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Ombudsman reference: 2012/03677
Agency reference: Not provided

FINAL REPORT

Date complaint received	16 May 2012
Agency	Corporation of the Town of Walkerville
Complainant	Ombudsman own initiative' investigation, section 13(2) Ombudsman Act 1972
Allegations	<ol style="list-style-type: none">1. Whether the Chief Executive Officer (the CEO) had a conflict of interest, contrary to section 120(1) of the <i>Local Government Act 1999</i>, in overseeing the investigation of a complaint of which she was the subject2. Whether the CEO and/or council failed to appoint a person to act in office whilst the CEO was overseas for two weeks, contrary to section 102 of the Local Government Act3. Whether the council complied with the law and its policies in incurring expenditure for the CEO's overseas trip4. Whether the CEO complied with her obligations under section 107 of the Local Government Act and section 55A of the <i>Occupational Health, Safety and Welfare Act 1986</i>

Aspects of allegations within jurisdiction

The complaint is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*.

This investigation originated from two disclosures made to my office, which attracted the protections of the *Whistleblowers Protection Act 1993*. In order to protect the identity of the whistleblowers, I commenced an 'own initiative' investigation under section 13(2) of the Ombudsman Act.

Some elements of the disclosures concern administrative acts which arise from an employment relationship between the CEO and staff of the council. Under section 17(1) of the Ombudsman Act I do not have jurisdiction to investigate administrative acts done by another in the capacity of an employer, and I have therefore excluded these elements from my investigation.

I note that these elements currently are the subject of proceedings before the Industrial Relations Commission.

Investigation

My investigation has involved:

- meeting with the whistleblower and their lawyer on 14 June 2012
- assessing the information provided by the whistleblower
- clarifying the information the whistleblower provided in a meeting on 12 July 2012
- writing to the CEO and mayor of the council on 8 August 2012 inviting them to give evidence. The mayor and the CEO both declined to be interviewed
- analysing written material provided by the council's lawyers on 4 September 2012 and 24 October 2012
- considering sections 73, 74, 102, 107, 120, 125, 126 of the Local Government Act; and the council's 'Bullying & Harassment Policy / Procedure' (**the OHSW policy**)
- considering the investigation report prepared by Mr Peter Warner dated 30 April 2012
- providing a provisional report dated 7 November 2012 to the mayor, CEO and the council's lawyers for comment
- considering the council's response, which I received on 23 January 2013
- providing a revised provisional report dated 14 February 2013 to the deputy mayor, CEO, council's lawyers, and the whistleblowers for comment
- preparing this final report

Response to my revised provisional report

The deputy mayor, CEO and council's lawyers did not respond to my revised provisional report.

The whistleblower made no response to my revised provisional report, only to comment through their lawyer that they wished to make no further comment.

Standard of proof

The standard of proof applied is on the balance of probability. However, given the nature of the allegations and the consequences if they were to be upheld, the level of evidence required by the *Briginshaw principle* has been applied. This recognises that questions of fact vary greatly in nature, and greater care is needed in scrutinising the evidence in some cases, (see *Briginshaw v Briginshaw* (1938) 60 CLR 336).

Ombudsman Comment

This investigation has been protracted largely as a consequence of the council's wish to deal with my office only through its solicitors. Both the mayor and the CEO declined to be interviewed in relation to the disclosures made against them, instead preferring that the council's solicitors should provide documentation and legal advice. In the circumstances, I refrained from issuing summons requiring them to give evidence.

Whilst the documentation and advice provided on the council's behalf was particularly thorough, and has been helpful to my investigation, I consider that this approach is unnecessary. In my view, the required information could have been provided directly to my investigation by the people involved. I encourage the council to reflect on this issue should it be necessary for me to investigate any further matters involving it.

In accordance with my powers under section 26 of the Ombudsman Act, I intend to publish my final report on these disclosures by placing it on my website.

Background

1. The allegations detailed in the two disclosures concern the CEO of the council, Ms Kiki Magro, and/or the mayor, Ms Heather Wright. The first disclosure included the following allegations:
 - a. that the council resolution made on or before 5 March 2012¹ that the CEO 'take over the conduct of a dispute concerning the investigation of [a] bullying complaint made against the CEO' was inappropriate, and gave rise to a conflict of interest on the part of the CEO contrary to section 120 of the Local Government Act
 - b. that the CEO was absent for two weeks on a study trip to Japan, and failed to appoint an acting CEO contrary to section 102 of the Local Government Act
 - c. that the CEO was inappropriately given a cash advance by the mayor for the trip to Japan despite there being no agreed budget for this expense, no council resolution and no authority for the mayor to do so
 - d. that the council's policies governing the complaint and investigation processes for bullying behaviour are inadequate for independent investigation of bullying complaints made against executive managers, and consequently the CEO breached section 107 of the Act.
2. This report deals only with the first disclosure, and the second disclosure is the subject of a separate report. In relation to the first disclosure, I consider it appropriate to investigate all of the above allegations.

Whether the CEO had a conflict of interest, contrary to section 120(1) of the Local Government Act, in overseeing the investigation of a complaint of which she was the subject

3. In October 2011 two council employees made bullying complaints against the CEO. The disclosure states that these complaints were independently investigated by Norman Waterhouse Lawyers. It states that the CEO was aware of the complaints and took advice from Norman Waterhouse in relation to them.
4. According to a statutory declaration provided by the CEO in response to my provisional report (**the CEO's statutory declaration**),² her involvement in the investigation was 'limited to providing answers to questions put to [her] by Norman Waterhouse and providing documents when requested'. After the investigation was completed, two final reports were considered by the council at its meeting held on 16 January 2012. According to the CEO the reports 'completely exonerated' her of any wrongdoing.³
5. The first investigation report was considered by the council in agenda item 16.1.4 at its 16 January 2012 meeting. In the council report prepared for the item, the CEO indicated under section 83(5) of the Local Government Act that the matter may be considered in confidence pursuant to Part 3 of that Act. The council passed a motion as follows:

That pursuant to Section 90(2) of the Local Government Act 1999 Council order that the public be excluded, with the exception of the Mr Sathish Dasan and Mr Dale Mazzachi of Norman Waterhouse Lawyers, and the CEO (upon Council's invitation at their discretion) from being present at the meeting on the basis that the matter contained in this report is information of the nature specified in subsections 90(3)(a) and 90(3)(h) of the Act being:

¹ This date was specified in the disclosure but as noted below, the relevant substantive decisions of the council were made on 16 January 2012.

² Statutory declaration by Ms Kiki Magro dated 20 December 2012, paragraph 6.

³ Ibid, paragraph 7.

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

The said information relates to the personal affairs of employees of the Council and it would be unreasonable for those matters to be publicised.

(h) legal advice, being a report from Council's lawyers.

6. The confidential minutes of the meeting show that the CEO declared an interest 'due to her employment' and left the chamber.⁴ The council then dealt with a substantive motion about the first investigation report; passed a motion under section 91(7) of the Local Government Act keeping certain documents in confidence; and moved out of confidence. After readmitting the public,⁵ the council carried the following motion:

That pursuant to Section 120 of the Local Government Act 1999, Council authorises the CEO to act in the course of this matter.
7. The council then again went into confidence to deal with a second agenda item, Item 16.1.5, which concerned the second investigation report.⁶ Again the council dealt with a substantive motion on the matter; passed a motion under section 91(7) of the Local Government Act keeping certain documents in confidence; and moved out of confidence. After readmitting the public, the council carried another motion authorising the CEO to act in respect of Item 16.1.5.⁷
8. A similar sequence of events occurred for a third time at the 16 January 2012 meeting, in relation to Item 16.1.6 which concerned a separate code of conduct complaint against an elected member.⁸ In this case, after the council went into confidence the mayor declared an interest and left the chamber, and both she and the CEO remained out of the room until the council resolved to re-admit the public. In this instance, there was no motion authorising the CEO to act.
9. A further bullying complaint against the CEO was made to the mayor by a council employee on 28 March 2012. On 3 April 2012 the council instructed Mr Peter Warner from Warner & Associates Pty Ltd to conduct an independent investigation. As part of his investigation, Mr Warner interviewed the employee and the CEO.
10. On 30 April 2012 Mr Warner reported his findings to the council. Mr Warner reported that the allegations of bullying and harassment were unfounded because they were directly linked to the performance management of an individual. Mr Warner found that the CEO's management of the individual was reasonable in the circumstances.
11. On 4 May 2012 Mr Warner received additional instructions from the council's lawyers to obtain statements from other individuals involved in the bullying/harassment claims, and allegations of misconduct and financial mismanagement made against the CEO. During the course of this investigation the council's accountant and other elected members were interviewed.
12. On 30 May 2012 Mr Warner reported back to the council's lawyers that there was no substance to the allegations and that the CEO's actions had been reasonable.

⁴ The interest which the CEO declared related to this item, entitled 'Staff Matter 1', and Item 16.1.5 Staff Matter 2.

⁵ In advice dated 4 December 2012 provided to the council (a copy of which was provided to me), the council's lawyers have stated that notwithstanding the motion readmitting the public, the CEO remained out of the room prior to the passage of the motion authorising her to act.

⁶ Item 16.1.5 Staff Matter 2.

⁷ The legal advice dated 4 December 2012 states that notwithstanding the motion readmitting the public after the council dealt with Item 16.1.5, the CEO again remained out of the room.

⁸ Item 16.1.6 Code of Conduct Motion with Notice.

13. According to the CEO's statutory declaration, her involvement in Mr Warner's investigation was 'limited to providing answers to questions put to [her] by Mr Warner on two separate occasions and providing documents when requested'.⁹ The CEO states that she did not have conduct of the investigation, which was handled by the mayor and Mr Warner.
14. After the investigation was completed, Mr Warner's report was considered by the council at its meeting held on 18 June 2012. According to the CEO's statutory declaration the report 'completely exonerated' her of any wrongdoing.¹⁰
15. In the same way as at the 16 January 2012 meeting, the CEO declared an interest, and the council dealt with the substantive matter in confidence following an indication from the CEO under section 83(5) of the Local Government Act. On this occasion, however, the CEO returned to the meeting after the council had made its decision on the substantive matter,¹¹ but before it resolved to re-admit the public. According to the CEO's statutory declaration:

I returned to the Chamber after the council had made its decision whereupon the Council explained to me the outcome of the investigation and reinforced its faith in my leadership. The Council meeting was then opened to the public, and the Council resolved to authorise me to act in the matter for the purposes of performance managing [an employee].¹²

16. I note that the publicly available minutes of the council meeting held on 18 June 2012¹³ do not record the fact that the council carried a motion to end its confidential deliberations; nor that it passed another motion authorising the CEO to act in relation to the matter 'on the basis that the CEO provide update reports to the council as she sees fit'. In concluding that these motions were passed, I have relied on a copy of the confidential minutes of the 18 June 2012 meeting provided to my investigation by the council in response to my provisional report, and on the CEO's statutory declaration.
17. Section 120(1) of the Local Government Act states:
 - (1) The chief executive officer of a council who has an interest in a matter in relation to which he or she is required or authorised to act in the course of official duties -
 - (a) must disclose the interest to the council; and
 - (b) must not, unless the council otherwise determines during a council meeting that is open to the public, act in relation to the matter.

Maximum penalty: \$5 000.

18. The CEO's statutory declaration states in effect that her participation in the Norman Waterhouse and Warner investigations was limited to that of a witness; that in each case when the reports came before the council she declared an interest in them; that she was outside of the chamber during all confidential discussions because of her declared interest; and that all motions authorising her to act in the course of the investigations occurred when the public were present. This position is supported by the confidential council minutes of the meetings held on 16 January 2012, and 18 June 2012; although, as I have noted above, the publicly available minutes for the latter meeting do not appear to be complete. Nonetheless, I accept that this was the sequence of events which occurred in each case.

⁹ Statutory declaration by Ms Kiki Magro dated 20 December 2012, para graph 8.

¹⁰ Ibid, paragraph 9.

¹¹ Ibid, paragraph 12; See also the confidential minutes of the council meeting held on 18 June 2012, Item 16.1 Staff matter. <http://www.walkerville.sa.gov.au/webdata/resources/files/MCNC06%20180612.pdf>, viewed on 11 February 2013.

¹² Statutory declaration by Ms Kiki Magro dated 20 December 2012, para graph 12.

¹³ Public minutes of the council meeting held on 18 June 2012, Item 16.1 Staff matter.

<http://www.walkerville.sa.gov.au/webdata/resources/files/MCNC06%20180612.pdf>, viewed on 11 February 2013.

19. In my view the above outline does not disclose any administrative error. The CEO properly limited her participation in the investigations; declared her interest; absented herself from the chamber; and was subsequently appointed to act by the council when the meeting was open to the public.

Opinion

In light of the above, my final view is that in handling the investigation of the complaints against the CEO, the council has not acted in a manner which is unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

Whether the CEO and/or council failed to appoint a person to act in office whilst the CEO was overseas for two weeks, contrary to section 102 of the Local Government Act

20. The CEO visited Japan from 5 to 18 November 2011 on a study trip, as part of a Local Government Exchange Program (**the Japan trip**). During the CEO's absence, no acting CEO was appointed.

21. Section 102 of the Act states:

In the absence of the chief executive officer, the following provisions apply:

(a) if there is a deputy to the chief executive officer - the deputy must act in the office of the chief executive officer;

(b) if there is no deputy or the deputy is absent - a suitable person appointed by the chief executive officer after consultation with the council must act in the office;

(c) if a person is not appointed under paragraph (b) - a suitable person must be appointed by the principal member of the council to act in the office (after taking into account the organisational structure of the council);

(d) if a person is not appointed under paragraph (c) - a suitable person must be appointed by any three or more members of the council to act in the office (after taking into account the organisational structure of the council).

22. In the organisational structure of the council there is no position of deputy CEO. There are two senior staff appointed below the CEO, the 'Executive Finance and External Relations' and 'Executive Planning and Infrastructure' positions. In my view, either of these would have been appropriate positions to act in the absence of the CEO.

23. I note from correspondence obtained during the course of my investigation that section 102 of the Act was brought to the CEO's attention prior to her departure, to which she replied:

I asked a few councils (Pt Adel Enf; Onka; Adel; Marion; Salisbury) what they did in these circumstances and the responses weighted towards no acting arrangements. There is only a 1.5 hour time delay (Japan is one hour behind us) and given that I am someone who always checks my emails and messages I also don't see the need for acting arrangements. I have spoken to the Mayor about this who supports my decision. However, if you believe we need an opinion on this I am happy to consider advise (sic) on this matter.

24. It is my understanding that this matter was not pursued any further, and legal advice was not obtained. I note that in the Local Government Association Guidelines 'Obtaining Legal Advice: Guidelines for Mayors/ Chairpersons' (May 2011) (**the guidelines**) it states on page 3:

Specifically, the ability of the Mayor/ Chairperson to obtain legal advice directly may be justified having regard to the following:

- (a)....
- (b) under section 102(c) of the Local Government Act, in the absence of the CEO, the Mayor/Chairperson may be required to appoint a suitable person to act as CEO. Where the Mayor/Chairperson is exercising this power and in order to ensure the appointment is lawful, the Mayor/Chairperson may necessarily require legal advice. The Mayor/Chairperson's ability to obtain legal advice directly in relation to the valid exercise of this power is implied and is necessarily implicit in their role and functions of office.
25. It does not appear that section 102 of the Act is a discretionary provision; it sets out provisions which must be followed in the absence of the CEO. Further, the guidelines also reiterate that responsibility for appointing an acting CEO lies not only with the CEO but, in certain circumstances (i.e. where the CEO does not appoint a suitable person after consultation with the council) the mayor as well. Given that the CEO discussed her decision with the mayor, presumably the mayor could have made an appointment (under section 102(c)) and it would have been open to her to seek legal advice on the subject.
26. The question therefore is whether the Japan trip amounted to an 'absence' from office on the part of the CEO. If she was not absent, then the obligation to appoint an acting CEO did not arise. A number of factors lead me to conclude that the CEO was not absent from office.
27. First, the Japan Local Government Centre promotes CLAIR¹⁴ (the organisation involved in the Japan trip) as follows:
- CLAIR is a joint agency of cities and regions working to promote international learning and partnerships, particularly around the revitalization of local and regional areas through sustainable growth and development, as well as common challenges of public service reform, governance, demographic change and the low carbon society.
28. In my view, these issues are related to the CEO's responsibilities, and thus it cannot be suggested that the Japan trip was undertaken for purposes unrelated to her position as CEO. I note that the CEO stated that the Japan trip was consistent with her role as CEO, and that she was able to fill both roles simultaneously.
29. Second, elsewhere in this report I note the council's resolution on 15 August 2011 endorsing the CEO's participation in the trip; and the arrangements which were put in place to enable her to maintain remote access to the council's electronic systems to see work documents, check emails, etc whilst she was away. In my view these factors demonstrate that she was travelling with the express consent of the council. She did not consider herself to be absent, did not take leave, and was still working on council matters remotely.
30. In responding to my provisional report, the council confirmed through the deputy mayor that the CEO remained on duty working for the council whilst she was in Japan. The response also noted that the time difference between Japan and Adelaide is only 1.5 hours; that the CEO was at all times contactable via telephone and email; and that in the council's view her physical absence did not mean she was absent from her position.
31. Third, it was put to me during the course of my investigation that the CEO's absence from the country prevented her from undertaking some of the tasks associated with the position of a chief executive officer, such as attending at matters of physical emergency. An example was provided of a problem that arose on 18 November 2011 at

¹⁴ CLAIR stands for the Council of Local Authorities for International Relations, London.

the Gilberton Lower Bridge where there was damage to the footpath. On this occasion it was necessary for council staff to identify risks, block the footpath and arrange for repairs to be carried out as a matter of urgency. However, I do not consider that given the communications technology available in this day and age, and having regard to the CEO's powers of delegation under section 101 of the Local Government Act, it is always necessary for a CEO to be physically present within the municipal area to be able to carry out his or her responsibilities effectively.

32. In summary, it is my view that based on the facts that the council had expressly approved the CEO's trip; that she was in Japan for 13 days; and that she had remote technology available to her to perform her duties, I do not consider that she was absent from her position as CEO. In these circumstances the obligation to appoint an acting CEO under section 102 of the Act did not arise.

Opinion

In light of the above, my final view is that in deciding not to appoint an acting CEO whilst the CEO was in Japan, neither she nor the council have breached section 102 of the Act and have not acted in a way which is unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

Whether the council complied with the law and its policies in incurring expenditure for the CEO's overseas trip

33. The council approved the CEO's participation in the Japan trip by a resolution at its meeting held on 15 August 2011. It was noted in the minutes that:
- That Council endorse the CEO's participation in the 2011 Local Government Exchange and Cooperation Program to Japan in November 2011 and cover associated airfare costs;
- That all expenses associated with the program registration and material, including all domestic activities and events in Japan will be fully funded by the Japan Local Government Centre (CLAIR, Sydney).
34. It is alleged in the disclosures to my office that the CEO arranged for the council to upgrade her laptop to allow for remote access so that she would be able to access the council's server and, in effect, work remotely whilst she was in Japan. It is alleged that the cost of the remote access was \$5,500; and that this was not disclosed to the council prior to its inclusion in the Budget Review Report, which was compiled for consideration by council at its meeting on 20 February 2012, (i.e. three months after the Japan trip took place).¹⁵
35. The disclosures also alleged that prior to the Japan trip, the CEO requested a one-off \$500 cash advance to help with her expenses, and that this was approved by the mayor. It appears to me that there is no council policy or practice for cash advance payments to be paid to employees. The first disclosure alleged that the cash advance could only have been approved by a resolution of council, as the mayor had no authority to approve such expenditure.
36. The disclosures therefore alleged that both of these were costs to council that were (a) not budgeted for expenses nor (b) taken to council for a resolution prior to their expenditure. In the case of the cash advance, it is alleged that it was given without proper authority.

¹⁵ In the event, the council's consideration of the Budget Review Report was deferred from the 20 February 2012 meeting to the 18 June 2012 meeting.

37. I have examined the council's minutes both before and after the Japan trip and can see no council resolutions that demonstrate that either the \$500 cash advance, or the alleged \$5,500 remote access cost were considered by the council. The only expense for the Japan trip that was approved by a council resolution was for the CEO's return international airfares. In his interviews with the mayor, and another councillor, Mr Warner established that both believed that the \$500 cash advance was discussed by the council at the time the airfares were approved, and that the cost of the remote access was covered by the training budget.

38. The council's powers of expenditure are provided by section 137 of the Act, which states:

137- Expenditure of funds

Subject to this or another Act, a council may expend its funds as the council thinks fit in the exercise, performance or discharge of its powers, functions or duties under this or other Acts.

39. The CEO has unlimited financial delegation to spend the council's budgeted funds.¹⁶ The disclosures to my office alleged that the funds utilised for the Japan trip were unbudgeted, and that the CEO therefore breached section 99(1)(g) of the Act. This provides:

- (1) The functions of the chief executive officer include -
 (a) - (f) ...
 (g) to ensure that the assets and resources of the council are properly managed and maintained

40. In addition to this statutory requirement, council's budget policy states:

Over Budget Expenditure

...

Where it becomes evident that expenditure is necessary for a purpose that has no budget allocation, Executive may authorise such expenditure, providing it does not exceed a total of \$5,000.

In the above situations where a budget line is exceeded or one needs to be established Executive must make the necessary budget amendment at the next budget review. Every attempt must be made to adjust other budget lines, expenditure and/or revenue so as not to adversely impact on the budget result.

...

Motions of Council

A motion of Council that would result in a budget implication, requiring additional expenditure to the adopted budget, or the significant redirection of resources from the ordinary business of staff, should be provided on notice and include the funding source and/or budget line and/or budget area the costing should be allocated.

No Motion without Notice shall be considered at a Council meeting which would involve the aggregate of additional expenditure of more than \$5,000.

41. The council budget for 2011/2012 included budget lines for IT software/hardware upgrades and training of \$79,300 and \$28,000 respectively. The council has advised me that the CEO utilised her delegation to incur the expenditure against these budget lines, in accordance with her delegation.

¹⁶ Instrument of Delegation under the *Local Government Act 1999*, adopted by the council at its meeting on 17 October 2011 to apply from that date, Item 34.

42. In relation to the iPad expenses, the council provided evidence (including receipts) that the cost of the CEO's iPad, plus the set up costs to enable her to use it in Japan, amounted to \$1,804 (i.e. not \$5,500 as alleged in the disclosure). It stated that this expenditure was properly incurred by the CEO in accordance with her delegation, against the budgeted IT software/hardware line. This appears to me to be appropriate, and the budget policy set out above has no application.
43. In relation to the \$500 cash advance paid to the CEO, the mayor stated in interview with Mr Warner:¹⁷

..Council was pleased that Kiki had been invited to go and were happy to pay her flights. Now, although everything was found in Japan, she felt that she might need some money to perhaps buy gifts for people if they took her out for a meal or invited her to their home or whatever. So, she asked me if I thought \$500 to take with her would be acceptable, and I couldn't see a problem with that, I could see what she was talking about, so I agreed. See normally, it's a difficult one because I don't deal with operational matters. There's a division. You know, I'm the elected mayor and then there's the operational manager, the CEO. So who does she check with in situations like this?

Presumably the mayor?

Well that's it, so yes, and I, I felt that was perfectly reasonable.

And you were comfortable with that?

Yes. So I agreed that would be acceptable.

44. The disclosures alleged that, under the budget policy, the only proper procedure to approve this cash advance was via council resolution, as was done with the council airfares. The council has advised me that in accordance with her delegation, the CEO was entitled to draw a cash advance from the training budget line, and the fact that she sought approval from the mayor for this expenditure was beyond what was required by her under her delegated authority. On the materials provided to me, I agree with the council's assessment.

Opinion

In light of the above, my final view is that the council and the CEO complied with the council's policies in relation to the expenditure for the Japan trip and did not act in a manner that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

Whether the CEO complied with her obligations under section 107 of the Local Government Act; and section 55A of the *Occupational Health, Safety and Welfare Act 1986*

45. The disclosures to my office alleged that the council's and the CEO's handling of the bullying complaints breached other legislation, namely section 107 of the Local Government Act; and section 55A of the *Occupational Health, Safety and Welfare Act 1986 (the OHSW Act)*.¹⁸ I have set out the facts and background to this issue above, in the section of this report headed 'Whether the Chief Executive Officer (CEO) had a conflict of interest, contrary to section 120(1) of the *Local Government Act 1999*, in overseeing the investigation of a complaint of which she was the subject'.

¹⁷ Mr Warner was independently engaged by the council to investigate employee claims of bullying against the mayor and CEO. His interview took place with the mayor on 8 May 2012.

¹⁸ I note that this provision was repealed by Sch. 6 cl. 11 of the [Work Health and Safety Act 2012](#), which commenced operation on 1 January 2013.

46. Section 107 of the Local Government Act sets out the 'general principles of human resource management' which the CEO must ensure are applied to employment in the administration of a council. The first disclosure alleges that the CEO breached section 107(2)(c), (d) and (f) in dealing with a bullying complaint made against her. These provide as follows:

107 - General principles of human resource management

(1) The chief executive officer must ensure that sound principles of human resource management are applied to employment in the administration of the council, and must take reasonable steps to ensure that those principles are known to all employees.

(2) In particular, the chief executive officer must ensure -

(a) ...

(b) ...

(c) that employees are treated fairly and consistently, and are not subject to arbitrary or capricious decisions; and

(d) that employees have access to suitable processes to deal with grievances concerning working conditions or the decisions of supervisors; and

(e) ...

(f) that employees are provided with safe and healthy working conditions; and

(g) ...

(h) ...

47. The council also has an occupational health, safety and welfare policy, which was signed by the CEO on 17 June 2011 (**the OHSW policy**). The OHSW policy defines unacceptable behaviour; introduces the Employee Assistance Provider (**the EAP**) for counselling support for all staff involved in complaints; and attaches procedural guidelines.
48. The procedural guidelines attached to the OHSW policy (option 2) state that any complaint must be made in writing, and:
- 2.2.4 If the accused is the Chief Executive Officer, the information must be referred to the Mayor.
49. As stated above, the whistleblower complied with this guideline by making a complaint to the mayor, in writing on 28 March 2012.
50. The procedural guidelines further state:
- 2.3.2 All formal complaints of bullying must be reported by the Executive / Team Leader who receives the complaint to the CEO who will monitor the investigatory and disciplinary process to ensure immediacy of action and procedural correctness. The CEO may appoint an external person to undertake the investigation where it is appropriate to do so.
- 2.3.3 Those investigating the complaint must not be connected with the allegation in any way.
- 2.3.4 A thorough investigation will be carried out, either by appropriate internal personnel or an external service provider.
- 2.3.5 All staff involved in the investigation will be required to maintain confidentiality. Failure to do so may result in disciplinary action.

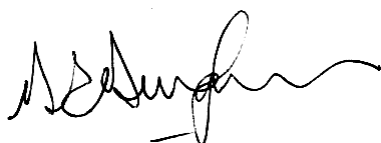
2.3.6 Where evidence from the investigation is sufficient to substantiate the claim of bullying and/or harassment, the alleged perpetrator's Executive / Team Leader will arrange for the implementation of counselling, training and/or disciplinary procedures to modify unsatisfactory behaviour, with details being recorded in a confidential complaint file.

2.3.7 Where the allegation of bullying and/or harassment is not substantiated, the relevant officer carrying out the investigation has responsibility for ensuring the resolution of any conflict between the two parties.

51. I note that whilst the OHSW policy states that complaints against the CEO are to be provided to the mayor, the policy does not cater for situations where there may be allegations against both the CEO and the mayor. Also, in relation to section 2.3.7 of the procedural guidelines, where an investigation is carried out by an independent assessor (for example, a law firm), and the claim of bullying and/or harassment is not substantiated, there is no 'relevant officer' to ensure the resolution of any conflict between the parties.
52. Section 55A of the OHSW Act defines the scope of bullying behaviour. Whilst it may be relevant to a consideration of any industrial issues arising from the events, I do not intend to consider it further because I consider it beyond the scope of my investigation and jurisdiction.¹⁹
53. The question for my investigation is whether the CEO, through the council's OHSW policy, complied with her obligations under section 107(2)(c)(d) and (f) of the Local Government Act. The disclosure alleges that she did not, and points in support to the findings of the Australian Services Union (ASU) in its survey of bullying complaints at the council undertaken in November 2011. The outcome of these proceedings²⁰ was that the ASU and the council agreed that its disciplinary policies and procedures be updated, including its complaint reporting procedures.
54. As I have outlined above, from the evidence provided to me I am not satisfied that the CEO was placed in charge of bullying allegations made against her, and therefore that she breached her obligations under section 107(2) of the Local Government Act. In my view, once the external investigations in relation to all bullying claims against the CEO were complete, and her actions exonerated, there is no reason why relevant individuals who reported to the CEO should not be performance managed by her.

Opinion

In light of the above, my final view is that the CEO complied with her obligations under section 107 of the Local Government Act, and that the council did not act in a manner that was unlawful, unreasonable or wrong within the meaning of section 25(1)(a) of the Ombudsman Act.



Richard Bingham
SA OMBUDSMAN

27 March 2013

¹⁹ I note that section 17(1) of the Ombudsman Act prohibits me from conducting an investigation if a complaint is made by an employee, and it relates to an administrative act done by another in the capacity of employer of that person.

²⁰ *Australian Services Union v Town of Walkerville SAIRComm* (516/2012) 31 October 2012