

Report

Full investigation - *Ombudsman Act 1972*

Complainant	Mayor David Parkin
Council member	Councillor Felicity Lord
Council	City of Burnside
Ombudsman reference	2016/08185
Date complaint received	19 October 2016
Issues	Whether Cr Lord breached Part 3 of the Code of Conduct for Council Members by failing to comply with a resolution of the council under Part 2 of the Code of Conduct

Jurisdiction

The complaint alleges a breach of Part 3 of the Code of Conduct for Council Members (**the Code of Conduct**)¹ made pursuant to section 63 of the *Local Government Act 1999*. 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 council referred this complaint to my Office pursuant to clause 2.22 of the Code of Conduct which states:

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

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 Felicity Lord (**Cr Lord**)
- considering the Code of Conduct and the council's Council Member Code of Conduct Complaint Handling Procedure (**Complaint Procedure**)
- 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

Response to my provisional report

Mayor Parkin did not provide a response to my provisional report.

Cr Lord did not provide a response to my provisional report.

In light of the above, my view remains as set out in my provisional report.

Background

1. On 22 September 2015 the council's Mayor, Mr David Parkin, made a complaint to the Chief Executive Officer, Mr Paul Deb under the Code of Conduct. The complaint alleged that Cr Felicity Lord made comments to a reporter from the Adelaide Advertiser which constituted breaches of clauses 2.2-2.5, 2.7-2.8 and 2.11-2.14 of Part 2 of the Code of Conduct.
2. On 25 September 2015 Mr Deb referred the complaint to Norman Waterhouse Lawyers to act as the legal practitioner Conduct Reviewer⁵ to conduct a Preliminary Assessment of the complaint. The referral was made in accordance with the council's Complaint Procedure. On 22 October 2015 Norman Waterhouse Lawyers provided Mr Deb with its Preliminary Assessment Report.
3. On 10 November 2015 the council considered the Preliminary Assessment Report and resolved in accordance with the Complaint Procedure to refer the complaint to KelledyJonesLawyers (**KJL**) to act as Independent Assessor⁶ and conduct a further investigation into the allegation.
4. On 14 January 2016 KJL provided the council with its Final Investigation report (**KJL Report**) which was then provided to Mayor Parkin on 15 January 2016. The KJL Report identified the allegations against Cr Lord and found that Cr Lord breached clauses 2.2-2.5, 2.7 and 2.11 of the Code of Conduct.
5. The KJL Report recommended that the council:

...notes this Report at a formal public meeting of the Council;

request that Cr Lord make a verbal public apology to Jenny Barrett for having falsely confirmed with the media that Barrett made the comment that Council *"wasn't going to keep paying the Messenger because of its negative coverage"*;

request that Craig Cook publicly retract the comments falsely attributed to Barrett, but not take the opportunity to run the article again at the same time.

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 An external legal practitioner appointed under the Complaint Procedure to undertake a Preliminary Assessment of a complaint.

⁶ An external legal practitioner appointed under the Complaint Procedure to undertake further investigation of a complaint.

6. On 9 August 2016 the council considered the KJL Report in confidence. The minutes record that Mayor Parkin declared a conflict of interest and left the meeting. Cr Lord declared a conflict of interest and left the meeting and did not return. A motion was moved and carried that:
1. the Report be received.
 2. the Council notes that having investigated the alleged breach of the Code of Conduct for Council Members, KelledyJonesLawyers, the Independent Assessor, finds that Councillor Lord has breached paragraphs 2.2-2.5; 2.7-2.8 and 2.11 of the Code.
 3. the Council expresses its disappointment with Councillor Lord's actions but notes her apologies to the Mayor.
 4. the Council requests that Councillor Lord make a verbal apology at a council meeting to Ms Jenny Barrett for having falsely confirmed with the media that Ms Barrett made the comment the Council "wasn't going to keep paying the Messenger because of its negative coverage" by 30 September 2016.
 5. the Chief Executive sends a copy of this Motion to Mr. Craig Cook to reinforce the inaccuracy of the allegations published in his article.
 6. the Council wishes to formally apologise to Ms Jenny Barrett for the false allegations provided to the media and for the distress and the inconvenience caused by it.
7. In his letter dated 18 October 2016, Mayor Parkin advised me that:

The time within which Cr Lord was required to comply with paragraph 4 of the resolution of the Council has now expired. Cr Lord has failed to apologise to Ms Barrett.

The CEO has reminded Cr Lord of the Council's resolution in this regard.

I now wish to report a breach of Part 3 of the Code, as against Cr Lord, for failing to apologise to Ms Barrett in accordance with Council resolution C10772.

Clause 7.6 of the [Complaint Procedure] provides that if an elected member fails to comply with the sanctions imposed by the Council within the specified time, in this case the apology at paragraph 4 of the resolution of the Council, this will result in the Council elevating the issue to the Ombudsman under Part 3 of the Code.

In support of this position, clause 2.22 of the Code provides that a failure of a Council member to comply with a finding of an investigation under Part 2, adopted by the Council, may be referred for investigation under Part 3, while clause 2.15 states that a Council member, who is of the opinion that a breach of Part 3 of the Code has occurred, or is currently occurring, **must report** the breach.

In my capacity as Mayor of the Council, I am of the opinion that Cr Lord has breached Part 3 of the Code, such a breach being deliberate and wilful.

Cr Lord has failed to comply with a finding of an investigation under Part 2 of the Code, adopted by the Council.

Accordingly, this letter constitutes my report to you of Cr Lord's breach of Part 3 of the Code.

Relevant law

8. Section 63 of the *Local Government Act 1999* provides:

63-Code of conduct for members

...

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

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

Part 2

General behavior

2.6 Comply with all Council policies, codes and resolutions.

...

Complaints

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

...

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;

Part 3

3.2 Perform and discharge their official functions and duties with reasonable care and diligence at all times.

3.18 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 Lord breached Part 3 of the Code of Conduct for Council Members (the Code of Conduct) by failing to comply with a resolution of the council under Part 2 of the Code of Conduct

10. At the meeting of the council on 9 August 2016 the council resolved to accept those sanctions (recommendations) contained in the KJL Report including:

That Council requests that Councillor Lord make a verbal public apology at a council meeting to Ms Jenny Barrett for having falsely confirmed with the media that Ms Barrett made the comment the Council "wasn't going to keep paying the Messenger because of its negative coverage" by 30 September 2016.

11. In his letter dated 18 October 2016, Mayor Parkin advised me that:

While Cr Lord subsequently apologised in person to me for her comments made to the media, this was during a private conversation, and Cr Lord **has not** apologised for making inaccurate comments to the media regarding the attribution of statements to Ms Barrett.

The time within which Cr Lord was required to comply with paragraph 4 of the resolution of the Council has now expired. Cr Lord has failed to apologise to Ms Barrett.

The CEO has reminded Cr Lord of the Council's resolution in this regard.

12. On 14 December 2016 Cr Lord responded to my letter to her and responded to the question as to whether she had complied with the resolution made by the council on 9 August 2016 as follows:

Regarding my compliance with the council resolution of August 2016, I can only say that I have not yet publicly apologised to Ms Barrett for the reason that my attendance at council meetings this year [2016] has been sparse due to my illness. As well as needing the first six months of the year on leave when I was bed ridden, I have missed about four meetings completely and leave early from another two since July. My medical treatments at the RAH are now regular at Tuesday, Thursday and Saturday between 2pm-7pm, so I can now attend Tuesday meetings albeit arriving after the meetings start.

I would like to make two points for your consideration. Firstly, my Mayor's complaint surprised me simply because I would have thought that a friendly chat would have put things right largely because I don't know when during a meeting this apology should have been delivered. I have not spoken with Mayor Parkin since August, but with the combined stress of my illness, the death of my mother and my enforced house move, all since last Christmas [2015], it [sic] just wasn't a major focus. Secondly, I have ambivalent feelings about accepting full responsibility for this matter as my contribution was only to confirm what the journalist had already been told and in my naivety I still thought of the entire throw-away line as a joke! Certainly the three or four councillors around me were laughing. As a Justice of the Peace, I take my honesty seriously so have not denied my role in this event and will apologise, but my faith in the team around me has learnt an unpleasant lesson [sic].

13. Whilst I note the mitigating circumstances outlined by Cr Lord and the fact that she has indicated her willingness to apologise, I also note that Cr Lord had attended the council meetings on 27 September 2016 and 11 and 25 October 2016 (being those meetings immediately before and after which the public apology was to have been made). I consider that Cr Lord had opportunity to apologise and that by failing to apologise within the time limit specified by the council, Cr Lord breached clause 3.2 of the Code of Conduct in that:

- Section 63(2) of the Local Government Act stipulates that council members must observe the Code of Conduct i.e. they have a duty to comply with the Code of Conduct;
- Clause 2.6 of the Code of Conduct stipulates that council members must comply with all council policies, codes and resolutions;
- Cr Lord failed to comply with resolution 4 of the 9 August 2016 meeting; and
- By failing to comply with the resolution, Cr Lord has breached clause 2.6 of the Code of Conduct and thereby failed to discharge her duty with reasonable care and diligence in accordance with clause 3.2 of the Code of Conduct.

Conclusion

In light of the above, I consider that Cr Lord, in failing to comply with the council's resolution dated 9 August 2016 to make a public apology at a council meeting by 30 September 2016 to council employee Ms Jenny Barrett, breached the provisions of section 63 of the Local Government Act and clause 3.2 of the Code of Conduct. In doing so, Cr Lord acted in a manner that was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

Recommendation

To remedy this error, I recommend that under section 25(2) of the Ombudsman Act and section 263B(1)(a) and (b) of the Local Government Act that the council:

- 1) reprimand Cr Lord
- 2) require Cr Lord to issue a public apology to Ms Barrett at the meeting of the council at which my final report is tabled.

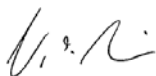
Final comment

In accordance with section 25(4) of the Ombudsman Act the council should report to the Ombudsman by 17 April 2017 on what steps have been taken to give effect to the 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.

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 that/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 the member in the District Court.



Wayne Lines
SA OMBUDSMAN

17 February 2017