

Report

Full investigation - *Ombudsman Act 1972*

Complainant	Anonymous
Council member	Councillor Kim Miller
Council	District Council of Peterborough
Ombudsman reference	2020/03096
Date complaint received	17 July 2020
Issues	Whether Cr Miller breached clause 3.18 of the Code of Conduct for Council Members by failing to comply with a council resolution requiring him to make an apology

Jurisdiction

The complaint alleges a breach of Part 3 of the Code of Conduct for Council Members made pursuant to section 63 of the *Local Government Act 1999* (**the Code of Conduct**).¹ An act of a council member that may constitute grounds for complaint under the Local Government Act is taken to be an 'administrative act' for the purposes of the Ombudsman Act.²

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 Cr Miller
- seeking a response from the council
- considering
 - the Ombudsman Act
 - the Local Government Act
 - the Code of Conduct
- providing the parties with my provisional report for comment, and considering their 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

¹ The Code of Conduct was gazetted on 29 August 2013.

² Section 263A(4) Local Government Act; section 3, Ombudsman Act.

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.³ 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 ...⁴

Procedural fairness

My provisional report was provided to Cr Miller, the complainant, Mayor Ruth Whittle and the Acting Chief Executive Officer of the District Council of Peterborough (**the council**), Mr Colin Davies, on 29 October 2020.

I have considered Cr Miller's response and have addressed his submissions where necessary in the body of this report. Ultimately, Cr Miller's response did not persuade me to alter my conclusions or recommendations.

Mayor Whittle also provided submissions in response to my provisional report and, in order to inform my recommendations, advised that the cost of the Panel investigation was \$6,957.19. Whilst Mayor Whittle did not disagree with my provisional opinion and recommendations, she noted her concern with the potential cost implications on the council in order to lodge a complaint with the South Australian Civil and Administrative Tribunal.⁵

I have regard to these concerns but am not persuaded to alter my conclusions or recommendations. In circumstances where Cr Miller has not shown any willingness to apologise, I consider that my recommendations are appropriate and necessary.

Background

1. In November 2018, two complaints alleging breaches of Part 2 of the Code of Conduct were made against Cr Miller. I do not consider it necessary to go into detail about the complaints or their background. Cr Miller provided submissions prior to and in response to my provisional report as to the background of the complaints and I have had regard to those submissions.
2. The Local Government Association of South Australia's Governance Panel (**the Panel**) prepared an independent report (**the Panel report**) about the complaints against Cr Miller. The Panel also considered complaints made by Cr Miller and his wife, Ms Vera Miller, about Cr Graham Mercer. The Panel found that Cr Miller's conduct in the course of council meetings in 2018 had been in breach of clauses 2.9 and 2.10 of the Code of Conduct. The Panel then made the following recommendations:
 - A. That Council discuss and endorse a motion that:
 - a. notes with concern the findings of the report; and
 - b. Requires Crs Miller and Mercer to behave in Council meetings, in any social media and in dealings with community members, in a manner consistent with the Code [of Conduct] and Social Media Policy to avoid further expense associated with other likely complaints and embarrassment to the Council;

³ 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.

⁴ *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

⁵ Letter from Mayor Whittle to my Office, 3 November 2020.

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- c. Requires Crs Miller and Mercer to apologise to one another in relation to the Code breaches this report identifies as being substantiated; and
 - d. Requires Crs Miller and Mercer to each apologise to their fellow elected members for the conduct in breach of the Code as identified in this report.
- B. Council should consider nominating a senior Councillor, acceptable to both Crs Miller and Mercer, to work towards resolving any differences associated with planned Yongala community projects.
 - C. Council should reaffirm its position that future grant funding for the Yongala community will not differentiate between the [Yongala and District Hall] Committee and the [Yongala Progress] Association.
 - D. The Council immediately revise its Social Media Policy to include specific examples of unacceptable behavior and postings. This should include guidelines covering the barring of access to posts. All elected members should undergo training in both the new policy and productive social media use generally.
3. The recommendations of the Panel report were adopted by the council at a council meeting on 15 July 2019.
4. Cr Miller has refused to follow recommendations A(c) and A(d). In response to my investigation⁶ and provisional report,⁷ Cr Miller confirmed that he has not and will not make an apology as recommended. I understand that Cr Miller rejects the Panel's conclusions in regard to his conduct. His reasoning for refusing to apologise includes that:
- the Code of Conduct complaints process has been misused against him⁸
 - he is unhappy with how the Panel investigation was conducted⁹
 - he had requested that the council be provided with all information relating to the Panel's investigation, but only the Panel report had been provided
 - he had voted against the Panel recommendations being accepted by the council
 - he disputes the accuracy of Cr Mercer's complaint against him
 - Cr Mercer's behavior towards him and his family has continued after the Panel report was accepted by the council and:
- I don't know of any individual who would submit and apologise to a person who is so obsessed with the constant intent to hurt, defamation, intention to publicly humiliate myself and my family.
- ...
- To apologise to an individual who over time has been very personal with his assault particularly to my wife's honesty, integrity, community volunteering etc doesn't meet my expectations nor align with my values, both personally and as an elected member.¹⁰
- Cr Mercer's apologies have been shallow and baseless.¹¹

Legislation

5. The Local Government Act provides:

⁶ Emails from Cr Miller to my Officer, 13 September 2020 and 16 September 2020.

⁷ Phone call between Cr Miller and my Officer, 9 November 2020; email from Cr Miller to my Office, 13 November 2020.

⁸ Phone call between Cr Miller and my Officer, 9 November 2020; email from Cr Miller to my Office, 13 November 2020.

⁹ Ibid.

¹⁰ Email from Cr Miller to my Office, 13 November 2020.

¹¹ Phone call between Cr Miller and my Officer, 19 October 2020.

63—Code of conduct for members

- (1) The Governor may, by regulation, prescribe a code of conduct to be observed by the members of all councils.
- (2) Council members must observe the code of conduct.

263—Grounds of complaint

- (1) There are grounds for complaint under this Part against a member of a council if the member has contravened or failed to comply with Chapter 5 Part 4.

263A—Investigations of grounds of complaint by Ombudsman

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- (2) Any person may make a complaint to the Ombudsman setting out matters alleged to constitute grounds for complaint under this Act against a member of the council.

263B—Outcome of Ombudsman investigation

- (1) The recommendations that may be made by the Ombudsman under the *Ombudsman Act 1972* on the completion of an investigation of the complaint include that the council—
 - (a) reprimand the member (including by means of a public statement); or
 - (b) require the member to attend a specified course of training or instruction, to issue an apology in a particular form or to take other steps; or
 - (c) require the member to reimburse the council a specified amount; or
 - (d) ensure that a complaint is lodged against the member with SACAT.
- (2) If a member of a council fails to comply with a requirement of the council of a kind referred to in subsection (1) made in accordance with the recommendation of the Ombudsman, the member will be taken to have failed to comply with Chapter 5 Part 4 and the council is to ensure that a complaint is lodged against the member with SACAT.
- (3) A council is taken to have the power to act according to the Ombudsman's recommendations.

6. Clause 3.18 of Part 3 of the Code of Conduct provides:

A failure to comply with a finding of inappropriate behaviour (by the Council, independent investigator or Ombudsman) under Part 2 is also grounds for a complaint under this Part.

Whether Cr Miller committed misconduct under Part 3 of the Code of Conduct for Council Members by failing to comply with a council resolution requiring him to make an apology

7. As I have stated in other reports, it is essential that council members comply with council resolutions, regardless of whether they agree with the outcome of a particular investigation. It is part of a council member's role to uphold the principles underpinning the Code of Conduct and to comply with council resolutions, regardless of their personal views. While I have had regard to Cr Miller's reasons for refusing to comply with the council's resolution, this does not alter his responsibilities as failure to comply may undermine community trust and confidence in the council and in the principles of local government more generally.

8. Cr Miller has failed to comply with the Panel's recommendations, adopted by the council on 15 July 2019, in breach of clause 3.18 of the Code of Conduct. I am therefore of the view that he has breached Part 3 of the Code of Conduct and he has committed misconduct.
9. In my view, where an elected member blatantly refuses to comply with a finding of an investigation adopted by the council, as has occurred in this matter, the cost of the investigation should not have to be borne by the ratepayers. Instead, the elected member should be required to reimburse the council for the cost of the investigation. While an elected member may wish to exercise their prerogative to reject the council's process and adoption of an independent investigator's finding, this should be at their own cost; not the ratepayers.
10. Section 263B(1)(c) of the Local Government Act allows me to recommend that the council require a member to reimburse the council a specified amount, and in my view, the circumstances of this case call for such a recommendation.

Opinion and recommendations

In light of the above, I consider that Cr Miller breached the provisions of section 63 of the Local Government Act and clause 3.18 of Part 3 of the Code of Conduct. In this way, Cr Miller acted in a manner that was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

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

1. The council reprimand Cr Miller at a public meeting
2. The council resolve to require Cr Miller to reimburse the council for the cost of the Panel investigation in the amount of \$6,957.19, pursuant to section 263B(1)(c) of the Local Government Act
3. The council resolve to require Cr Miller to issue an apology that is consistent with the recommendations of the Panel report.

In accordance with Part 3 of the Code of Conduct for Council Members, this report must be provided to a public meeting of the council within two ordinary meetings of the council receiving my report.

In accordance with section 25(4) of the Ombudsman Act, I request that the council report to me by **19 February 2021** 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 recommendations.

In the event that no action has been taken, reasons for the inaction should be provided to the Ombudsman.

Pursuant to section 263B(2) of the Local Government Act, if a council member fails to comply with a council requirement made as a result of an Ombudsman recommendation such as those above, the council member will be taken to have failed to comply with Chapter 5 Part 4 of the Local Government Act. In this event, the council is to ensure that a complaint is lodged against Cr Miller with the South Australian Civil and Administrative Tribunal.

In order to report Cr Miller's misconduct, as required by section 18(5) of the Ombudsman Act, a copy of this report has been provided to the principal officer of the council.

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

A handwritten signature in black ink, appearing to read 'W. Lines', with a stylized flourish at the end.

Wayne Lines
SA OMBUDSMAN

14 December 2020