

Report

Full investigation - *Ombudsman Act 1972*

Complainant	Mayor Karen Redman
Council member	Cr Ian Tooley
Council	Town of Gawler
Ombudsman reference	2019/04332
Date complaint received	2 May 2019
Issue	Whether Cr Ian Tooley failed to comply with a finding of inappropriate behaviour for the purposes of clause 3.18 of Part 3 of the Code of Conduct for Council Members by failing to comply with a recommendation of an independent investigator adopted by the council on 27 November 2018

Jurisdiction

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

The complaint made by the Mayor of the Town of Gawler (**the council**) alleges that Cr Tooley did not make an apology to a public meeting of the council as required by a resolution made by the council on 27 November 2018 (**the resolution**).

The complaint alleges a breach of Part 3 of the Code of Conduct for Council Members (**the Code**) made pursuant to section 63 of the *Local Government Act 1999*.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

During my assessment of the complaint to determine whether to commence an investigation Cr Tooley was given the opportunity to make an apology at the council meeting on 28 May 2019. In the circumstances, I believe it was reasonable to provide that opportunity to Cr Tooley.

On 30 May 2019 I was informed that Cr Tooley did not make an apology at the public meeting of the council.

I consider it is proper to investigate the complaint.

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

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

Investigation

My investigation has involved:

- assessing the information provided by the Mayor
- seeking a response from Cr Tooley
- meeting with Cr Tooley
- considering the Local Government Act, the Code, the council's Complaints Handling Procedure under the Code of Conduct for Council Members' (**the procedure**) and the minutes of council meetings for 27 November 2018, 23 April 2019 and 28 May 2019
- providing the council and Cr Tooley with my provisional report for comment, and considering their responses
- providing the council and Cr Tooley with a further chance to comment on my provisional report in light of my consideration of Cr Tooley's separate complaint (discussed below)
- 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

Response to my provisional report

The Mayor initially commented in response to my provisional report that, if I proceeded to make a specific recommendation that the council reprimand Cr Tooley, I should provide sufficient clarity as to the options available to the council to enable it to comply. In that regard I have had regard to the relevant sanctions available to the council under the Code and have varied the recommendation foreshadowed in the provisional report.

Initially, Cr Tooley responded to my provisional report:

- noting that my provisional report highlighted that, while Cr Tooley disagreed with the findings of the Kelledy Jones investigation report (**the Kelledy Jones report**), he never lodged a complaint about it
- stating that he never raised a complaint because he was never advised that he had the option
- submitting that, had he known of his right to complain to my Office about the Kelledy Jones report, he would have done so without hesitation.

In light of that response, I considered it appropriate to give Cr Tooley the opportunity to lodge a complaint about the Kelledy Jones report with my Office before I finalised my views.

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.

I assessed that complaint, and determined that investigation was not necessary or justifiable on the basis that investigation was unlikely to result in a finding of administrative error and would not be a proportionate use of my Office's resources.

Subsequently, I provided the parties a further chance to respond on my provisional report in light of that determination.

Cr Tooley provided a further response, and I have addressed that response as necessary in the body of this report.

The council's Chief Executive responded by referring to the Mayor's previous response to my investigation and confirming that it did not wish to make any comment

Having considered the responses of the parties, my views remain as set out in the provisional report.

Background

1. On 23 July 2018 the Mayor received a complaint from another councillor alleging that on 13 February 2018 Cr Tooley breached Part 2 of the Code. As envisaged by the procedure, the council engaged Kelledy Jones solicitors to conduct the investigation of the complaint and to report to the council.
2. Kelledy Jones' investigation report was tabled at the council meeting on 27 November 2018.
3. The council considered the report and recommendations made and passed the following resolution:

Cr Koch declared a perceived conflict of interest in item 9.10 as the complainant (sic) and will deal with the matter by leaving the room.

Cr Koch sought and was granted leave of the meeting to make a personal statement

Cr Tooley declared a conflict of interest in item 9.10 as the subject of the complaint and will deal with the matter by leaving the room.

Cr Tooley sought and was granted leave of the meeting to make a personal statement.

Cr Tooley sought and was granted leave of the meeting to have 2 additional minutes to complete his personal statement

At 11:05 pm, Cr Ian Tooley left the meeting.

At 11:05 pm, Cr Paul Koch left the meeting.

9.10 CODE OF CONDUCT COMPLAINT FINAL REPORT

...

RESOLUTION 2018:11:COU466

Moved: Cr D Fraser

Seconded: Cr C Davies

That Council

1. Notes the Final Report by Kelledy Jones into the investigation of the alleged breach of Part 2 of Code of Conduct for Council Members.

2. Note the recommendations by Kelledy Jones in the Final report (Attachment 3).

3. That the personal explanations subject to legal advice be included in the minutes.

4. That Cr Tooley be required to provide an apology at a public meeting of the Council for his actions and behaviors (sic) at the IES Committee meeting of 13 February 2018 and 10 April 2018 and for his offensive and discourteous comments to elected member and Council employees at the IES meeting of 10 April 2018, in email exchanges and as reported in the media.

CARRIED

Cr Vallelonga called a division.
The Mayor declared the vote set aside.

In Favour: Crs C Davies, D Fraser, K Goldstone, D Hughes, P Little and N Shanks
Against: Crs B Sambell and J Vallelonga

CARRIED 6/2

4. The agendas for the subsequent council meetings on 18 December 2018, 22 January 2019, 26 February 2019, 19 and 26 March 2019 did not provide for a specific item to allow for Cr Tooley to make an apology.

5. The agenda for the council meeting scheduled for 23 April 2019 provided as follows:

Order of Business

...

9 Business Arising from Minutes..... 4

Cr Tooley apology as per 27 November 2018 Council meeting resolution
2018:11:COU466

...

6. The draft minutes of the meeting of 23 April 2019 record the following:

9 BUSINESS ARISING FROM MINUTES

Nil

Cr Tooley requested leave of the meeting to make a personal statement. Leave was not granted.

7. On 16 May 2019 one of my officers interviewed Cr Tooley in relation to the allegations against him. Cr Tooley refuted the findings of the investigation by Kelledy Jones. He intimated that he has always been prepared to address the issue but it had never been an agenda item at subsequent meetings. He remained committed to make a 'personal explanation' to a council meeting but that he was not inclined to make an apology.
8. I then contacted the Mayor and proposed that Cr Tooley be given a clear opportunity to make an apology to the next council meeting scheduled for 28 May 2019. Both Cr Tooley and the Mayor were amenable to this. The Mayor acknowledged that the minutes of the meeting of 23 April 2019 did not accurately reflect the discussion that took place at the time. The Mayor stated that a motion would be put to the next meeting to amend the minutes to accurately reflect the discussion.
9. At the next meeting of the council on 28 May 2019 a motion was put to amend the minutes of the meeting on 23 April 2019 to read:

9 BUSINESS ARISING FROM MINUTES

Nil

**Cr Tooley apology as per 27 November 2018 Council Meeting resolution
2018:11:COU466**

Mayor Redman invited Cr Tooley to address the Meeting and advised Cr Tooley he had the floor to deliver his apology.

Cr Tooley addressed the meeting in relation to resolution 2018:11:COU466. Mayor Redman sought clarification (sic) from Cr Tooley if it was he's (sic) intent to make an apology.

Cr Tooley sought leave of the meeting to make a personal statement. Leave was not granted.

Cr Koch raised (sic) a Point of Order objecting to the wording that was being used by Cr Tooley and ruled that he behave contrary to Regulation 29(2).

Mayor Redman upheld the Point of Order.

Cr Tooley advised the meeting that he would not be making an apology in regards to resolution 2018:11:COU466.

10. The minutes of the meeting record the following:

RESOLUTION 2019:05:COU168

Moved: Cr B Sambell

Seconded: Cr D Hughes

That the minutes as amended of the Ordinary Council meeting held on 23 April 2019 be confirmed as a true and correct record.

CARRIED

11. The minutes of the meeting also record the following:

9 BUSINESS ARISING FROM MINUTES

Cr Tooley apology as per 27 November 2018 Council meeting resolution 2018:11:COU466

Mayor Redman offered Cr Tooley an opportunity to present an apology.

Cr. Tooley referenced that there was no point in making an apology. He referenced that he was not satisfied with the amended Minutes of the Council meeting held 23 April as just resolved by Council which he considers are not an accurate record of what occurred at that meeting regarding the matter.

Mayor Redman offered Cr Tooley a further opportunity to present an apology.

Cr. Tooley did not respond.

Mayor Redman offered Cr Tooley a further opportunity to present an apology.

Cr Tooley again referenced his reasoning to not making an apology relative to the minutes of the Council meeting 23 April 2019.

Mayor Redman offered Cr Tooley a further opportunity to present an apology.

Cr. Tooley again referenced the Council meeting held 23 April 2019 minutes as just resolved.

Mayor Redman offered Cr Tooley a further opportunity to present an apology.

Mayor Redman commented that she concluded Cr Tooley's position such that he would not be offering an apology.

Cr. Tooley again referenced the Council meeting held 23 April 2019 minutes as just resolved and therefore was refusing to make an apology.

Mayor Redman noted that Cr Tooley was not going to make an apology.

Mayor Redman offered Cr Tooley a further opportunity to present an apology.

Mayor Redman moved to the next item of business.

12. In light of this I determined that I should conduct a full investigation of the complaint against Cr Tooley. On 31 May 2019 I informed the Mayor⁵ and Cr Tooley of my decision and I invited the latter to make submissions as to why he did not comply with the council resolution made on 27 November 2018.
13. On 4 June 2019 Cr Tooley made submissions in an email to my Office. The portions of the submission relevant to this investigation are as follows:

Dear Ombudsman Lines,

I write in reply to your email and letter dated 31 May 2019.

I would like to advise that I have been ready to give my apology statement since Nov 2018 but the opportunity was not provided to me until the 23 April 2019 Council meeting.

I disagree with, but respect, the Nov 2018 decision of council that I give an apology and believe that members deserve more than a mere 'I apologize/I do not apologize' statement given the length and \$11,000 cost of the matter. I believe that members deserve an explanation by way of an apology statement.

⁵ Section 18(1a) of the Ombudsman Act 1972 requires that I advise the principal officer of an agency when I intend conducting a full investigation of a complaint.

At the 23 April Council meeting the matter was listed on the agenda and I was given the floor to deliver my apology statement.

I began to deliver my apology statement only to be interrupted immediately by Mayor Redman demanding that I state if I was apologizing or not! I answered that I was giving an apology statement in the same way that she did when giving her apology statement for conflict of interest violations as directed by the Ombudsman last year, and I asked that I be allowed to continue uninterrupted. Mayor Redman refused to allow me to continue and she kept over-talking me, interrupting me and demanding that I simply state if I am apologizing or not. This went on for some time, and each time I repeated the same request, that I be allowed to deliver my apology statement uninterrupted. I felt that this was entrapment on behalf of mayor (sic) Redman, and that I was being bullied into making a refusal statement.

I then asked if I could be granted leave of the meeting to make a Personal Explanation, as a means to get some clean air and be able to give the chamber my apology statement, but this request was denied. Mayor Redman then stated that she would record this as a refusal to apologize and I replied, no you won't, you can record that I was denied natural justice and denied the opportunity to provide an apology statement!

...

Mayor Redman then announced to the chamber that I was to be granted leave to make an apology.

I replied that such an apology was now pointless as she had just ensured that the minutes recorded that I refused to apologize at the 23 April council meeting! I stated that this was incorrect and a false record of what actually took place and that if she was unwilling to correct the minutes of 23 April to accurately state that I was denied the opportunity to give my apology statement, then it was a done deal, she'd got what she wanted all along, and that I would therefore have nothing further to say on the matter.

Mayor Redman went on for some time, repeatedly demanding that I speak and deliver an apology and I remained silent.

...

14. Cr Tooley's response to my provisional report also included the following points:
- since the council had resolved that he apologise, he had gone to every council meeting ready and prepared to apologise but the opportunity was only offered on two occasions
 - Cr Tooley stated:
 - On both of the occasions where I have attempted to deliver my apology statement, 23 April and 28 May, I have been interrupted, badgered, bullied and shut down by Mayor Redman and unable to deliver my apology statement!
 - when Cr Tooley sat silent and refused to continue as a consequence, refusing to comply with the Mayor's insistence that he say "I apologise", the Mayor took that as a failure to apologise
 - Cr Tooley never stated "I refuse to apologise" and the minutes are inaccurate in that regard
 - Cr Tooley has no intention of delivering a two word statement, "I apologise"
 - given the circumstances of Cr Koch's complaint, he believes that the council deserves as more detailed apology statement
 - the Mayor has previously been given the opportunity to provide an apology statement herself in another matter
 - Cr Tooley stated:
 - All I have ever wanted to do is, in compliance with the resolution of council, and in accord with meeting procedure and natural justice, is to be allowed my right to deliver my apology statement uninterrupted and without criticism, rebuttal, bullying and harassment!

If council then decide to formally consider what I had to say in my apology statement, if they then deliberate as to whether they accept or reject my apology statement, I am more than happy to leave the chamber for that to happen and I will accept the outcome of that process!

Relevant law/policies

15. Section 63 of the Local Government Act provides 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.

16. Clause 2.6 of the Code provides that:

Responsibilities as a member of Council

2.6 Comply with all Council policies, codes and resolutions.

17. Clause 2.22 of the Code provides that:

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.

18. Clause 3.18 of the Code provides 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 Ian Tooley failed to comply with a finding of inappropriate behaviour for the purposes of clause 3.18 of Part 3 of the Code of Conduct for Council Members by failing to comply with a recommendation of an independent investigator adopted by the council on 27 November 2018

19. It is not in dispute that Kelledy Jones made a finding of inappropriate behaviour against Cr Tooley or that the council validly resolved to adopt Kelledy Jones' recommendation that Cr Tooley apologise.

20. In my view the resolution is clear in terms of what Cr Tooley was required to do; that is, provide an apology at a public meeting of the council. Furthermore, the council's rationale for passing the resolution was clear, namely:

for his actions and behaviors (sic) at the IES Committee meeting of 13 February 2018 and 10 April 2018 and for his offensive and discourteous comments to elected member and Council employees at the IES meeting of 10 April 2018, in email exchanges and as reported in the media.

21. I have not investigated the manner in which the investigation was conducted by Kelledy Jones or whether the evidence supported the recommendations made. Having considered a complaint in that regard, I determined that investigation was not necessary or justifiable.

22. On receiving the complaint about Cr Tooley, my Office endeavoured to arrange an opportunity for Cr Tooley to comply with the resolution. The council was amenable to this. This arrangement failed to achieve its intended outcome.

23. I consider that in resolving to adopt the recommendations of Kelledy Jones, the council intended that Cr Tooley apologise. I note that clause 2.6 of the Code requires council members to comply with all council resolutions. I consider it reasonable to construe the Code as intending that any breach of it that is substantiated through the proper processes will result in consequences for the council member who is found to have committed the breach.

24. The submissions made by Cr Tooley to my investigation are consistent with his stated view that he did not act in the manner alleged in the Kelledy Jones investigation. Cr Tooley had the opportunity to provide his views to the investigation (and to make a complaint to my Office, which he subsequently did). Regardless of whether he agrees with the outcome of the investigation, the council has validly resolved that he now apologise. Cr Tooley has not apologised despite being given two opportunities to do so. Cr Tooley has told my investigation on 16 May 2019 that he was not inclined to apologise and in my view, his subsequent statement to the council on 28 May 2019 is consistent with that position.
25. I am advised that the council provided training on the operation of the Code to council members, including Cr Tooley, on 21 May 2019. Considering this training together with his overall experience as a council member, I am of the view that Cr Tooley should be fully aware of his responsibilities as a council member.
26. In my view Cr Tooley has had ample opportunity to raise the issue of an apology and his preparedness to comply (or not) with the resolution since November 2018.
27. I am also of the view that, even if Cr Tooley does not agree with the Kelledy Jones finding, refusing to apologise is unnecessarily obstructive, shows a disregard for the principles underpinning the Code and potentially undermines community confidence and trust in local government.
28. Cr Tooley has raised concerns about the fact that the Mayor repeatedly asked whether he was going to apologise before allowing him to make a personal statement. In the circumstances, I do not consider it unreasonable for the Mayor to clarify that issue before allowing him to continue. I also consider that the issues raised about the accuracy of the minutes are a matter of interpretation and I do not consider they warrant further enquiry by my Office.
29. I consider that the terms of the resolution are clear as to what type of apology is required. Despite Cr Tooley's personal views, there is no reason why he should not be able to comprehend or comply with the resolution.
30. My view is that Cr Tooley's failure to comply with the recommendation of the Kelledy Jones investigation that he apologise, as adopted by the council on 27 November 2018, 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 requirements of section 63 of the Local Government Act.

Opinion

In light of the above, I consider that Cr Tooley has failed to comply with a finding of inappropriate behaviour for the purposes of clause 3.18 of Part 3 of the Code and section 63 of the Local Government Act. In this way, Cr Ian Tooley 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 the council propose a resolution censuring Cr Tooley for his failure to comply with the Code of Conduct for Council Members.

Final comment

I now report Cr Ian Tooley's misconduct to the principal officer of the council, as required by section 18(5) of the Ombudsman Act.

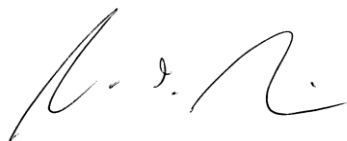
In accordance with Part 3 of the Code of Conduct for Council Members, this report must be provided to a public meeting of the council within two ordinary meetings of the council receiving my report.

In accordance with section 25(4) of the Ombudsman Act, I request that the council report to me by **20 February 2020** on what steps have been taken to give effect to my recommendation 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.

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*.



Wayne Lines
SA OMBUDSMAN

18 November 2019