where councils elect to use a Tribunal member to investigate and make recommendations about a complaint of inappropriate conduct, the council should pay the member's costs.

Recommendation 5.15

Twelve months after the proposed system commences, the LGLG should review the way councils have been adjudicating inappropriate conduct matters with a view to determining whether it is necessary and desirable to introduce an appeal system such as that described in this report.

Misconduct

Recommendation 6.1

The definition of misconduct (s. 176(3)(b) of the LG Act) should encompass:

- (i) The performance of the councillor's responsibilities, or the exercise of the councillor's powers, in a way that is not honest or is not impartial.
- (ii) A breach of the trust placed in the councillor.
- (iii) A misuse of information or material acquired in or in connection with the performance of the councillor's responsibilities, whether the misuse is for the benefit of the councillor or someone else.
- (iv) Unauthorised use of council staff or resources for private purposes. (
- (v) Use of information obtained as a councillor to the financial detriment of the council or the public interest.
- (vi) Failure to cooperate with the council, CAC or Tribunal member during inappropriate conduct proceedings or to comply fully with a penalty for inappropriate conduct.
- (vii) Third or subsequent finding of inappropriate conduct during council term.
- (viii) Bullying or harassment.
- (ix) Failure to declare and resolve conflict of interest at a meeting in a transparent and accountable way.
- (x) Seeking gifts or benefits of any kind.
- (xi) Improper direction or attempted direction of staff.
- (xii) Deliberate release of confidential information.

Recommendation 6.2

A further clause should be added to s. 176(3) of the LG Act to provide that an offence against ss. 171(1), 171A(2) and (3), 171B(2), 172(5) and 176C(8) may be dealt with as misconduct.

Recommendation 6.3

Section 176A of the LG Act (Application to former councillors) should be amended to provide that a complaint has to be made within 6 months of the person ceasing to be a councillor.

Recommendation 6.4

Section 180 of the LG Act be amended to provide the following penalties for misconduct. One or more of the following:

- Mandatory training or counselling.
- An order that the councillor reimburse the local government and/or pay up to 50 penalty units.
- An order that a councillor may not remain as or become deputy mayor or a committee chair for the remainder of the term.
- Councillor to be excluded for up to three meetings of the council.
- Councillor removed from any position representing the council for a period of up to three months.
- Councillor not to attend committees and/or other specified meetings for a period of up to three months.
- An order suspending the councillor (without pay) for a period of up to three months.
- A recommendation to the Minister that the councillor be suspended for more than three months and up to six months (without pay) or dismissed.
- A recommendation that the Department prosecute the councillor for an offence under the LG Act.

Where an order is made that the councillor be excluded from council meetings, such absence shall not trigger a vacancy under s. 162(1)(e) of the LG Act.

Recommendation 6.5

A councillor who is the subject of an order by the Tribunal in relation to a misconduct finding may not attend a council meeting until such time as the councillor has complied fully with the order. Section 162 of the LG Act (When a councillor's office becomes vacant) would apply in relation to such resulting non-attendance.

Recommendation 6.6

Section 153 of the LG Act (Qualifications of councillors) be amended to disqualify for seven years a person who as a result of their failure to comply with an order of the Tribunal following a finding of misconduct has ceased to be a councillor as a result of the operation of s. 162(1)(e) of the LG Act.

Corrupt conduct

Recommendation 7.1

The LG Act be amended to deem the Independent Assessor to be the holder of an appointment in a unit of public administration for the purposes of the CC Act and that such complaints about corruption that the CCC would otherwise have directed back to the Department or to councils should be sent instead to the Independent Assessor.

Recommendation 7.2

Section 182(2) of the LG Act be amended to substitute the Independent Assessor for the Department's chief executive as the public official dealing with corruption complaints.

Election issues

Recommendation 8.1

The LG Act be amended to provide that during the local government caretaker period before an election, it is an offence for a person who has made a complaint alleging inappropriate conduct, misconduct or corrupt conduct of a councillor or candidate for election, or an associate of the complainant, to disclose information that the complaint has been made, or disclose any detail of the complaint. The Tribunal has jurisdiction to hear a complaint under this section and may impose a penalty of up to 50 penalty units.

Recommendation 8.2

Section 234 (1)(f) (False or misleading information) of the LG Act be amended to substitute 'Independent Assessor' for 'a regional conduct review panel'. The Tribunal has jurisdiction to hear a complaint under this section and may impose a penalty of up to 50 penalty units.

Offences in the Act

Recommendation 9.1

Both the Independent Assessor and the Tribunal have the power to make recommendations to the Department that a councillor or former councillor be prosecuted for an offence under the Act.

Recommendation 9.2

Section 171(1) of the LG Act be amended to read:

A person who is, or has been, a councillor must not use information that was acquired as a councillor to gain, directly or indirectly, a financial advantage for the person or someone else.

Maximum penalty—100 penalty units or two years imprisonment.

Recommendation 9.3

The definition of misconduct in s. 176(3)(b) of the LG Act be amended to include:

Cause financial detriment to the local government.

Natural justice, procedural fairness and confidentiality

Recommendation 10.1

Section 213(3) of the LG Act, requiring RCRPs and the tribunal to comply with any procedural rules prescribed under a regulation, be retained. One year after the proposed Tribunal commences, its president should consider whether to recommend to the Minister the adoption of a regulation prescribing procedural rules for the Tribunal.

Recommendation 10.2

Section 213(2)(c) of the LG Act, giving the RCRPs and tribunal power to refuse to allow a person to be represented by a legal practitioner be amended to read:

Where it considers it desirable to do so in the interests of justice, may allow a person to be attended by a legal practitioner.

Recommendation 10.3

Section 179(5) of the LG Act, which establishes that the standard of proof in misconduct hearing is the balance of probabilities, be retained.

Recommendation 10.4

Section 179(6) of the LG Act, that requires the panel or tribunal to keep a written record of the hearing, be amended to add:

(c) The reasons for its decision.

Recommendation 10.5

The provisions of the LG Act limiting appeals, be amended to permit appeals to the District Court from decisions of the proposed Tribunal on misconduct matters on questions of law only, and for jurisdictional error.

Recommendation 10.6

Subsections 177A(4)(5) and (6), which require a complainant who is also a councillor to appear before the panel or tribunal to confirm the complaint, be deleted as several other recommendations of the Panel will make it redundant.

Role of the Minister and the department

Recommendation 11.1

The Department establish the LGLG to coordinate the provision of advice for local government councillors on the interpretation of relevant legislative provisions, and to provide assistance and training in areas such as declarations of interests, declarations of material interests and conflicts of interest. The group should provide advice to the Minister, through the Department, on governance issues such as the proposed Code of Conduct. And it should include the CCC, the Ombudsman, the Auditor-General and the Independent Assessor, together with the LGAQ and the LGMA.

Reconstituting the complaints authorities

Recommendation 12.1

The functions of the tribunal and the RCRPs be transferred to the proposed Tribunal.

Recommendation 12.2

The tribunal be reconstituted as the Councillor Conduct Authority (CCA) with the Tribunal as one of its two constituent parts, the other being the Independent Assessor.

Recommendation 12.3

The Independent Assessor be the chief executive officer of the CCA.

Recommendation 12.4

The former tribunal's responsibilities for establishing categories of local governments and deciding to which category each local government belongs, be transferred to the Department, and its responsibility for deciding the remuneration that is payable to the mayors, deputy mayors and councillors be transferred to the Queensland Independent Remuneration Tribunal.

Recommendation 12.5

The Independent Assessor and the president of the new Tribunal be statutory appointments, and that both should be appointed for fixed terms of up to five years. Other sessional members of the Tribunal be appointed for three year terms by the Minister, on the recommendation of the president of the Tribunal.

Recommendation 12.6

A person who is to be appointed to the Tribunal must have extensive knowledge of and experience in, one or more of the following:

- Local government
- Investigations
- Law
- Public administration
- Public sector ethics
- Public finance.

Recommendation 12.7

The president should draw up and publish on the website the rules governing the way Tribunal hearings are conducted.

Recommendation 12.8

Section 181A of the LG Act (Records about complaints) be amended to provide in ss. (1) that the section also concerns complaints received by the Independent Assessor that are referred to the council to be dealt with as inappropriate conduct and relevant misconduct decisions by the proposed Tribunal.

Recommendation 12.9

Section 181A(2)(a) of the LG Act (Records about complaints) be amended by substituting ‘and’ for ‘or’.

Recommendation 12.10

The CCA establish a website where all the Tribunal’s decisions and the reasons for them are published and where decisions of councils concerning inappropriate conduct are also published. Decisions by the Independent Assessor dismissing complaints that are trivial, vexatious etc. should also be published in summary form.

Recommendation 12.11

The publication of information about new councillor complaints should be suspended during the caretaker period before a council election.

Recommendation 12.12

The disciplinary system provided for in the CoBA [CB Act] be aligned with that proposed for the LG Act.

Appendix D – Offences under the Bill

Offence description	Maximum penalty
Failing to return investigator identity card within 21 days	\$1,261 (10 penalty units)
Assessor taking part in an investigation when they have a conflict of interest	\$4,415 (35 penalty units)
Assessor failing to advise the Minister of a conflict of interest	\$4,415 (35 penalty units)
CCT member taking part in a hearing when they have a conflict of interest	\$4,415 (35 penalty units)
CCT member failing to advise the president (or the Minister) of a conflict of interest	\$4,415 (35 penalty units)
Failing to comply with a requirement to help an investigator	\$6,307 (50 penalty units)
Failing to seal a seized object or entrance to where the object is, or to make equipment inoperable as directed by an investigator	\$6,307 (50 penalty units)
Tampering with a seized object or mechanism to restrict access to it	\$6,307 (50 penalty units)
Entering a restricted place or tampering with a mechanism to restrict access to the place	\$6,307 (50 penalty units)
Failing to comply with a notice to provide information to an investigator	\$6,307 (50 penalty units)
Failing to attend a meeting and answer questions as required by an investigator	\$6,307 (50 penalty units)
Obstructing a state official exercising power under the Act	\$6,307 (50 penalty units)
Impersonating an authorised officer, the Assessor or an investigator	\$6,307 (50 penalty units)
Making a complaint vexatiously or not in good faith	\$10,722 (85 penalty units)
Making a second or subsequent frivolous complaint	\$10,722 (85 penalty units)
Disclosing information in contravention of a confidentiality notice	\$10,722 (85 penalty units)
Assessor, OIA staff member or investigator disclosing confidential information	\$12,615 (100 penalty units)
Assessor, CCT member, LGRC commissioner failing to give notice of a conviction of an indictable offence	\$12,615 (100 penalty units)
Taking detrimental action against another councillor or a council employee in reprisal for a complaint or notification	\$21,067 (167 penalty units) or 2 years imprisonment

