

Redacted Report
Full investigation - *Ombudsman Act 1972*

Complainant	Cr Gail Kilby
Council	City of Onkaparinga
Ombudsman reference	2016/04481
Council reference	GC2016-20
Date complaint received	30 May 2016
Issues	<ol style="list-style-type: none">1. Whether a resolution of elected members to not accept the investigator's findings was unreasonable and based on irrelevant grounds2. Whether a resolution of the elected members to take no action other than to apologise was unreasonable and based on irrelevant grounds

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 and considering a response from the council's Mayor, Ms Lorraine Rosenberg and the Chief Executive, Mr Mark Dowd
- considering the City of Onkaparinga *Code of Conduct for Council Members* (2014) (**the Code of Conduct**) and the *Appendix 2 - City of Onkaparinga's Procedure for Investigating Complaints* (**the council's procedure**)
- considering the City of Onkaparinga's *Procedure for Investigating Complaints Under the Code of Conduct for Council Members 2016, Managing a Complaint Under Part 2 - Behavioural Code* (**the amended Procedure**)
- considering the *Local Government Act 1999*
- preparing my provisional report dated 17 February 2017 (**my provisional report**)
- considering submissions made by the complainant and submissions made, on behalf of [REDACTED], by Iles Selley Lawyers ([REDACTED]'s **solicitors**) in response to my provisional report
- seeking and considering further information from the council
- preparing my revised provisional report dated 1 June 2016 (**my revised provisional report**)

- considering submissions made in response to my revised provisional report
- preparing this final 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.¹ 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 ...²

Response to my provisional report

By my provisional report I formed the view that:

- in resolving not to accept the investigator's findings the council acted in a manner that was unreasonable within the meaning of section 25(1)(b) of the Ombudsman Act and exercised its discretion based on irrelevant grounds within the meaning of section 25(1)(d) of the Ombudsman Act
- in resolving to take no action other than to apologise to both councillors, the council acted in a manner that was unreasonable within the meaning of section 25(1)(b) of the Ombudsman Act and exercised its discretion based on irrelevant grounds within the meaning of section 25(1)(d) of the Ombudsman Act.

Based on those provisional findings, I foreshadowed the following recommendations:

- that the investigation report be reconsidered by the elected members and the matter be brought forward by a written notice of motion and the motion be voted on at the next council meeting following my final report
- that the council provide me with an update in relation to the progress of a proposed Elected Member Leadership Program.

In response to my provisional report, submissions were made by the complainant and by ██████'s solicitors. By email dated 10 March 2017, I was informed that the Mayor had no further comments to make on the matter. I did not receive a response from the Chief Executive.

The complainant made the following submissions:³

- there appears to be a discrepancy in the way that other Code of Conduct complaints have been addressed by the council
- there is a considerable history that has evolved and 'the pain and anger around this matter still continues within the Chamber and the Administration'
- there continues to be cultural issues within the council.

In relation to the complaint to my Office, the complainant emphasised:⁴

¹ 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.

² *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

³ Letter from the complainant to me, forwarded by email on 6 March 2017.

⁴ Email from the complainant to my Office dated 27 April 2017.

... this complaint was regarding the decision of the Council following the investigation and not of the actions of [REDACTED] or the results of the independent investigation.

By letter dated 24 March 2017, [REDACTED]'s solicitors made the following submissions:

- the Minutes of the council meeting held on [REDACTED] (**the council meeting**) record that Cr Themeliotis moved to accept the findings made by Mr Ted Byrt of Byrt Corporate Advisory (**the investigator**) and moved that [REDACTED] should make a public formal apology. That motion lapsed, however, for want of a seconder, indicating that only one member of the council 'expressed a willingness to accept the findings ...'
- the resolution that *was* passed not only had a seconder but had a clear majority as the Minutes record that 'the majority of members entitled to vote at the meeting voted in the affirmative', therefore the Mayor's submission that the vote was close, is incorrect
- the investigator's report dated 4 March 2016⁵ (**the investigator's report**):
 - made no recommendations and instead referred the matter to the elected members to determine the most appropriate course of action, which indicates the investigator's assessment of 'the gravity of the breaches'
 - considered the matter was for the council to determine, and the council did so 'after appropriate debate'
 - the investigator's report noted that [REDACTED]'s conduct was out of character
- it is important that breaches of the Code of Conduct be addressed by the council and dealt with in a manner determined to be appropriate by the council in accordance with the relevant Code of Conduct procedure
- the council is best placed to determine how, in the interests of the parties and rate payers, the dispute should have been resolved
- the council's procedure empowered the council to either accept or reject the investigator's findings and expressly provided that the council may take no action
- in accordance with the council's procedure no reasons needed to be given when the council rejected the investigator's findings; reasons only needed to be given if the council rejected recommendations
- in any event, the council gave legitimate reasons for rejecting the investigator's findings and 'there was nothing beyond power, or inappropriate, in the Council reaching this decision'
- [REDACTED] subsequently made a Code of Conduct complaint about a council employee and that person's role in handling the complaint and investigation related to [REDACTED]'s conduct; the report compiled by Kelledy Jones Lawyers (**the Kelledy Jones Report**) directly addressed the procedural flaws in the investigator's report, reflected the concerns of the council that led to the resolution of [REDACTED] and considered that any detriment that may have been caused to [REDACTED] by the delays was remedied by the council not accepting the findings of the investigator's report
- in conclusion:

The duly elected members of the Council made an assessment as to what they thought the appropriate outcome should be. Their actions in doing so were not, in our respectful submission, out of step with the conclusions of the Byrt Report. Quite the contrary. They were also supported by the Kelledy Jones Lawyers report.

In addition, [REDACTED]'s solicitors provided me with copies of submissions that had been made by several elected members and provided to the investigator during his investigation of the Code of Conduct complaint. I was also provided with letters to me from five elected members of the council, concerning:

- recollections of [REDACTED]'s conduct which formed the subject of the Code of Conduct complaint

⁵ Report on the Investigation of Code of Conduct Complaint by Cr Gail Kilby, Ted Byrt, Byrt Corporate Advisory, 4 March 2016.

- submissions that the complaint handling and investigation process in relation to the Code of Conduct complaint was flawed and denied [REDACTED] procedural fairness, therefore, the findings of the investigation were not reliable
- recollections of the council meeting and submissions as to why the council resolved not to accept the investigator's findings and resolved to apologise to both parties
- that the decision was ultimately a decision for the council to make.

The complainant and [REDACTED]'s solicitors informed me of a formal letter of apology from the Mayor that has been provided to both parties in accordance with the resolution of [REDACTED].⁶

Many of the submissions I received and considered in response to my provisional report concerned events that have occurred since the resolution of the council on [REDACTED], including matters related to:

- the subsequent Code of Conduct complaint made by [REDACTED] about a council employee and that the resulting Kelledy Jones Report makes comment on the integrity of the investigator's report
- a subsequent Code of Conduct complaint made by [REDACTED] about the complainant and the resolution of the council in relation to that matter
- the Mayor issuing a formal apology in accordance with the resolution of [REDACTED]
- alleged ongoing issues between the complainant and [REDACTED]
- alleged ongoing cultural issues in the council.

In my revised provisional report I noted that while such submissions indicate that a considerable and complex history has developed, I am mindful that such matters occurred after the resolution of the [REDACTED] and consequently provide limited context to what information was before the elected members on the evening of [REDACTED].

In addition, I noted that my investigation concerns a consideration of the resolution of the council on [REDACTED] and, on that basis, submissions relating to [REDACTED]'s conduct or character, the council's complaint handling process, the investigation of the Code of Conduct complaint and the integrity of the investigator's report are not determinative of the issues per se. Instead, I must consider what information the elected members had before them at the time the resolution was passed in order to determine whether that resolution was unreasonable or based on irrelevant grounds.

I considered all of the submissions provided to me in response to my provisional report and I amended my view accordingly.

Response to my revised provisional report

By my revised provisional report I formed the following revised views:

- in resolving not to accept the investigator's findings, the council exercised its discretion based on irrelevant grounds within the meaning of section 25(1)(d) of the Ombudsman Act
- in resolving to take no action other than to apologise to both councillors, the council exercised its discretion based on irrelevant grounds within the meaning of section 25(1)(d) of the Ombudsman Act.

In addition, I formed the view that no recommendation was necessary. However, I foreshadowed requesting an update from the council in relation to the Elected Member Leadership Program.

⁶ Letter of apology from the Mayor to the complainant and [REDACTED] dated 30 January 2017.

The Chief Executive did not respond to my revised provisional report.

██████████'s solicitors responded by email dated 6 June 2017. ██████████'s solicitors informed me that while they did not agree with my finding that the council exercised its discretion on irrelevant grounds, they had no submissions to make in response to my revised provisional report. ██████████'s solicitors agreed that it was unnecessary for the matter to be referred back to the council and that:

Our client accepts that the matter has been resolved by way of the Mayor's apology to him dated 7 April 2017.

By email dated 7 June 2017 the complainant stated that she considers my revised provisional report acknowledged her concerns. While the complainant briefly re-iterated her concerns in relation to the alleged cultural issues at the council and the history of this matter, she stated that she had little further to add in response to my revised provisional report.

The Mayor responded by letter dated 19 June 2017 and made the following submissions:

- the findings of my provisional report should stand, in that the council acted in a manner that was unreasonable and exercised its discretion based on irrelevant grounds, within the meaning of the Ombudsman Act
- the council should be held to account for the fact that \$10,000 of public money was spent on the external investigation, only for the council to resolve not to accept the findings 'without evidence of good reason to do so'
- the resolution of the council was not a 'rare' circumstance where there was evidently good reason to depart from the findings of the investigation
- the time taken to conduct a preliminary assessment and full investigation can be affected by the parties and extenuating factors and such matters should not impact on whether the findings of a breach should be accepted by the council
- in relation to ██████████'s solicitors:
 - the Mayor queried why ██████████'s solicitors were given an opportunity to make submissions in relation to the matter; in the Mayor's view, the complaint was clearly about the council's decision and not ██████████'s initial behaviour or the subsequent Code of Conduct findings
 - the council has not had the benefit of seeing the submissions made by ██████████'s solicitors or the letters from the five elected members and the council should have the opportunity to do so for procedural fairness
- the Mayor's comment in relation to the vote at the council meeting of ██████████ being close was not a suggestion that there was not a majority and the Mayor does not accept submissions made by ██████████'s solicitors that because the motion to accept the findings lapsed for want of a seconder this indicates only one elected member accepted the findings
- ██████████ did not accept the Mayor's written apology provided to both ██████████ and Cr Kilby
- in conclusion, the Mayor stated that my final report should:
 - reinstate the findings of the provisional report
 - give greater weight to the fact that the behaviour amounted to breaches of the Code of Conduct
 - note that the breach was found by an external investigator who took into account the time delay
 - consider whether dismissing and not accepting the external investigator's findings was wrong.

Many of the submissions made by the Mayor are matters I had addressed both in my provisional report and in my revised provisional report and therefore I do not consider it necessary to re-address those matters. I appreciate that the Mayor considers such matters are reasons for me to find that the council acted in a manner that was unreasonable within

the meaning of section 25(1)(b) of the Ombudsman Act as well as finding that the council had exercised its discretion based on irrelevant grounds. In particular, I refer to the Mayor's submissions concerning:

- the appropriateness of the council rejecting the findings of an external investigation that was funded with public money
- that the council's resolution was not a circumstance in which there was good reason to depart from the findings
- the appropriateness of relying on the time taken to complete an investigation as a justification for departing from findings of a breach of the Code of Conduct
- that weight should be given to the fact that behaviour of an elected member was found to have amounted to a breach of the Code of Conduct
- that my investigation does not concern ██████'s behaviour or the subsequent Code of Conduct investigation/complaint handling process.

In relation to the Mayor's submissions concerning procedural fairness I note:

- ██████ was provided a copy of the provisional reports on the basis that the final outcome may directly affect him and ██████ engaged solicitors in order to provide that response
- the submissions made by ██████'s solicitors were addressed in my revised provisional report and my final report remains unchanged in that respect
- the submissions contained in five letters from elected members provided to me by ██████'s solicitors, were broadly addressed in my revised provisional report, as were my reasons for placing little weight on many of the submissions I had received, and my final report remains unchanged in that respect.

I have considered all of the submissions provided to me in response to my revised provisional report. However, my views remain unchanged. Accordingly, the views expressed in my revised provisional report remain the same.

Background

1. A council meeting was held on ██████. On ██████ the complainant made a formal complaint to the council about ██████'s conduct both during and immediately after the meeting on ██████ (the Code of Conduct complaint). The complaint alleged that ██████ breached the following clauses of Part 2 of the Code of Conduct:

General Behaviour

...

- 2.3 Act in a reasonable, just, respectful and non-discriminatory way when dealing with people.

...

Relationship with fellow Council Members

...

- 2.10 Not bully or harass other Council Members.

Relationship with Council staff

- 2.11 Not bully or harass Council Staff

...

- 2.14 Refrain from directing or influencing Council staff with respect to the way in which these employees perform their duties.

...

2. Between 4 June 2015 and 24 August 2015, the complaint was assessed internally by the council. The council also sought an independent preliminary assessment of the complaint by lawyers.

3. The council notified ██████ of an investigation of the complaint by letter dated 6 October 2015 and for two months ██████ and the council proceeded to communicate in relation to the process associated with investigation of the complaint.
 4. On 9 December 2015 the council engaged the investigator as an external investigator. The investigator's preliminary report was finalised on 5 February 2016. The investigator considered submissions made by interested parties. The investigator's final report was dated 4 March 2016.
 5. The investigator found that ██████ had behaved in a manner that constituted a breach of the Code of Conduct on the following three grounds:
 - Clause 2.3: by not acting in a reasonable, just, respectful way
 - Cause 2.10: by acting to bully or harass other Council members
 - Clause 2.11: by acting to bully or harass Council staff.
 6. The investigator made no recommendations in relation to the findings but referred the matter to the elected members to determine the appropriate course of action pursuant to Clause 2.25 of the Code of Conduct.
 7. Item 9.8 of the Agenda dated ██████ for the council meeting to be held on ██████ concerned a report in relation to the findings of the investigation and made the following recommendations:
 1. That Council notes that as per the Code of Conduct for Council Members, Part 2.24, a breach of the Behavioural Code must be the subject of a report to a public meeting of the Council.
 2. That Council resolves:

To accept the investigator's findings, that as per the Code of Conduct for Council Members and Council's procedure for investigating complaints, the investigation found a breach of the following clauses of the Code of Conduct for Council Members, Part 2, Behavioural Code by ██████:

 - Clause 2.3 by not acting "*in a reasonable, just, respectful way*".
 - Cause 2.10 by acting to "*bully or harass other Council members*".
 - Clause 2.11 by acting to "*bully or harass Council staff*".
 3. That as per the Code of Conduct for Council Members Part 2.25, that Council takes no action against ██████ on this occasion due to the timeframes associated with the processing of this complaint.
- OR
4. That Council resolves:
 - a. Not to accept the investigator's findings and justifies not accepting the findings for the following reason/s:
(to be determined by Council at the Council meeting)
 - b. And that the most appropriate course of action is:
(to be determined by Council at the Council meeting).
 8. Attached to the Agenda item were written submissions made by both the complainant and ██████.
 9. By internal email dated ██████ the elected members were advised that the investigator's report and a chronology of events relating to Item 9.8 were available on the elected member secure website. Hard copies of the investigator's report were provided to each elected member on the night of the council meeting.

10. On the day of the council meeting an email chain dated [REDACTED], between Cr Don Chapman and the Manager Governance, was copied to all elected members. This email chain consisted of answers to questions raised by Cr Chapman in relation to the council's complaint handling process and the investigation associated with the Code of Conduct complaint.
11. The council meeting commenced at 7pm on [REDACTED]. The Minutes of the council meeting (**the Minutes**) record that the complainant left the meeting at 9.01pm and that Item 9.8 was heard at 9.42pm when [REDACTED] declared a material conflict of interest and left the Chamber. Several elected members declared a perceived conflict of interest as persons named in the investigator's report but chose to remain in the meeting having stated they would receive no benefit or detriment, direct or indirect, personal or pecuniary from considering and voting on the matter.
12. The council passed the following resolution:

That council resolves:

 - a. Not to accept the investigator's finding and justifies not accepting the findings because the time delays in assessing the complaint, notifying the complainant and investigating the complaint were too far outside the boundaries of our Code of Conduct Procedure to be fair to both Crs Kilby and [REDACTED].
 - b. That the most appropriate course of action is for the Council to apologise to both Councillors for this unfortunate delay and for the stress and anxiety resulting from this delay.
 - c. That the Code of Conduct review report come to Council for consideration as a matter of urgency by the Council meeting in July 2016.
13. The complaint to my Office alleges that the council's resolution not to accept the investigator's findings of three breaches of the Code of Conduct and to apologise to the parties for the time taken in handling the complaint and for the stress and anxiety related to that delay, was inappropriate. The complainant submits that the resolution was inappropriate on the following bases:⁷
 - the Code of Conduct complaint and subsequent findings relate to 'some extremely serious bullying, intimidating and misogynistic behaviours' and the resolution fails to address a finding of that behaviour under the Code of Conduct
 - public money is spent on Code of Conduct investigations, however, the investigation may result in elected members deciding to take no action, even when a breach has been found
 - a precedent may be created by the council resolving to apologise to an elected member found to have breached the Code of Conduct.
14. Further, the complainant submits:⁸

Considering the nature of the breaches ... [it] is incredibly difficult to understand and puzzling in the extreme and should raise some alarm bells amongst those with an interest in fair and just behaviour of Elected Members. I fully understand that this was a democratic decision of our Council which legislation requires me to stand by, however the ramifications of such a decision are potentially far reaching. I feel that Council is currently in danger of splitting into factions and a culture of Code of Conduct Complaints and Counter complaints being thrown around at great expense to the well-being of all involved and great expense to our community.

⁷ Letter from the complainant to me dated 30 May 2016.

⁸ Letter from the complainant to me dated 30 May 2016.

Relevant law

15. Part 2 of the Code of Conduct provides:

Complaints

...
2.24 A breach of the Behavioural Code must be the subject of a report to a public meeting of the Council.

Findings

2.25 If, following investigation under the Council's complaints handling process, a breach of the Behavioural Code by a Council member is found, the Council may, by resolution:

- 2.25.1 Take no action;
- 2.25.2 Pass a censure motion in respect of the Council member;
- 2.25.3 Request a public apology, whether written or verbal;
- 2.25.4 Request the Council member to attend training on the specific topic found to have been breached;
- 2.25.5 Resolve to remove or suspend the Council member from a position within the Council (not including the member's elected position on Council);
- 2.25.6 Request the member to repay monies to the Council.

16. The council's procedure provided:

...
Council maintains jurisdiction where the complaint deals with conduct that falls into Part 2 of the Code.

3. Investigation

The Mayor is provided with the discretion to select several pathways to initiate an examination or investigation of alleged inappropriate behaviour by council members.

The following methods may be initiated at the Mayor's discretion (in consultation with the CEO):

- 1) The Mayor may request that the CEO or the Manager Risk and Compliance conduct an examination of facts surrounding a particular incident involving council members ...
- ...
4) The Mayor may initiate through the CEO an independent examination of council member behaviour that may be in breach of the Code.

8. Conclusion of the investigation

At the conclusion of the investigation, the investigator will report back to Council on the outcome of the investigation. The report will include the investigator's findings and recommend action, as cited under 2.25 of the Code:

- Take no action
- Pass a censure motion in respect of the Council member
- Request a public apology, whether written or verbal
- Request the council member to attend training on the specific topic found to have been breached
- Resolve to remove or suspend the Council member form a position within the Council (not including the member's elected position on Council)
- Request the member to repay monies to the Council

Where possible the formal investigation and report back to Council should be completed within three months of the commencement of the investigation.

The Council must resolve whether or not to accept the investigator's findings and/or recommendations.

If the Council does not accept the recommendations of the investigator, it must be able to justify why it did not accept the recommendations and resolve an appropriate course of action.

If the Council accepts the investigator's recommendations it must resolve the course of action for their implementation.

Whether the resolution of the elected members to not accept the investigator's findings was unreasonable and based on irrelevant grounds

17. Pursuant to section 2.19 of the Code of Conduct, a complaint may be investigated and resolved in any manner which the council deems appropriate in its process for handling alleged breaches of Part 2.
18. The council's procedure stated that:⁹
 - the council must resolve whether or not to accept the investigator's findings and/or recommendations
 - if the council does not accept the recommendations of the investigator, it must be able to justify why it does not accept the recommendations and resolve an appropriate course of action
 - if the council accepts the investigator's recommendations it must resolve the course of action for their implementation.
19. In addition to the report contained in the Agenda, the full investigator's report was available to the elected members on the elected member secure website four days prior to the council meeting and hard copies were provided to the elected members on the night of the council meeting. Accordingly, the elected members had the opportunity to consider the investigator's report in its entirety.
20. An email chain concerning questions and answers related to the complaint handling process, the investigation process and the procedural delays addressed by the investigator's report, was copied to all elected members on the day of [REDACTED].
21. In accordance with the council's procedure, the council resolved not to accept the investigator's findings. The council justified doing so on the basis that delays in the process were too far outside the boundaries of the council's procedure to be fair to either party. I note that the council's procedure stated that, 'where possible', a formal investigation and report back to the council should be completed within three months of the commencement of the investigation. Accordingly, I accept that the time taken to finalise the investigation process in this matter was well outside of the preferred timeframe of three months.
22. In relation to time considerations, the investigator's report noted:
 - there was an unfortunate delay between June and December 2015 in actioning the external investigation
 - the investigator had before him relatively contemporaneous written statements and independent recollections that he considered confirmed the accuracy of the written statements
 - on the other hand, the evidence also consisted of statements from some council members, including [REDACTED], that were made some eight months after the council meeting and those statements did not support the allegations

⁹ City of Onkaparinga, *Code of Conduct for Council Members 2014*, Appendix 2 - City of Onkaparinga's Procedure for Investigating Complaints, Clause 8.

- the investigator was satisfied that the contemporaneous written statements, coupled with subsequent independent interviews confirming the accuracy of the written statements was persuasive and acceptable evidence to make a finding.
23. As I understand it, the investigator found the issue of time to be a relevant consideration in relation to the acceptability of the evidence before him. The investigator considered that although there had been a delay, in his view, there was sufficient and reliable evidence to make findings. Accordingly, the investigator found that on the evidence before him, ██████'s behaviour amounted to three breaches of Part 2 of the Code of Conduct. The investigator did not consider the issue of time to be an impediment in relation to making those findings, stating that he had before him:
- ... persuasive and acceptable evidence of what transpired at the meeting.¹⁰
24. In my provisional report and in my revised provisional report, I noted that I had sought the views of the Mayor in relation to the rationale behind the resolution and that the Mayor had responded with both her observations of the debate that occurred at the council meeting and her views more generally in relation to the appropriateness of elected members having the power to dismiss the findings of an investigation.
25. In relation to the events at the council meeting, the Mayor submitted:
- The only reason given during debate of this item were a series of Councillors repeating the similar lines:
- “This has taken too long and has caused ██████ stress.”
 “It is impossible for people to recall accurately something that happened so long ago.”
 “Unjust to ██████.”
26. The Mayor informed me that, in her view, the comments at the council meeting focussed on the effect that the investigation had on ██████, yet the resolution does not give that impression. The Mayor noted that there appears to be ‘camps’ of support that have formed between the elected members and, in her view, the decision reflects ‘camp mentality’ rather than good decision making. However, the Mayor also noted:
- As the Council (in majority) voted to support the motion, it indicates the “Council” did believe this approach to be appropriate and reasonable. A motion to accept the report which required the recommendation to be instigated, moved by the Deputy Mayor, was not seconded and therefore lapsed.
- My only regret was that I didn’t call a division so that the actual members were recorded. However my memory is that the vote was close’.
27. In relation to the ability of the elected members to resolve not to accept the findings of an investigation, the Mayor submitted:
- As the Principal member of Council I have consistently questioned how a group of Councillors without knowledge of all the discussions, interviews and extraneous information can suggest they are better placed to make a determination than those tasked with this investigation.
 Indeed, in my view it is arrogant to assume they are better placed to make this determination.
- To say nothing of the \$10,000 cost of the investigation, to then cast it aside, beggars belief.

¹⁰ Byrt, above n 5, p 3.

Many statements were made around the “Code is at fault” rather than the behaviour is at fault. Worrying as this is, it has led to the Part 2 Code of Conduct procedure being re-examined.

Despite many training sessions and staff explanations of the working of the Code and our legal requirements, there are many councillors who ignore the advice and listen to rumour and innuendo from various councillors as a more acceptable explanation.

Ignorance of the law does not excuse this behaviour, and blaming the examination process not the behaviour is also not acceptable.

28. In response to my provisional report, ██████'s solicitors disputed the Mayor's assertion that the vote at the meeting of the ██████ was close and noted that the Minutes record that Cr Themeliotis moved a motion to accept the investigator's findings however, the motion lapsed for want of a seconder, which in their view indicates that only one elected member expressed a willingness to accept the findings of the investigator's report. Further, the resolution that was ultimately passed had not only a seconder but a clear majority as recorded in the Minutes.
29. In response to my provisional report ██████'s solicitors also submitted that it is the elected members that are best placed to debate and then determine whether or not to accept the findings and that resolving not to accept the findings, was not 'out of step with the conclusions of the Byrt Report'.
30. I note that, in response to my revised provisional report, the Mayor submitted that her reference to a 'close' vote was not made to suggest that there was not a majority, however, she did not agree with the assertion that because a motion lapsed for want of a seconder this meant that only one elected member was willing to accept the findings of the investigator's report.
31. Regardless, as expressed in my revised provisional report, I accept that:
 - the Code of Conduct envisages that a council may investigate and resolve a Code of Conduct complaint in any manner the council deems appropriate in its process
 - the council's procedure indicated a preferred timeframe of three months for the finalisation of investigations
 - there was a notable delay in the complaint being investigated and finalised
 - the investigator's report acknowledged delays in the process but also indicated that the delay did not impact on the reliability of the evidence before the investigator
 - in accordance with the council's procedure it was open to the council to resolve not to accept the investigator's findings¹¹
 - the council's procedure did not require the council to provide reasons for not accepting findings,¹² the council's procedure only required that reasons be provided if recommendations were not accepted
 - regardless, the council provided reasons for not accepting the findings and those reasons recorded in the Minutes provide context as to why the decision was made
 - the resolution not to accept the findings was passed in the majority.¹³
32. Assuming that the submissions I have received are correct in relation to alleged cultural issues occurring at the council, I accept that it was prudent for the council to engage an external investigator in order to ensure an entirely independent investigation. I understand that ██████ had input in relation to the selection of the investigator.

¹¹ Letter from ██████'s solicitors to me dated 24 March 2017.

¹² Ibid.

¹³ Ibid.

33. In my provisional report and in my revised provisional report, I noted that I accept there may be rare circumstances where there is evidently good reason to depart from the findings of an investigation. However, I am concerned that in this case, the elected members had before them findings of three breaches of Part 2 of the Code of Conduct, those findings were made by an independent and external investigator on evidence the investigator considered to be acceptable and the elected members resolved not to accept those findings. I also noted that it is of concern to me that the only justification for the decision was time delays in the complaint handling process, particularly when the investigator noted that the issue of time was not an impediment to the reliability of the evidence before him or to his ability to make findings.
34. In determining whether the resolution of the council to not accept the investigator's findings was unreasonable or based on irrelevant grounds, I am mindful of what information was before the elected members when debating the matter and reaching a resolution at the council meeting.
35. The investigator's report noted:
- At the outset of documenting this Report, I note the unfortunate time delays in actioning and processing this formal investigation ... I am not privy to the circumstances except to note that the Council administration obviously followed due process but nonetheless such time delay is unfortunate and arguably unfair on [REDACTED]
- ...
- The unfairness can be seen simply because of the efflux of time which has required [REDACTED] and four Councillors to recall in January 2016 what happened and what was said at the Council meeting on [REDACTED].¹⁴
36. Further, the Agenda report provided to the elected members addressed the investigator's comments in relation to the complaint handling process and noted that 'the time lapsed is a relevant issue in Council determining its response to the findings'. The elected members were also copied into the email chain concerning queries about the delays and the complaint handling process.
37. In light of this, I accept that on the evening of the council meeting, there was a distinct focus on the perceived procedural errors in the complaint handling process rather than the findings of the investigator's report. Given this, and that the council's procedure left it open to the elected members to resolve not to accept the findings, I am unable to conclude that, in resolving not to accept the investigator's findings, the council acted in a manner that was unreasonable for the purposes of the Ombudsman Act.
38. However, I remain mindful of the following matters expressed in both my provisional report and my revised provisional report:
- the purpose of investigation of a Part 2 Code of Conduct complaint is to determine whether the alleged behaviour amounts to a breach of the Code of Conduct. If such a breach is found, then an appropriate course of action is to be determined. Any effect the investigation process has on the parties, including the time taken to reach an outcome, in my view, should hold little weight when resolving how to address behaviour that has legitimately been determined to amount to a breach of the Code of Conduct. This, of course, does not detract from the fact that a complaint under the Code of Conduct should be handled as expeditiously as possible
 - it is worrying that \$10,000 of public money can be spent on an external investigation, only for the elected members to resolve not to accept the findings of that investigation without cogent evidence of good reason to do so.

¹⁴ Byrt, above n 5, pp 2 and 3.

39. I accept that the time taken to handle and investigate the complaint was a relevant consideration for the elected members when deciding whether or not to accept the investigator's findings, as it formed part of the information before them.
40. However, I remain cognisant that following the investigator's comments concerning the procedural delays and the effect those delays had on [REDACTED] recounting events, the investigator concluded that:
- .. the contemporaneous written statements ... coupled with the subsequent independent interviews I conducted ... are persuasive and acceptable evidence of what transpired at the meeting.¹⁵
41. Further, on a consideration of all the evidence, the investigator was satisfied of three breaches of the Code of Conduct.
42. Part 2 of the Code of Conduct is concerned with the 'management of the conduct of Council members that does not meet the reasonable community expectations of the conduct of Council members'.¹⁶
43. I am concerned that, when charged with the responsibility of addressing conduct that has been found not to meet the reasonable community expectations of the conduct of elected members, the elected members failed to take into account the consideration that three breaches of the Code of Conduct were found by the investigator on evidence that was deemed 'persuasive and acceptable'. Rather, the elected members took into account concerns about procedural delays in the council administration's complaint handling process and in doing so, in my view, failed to properly take into account a significant consideration.
44. Pursuant to section 25(1)(d) of the Ombudsman Act, I may determine that an exercise of a power or discretion was done on irrelevant grounds. In my view, this includes failing to adequately take into account a relevant consideration.
45. For the reasons I have set out above, I consider the resolution of the elected members to not accept the investigator's findings was based on irrelevant grounds within the meaning of section 25(1)(d) of the Ombudsman Act.
46. The council has since amended its procedure, which no longer provides that the elected members can resolve whether or not to accept the findings of an investigation. Instead, it is for the elected members to resolve what action to take, including whether or not to accept any recommendations made by the investigator. In addition, the council is developing an Elected Member Leadership Program to support the development of an elected member team culture.¹⁷

Opinion

In light of the above, I consider that in resolving not to accept the investigator's findings, the council exercised its discretion based on irrelevant grounds within the meaning of section 25(1)(d) of the Ombudsman Act.

Given that the council has amended its Code of Conduct procedure and that the Mayor has issued an apology to both the complainant and [REDACTED] in accordance with the resolution, I consider little would be achieved by recommending that the elected members reconsider the matter.

¹⁵ Byrt, above n 5, p 3.

¹⁶ City of Onkaparinga *Code of Conduct for Council Members* (2014), p 2.

¹⁷ Letter from Chief Executive to me dated 24 August 2016.

However, I have asked that the Mayor writes to me by **11 July 2017** outlining the progress of the Elected Member Leadership Program and an explanation of any other such programs that may be in place to address alleged cultural issues in the council.

Whether the resolution of the elected members to take no action other than to apologise was unreasonable and based on irrelevant grounds

47. The council's procedure stated that:

At the conclusion of the investigation, the investigator will report back to Council on the outcome of the investigation. The report will include the investigator's findings and recommended action, as cited under 2.25 of the Code ...

48. In this case, the investigator's report made findings but did not make recommendations and stated:

I refer the matter to the Council to determine the appropriate action as prescribed by Clause 2.25 of the Code of Conduct ...

49. 2.25 of the Code of Conduct provides:

2.25 If, following investigation under the Council's complaints handling process, a breach of the Behavioural Code by a Council member is found, the Council may, by resolution:

2.25.1 Take no action;

2.25.2 Pass a censure motion in respect of the Council member;

2.25.3 Request a public apology, whether written or verbal;

2.25.4 Request the Council member to attend training on the specific topic found to have been breached;

2.25.5 Resolve to remove or suspend the Council member from a position within the Council (not including the member's elected position on Council);

2.25.6 Request the member to repay monies to the Council.

50. The Minutes record that the council resolved:

That the most appropriate course of action is for the Council to apologise to both Councillors for this unfortunate delay and for the stress and anxiety resulting from this delay.

51. I remain concerned that the focus of the elected members who were tasked with determining action that would appropriately address conduct found to have amounted to a breach of the Code of Conduct was the effect that the investigation process had on the interested parties. However, I accept that the investigator referred the matter to the council and that section 2.25.1 of the Code of Conduct empowered the council to resolve to take no action. Further, as I have already noted, I accept that certain information that was before the elected members noted the effect that delays in the complaint handling process may have had on the parties. Accordingly, I cannot find that by resolving to take no action other than to apologise to both councillors, the council acted in a manner that was unreasonable within the meaning of the Ombudsman Act.

52. However, I remain of the view that the elected members failed to properly take into account that the investigator had found three breaches of the Code of Conduct and had done so on evidence the investigator considered to be acceptable and reliable. Instead the council placed undue importance on any consequence the complaint handling

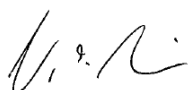
process had on the parties. On this basis, I remain concerned that the elected members, who were tasked with determining the most appropriate way to address conduct that had been found not to have met the reasonable community expectations of the conduct of elected members, failed to consider the conduct in question or how to address that conduct, and instead resolved that an apology to both parties for procedural delays was appropriate.

53. Accordingly, I consider that the resolution of the elected members to take no action other than to apologise to the parties was based on irrelevant grounds within the meaning of section 25(1)(d) of the Ombudsman Act.

Opinion

In light of the above, I consider that, in resolving to take no action other than to apologise to both councillors, the council exercised its discretion based on irrelevant grounds within the meaning of section 25(1)(d) of the Ombudsman Act.

For the reasons I have already mentioned in relation to the first issue, I do not consider it necessary to make recommendations.



Wayne Lines
SA OMBUDSMAN

27 June 2017