

Enquiries: Sarah Fairhead Hall  
Telephone: (08) 8226 8699  
Ombudsman reference: 2012/03659  
Agency reference: None provided

## FINAL REPORT

<b>Date complaint received</b>	16 May 2012
<b>Agency</b>	Corporation of the Town of Walkerville
<b>Complainant</b>	Ombudsman own initiative' investigation, section 13(2) Ombudsman Act 1972
<b>Allegation (s)</b> <i>(number if more than one)</i>	<ol style="list-style-type: none"><li>1. Whether the Chief Executive Officer (CEO) and/or council failed to appoint a person to act in office whilst the CEO was overseas for two weeks, contrary to section 102 of the <i>Local Government Act 1999</i></li><li>2. Whether the council complied with the law and its policies in incurring expenditure for the CEO's overseas trip</li><li>3. Whether the council complied with the law and its policies in not immediately adopting some auditor's recommendations</li><li>4. Whether the CEO breached section 122 of the Local Government Act by spending excessively, and not reporting accordingly, for the strategic management plan</li><li>5. Whether the CEO complied with her obligations under section 107 of the Local Government Act; and section 55A of the <i>Occupational Health, Safety and Welfare Act 1986</i></li></ol>

### Aspects of allegations within jurisdiction

The complaint is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*.

This investigation originated from two disclosures made to my office, which attracted the protections of the *Whistleblowers Protection Act 1993*. In order to protect the identity of the whistleblowers, I commenced an 'own initiative' investigation under section 13(2) of the Ombudsman Act.

Some elements of the disclosures concern administrative acts which arise from an employment relationship between the CEO and staff of the council. Under section 17(1) of

the Ombudsman Act I do not have jurisdiction to investigate administrative acts done by another in the capacity of an employer, and I have therefore excluded these elements from my investigation.

I note that these elements currently are the subject of proceedings before the Industrial Relations Commission.

## Investigation

My investigation has involved:

- meeting with the whistleblower and their lawyer on 14 June 2012
- assessing the information provided by the whistleblower
- clarifying the information the whistleblower provided in a meeting on 12 July 2012
- writing to the CEO and mayor of the council on 8 August 2012 inviting them to give evidence. The mayor and the CEO both declined to be interviewed
- analysing written material provided by the council's lawyers on 4 September 2012 and 24 October 2012
- considering sections 73, 74, 102, 107, 120, 125, 126 of the *Local Government Act 1999*, the council's 'Budget Management Policy' (**the budget policy**); the council's 'Bullying & Harassment Policy / Procedure' (**the OHSW policy**); and the council's 'Ethical Code of Conduct for Council Employees' (**the employee code of conduct**)
- considering the investigation report prepared by Mr Peter Warner dated 30 April 2012
- providing a provisional report dated 7 November 2012 to the mayor, CEO and the council's lawyers for comment
- considering the council's response, which I received on 23 January 2013
- providing a revised provisional report dated 14 February 2013 to the deputy mayor, CEO, council's lawyers, and the whistleblower for comment
- preparing this final report

## Response to my revised provisional report

The deputy mayor, CEO and council's lawyers did not respond to my revised provisional report.

The whistleblower made no response to my revised provisional report, only to comment through their lawyer that they wished to make no further comment.

## Standard of proof

The standard of proof applied is on the balance of probability. However, given the nature of the allegations and the consequences if they were to be upheld, the level of evidence required by the *Briginshaw principle* has been applied. This recognises that questions of fact vary greatly in nature, and greater care is needed in scrutinising the evidence in some cases, (see *Briginshaw v Briginshaw* (1938) 60 CLR 336).

## Ombudsman Comment

This investigation has been protracted largely as a consequence of the council's wish to deal with my office only through its solicitors. Both the mayor and the CEO declined to be interviewed in relation to the disclosures made against them, instead preferring that the council's solicitors should provide documentation and legal advice. In the circumstances, I refrained from issuing summons requiring them to give evidence.

Whilst the documentation and advice provided on the council's behalf was particularly thorough, and has been helpful to my investigation, I consider that this approach is unnecessary. In my view, the required information could have been provided directly to my

investigation by the people involved. I encourage the council to reflect on this issue should it be necessary for me to investigate any further matters involving it.

In accordance with my powers under section 26 of the Ombudsman Act, I intend to publish my final report on these disclosures by placing it on my website.

## Background

1. The allegations detailed in the two disclosures concern the CEO of the council, Ms Kiki Magro, and/or the mayor, Ms Heather Wright. The second disclosure included the following allegations:
  - a. that the CEO was absent for two weeks on a study trip to Japan and failed to appoint an acting CEO contrary to section 102 of the Local Government Act
  - b. that the CEO was inappropriately given a cash advance by the mayor for the trip despite there being no agreed budget for this expense, no council resolution and no authority for the mayor to do so
  - c. that the CEO breached section 125 of the Local Government Act by not allowing or implementing the recommendations of the council's Audit Committee, as recommended by the council's external auditors
  - d. that the council's policies governing the complaint and investigation processes for bullying behaviour are inadequate for independent investigation of bullying complaints made against executive managers, and consequently the CEO breached section 107 of the Local Government Act.
2. This report deals only with the second disclosure, and the first disclosure is the subject of a separate report. In relation to the second disclosure, I consider it appropriate to investigate all of the above allegations.

## Whether the CEO and/or council failed to appoint a person to act in office whilst the CEO was overseas for two weeks, contrary to section 102 of the Local Government Act

3. The CEO visited Japan from 5 to 18 November 2011 on a study trip, as part of a Local Government Exchange Program (**the Japan trip**). During the CEO's absence, no acting CEO was appointed.
4. Section 102 of the Act states:

In the absence of the chief executive officer, the following provisions apply:

  - (a) if there is a deputy to the chief executive officer - the deputy must act in the office of the chief executive officer;
  - (b) if there is no deputy or the deputy is absent - a suitable person appointed by the chief executive officer after consultation with the council must act in the office;
  - (c) if a person is not appointed under paragraph (b) - a suitable person must be appointed by the principal member of the council to act in the office (after taking into account the organisational structure of the council);
  - (d) if a person is not appointed under paragraph (c) - a suitable person must be appointed by any three or more members of the council to act in the office (after taking into account the organisational structure of the council).
5. In the organisational structure of the council there is no position of deputy CEO. There are two senior staff appointed below the CEO, the 'Executive Finance and External Relations' and 'Executive Planning and Infrastructure' positions. In my view, either of these would have been appropriate positions to act in the absence of the CEO.

6. I note from correspondence obtained during the course of my investigation that section 102 of the Act was brought to the CEO's attention prior to her departure, to which she replied:

I asked a few councils (Pt Adel Enf; Onka; Adel; Marion; Salisbury) what they did in these circumstances and the responses weighted towards no acting arrangements. There is only a 1.5 hour time delay (Japan is one hour behind us) and given that I am someone who always checks my emails and messages I also don't see the need for acting arrangements. I have spoken to the Mayor about this who supports my decision. However, if you believe we need an opinion on this I am happy to consider advise (sic) on this matter.

7. It is my understanding that this matter was not pursued any further, and legal advice was not obtained. I note that in the Local Government Association Guidelines 'Obtaining Legal Advice: Guidelines for Mayors/ Chairpersons' (May 2011) (**the guidelines**) it states on page 3:

Specifically, the ability of the Mayor/ Chairperson to obtain legal advice directly may be justified having regard to the following:

(a)...

(b) under section 102(c) of the Local Government Act, in the absence of the CEO, the Mayor/Chairperson may be required to appoint a suitable person to act as CEO. Where the Mayor/Chairperson is exercising this power and in order to ensure the appointment is lawful, the Mayor/Chairperson may necessarily require legal advice. The Mayor/Chairperson's ability to obtain legal advice directly in relation to the valid exercise of this power is implied and is necessarily implicit in their role and functions of office.

8. It does not appear that section 102 of the Act is a discretionary provision; it sets out provisions which must be followed in the absence of the CEO. Further, the guidelines also reiterate that responsibility for appointing an acting CEO lies not only with the CEO but, in certain circumstances (i.e. where the CEO does not appoint a suitable person after consultation with the council) the mayor as well. Given that the CEO discussed her decision with the mayor, presumably the mayor could have made an appointment (under section 102(c)) and it would have been open to her to seek legal advice on the subject.
9. The question therefore is whether the Japan trip amounted to an 'absence' from office on the part of the CEO. If she was not absent, then the obligation to appoint an acting CEO did not arise. A number of factors lead me to conclude that the CEO was not absent from office.
10. First, the Japan Local Government Centre promotes CLAIR<sup>1</sup> (the organisation involved in the Japan trip) as follows:

CLAIR is a joint agency of cities and regions working to promote international learning and partnerships, particularly around the revitalization of local and regional areas through sustainable growth and development, as well as common challenges of public service reform, governance, demographic change and the low carbon society.
11. In my view, these issues are related to the CEO's responsibilities, and thus it cannot be suggested that the Japan trip was undertaken for purposes unrelated to her position as CEO. I note that the CEO stated that the Japan trip was consistent with her role as CEO, and that she was able to fill both roles simultaneously.
12. Second, elsewhere in this report I note the council's resolution on 15 August 2011 endorsing the CEO's participation in the trip; and the arrangements which were put in

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<sup>1</sup> CLAIR stands for the Council of Local Authorities for International Relations, London.

place to enable her to maintain remote access to the council's electronic systems to see work documents, check emails, etc whilst she was away. In my view these factors demonstrate that she was travelling with the express consent of the council. She did not consider herself to be absent, did not take leave, and was still working on council matters remotely.

13. In responding to my provisional report, the council confirmed through the deputy mayor that the CEO remained on duty working for the council whilst she was in Japan. The response also noted that the time difference between Japan and Adelaide is only 1.5 hours; that the CEO was at all times contactable via telephone and email; and that in the council's view her physical absence did not mean she was absent from her position.
14. Third, it was put to me during the course of my investigation that the CEO's absence from the country prevented her from undertaking some of the tasks associated with the position of a chief executive officer, such as attending at matters of physical emergency. An example was provided of a problem that arose on 18 November 2011 at the Gilberton Lower Bridge where there was damage to the footpath. On this occasion it was necessary for council staff to identify risks, block the footpath and arrange for repairs to be carried out as a matter of urgency. However, I do not consider that given the communications technology available in this day and age, and having regard to the CEO's powers of delegation under section 101 of the Local Government Act, it is always necessary for a CEO to be physically present within the municipal area to able to carry out his or her responsibilities effectively.
15. In summary, it is my view that based on the facts that the council had expressly approved the CEO's trip; that she was in Japan for 13 days; and that she had remote technology available to her to perform her duties, I do not consider that she was absent from her position as CEO. In these circumstances the obligation to appoint an acting CEO under section 102 of the Act did not arise.

## Opinion

In light of the above, my final view is that in deciding not to appoint an acting CEO whilst the CEO was in Japan, neither she nor the council have breached section 102 of the Act and have not acted in a way which is unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

## Whether the council complied with the law and its policies in incurring expenditure for the CEO's overseas trip

16. The council approved the CEO's participation in the Japan trip by a resolution at its meeting held on 15 August 2011. It was noted in the minutes that:
  - That Council endorse the CEO's participation in the 2011 Local Government Exchange and Cooperation Program to Japan in November 2011 and cover associated airfare costs;
  - That all expenses associated with the program registration and material, including all domestic activities and events in Japan will be fully funded by the Japan Local Government Centre (CLAIR, Sydney).
17. It is alleged in the disclosures to my office that the CEO arranged for the council to upgrade her laptop to allow for remote access so that she would be able to access the council's server and, in effect, work remotely whilst she was in Japan. It is alleged that the cost of the remote access was \$5,500; and that this was not disclosed to the council prior to its inclusion in the Budget Review Report, which was compiled for consideration

by council at its meeting on 20 February 2012, (i.e. three months after the Japan trip took place).<sup>2</sup>

18. The disclosures also alleged that prior to the Japan trip, the CEO requested a one-off \$500 cash advance to help with her expenses, and that this was approved by the mayor. It appears to me that there is no council policy or practice for cash advance payments to be paid to employees. The first disclosure alleged that the cash advance could only have been approved by a resolution of council, as the mayor had no authority to approve such expenditure.
19. The disclosures therefore alleged that both of these were costs to council that were (a) not budgeted for expenses nor (b) taken to council for a resolution prior to their expenditure. In the case of the cash advance, it is alleged that it was given without proper authority.
20. I have examined the council's minutes both before and after the Japan trip and can see no council resolutions that demonstrate that either the \$500 cash advance, or the alleged \$5,500 remote access cost were considered by the council. The only expense for the Japan trip that was approved by a council resolution was for the CEO's return international airfares. In his interviews with the mayor, and another councillor, Mr Warner established that both believed that the \$500 cash advance was discussed by the council at the time the airfares were approved, and that the cost of the remote access was covered by the training budget.
21. The council's powers of expenditure are provided by section 137 of the Act, which states:

**137- Expenditure of funds**

Subject to this or another Act, a council may expend its funds as the council thinks fit in the exercise, performance or discharge of its powers, functions or duties under this or other Acts.

22. The CEO has unlimited financial delegation to spend the council's budgeted funds.<sup>3</sup> The disclosures to my office alleged that the funds utilised for the Japan trip were unbudgeted, and that the CEO therefore breached section 99(1)(g) of the Act. This provides:
  - (1) The functions of the chief executive officer include -
    - (a) - (f) ...
    - (g) to ensure that the assets and resources of the council are properly managed and maintained

23. In addition to this statutory requirement, council's budget policy states:

**Over Budget Expenditure**

...

Where it becomes evident that expenditure is necessary for a purpose that has no budget allocation, Executive may authorise such expenditure, providing it does not exceed a total of \$5,000.

In the above situations where a budget line is exceeded or one needs to be established Executive must make the necessary budget amendment at the next budget review. Every

<sup>2</sup> In the event, the council's consideration of the Budget Review Report was deferred from the 20 February 2012 meeting to the 18 June 2012 meeting.

<sup>3</sup> Instrument of Delegation under the *Local Government Act 1999*, adopted by the council at its meeting on 17 October 2011 to apply from that date, Item 34.

attempt must be made to adjust other budget lines, expenditure and/or revenue so as not to adversely impact on the budget result.

...

### **Motions of Council**

A motion of Council that would result in a budget implication, requiring additional expenditure to the adopted budget, or the significant redirection of resources from the ordinary business of staff, should be provided on notice and include the funding source and/or budget line and/or budget area the costing should be allocated.

No Motion without Notice shall be considered at a Council meeting which would involve the aggregate of additional expenditure of more than \$5,000.

24. The council budget for 2011/2012 included budget lines for IT software/hardware upgrades and training of \$79,300 and \$28,000 respectively. The council has advised me that the CEO utilised her delegation to incur the expenditure against these budget lines, in accordance with her delegation.
25. In relation to the iPad expenses, the council provided evidence (including receipts) that the cost of the CEO's iPad, plus the set up costs to enable her to use it in Japan, amounted to \$1,804 (i.e. not \$5,500 as alleged in the disclosure). It stated that this expenditure was properly incurred by the CEO in accordance with her delegation, against the budgeted IT software/hardware line. This appears to me to be appropriate, and the budget policy set out above has no application.
26. In relation to the \$500 cash advance paid to the CEO, the mayor stated in interview with Mr Warner:<sup>4</sup>

..Council was pleased that Kiki had been invited to go and were happy to pay her flights. Now, although everything was found in Japan, she felt that she might need some money to perhaps buy gifts for people if they took her out for a meal or invited her to their home or whatever. So, she asked me if I thought \$500 to take with her would be acceptable, and I couldn't see a problem with that, I could see what she was talking about, so I agreed. See normally, it's a difficult one because I don't deal with operational matters. There's a division. You know, I'm the elected mayor and then there's the operational manager, the CEO. So who does she check with in situations like this?

#### **Presumably the mayor?**

Well that's it, so yes, and I, I felt that was perfectly reasonable.

#### **And you were comfortable with that?**

Yes. So I agreed that would be acceptable.

27. The disclosures alleged that, under the budget policy, the only proper procedure to approve this cash advance was via council resolution, as was done with the council airfares. The council has advised me that in accordance with her delegation, the CEO was entitled to draw a cash advance from the training budget line, and the fact that she sought approval from the mayor for this expenditure was beyond what was required by her under her delegated authority. On the materials provided to me, I agree with the council's assessment.

<sup>4</sup> Mr Warner was independently engaged by the council to investigate employee claims of bullying against the mayor and CEO. His interview took place with the mayor on 8 May 2012.

## Opinion

In light of the above, my final view is that the council and the CEO complied with the council's policies in relation to the expenditure for the Japan trip and did not act in a manner that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

### Whether the council complied with the law and its policies in not immediately adopting some auditor's recommendations

28. Sections 125 and 126 of the Local Government Act provide as follows:

#### 125 - Internal control policies

A council must ensure that appropriate policies, practices and procedures of internal control are implemented and maintained in order to assist the council to carry out its activities in an efficient and orderly manner to achieve its objectives, to ensure adherence to management policies, to safeguard the council's assets, and to secure (as far as possible) the accuracy and reliability of council records.

#### 126 - Audit committee

- (1) A council must have an audit committee.
- (2) The membership of an audit committee -
  - (a) may include persons who are not members of the council; and
  - (b) may not include an employee of the council (although an employee may attend a meeting of the committee if appropriate); and
  - (c) may include, or be comprised of, members of an audit committee for another council; and
  - (d) must otherwise be determined in accordance with the requirements of the regulations.
- (4) The functions of an audit committee include -
  - (a) reviewing annual financial statements to ensure that they present fairly the state of affairs of the council; and
  - (ab) ...
  - (ac) ...
  - (ad) ...
  - (b) liaising with the council's auditor; and
  - (c) reviewing the adequacy of the accounting, internal control, reporting and other financial management systems and practices of the council on a regular basis.

29. On 6 February 2012 the council's audit committee reported as follows:

Council's external auditors Galpins Accountants, Auditors & Business Consultants undertook their first interim audit of Council in may (sic) 2011. Their findings of that audit were presented to Council in their letter dated 1st July 2001 (sic).

The auditors have made a number of recommendations in their findings relating to gaps they have identified in the policies Council has adopted. In particular adopted policies and/or



procedures that are required of Council to ensure it meets legislative requirements relating to Internal Control reporting which comes into effect on 1st July 2012.<sup>5</sup>

30. The audit committee went on to 'recommend to Council to adopt the Internal Control Policy to assist it meet best practice in internal control governance and compliance with various sections of the LGA 1999'.<sup>6</sup> As stated above, under section 126(2) audit committee members must be determined in accordance with the regulations, which require that they have relevant financial experience.
31. The disclosures to my office allege that the CEO instructed that the report from the audit committee (which recommended that the policies should be adopted) should be withdrawn, as she claimed she had not been consulted about the policies. It is therefore alleged that sections 125 and 126 could not be complied with, as proper internal control policies were not being maintained.
32. The CEO asked that some of the policies be re-written as procedures, as they were administrative in nature. However, the CEO claimed to Mr Warner that she endorsed the internal controls policy and put it forward at the February council meeting. I note the minutes of the audit committee meeting on 6 February 2012 carry the motion:

That the Committee recommends to Council that it adopts the draft Internal Council Policy as amended as its Internal Control Policy.

I note that the policy was adopted by the council at the 19 March 2012 council meeting.

33. It is clearly good administrative practice for a council to have its internal control policies in place for a whole financial year. Indeed, in the absence of an internal controls policy, a council could receive an adverse external audit opinion on its internal controls.
34. In this situation, I do not consider that the CEO's request that some of the policies be withdrawn and rewritten was unlawful, unreasonable or wrong. The CEO did not refuse to comply with sections 125 and 126, but stated that she was not yet satisfied that what had been approved by the audit committee was what should amount to the final policy. In my view the CEO was entitled to put recommendations to council (i.e. to re-write the policies as procedures) and then let the council vote at a council meeting. Ultimately, the council's internal control policies and the functions of the audit committee were all in accordance with sections 125 and 126 of the Act.

## Opinion

In light of the above, my final view is that in not immediately adopting the auditor's recommendations, the council did not act in a way that was unlawful, unreasonable or wrong within the meaning of the Ombudsman Act.

## Whether the CEO breached section 122 of the Local Government Act by spending excessively, and not reporting accordingly, for the strategic management plan

35. Section 122 of the Act lists the requirements that councils must comply with in relation to the development and adoption of strategic management plans. In 2010/2011 the council approved a budget of \$30,000 to develop a strategic plan (**the strategic plan**). The disclosures to my office allege that:
  - the council failed to develop and adopt a strategic plan (thereby breaching section 122 of the Local Government Act)

<sup>5</sup> Minutes of audit committee meeting on 6/2/12, page 23

<sup>6</sup> Minutes of audit committee meeting on 6/2/12, page 25

- the CEO caused excessive unbudgeted expenditure to the council by engaging many external consultants without following the council's Contracts and Tenders Policy
  - the \$30,000 budget was exceeded, and that the council has spent in excess of \$250,000. This allegation spans two financial years - 2010/2011 and 2011/2012.
36. First, I note that the council's current strategic plan was endorsed by the council on 19 March 2012. I therefore consider that there was a strategic plan delivered in accordance with section 122 of the Local Government Act.
37. Second, the disclosures allege that eight external consultants were engaged on an ad hoc basis to work on different aspects of the strategic plan. The CEO states that nobody in the organisation was engaged without a contract. She states that the following external consultants were engaged under the following terms:

Consultant	Terms
Peter Graves	Letter of Engagement
Gilbert Rochester	Scope of Works - ran 2 workshops
John Samartzis	Contract
Nick Nolan	Contract from Integrated Design Commission
JPE Architects/ Adrian Evans	Scope of Works
Andrew Collier	2.5 yr fixed term contract
Sonia De Nicola	Contract from Integrated Design Commission (applied for position)

38. The council's Contracts & Tenders policy states that consultants can be engaged in a number of ways, by sole supplier contract, panel contract, direct sourcing, quotations, tender, strategic alliance contracts, or emergency purchases. The appropriate method of purchase is determined by the dollar amount of expenditure. It appears that all of the above were engaged contractually. This would accord with the Contracts & Tenders policy.
39. In relation to the alleged overspend of the strategic plan, the CEO agrees that there has been a 'blow-out' of what was initially agreed by council, but this has been with the full endorsement of the council. I have examined the minutes of the council, audit committee and strategic planning and development policy committee in the year prior to the strategic plan, and I do not see any resolutions dealing with the engagement or cost of external consultants in relation to the strategic plan. I therefore conclude that this was done through the council's budgetary process.
40. I sought further information from the CEO in relation to the process by which the council gave its endorsement to engage the external consultants. The CEO, through the council's lawyers, stated that all expenditure for the strategic plan was contained within the approved budget of the council. The council adopted its budget for 2011/2012 on 27 June 2011, which included a sum of \$3,478,750 for materials, contracts and other expenses (including consultants retained by the council for the purposes of the strategic plan). Further:

As necessary under the Local Government *Financial Management Regulations 2011*, the Council reviewed its budget on 17 October 2011, 21 May 2012 (deferred from 20 February and 19 March 2012),<sup>7</sup> and 5 June 2012. Those reviews endorsed variations to strategic planning expenses.

41. Strategic plan expenses were reported in the Annual Business Plan 2011-2012. The council resolution dated 27 June 2011 adopts the business plan and annual budget, and notes in recommendation 3:

That council has determined that in preparing its 2011/2012 Annual Business Plan and Budget it has considered and taken into account:

...

The relationship of the amount of funds needed to meet the 2011/2012 Annual Business Plan objectives and Council's ability to raise such funds

42. Variations that occurred to strategic planning expenses were duly reported to council on 17 October 2011, 21 May 2012 and 5 June 2012. The CEO stated (through the council's lawyers) that 'at all times via her delegated authority under Section 137 of the Act and the Council's approved budgets, (she) had specific Council endorsement to make payments to external consultants for the purposes of the delivery of the strategic plan.'<sup>8</sup>
43. I therefore consider that whilst the adopted budget for the strategic plan represented an increase in that which was previously budgeted, the amount of the expenditure on the strategic plan is a matter of policy for the council, and therefore not within my jurisdiction.<sup>9</sup> I consider that the increase was reported to and endorsed by council at the meeting on 27 June 2011, along with the variations at later dates.

## Opinion

In light of the above, my final view is that in preparing its strategic plan, the council did not act in a way that was unlawful, unreasonable or wrong within the meaning of the Ombudsman Act.

## Whether the CEO complied with her obligations under section 107 of the Local Government Act; and section 55A of the *Occupational Health, Safety and Welfare Act 1986*

44. The disclosures to my office alleged that the council's and the CEO's handling of the bullying complaints breached other legislation, namely section 107 of the Local Government Act; and section 55A of the *Occupational Health, Safety and Welfare Act 1986 (the OHSW Act)*.<sup>10</sup>
45. In October 2011 two council employees made bullying complaints against the CEO. These complaints were independently investigated by Norman Waterhouse Lawyers. After the investigation was completed, two final reports were considered by the council at its meeting held on 16 January 2012.
46. A further bullying complaint against the CEO was made to the mayor by a council employee on 28 March 2012. This complaint was investigated by Mr Peter Warner from

<sup>7</sup> Letter from Norman Waterhouse Lawyers to my office, dated 24 October 2012.

<sup>8</sup> Ibid, page 2.

<sup>9</sup> *City of Salisbury v Biganovsky* (1990) 54 SASR 117.

<sup>10</sup> I note that this provision was repealed by Sch. 6 cl. 11 of the [Work Health and Safety Act 2012](#), which commenced operation on 1 January 2013.

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Warner & Associates Pty Ltd. After the investigation was completed, Mr Warner's report was considered by the council at its meeting held on 18 June 2012.

47. In both cases, the reports exonerated the CEO. I have considered the process by which the council dealt with these reports in connection with the investigation which I have conducted into the first disclosure made to my office, and I have provisionally concluded that in handling the investigation of the complaints against the CEO, the council has not acted in a manner which is unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act. In the following paragraphs I summarise my reasons for that conclusion.
48. In a statutory declaration provided in response to my provisional report (**the CEO's statutory declaration**),<sup>11</sup> the CEO states that her involvement in the two investigations was limited to providing answers to questions put to her by Norman Waterhouse and Mr Warner, and providing documents when requested. According to the CEO the reports by Norman Waterhouse and Mr Warner 'completely exonerated' her of any wrongdoing.<sup>12</sup>
49. The CEO's statutory declaration states in effect that her participation in the Norman Waterhouse and Warner investigations was limited to that of a witness; that in each case when the reports came before the council she declared an interest in them; that she was outside of the chamber during all confidential discussions because of her declared interest; and that all motions authorising her to act in the course of the investigations occurred when the public were present. This position is supported by the confidential council minutes of the meetings held on 16 January 2012, and 18 June 2012; although, the publicly available minutes for the latter meeting do not appear to be complete. Nonetheless, I accept that this was the sequence of events which occurred in each case.
50. In my view the above outline of events does not disclose any administrative error. The CEO properly limited her participation in the investigations; declared her interest; absented herself from the chamber; and was subsequently appointed to act by the council when the meeting was open to the public.
51. In addition to the matters which I considered in investigating the first disclosure to my office, the second disclosure (which was the subject of the current investigation) alleges that the CEO breached section 107 of the Local Government Act, by reason of the fact that the council's complaint and investigation processes for bullying behaviour are inadequate for independent investigation of bullying complaints made against executive managers.
52. Section 107 of the Local Government Act sets out the 'general principles of human resource management' which the CEO must ensure are applied to employment in the administration of a council. The first disclosure alleges that the CEO breached section 107(2)(c), (d) and (f) in dealing with a bullying complaint made against her. These provide as follows:

**107 - General principles of human resource management**

(1) The chief executive officer must ensure that sound principles of human resource management are applied to employment in the administration of the council, and must take reasonable steps to ensure that those principles are known to all employees.

(2) In particular, the chief executive officer must ensure -

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<sup>11</sup> Statutory declaration by Ms Kiki Magro dated 20 December 2012, paragraphs 6 and 8.

<sup>12</sup> Ibid, paragraphs 7 and 9.

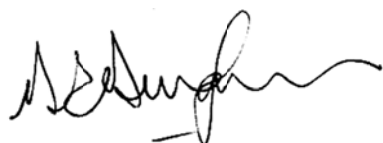
- 
- (a) ....
  - (b) ...
  - (c) that employees are treated fairly and consistently, and are not subject to arbitrary or capricious decisions; and
  - (d) that employees have access to suitable processes to deal with grievances concerning working conditions or the decisions of supervisors; and
  - (e) ...
  - (f) that employees are provided with safe and healthy working conditions; and
  - (g) ...
  - (h) ...
53. The council also has an occupational health, safety and welfare policy, which was signed by the CEO on 17 June 2011 (**the OHSW policy**). The OHSW policy defines unacceptable behaviour; introduces the Employee Assistance Provider (**the EAP**) for counselling support for all staff involved in complaints; and attaches procedural guidelines.
54. The procedural guidelines attached to the OHSW policy (option 2) state that any complaint must be made in writing, and:
- 2.2.4 If the accused is the Chief Executive Officer, the information must be referred to the Mayor.
55. As stated above, the whistleblower complied with this guideline by making a complaint to the mayor, in writing on 28 March 2012.
56. The procedural guidelines further state:
- 2.3.2 All formal complaints of bullying must be reported by the Executive / Team Leader who receives the complaint to the CEO who will monitor the investigatory and disciplinary process to ensure immediacy of action and procedural correctness. The CEO may appoint an external person to undertake the investigation where it is appropriate to do so.
  - 2.3.3 Those investigating the complaint must not be connected with the allegation in any way.
  - 2.3.4 A thorough investigation will be carried out, either by appropriate internal personnel or an external service provider.
  - 2.3.5 All staff involved in the investigation will be required to maintain confidentiality. Failure to do so may result in disciplinary action.
  - 2.3.6 Where evidence from the investigation is sufficient to substantiate the claim of bullying and/or harassment, the alleged perpetrator's Executive / Team Leader will arrange for the implementation of counselling, training and/or disciplinary procedures to modify unsatisfactory behaviour, with details being recorded in a confidential complaint file.
  - 2.3.7 Where the allegation of bullying and/or harassment is not substantiated, the relevant officer carrying out the investigation has responsibility for ensuring the resolution of any conflict between the two parties.
57. I note that whilst the OHSW policy states that complaints against the CEO are to be provided to the mayor, the policy does not cater for situations where there may be allegations against both the CEO and the mayor. Also, in relation to section 2.3.7 of the procedural guidelines, where an investigation is carried out by an independent

assessor (for example, a law firm), and the claim of bullying and/or harassment is not substantiated, there is no 'relevant officer' to ensure the resolution of any conflict between the parties.

58. Section 55A of the OHSW Act defines the scope of bullying behaviour. Whilst it may be relevant to a consideration of any industrial issues arising from the events, I do not intend to consider it further because I consider it beyond the scope of my investigation.<sup>13</sup>
59. The question for my investigation is whether the CEO, through the council's OHSW policy, complied with her obligations under section 107(2)(c)(d) and (f) of the Act. The disclosure alleges that she did not, and points in support to the findings of the Australian Services Union (ASU) in its survey of bullying complaints at the council undertaken in November 2011. The outcome of these proceedings<sup>14</sup> was that the ASU and the council agreed that its disciplinary policies and procedures be updated, including its complaint reporting procedures.
60. As I have outlined above, from the evidence provided to me I am not satisfied that the CEO was placed in charge of bullying allegations made against her, and therefore that she breached her obligations under section 107(2) of the Act. In my view, once the external investigations in relation to all bullying claims against the CEO were complete, and her actions exonerated, there is no reason why relevant individuals who reported to the CEO should not be performance managed by her.

## Opinion

In light of the above, my final view is that the CEO complied with her obligations under section 107 of the Local Government Act, and that the council did not act in a manner that was unlawful, unreasonable or wrong within the meaning of section 25(1)(a) of the Ombudsman Act.



Richard Bingham  
**SA OMBUDSMAN**

27 March 2013

<sup>13</sup> I note that section 17(1) of the Ombudsman Act prohibits me from conducting an investigation if a complaint is made by an employee, and it relates to an administrative act done by another in the capacity of employer of that person.

<sup>14</sup> *Australian Services Union v Town of Walkerville SAIRComm* (516/2012) 31 October 2012