

## STATEMENT ON INVESTIGATION

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### Outcome of Ombudsman investigation into alleged breach of the Code of Conduct for Council Members – Cr Robyn Holtham of the City of Onkaparinga

The Ombudsman has concluded an investigation into a complaint made under section 263A(2) of the *Local Government Act 1999* against Cr Robyn Holtham of the City of Onkaparinga.

The complaint alleged, *inter alia*, that Cr Holtham breached Part 3 of the Code of Conduct for Council Members by failing to declare and appropriately deal with an actual conflict of interest in Agenda Item 15.4 during a meeting of the council on 20 March 2018.

Agenda Item 15.4 comprised a Preliminary Assessment Report prepared in respect of a complaint made by a ratepayer against the council's mayor. It was not in dispute that Holtham declared a perceived conflict of interest in respect of the matter, identified as arising from, *inter alia*, her status as a mayoral candidate. It was also not disputed that Cr Holtham remained in the chamber during the course of the council's deliberation of the matter and that Cr Holtham voted for and against the council investigating different aspects of the complaint against the mayor.

The complaint alleged that Cr Holtham should have, but did not, declare an actual conflict of interest in respect of Agenda Item 15.4, arising, *inter alia*, from her declared intention to stand as candidate for mayor at the upcoming local government elections.

As a result of the investigation, the Ombudsman concluded that Cr Holtham did not contravene Part 3 of the Code.

In concluding that Cr Holtham had an actual conflict of interest in respect of Agenda Item 15.4, the Ombudsman observed:

In the circumstances, I consider that it was in Cr Holtham's direct personal interests that she succeed in her endeavour to be elected as mayor of the council.

I also consider that it was in Cr Holtham's indirect personal interests that other persons vying for the position suffer embarrassment such as to damage their own prospects of election.

In this case, I consider that [the mayor] was such a person because she was the incumbent mayor and because at the relevant time she had publicly declared her intention to stand for re-election.

In my view, there is a clear public interest in matters before a council being decided in a fair and unbiased manner and in the ultimate interests of ratepayers.

There is also a clear public interest in complaints about elected members being assessed in a fair and unbiased manner and without undue cost to ratepayers.

I consider that there is also a public interest in a council avoiding the unreasonable disclosure of information concerning the personal affairs of an individual.

The question that arises is whether Cr Holtham's indirect personal interest in the mayor suffering embarrassment of a kind identified above came into conflict with the public interest in a manner that had the potential to lead to a decision that was contrary to the public interest ('...a conflict [...] that *might* lead to a decision...'). That is, whether in the circumstances there was some variance or active disagreement between Cr Holtham's personal interests and the wider public interest.

In my view, such a conflict existed. I say this because in the circumstances the elected body could reasonably have been expected to entertain a number of decisions with the potential to cause detriment to [the mayor's] public image, including:

- the decisions as to whether to consider the Preliminary Assessment Report in confidence and as to whether the Preliminary Assessment Report and the [...] complaint were to remain confidential
- the decisions as to whether any, some or all of the allegations made by the [...] complaint were to be investigated by the council.

I consider that a decision to make the details of the Preliminary Assessment Report and [the] complaint and the details of the council's consideration of both documents available to the public would clearly have been detrimental to [the mayor's] public image, notwithstanding the fact that the council had yet to reach a determination in respect of the allegations.

I consider that a decision to investigate some or all of the allegations made against the mayor would also have been detrimental to [the mayor's] image, on the basis that such a decision would have carried with it the implication that the elected body had determined that the allegations raised a *prima facie* breach of the Code.

In the circumstances, I consider that a decision in respect of the above questions would have been contrary to the public interest if it was made out of motivation to embarrass the mayor, rather than on a fair and unbiased consideration of the matter the subject of the resolution.

[...]

In my view, it is not the *potential* for an elected member to stand as candidate for mayor that gives rise to a relevant interest but that member's *forming of an intention* to do so. It is at this time that it becomes in the interests of the relevant member to advance his or her own public image as compared to other likely candidates, giving rise to the potential for a decision that runs contrary to the greater public interest.

[...]

I consider that Cr Holtham had an actual conflict of interest in Agenda Item 15.4, arising from her intention to stand as mayor at the upcoming local government elections.

The Ombudsman proceeded to consider whether Cr Holtham's mischaracterisation of her interest in Agenda Item 15.4 amounted to a breach of clause 3.13 of Part 3 of the Code of Conduct for Council Members.

In concluding in the negative, the Ombudsman observed:

[S]ection 75A(2)(a) [of the Local Government Act] does not require the elected member to specify whether the relevant interest gives rise to an *actual* or *perceived* conflict of interest in the relevant matter.

The minutes concerning the 28 March 2018 ordinary meeting reflect that Cr Holtham declared a perceived conflict of interest in Agenda Item 15.4, identified as arising in part from her intention to stand as candidate for mayor.

As such, I do not consider that Cr Holtham contravened section 75A(2)(a) of the Local Government Act because it is clear that she declared that she had an *interest* in Agenda Item 15.4, albeit one she mischaracterised as giving rise to a perceived conflict of interest.

In the circumstances, I have considered whether Cr Holtham's declaration of a perceived conflict of interest in Agenda Item 15.4 contravened her obligation under section 75A(1) of the Local Government Act to 'deal with the actual or perceived conflict of interest in a transparent and accountable way.'

On balance, I am not satisfied that Cr Holtham's conduct gives rise to such a contravention.

In this regard, I observe that:

- Cr Holtham declared to the chamber the circumstances giving rise to her interest in the matter, such that other persons present were in a position to form their own view in respect of the issue
- there is no evidence before me that Cr Holtham deliberately sought to mislead the chamber as to the nature of her conflict of interest in the matter, in the sense that I am satisfied that Cr Holtham held the honest but mistaken belief that she did not hold an actual conflict of interest in the matter.

It follows that I am not satisfied that Cr Holtham failed to declare or appropriately deal with her actual conflict of interest in Agenda Item 15.4.

In considering the adequacy of Cr Holtham's explanation to the chamber as to her reasons for participating in the elected body's deliberations concerning the matter (expressed as being 'to substantiate information provided at attachment 3 and to debate the intent of the Act with regard to the council email system'), the Ombudsman observed:

In my view, an elected member who declares a relevant interest and who nevertheless proposes to remain in the chamber should inform the chamber as to why he or she considers that he or she is still able to bring an impartial mind to consideration of the matter at issue.

All told, however, I am not satisfied that Cr Holtham's omission to do so in the circumstances of this matter contravened her obligation to 'deal with the actual or perceived conflict of interest in a transparent and accountable way', in the sense that, on balance, I consider that Cr Holtham was sufficiently transparent as to her motivations for remaining in the chamber.

The circumstances of this matter are quite finely balanced. Ultimately, what will constitute transparent and accountable conduct will differ from case to case. This report should not be read as an endorsement of the approach adopted by Cr Holtham. Nor should it be considered that the level of disclosure made by Cr Holtham will always satisfy an elected member's obligations under section 75A(1) of the Local Government Act.

Notwithstanding my conclusion above, I also query whether it would have been prudent for Cr Holtham to have entirely abstained from participating in respect of Agenda Item 15.4. While I accept that Cr Holtham's decision to remain in the chamber may not have been motivated by a desire to cause embarrassment to the mayor, there was the clear potential for such a perception to arise in the circumstances.

The Ombudsman's final report concerning the investigation, dated 23 July 2018, remains confidential.