

**Final Report**  
**Full investigation - *Ombudsman Act 1972***

<b>Complainant</b>	<b>Mr John Ayliffe</b>
<b>Council</b>	<b>Kangaroo Island Council</b>
<b>Ombudsman reference</b>	<b>2017/06921</b>
<b>Agency reference</b>	<b>E2017/6954</b>
<b>Date complaint received</b>	<b>6 July 2017</b>
<b>Issue</b>	<b>Whether the council undertook its review of Mr Ayliffe's complaint in accordance with its Code of Conduct for Elected Council Members Procedure.</b>

### **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 council
- considering:
  - the *Local Government Act 1999*
  - the *Code of Conduct for Council Members*
  - the council's *Code of Conduct for Elected Council Members – Procedure*
- preparing a provisional report, and seeking response from the interested parties
- 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.<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>

<sup>1</sup> This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR449 at 449-450 per Mason CJ, Brennan, Deane and Gaudron JJ.

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

## Response to my provisional report

The complainant, Mr John Ayliffe, wrote to me on 7 January 2018 in response to my letter of 15 December 2017 inviting comment on my provisional report. In summary, Mr Ayliffe endorsed the content, findings and foreshadowed recommendations of my report.

He made one 'small point', requesting that I consider making a further recommendation to request an apology to be issued by the Deputy Mayor as well as by the council for the incorrect handling of his Code of Conduct complaint.

I have maintained my recommendation that the council only apologise as the council bears the responsibility for the administration of the complaint handling procedure. As such, the council is the respondent to this complaint rather than the Deputy Mayor.

The council did not provide a response to my provisional report by the notified due date of 12 January 2018. However, after checking with council to ensure that no response was to be forwarded, I received a request for an extension of time to prepare a response. I received that response on 22 January 2018. In summary, the council has submitted:

- that item 24 of my provisional report has not included a reference to dot point 4 in clause 4.1.5 of the council's Code of Conduct for Council Members Procedure
- that the advice sought from Mr Harris QC does form part of the Code of Conduct Process because the Procedure also states that in making a determination pursuant to clause 4.1.5 'the mayor may seek advice and guidance from any source in relation to the best course of action to pursue'
- that the referral of the matter to the Local Government Association Mutual Liability Scheme (LGAMLS) was separate to the Code of Conduct Process
- that Clause 4.1.5 of the Code of Conduct Procedure does not require the council to employ a formal mediation process as this is only one of the options available at the preliminary assessment stage
- that the Deputy Mayor made a determination that the complaint was considered frivolous and/or vexatious and therefore a referral to a formal mediation process was not required<sup>3</sup>
- that at no stage was Mr Ayliffe denied the opportunity to have his allegations assessed as part of the Code of Conduct procedure and in any event a determination in regards to this had already been made
- that the assessment of the complaint by the Deputy Mayor does not appear to systematically address any of the six Code of Conduct breaches alleged against Mayor Clements 'nor do we believe that it is required to do so'
- that as the complaint had been determined to be frivolous and/or vexatious there was no case to answer and therefore no need to provide a detailed assessment on any of the six alleged breaches
- that although the Procedure does require the Deputy Mayor to refer the matter to the Local Government Governance Panel if the matter cannot be resolved, council considers that the matter was resolved when the complaint was deemed frivolous and/or vexatious - therefore no referral was necessary
- that despite considering the matter resolved, the council offered an informal meeting in a genuine attempt to satisfy Mr Ayliffe's grievance
- that the Deputy Mayor was permitted to seek advice and guidance from any source in relation to the best course of action to pursue
- that because there had already been a determination by the Deputy Mayor that there was no breach of the Code of Conduct, advice regarding civil liability protection was not part of the Code of Conduct investigation
- that the deputy Mayor did not hand the entire Code of Conduct matter to the LGAMLS

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<sup>3</sup> The timing and implications of this determination by the council are discussed in detail at 30.

- for resolution as a determination had already been made. The matter referred to the LGAMLS was one of civil liability
- that the wording of the Special Council Meeting resolution carried on 29 July 2017 stating that Mayor Clements had no case to answer 'based on advice' [my emphasis] sought from Mr Harris QC contradicted the earlier statement that the Deputy Mayor relied on 'his assessment alone' and, perhaps, should have read was 'confirmed by advice' [my emphasis] from Mr Harris QC
  - that council believes it has taken all decisions in this matter in accord with the council's Code of Conduct for Elected Council Members - Procedure
  - that with the benefit of hindsight the council considers that the invitation to attend an informal meeting with Mayor Clements was an offer made in error - and for that the council apologises
  - that the council does not apologise for an incorrect handling of the Code of Conduct complaint
  - that the council stands by the determination made by the Deputy Mayor that the complaint was frivolous and/or vexatious and there was no breach of the Code and the Mayor had no case to answer.

I have considered the substantive submissions of the council and responded to them where necessary in the body of this report. However, none of the submissions has persuaded me to change my findings. I have made only minor changes to my provisional recommendations.

## Background

1. The complainant, Mr John Ayliffe, is a small business person who has run a pelican feeding show at Kingscote for residents and tourists for approximately 20 years. He is known locally as 'The Pelican Man'.
2. Mr Ayliffe has referred to an article which ran on the ABC news website on or about 28 May 2017. The article stated:

A major tour operator has dropped Mr Ayliffe's pelican show from its itinerary. At the end of April, Mr Ayliffe stepped off the feeding platform and has not been back since - a move he never wanted to make.

"You don't work at something for that long to just walk away for the fun of it", he said. It was not the birds which beat him, he said, but the tourists who were watching and not paying the \$5 fee which covers the cost of the fish.

"When you have a lot of people you'll see some of them jumping through the rails and out the back. You might lose 15 per cent", he said. Those losses were compounded by a major tour operator dropping him from one of their itineraries.

Kangaroo Island Mayor Peter Clements said while Mr Ayliffe's act had become a major part of the island, the pelican man had put some people offside by being rude to customers who did not pay at the end of the show.

He's got quite hostile. [Tour operator] Sealink pulled out of sending people there because some people were being abused", Mr Clements said.

But Mr Clements said he was willing to help Mr Ayliffe develop the site if the Government approved it. "He's good for the island. He's good for Kingscote and I hope we can make it work for him," he said.

3. The complaint alleged that the comments made by the Mayor of Kangaroo Island Council (**the council**) Mr Peter Clements constituted breaches of clauses 2.2-2.5, 2.6 and 2.8 of Part 2 of the Code of Conduct for Council Members (**the Code of Conduct**).

4. The complaint alleged, *inter alia*, that there is no basis in truth to the Mayor's comments and that because they had been circulated on ABC media outlets and on social media they have damaged Mr Ayliffe's reputation and caused distress to him and his family.
5. On 31 May 2017, Mr Ayliffe sent an email to the council's Deputy Mayor Graeme Ricketts setting out a formal complaint against Mayor Clements for the Part 2 Code of Conduct breaches.
6. On 1 June 2017 Mr Ricketts acknowledged receipt of the Code of Conduct complaint to Mr Ayliffe and advised him that he would be attending to the matter as required by the council's Code of Conduct for Elected Members - Procedure (**the Procedure**).
7. In response to further evidence of the content of the ABC media article provided by Mr Ayliffe, Mr Ricketts contacted him again on 1 June 2017 to confirm that he was in the preliminary stages of his investigation and advising Mr Ayliffe that he may seek further clarification of the allegations prior to making an initial determination.
8. On 6 June 2017 Mr Ricketts rang Mr Ayliffe to confirm that he had conducted an assessment of the complaint and then proposed mediation between Mr Ayliffe and Mayor Clements to resolve the matter. Mr Ayliffe indicated that he was reluctant to attend a mediation session. He suggested that he had suffered damage to his reputation and asked what Mayor Clements was prepared to do to resolve the damage to himself and his family.
9. At this point Mr Ricketts concluded that Mr Ayliffe was intimating that he was likely to make a claim for damages once he had confirmation of the outcome of the Code of Conduct inquiry. As a consequence, he sought external legal advice in relation to the matter and, on 8 June 2017, also referred the matter to the LGAMLS for their consideration.
10. Given the seriousness of the allegations the council considered it had an obligation pursuant to LGAMLS Rules to notify them of the potential threat of a defamation claim.
11. On 20 June 2017, the LGAMLS wrote to Mr Ayliffe confirming that the matter was now being managed by the LGAMLS, on behalf of council and Mayor Clements, and that it would be inappropriate for Mr Ricketts in the circumstances, to attempt to resolve the issue between the parties.
12. On 22 June 2017, Mr Ayliffe sent an email addressed to Mr Ricketts stating his:

disappointment that the Code of Conduct process had not been able to consider his claims...to bring about a resolution...

My Code of Conduct claim clearly requested the council to consider my claims and to have the elected members of council arbitrate on the matter to bring about a resolution to the disagreement between the mayor and myself. This disagreement is a result of publicly made untruths made by the mayor acting in his capacity of mayor; on the ABC radio and repeated on various commercial media and the internet.
13. Mr Ayliffe asked Mr Ricketts to:

...in good faith, to follow the procedures spelt out in the Kangaroo Island Council's procedure guide to resolving Code of Conduct complaints.
14. Also on 22 June 2017, the LGAMLS wrote to Mr Ayliffe noting that:

The Council has now considered these comments [allegedly made by Mayor Clements] using their internal Code of Conduct process to determine, if in the course of Mayor

Clements undertaking his role, duties, functions as the Mayor, was in breach of any protocols.

The Council has determined that in this case Mayor Clements was not in breach of any protocols.

15. A report covering the above facts was tabled before the council during a confidential session of the 29 June 2017 Special Council Meeting.
16. The council's minutes concerning this meeting record the following:

### 3.3 Code of Conduct 2017/02

Moved Cr S Kauppila

Seconded Cr L Turner

1.14pm That Council approves under the provisions of Section 90 (2) of the Local Government Act 1999 an order be made that the public be excluded from attendance at the meeting, excluding CEO, in order to consider, in confidence, a matter on the grounds of Section 90 (3) -

- a) Information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead);

This matter relates to a code of conduct (*sic*) and as such represents private interest that should not be divulged in the public realm.

CARRIED.

Minute: SC16:2017

Moved Cr S Kauppila

Seconded Cr L Turner

1. That the Code of Conduct complaint from Mr John Ayliffe against Mayor Peter Clements for breaches of multiple provisions of the Code is assessed as having no case to answer based on advice sought from Mr Harris QC.
2. Endorse the provisions of Section 39 of the *Local Government Act 1999* apply to the Mayor, Mr Peter Clements, in the case of all statements made by him pertaining to Mr John Ayliffe and his conduct in business.
3. Note that, based on the implied threat of litigation against the Mayor, the matter has been referred to the LGAMLS for their action if required.

CARRIED.

Minute: SC17: 2017

Moved Cr S Kauppila

Seconded Cr L Turner

1:27pm That Council approves:

- a. That all documentation and reports relating to the above matter be kept confidential, pursuant to Section 91(7)(b) of the said Act.
- b. Further, that pursuant to Section 91(9)(a) of the said Act, that part 'a' of this resolution shall cease from 30 June 2018.

The reports relating to a code of conduct (*sic*) and as such represents private interest that should not be divulged in the public realm.

CARRIED.

Minute: SC18: 2017

17. As part of the initial assessment of Mr Ayliffe's complaint, my Office wrote to the council's Chief Executive Officer, Mr Andrew Boardman to ask if an Internal Review of Council Decision (under section 270 of the Local Government Act) had been considered at any stage of the handling of the complaint. My Office also requested details of the reasons for the decision made by Deputy Mayor Ricketts that 'there was no case to answer' with regard to the Code of Conduct complaint.

18. Mr Boardman responded that the matter had not been considered for a section 270 Internal Review of Decision: 'given Mr Ayliffe has already complained to the Ombudsman I do not see any benefit in this process being followed...'. In response to the request for the reason given for the decision not to pursue the matter, Mr Boardman enclosed an email from Mr Ricketts to Mr Ayliffe dated 5 July 2017. It read as follows:

Dear Mr Ayliffe,

Thank you for your email dated 4 July 2017.

You are correct in that it was my assessment alone that determined that there was no case to answer with regards your Code of Conduct Complaint against Mayor Clements.

It is clear in Councils Code of Conduct - Policy and Procedures that as the Deputy Mayor I have the ability to seek advice / opinion while undertaking my assessment. The advice I received assisted in my determination of no case to answer.

In this circumstance Council does not debate on a Code of Conduct but simply notes the result of the assessment.

If my assessment determined that an independent investigation was required (which it wasn't), Council would only debate on a CoC if recommended as a result of a investigative report... this was not the case.

As noted in the letter dated 30 June 2017 this decision cannot be appealed however you have the right to refer the matter to the Ombudsman should you feel the procedure has not been followed correctly.

Sincerely,

Graeme Ricketts  
Deputy Mayor  
KI Council

19. After deciding to commence an investigation of the matter, I wrote to the council to seek an explanation of what consideration was given by the council to assessing Mr Ayliffe's complaint against the cited Code of Conduct provisions. I also sought an explanation of the decision by Mr Ricketts to conclude an investigation of the complaint under the council's Procedure.

20. By letter dated 2 November 2017, Mr Ricketts advised my investigation:

In response to the complaint and request, I conducted an internal Code of Conduct investigation in accord with the Council's complaint procedures. [...]

As a result of my investigation, I was unable to identify any breach of the provisions of the Code of Conduct... ..It was my decision that Clements was acting at all times in accord with the Code of Conduct and was not in breach of any of the Code's provisions. [...]

At that point, I sought legal advice in relation to personal immunity protection for Mayor Clements on the premise that Ayliffe had intimated a damages claim on the basis of defamation, allegedly impacting on his wife, his business and himself. [...]

Mr Harris QC dictated a letter to me over the phone for sending to Ayliffe which reflected his advice that in the light of the complaint of reputational damage and loss being complained of by Mr Ayliffe this was a matter appropriate for notification to the LGA Mutual Liability Scheme. Mr Harris QC also confirmed his advice to me on the telephone that, on the facts as he had been given them, any statements made by Clements were protected by the statutory immunity attaching to public statements made by the Mayor in the exercise or purported exercise of his powers, duties and functions and for that same reason this disposed of any suggestion of a Code of Conduct breach as well.

21. In response to my request to provide documentation received from and sent to the LGAMLS in relation to the Code of Conduct complaint against Mayor Clements, Mr Ricketts responded in the same letter as follows:

The LGAMLS is a local government indemnity scheme established pursuant to Schedule 1, Part 1(2) of the Local Government Act 1999. It is owned by the Local Government Association of South Australia and governed by a set of Rules, overseen by a Board with delegated authority from the LGA. It is an exempt agency for the purpose of the Ombudsman's jurisdiction. Council is therefore not in a position to provide all correspondence however, the LGAMLS is willing to meet and discuss its file with you in order to support Council's position.

### Relevant law

22. The relevant clauses of the Code of Conduct are:

#### Part 2 - General behaviour

- 2.2 Act in a way that generates community trust and confidence in the Council.
- 2.3 Act in a reasonable, just, respectful and non-discriminatory way when dealing with people.
- 2.4 Show respect for others if making comments publicly.
- 2.5 Ensure that personal comments to the media or other public comments, on Council decisions and other matters, clearly indicate that it is a private view, and not that of the Council.
- 2.6 Comply with all Council policies, codes and resolutions.
- 2.8 Endeavour to provide accurate information to the Council and to the public at all times.

23. The relevant sections of the Local Government Act are:

#### 39-Protection of members

- (1) No civil liability attaches to a member of a council for an honest act or omission in the exercise, performance or discharge, or purported exercise, performance or discharge, of the member's or council's powers, functions or duties under this or other Acts.
- (2) A liability that would, but for this section, attach to a member of a council attaches instead to the council.

#### 63-Code of conduct for members

- (2) Council members must observe the code of conduct.

### Whether the council undertook its review of Mr Ayliffe's complaint in accordance with its Code of Conduct for Elected Council Members Procedure.

24. The council's Code of Conduct Procedure, current at the time the complaint from Mr Ayliffe was received, states at clause 4.1.5:<sup>4</sup>

<sup>4</sup> Clause 4.1.1 of the council's Procedure notes that the 'complainant should report the allegation to the Council, addressed to the Mayor (or in the case of the Presiding Member being the subject of the complaint, the Deputy Mayor)...'

## Preliminary Assessment of Complaint

Upon receiving a complaint the Mayor will make a preliminary assessment of the complaint to determine whether the complaint:

- Is frivolous and/or vexatious, in which case, no further action will be taken in relation to the complaint; or
- Has the potential to be adequately resolved informally between the Member who is the subject of the complaint and the complainant (for example, such as where constructive discussion is facilitated between the parties); or
- Should be referred for a formal mediation process, such as the Local Government Governance Panel, etc; or
- Warrants referral to an independent assessor, such as the Office of Public Integrity, SAPOL, etc., for a formal investigation and report to the Council (which may occur immediately or in circumstances where any mediation of informal discussion did not adequately resolve the matter).

25. The council's Procedure states at clause 5.1.2 that:

The Principal Member must ensure that the principles of natural justice and procedural fairness are observed.

26. The council's Procedure states at clause 5.1.4 that:

Where the matter cannot be resolved, the Principal Member will refer the original complaint to the Local Government Governance Panel. Neither the Principal Member nor the CEO will investigate a complaint.

27. The Procedure also states that in making a determination pursuant to clause 4.1.5:

- the Mayor may seek advice and guidance from any source in relation to the best course of action to pursue;

28. In this instance the Deputy Mayor was handling the complaint and in the process sought external professional advice from Mr Andrew Harris QC. However, as noted above, he did so only after [my emphasis] making the decision that there was no Code of Conduct breach.

29. The issue of Deputy Mayor Ricketts' decision to seek external legal advice and the subsequent referral of the matter to the LGAMLS to manage is related to but separate to my examination of the question of procedural propriety in the council's handling of the complaint.

30. For the following reasons, I consider that the Deputy Mayor's handling of Mr Ayliffe's complaint against the Code of Conduct was not undertaken in accordance with the council's Procedure:

- (a) Clause 4.1.5 of the Procedure requires the complaint to be assessed and dealt with in one of four ways: no further action if the complaint is frivolous and/or vexatious; resolve informally; referral for formal mediation; referral to an independent assessor. In this case, the council has recently submitted to me that the Deputy Mayor considered the complaint to be frivolous and/or vexatious from the outset of his assessment.<sup>5</sup> There is no evidence that the Deputy Mayor made this determination and conveyed this decision to Mr Ayliffe. Indeed, the council has conceded that they 'perhaps should have'. Instead, the Deputy Mayor spoke to Mr Ayliffe and later confirmed to him in an email dated 9 June 2017 that he had

<sup>5</sup> The submission has been made for the first time in the council's response to my provisional report. The claim that the complaint was considered 'frivolous and/or vexatious' was made only in response to my provisional report, not at any of the earlier stages of my enquiry.

conducted an investigation and proposed informal mediation with the Mayor. I consider this action to be clear evidence that Mr Ayliffe's complaint had not been deemed to be frivolous and/or vexatious and that a version of the 'second option' in the process had been assessed as appropriate for resolving the matter. Moreover, no opportunity was given to Mr Ayliffe to respond to the alleged determination that the matter was considered frivolous and/or vexatious. If that was the determination at the time, no heed was paid to observing the principles of natural justice and procedural fairness as required at 5.1.2 of the Procedure. In any event, I do not consider that Mr Ayliffe's complaint can be reasonably described as being either frivolous or vexatious.<sup>6</sup> I note that the report to the council dated 29 June 2017 states that Mr Ayliffe objected to Mayor Clements' alleged comments on ABC radio on or about 28 May 2017 when he said about Mr Ayliffe:

*He's got quite hostile. (Tour Operator) Sealink pulled out of sending people there because some people were being abused.*

This statement was made in a very public domain and circulated widely in the media. It does not appear that the Mayor has denied making these comments. Plainly, the comments have the potential to be hurtful and damaging and were the basis for the Code of Conduct complaint Mr Ayliffe brought against Mayor Clements. There is nothing to suggest that the complaint was other than a genuine grievance. On these facts, I cannot see how the complaint could be assessed as frivolous or vexatious.

- (b) The assessment of the complaint by Mr Ricketts did not systematically address any of the six Code of Conduct breaches alleged against Mayor Clements. Mr Ayliffe identified the individual breaches and made comment on each in his complaint. Mr Ricketts provided no detailed assessment on any of the alleged breaches. The council submission is that the Procedure did not require this, but in my view the commitment of clause 5.1.2 to apply the principles of natural justice did require this.
- (c) This recent council submission contradicts the Deputy Mayor's statement in his 30 June 2017 letter that: 'I have assessed your complaint against Mayor Peter Clements for breaches of multiple provisions of the Code as having no case to answer'. This indicates such an assessment was done and that the complaint had been taken seriously. However, the council now maintains that because the Deputy Mayor had determined that the complaint was frivolous and/or vexatious, and that there was no case for the Mayor to answer, there was 'no need to provide a detailed assessment on any of the six alleged breaches'. This strikes me as a reconstruction of events.
- (d) As Mr Ayliffe declined the offer of an informal resolution process, clause 5.1.4 required the Deputy Mayor to refer the matter to the Local Government Governance Panel or to 'an independent assessor' because it had not been resolved. The clause further prohibited the Deputy Mayor from investigating the complaint himself. The matter was not referred to the Panel and it was investigated by the Deputy Mayor. In my view, these actions are in clear breach of the Procedure.<sup>7</sup>

<sup>6</sup> In *SB, MF v Minister for Education and Child Development* [2017] SASC 161 the SASC has referred to previous authorities and interpreted 'frivolous' and 'vexatious' quite simply:

- a frivolous proceeding is one which does not warrant serious attention.
- a vexatious proceeding is one which is pursued in order to harass a party.

<sup>7</sup> Whilst the council's Code of Conduct Procedure at 5.1.4 refers to the 'Principal Member' not being eligible to investigate the complaint, in this instance the Deputy Mayor was acting in his position for the purposes of the investigation as per clause 4.1.1.

31. The council's decision to absolve Mayor Clements of any breach of the council's Code of Conduct was apparently confirmed on the strength of advice of Mr Andrew Harris QC. The report made to the council Special Meeting held on 29 June 2017 states that Mr Harris advised that Mayor Clements had 'no case to answer' on the Code of Conduct breaches alleged. The report rejected the allegation with the assertion that:

at no point had Mayor Clements:

- Intentionally or maliciously shown disrespected (*sic*) towards Mr Ayliffe
- acted in a manner during the interview that generated breach of community trust and confidence in the council or
- made personal comment during the interview that it was a private view and not that of the council.

The report then notes the further advice of Mr Harris 'that any remedy for the allegations made by Mr Ayliffe could not be found via the council's Code of Conduct process'.

32. Whilst I consider that Deputy Mayor Ricketts had good cause to seek external legal advice regarding what he considered a likely threat of defamation action, a problem arose with the advice also dealing with the Code of Conduct allegations outside the processes laid down in the council's Procedure.
33. I observe that insofar as the report dismissed the complaint because the Mayor did not intentionally or maliciously show disrespect, the report is misguided because a breach of the Code can occur unintentionally. I further observe that reliance on section 39 of the Local Government Act for dismissing the complaint is also misguided. Section 39 only provides council members with protection from civil liability for an honest act or omission in the exercise of their duties. It is not a defence to a complaint about a breach of the Code.
34. In addition, the Deputy Mayor's decision to refer the matter to the LGAMLS for resolution created a new layer of authority for the complainant to deal with. This is so because the LGAMLS appeared to take on the role of communicating with the complainant on the Code of Conduct issue as well as the separate civil liability issue within its authority.
35. I note also that while the Deputy Mayor wrote to Mr Ayliffe on 5 July 2017 to assert that 'it was my assessment alone that there was no case to answer with regards your Code of Conduct Complaint against Mayor Clements' - Mr Ricketts later relied on the advice given to him by Andrew Harris QC to explain his decision and advance reasons for rejecting the allegations. This is also confirmed in the earlier letter to Mr Ayliffe dated 30 June 2017, where the Deputy Mayor states that he 'determined to seek professional advice from Mr Andrew Harris QC and based on his advice I have assessed your complaint...'.
36. Mr Ricketts' statement stands in contrast to the first point in the resolution of the council made at the Special Meeting on 29 June 2017. The resolution dismisses the complaint from Mr Ayliffe citing: 'no case to answer based on advice sought from Mr Harris QC'. The council now argues that the Special Meeting resolution should have read 'confirmed by advice'. I consider the wording of the meeting resolution and the same phrase used in the letter of 30 June 2017 to be the intended meaning.
37. In my view, the assessment of the complaint should have been undertaken as a separate exercise and kept distinct from addressing concerns about a potential defamation action.

38. In summary, my view is that:
- the council's Procedure was not followed in that upon Mr Ayliffe declining the offer of informal resolution, the complaint should have been referred for independent investigation as required by the Procedure
  - if, as asserted by the council, the complaint was dismissed for being frivolous and/or vexatious (which I don't accept it was), Mr Ayliffe should have been given reasons for that assessment and an opportunity to respond before the final decision to dismiss was made (as required by principles of procedural fairness which the council Procedure adopts)
  - Mr Ayliffe had clearly and appropriately outlined his complaint with reference to six provisions of the Code and he was entitled to receive a more detailed explanation for it being dismissed than that there was no case to answer.

### Opinion

In light of the above, my final view is that, by not undertaking its review of Mr Ayliffe's complaint in accordance with its Code of Conduct for Elected Members Procedure, the council acted in a manner that was unreasonable and wrong within the meaning section 25(1)(b) and (g) of the Ombudsman Act.

### Recommendations

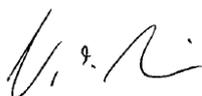
I recommend under section 25(2) of the Ombudsman Act that, within two months from the date of my final report, the council:

1. Issue a public written apology to Mr Ayliffe for the incorrect handling of his Code of Conduct complaint.
2. The council reconsider the assessment of the complaint and either provide Mr Ayliffe with proper reasons for it being dismissed or refer it for independent investigation.

In accordance with section 25(4) of the Ombudsman Act, I request that the council report to me by **30 March 2018** 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.



Wayne Lines  
SA OMBUDSMAN

9 March 2018