



OmbudsmanSA

## Report

### Full investigation - *Ombudsman Act 1972*

Complainant	Mayor Jayne Bates
Council member	Cr Graeme Walkom
Council	Kangaroo Island Council
Ombudsman reference	2014/03554
Council reference	L2014/999
Date complaint received	17 April 2014
Issues	Whether Cr Walkom failed to comply with a finding of inappropriate behaviour, contrary to clause 3.18 of the Code of Conduct

#### Jurisdiction

The complaint alleges a breach of Part 3 of the Code of Conduct for Council Members made pursuant to section 63 of the *Local Government Act 1999* (the Code of Conduct).<sup>1</sup> 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.<sup>2</sup>

I consider that the complaint about Cr Walkom falls within this definition; and I am also satisfied that in relation to the complaint, Cr Walkom was 'engaged in the work of ... [the] agency' within the meaning of section 3 of the Ombudsman Act.

#### Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from Cr Walkom
- considering:
  - the Code of Conduct
  - the report of the Local Government Governance Panel (the LGGP), *Report on the Investigation of Code of Conduct Complaint, 577228 - Kangaroo Island Council - Bernie and Meaghan May -v- Cr Graham Walkom*
  - report prepared for the council meeting held on 9 April 2014 - *Assessing Cr Walkom's compliance with Council's Resolution with regard to the findings of the LGGP (the staff report)*
  - section 263B(1) and (2) of the Local Government Act
- preparing a provisional report and sending it to the parties for comment
- considering the parties' responses
- preparing a revised provisional report and sending it to the parties for comment

<sup>1</sup> The Code of Conduct was gazetted on 29 August 2013.

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

- considering the parties responses
- preparing this final 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.<sup>3</sup> 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 ...<sup>4</sup>

### Responses to my provisional reports

I published my provisional report to the parties on 6 May 2014, and sought their responses by 13 June 2014.

The complainant responded by letter dated 28 May 2014. She made the following points:

- she is supportive of my provisional findings, but considers the offensive material on the social postings requires further consideration. She notes that whilst Cr Walkom has requested the posting be removed and the web master has refused to do so, the council also directed that an apology be posted on the website
- she states that 'the ongoing and inappropriate actions by Cr Walkom throughout [the LGGP and my] investigations have increased, creating further offence to the May's, inappropriate criticism of the CEO and Staff and an extra burden on the administration to track the compliance on the KIPolis website, only to be criticised of lying in a report to Council, as detailed in my initial complaint'
- Cr Walkom's apology is 'incomplete, insincere and is almost impossible to find in a comment box'. Cr Walkom states in this apology (Council opts for Handouts rather than fixing roads, posting dated 16/3/2014) that he has 'not included the name as I did not include it on the original post above'. She states that this apology 'thus becomes a nonsense as it is to no one'
- she asks me to reconsider my provisional findings to ensure that Cr Walkom's apology on the KIPolis website is visible; fulfils the requirements of the council's recommendation; and provides the community with confidence in the outcome.

Cr Walkom responded by email dated 12 June 2014, as follows:

- Mrs May did not make any representations to him, and this is acknowledged by the LGGP
- the advice from the mayor about the events at the meeting held on 12 February 2014 is inaccurate, and in any event is irrelevant. Further, Mr and Mrs May may well have been in the gallery at that meeting, but he has never been introduced to them and could not have recognised them
- he clarified the events surrounding his request at the council meeting held on 12 March 2014 to include the words 'in full accord' in his apology.

<sup>3</sup> 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.

<sup>4</sup> *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

- the first occasion on which he became aware there was a late item relevant to this matter was on 6 June 2014, when it was posted to him as an inclusion in his agenda pack for the 11 June 2014 meeting. He was never advised there was, or was to be an attempt to correct the record regarding this matter; and he does not believe that this accords with the Local Government Act
- my comments about the findings of the LGGP in an earlier report were premature, and he considers them to be a denial of natural justice
- my provisional findings appear to be that he was guilty of not apologising to no-one in particular
- he noted that at the council meeting held on 11 June 2014, in order to clarify this matter he made a personal statement adjusting the apology he originally made on 12 February 2014. He advised me of the subsequent motion passed by the council

In view of the content of these responses, and the developments which have occurred (notably the further apology made by Cr Walkom at the council meeting held on 11 June 2014), I considered it appropriate to publish this revised provisional report to the parties for comment.

I published my revised provisional report to the parties on 17 June 2014, and sought their responses by 27 June 2014. I received no response from the complainant.

Cr Walkom responded by email dated 27 June 2014, seeking clarification of my views on why he should apologise to Mrs May as she was not an intended recipient of his original email. I noted in response that Mrs May was a named complainant in the LGGP investigation; that she was interviewed as a part of it; and that she is one of the other people who 'may have been affected', within the meaning of the LGGP recommendation and council decision. I amended the form of the recommended apology accordingly.

## Background

1. On 9 September 2013, Mr and Mrs Bernie and Meaghan May sent an email to the mayor complaining about an email which they had received from Cr Walkom. Cr Walkom's email was dated 8 September 2013, and responded to Mr May's representations on behalf of the Parndana Sports Club about council spending on Community Infrastructure Grants.
2. The mayor referred Mr and Mrs May's complaint to the LGGP on 9 September 2013. The LGGP undertook an investigation, which found that Cr Walkom had breached Parts 2.3 and 2.4 of the code 'by sending an email which was offensive in character and disrespectful towards Mr May and a group of residents of Kangaroo Island'. The LGGP required that Cr Walkom 'issue a public apology in a public meeting of Council to Mr May and anyone else who may have been affected, within a timeframe to be determined by Council'.
3. The LGGP report concluded with the following comments:

### Recommendations

It is a matter for Council to consider what action, if any, it wishes to take however the Panel recommends that Council:

- notes this report at a public meeting of council;
- notes that having investigated the alleged breach of the council Members Code of Conduct, the Local Government Governance Panel finds that Cr. Walkom has breached Sections 2.3 and 2.4 of the council Members Code of Conduct by sending an email which was offensive in character and disrespectful towards Mr May and a group of residents of Kangaroo Island;

- requires that Cr. Walkom issue a public apology in a public meeting of council to Mr. May and anyone else who may have been affected, within a timeframe to be determined by council;
  - notes the obligations, joint and several, of all Elected Members to behave at all times in manner prescribed by the council Members Code of Conduct and takes steps to ensure that all Elected Members (current and future) understand these obligations; and
  - takes such other action as it sees fit.
4. The LGGP's final report was presented to the council on 22 January 2014, as Item 10.3 on the agenda. The council's resolution on the item read:  
Item No 10.3

Report Title Code of Conduct Final Report 01/2013  
Moved Cr Clements

Seconded Cr Connell

That Council adopt the recommendations of the Local Government Governance Panel in its entirety, namely:

- That this be noted at the public meeting of Council;
- Having investigated the alleged breach of the Council Members Code of Conduct, the Local Government Governance Panel finds that Cr Walkom has breached Sections 2.3 and 2.4 of the Council Members Code of Conduct by sending an email which was offensive in character and disrespectful towards Mr May and a group of residents of Kangaroo Island;
- That Cr Walkom issue a public apology in a public meeting of Council to Mr May and anyone else who may have been affected, within two months of Council's resolution;
- Note the obligations, joint and several, of all Elected Members to behave at all times in a manner prescribed by the Council Members Code of Conduct and takes steps to ensure that all Elected Members (current and future) understand these obligations; and
- Takes such other actions as it sees fit

With the inclusion of the following directive:

- That postings on all social media relevant to the offence be removed and replaced by a public apology.

CARRIED.

5. At a special meeting held on 29 January 2014, the council considered a further report, following comments received from Cr Walkom on the outcomes of the LGGP's investigation. The mayor has advised me that these comments were received too late to be considered at the 22 January 2014 meeting, and were provided to the council at the earliest opportunity. The resolution of the council following this report was:

That Council acknowledges receipt of Cr Walkom 's comments and maintains the resolution 10.3 passed at the 22 January 2014 Council meeting.

6. At the council meeting held on 12 February 2014, Cr Walkom offered an apology to Mr May. The mayor has advised me that at the time Cr Walkom was asked if he would like to extend his apology to include 'anyone else who may have been affected'; and that he declined. Cr Walkom disputes the mayor's recollection in this regard. In any event, the apology was recorded in the minutes as follows:

Minute Item 4.2:

Moved Cr Clements

Seconded Cr Willson

That Council record the apology of Cr Walkom verbatim:

Cr Walkom stated "I unreservedly apologise to Mr Bernie May in accordance with resolution 10.3" (of the 22 January 2014 Council meeting).

CARRIED. 4 For 3 Against

7. The mayor has also advised that both Mr and Mrs May and a number of affected residents (members of the Parndana Sports Club) were present in the gallery when Cr Walkom made his apology to the council, but that Cr Walkom did not acknowledge nor address his apology to them. Cr Walkom does not dispute that they were there, but states that he has 'never been introduced to them and could not have recognised them'.
8. At the council meeting held on 12 March 2014, when the minutes of the previous meeting on 12 February 2014 were being considered, Cr Walkom asked that the words.. *.in full accord* be added to his apology. The minutes record the outcome as follows

Minute Item 4.1:

and further that minute 4.2 being altered to read:

"Moved Cr Clements

Seconded Cr Wilson

That Council record the apology of Cr Walkom verbatim:

Cr Walkom stated "I unreservedly apologise to Mr Bernie May in full accord with resolution 10.3" (of the 22 January 2014 Council Meeting).

CARRIED. 4 For 3 Against"

9. In relation to this minute, Cr Walkom has commented to my investigation:
 

Unfortunately these words [i.e. the words 'in full'] were then inserted in the wrong place and I chose not to seek further correction. Had they been inserted correctly my apology would have read as I gave it : that I apologise in full accord with council's resolution - which of course covered any nuance or interpretation that anyone might want to make, and was always going to be what council meant or required.
10. Following the effluxion of the two month period specified in the council's resolution of 22 January 2014, at the request of the council's CEO the Executive Officer prepared the staff report assessing Cr Walkom's compliance with the council's resolution. As Cr Walkom had requested and been granted leave for the month of April, the staff report was provided to him by email on 24 March 2014 to allow him to provide written comments.
11. Cr Walkom provided his comments to the mayor on 30 March 2014. They contained statements which I do not need to consider in detail here, as they are beyond the scope of this investigation. However, I set out the events relevant to a consideration of the issue in this investigation.
12. The mayor advised me that she sought legal advice about Cr Walkom's comments, because of the council's concern over the CEO's health and wellbeing and its obligations under work health and safety legislation. She advised me that she 'considered Cr Walkom's statement criticising the CEO to be manifestly unfair and untrue, and certainly not relevant to the subject of his compliance to Council's recommendation'.
13. In accordance with the legal advice, on 31 March 2014 the mayor provided an email to all elected members including the legal advice and the full statement by Cr Walkom. However, she informed the elected members that only a redacted version of Cr Walkom's comments would be printed in the agenda.

14. On 1 April 2014, Cr Walkom sent a response to the mayor and the other elected members, amongst other things requesting that the council have the CEO 'medically assessed and a relevant professional management plan developed'. On the same day, the deputy mayor responded to Cr Walkom's email, and Cr Walkom in turn responded to the deputy mayor objecting to the fact that the mayor and deputy mayor had accepted the staff report as factual. In this response, Cr Walkom commented as follows:

A majority of the status 'facts' in this report are lies pure and simple.

...

I will not accept that my response is edited: I formally advise here that I withdraw that response in total (March 30) and decline to comment on the CEO's report at all.

15. In a separate email to the mayor dated 3 April 2014, Cr Walkom commented:

I am advising you that if a Council agenda is published with the CEO's report (referenced here or similar) containing errors of fact pertaining to my actions, then I will also publish an appropriate clarification.

16. On 3 April 2014, the agenda and papers for the 9 April 2014 council meeting were distributed to elected members. On 4 April 2014, Cr Walkom posted an article on the website known as Klpolis titled 'Misleading CEO Report against Councillor'. This article was attached to a posting titled 'Klpolis will not be drawn in the censoring and silencing of Cr Walkom'. The article contained the full commentary provided by Cr Walkom to the mayor in response to the staff report, and which had been subsequently withdrawn by Cr Walkom.

17. Cr Walkom does not agree that this sequence of events correctly reflects what occurred, and has advised my investigation as follows:

15) Only true in part - the very first time I received, indeed became aware there was a late item relevant to this matter was on Friday 6th June 2014, when it was posted to me as inclusion in my agenda pack for the 11th June 2014 council meeting. I was never advised there was, or was to be an attempt to correct the record regarding this matter. Not in accord with the LG Act I believe.

18. At its 9 April 2014 meeting, the council considered the staff report (and addendum report) to assess Cr Walkom's compliance with the resolution of 22 January 2014. The council determined as follows:

Moved Cr Davis

Seconded Cr Willson

That the addendum to item 10.5 be received.

CARRIED.

10.5.1

Moved Cr Denholm

Seconded Cr Willson

1. That Council having considered the report and subsequent addendum report have assessed Cr Walkom's compliance to the recommendations following a final report from the LGGP 01/2013 and does not consider Cr Walkom has complied:

- a) Cr Walkom did not extend his public apology in a meeting of Council to anyone else who may be affected.
- b) Cr Walkom's social media post relevant to the offense has not been removed.
- c) Cr Walkom's apology in a 'comment box' on social media is not considered a genuine apology to Mr May and anyone else who may have been affected.

- d) Cr Walkom's posting dated 4th April 2014 titled "Misleading CEO Report against Councillor" as a response to the Report contains an apology to 'anyone else who took offense to my remarks' but failed to meet the deadline of 22nd March.
- e) This posting also contained inappropriate commentary towards the CEO and misrepresents the LGGP final report by inferring Mrs May's complaint was ruled 'mischievous'.

The Council refers this failure to comply to a finding of inappropriate behaviour to the Ombudsman as per the section 3.18 of the Elected Members Code of Conduct

2. The Council refers the inappropriate commentary by Cr Walkom in regards to the CEO in the posting 'Misleading CEO Report against Councillor' to the LGGP as a breach of Section 2.2, 2.4 and 2.11 of the Elected Member Code of Conduct.

CARRIED. 5 For I Against  
Cr Connell called a division  
For: Crs Denholm, Wilson, Connell, Boxall & Davis  
Against: Cr Liu

19. On 29 April 2014, Cr Walkom provided me with a copy of an email which he had sent to the webmaster of the KIPolis site on 16 March 2014 at 10.00pm. It read as follows:

You may be aware that the Kangaroo Island Council has resolved that I must remove the post originally sent to Mr Bernie May from the website and to replace it with an apology. I have posted the apology, but am unsure if you are able to delete my post without the supplementary posts - I will leave it to your discretion.

Please note this is a mandated requirement by council and I have likewise requested The Islander newspaper to similarly remove their references to this matter and one other site. So far I have not had any acknowledgement of this request.

20. At the council meeting held on 11 June 2014, Cr Walkom sought leave to make a personal statement 'to adjust the apology' which he originally made on 12 February 2014. The council then passed the following motion:

18.2 Moved Cr Davis

Seconded Cr Clements

That Cr Walkom's personal statement be recorded in the minutes, being:

"I refer to resolution 10.3 of the 22 January 2014 Council meeting and the subsequent apology I gave in respect to this.

To clarify this matter, I apologise in full accord with Council's resolution. And now fully withdraw my original apology, save for the date on which it was made."

CARRIED.

21. Based on a recent viewing of the KIPolis site, it appears to me that the webmaster has declined to accede to Cr Walkom's request, for reasons which he has explained.<sup>5</sup> Cr Walkom's original post dated 22 September 2013 concerning his response to Mr May,<sup>6</sup> and his subsequent post dated 4 April 2014 criticising the council's CEO,<sup>7</sup> remain on the website.

### Relevant law/policies

22. Clause 2.6 of the Code of Conduct provides:

#### Responsibilities as a member of Council

<sup>5</sup> [http://www.buddhayatana.org/blog\\_KIpoli/?p=1299](http://www.buddhayatana.org/blog_KIpoli/?p=1299), viewed at 6 May 2014.

<sup>6</sup> [http://www.buddhayatana.org/blog\\_KIpoli/?p=1193](http://www.buddhayatana.org/blog_KIpoli/?p=1193), viewed at 6 May 2014.

<sup>7</sup> [http://www.buddhayatana.org/blog\\_KIpoli/?p=1343](http://www.buddhayatana.org/blog_KIpoli/?p=1343), viewed at 6 May 2014.

2.6 Comply with all Council policies, codes and resolutions.

23. Clause 3.18 of the Code of Conduct provides:

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 Walkom failed to comply with a finding of inappropriate behaviour, contrary to clause 3.18 of the Code of Conduct**

24. The findings of the LGGP were expressed as recommendations, which were adopted in full by the council at its 22 January 2014 meeting. The council also determined to add an additional matter concerning Cr Walkom's posting on the KIPolis website, which had occurred subsequent to the council's referral of Mr May's complaint to the LGGP. I therefore consider that by virtue of its 22 January 2014 resolution, the council made findings of inappropriate behaviour against Cr Walkom.

25. I note that in a previous investigation,<sup>8</sup> I commented on the LGGP findings as follows:

I consider the Panel's findings to be fair and reasonable and I support the proposed recommendations for Cr Walkom to take public responsibility for his mistake.

Cr Walkom considers this statement to be 'premature and a denial of natural justice'.

26. Under clause 2.6 of the Code of Conduct, Cr Walkom was obliged to comply with the council's 22 January 2014 resolution. Under clause 3.18, a failure to comply with the resolution amounted to grounds for a complaint under Part 3 of the Code of Conduct.

27. Based on the above outline of the facts, it is apparent that Cr Walkom originally apologised publicly to Mr May, but did not extend his apology to include 'anyone else who may have been affected' by his email of 8 September 2013. I accept that he endeavoured to rectify this at least partially by his personal statement made to the council meeting held on 11 June 2014, in which he stated that he apologised 'in full accord' with the council resolution.

28. I acknowledge that this apology is not directed to any person in particular. However, it appears to me that Cr Walkom has now complied with the third dot point of the council resolution made at the meeting held on 22 January 2014, which reflects the recommendation of the LGGP. This requirement was as follows:

That Cr Walkom issue a public apology in a public meeting of Council to Mr May and anyone else who may have been affected, within two months of Council's resolution

29. Nonetheless, my final view is that for the period from 22 March 2014 (being 2 months from the date of the council meeting at which the apology was first required to be made) to 11 June 2014 (when the complying apology was tendered at the council meeting held on that day), Cr Walkom was in breach of his obligation to comply with a council resolution.

30. It also appears to me that Cr Walkom sought to remove the article which he posted to the KIPolis website on 22 September 2013, and replaced that posting with the following comment:

<sup>8</sup> Ombudsman reference 2013/10720 - Complaint by Mayor Jayne Bates on behalf of the Kangaroo Island Council against Cr Graham Walkom.



Cr Walkom on 2014/03/16 at 21:50 said:

Councillors are now required to comply with any resolution that demands an action by them and council requires me to remove my original post and apologise. To this end I have written to the webmaster and advised of council's resolution and their requirement.

In accordance with their requirement for an apology a (sic) include the same apology I formally made in council; "That in full accord with the resolution I unreservedly apologise to ....." "

I have not included the name as I did not include it on the original post above.  
Cr Graham Walkom<sup>9</sup>

31. The mayor has commented that this apology is 'incomplete, insincere and is almost impossible to find in a comment box'. Cr Walkom states in this apology (Council opts for Handouts rather than fixing roads, posting dated 16/3/2014) that he has 'not included the name as I did not include it on the original post above'. She states that this apology 'thus becomes a nonsense as it is to no one'. As noted above, it appears to me that the webmaster has declined Cr Walkom's request to remove his 22 September 2013 post.

### Opinion

In light of the above, my final view is that for the period from 22 March 2014 to 11 June 2014, Cr Walkom breached clause 3.18 of Part 3 of the Code of Conduct and section 63 of the Local Government Act by failing to comply with a finding of inappropriate behaviour made by the council against him. In this way, Cr Walkom acted in a manner that was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

### Recommendations

In my provisional report I foreshadowed making a recommendation under section 25(2) of the Ombudsman Act and section 263B(1) of the Local Government Act that:

- the council reprimand Cr Walkom
- the council require Cr Walkom to issue a public apology in a public meeting of the council to Mr May and anyone else who may have been affected by Cr Walkom's email of 8 September 2013, by 31 July 2014.

In view of the public apology tendered by Cr Walkom to the council meeting held on 11 June 2014, I do not consider it necessary to make that recommendation.

In my provisional report I noted also that I had given consideration to making a recommendation that the council require Cr Walkom to replace his 22 September 2013 posting on the KIPolis website with an apology, as sought by the last dot point in the council's resolution of 22 January 2014. In that report, I expressed the view that this was not within Cr Walkom's power to achieve, given the apparent attitude of the KIPolis webmaster; and I noted that Cr Walkom had qualified his original post with the apology which I have quoted above.<sup>10</sup>

However, the complainant has made submissions on this matter, and I consider that there is merit in them. I now recommend that, as sought by the last dot point in the council's resolution of 22 January 2014, Cr Walkom replace his 22 September 2013 posting on the KIPolis website with an explicit apology as follows:

In accordance with a council resolution dated 22 January 2014, I, Cr Graham Walkom, apologise to Mr Bernie May, and any other person who may have been affected, for distributing an email dated 8 September 2013 which has been determined by the Local Government

<sup>9</sup> [http://www.buddhayatana.org/blog\\_KIpolis/?p=1193](http://www.buddhayatana.org/blog_KIpolis/?p=1193), viewed at 6 May 2014.

<sup>10</sup> Paragraph 30.

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Governance Panel to have been offensive in character and disrespectful towards Mr May and a group of residents of Kangaroo Island.

I note that if Cr Walkom fails to comply with this recommendation, under section 263B(2) of the Local Government Act he will be taken to have failed to comply with Chapter 5 Part 4 of that Act; and the council is to ensure that a complaint is lodged against him in the District Court.

In accordance with Part 3 of the Code of Conduct for Council Members, my report must be provided to a public meeting of the council, within two ordinary meetings of the council following the receipt of the recommendations. I now recommend that the council confirm to me in writing that my report has been so tabled within the stipulated timeframe.



Richard Bingham  
SA OMBUDSMAN

30 June 2014