



Report

Full investigation - *Ombudsman Act 1972*

Complainant	Ombudsman 'own initiative' investigation, section 13(2) <i>Ombudsman Act 1972</i>
Council member	Cr Bronwyn Lewis
Council	Alexandrina Council
Ombudsman reference	2022/01403
Date report received	9 March 2022
Issues	Whether Cr Lewis failed to comply with a finding of inappropriate behaviour under Part 2 of the Code of Conduct for Council Members.

Jurisdiction

A report received by my Office alleged a breach of Part 3 of the Code of Conduct for Council Members (**the Code of Conduct**) made pursuant to section 63 of the *Local Government Act 1999* (**the Local Government Act**).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

I note that since the original report was made to my Office, and since issuing my provisional report, the relevant provisions of the Local Government Act have changed. I have, however, considered whether Cr Bronwyn Lewis complied with the legislative scheme that was in place at the time of her alleged conduct.

The original report attracted the protections of the *Public Interest Disclosure Act 2018*.

Investigation

My investigation has involved:

- assessing the information provided by the reporter
- providing Cr Lewis with notice of my investigation and requesting a response from Cr Lewis
- providing the council with notice of my investigation and affording an opportunity for the council to provide any information it considered relevant to this investigation
- considering the response received from Cr Lewis

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

² *Local Government Act 1999* s 263A(4); *Ombudsman Act 1972* s 3.

- considering further information provided by the reporter
- considering:
 - the Ombudsman Act
 - the Local Government Act
 - the Code of Conduct
- preparing this report.

Standard of proof

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

I provided my provisional report dated 28 October 2022 to Cr Bronwyn Lewis, the Mayor, the Chief Executive Officer of the Alexandrina Council (**the council**) and the reporter.

I note that Cr Lewis is no longer an Elected Member of the council. For ease of reference and for the purposes of this report, I will continue to refer to Cr Lewis with the title of Cr.

I have not received any response to my provisional report from the Mayor or Chief Executive Officer.

The reporter provided my Office with some further information that I do not consider relevant to the issues under investigation.

My Office received a response from Cr Lewis on 29 November 2022. The pertinent aspects of Cr Lewis' response can be summarised as follows:

- Cr Lewis reiterates that she considers herself to be the victim of sexist behaviour and bullying by Elected Members of council
- Cr Lewis considers the audio recording from the 15 November 2021 council meeting to be highly relevant to this matter and seeks a copy of it for the purposes of obtaining legal advice
- Cr Lewis remains of the view that in the absence of a response from Elected Members of council that specifies what she has done to offend them, she cannot apologise.

I have considered the further response from Cr Lewis, however I note that the points she has raised had already been addressed in my provisional report. I do not consider her response raises any new issues that I had not previously addressed, and ultimately, her response has not persuaded me to alter my conclusions.

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.

Background

1. In 2021 the Chief Executive Officer of the council received a complaint by an informant for the purposes of the PID Act regarding certain posts made to various Facebook pages by Cr Lewis.
2. The Mayor of the council considered that he may have a potential conflict of interest in investigating the matter and in accordance with the council's Complaints Handling Procedure, the matter was referred to Kelledy Jones Lawyers (**Kelledy Jones**) to receive, consider and investigate the complaint.
3. On 16 August 2021 Kelledy Jones advised Cr Lewis of its engagement by the council.
4. Kelledy Jones provided the council with its final investigation report in relation to the complaint and the report was considered by the council at a council meeting held on 15 November 2021.
5. At that meeting, the council considered the report as part of agenda item 13.4 under the heading of Code of Conduct Determination 2 - Cr Lewis. The following motion was voted on:
 1. That Council receive and note the report titled Code of Conduct Determination 1 [sic] - Cr Bronwyn Lewis.*
 2. That Council accepts the findings of Kelledy Jones Lawyers, that Cr Lewis, in relation to the allegations, has breached the following clauses of the Elected Members Code of Conduct:
 - 2.2 Act in a way that generates community trust and confidence in the Council.
 - 2.4 Show respect for others if making comment 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
 3. That Council having noted the nature of the breaches as outlined by Kelledy Jones Lawyers, adopts the recommend action and:
 - a. Requests that Cr Lewis remove the posts from her Facebook pages and commit to not repeating them; and
 - b. Requires Cr Lewis to provide a written, private apology without equivocation, defensiveness and without explanation, to the male Elected Members of the council for any embarrassment or offence that may have been caused by her posts within [2] ordinary meetings of council
 4. That Council notes the obligation of all Elected Members, who are Moderators/ Administrators of social media pages, to monitor not only their own content posted, but also that posted by others.
6. The motion was carried in the above terms (**the resolution**).
7. I observe that item 13.4 of the agenda included the following statements under the heading of 'General Analysis':

In her written response to Kelledy Jones Lawyers, Cr Lewis stated that her personal Facebook page is private and for friends only and that:

'As for my Council Facebook page I stand firm on my opinion - it is on the public record ...'

In addition to the comments made with regard to Council decisions, allegations were made in relation to sexist behaviour at a Special Meeting of Council held on 2 August 2021. While these allegations are outside of the scope of the investigation, Kelledy Jones

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Lawyers did examine the relevant statements made on Cr Lewis' personal Facebook page with regard to the allegations.

The posts made by Cr Lewis in this thread give rise to the following imputations:

- the alleged perpetrator is a male, fellow Elected Member of Council;
- that member is misogynistic;
- other Elected Members are in fear of being bullied by this Member; and
- the actions and behaviours of that Member place other Members in fear.

Kelley Jones lawyers consider that these comments have posed a risk of reputational damage **to each** of the Council's male Elected Members.

8. The report by Kelley Jones Report contained the following statements:

4.12 the posts made by Cr Lewis in this thread, give rise to the following imputations:

- the alleged perpetrator is a male, fellow Elected Member of Council;
- that member is misogynistic;
- other Elected Members are in fear of being bullied by this Member; and
- the actions and behaviours of that Member place other Members in fear.

4.13 whilst, as above, it is outside of the scope of this investigation to make any findings with respect to the veracity of the comments made, **we find** that Cr Lewis' posts, made in a forum that denied any opportunity for any alleged perpetrator to provide a meaningful response, has risked reputational damage **to each of** the Council's male Elected Members; [emphasis in source]

4.14 in which case, on any reasonable and objective consideration of these comments, Cr Lewis has breached the following provisions of the Code in making the comments in a public forum:

2.2 Act in a way that generates community trust and confidence in the Council.

2.4 Show respect for others if making comments publicly.

9. I note that on page 139 of the agenda for the meeting, the agenda item refers to a Final Investigation Report as prepared by Kelley Jones Lawyers, stating 'REFER ATTACHMENT 13.4 (page 532)'. The agenda can be accessed at the following web address:

https://www.alexandrina.sa.gov.au/_data/assets/pdf_file/0015/1062510/Council-Agenda-15-November-2021.pdf

10. Attachment 13.4 has a cover page with the title: Alexandrina Council - Code of Conduct Complaint - Final Investigation Report - Cr Bronwyn Lewis - Facebook Posts. The attachment can be accessed at the following web address:

https://www.alexandrina.sa.gov.au/_data/assets/pdf_file/0017/1062512/Council-Attachments-15-November-2021.pdf

11. Despite the council's resolution referring to the report as titled 'Code of Conduct Determination 1 - Cr Lewis', I am satisfied that the resolution refers to the report at page 532 of the above attachment.

12. Following the resolution, Cr Lewis sent two emails to all Elected Members of council. The first email was sent on 7 December 2021 and stated:

Dear all

Re the Code of Conducts debated at the last Council meeting.

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Could you please let me know what you found offensive so I can make 'meaningful' apologies. According to the audio file the actual breaches were not discussed. You only debated the punishments so I am unclear as to what you want me to say.

Thanks and please cc all so that it is clear.
Best wishes
Bronwyn

13. On 17 December 2021 Cr Lewis forwarded the previous email and stated the following:

Hi all
It's been ten days since I emailed you all and no one has responded?
Could you please respond? Please cc all.
Thanks in advance
Bronwyn

14. On 24 January 2021 at an ordinary meeting of council, Cr Lewis provided the following written statement in relation to the 15 November 2021 council resolution:

In relation to the Minutes of the Council meeting of 15 November 2021 reference ACM211234 in a motion moved by Cr Rebbeck and seconded by Cr Carter, herewith is my written apology to the male Elected Members who may have been embarrassed or offended.

I have written to ALL the Elected Members (twice) to ask for clarification of what has offended them and to date have had no response, without this information I cannot apologise.

According to the audio file, the mover of the motion, Cr Rebbeck said she wanted me to say I'm sorry and take account for what I have said on Facebook.

I take full responsibility for the *public post*. [emphasis mine]

Cr Bronwyn Lewis

16/1/22.

15. On 8 March 2022, an email was sent by the Senior Governance Officer of the council to Elected Members asking if they had received an apology from Cr Lewis in accordance with the resolution. There were no responses indicating that Cr Lewis had complied.
16. I understand that in the audio recording of the council meeting on 15 November 2021, a male Elected Member of council advised that he did not take offence to the Facebook posts.
17. However based on the material that has been provided to me, it is evident that there are male Elected Members of council who did anticipate receiving an apology.
18. In an internal email dated 9 March 2022, one male Elected Member stated the following:

No [Cr Lewis] made no sincere apology and instead sent two emails asking for the reason why she was apologising and as she received no response she said therefore she had no obligation to apologise. I found this disrespectful as records from Council minutes recorded why she was required to apologise.

The action for Cr Lewis to provide a written, private apology without equivocation, defensiveness and without explanation, to the male Elected Members of the Council for

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any embarrassment or offence that may have been caused by her posts within two (2) ordinary meetings of Council was not met.

I have not received an apology in writing or verbally.

19. In another internal email dated 9 March 2022, a separate male Elected Member stated:

[Cr Lewis] references her attempts to ask elected male members what and how she should apologise over remarks she had previously made.

To actually ask the question only suggests that she has shown an indifference to any angst incurred by any of the male members within the Chamber.

I have no intention of telling Cr Lewis or anyone else for that matter how they should couch an apology to me.

Its [sic] up to the individual to draft their own apology which I would suspect and hope would be genuine.

20. On 9 March 2022, Cr Lewis sent the following email to the council's Senior Governance Officer:

I believe you have written an email to the male Elected Members asking if I have written and apologised as per the motion in November.

I wrote twice to the Elected Members asking for details as my behaviour was not discussed only the punishment.

I then sought legal advice as to my apology and furnished the Council with that apology which was recorded in the minutes of the January meeting.

21. On 9 March 2022 I received the report alleging that Cr Lewis had failed to comply with a finding of inappropriate behaviour under Part 2 of the Code of Conduct, and accordingly it was being reported to me as a complaint pursuant to clause 3.18 of the Code of Conduct.

22. On 25 August 2022 I advised the council, Cr Lewis and the reporter that I was initiating an investigation into the matter.

23. I also requested Cr Lewis provide me further information and a response to the alleged failure to comply with a finding of inappropriate behaviour under Part 2.

24. On 9 September 2022 I received a response by Cr Lewis that addressed my enquiries in relation to this investigation. Cr Lewis made the following statements to my Office:

As punishment for the case I was asked to write a meaningful apology I sought clarification from the Elected Members on two Occasions and not one answered. If you listen to the public file of the debate there is no indication of what was offensive on my behalf - after over an hour of Kelledy Jones's briefing them on my "behaviour". No one to this day has clarified and in order to comply my lawyer advised me to write the attached which was filed as part of the Minutes of 24 January 2022. I knew if I made no statement that I would be reported. I verbally cleared this with the Governance office around the time as well.

As I have taken responsibility of [sic] the Facebook posts on my public Facebook site I am unsure to which you are referring - I though [sic] I had taken down the thread on my private Facebook ...

...

You have ruled in the past that private Facebook post [sic] are private - I have the strongest settings I can find for privacy - but you cannot prevent vexatious people from screen shots. ...

...

I hope this is the end of the matter, I believe I have done everything required of me and have always done as instructed over these spurious and vexatious claims.

25. I also consider it relevant to observe that, following receipt of notice of my investigation, Cr Lewis initially responded on 25 August 2022 by stating:

Dear Mr Lines

I am thrilled you are investigating this case - it saves me putting in a complaint, which I have decided not to do as the constant complaints from Alexandrina Council are tedious and trivial.

...

As you are now investigating this I am requesting that you investigate [redacted] have used the Code of Conduct provision to bully and harass not just me, but on the 15 November 2021 the entire Chamber - please listen to the audio file of the Motion where the Elected Members complained.

I will collate the files for you in due course, and please if you could get back to me with the audio file that would be much appreciated.

26. My Office responded to Cr Lewis advising that her complaint was a behavioural complaint that would best be handled under Part 2 of the Code of Conduct, and that my Office would not take any further action in relation to her complaint.
27. Cr Lewis issued a further response on 31 August 2022:

... I am raising an issue of Maladministration and Abuse of power. Please ask for the recording as soon as possible as it will disappear and the evidence will be 'lost'.

...

... [a male Elected Member of council] abused the process entirely and had a conflict of interest being present as the Facebook posts I was supposed to have monitored on my private page were regarding his sexist and tyrannical behaviour.

28. My Office did not take any further action in relation to Cr Lewis' complaint and I did not intend to take any action to seek the audio recording, as I did not consider it necessary for the purposes of this investigation.

29. On 9 September 2022, Cr Lewis sent to an email to the council which stated:

Could you please supply the Ombudsman's Office with the audio file of 15 November 2021 - briefing by Ms Tracy Riddle of Kelledy Jones to the Elected Members.

This file relates to the Case number 2022/01403 and is needed for evidence in the case. I know the audio file is stored as I sat with the Governance Officer to hear it months after the meeting.

Thank you in advance for your assistance,
Cr Bronwyn Lewis

30. Included in Cr Lewis' response to my enquiries on the same day was a statement 'I cannot urge strongly enough for you to listen to the briefing by Kelledy Jones which was put upon the elected members on 15 November 2021.'
31. On 9 September 2022 the council provided the audio file to my Office. For the sake of completeness, I have listened to the audio and I confirm that the audio has little bearing on the issues in this investigation.

Relevant law/policies

32. At the relevant time, section 63 of the Local Government Act provided that:
 - (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.

33. At the relevant time, sections 263, 263A and 263B of the Local Government Act provided:

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—Investigation of grounds of complaint by Ombudsman

- (1) The Minister may refer to the Ombudsman for investigation and report under the Ombudsman Act 1972 any matter alleged to constitute grounds for complaint under this Act against a member of a council.
- (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 a 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

34. Clause 2.22 of the Code of Conduct provided that:
-

A failure of a Council member to comply with a finding on an investigation under this Part, adopted by the Council, may be referred for investigation under Part 3.

35. Clause 3.18 of the Code of Conduct provided that:

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 Lewis failed to comply with a finding of inappropriate behaviour under Part 2 of the Code of Conduct for Council Members.

36. On 15 November 2021 Kelledy Jones issued a report making a finding of inappropriate behaviour against Cr Lewis, and the council validly resolved to adopt the Kelledy Jones' recommendations.

37. The resolution of the council required Cr Lewis to provide a written, private apology without equivocation, defensiveness and without explanation, to the male Elected Members of the council for any embarrassment or offence that may have been caused by her Facebook posts.

38. The written apology Cr Lewis submitted to the council stated:

In relation to the Minutes of the Council meeting of 15 November 2021 reference ACM211234 in a motion moved by Cr Rebbeck and seconded by Cr Carter, herewith is my written apology to the male Elected Members who may have been embarrassed or offended.

I have written to ALL the Elected Members (twice) to ask for clarification of what has offended them and to date have had no response, without this information I cannot apologise.

According to the audio file, the mover of the motion, Cr Rebbeck said she wanted me to say I'm sorry and take account for what I have said on Facebook.

I take full responsibility for the *public post*. [emphasis mine]

Cr Bronwyn Lewis

16/1/22.

39. Based on Cr Lewis' written response provided at the 24 January 2022 council meeting, it appears to be Cr Lewis' position that unless she was provided by male Elected Members of council with the exact particulars stating how her remarks are offensive, she was unable to comply with the resolution requiring her to apologise.
40. Cr Lewis' response to my enquiries indicate that she considers her written response complied with the council's resolution.
41. It also appears to be Cr Lewis' position that she only accepted the motion applies to posts that she has made 'Public' on Facebook, and that she does not accept that it applies to posts made that were categorised by Facebook as 'Private'.
42. In my view, the terms of the resolution and the required actions by Cr Lewis are clear. By reference to the report and the terms of the resolution, I consider that a reasonable person should have been able to conclude:

- Cr Lewis was required to privately apologise for implying any male member of council was potentially misogynistic, a bully and caused fear in other council members
 - The apology was to be without equivocation, defensiveness and without explanation
 - Cr Lewis was to remove all Facebook posts related to the matter, and commit not to make future posts on Facebook that gave rise to similar imputations that a male member of council is misogynistic, a bully and causes fear to other council members.
43. Cr Lewis' written response provided at the 24 January 2022 meeting does not contain an apology. While the response contains the statement 'herewith is my written apology...', the response also states 'without [further information] I cannot apologise'.
44. Taken as a whole, I do not consider the written statement contains an apology.
45. The emails that I have been provided with by the council indicate that Cr Lewis did not issue a private, written apology to any male Elected Members of council.
46. I acknowledge Cr Lewis has raised concerns about the fact that she asked for further clarification for what she had done to cause offence, and that she was not provided with a response.
47. I do not consider it unreasonable for other Elected Members of council to not respond to Cr Lewis' request, given that it undermines the purpose of the apology and there was, in my view, already sufficient information for Cr Lewis to understand what was required of her by the council resolution.
48. Cr Lewis has also indicated that she disagrees with Kelledy Jones finding that her 'private' Facebook posts are within the public domain.
49. Cr Lewis responded to my enquiries by stating that her personal Facebook posts now have the 'strongest settings I can find for privacy'.
50. Having regard to Cr Lewis' response where she stated '[I] have ruled in the past that private Facebook post [sic] are private', it is unclear what matter or matters Cr Lewis may be referring to.
51. It is my view that social media posts are public statements, even in instances where those posts are caveated as private by the social media platform or are set to be available to a restricted audience, such as 'private' Facebook posts.
52. In any event, whether Cr Lewis considers her 'private' Facebook posts are not publicly available is irrelevant to the issue. The report by Kelledy Jones concluded that Cr Lewis' Facebook posts in relation to this matter, including those posted to her personal page, constituted a breach of clauses 2.2 and 2.4 of the Code of Conduct.
53. The council accepted those findings, and moved for Cr Lewis to 'remove the posts from her Facebook pages and commit to not repeating them'. There is no caveat in the council's resolution delineating between Facebook posts categorised by Facebook as 'public' and those categorised by Facebook as 'private'.
54. Even if Cr Lewis does not agree with the Kelledy Jones findings, her refusal to apologise, and her refusal to accept that all of her Facebook posts were relevant to the

resolution, is unnecessarily obstructive, shows a disregard for the principles underpinning the Code and potentially undermines community confidence and trust in local government. Under the Code, a council member must comply with all council resolutions, regardless of whether they agree with those resolutions or not.

55. I consider that the terms of the resolution are clear as to the requirements of the apology. Despite Cr Lewis' stated views, I do not consider that there is any reason why she should not be able to comprehend or comply with the resolution, and I do not consider that she has provided me with sufficient evidence to indicate that she has complied with the resolution.
56. My view is that Cr Lewis' failure to comply with the recommendation of the Kelledy Jones investigation that she apologise, and failure to commit to not making posts on Facebook of similar nature in future, as adopted by the council on 15 November 2021, amounts to a failure to comply with a finding of inappropriate behaviour for the purposes of clause 3.18 of Part 3 of the Code. A failure to observe the Code is contrary to the obligation of section 63 of the Local Government Act.

Summary and Recommendation

In light of the above, my view is Cr Lewis has failed to comply with a finding of inappropriate behaviour of the purposes of clause 3.18 of Part 3 of the Code of Conduct and section 63 of the Local Government Act.

In my provisional report I foreshadowed making a recommendation under section 25(2) of the Ombudsman Act and 263B(1) of the Local Government Act that the council reprimand Cr Lewis for her failure to comply with the Code of Conduct for Council members.

I acknowledge that since my provisional report was issued, Cr Lewis is no longer an Elected Member of council. As such I no longer consider it appropriate or necessary to make the recommendation that the council reprimand Cr Lewis.

However, as the matter subject of this investigation were publicly ventilated by Cr Lewis, and as I have made a finding that Cr Lewis acted contrary to clause 3.18 of the Code of Conduct as it existed at the time, I still consider it appropriate that the council make this report public.

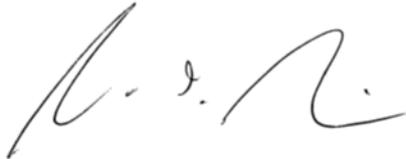
Accordingly, I recommend pursuant to section 25(2) of the Ombudsman Act that the council provide a copy of this report to a public meeting of the council within two ordinary meetings of the council following receipt of my report.

Final comment

In accordance with section 25(4) of the Ombudsman Act, I request that the council report to me within three months to confirm that the report has been provided at a public meeting of the council.

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

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

A handwritten signature in black ink, appearing to read 'W. Lines', written in a cursive style.

Wayne Lines
SA OMBUDSMAN

30 November 2022