

Report [Redacted]  
Full investigation - *Ombudsman Act 1972*

Complainant	Mr Noel Lewis
Council	Regional Council of Goyder
Ombudsman reference	2017/07637
Date complaint received	28 July 2017
Issues	<ol style="list-style-type: none"><li>1. Whether the council's actions before a fatal canine attack were unreasonable or wrong</li><li>2. Whether the council's action and findings in investigating the fatal canine attack were unreasonable or wrong</li><li>3. Whether the council's handling of a complaint about an investigator's conduct was unreasonable or wrong</li><li>4. Whether the council conducted an internal review of its decision concerning a complaint about the investigation of the fatal canine attack and appropriately dealt with an Employee Code of Conduct complaint in accordance with its policy.</li></ol>

### Jurisdiction

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

### Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from the council
- seeking more particulars from the complainant
- considering section 270 of the *Local Government Act 1999*
- consider the *Dog and Cat Management Act 1995* (Historical version: 1.7.2015 to 30.6.2017) (**DCM Act**)
- reference to the Ombudsman SA - Right of Review: An audit of Local Government Internal Review of Council Decisions Procedures (November 2016) (**Internal Review Report**)
- considering the council's:
  - Internal Review of Council Decisions Policy (**Review Procedure**)

- Complaints Handling Policy & Procedure (**Complaints Procedure**)
  - Animal Management Plan
  - Code of Conduct for Council Employees (**Employee Code**)
  - council's notice of subdelegation applying to the position of compliance officer and authorised officer for the council (**delegation authority**)
  - the Chief Executive Officer's report to the council dated 20 December 2016 (**CEO Report**)
- providing the council and the complainant with my provisional report for comment, and considering the council and the complainant's responses
  - preparing this report.

### Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.<sup>1</sup> It is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved ...<sup>2</sup>

### Background

Mayor Peter Matthey responded to my provisional report on behalf of the council and made no comment on issues 1 and 2. The council did however, make the following points in regards to issues 3 and 4:

- paragraphs 72, 73 and 75 of my provisional report identified possible procedural errors and areas for improvement including but not limited to the council not providing the complainant with:
  - articulation of the scope of an internal review of a council decision
  - sufficient and detailed explanations about its decisions
  - the evidence relied upon to make its findings
  - details about avenues for appeal or review of a decision
- to remedy those issues, the council has undertaken to complete a full and thorough review of the:
  - Employee Code and Complaints Procedure as it related to council
  - Review Procedure as it relates to council.

In regards to my recommendations, the council commented as follows:

- in regard to recommendation 1, the council agrees to provide the complainant with an apology for the possible and other errors appearing to have occurred in its Review Procedure
- in regard to recommendation 2 the council commented as follows:

Council seeks you to reconsider your provisional decision to ask Council to undertake another Internal Review for the following reasons;

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<sup>1</sup> This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) [110 ALR 449](#) at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

<sup>2</sup> *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

- Council will undertake to complete a full and thorough review of the Employee Code of Conduct, Complaints Handling Policy and the Internal Review of Council Decisions as they relate to Council immediately after caretaker period ceases.
- Council has provided all of the information it has on file relating to the matter to your office. Further, that your Provisional Report and ultimately your Final Report will be provided to the complainant and Council. These reports contain substantial detail including possible procedural and other errors made by the Council. To this end, Council is of the view it is unlikely another Internal Review will reveal any new information other than those matters already discovered and reported. Council considers a better use of its resources would be to undertake the reviews mentioned above.
- Mr Brak has retired and is unavailable for further comment.
- [the council officer] has retired and is unavailable for further comment.

I have carefully considered the council's submission in regards to issues 3 and 4 and note that the council does not dispute my findings and has acknowledged the error and has committed to undertaking a review of its procedures in relation to the council's handling of Employee Code and Internal review matters. I commend the council on the steps it is taking to improve its procedures.

That said, the fact remains that the complainant has not had the benefit of a properly conducted internal review. My view remains that in the circumstances it is appropriate for the reviewer to identify all relevant evidence relied upon and provide detailed reasons for their decision.

The complainant responded to my provisional report and those points relevant to my consideration and findings are outlined below:

- the complainant asserts that due to an alleged bias [the council officer] regarded the Clifford dogs differently to other dogs in the community and the Clifford dogs were therefore given preferential treatment
- the complainant reiterated his view that [the council officer] assisted Mr Clifford with a defence under section 44 of the *Dog and Cat Management Act 1995*
- it is alleged by the complainant that [the council officer] sought and received advice from the Dog and Cat Management Board about a legal ruling in regards to a defence under section 44; the complainant suggest that it is the Ombudsman Office's role to investigate the Board's actions in this regards
- the Provisional Report referred to the current version of the DCM and not the version in place at the time of the incident
- the complainant commented that at the time of interviewing the complainant, [the council officer's] demeanor indicated a disinterest and that a view about the incident had been formed beforehand
- the statements of Ms Stevens and Ms Scarlett to the council about the Clifford dogs ought to have been considered at the time [the council officer] determined his response about the incident and at the time of issuing the control orders
- in regard to issue 3, the complainant made no comment in regard to my view however, asked that I make a separate recommendation for this issue
- in regard to issue 4, the complainant states that he would prefer a Dangerous Control Order to be placed on the Clifford dogs
- the complainant concurred and supported my recommendations.

I comment on these matters as follows:

- for the reasons set out in my report, I do not consider that there is any evidence that [the council officer's] actions, conduct and decision in regards to the investigation of the incident demonstrated bias towards the Cliffords
- the complainant has raised various issues concerning Ms Scarlett's dealings with the council about the Clifford dogs. For those reasons set out in my report, I do not consider

that those issues raised impact upon my view of the council's knowledge about complaints about the Clifford dogs prior to the incident

- the complainant has reiterated his previous submissions to my investigation about [the council officer] providing Mr Clifford with a defence under section 44 of the DCM Act. For those reasons set out in my report, there is no evidence before me to conclude that [the council officer] inappropriately provided Mr Clifford with information about the operation of the DCM Act for the purpose of establishing a defence
- the evidence before me does not support the complainant's assertions that it was inappropriate for [the council officer] to approach the DCM Board to receive advice about the operation of section 44 of the DCM Act and that that advice could be construed as direct legal advice about the incident
- it is noted that Ms Scarlett and Ms Stevens' statements about the Clifford dogs were provided to the council at the time of making his complaint about [the council officer] and the investigation of the incident and when applying for an internal review of the council's decision
- there is no evidence before me to suggest that at the time of interviewing the complainant on 21 September 2015, or when issuing his report to the complainant on 26 October 2015, [the council officer] was aware of the statements from Ms Scarlett and Ms Stevens, both dated 27 September 2015, about the Clifford dogs
- I consider it reasonably open in the circumstances for [the council officer], in his capacity as the Authorised Officer for the council, to issue the control order for the Clifford dogs that he deemed to be appropriate
- for those reasons expressed in my final view for issue 3, my view remains that it is unnecessary in the circumstances to make a separate recommendation for this issue.

I have carefully considered the complainant's submission to my provisional report which, to a certain extent, reiterates the previous responses and submissions to my investigation.

That said, for those reasons set out above, I do not consider that the submissions by the complainant and the council raise further information that would cause me to change my view. However, where appropriate, my report has been amended to reflect the relevant version of the DCM Act.

## Background

1. On 18 September 2015 the complainant's dog died from injuries sustained in a dog attack (**the incident**). [The council officer], investigated the incident and provided his findings in a report provided to the complainant on 26 October 2015 (**the investigation report**).
2. In the investigation report, [the council officer] identified Mr Steven Clifford as the owner of 'Cloe' and 'Smokey' (**the Clifford dogs**) which were involved in the incident with the complainant's dog.
3. Under section 26A of Division 2 of Part 3 the DCM Act, a council is required to prepare a plan for the management of dogs and cats within its area which requires the Dog and Cat Management Board's (**the Board's**) approval before it comes into effect. On 6 May 2012 the Board advised the council that it had approved the council's Plan of Management relating to Dogs and Cats (**the DCM Plan**) for a period of five years from 6 May 2012. I am satisfied therefore, that prior to and at the time of the incident, the council had an approved DCM Plan.

4. I note that the DCM Plan provides that the council is able to make by-laws relating to the management of dogs and cats within its area however, the DCM Plan states that the council does not have any by-laws in place. The DCM Plan however, states that the council is required to administer and enforce the provisions relating to the management of dogs within its area in accordance with the DCM Act.
5. For the purposes of section 27 of the DCM Act, I am satisfied that at the relevant time, [the council officer] was appointed by the council to the position of Authorised Officer for the council, and therefore was the appropriate person within council to receive and manage complaints and incidents about the Clifford dogs in accordance with the DCM Act and the DCM Plan.

*The council's actions before the incident*

6. The complainant asserts that statements from Ms Veronica Scarlett and Ms Lisa Stevens about the Clifford dogs (both statements being dated 27 September 2015 i.e after the incident) demanded more attention from the council than simply taking no action. It is the complainant's view that if the reports to council about the Clifford dogs had been dealt with properly, the complainant's dog would still be alive.
7. Ms Stevens' statement relevantly included:

I have a big problem with another neighbour who has a dog, a Ridgeback X from the same litter as Steve and Sonia Clifford's dog. His name is Toby Cocks. I have spoken to Toby on many occasions about his dog. The dog came onto my property once and killed my pet turkey. Two days later, the dog came back and ran my sheep to the ground.

I spoke to Toby about this. He just grunted at me. Three (3) weeks later, when I came home from shopping, the dog was chasing my goats in my property. Then, when I went inside my property, I found five (five) dead ducks. Toby's dog had killed them. So, instead of talking to Toby again, I rang [the council officer] at the Goyder Council. Things did go quiet for a while, but then Toby's dog started chasing my livestock again.

So, I rang [the council officer] again. To this day, Toby's dog is still coming on to my property. Nothing is being done. Toby's dog is trained to pull down and kill goats. It was trained at the same time as the Clifford's dog was trained: TO HUNT AND TO KILL. The other dog belonging to the Cliffords is a stumpy tailed Red Heeler.

This has gone on long enough. These dogs are going to kill someone soon, perhaps a small child. And I don't want it to be me. I live alone. I rescue animals as I have done for the past seven (7) years. We do not need this problem at all.

On Saturday, 26<sup>th</sup>, 2015, Steven Clifford came to my house and told me that Jay Newell was doing an Affidavit for the Cliffords, saying that Noel and Elspeth's three (3) dogs have been on Jay's block many times.

To my knowledge, Noel and Elspeth's dogs have never roamed. The dog that was killed was Elspeth's Lap Dog, a MALTESE/POODLE CROSS. She never left Elspeth.

8. Ms Scarlett's statement relevantly included:

My son owns a block of land opposite the former Catholic church in Whyte Yarcowie, now owned by Steven and Sonia Clifford.

About 12 months ago, I drove down to the block to do some mowing. In fact I went there on 3 separate [sic] days. Each time 2 dogs (a heeler and a Rhodesian ridgeback X) ran across the road, barking and snarling. They jumped up at my car. On at least one occasion [sic] the small dogs, at Lewis's place also barked, but as they were behind a fence at all times, I did not feel threatened by them.

After the third time, I rang Goyder Council and was advised to ring Cliffords and arrange a time and day when they could have the dogs restrained.

I do not find this solution acceptable at all.

I believe it is only a matter of time before a person is attacked.

9. In its response about its actions prior to the incident, the council informed my investigation as follows:
- although the council became aware of previous issues about the Clifford dogs after the incident, there was no proof that the dogs in question were the Clifford dogs
  - the council had not received any formal complaints about the Clifford dogs prior to the incident
  - during general inspection duties prior to the incident, [the council officer] observed on a number of occasions, that the Clifford dogs were unrestrained in the gateway to Mr Clifford's property
  - [the council officer] issued Mr Clifford with a number of verbal warnings about his unrestrained dogs
  - the council has no record of the telephone call from Ms Scarlett or Ms Stevens that, as alleged in their written statements dated 27 September 2017, occurred prior to the incident.

*The council's investigation of the incident*

10. The complainant submits that [the council officer] did not properly investigate the incident and that he felt that the report was inadequate in that it did not represent his recollection of the incident. The complainant raised concerns that he believed that [the council officer], because of a perceived relationship with the Cliffords, forewarned and informed the Cliffords after the incident about a defence under section 44(4) of the DCM Act.

*The investigation interview conducted by [the council officer] on 21 September 2015*

11. On 21 September 2015 [the council officer] interviewed the complainant. The complainant provided my Office a copy of the record of that interview (**record of interview**) along with his handwritten recollection of the incident (attached to the record of interview). The complainant also provided to my Office his views about that interview and the investigation conducted by [the council officer].
12. According to the record of interview, [the council officer] recorded:
- he was uncertain if the attack/harassment was provoked or unprovoked
  - that because of conflicting stories, he was uncertain where the attack/harassment took place.
13. After the interview, the complainant called [the council officer] at the council offices and advised him that he had received a phone call that 'throws a different light on this business'. The complainant thereafter raised a series of questions to which [the council officer] is alleged to have responded as follows:

I said, "At what time did you interview the Cliffords?"

He said, "Before you."

I repeated, "What time did you do their interview?"

He said, "Before you."

I said, "can I get a copy of the record of interview with the Cliffords? I will come down to Burra and collect it."

He said, "It was done over the phone."

I said, "What time did Steve [Clifford] ring you?"

He said, "About 9 ish", answered straight away.

I said, "The incident didn't happen until after 10 am."

He said, "It must have been about then." Again, answered straightaway.

I said, "So when he rang you, you told him about the defence of Section 44(4) in the [DCM Act]."

He said, "I knew nothing about the dog being killed. He asked and I rang the [Board] in Adelaide "and told him what he wanted to know"

I said, "I'll ask for your's [sic] and [Mr Clifford's] phone records to be checked, and rest assured I intend to take the matter further."

He said, "What are you saying? He asked for information and I gave it to him."

...[Mr Clifford] informed us that, as I had no witness to the attack on our dog and that [Mr Clifford] had a legal defence, there was little he could do.

I informed him that I had witnessed the attack, but he ignored me

14. In his letter to the council dated 1 October 2015 the complainant furnished his notes to the incident that he considered relevant. The notes relevantly included:

- at the time of the incident the complainant was at the rear of his house
- the complainant was alerted to an incident by Ms Clifford
- the complainant witnessed Ms Clifford fighting the dogs attempting to take the object they had between them
- the complainant followed Ms Clifford to the roadway where he saw the Clifford dogs and the 'mutilated form of' his dog
- Mr Clifford arrived and stated that the complainant's dog was killed in his yard
- the complainant called Mr Clifford and stated that if the attack dogs were put down he would 'leave it at that'
- the complainant states that Mr Clifford declined the offer in the following terms:

"the dogs stay-I've got legal advice. Your dog was on my property so you've got nothing on the dogs."

- that [the council officer] was unable to assist the complainant and his wife about the dogs responsible for the incident because the complainant's dog was on the Clifford's property and that under section 44(4) of the DCM Act the Cliffords' had a perfect defence to the incident
- the complainant disagreed with [the council officer] on several points however, noted that [the council officer] remained adamant that there was 'no case to answer'
- that each time the complainant raised the defence under section 44(4) of the DCM Act [the council officer] replied that he could not do anything because the Cliffords' had a defence
- the complainant has submitted that he considers [the council officer's] statements and responses to the questions to be pre-conceived
- [the council officer] was provided a copy of the complainant's hand written notes of the incident and appeared to read them
- [the council officer] advised the complainant that he would place an 'Order on the dogs so that they won't be able to leave the property without being muzzled and on a leash'
- that [the council officer] failed to correct the complainant's understanding that he was an Officer of the Board.

15. On 15 October 2015 [the council officer] responded to the complainant's request to the council for a copy of the complainant's record of interview as follows:

There are a couple of inaccuracies in your request which require addressing. Firstly I am not an officer of the Dog and Cat Management Board I am the Compliance Officer for the

Regional Council of Goyder. Secondly, I don't know from where you arrived at the belief that you would be forwarded copies of the interview statements.

...

I told you at the interview that I would be applying for a Control Order for both of the Clifford's dogs to ensure that they would not be able to leave the property untethered but also no dogs could enter the property where the dogs were being kept. A notice of intention and draft orders have been issued to Mr Clifford and a mandatory period must be given for submissions against the orders. The submission period ends close of business on **19<sup>th</sup> October** [writer's emphasis], should no submission be received an official Control order will be issued for both dogs.

Be advised that after that time, I will then issue my report based on the information gained from the interviews and any witness accounts of the events.

16. On 26 October 2015 [the council officer] wrote to the complainant providing him with a copy of the investigation report and advising him that:

An official order has now been placed on both dogs belonging to Mr Clifford, sever [sic] penalties apply if conditions are breached.

*Issuing of the control order*

17. On 22 September 2015 [the council officer] interviewed Ms Clifford, in which she was identified as the owner/person responsible for the Clifford dogs. In Ms Clifford's Record of Interview, [the council officer] recorded as follows:

Action Taken: Interviewed all parties and feel dogs acted to defend property & owners. Have told both parties to fix or replace fences to stop re-occurrence.

Orders considered: Nil on Dangerous, possibly Nuisance.

18. On 8 October 2015 the council issued a Notice of Intention To Make An Order (**Notice of Intention**) in which Mr Clifford was advised that the council intended to make a Control (Nuisance Dog) Order for the Clifford dogs. The Notice of Intention stated:

Dog is allowed to access the parts and roadway via an unclosed driveway which also allows access for other dogs and animals to enter. A recent incident has prompted this action which would not have occurred if the dogs were secured to the property via adequate fencing.

19. As required under section 50(1) of the DCM Act, Mr Clifford was provided the opportunity to make a submission to the council about the Notice of Intention. Upon expiration of the period for submission, on 20 October 2015 the council issued to Mr Clifford pursuant to section 50(5) of the DCM Act Control (Nuisance Dog) Orders for both of the Clifford dogs (**the Control Orders**).
20. In its response the council advised my Office that:
- the council constantly reviews all dog orders and is monitoring the Clifford dogs closely
  - the council had received two complaints about incidences in the area that allegedly involved the Clifford dogs however, this was not proved
  - on 16 June 2017 the council issued a letter to Mr Clifford about the complaints it had received about the Clifford dogs wandering off the property at large and reminded him about the effect of the Control Order and advised that another complaint would result in a destruction order being issued for the Clifford dogs.

*The investigation report*

21. The investigation report (prepared by [the council officer]) was provided to the complainant on 26 October 2015. In summary, I note that the investigation report states as follows:

- on 18 September 2015 Mr Clifford contacted [the council officer] seeking advice about his dogs attacking a dog coming on to his property. [The council officer] stated that at the time he was unaware of the details that prompted the question
- [the council officer] advised Mr Clifford that under section 44(2) of the DCM Act, it is 'an offence for a dog to attack/chase or harass a person, animal or bird owned by a person'
- [the council officer] advised Mr Clifford that he would check with the Board on the operation of section 44(4) of the DCM Act
- section 44(4) 'states that it is a defence to an offence if it is proved that the dog is acting in defence of the property of its owner'
- [the council officer] advised Mr Clifford that Ms Anne Gee of the Board told him that on the basis of a recent legal ruling, there was no case to answer
- on 21 September 2015 [the council officer] called the council to report the incident after which he arranged to interview the complainant and his wife Ms Elspeth Lewis later that day
- when the complainant and his wife enquired whether the Cliffords dogs would be destroyed, [the council officer] referred to the Board's advice. The complainant and his wife were angry about that advice
- during the Clifford interview, [the council officer] was informed:
  - that Mrs Clifford was the only witness to the incident
  - that [the council officer] was shown photographs of where the incident was alleged to have started with one of the Clifford's dog and thereafter 'spilled out onto the street' after which the second dog broke from his chain and 'joined in the fight' causing 'serious injuries'
  - that photos of a hole in the complainant's fence 'shows what is believed to be an exit hole rather than an entrance hole' which discredits the Lewis' statements that one of Clifford's dogs entered the Lewis' property and took their dog through the hole.

22. In the investigation report, [the council officer] concluded:

It is my opinion on the balance of probability that the Lewis [sic] dog did wander onto the Clifford's property, when Mrs Clifford told the dog to "get" aroused the attention of 1 of Clifford's dogs which acted in defence of it's [sic] owners and attacked the dog. It is plausible that the fight spilled out onto the roadway which excited another dog chained on the Clifford's property which reportedly slipped its collar and joined the melee

[...]

It must be said here that Council has no past reports on file of a problem with the dogs of either property although complaints about previous issues are now surfacing from Mr Lewis but not reported. It is also understood that the Lewis' feel intimidated by Mr Clifford and a possible ongoing neighbourhood dispute may exist.

23. On 5 November 2015 the complainant wrote to Ms Gee of the Board stating:

Further to our two (2) telephone conversations around 3pm on Wednesday, November 4<sup>th</sup> 2015, I have been endeavouring to find a particular Court Case mentioned in [the council officer's] "Report in Summary" AMO/FPO (letter and copy of report attached for your information).

You advised him (paragraphs 2 and 3) of a recent Court Case applicable to the matter in question.

I am unable to find this Court Case.

Could you please inform me of how I can obtain this particular Court Case?

24. In response to the complainant's letter, on 10 November 2015, Mr Andrew Lamb, Board Secretary for the Board wrote to the complainant, in reference to the report and the court case referred to by the complainant, as follows:

The [Board] are responsible for providing advice to councils about issuing of orders, the appropriate levels of administration and enforcement and any other matter relating to the provisions of the *Dog and Cat Management Act 1995* (the Act). The Board does not provide advice or opinions to councils or members of the public.

During a phone call on the 18 September 2015 with [the council officer], Ann Gee discussed Section 44 of the Act and subsection (4), which describes the defence to a change of an offence. Legal advice in relation to another council's investigation and Section 44(4) was referred to.

[...]

...We will review the level of information discussed with investigating officers and where necessary refer them to seek their own legal advice. I can however reassure you that no court case was quoted, as the Board staff are not involved with court proceedings.

25. [The council officer] responded to my investigation:

The advice I received from an officer of the **Dog and Cat Management Board** [writer's emphasis] in relation to this matter was that there was no case to answer. It was, in the absence of someone being able to read the minds of the dogs living at the property, assumed that the dogs were acting in defence of the property and/or the owners of the property as stated *in Section 44(4) of the Dog and Cat Management Act 1995* [writer's emphasis].

*The complaint about [the council officer's] conduct*

26. On 22 February 2016 the complainant lodged a complaint with Mr Brak, the then Chief Executive Officer for the council about [the council officer] conduct in relation to the incident. In his complaint, the complainant stated that [the council officer] was biased, incompetent and inefficient in his handling of the dog attack. The complainant further states that [the council officer's] advice to him and his wife was that the owner of the dogs responsible for the dog attack had a defence under section 44(4) of the DCM Act and that Mr Clifford had nothing to answer.
27. On 16 March 2016 Mr Brak responded to the complainant's complaint against [the council officer] and his investigation into the incident in the following terms:

Dear Mr Lewis,

I am in receipt of your correspondence dated 22 February 2016 in which you lodge an official complaint against [the council officer] in relation to his actions in respect to the incident that occurred on 18 September 2015 that lead to the death of your wife's dog. You also seek Council to undertake an investigation into the matter of the management of that incident by a person who is "unbiased, competent and truthful, and who knows what is required".

I advise that I am satisfied with the manner in which [the council officer] undertook his investigation in relation to that unfortunate incident and find your allegation against [the council officer] of bias, incompetence and inefficiency unfounded.

Accordingly, whilst you have my sympathy for the loss you and your wife have experienced, I will not take any further action in relation to your correspondence.

*The internal review*

28. On 25 October 2016 the complainant sought from the council an internal review of the decision pursuant to section 270 of the Local Government Act and Part 1 of the Employee Code, pursuant to section 110(1) of the Local Government Act.

29. In its letter dated 31 October 2016 the council relevantly stated:

Section 270 Review

I understand from your correspondence that you are requesting a formal review of my decision, as provided to you dated 16 March 2016, pursuant to Section 270 of the Local Government Act 1999 and in accordance with Council's 'Internal Review of Council Decisions' Policy.

Council's Policy requires that when the decision to be reviewed was made by the Chief Executive Officer, the elected Council will be the reviewer.

Prior to elevating your request for review to the elected Council, I seek from you, in accordance with the above mentioned Council Policy, your written reasons for applying for the review (that is, why you believe that the decision is wrong).

Upon receipt of your written reasons, I will elevate this matter to the attention of the elected Council.

Code of Conduct for Council Employees

I understand from your correspondence that you are now formally lodging a complaint about [the council officer] pursuant to Item 2.27 of the Code of Conduct for Council Employees.

In your correspondence to Council dated 22 February 2016 you lodged a complaint against [the council officer] for bias, incompetence and inefficiency in the handling of the fatal canine attack incident.

My response to you in relation to your complaint, as provided to you in my correspondence dated 16 March 2016 was that I found your allegations to be unfounded.

Whilst not articulated to you in my correspondence to you dated 16 March 2016, my assessment of [the council officer's] conduct in relation to the allegations made by you was undertaken having regard to the information provided by yourself; the information provided by [the council officer]; all other relevant documentation; and the Code of Conduct for Council Employees.

Because you have not identified which general behavior item to which your complaint relates, I have assumed that your formal complaint relates to the allegations that you made in your correspondence dated 22 February 2016.

Accordingly, I reiterate my earlier response in that I found your allegations to be unfounded and advise you that my investigation of your formal complaint against [the council officer's] conduct is now closed.

30. On 28 November 2016 the complainant responded to the council about his request for an internal review as follows:

[...]

It became apparent to me that nobody has read the damning correspondence that covers the voluntary statements from both Lisa Stevens and Veronica Scarlett, of which both are dated September 27<sup>th</sup>, 2015, and held by your office.

Their statements cover [the council officer's] dereliction of duty concerning their many complaints to the Council about the two (2) killer dogs. If [the council officer] had carried out his duties in a reasonable manner, our little dog would still be with us.

I also draw your attention, again, to the advice [the council officer] gave to Veronica Scarlett. He asked her to contact Clifford to lock up the dogs while she was working at her son's property opposite.

[...]

Please tell me how I can get this very simple statement across to you and the Council members. It is obvious you have not perused the statements from Stevens and Veronica Scarlett. Their statements are self-explanatory.

[...]

[the council officer] stated in his Report that I was the only person to lodge a complaint (on September 21<sup>st</sup>, 2015). Refer to his letter of October 26<sup>th</sup>, 2015, with his attached Report. In answer, refer to Veronicas Scarlett's statement, dated September 27<sup>th</sup>, 2015.

My reason for the Section 270 and Employee Code of Conduct Reviews are quite clear. [the council officer] lied, and failed in his duty which resulted in our dog being fatally injured.

31. The CEO Report titled 'Request for a Section 270 Review of CEO Decision', tabled at the council meeting on 20 December 2016 recommended that the council determine that the request for an internal review of the council's decision be undertaken by a delegate of the Chief Executive Officer of the council, Mr Brak. The report to the council outlined the background of the matter including that the complainant disputed the council's decision.
32. In an email dated 21 December 2016 Mr Brak confirmed that Mr Colin Byles, Chief Executive Officer of Northern Areas Council would, as his delegate, be conducting an internal review of the council's decision. Mr Brak enclosed with his email a book of documents in relation to the matter. Pertinent to the internal review, I note that the book of documents included the following documents:
- [the council officer's] investigation report
  - Section 44(4) of the DCM Act
  - a handwritten letter from the complainant and his wife dated 21 September 2015 advising that their dog had been killed by the Clifford Dogs and referring to an incident which another Yarcowie resident, Ms Judith Lewis, had with the Clifford dogs six months earlier
  - the complainant's record of interview, including his handwritten notes
  - Ms Clifford's record of interview
  - photos of the aftermath of the incident
  - the complainant's detailed notes dated 1 October 2015
  - the complainant's letter to the council dated 13 October 2015 requesting [the council officer's] paperwork in relation to his investigation
  - the Notices of Intention and the Control Orders for both Clifford dogs

- [the council officer's] letter to the complainant dated 15 October 2015 and the complainant's response to that letter dated 20 October 2015
  - [the council officer's] letter to the complainant dated 26 October 2015 in which he advised the complainant of the control orders and provided a copy of his investigation report
  - the complainant's letter of complaint about [the council officer] dated 22 February 2016
  - the statements of Ms Stevens and Ms Scarlett
  - an email from the complainant's daughter dated 28 September 2015
  - a letter from the complainant dated 9 March 2016 forwarding to the council his correspondence with the Office of Public Integrity
  - an email from my Office dated 6 October 2016 concerning assessment of the complainant's complaint to my Office and the council's written response dated 6 October 2016
  - a letter from my Office to the complainant dated 11 October advising that it was reasonable for him to seek a more formal review of his complaint and to formally lodge an Employee Code of Conduct complaint
  - Mr Brak's letter dated 16 March 2016 advising that he was satisfied with [the council officer's] investigation
  - the complainant's letter dated 25 October 2016 formally seeking an internal review and lodging an Employee Code of Conduct complaint
  - section 270 of the Local Government Act
  - pages 1-2 of the Employee Code of Conduct
  - the council's letter to the complainant dated 31 October 2016 and the complainant's response to that letter dated 14 November 2016
  - the council's letter to the complainant dated 22 November 2016 seeking clarity around the reasons for the internal review and the complainant's response dated 28 November 2016
  - the relevant agenda item for the council meeting on 20 December 2016
  - the council's letter to the complainant dated 23 December 2016 in which the council advised that Mr Byles would be conducting the internal review and a letter from the complainant dated 13 February 2017
  - the relevant agenda item for the council meeting on 18 April 2017
  - the council's letter to the complainant dated 4 April 2017 enclosing Mr Byle's letter dated 4 April 2017 providing the outcome of the internal review.
33. In its response dated 23 December 2016 the council advised the complainant that at the council meeting on 20 December 2016 the council resolved as follows:
- That because the subject of the Mr. Noel Lewis 'S270 Review' is of an operational nature, Council determines, in accordance with its Internal Review of Council Decisions Policy V1.1, that Colin Byles, Chief Executive Officer of Northern Areas council be approached to undertake the review of the investigation.
34. On 13 February 2017 the complainant wrote to Mr Byles confirming his understanding that he would be undertaking the internal review and considering the matter about the council officer] under the Employee Code and provided a copy of the following letters:
- the Complainants letter to the council dated 28 November 2016; and
  - the Council's letter to the Complainant dated 23 December 2016.
35. On 4 April 2017 Mr Byles advised the council of the outcome of the internal review of the council's decision as follows:

I have carried out a review of the decision made by the former Chief Executive Officer of the Regional Council of Goyder John Brak. "that I (John Brak) was satisfied with the

manner in which [the council officer] undertook his investigation in relation to the fatal canine attack that occurred on 18 September 2015” and conclude that the investigation was carried out in the correct manner and I am satisfied that the findings of the Council Chief Executive Officer John Brak were correct.

36. On 4 April 2017 the council advised the complainant of the outcome of the internal review in the following terms:

Dear Mr Lewis,

Please find enclosed a copy of the letter received from Colin Byles, Chief Executive Officer of Northern Areas Council, who conducted an independent review, in accordance with Part 3 S270 of the Local Government Act 1999, of the decision made by former Regional Council of Goyder Chief Executive Officer, John Brak in regard to the manner in which staff member [the council officer] undertook the investigation in relation to the fatal canine attack that occurred on 18 September 2015.

This review finding has been tabled for Council’s 18th April meeting.

[...]

37. On 10 July 2017 the complainant raised the following complaint with my Office about his dissatisfaction with the council and the internal review:

In your letter dated October 11<sup>th</sup>, 2016 you advised me to contact your Office again if I had no success in having the matter investigated further, and would appreciate further advice.

[...]

Notice of Intention to Make an Order, and the Orders thereafter are incorrect and misleading. All of the forms numbered 1 to 6 [as supplied to my investigation] are filled in and signed by [the council officer]. He had informed us that they were Dangerous Dogs, but we find out that they have been classified as Nuisance Dogs, contrary to his information to us.

I am certainly not impressed with both the Councils’ (Regional Council of Goyder and Northern Areas Council) attitudes defending their findings of employee conduct when I requested the S270 Review.

[The council officer’s] lack of duty of care is very obvious when request for help from Lisa Stevens and Veronica Scarlett from the Council were ignored - especially the one where Veronica Scarlett was advised to make an appointment with Clifford to tie his dogs up so she could work at her son’s house opposite our, and the Clifford’s house.

It all boils down to the reality that, if [the council officer] had fulfilled his duties in an efficient manner, Lulu would still be with us.

We feel that most, if not all, of our correspondence has not been taken seriously, or ignored.

[...]

## Relevant law

38. Section 270 of the Local Government Act requires for the council to maintain policy, practices and procedures for dealing with complaints about the actions of a council as follows:

### Part 2—Internal review of council actions

#### 270—Procedures for review of decisions and requests for services

- (a1) A council must develop and maintain policies, practices and procedures for dealing with—
- (a) any reasonable request for the provision of a service by the council or for the improvement of a service provided by the council; and
  - (b) complaints about the actions of the council, employees of the council, or other persons acting on behalf of the council.
- (a2) The policies, practices and procedures required under subsection (a1) must be directed towards—
- (a) dealing with the relevant requests or complaints in a timely, effective and fair way; and
  - (b) using information gained from the council's community to improve its services and operations.
- (1) Without limiting subsections (a1) and (a2), a council must establish procedures for the review of decisions of—
- (a) the council;
  - (b) employees of the council;
  - (c) other persons acting on behalf of the council.
- (2) The procedures must address the following matters (and may address other matters):
- (a) the manner in which an application for review may be made;
  - (b) the assignment of a suitable person to reconsider a decision under review;
  - (c) the matters that must be referred to the council itself for consideration or further consideration;
  - (ca) in the case of applications that relate to the impact that any declaration of rates or service charges may have had on ratepayers—the provision to be made to ensure that these applications can be dealt with promptly and, if appropriate, addressed through the provision of relief or concessions under this Act;
  - (d) the notification of the progress and outcome of an application for review;
  - (e) the time frames within which notifications will be made and procedures on a review will be completed.
- (7) Nothing in this section prevents a person from making a complaint to the Ombudsman at any time under the *Ombudsman Act 1972*.

39. Section 4 of the DCM Act defines an authorised person as follows:

#### 4—Interpretation

In this Act, unless the contrary intention appears—

***Dog management officer*** means—

- (a) a member of the police officer; or
- (b) a person holding office as a dog management officer under Part 3;

40. Under section 26 of Division 4 of Part 3 of the DCM Act, a council is responsible for the management of dogs within its area as follows:

**Part 3—Administration of provisions relating to dogs**  
**26—Council responsibility for management of dogs**

(1) Each council is required to administer and enforce the provisions of this Act relating to dogs within its area and for that purpose must—

...

- (d) appoint at least one full-time dog management officer or make other satisfactory arrangements for the exercise of the functions and powers of dog management officers; and

[...]

41. Section 27 of the DCM Act provides for the appointment of dog management officer as follows:

**27—Appointment of dog management officer**

- (1) A council may appoint suitable persons (other than members of the council) to be dog management officers for the purposes of this Act.

42. Section 44, Division 1 of Part 5 of the DCM Act stipulates:

**44—Dogs not to be allowed to attack etc**

- (1) A person who sets on or urges a dog to attack, harass or chase a person or an animal or bird owned by or in the charge of another person is guilty of an offence (whether or not actual injury is caused).  
Maximum penalty: \$10 000 or imprisonment for 2 years.
- (2) A person who owns or is responsible for the control of a dog is guilty of an offence if the dog attacks, harasses or chases or otherwise endangers the health of a person or an animal or bird owned by or in the charge of another person (whether or not actual injury is caused).  
Maximum penalty: \$2,500.  
Expiation fee: \$210.
- (3) A person who is guilty of an offence against this section is guilty of an aggravated offence if the offence relates to a dog that is a dangerous dog or a dog of a prescribed breed and, on conviction, the person is liable to a monetary penalty not exceeding double the monetary penalty, or imprisonment for a term not exceeding double the term, that would otherwise apply under this section for that offence.
- (4) It is a defence to a charge of an offence against this section if it is proved that the dog was at the time of the offence being genuinely used in the reasonable defence of a person or property, or for driving or removing an animal found trespassing.

43. Section 50, Division 3 of Part 5 of the DCM Act permits the council to issue an order of any of the following classes to a specified dog:

**50—Destruction and control orders**

- (1) A council or the Board may, in accordance with this Division, make an order of any of the following classes in relation to a specified dog:
- (a) a Destruction Order;
  - (b) a Control (Dangerous Dog) Order;
  - (c) a Control (Menacing Dog) Order;
  - (d) a Control (Nuisance Dog) Order;
  - (e) a Control (Barking Dog) Order.
- (3) A Control (Dangerous Dog) Order requires—
- (a) the dog to be desexed within the period specified in the order; and
  - (b) the dog to be identified by means of an implanted microchip; and
  - (c) the dog, while on premises of which the person who is responsible for the control of the dog is the occupier, to be kept indoors or in an enclosure that is constructed so as to prevent the dog escaping from it; and
  - (d) the dog, at all times, to wear a collar that complies with the requirements of the Board (except while the dog is suffering from injury, disease or sickness to the extent that the wearing of a collar would be injurious to the health of the dog); and
  - (e) the dog, except while confined to premises of which the person who is responsible for the control of the dog is the occupier—
    - (i) to have a muzzle securely fixed on its mouth so as to prevent it from biting any person or animal; and
    - (ii) to be under the effective control of a person by means of physical restraint; and
  - (f) warning signs (complying with the requirements of the Board) to be prominently displayed at all entrances to premises where the dog is usually kept warning people that a dangerous dog is kept on the premises; and
  - (g) the dog and the person who is responsible for the control of the dog to successfully complete an approved training course specified in the order; and
  - (h) all reasonable steps to be taken to prevent the dog repeating the behaviour that gave rise to the order.
- (5) A Control (Nuisance Dog) Order requires—
- (a) the dog, while on premises of which the person who is responsible for the control of the dog is the occupier, to be kept indoors or in an enclosure that is constructed so as to prevent the dog escaping from it; and
  - (b) the dog, except while confined to premises of which the person who is responsible for the control of the dog is the occupier, to be under the effective control of a person by means of physical restraint.

44. Section 51, Division 3 of Part 5 of the DCM Act permits the council to issue an order of any of the following classes to a specified dog:

**51—Grounds on which orders may be made**

- (1) A council may, on its own initiative or on application, make a Destruction Order in relation to a dog if satisfied that—
- (a) the dog is unduly dangerous; and

- (b) the dog has attacked, harassed or chased a person or animal or bird owned by or in the charge of a person in circumstances that would constitute an offence against this Act.
- (2) A council may, on its own initiative or on application, make a Control (dangerous Dog) Order, a Control (Menacing Dog) Order or a Control (Nuisance Dog) Order in relation to a dog if satisfied that-
  - (a) The dog is dangerous, menacing or a nuisance; and
  - (b) The dog has attacked, harassed or chased a person or an animal or bird owned by or in the charge of a person in circumstances that would constitute an offence against this Act.

#### **52—Procedure for making and revoking orders**

- (1) Before making an order under this Division in relation to a dog, the council must take reasonable steps-
  - (a) to ascertain all persons who own or are responsible for the control of the dog; and
  - (b) to give each of the persons so ascertained at least 7 days written notice-
    - (i) identifying the dog in relation to which it is proposed that the order be made; and
    - (ii) setting out the terms of the proposed order; and
    - (iii) inviting the owner or other person to make submissions to the council (within 7 days or such longer period as is allowed by the council) with respect to the matter.
- (2) An order-
  - (a) must be made in the manner and form required by the Board; and
  - (b) must be noted in the register kept by the council under this Act; and
  - (c) takes effect when the council first gives a copy of the order to a person who owns or is responsible for the control of the dog.

#### **45. Sections 109 and 110 of the Local Government Act provide:**

##### **109—General duty**

- (1) An employee of a council must at all times act honestly in the performance of official duties.
- (2) An employee of a council must at all times act with reasonable care and diligence in the performance of official duties.

##### **110—Code of conduct for employees**

- (1) The Governor may, by regulation, prescribe a code of conduct to be observed by the employees of all councils.
- (2) The Minister must consult with any registered association that represents the interests of employees of councils before the regulation is made.
- (3) A code of conduct must not diminish a right or employment condition under an Act, award, industrial agreement or contract of employment.
- (4) Council employees must observe the code of conduct.
- (5) Contravention of or failure to comply with the code of conduct constitutes a ground for suspending, dismissing or taking other disciplinary action against the employee.

### **Whether the council's actions before the reported fatal canine attack were unreasonable or wrong**

46. The complainant alleges that prior to the incident on 8 September 2015, the council failed to act upon complaints it had received about the Clifford dogs. The complainant tendered statements from Ms Scarlett and Ms Stevens which he considers to be evidence that the council was aware of concerns about the dangerous nature of the Clifford dogs and that it failed to take appropriate action. In his complaint, the complainant asserts that a failure by the council to properly deal with complaints about the Clifford dogs resulted in the death of his dog.
47. In this regard, the council advised my investigation as follows:
- Council received two (2) complaints on or about 15th June 2017. The first complaint was from Mr Lewis regarding Mr Clifford's dogs, the second was from Ms Stevens regarding some chickens which had been killed, however Ms Stevens was unable to confirm what killed the chickens. Council correspondence with Mr Clifford regarding his dogs (see correspondence dated 16th June 2017).
- Up until the abovementioned complaints Council has not received any complaints. Council has no record of the alleged telephone call from Ms Veronica Scarlett as claimed in Ms Scarlett's statement dated 27th September 2017.
48. Ms Scarlett's statement dated 27 September 2015 referred to an approach she made to the council 12 months prior to the incident about two dogs she asserts to be the Clifford dogs. According to Ms Scarlett, she contacted the council by phone and was advised to approach the Cliffords in the first instance to address concerns. In this regard, while I note that the council advised my investigation that it had no record that Ms Scarlett contacted the council about the Clifford dogs, regardless, I accept that the council had not received any formal complaints before the incident, and I do not consider the council's advice to Ms Scarlett was necessarily unreasonable in the circumstances.
49. Ms Stevens' statement refers to dogs she assumes are related to the Clifford dogs and does not provide any evidence that concerns about the Clifford dogs were raised with the council before the incident.
50. I am satisfied that, with the exception of Ms Scarlett's telephone approach to the council 12 months before the incident, there is no record of the council receiving any other complaints about the Clifford dogs, whether formally or informally, before the incident. In those circumstances, there does not appear to be any evidence of an error in the council's action, or inaction, before the incident.

### **Opinion**

In light of the above, my final view is that the council did not act in a manner that was unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act by failing to take action in relation to the Clifford dogs before the incident.

**Whether the council's actions and findings in investigating the fatal canine attack were unreasonable or wrong**

51. According to the information provided to my Office, I am satisfied that:
- on 18 September 2015 at 10.30 AM Mr Clifford called [the council officer] about a matter during which sections 44(2) and (4) of the DCM Act were discussed
  - on 21 September 2015 the complainant reported the incident to the council
  - on 21 September 2015 [the council officer] interviewed the complainant and his wife about the incident during which the complainant provided [the council officer] with a four page hand written account of the incident. [The council officer] refers to this in his report.
  - on 22 September 2015 [the council officer] interviewed Ms Sonia Clifford (owner of Clifford dogs)
  - on 15 October 2015 [the council officer] confirmed with the complainant that he was the Compliance Officer for the council
  - on 26 October 2015 the council issued to the complainant the "Summary of Findings" into the incident
  - on 22 February 2016 the complainant lodged a complaint with the council about [the council officer's] investigation of the incident
  - on 16 March 2016 the council provided its response to that complaint.
52. I note that the complainant is dissatisfied with the council's actions in regards to the investigation of incident on the basis that [the council officer]:
- provided Mr Clifford with a defence to the incident under the DCM; and
  - had an association with Mr Clifford and therefore it could be said that he was biased in his investigation of the incident
  - failed to deal with complaints about the Clifford dogs prior to the incident
  - advised the complainant that a "Dangerous Order" would be issued for the Clifford dogs.
53. I have addressed the failure to deal with complaints about the Clifford dogs prior to the incident earlier in this report.

*Discussion of a defence under the DCM Act*

54. The complainant alleges that he was aware of an exchange between [the council officer] and Mr Clifford during which a defence under section 44(4) of the DCM Act was discussed.
55. [The council officer] acknowledged to the complainant that he had a discussion with [the council officer] about a potential defence under the DCM Act. Further, according to the investigation report prepared by [the council officer]:

At approximately 10.30am on 18<sup>th</sup> September 2015, I received a call from Steven Clifford of Whyte Yarcowie to ask a question. That question was, "where do I stand if a dog comes on to my property and my dogs attack it?" I explained to Mr Clifford that under section 44(2) it is an offence for a dog to attack/chase or harass a person, animal or bird owned by a person.

Also section 44(4) states that it is a defence to an offence if it is proved that the dog is acting in defence of the property or it's [sic] owner. I told Mr Clifford I would check with DCMB and ring him back.

I rang Ann Gee of the DCMB and posed the question to her, she told me a similar case recently had a legal ruling and that there was no case to answer. I rang Mr Clifford and relayed that information.

I did not know of the details that prompted the original question until first thing Monday morning 21<sup>st</sup> September 2015 when I received a call from Mr Noel Lewis to advise me of a dog attack and that his dog was dead. I arranged to meet him that morning at his property to take a statement which I completed at approx. 1200 hrs.

56. While [the council officer] should not have purported to provide legal advice to Mr Clifford, or formed a pre-conceived view of the incident, on the information before me, it appears that [the council officer] was simply responding to a general query about liability under the DCM Act, rather than purporting to provide legal advice. I note that [the council officer] has submitted that he was not aware of the incident at the time. Even if he had been aware of the incident, there is nothing inherently inappropriate in [the council officer] advising Mr Clifford that, as a general proposition, where a dog comes onto his property and his dogs attack it, a defence may be available under section 44(4) of the DCM Act. Further, there is nothing inappropriate in relaying to Mr Clifford that he had been advised by the Board that in a recent case, it was found that there was no case to answer due to the operation of section 44(4) of the DCM Act.
57. In all of the circumstances, I do not consider that there is evidence of an administrative error in relation to this issue.

*Alleged bias of [the council officer] due to a pre-existing relationship with Mr Clifford*

58. The complainant alleges that [the council officer] is an associate of Mr Clifford and that due to this friendship, the complainant infers that [the council officer] was conflicted in his duty and purports that he may have acted in a biased manner in his investigation to the incident.
59. The complainant appears to have formed the opinion of an association between Mr Clifford and [the council officer] on the basis that [the council officer] owned a Harley Davidson motor bike and that he and his wife were members of a 'Bike club' and 'bikies [...] visit the Cliffords three (3) to four (4) time yearly, usually on holiday weekends'.
60. The complainant has provided no information that would substantiate his view. Nor has the complainant identified how he considers that association compromised the investigation of the incident. I consider that the complainant's assertions are speculative only.
61. I also note that the approach taken by [the council officer] appears to have been reasonably open to him, and I do not consider that there is any evidence that he inappropriately favoured the Cliffords.
62. In all of the circumstances I do not consider that there is any evidence of bias on the part of [the council officer] which impacted on his investigation and I do not consider that further investigation of this allegation is necessary or justifiable.

*[The council officer's] advice in relation to issuing the control orders*

63. The complainant further alleges that during his investigation into the incident, [the council officer] advised him and wife that the Clifford dogs were to be classified as "Dangerous" however, he later found out that the Clifford dogs had been the subject of a "Nuisance" order.

64. The council explained its rationale for classifying the dogs as 'nuisance' as follows:
- [the compliance officer] attended Whyte Yarcowie on Monday 21<sup>st</sup> September, 2015 to undertake an investigation of the incident that had occurred on Friday 18<sup>th</sup> September 2015. [The compliance officer] classified the dogs as 'nuisance' based on inter alia that the incident had for the most part occurred on Mr Clifford's property and that there were no prior incidents regarding the dogs.
65. When asked whether [the council officer] informed Mr Lewis that Mr Clifford's dogs had been categorised as 'dangerous' rather than 'nuisance', the council responded that [the council officer] confirmed that the dogs were never classified as 'dangerous'.
66. The report and the complainant's Record of Interview does not refer to [the council officer's] advice about the classification of the Clifford dogs. I note however, that in the Record of Interview with Mrs Clifford (which occurred after the interview with the complainant) [the council officer] states under "Orders considered" 'Nil on Dangerous, possibly Nuisance'.
67. Whether or not [the council officer] represented to Mr Lewis that the Clifford dogs had or would be classified as 'dangerous' is a matter of [the council officer's] word against that of the Lewis's. There is no contemporaneous documentation recording that that occurred. In those circumstances, I am unable to determine whether [the council officer] made such a representation.
68. Regardless, I do not consider that much turns on whether [the council officer] made that representation. It was open to [the council officer] to revise that classification after interviewing Ms Clifford the following day i.e. it would not have been an administrative error by [the council officer] to advise the complainant and his wife that the Clifford dogs would be classified as dangerous and then to change his mind upon observing further information.
69. In all of the circumstances, I do not consider that there is any evidence before me of an administrative error in relation to this issue.

## Opinion

In light of the above, my final view is that the council did not act in a manner that was unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act in investigating the incident.

## Whether the council's handling of a complaint about an investigator's conduct was unreasonable or wrong

70. The complainant considers that the council has, in the reaching its decision that [the council officer's] investigation was sufficient, ignored the approaches to the council by Ms Stevens and Ms Scarlett about the Clifford dogs and that most, if not all the complainant's correspondence about his complaint about [the council officer] has not been taken seriously or had been ignored by the council.
71. In accordance with clauses 2.27 and 2.28 of the Employee Code, the complainant is entitled to make a complaint about a council employee and for that complaint to be brought to the attention of the council's Chief Executive Officer, Mr Brak. Therefore in this regard, I am satisfied that the council complied with this requirement under the Employee Code.

72. The Employee Code is silent on how a complaint is to be dealt with. In this regard, the council advised my investigation that the complaint about [the council officer] was dealt with under the Complaints Procedure.
73. The Complaints Procedure does not provide a detailed process for handling complaints, but I note that it requires that the complainant should be responded to with a clear decision.
74. Mr Brak's response to Mr Lewis stated:
- I am in receipt of your correspondence dated 22 February 2016 in which you lodge an official complaint against my Compliance Officer, [the council officer] in relation to his actions in respect to the incident that occurred on 18 September 2015 that lead [sic] to the death of your wife's dog.
- You also seek Council to undertake an investigation into the matter of the management of that incident by a person who is "unbiased, competent and truthful, and who knows what is required".
- I advise that I am satisfied with the manner in which [the council officer] undertook his investigation in relation to that unfortunate incident and find your allegation against [the council officer] of bias, incompetence and inefficiency unfounded.
- Accordingly, whilst you have my sympathy for the loss that you and your wife have experienced, I will not take any further action in relation to your correspondence.
75. While for the reasons set out earlier in this report, I consider that Mr Brak's conclusion was reasonably open to him, and that decision was clear, in my view, he erred in failing to provide:
- a detailed explanation for the council's decision, including adequately addressing those issues raised in the complaint
  - details of the evidence (including documentation) relied upon in reaching the council's decision
  - a direct reference in the decision to the Employee Code (including any particular clauses considered)
  - details of any appeal or internal review options of the council's decision that were available to him.
76. In the absence of that information, it is not surprising that the complainant was not satisfied that his complaint had been properly considered.

## Opinion

In light of the above, my final view is that by failing to provide sufficient detail of:

- the council's reasoning
- evidence and statutory instruments considered
- appeal and review options

the council acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act in handling the complaint about [the council officer].

Given my view and recommendation in relation to the next issue, I do not consider it necessary to make a separate recommendation in relation to this issue.

**Whether the council conducted an internal review of its decision concerning a complaint about the investigation of the fatal canine attack and appropriately dealt with an Employee Code of Conduct complaint in accordance with its policy**

*The internal review*

77. According to the information provided to my Office:

- on 25 October 2016 the complainant requested a review of the council's decision (**the internal review**) and made a complaint about [the council officer] under the Employee Code
- on 31 October 2016 the council wrote to the complainant seeking the complainant's written reasons for applying for the internal review. In relation to the Employee Code of Conduct complaint, that letter stated:

I understand from your correspondence that you are now formally lodging a complaint about [the council officer] pursuant to Item 2.27 of the Code of Conduct for Council Employees. In your correspondence to Council dated 22 February 2016 you lodged a complaint against [the council officer] for bias, incompetence and inefficiency in the handling of the fatal canine attack incident.

My response to you in relation to your complaint , as provided to you in correspondence dated 16 March 2016 was that I found your allegations to be unfounded.

Whilst not articulated to you in my correspondence to you dated 16 March 2016, my assessment of [the council officer's] conduct in relation to the allegations made by you was undertaken having regard to the information provided by yourself; the information provided by [the council officer]; all other relevant documentation and the Code of Conduct for Council Employees.

- on 14 November 2016 the complainant furnished additional information to the council, specifically referring to the statements of Ms Scarlett and Ms Stevens to support his reasons for an internal review under the Local Government Act
- on 22 November 2016 the council wrote to the complainant in response to the complainant's letter of 14 November 2016 including:
  - Your response to my request for you to provide written reasons for applying for the review was to refer me back to information that you have previously provided to Council.
  - That response does not articulate the reasons why you believe that the decision is wrong.
  - Providing clarity around the reasons will assist the Council in undertaking the 'S270 Review' and accordingly I seek that clarity from you.
  - I propose that Council undertake the 'S270 Review' when they next meet on 20 December 2016 and seek your response by 9 December 2016.
- on 28 November 2016 the complainant responded to the council's letter of 22 November 2016 referring further to the statements of Ms Scarlett and Ms Stevens and asserting that [the council officer] had lied in saying that the complainant was the only person to lodge a complaint about the Clifford dogs
- on 20 December 2016 the council resolved that Mr Byles be approached to undertake the review of the investigation
- on 21 December 2016 the council provided Mr Byles with a book of documents which included various documents relevant to the internal review.

78. I am satisfied that in accordance with the Review Procedure:
- the CEO Report to the council appropriately outlined the background and context for the complainant's request for the internal review of the council's decision
  - the council appropriately resolved to appoint Mr Byles as the external person to conduct the internal review of the council's decision
  - the complainant submitted to Mr Brak his request for the internal review in writing, including the reasons why he considered the council's decision was wrong
  - Mr Byles was appraised of all the information relevant to the council's decision and that was considered by the original decision maker
  - the principles of procedural fairness were observed and that the complainant was able to submit to the council and Mr Byles additional information he considered relevant to the internal review.
79. However, it is my view that Mr Byles' letter dated 4 April 2017 did not demonstrate:
- how Mr Byles stood in the shoes of the original decision maker
  - whether, on the basis of the evidence, Mr Byles gave consideration to whether a different decision would be better
  - how a review of the facts supported the internal review outcome
  - procedural fairness by articulating how only proper evidence that is capable of proving the case was considered.
80. Further, the thrust of the complainant's submissions was that the council had not had proper regard to the Stevens and Scarlett statements. Mr Byles did not specifically address those statements at all.
81. The council submitted the following to my investigation:
- It is difficult to determine from the response from Northern Areas Council if the review took into account **all** of the matters addressed in Mr Lewis' complaint. However Mr Byles did receive all the documents necessary to make an informed review and decision.
- [...]
- It is possible the review could have been undertaken more timely,
- [...]
- From the information held on file, it could be concluded that further reasons and/or detailed explanations may have been useful.
82. In my final view, the council, as the entity responsible for receiving and managing the internal review of the council's decision, failed to comply with its Review Procedure by not:
- clearly describing the scope of the internal review in the terms of the CEO Report
  - providing detailed reasons or providing the complainant with its reasoning as to why it did not consider it practicable to provide reasons of the decision of the internal review
  - advising the complainant of an alternate remedy including the right to raise the matter with my Office.
83. It is impossible for me, let alone the complainant to ascertain, on the basis of the responses provided by Mr Byles and the council, whether the internal review was conducted properly, thoroughly and in accordance with the Review Procedure. In those circumstances, it is not surprising that a complaint was made to my Office. While it is possible that Mr Byles conducted a proper review, and, in my view, the conclusion

reached appears to have been reasonably open to him, the council has not provided me with any evidence to satisfy me that a proper process was followed.

84. I therefore find that for those reasons above, the council acted in a way that was wrong within the meaning of the Ombudsman Act in conducting the internal review.

*The Employee Code of Conduct complaint*

85. In responding to this matter, the council stated:

Mr John Brak considered this matter and responded to Mr Lewis on a number of occasions (see correspondence dated 16<sup>th</sup> March, 2016, 31<sup>st</sup> October, 2016 and 22<sup>nd</sup> November 2016).

86. The council's letter dated 16 March 2016 states:

I am in receipt of your correspondence dated 22 February 2016 in which you lodge an official complaint against [the council officer] in relation to his actions in respect to the incident that occurred on 18 September 2015 that lead to the death of your dog. You also seek Council to undertake an investigation into the matter of the management of that incident by a person who is "*unbiased, competent and truthful, and who knows what is required*".

87. The complainant's letter dated 25 October 2016 states:

In reference to your letter dated March 16<sup>th</sup>, 2016, that the above matter was handled and concluded in a satisfactory manner, I am disputing your decision, and request a further enquiry as per the Local Government Act 1999 Section 270 Part 2 Internal Review of Council Actions, and Code of Conduct for Council Employees Part 1 Principles and Part 2 Conduct 110(1), copies of which are enclosed.

88. The council's letter dated 31 October 2016 states:

I understand from your correspondence [25 October 2016] that you are now formally lodging a complaint about [the council officer] pursuant to item 2.27 of the Code of Conduct for Council Employees.  
In your correspondence to Council dated 22 February 2016 you lodged a complaint against [the council officer] for bias, incompetence and inefficiency in the handling of the fatal canine attack incident.  
My response to you in relation to your complaint, as provided to you in my correspondence dated 16 March 2016 was that I found your allegations to be unfounded. Whilst not articulated to you in my correspondence to you dated 16 March 2016, my assessment of [the council officer's] [sic] conduct in relation to the allegations made by you was undertaken having regard to the information provided by yourself; the information provided by [the council officer]; all other relevant documentation; and the Code of Conduct for Council Employees.  
Because you have not identified which general behaviour item to which your complaint relates, I have assumed that your formal complaint relates to the allegations that you made in your correspondence dated 22 February 2016.  
Accordingly, I reiterate my earlier response in that I found your allegations to be unfounded and advise you that my investigation of your formal complaint against [the council officer's] conduct is now closed.

89. The council's letter dated 22 November 2016 states:

[...]

I am of the understanding that the decision to be the subject of the 'S270 Review' is my advice to you, as contained in my correspondence to you dated 16 March 2016 that I am satisfied with the manner in which [the council officer] undertook his investigation in relation to that unfortunate incident. Please confirm that my assumption is correct and if not advice accordingly.

In my correspondence to you dated 31 October 2016 I sought from you, in accordance with Council's Internal Review of Council Decision Policy, "your written reasons for applying for the internal review (that is, why you believe that the decision is wrong)". As stated in my correspondence to you dated 31 October 2016, I have informed myself of all the relevant information in regard to this issue, including that provided by yourself and [the council officer].

Your response to my request for you to provide written reasons for applying for the review was to refer me back to information that you have previously provided to the Council.

That response does not articulate the reasons why you believe that the decision is wrong. Providing clarity around the reasons will assist the Council in undertaking the 'S270 Review' and accordingly I seek that clarity from you.

[...]

90. The complainant's letter dated 28 November 2016 states:

[...]

It became apparent to me that nobody has read the damning correspondence that covers the voluntary statements from both Lisa Stevens and Veronica Scarlett, of which both are dated September 27<sup>th</sup>, 2015, and held by your office.

Their statements cover [the council officer's] dereliction of duty concerning their many complaints to the Council about the two (2) killer dogs. If [the council officer] had carried out his duties in a reasonable manner, our little dog would still be with us.

I also draw your attention, again, to the advice [the council officer] gave to Veronica Scarlett. He asked her to contact Clifford to lock up the dogs while she was working at her son's property opposite.

I'd like to know, Mr. Brak, if that was the correct conduct you would expect from [the council officer] in these circumstances? Irrespective of your opinion, this is one of the reasons that the Reviews should be conducted. In my opinion, you were wrong. My wife and I consider [the council officer] to be responsible for the horrible death of our dog. Again, I must reiterate that if he had done his job in an efficient manner, our dog would still be alive.

[...]

Please tell me how I can get this very simple statement across to you and the Council members. It is obvious you have not perused the statements from Stevens and Veronica Scarlett. Their statements are self-explanatory.

[...]

[The council officer] stated in his Report that I was the only person to lodge a complaint (on September 21<sup>st</sup>, 2015). Refer to his letter of October 26<sup>th</sup>, 2015, with his attached Report. In answer, refer to Veronicas Scarlett's statement, dated September 27<sup>th</sup>, 2015.

My reason for the Section 270 and Employee Code of Conduct Reviews are quite clear. [The council officer] lied, and failed in his duty which resulted in our dog being fatally injured.

[...]

91. From the correspondence above, I am satisfied that the complainant has clearly expressed to the council the reasons for his dissatisfaction with the council's decision, including the finding that the Employee Code complaint about [the council officer] was unfounded. I am satisfied that the council, in its communication with the complainant, was appraised of all of the information and reasoning for the complainant's request for an internal review, that is, a dissatisfaction with [the council officer's] investigation and an Employee Code complaint about [the council officer].
92. In my consideration of the communication between the parties and the CEO Report, I am of the view that the council has failed to demonstrate to the complainant that the internal review considered the following two separate and distinct elements that formed the basis of the complainant's request for an internal review:
- investigation of the incident by [the council officer]; and
  - the Employee Code complaint about the conduct of [the council officer].
93. It is my view that, although the internal review had considered the investigation of the incident by [the council officer], the council failed to review the council's decision in regards to the Employee Code complaint about [the council officer] or advise the complainant of alternative remedies including rights of appeal to an external agency such as the Ombudsman. The Employee Code complaint was not referred to by the council other than in the letter dated 31 October 2016. In that letter, the council simply indicated that the complaint was closed.
94. In light of the above, my final view is that for those reasons above, and earlier in my report, the council acted in a way that was wrong within the meaning of the Ombudsman Act in conducting the internal review.

## Opinion

Although the council may consider that it had dealt with the Employee Code complaint in terms of a finding that the allegations were unfounded and that its decision was final, the council failed to reconsider that decision in accordance with the council's Complaints and Internal Review Procedures. Therefore, it is my final view that the council's actions in this regard were wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

## Summary and Recommendation

In light of the above, my final view is that:

- in regard to the first issue, the council did not act in a manner that was unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act by failing to take action in relation to the Clifford dogs before the incident
- in regard to the second issue, the council did not act in a manner that was unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act in investigating the incident
- in regard to the third issue, the council acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act in handling the complaint about [the council officer]
- in regard to the fourth issue, the council acted in a way that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act in conducting the internal review.

To remedy the errors, I recommend under section 25(2) of the Ombudsman Act that the council:

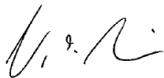
1. apologise to the complainant for not conducting an internal review in accordance with its Review Procedure
2. conduct a further internal review in accordance with the Review Procedure and provide the complainant with the outcome of that review including:
  - identification of all evidence (including documentation) relied upon in reaching the reviewer's decision.
  - detailed reasons for the reviewer's decision adequately addressing all issues raised in the complaint.

In accordance with section 25(4) of the Ombudsman Act, I request that the council report to me by **20 March 2019** on what steps have been taken to give effect to my recommendations above; including:

- details of the actions that have been commenced or completed
- relevant dates of the actions taken to implement the recommendation.

In the event that no action has been taken, reason(s) for the inaction should be provided to the Ombudsman.

I have also sent a copy of my report to the Minister for Local Government as required by section 25(3) of the *Ombudsman Act 1972*.



Wayne Lines  
**SA OMBUDSMAN**

19 December 2018