



Report of the Queensland Ombudsman



QUEENSLAND
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The Councillor Code of Conduct Report

An investigation into the Redland Shire Council's management of a complaint against a councillor.

December 2007

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3 December 2007

The Honourable Mike Reynolds MP
Speaker of the Legislative Assembly
Parliament House
George Street
BRISBANE QLD 4000

Dear Mr Reynolds

In accordance with s.52 of the *Ombudsman Act 2001*, I hereby furnish to you my report, *The Councillor Code of Conduct Report: An investigation into the Redland Shire Council's management of a complaint against a councillor*.

This report arises from my investigation of a complaint made by a Redland Shire councillor about how Council managed a complaint made against her. The complaint was to the effect that the councillor had breached the Councillor Code of Conduct by her unauthorised attendance at a quarry.

I have formed the opinion that Council did not afford the councillor procedural fairness during its own investigation. I also make recommendations in the report, both for the rectification of the procedural unfairness in this case, and for improvements in complaint handling processes both at Redland and across local government generally.

Yours faithfully

A handwritten signature in black ink, appearing to read "D Bevan".

David Bevan
Queensland Ombudsman

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Foreword

Amendments to the *Local Government Act 1993* in 2005 required all local governments in Queensland, by 1 March 2006, to develop and implement a code of conduct to guide the management of complaints made about the actions of councillors.

In December 2006, I received a complaint from a councillor of Redland Shire Council in relation to an investigation Council had conducted under its own Code of allegations made against her by a member of the public.

My investigation revealed that Council's internal handling of the complaint, and subsequent resolution reprimanding the councillor, were flawed and that the councillor had not been given procedural fairness. Accordingly, among other recommendations, I have recommended that Redland Shire Council rescind its reprimand of the councillor.

This case has brought to light the difficulties councils may face in conducting investigations of alleged breaches of codes of conduct by councillors. With a view to ensuring the problems I found in the Redland matter do not recur elsewhere, I provide advice to councils on conducting such investigations.

Accordingly, I believe this report will serve as a useful case study for all Queensland councils and enable them to manage future complaints against councillors in a timely and efficient manner, while adhering to the requirements of procedural fairness.



David Bevan
Queensland Ombudsman

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Abbreviations and Dictionary

Addendum	The document prepared on 7 June 2006 by the Complaints Officer as an addendum to the complaint investigation report of 30 May 2006, detailing further investigation of property and safety issues at the quarry
CEO	Ms Susan Rankin, Chief Executive Officer, Redland Shire Council
CMC	Crime and Misconduct Commission
Code	The Redland Shire Council's Councillor Code of Conduct
Complaints Officer	The Council officer who was appointed by the CEO as the complaints officer to undertake the investigation into the complaint against Cr Bowler
Council	Redland Shire Council
Cr Bowler	Councillor Toni Bowler, Redland Shire Council
Department	Department of Local Government, Sport and Recreation (formerly the Department of Local Government, Planning, Sport and Recreation until 13 September 2007)
LGA	<i>Local Government Act 1993</i>
Mayor	Cr Don Seccombe, Mayor, Redland Shire Council
Minister	The Minister with responsibility for the <i>Local Government Act 1993</i> (currently the Honourable Warren Pitt MP; the Honourable Andrew Fraser MP between September 2006 and September 2007; prior to the 9 September 2006 State election, the Honourable Desley Boyle MP).
MQSHA	<i>Mining and Quarrying Safety and Health Act 1999</i>
Officer 1 and Officer 2	The officers who accompanied Cr Bowler to the quarry on 22 May 2006
Ombudsman Act	<i>Ombudsman Act 2001</i>
quarry	The quarry relevant to the complaint
quarry representative	The representative of the quarry who made the complaint to Council about the presence in the quarry car park of Cr Bowler and Officers 1 and 2 on 22 May 2006
solicitors' submission	The submission of 10 August 2007 (reproduced in Appendix 2) on behalf of the Council, the Mayor, the CEO and the Complaints Officer in response to the Ombudsman's proposed report

Executive Summary

Background

The *Local Government Act 1993* (LGA) requires all local councils to implement a code of conduct for their councillors.

On 11 December 2006, I received a complaint¹ from Cr Toni Bowler of the Redland Shire Council (Council) about a Council investigation under its Councillor Code of Conduct (the Code) into her actions. The investigation was in response to a complaint about Cr Bowler made by a local quarry representative.

Essentially, the quarry representative's complaint was initially treated as a complaint that Cr Bowler and two Council officers had trespassed on quarry property on 22 May 2006.

Council conducted an investigation of the complaint under its Code and, ultimately, reprimanded Cr Bowler.² Council formally discussed the matter twice (in General Meetings of 31 May 2006 and 26 July 2006).

At Council's General Meeting on 26 July 2006, it resolved:

- 1. To accept the findings of the complaints officer that there is sufficient evidence to substantiate the allegation that on 22 May 2006, Cr Bowler was on land under the safety control of the complainant contrary to the lawful signage requiring visitors to report to the site; and*
- 2. That this action by the Councillor constituted a breach of the Councillor Code of Conduct and is a minor breach as defined in section 250M of the Local Government Act 1993, and, therefore, in accordance with sections 250S and 250X of the Local Government Act 1993, reprimand the Councillor in writing.*

Cr Bowler alleged that:

- the complaint was frivolous and vexatious;
- Council failed to correctly follow the Councillor Code of Conduct in managing the complaint;
- Council conducted a biased investigation to intimidate and discredit her as an elected member; and
- Council prejudged her.

In her submission, Cr Bowler expressed concern about the operation of the Code generally, and the lack of clear guidance provided by the LGA.

I commenced an investigation under the *Ombudsman Act 2001* (Ombudsman Act)³ into these matters. My investigation was conducted informally⁴ without exercising my coercive powers.⁵

¹ Forwarded by the Minister for Local Government, Planning, Sport and Recreation

² See Appendix 1 for a timeline of this case.

³ Ombudsman Act s.12(a)(ii)

⁴ Ombudsman Act s.24(a)

⁵ Ombudsman Act, part 4

Role of Ombudsman

The Ombudsman's role is to investigate the administrative actions of public sector agencies and to consider whether those actions are (among other things):

- unlawful, unreasonable or unjust;
- taken on irrelevant grounds or having regard to irrelevant considerations;
- based wholly or partly on a mistake of law or fact; or
- wrong.⁶

The Ombudsman is empowered to make recommendations to the principal officer of an agency that action be taken to rectify the effect of maladministration and to improve administrative practice within that agency. The Redland Shire Council, as a Queensland local government, is an 'agency' as defined in the Ombudsman Act.⁷

Public report

The Ombudsman Act provides that I may present a report to the Speaker for tabling in the Assembly, as I consider appropriate, on a matter arising from the performance of my functions. I have decided that it is in the public interest to report to Parliament on my investigation for the following reasons:

- All local councils are now required to implement their own codes of conduct for councillors and, therefore, the matters dealt with in this report are likely to be of considerable interest and guidance to other councils.
- The complaint against Cr Bowler was dealt with by the Council in two open Council meetings that have been the subject of reports in the media and, therefore, publication of my report will have the effect of correcting the public record.
- In the circumstances, it would be unreasonable to require Cr Bowler to maintain confidentiality in respect of the outcome of my investigation, as she would be obliged to do under s.92 of the Ombudsman Act if the report was not tabled.

Principal objects of the investigation

The principal objects of the investigation were:

- to determine whether the Council acted fairly during the investigative process, including the Council meetings at which the matter was considered;
- to determine whether the disciplinary action taken by the Council was reasonable in the circumstances; and
- to identify ways to improve the Council's complaint handling and investigation policies and practices.

De-identification

I have endeavoured to avoid identifying individual councillors, officers and private persons except for the Mayor, the CEO and Cr Bowler whose identities would be obvious to readers (particularly readers with local knowledge) of media reports on the action taken against Cr Bowler by the Council.

⁶ Ombudsman Act s.49(2)

⁷ Ombudsman Act s.8(1)

Investigative process

My officers conducted a detailed assessment of the issues raised in Cr Bowler's complaint in January and February 2007. The decision to commence the investigation was made early in March 2007. By letter dated 12 March 2007, Assistant Ombudsman, Craig Allen, informed Council's CEO of my intention to investigate the issues raised in Cr Bowler's complaint.

The councillors and officers provided all information requested by my investigators and cooperated fully with the investigation.

During the investigation, my investigators recorded interviews with a number of senior Council officers and councillors. The interviews began in the week commencing 19 March 2007.

In addition to the documents provided by Cr Bowler, my investigators also obtained a copy of the documents contained in the Council's investigation file. The Council did not seek to withhold any documents on the grounds of legal professional privilege even though some of the documents contained advice provided by a legal officer employed by Council.

I considered that certain parts of my proposed report constituted adverse comment against either councillors or officers of the Council. Therefore, to comply with the procedural fairness requirements of the Ombudsman Act⁸, I provided the relevant councillors and officers with notice of the adverse comments I proposed to make and invited them to lodge submissions in response. These notices were sent to the relevant parties on 29 June 2007 and advised that I intended to make the report public.

My jurisdiction under the Ombudsman Act extends only to the administrative actions of Council, and officers and councillors within Council. In my report, I have not made any comment on the actions of private individuals, including the quarry representative.

Under cover of letter of 10 August 2007, I received a detailed submission from solicitors stating that they were acting on behalf of the Council, Mayor, CEO and Complaints Officer. I take the reference to the Council to be to the councillors who voted in favour of reprimanding Cr Bowler. Among other issues raised, the submission challenged my jurisdiction to conduct the investigation.

I am obliged under s.55(3) of the Ombudsman Act to ensure the defence of a person adversely named in a report is fairly stated in the report. Accordingly, I have reproduced the full submission in Appendix 2 to this report, along with my comments on the matters raised.

Because of some of the issues raised in the solicitors' submission, I considered that it was appropriate to seek Senior Counsel's advice on:

- my jurisdiction to conduct this investigation;
- my decision to table the report; and
- generally, whether I had made any legal errors in the proposed report, or in my analysis of the solicitors' submission.

⁸ See ss.25(2)(b) and 55 of the Ombudsman Act.

I received Senior Counsel's opinion on 13 November 2007 that there are no legal errors in the report or in my response to solicitors' submissions. He further advised that, in his opinion:

- I have jurisdiction to investigate the matter the subject of the report; and
- the report is on a matter arising out of the performance of my functions within the meaning of s.52 of the Ombudsman Act and, if I consider it appropriate to give the report to the Speaker for tabling in Parliament, I am authorised to do so.

I have made some changes to my report as a result of considering certain issues raised in the solicitors' submission. Details of these changes are provided in Appendix 2.

However, after considering the submission, I remain of the opinion that it is appropriate to present the report to the Speaker for tabling.

Outcomes of the investigation

As a result of my investigation, I have concluded that some of the administrative actions of Council, in:

- investigating the 22 May 2006 complaint by the quarry representative against Cr Bowler;
- determining that Cr Bowler had breached its Councillor Code of Conduct; and
- reprimanding her in writing for this breach,

were contrary to law⁹, and/or unreasonable, and/or unjust¹⁰, and/or otherwise wrong.¹¹

Opinions

I have formed the following opinions:

Opinion 1¹²

The Mayor and CEO failed to make and keep adequate records of their telephone conversations with the quarry representative on 22 May 2006 in relation to his complaint about Cr Bowler. This failure constituted administrative action that was unreasonable within the meaning of s.49(2)(b) and wrong within the meaning of s.49(2)(g) of the Ombudsman Act.

Opinion 2

In the circumstances, I am satisfied that the decision made by the CEO to proceed to a formal investigation was a reasonable one.

Opinion 3¹³

The CEO failed to adequately document her reasons for not following the recommended procedure in the General Complaints Process, and proceeding directly to a formal investigation of the quarry representative's complaint. This failure constituted administrative action that was unreasonable within the meaning of s.49(2)(b) and wrong within the meaning of s.49(2)(g) of the Ombudsman Act.

⁹ Ombudsman Act s.49(2)(a)

¹⁰ Ombudsman Act s.49(2)(b)

¹¹ Ombudsman Act s.49(2)(g)

¹² In Appendix 2, this is referred to as 'Proposed Opinion 1'.

¹³ In Appendix 2, this is referred to as 'Proposed Opinion 2'.

Opinion 4¹⁴

The CEO incorrectly informed Cr Bowler and the Complaints Officer on 24 May 2006 that the investigation into the complaint had to be reported to the next General Meeting of Council on 31 May 2006. This information was not in accordance with the relevant provision of the Local Government Act, the Councillor Code of Conduct or its Code Guideline Document and meant that the Complaints Officer had an unreasonably short time to properly investigate the matter.

Opinion 5¹⁵

Council failed to provide Cr Bowler with a reasonable opportunity to consider the contents of the report on the investigation of the complaint and to prepare a submission before the report was considered by Council at its General Meeting on 31 May 2006. This failure constituted administrative action that was unreasonable and/or unjust within the meaning of s.49(2)(b) and/or wrong within the meaning of s.49(2)(g) of the Ombudsman Act.

Opinion 6¹⁶

The conclusion in the Complaints Officer's report of 30 May 2006 that Cr Bowler was on the quarry property, and the recommendation in the Direct to Council Report that Council accept there was sufficient evidence to substantiate the allegation that she was on private property without permission, were wrong within the meaning of s.49(2)(g) of the Ombudsman Act in that the quarry operator did not own or lease the land on which the incident occurred.

Opinion 7¹⁷

The evidence contained in the Complaints Officer's reports to Council did not establish that Cr Bowler had committed a breach of any provision of the Mining and Quarrying Safety and Health Act.

Opinion 8¹⁸

The Mayor's memorandum of 13 June 2006 recommending that Cr Bowler apologise to the quarry representative was not in accordance with the procedure required by the Local Government Act and the Councillor Code of Conduct for dealing with complaints of minor breaches of the Code by councillors and gave rise to the perception the Mayor had prejudged the issue, and constituted administrative action that was unreasonable within the meaning of s.49(2)(b) and wrong within the meaning of s.49(2)(g) of the Ombudsman Act.

Opinion 9

The evidence does not support the allegation that the Council prejudged Cr Bowler.

¹⁴ In Appendix 2, this is referred to as 'Proposed Opinion 3'.

¹⁵ In Appendix 2, this appears as 'Proposed Opinion 4', but has been amended before finalisation in light of the submission of the Council, Mayor, CEO and Complaints Officer.

¹⁶ In Appendix 2, this appears as 'Proposed Opinion 5'.

¹⁷ In Appendix 2, this appears as 'Proposed Opinion 6'.

¹⁸ In Appendix 2, this appears as 'Proposed Opinion 7'.

Opinion 10

The evidence does not support the allegation that Council conducted a biased investigation to intimidate and discredit Cr Bowler as an elected member.

Opinion 11

Council's decision at its General Meeting on 26 July 2006 that Cr Bowler had committed a breach of the Councillor Code of Conduct (by being *on land under the safety control of the complainant contrary to the lawful signage requiring visitors to report to the site office*) constituted administrative action that was wrong, within the meaning of s.49(2)(g) of the Ombudsman Act, in that the Council did not find that her actions in not complying with the signage constituted a breach of the Mining and Quarrying Safety and Health Act and she had no other obligation to comply with the signage.

Opinion 12¹⁹

Council, in deciding at its General Meeting on 26 July 2006 that Cr Bowler had committed a breach of the Councillor Code of Conduct, failed to provide her with reasonable notice of the provision of the Code she was alleged to have breached to enable her to make a submission to Council. The failure constituted administrative action that was unreasonable and/or unjust within the meaning of s.49(2)(b) and/or wrong within the meaning of s.49(2)(g) of the Ombudsman Act. The failure also amounted to a denial of procedural fairness.

Opinion 13²⁰

Council's resolution of 26 July 2006 that Cr Bowler be reprimanded for breaching the Councillor Code of Conduct constituted administrative action that was unreasonable and/or unjust within the meaning of s.49(2)(b) and/or wrong within the meaning of s.49(2)(g) of the Ombudsman Act in that, having decided that she had breached the Code, Council failed to give her an opportunity to be heard on the appropriate action Council should take in relation to the breach.

Opinion 14²¹

Council's actions in allowing Cr Bowler to address its General Meeting of 26 July 2006, and to vote, on her alleged breach of the Councillor Code of Conduct constituted administrative action that was unreasonable and/or unjust within the meaning of s.49(2)(b) of the Ombudsman Act in that it put her in a situation where, in responding to the allegation, she risked committing a breach of s.244 of the Local Government Act.

¹⁹ In Appendix 2, this appears as 'Proposed Opinion 8'.

²⁰ In Appendix 2, this appears as 'Proposed Opinion 9'.

²¹ In Appendix 2, this appears as 'Proposed Opinion 10'.

Recommendations

I make the following recommendations under s.50(1) of the Ombudsman Act, based on the opinions I have formed:

Recommendation 1²²

That Council amend Part 5 of its Code Guideline Document to clarify the correct reporting procedure to be followed where a formal investigation is commenced into a complaint against a councillor.

Recommendation 2²³

That Council amend its General Complaints Process to require that any councillor about whom an adverse report is to be made to Council in relation to a minor Councillor Code of Conduct breach be given a copy of the proposed report or informed of its contents and given a reasonable opportunity to make submissions about it prior to the report being considered by Council.

Recommendation 3²⁴

That Council amend its procedures to require a complaints officer (whether internal or external to Council), who submits a report recommending that the Council consider whether a councillor has committed a minor breach of the Councillor Code of Conduct, to specify in the report the provision or provisions of the Code that may have been breached and how the provision or provisions may have been breached.

Recommendation 4

That, where a complaints officer's report into an alleged minor breach of the Councillor Code of Conduct does not specify the provision of the Code alleged to have been breached, the Council give reasonable notice of the provision to the relevant councillor in some other way, for example, by notice signed by the CEO.

Recommendation 5²⁵

That Council rescind its motion of 26 July 2006 in relation to reprimanding Cr Bowler.

Recommendation 6²⁶

That Council amend its Code Guideline Document to provide that, if Council determines that a councillor has committed a breach of the Councillor Code of Conduct (other than a meeting breach), it give the councillor a reasonable opportunity to make a submission on the appropriate action Council should take prior to making any order in respect of the breach.

²² Following consideration of the solicitors' submission, I decided an additional recommendation was necessary to address possible confusion in the Council's Guideline. This recommendation did not appear in the proposed report.

²³ In Appendix 2, this appears as 'Proposed Recommendation 1'.

²⁴ In Appendix 2, this appears as 'Proposed Recommendation 2'.

²⁵ In Appendix 2, this appears as 'Proposed Recommendation 3'.

²⁶ In Appendix 2, this appears as 'Proposed Recommendation 4'.

Recommendation 7²⁷

That Council amend its Standing Orders to provide that a councillor about whom a complaints report has been given to Council must not be present at any meeting of the Council at which any matter arising from the report is discussed or voted on.

Recommendation 8²⁸

That Council amend its General Complaints Process to require that councillors the subject of proceedings under Chapter 4, Part 3A (Code of Conduct for Councillors) and/or Chapter 6, Part 5 (General Complaints Process) be given reasonable notice of, and a reasonable opportunity to respond to, the issues the subject of the proceedings.

Recommendation 9²⁹

That the Department of Local Government, Sport and Recreation take steps to amend the Local Government Act to specify the procedure to be followed by councils in dealing with councillors the subject of proceedings under Chapter 4, Part 3A (Code of Conduct for Councillors) and/or Chapter 6, Part 5 (General Complaints Process) to ensure councillors are given reasonable notice of, and a reasonable opportunity to respond to, the issues the subject of the proceedings.

Recommendation 10³⁰

That, where a complaint is received about a councillor's conduct that potentially involves a minor breach of the Councillor Code of Conduct and Council determines a formal investigation should be conducted, it appoint an investigator external to Council to conduct the investigation.

²⁷ In Appendix 2, this appears as 'Proposed Recommendation 5'.

²⁸ In Appendix 2, this appears as 'Proposed Recommendation 6'.

²⁹ In Appendix 2, this appears as 'Proposed Recommendation 7'.

³⁰ In Appendix 2, this appears as 'Proposed Recommendation 8'.

Chapter 1: Complaints against councillors

1.1 Background

Council received a complaint from a representative of a local quarry that, on 22 May 2006, Cr Bowler had trespassed on the quarry property and failed to report to the quarry office as directed by a sign.

The quarry is fenced but the gate to the main road is apparently left open during normal business hours. A little way inside the gate the entry road divides and the left hand branch leads to the car park and the right hand branch leads past the office buildings. A sign is located where the road divides stating that visitors must report to the office.

The details of the allegation were that Cr Bowler had driven a Council vehicle, in the company of Officers 1 and 2, into the car park of the quarry. Cr Bowler had turned the vehicle around and commenced driving back along the entry road towards the gates but stopped before the gates to allow Officer 2 to alight to take several photographs. Cr Bowler had not sought prior permission from any person associated with the quarry before entering the car park.

Council considered that this allegation involved a potential breach of its Councillor Code of Conduct by Cr Bowler and commenced an investigation. Council formally discussed the matter at its General Meetings on 31 May 2006 and 26 July 2006. At the 26 July meeting, it found that Cr Bowler had committed a breach of the Code and reprimanded her.

Cr Bowler made a complaint to my Office alleging that:

- the complaint was frivolous and vexatious;
- Council failed to correctly follow the Councillor Code of Conduct in managing the complaint;
- Council conducted a biased investigation to intimidate and discredit her as an elected member; and
- Council prejudged her.

1.2 Investigation

My officers conducted a detailed assessment of the issues raised in Cr Bowler's complaint in January and February 2007. The decision to commence the investigation was made in early March 2007. By letter dated 12 March 2007, Assistant Ombudsman, Craig Allen, informed Council's CEO of my intention to investigate the issues raised in Cr Bowler's complaint.

The principal objects of the investigation were:

- to determine whether the Council acted fairly during the investigative process, including the Council meetings at which the matter was considered;
- to determine whether the disciplinary action taken by the Council was reasonable in the circumstances; and
- to identify ways to improve the Council's complaint handling and investigation policies and practices.

My investigation has been conducted informally under s.24(a) of the Ombudsman Act, without the need to invoke my coercive powers.³¹ The councillors and officers provided all information requested by my investigators and cooperated fully with the investigation.

During the investigation my investigators recorded interviews with a number of senior Council officers and councillors. The interviews began in the week commencing 19 March 2007.

In addition to the documents provided by Cr Bowler, my investigators also obtained a copy of the documents contained in the Council's investigation file. The Council did not seek to withhold any documents on the grounds of legal professional privilege.

Following the investigation, I prepared a proposed report. I considered that certain parts of my proposed report constituted adverse comment against either councillors or officers of the Council.

Therefore, to comply with the procedural fairness requirements of the Ombudsman Act,³² I provided the relevant councillors and officers with notice of the adverse comments I proposed to make and invited them to lodge submissions in response.³³ These notices also advised the recipients that I intended to make the report public.

In formulating a final report, I am required to take into account any submission I receive in response to such a notice and, if I still propose to make the adverse comment, to ensure the person's defence is fairly stated in the report.

The proposed report was also provided to the Director-General of the Department of Local Government, Planning, Sport and Recreation (the Department) to allow the Director-General to comment on a recommendation I was considering making that the *Local Government Act 1993* (LGA) be amended.

Submissions made by the Council, Mayor, CEO, Complaints Officer, Cr Bowler and the Director-General of the Department have been incorporated into this report at various points, along with my comments on these submissions.

The Council, Mayor, CEO and Complaints Officer made a joint submission on 10 August 2007 in response to notices of adverse comment sent to each of them. This submission, prepared by a private law firm, essentially rejected all my proposed recommendations, and expressed the view that the proposed opinions contained in the report were variously unreasonable, unnecessary and/or unsound. The submission is referred to in this report as the "solicitors' submission".

The solicitors' submission is reproduced in Appendix 2. In order to preserve confidentiality, I have deleted references to the identity of the quarry representative, the Complaints Officer and Officer 1 from this submission.

This submission also questioned my jurisdiction to conduct the investigation. My reasons for concluding that I have jurisdiction to conduct the investigation are provided in Appendix 2 as well as in the body of the report.

³¹ Under part 4 of the Ombudsman Act

³² See s.55 of the Ombudsman Act.

³³ No contact was made with the quarry representative as I did not consider that I had made any comment in the proposed report that was adverse to the quarry representative.

Following receipt of the submission, I sought Senior Counsel's advice on my jurisdiction, and on the correctness of the opinions and recommendations I was considering forming and making. Senior Counsel advised me that I did have jurisdiction to conduct the investigation, and that there were no legal errors in the report. His advice included the following:

On 28 June 2007 the Ombudsman completed a draft report following an investigation into the Council's management of a complaint that a councillor had breached the Council's code of conduct for councillors. Pursuant to s.55 of the Ombudsman Act 2001 proposed adverse comments about certain persons were provided to those persons to give them an opportunity to make submissions thereon.

Submissions were made by [solicitors] on behalf of the affected persons by a written response dated 10 August 2007. That response, and the Ombudsman's response thereto, have been added to the report as Appendix 2.

That report is intended to be given to the Speaker of the Legislative Assembly under s.52 of the Act.

I have been asked to review the report, and in particular the Ombudsman's response to the submissions made by [solicitors], to identify any legal errors.

In my opinion there are no legal errors in the report or in the Ombudsman's response to the submissions. More particularly, it is my opinion that:-

- (a) the Ombudsman had jurisdiction to investigate the matter the subject of the report;*
- (b) the report is on a matter arising out of the performance of the Ombudsman's functions within the meaning of s.52, and if the Ombudsman considers it appropriate to give the report to the Speaker, the Ombudsman is authorised to do so.*

The solicitors' submission argued I should not make the report public. After considering this, I have decided that it is in the public interest to report to Parliament on my investigation for the following reasons:

- All local councils are now required to implement their own codes of conduct for councillors and, therefore, the matters dealt with in this report are likely to be of considerable interest and guidance to other councils.
- The complaint against Cr Bowler was dealt with by the Council in two open Council meetings that have been the subject of reports in the media and, therefore, publication of my report will have the effect of correcting the public record.
- In the circumstances, it would be unreasonable to require Cr Bowler to maintain confidentiality in respect of the outcome of my investigation, as she would be obliged to do under s.92 of the Ombudsman Act if the report was not tabled.

Although my proposed report did not refer to my intention to make the report public, my covering letters to the Mayor, CEO and Complaints Officer did and the solicitors' submission addresses this issue in detail.³⁴

³⁴ See Appendix 2 at paragraph 14 of the solicitors' submission, and my response.

1.3 Legislation

The LGA establishes the system of administration for most Queensland local councils.³⁵ On 31 May 2005, amendments to the LGA introduced a new Part 3A in relation to councillor conduct. Under Part 3A, all local councils were required to develop and implement a code of conduct for councillors.³⁶ Section 243A(1) of the LGA requires all councillors to comply with the obligations stated in their council's code of conduct.

Additionally, all local councils were required to develop (by 1 March 2006) a general complaints process for handling a broad range of complaints about council activities and policies, as well as certain types of complaints against councillors.³⁷

The former Minister for Environment, Local Government, Planning and Women, the Honourable Desley Boyle MP, stated in the Queensland Parliament during the second reading speech for the amending legislation:³⁸

This Bill amends the Local Government Act to establish ... a statutory framework to allow councils to deal with misconduct that falls outside the scope of the Crime and Misconduct Commission, or Ombudsman, but is nonetheless unacceptable to the council and its community.

The Bill requires councils to adopt a code of conduct for their councillors based on ethics principles adapted from the code of ethical standards that applies to members of this House.

...

The ... codes of conduct will mean that each council has a public statement about the standard of behaviour expected of its members. This will include both statutory obligations, that is, obligations under the Local Government Act, and additional ethical and behavioural obligations. The framework also provides a way of dealing with behaviour that fails to meet these obligations—code breaches.

The Bill specifies four possible types of breaches: meeting breaches; minor breaches; statutory breaches, which are breaches of the statutory obligations placed on councillors by the Local Government Act; and repeat breaches. Examples might be—

- *a meeting breach—abusing another councillor during a council debate or a council committee meeting;*
- *a minor breach—publicly misrepresenting council policy;*
- *a statutory breach—disclosing confidential information in contravention of section 250 of the Local Government Act; and*
- *a repeat breach—committing an inordinate number of meeting or minor breaches within a certain period.*

³⁵ Including Redland Shire Council

³⁶ LGA, s.250C

³⁷ LGA, s.501D

³⁸ Hansard, 19 April 2005, pp.898-899 (Second Reading speech for the Local Government Legislation Amendment Bill 2005)

Councils will have some discretion in defining what behaviours might be considered breaches. The Government recognises, for example, that circumstances vary and that what might be unacceptable in one setting might be acceptable in another.

The Bill next sets out a number of procedures that councils will have to follow when councillors breach their code or a breach is alleged. Meeting breaches will be dealt with in the most direct way possible, that is, by the council itself. Minor breaches will first be investigated by the council's complaints officer who will report accordingly to council. If the matter is resolved during this process, no breach will be recorded ... In all cases councils will be the final decision maker, applying the principles of natural justice.

...

The most recent review of the Office of the Ombudsman recommended that councils should be required to have a general complaints process³⁹, and both the Ombudsman and the Department of Local Government, Planning, Sport and Recreation have encouraged councils to do so. Some Councils already have a general complaints process. There is now an additional imperative, as the code of conduct framework envisages that minor breaches of the code will be drawn to a council's attention through a general complaints process.

³⁹ The review of the Ombudsman's Office referred to was titled *Report of the Strategic Management Review of the Offices of the Queensland Ombudsman and the Information Commissioner* and was the subject of a report to Parliament in June 2000. The reviewer did not specifically recommend that councils be required to have a general complaints process but recommended that the Ombudsman "... select a range of demand management initiatives likely to improve customer service and response to complaints in agencies and reduce the incidence of complaints being referred to the Ombudsman". (Recommendation 23)

1.4 Councillor Code of Conduct

1.4.1 Ethical principles

Redland Shire Council adopted its own Councillor Code of Conduct on 1 February 2006. Part 5 of the Code lists the ethical principles applicable to councillors, as follows:

1. Integrity of local government
2. Primacy of the public interest
3. Independence of action by councillors
4. Appropriate use of information by councillors
5. Transparency and scrutiny
6. Appropriate use of entitlements.

The Code states, in relation to Principle 1, that *“Councillors must conduct themselves in a way that promotes and maintains the public’s trust and confidence in the local government and the good rule and government of its area.”*⁴⁰

Elaborating on this, the Code reads:

*Councillors will ... show respect for the laws of the Commonwealth of Australia, the State of Queensland and the system of government in general. Councillors must comply with local laws, subordinate local laws and policies and guidelines adopted by this Council.*⁴¹

*Councillors must demonstrate respect for all people, including members of the public, Council officers and fellow councillors. They must treat others with dignity and respect and ensuring that neither offence, nor embarrassment, nor harassment are caused.*⁴²

*Councillors must ensure they do not bring Council into disrepute.*⁴³

In relation to Principle 2 (Primacy of the public interest), the Code provides:

*At all times, councillors should observe the highest ethical standards in the conduct of their responsibilities. The public interest must be the primary concern. Councillors will undertake all activities with the intent of protecting the council’s integrity.*⁴⁴

1.4.2 Breaches

In accordance with the LGA, the Code sets out four categories of breach:

1. Meeting breach (misbehaviour at meetings)
2. Minor breach
3. Statutory breach
4. Repeat breach.⁴⁵

⁴⁰ Councillor Code of Conduct, p.12, para 5.1

⁴¹ Councillor Code of Conduct, p.13, para 6.1.1 (a)

⁴² Councillor Code of Conduct, p.13, para 6.3.1

⁴³ Councillor Code of Conduct, p.14, para 6.3.8

⁴⁴ Councillor Code of Conduct, p.15, para 7.3.1

⁴⁵ Councillor Code of Conduct, p.23, para 12.1.1

The complaint made by the quarry representative about Cr Bowler was determined by Council to constitute a potential minor breach of its Code. This appears to have been the correct categorisation.

1.5 Investigating code breaches

Section 250R of the LGA requires that all complaints about alleged minor breaches of a council's councillor code of conduct be made under the council's general complaints process. The Redland Code states that:

All complaints of alleged breaches of this Code must be determined and dealt with by Council resolution in the manner prescribed in the Act except minor breaches which may be resolved through the General Complaints Process.⁴⁶

If the complaint cannot be satisfactorily resolved under the process, the complaints officer appointed to investigate the allegations is to prepare a report for council.⁴⁷ Section 250S of the LGA establishes the basis on which all councils are to respond to the complaints officer's report:

250S How local government must deal with complaints officer's report

- (1) *This section applies if—*
- (a) *a report about a complaint about a minor breach of a local government's code of conduct is given to the local government by the complaints officer who investigated it under the general complaints process; and*
 - (b) *the report states the complaint has not been resolved through the process.*
- (2) *The local government may decide, by resolution, to take no further action in relation to the complaint if the local government is satisfied it concerns frivolous matter or was made vexatiously.*
- (3) *If the local government does not deal with the complaint under subsection (2), the local government must decide, by resolution, whether the councillor has committed the alleged minor breach.*
- (4) *If the local government decides the councillor committed the minor breach, it may do any of the following—*
- (a) *take no further action in respect of the breach;*
 - (b) *by resolution, impose a penalty on the councillor under subdivision 5;*
 - (c) *if it considers the breach may be a repeat breach of the code of conduct—refer a complaint about the repeat breach to its conduct review panel for review.*
- (5) *In deciding whether the councillor has breached the code of conduct and whether to impose a penalty on the councillor, the local government must comply with the principles of natural justice.*

⁴⁶ Councillor Code of Conduct, p.23, para 12.1.2

⁴⁷ LGA, s.501E(g)

Natural justice (referred to in this report as 'procedural fairness') is to be afforded to all councillors subject to an investigation under the Code, although the extent of procedural fairness requirements will obviously vary depending on the nature of the alleged breach and its seriousness. The Code specifically requires this in the case of Council's consideration of a potential minor breach.⁴⁸ There is also general judicial support for implying procedural fairness requirements, for example:

*... subject to any contrary indication in the statute a duty of procedural fairness exists where the interests (including career and reputation) of a person may be adversely affected by the findings of an inquiry and the inquisitor is authorised to publish those findings.*⁴⁹

At a broad level, the High Court has stated:

*The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.*⁵⁰

It has also been judicially recognised that personal reputation (including the broader public reputation of a local councillor) is an interest which may be protected by the requirements of procedural fairness.⁵¹

Procedural fairness has been described as follows:

*The notion of procedural fairness demands that a person be given notice of what is put against him and be given a real opportunity to be heard. He must be given sufficient particulars of contentious matters to allow him to respond by way of correcting or contradicting the adverse material in a meaningful way.*⁵²

Procedural fairness is generally considered to contain three major elements which must be followed by those making decisions affecting the interests of individuals:

1. The **notice requirement** – a person who is likely to be affected by a decision must be given notice of the issues and relevant information;
2. The **fair hearing rule** – the person must be given a reasonable opportunity to respond to the information/issues; and
3. The **lack of bias rule** – the person making the decision must act impartially in considering the matter.⁵³

Section 501E(1)(g) of the LGA establishes the requirement that the general complaints process of a council must direct a complaints officer to report to the council on an investigation into a complaint ... *if the complaint is not resolved to the affected person's satisfaction through the general complaints process.*

⁴⁸ Councillor Code of Conduct, p.25, para 14.2.1

⁴⁹ *Annetts v McCann* (1990) 170 CLR 596 at 608-609

⁵⁰ *Kioa v West* (1985) 62 ALR 321 at 346 per Mason J

⁵¹ *Edwardes v Kyle* (1995) 15 WAR 302 per Owen J

⁵² *Kanda v The Government of Malaya* [1962] AC 322 at 337 (Note: references to 'he' and 'him' are in the original)

⁵³ See *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, and, more generally, NSW Ombudsman, *Natural Justice/Procedural Fairness: Public Sector Agencies fact sheet No. 14*, Sydney, June 2005.

The Department has summarised the process for minor complaints as follows:

All councils will be required to establish a general complaints process, which will provide a means for dealing with all complaints to the council. It will also serve as the first point of review for councillor misbehaviour that involves minor code breach matters.

The general complaints process will be one element of dealing with complaints of minor code breaches, providing an opportunity for a complainant and the relevant councillor to resolve a matter.

In the event a complainant is not satisfied with the outcome of this process, the matter will then be referred to council for a decision on whether a code breach has occurred and, if so, what penalty should be imposed.

Minor code breaches resolved to the satisfaction of a complainant using the general complaints process will not be considered a breach of the code of conduct for the purpose of recording code breaches by councillors in the council's annual report.⁵⁴ [my emphasis]

The Department's 2005 Discussion Paper on the new Councillor Code of Conduct system contains a useful commentary on how it was intended minor breaches would be handled:

A complaint of a minor breach is initially dealt with by the local government's general complaints process with the possibility of resolution between the complainant and the relevant councillor. If the matter is resolved using the local government's general complaints process it is not recorded as a code breach. If the matter is not resolved using this process it will then pass to the council for determination. [my emphasis]

An example of how this might work in practice is set out below:

A councillor speaks to a ratepayer. The ratepayer takes offence at the manner and tone of how the councillor addresses them and makes a complaint of verbal abuse against the councillor. The local government's general complaints process is activated and the complaints investigator (a person independent of the council rather than a council employee) convenes a meeting between the complainant and the councillor.

At the meeting the councillor makes an apology to the complainant. The complainant accepts the apology as a resolution to their concern and the matter is NOT recorded as a code breach.

In another scenario, the councillor denies the claim of the complainant. The complainant is not satisfied with this outcome. The complaints investigator makes a report on the matter and refers it to the council for determination. The council decides whether the councillor has breached their code of conduct.

⁵⁴ *Local Government Act 1993: Draft Legislative Proposals: A regulatory framework for councillor codes of conduct*, Department of Local Government, Planning, Sport and Recreation, Brisbane, 2005 pp.7-8

In dealing with the complaint, the council must comply with the principles of natural justice. This would include the council giving an unbiased review of the report from the complaints officer, allowing the relevant councillor to consider the report prior to the meeting and a right of reply before the council makes its decision.⁵⁵ [my emphasis]

The Explanatory Notes to the Bill which amended the LGA to insert the General Complaints Process requirements state:

*Internal review will occur where the complaint is about an administrative action by council staff that can be investigated by a more senior officer, an officer of equivalent level from another branch, or the council itself. **External reviews will occur where the complaint is about a decision of council or involves the behaviour of a councillor.***⁵⁶ [my emphasis]

The Department has provided limited guidance on investigations into breaches such as the one alleged in this case:

*Although the system put in place by the [LGA] is non-judicial (i.e. outside the formal justice system), councils are required to apply natural justice principles in determining code breach matters ... A councillor may seek legal advice and may, at the discretion of the council, have legal support at meetings where an alleged code breach is being considered, but this would not be in the spirit of the legislation. The legislation is intended rather to achieve a system like that of State Parliament, where conduct issues are determined inhouse.*⁵⁷

*The council, when dealing with the complaint, must comply with the principles of natural justice; for example, **it must allow the councillor about whom the complaint has been made the opportunity to consider the complaints officer's report before the meeting and to give a reply at the meeting before a decision is made.** (Note: these are given as examples only and are not intended to limit a council's application of the principles of natural justice).*⁵⁸ [my emphasis]

While the Department has not provided detailed guidance for complaints officers on undertaking investigations of complaints under a councillor code of conduct, several accountability agencies have produced generic (and publicly available) guidance on conducting administrative investigations, which is relevant to the investigation of Cr Bowler's complaint. For example, the NSW Ombudsman advises:

Due process must be observed in every investigation. Any decision affecting an individual that has been made without affording that individual procedural fairness is liable to be challenged and set aside. Procedural fairness requires an investigator to:

- *inform people against whose interests a decision may be made of the substance of any allegations against them or grounds for adverse comment in respect of them;*

⁵⁵ *Local Government Act 1993: Draft Legislative Proposals: A regulatory framework for councillor codes of conduct*, Department of Local Government, Planning, Sport and Recreation, Brisbane, 2005 pp.16-17

⁵⁶ *Explanatory Notes for Local Government Legislation Amendment Bill 2005*, p.21

⁵⁷ *Local Government Bulletin 01/06*, Department of Local Government, Planning, Sport and Recreation, Brisbane, 12 January 2006, p.3

⁵⁸ *Local Government Bulletin 11/05*, Department of Local Government, Planning, Sport and Recreation, Brisbane, 6 June 2005, p.4

- *provide people with a reasonable opportunity to put their case, whether in writing, at a hearing, or otherwise;*
- *hear all parties to a matter and consider submissions;*
- *make reasonable inquiries or investigations before making a decision;*
- *ensure that no person decides a case in which they have a direct interest;*
- *act fairly and without bias; and*
- *conduct the investigation without undue delay.*⁵⁹

Likewise, the Crime and Misconduct Commission states:

An investigation can certainly affect an individual, especially in relation to their reputation and their employment. In order for your investigation to comply with the law, you will usually need to seek out a person's version of events and give them a chance to comment on any facts that might be detrimental or adverse to them.

...

There are also no hard-and-fast rules about how and when you must inform a person of the substance of any adverse comment about them. Certainly, no final decision can be made affecting a person's rights, interests or legitimate expectations without first providing them with an opportunity to respond.

If you propose to include in your investigation report adverse comment about someone, you must make that person aware of the substance of all the grounds for all those comments.

*... if your investigation report contains adverse comment and is provided to an officer for a final decision, subject to any statutory procedural fairness requirements, the person must at the very least know the case against them and be given an opportunity to respond to those adverse comments. This must be done before any decision is made.*⁶⁰

1.6 Authority to investigate

The investigation of the quarry representative's complaint against Cr Bowler was conducted by a Complaints Officer employed by Council. The Complaints Officer also prepared the series of reports which were presented to two Council meetings.

On 9 November 2005, Council resolved to grant the CEO power to nominate appropriate Council officers as investigating officers for Code complaints.⁶¹

The investigation was conducted by the Complaints Officer under an instrument of delegation from the CEO, dated 16 February 2006, and made under s.1132 of the LGA. The CEO instructed the Complaints Officer to undertake this specific investigation by a memorandum dated 24 May 2006.

⁵⁹ *Investigating Complaints: A Manual for Investigators*, NSW Ombudsman, Sydney, June 2004, pp.14-15

⁶⁰ *Facing the Facts: A CMC Guide for Dealing with Suspected Official Misconduct in Queensland Public Sector Agencies*, Crime and Misconduct Commission, Brisbane, 2007, pp.4.7-4.9

⁶¹ Redland Shire Council General Meeting Minutes, 9 November 2005, p.49

Chapter 2: Background to Council's investigation

2.1 Incident at the quarry

Although I did not directly investigate the incident behind the complaint against Cr Bowler, it provides relevant background to the central question in this investigation (namely, the appropriateness of the way Council dealt with the complaint).

According to the evidence available to me, on 22 May 2006, Cr Bowler, accompanied by Officers 1 and 2, drove a Council vehicle to a number of sites. The purpose of the trip was for Cr Bowler to show the officers several locations relevant to a catchment management plan which the officers were preparing in relation to the Leslie Harrison Dam at Capalaba West.

During the trip, Cr Bowler drove the vehicle from the main road through open gates in the fence along the main road and down the entry road to the quarry. She took the left hand fork in the entry road which led to the quarry car park where she turned the vehicle around. She commenced driving back towards the gates but, at Officer 2's request, stopped before reaching the gates on the wrong side of the entry road. Officer 2 alighted from the vehicle to take photographs. After a short time, a truck entered the quarry and stopped in front of the vehicle, blocking her exit from the quarry. The quarry representative then drove his vehicle from inside the quarry complex and parked behind the Council vehicle.

The quarry representative asked Cr Bowler and the officers why they were present at the site, and then left in the company of Officer 1. Following a discussion between Officer 1 and the quarry representative, Officer 1 returned to the vehicle. Cr Bowler and the two officers then departed the site in the Council vehicle.

Later that day, the quarry representative made a complaint by telephone to the Mayor and later to the CEO about the incident. He also made a written complaint dated 22 May 2006, that is, the day on which the incident occurred, which was apparently received by Council on 24 May 2006.

2.2 Quarry representative's complaint

The quarry representative's written complaint to Council was made to the CEO and the Mayor, and set out how he became aware of the presence of Cr Bowler and the officers. The written complaint stated that he gave instructions that the access to the quarry:

be, temporarily, blocked whilst I immediately attended to investigate.

The quarry representative's complaint continued:

Councillor Bowler informed me she was showing [Officer 1] around and he was concerned about the effect of the blue green algae on relevant catchments.

It was unclear what the purpose of taking photographs was. Putting that to one side, I am genuinely upset that a Councillor and a Council officer have entered into my land and taken photographs without authority and clearly disobeying signage on the entrance to the quarry which says 'All Visitors Must Report to the Office'.

If [Officer 1] had some genuine business at the quarry then I would have expected, at the very least, that he would have called ahead to provide me with the courtesy of an introduction before he asked permission to come onto the land.

Councillor Bowler, an avowed opponent of the quarry, has trespassed once again on the land knowing, full well, that she was not welcome nor did she have any legitimate causes to be at the quarry.

For future reference and so that there is no misunderstandings, Councillor Bowler is not in any circumstances, to enter upon the property for any reason.

In all the circumstances I would like to register a complaint against the conduct of Councillor Bowler. I will assume that [Officer 1] was acting in good faith albeit without appropriate courtesies.

I would like an explanation and what action Council intends to take about this unlawful trespassing.

2.3 Council's initial handling of the complaint

Based on the evidence provided to my investigators by the Mayor and the CEO, it would appear the quarry representative telephoned both of them shortly after the incident on 22 May 2006, and followed this with the written complaint.

The Mayor stated that, in accordance with the relevant legislative and policy requirements, he referred the complaint directly to the CEO. The CEO's statement about her actions at the time of receiving the telephone complaint included the following passage:

I spoke to the general manager [of the unit in which the two officers were employed, who] was obviously unaware of what was going on, so I said look can you please contact the officers and find out ... what's happening ... and he did that and then he rang me back ... He had spoken to [Officer 1] who was the senior officer and they had [Officer 2] with them ... and he said to me [Officer 1] did acknowledge that they'd gone on site and they hadn't signed in, the incident was as recorded ... So I said ... I've got to investigate it formally ... I was going to appoint [the Complaints Officer] to do that ... because it was going to be a matter that was under the code of conduct, it had to be done in time for the next general [meeting] which I think was only a week or so away. I was also aware that Cr Bowler was going away so wanted to handle the matter as rapidly as possible so that it just wasn't lingering.

Neither the Mayor nor the CEO appears to have made notes of their discussions with the quarry representative.

Public authorities (including local councils) are required to "make and keep full and accurate records" in accordance with the *Public Records Act 2002*.⁶² The Act does not stipulate that records must be made of all telephone conversations, and any such requirement would be impracticable. However, where a member of the public is making a specific allegation about a councillor that involves a potential breach of the council's code of conduct, it is essential that adequate notes are made of the details of the allegation for use in any subsequent investigation.

⁶² Section 7

In an interview with my investigators, the CEO gave the following account of her discussion with the quarry representative at this stage:

[The quarry representative] wanted to know what course of action was possible and he was talking about a number of things. One of them was ... he was saying that they trespassed and he was angry about that and I said look you know trespass is not a matter that we have any jurisdiction over. I said that's a completely separate matter ...

He went on for quite a while about being responsible for safety issues and you know that that was one of his concerns ... he said ... don't you have ... complaints processes ... and I said yes we do ... if you want me to pursue the matter please put it in writing and I'll have a look at what you put in writing and then I'll take it from there.

The solicitors' submission states⁶³, in relation to the failure to make notes, that the Mayor and CEO were focussed during the calls on trying to defuse an emotional situation and, in any event, the complaint process would not commence until a written complaint had been received.

I acknowledge these issues. Nonetheless, in this case, the failure of the Mayor and the CEO to make any notes of the telephone conversations with the quarry representative became a matter of some significance because their versions of the quarry representative's oral complaint varied in several respects from his written complaint – for example, the written complaint was based on alleged trespass, while the CEO's account of the oral complaint was that the quarry representative had also emphasised his obligation to ensure the safety of all persons at the site.

Opinion 1⁶⁴

The Mayor and CEO failed to make and keep adequate records of their telephone conversations with the quarry representative on 22 May 2006 in relation to his complaint about Cr Bowler. This failure constituted administrative action that was unreasonable within the meaning of s.49(2)(b) and wrong within the meaning of s.49(2)(g) of the Ombudsman Act.

2.4 Early resolution

Section 501E of the LGA sets out the basic requirements for a council's general complaints process. The section provides:

501E Requirements for general complaints process

- (1) The general complaints process must include at least the following elements—*
- (a) the process for selecting and appointing a complaints officer to investigate complaints;*
 - (b) preliminary procedures before an affected person can make a complaint;*
 - (c) the way an affected person may make a complaint;*
 - (d) sending complaints to, and their investigation by, the complaints officer;*

⁶³ See Appendix 2, at paragraph 7.1 of the solicitors' submission.

⁶⁴ In Appendix 2, this is referred to as 'Proposed Opinion 1'.

- (e) *giving an affected person who makes a complaint an opportunity to give the complaints officer further information about the complaint;*
 - (f) *a requirement that the complaints officer give the local government and affected person notice of a decision made by the officer under section 501F and the reasons for the decision;*
 - (g) *a requirement that, if the complaint is not resolved to the affected person's satisfaction through the general complaints process, the complaints officer give the local government and affected person—*
 - (i) *a written report on the results of the officer's investigation of the complaint; and*
 - (ii) *any recommendation in relation to the complaint the officer considers appropriate;*
 - (h) *the time within which the complaints officer must give the report and any recommendation mentioned in paragraph (g) to the local government;*
 - (i) *if a report and any recommendation mentioned in paragraph (g) is given to the local government—a requirement that the local government give the affected person notice of the outcome of the local government's consideration of the report and recommendation;*
 - (j) *recording the number of complaints made and resolved through the general complaints process.*
- (2) *Also, the process mentioned in subsection (1)(a) must require that the person appointed to be a complaints officer to investigate a complaint must not be involved with the administrative action or alleged minor breach of the code of conduct that is the subject of the complaint.*

The Council has produced a Code Guideline Document in relation to its own general complaints process.⁶⁵ This means that complaints about alleged minor breaches of Council's Code are to be dealt with according to the general complaints process specified in the Code Guideline Document.

The advice of Council's Code Guideline Document is that, where Council receives a complaint about the conduct of a councillor, the officer handling the complaint is to "... *advise the complainant ... where appropriate, they should try to resolve the dispute directly with the councillor/s or officer/s involved.*"⁶⁶

Additionally, it is open to a council officer conducting a Code investigation to determine that a complaint alleging a minor breach of the Code is trivial, frivolous or vexatious.⁶⁷ If so, the complaints officer may refuse to investigate the complaint or, having started to investigate the complaint, refuse to continue the investigation.⁶⁸ Council may make a similar determination if so satisfied following a consideration of the complaints officer's report (assuming the matter has escalated to that level).⁶⁹ In such a case, Council may decide by resolution to take no further action.⁷⁰

⁶⁵ Redland Shire Council Guideline Document GL-3037-001, Edition 1 (1 February 2006)

⁶⁶ Guideline Document, paras 5.1 – 5.1.1

⁶⁷ LGA, s.501F(1)

⁶⁸ LGA, s.501F(1)

⁶⁹ LGA, s.250S(2)

⁷⁰ LGA, s.250S(2)

The CEO told my investigators that some consideration was given before the commencement of the investigation to the question of whether the complaint against Cr Bowler might, in fact, be trivial, frivolous or vexatious, or whether it might be resolved informally, without warranting a formal investigation:

Investigator ... did you have any consideration of whether on the basis of [the quarry representative's] complaint the investigation under the formal processes under the general complaints process was a justifiable reaction to the complaint?

CEO Well I spoke to [the Complaints Officer] about that in probably general terms but [the quarry representative] was very adamant that this was a safety issue.⁷¹ [The quarry representative] was quite adamant about that and ... said ... it doesn't matter whether they were there 5 minutes or 5 hours ... it's a serious matter ... And I guess I thought well from my point of view that was a strong position that he was coming from ... And so at that stage I just said, I thought it was just best to have [the Complaints Officer] actually investigate the facts because the facts were still somewhat at odds between the couple of views ... And then really it's up to [the Complaints Officer] to come back ... to me ... once [the Complaints Officer] had the facts.

In addition, the Complaints Officer's conclusion was that:

... I didn't think that it was frivolous or vexatious ... because the allegation was that officers were on property... contrary to their lawful right to be there ...

On the basis of the written complaint made by the quarry representative, it would appear Cr Bowler and Officers 1 and 2 were present at the quarry car park for only a short period of time and did not attempt to enter any other part of the quarry complex. This raised for my consideration whether the alleged trespass was sufficiently serious to warrant a full Code investigation (even prior to the subsequent revelation that the land on which Cr Bowler and the officers were present was in fact *not* private land).⁷²

It is arguable that this approach can be contrasted with Council's approach to the quarry representative's complaint against Officers 1 and 2 which Council dealt with informally and at an early stage. The difference in treatment seems to have been based on the quarry representative's objection to Cr Bowler's presence in the quarry car park because of her history of opposition to the quarry and on her status as a councillor.

The quarry representative stated in his written complaint, "*I will assume that [Officer 1] was acting in good faith albeit without appropriate courtesies*". By contrast, in relation to Cr Bowler, his complaint read:

Councillor Bowler, an avowed opponent of the quarry, has trespassed once again on the land knowing, full well, that she was not welcome nor did she have any legitimate causes to be at the quarry.

⁷¹ The quarry representative's complaint letter dated 22 May 2006 did not specifically refer to safety concerns in relation to the incident, although this matter was later considered as part of the investigation.

⁷² See chapters 3.2 and 4.

Based on the interview my investigators conducted with the CEO, it appears that consideration of alternative dispute resolution options was limited to encouraging Officers 1 and 2 to apologise to the quarry representative.

I certainly did consider mediation because I had ... a second phone call with [the quarry representative] about the officers because when he sent his letter in he wasn't pursuing the officers ... I rang him to say ... the officers were equally involved in this incident and I wished to address that ... [The quarry representative] said to me they were only driving the car⁷³ and [Officer 1] had apologised ... I said well okay that's fine from your point of view but from my point of view ... I'll apologise to you for that ... on behalf of council because it was inappropriate and I said I'll make sure the officers are properly instructed about what their obligations are.

However, in relation to mediation of the quarry representative's complaint against Cr Bowler, the CEO's comment was:

Investigator: Before the matter was actually handed to [the Complaints Officer] as complaints officer ... at that time did you have any consideration of possibly mediating the dispute ... between [the quarry representative] and Cr Bowler?

CEO: Look I'd have to say at that time from the conversations that I had with [the quarry representative] he wasn't interested in anything like mediation ... and he was still threatening to go to his lawyer and, you know, try civil prosecution for trespass.

The CEO also stated:

I assigned [the Complaints Officer] the task to do, then tried to ... not be involved too much, which I wasn't because it was fairly quick ...

The Code Guideline Document specifically recommends that, normally, an attempt be made to resolve minor breaches directly with the complainant at the outset:

When a complaint is received, advise the complainant ... where appropriate, they should try to resolve the dispute directly with the Councillor/s or Officer/s involved.⁷⁴

However, as noted above, it is clear the CEO formed the opinion that any attempt to resolve the matter informally (via mediation, for example) would, in the circumstances, have been unlikely to succeed. My investigators were provided with evidence that there had been several public incidents over the past few years involving Cr Bowler and the quarry representative. As a result, there was evidence before the CEO that it was unlikely the quarry representative would, at that stage, have agreed to the complaint being informally resolved or that Cr Bowler would have apologised.⁷⁵

⁷³ The oral evidence provided to my investigators by Cr Bowler and Officer 1 was that Cr Bowler was driving the car at the time.

⁷⁴ Guideline Document GL-3037-001, para 5.1.1

⁷⁵ This commentary is not intended as an adverse comment on the actions of the quarry representative, but rather, a comment on the various considerations which should have been kept in mind by those managing the complaint at the time.

Opinion 2

In the circumstances, I am satisfied that the decision made by the CEO to proceed to a formal investigation was a reasonable one.

I note that up until the CEO's formal memorandum directing the Complaints Officer to commence an investigation of the matter (see 2.5), there was little or no documentation of the discussions or decisions the CEO had with various parties involving the complaint. The CEO also does not appear to have documented her reasons for bypassing an informal resolution stage and proceeding directly to a formal investigation.

In my view, the CEO's decision to formally investigate the complaint was a significant one in that it had potentially serious legal consequences for Cr Bowler as well as potentially serious consequences for her reputation and position as a councillor.

Opinion 3⁷⁶

The CEO failed to adequately document her reasons for not following the recommended procedure in the General Complaints Process, and proceeding directly to a formal investigation of the quarry representative's complaint. This failure constituted administrative action that was unreasonable within the meaning of s.49(2)(b) and wrong within the meaning of s.49(2)(g) of the Ombudsman Act.

2.5 Investigation

The CEO formally appointed the Complaints Officer to investigate the allegation against Cr Bowler on the day the written complaint was received.⁷⁷ My understanding is that this is the first investigation Council has undertaken under its Code.

The memorandum of 24 May 2006 from the CEO to the Complaints Officer stated:

I am attaching a letter received by me ... today from [the quarry representative] outlining a complaint in relation to actions taken by Councillor Toni Bowler.⁷⁸

I am appointing you as Investigating Officer for this matter and request that you undertake this investigation as a possible breach of the Councillor Code of Conduct and prepare a report to be available for the next General Meeting of Council.

The next General Meeting of Council was scheduled for 31 May 2006. Given that the 24th was a Wednesday, this allowed the Complaints Officer, *at most*, four full business days to complete the investigation and report to the CEO in time for the CEO to review and approve the report and include it in the meeting agenda for 31 May 2006. Furthermore, as meeting agendas and reports are generally circulated to councillors several days prior to meetings, in reality, the investigator had less than four full business days to complete this task.

⁷⁶ In Appendix 2, this is referred to as 'Proposed Opinion 2'.

⁷⁷ See commentary at 1.6 above.

⁷⁸ An extract of the quarry representative's letter is provided at 2.2, above.

The CEO notified Cr Bowler, by memorandum dated 24 May 2006, that the investigation had commenced. This memorandum (copied to the Complaints Officer) stated:

Councillor Bowler,

I have received a written complaint from [the quarry representative] which makes an allegation of trespass against you in relation to an incident at his quarry operations on 22 May, 2006.

I am treating this matter as a potential minor breach under the Councillor Code of Conduct. Therefore I have appointed [Complaints Officer] as the Complaints Officer to investigate this matter and prepare a report for Council.

As you are aware from the Code of Conduct requirements this matter must be reported to the next General Meeting of Council. I have requested [Complaints Officer] to complete [the] investigation and have a report finalized in time for the next General meeting. [Complaints Officer] will contact you accordingly to discuss this matter.

Section 250R of the LGA states that a complaint alleging a minor breach of a council's councillor code of conduct "... must be made under the local government's general complaints process".

Section 501E(1)(g)(i) of the LGA only requires a written report to be prepared for council "if the complaint is not resolved to the affected person's satisfaction through the general complaints process".

Council's Code Guideline Document authorises the senior complaints officer (that is, the CEO) to request the complainant to try to resolve the complaint with the relevant council officer or councillor before registering the complaint.⁷⁹

Where the CEO does not think it is appropriate to request a complainant to try to resolve the complaint (as was the case here), the CEO allocates the complaint to a complaints officer for investigation and:

- determines the appropriate timeframe for a response,⁸⁰ and
- advises the complaints officer accordingly.⁸¹

The Code Guideline Document sets out the following timeframes for dealing with matters under the General Complaints Process:⁸²

- urgent matters – within 10 business days;
- non-urgent complaints generally – within 20 business days; and
- complex complaints or matters to be investigated externally – within 25 business days.

Therefore, assuming the CEO considered the complaint about Cr Bowler to be an urgent one, the Complaints Officer would generally have been required to finalise the investigation within ten days. I also note that the CEO has power to extend that time once only.⁸³

⁷⁹ Guideline Document GL-3037-001, para 5.2.1

⁸⁰ Guideline Document GL-3037-001, para 5.2.4

⁸¹ Guideline Document GL-3037-001, para 5.2.5

⁸² Guideline Document GL-3037-001, para 5.2.6

⁸³ Guideline Document GL-3037-001, para 5.2.6

The Code Guideline Document required the Complaints Officer to prepare a report on the investigation containing certain information, including recommended outcomes.⁸⁴ The Complaints Officer was also required to submit the report and relevant documentation to the CEO “for any necessary action, including referral to the council in the case of investigation of minor breaches”.⁸⁵

The Code Guideline Document then provides that:

*If a report is required to be submitted to Council, the Senior Complaints Officer will arrange for the matter to be brought before the next General Meeting of Council.*⁸⁶

The CEO appears to have interpreted the Code Guideline Document as requiring that, once she had allocated the matter to the Complaints Officer for investigation, the Complaints Officer’s report had to be submitted to the next meeting of Council following the allocation. I disagree and interpret the Code Guideline Document as requiring the CEO to submit an investigation report to the next General Meeting only once the CEO has received the report.

Therefore, assuming the CEO had classified the matter as urgent, the due date for finalisation of the investigation should have been 6 June 2006. Had the CEO received the report by that date, she should have arranged for the matter to be brought before the next General Meeting of the Council after that date.

Opinion 4⁸⁷

The CEO incorrectly informed Cr Bowler and the Complaints Officer on 24 May 2006 that the investigation into the complaint had to be reported to the next General Meeting of Council on 31 May 2006. This information was not in accordance with the relevant provision of the Local Government Act, the Councillor Code of Conduct or its Code Guideline Document and meant that the Complaints Officer had an unreasonably short time to properly investigate the matter.

Recommendation 1⁸⁸

That Council amend Part 5 of its Code Guideline Document to clarify the correct reporting procedure to be followed where a formal investigation is commenced into a complaint against a councillor.

⁸⁴ Guideline Document GL-3037-001, para 5.2.7.1

⁸⁵ Guideline Document GL-3037-001, para 5.2.7.2

⁸⁶ Guideline Document GL-3037-001, para 5.2.7.3

⁸⁷ In Appendix 2, this is referred to as ‘Proposed Opinion 3’.

⁸⁸ Following consideration of the solicitors’ submission, I decided an additional recommendation was necessary to address possible confusion in the Council’s Guideline. This recommendation did not appear in the proposed report.

2.5.1 Complaints Officer's actions

The Complaints Officer conducted an interview with Cr Bowler on 30 May 2006 (the day before the report went to Council). The email from the Complaints Officer to Cr Bowler requesting that Cr Bowler attend the interview read (in part):

As you are aware, [the quarry representative] has complained about your attendance at his quarry on Monday 22 May 2006 and I have been appointed to investigate the complaint. This requires me to gather the facts and prepare a report to Council. The Council will consider my report at the General Meeting to be held on 31 May 2006, and the Council will determine (1) if any breach or offence has occurred and, if so, (2) an appropriate penalty.

... before I prepare my report, I would like to meet with you to obtain your account of the incident ...

The purpose of our meeting is simply for me to get your account of the facts. It is not for me to consider any submissions you may have or to be a hearing of any sort. You will have an opportunity to make any submissions to the Council at the General Meeting on Wednesday [31 May 2006] when they consider the matter. [my emphasis]

The report to Council about the investigation was completed by the Complaints Officer on 30 May 2006. The Complaints Officer advised my investigators that this report was provided directly to the CEO for circulation to all councillors as part of the normal distribution process for General Meeting agendas. The evidence suggests that Cr Bowler was not specifically informed of the contents or recommendations of the report, or provided with any opportunity to respond to the report, prior to the General Meeting the following day (31 May 2006). In fact, the notice provided by the Complaints Officer stated that the first opportunity Cr Bowler would have to make submissions would be at the General Meeting itself.

As mentioned, procedural fairness requires that a person who will be adversely affected by a proposed decision is informed of the allegations and given a reasonable opportunity to put their case before the decision is made (see the 'fair hearing rule' at 1.5). Indeed, the Department's Discussion Paper explicitly recommends that, where a complaint against a councillor cannot be resolved and an investigation is conducted:

- the report of the investigation be provided to that councillor for consideration prior to council meeting to consider it; and
- the councillor be afforded a right of reply before council makes its decision.

It appears that, although the agenda for the Council meeting of 31 May 2006 contained an item relating to the complaint against Cr Bowler, the Complaints Officer's report was not provided to Cr Bowler until the day of the meeting. Therefore, the issue to be considered is whether Cr Bowler was given sufficient notice of the report's findings and recommendations to be able to make her submission to the Council.

She may, for example, have wished to obtain legal advice on the report's findings to assist her in preparing her submission to Council. This opportunity was denied her.

Opinion 5⁸⁹

Council failed to provide Cr Bowler with a reasonable opportunity to consider the contents of the report on the investigation of the complaint and to prepare a submission before the report was considered by Council at its General Meeting on 31 May 2006. This failure constituted administrative action that was unreasonable and/or unjust within the meaning of s.49(2)(b) and/or wrong within the meaning of s.49(2)(g) of the Ombudsman Act.

Recommendation 2⁹⁰

That Council amend its General Complaints Process to require that any councillor about whom an adverse report is to be made to Council in relation to a minor Councillor Code of Conduct breach be given a copy of the proposed report or informed of its contents and given a reasonable opportunity to make submissions about it prior to the report being considered by Council.

⁸⁹ In Appendix 2, this appears as 'Proposed Opinion 4', but has been amended before finalisation in light of the solicitors' submission.

⁹⁰ This appears as 'Proposed Recommendation 1' in Appendix 2.

Chapter 3: Council's response

3.1 Report to Council

Consideration of the report on the Complaints Officer's investigation into the quarry representative's complaint was listed as an agenda item for the 31 May 2006 General Meeting as a 'direct to council' item. The report's executive summary stated:

A complaint has been received about a Councillor's conduct. It is alleged that the Councillor trespassed on private property. If this allegation is substantiated, it may constitute a minor breach of the Redland Shire Council Councillor Code of Conduct.

The Code of Conduct and the Local Government Act 1993 require that the complaint be referred to a complaints officer for investigation, and if it is unable to be resolved, the matter must be referred to Council to determine if a breach of the Code of Conduct has occurred and if so, appropriate action to be taken.

The allegation has been investigated by a complaints officer and been unable to be resolved. The complaints officer has found sufficient evidence to substantiate the allegation. The matter is now referred to Council to determine if a breach of the Code of Conduct has occurred and if so, appropriate action to be taken.

The report continued:

The allegation has been investigated in accordance with the General Complaints Process and an investigation report is attached. The investigator found that there was sufficient evidence to substantiate the allegation.

Because the complaint has been found to be substantiated, the matter is unable to be resolved through the complaints process. Therefore, the matter is referred to Council to determine if a breach of the Code of Conduct has occurred and if so, appropriate action to be taken. [my emphasis]

Council's Code Guideline Document states that, if the complaint is about councillor conduct, the complaints officer handling the matter will prepare a report outlining:

- a) a summary of the complaint;
- b) details of the investigation;
- c) findings of the investigation;
- d) recommended outcomes, including any penalty if the investigation is of a minor breach of the Councillor's Code of Conduct;
- e) a draft letter to the complainant advising of the outcome.

5.2.7.2 All reports and documentation gathered during the investigation will be submitted to the Senior Complaints Officer for any necessary action, including referral to the Council in the case of investigation of minor breaches. All reports from external reviews will be submitted to Council.⁹¹

⁹¹ Redland Shire Council Guideline Document GL-3037-001, paras 5.2.7.1 – 5.2.7.2

Section 250S(4) of the LGA sets out the courses of action open to Council if it determines a councillor has committed a minor breach. The Council may also determine that the complaint is frivolous or vexatious.⁹² However, s.250S(1) states that the section applies only if a report is given to the Council by the complaints officer and the report states the complaint has not been resolved through the general complaints process. In the present matter, as mentioned at 2.4 of this report, Cr Bowler was not given the opportunity to have the complaint resolved without a formal investigation (and thereby avoid a Code breach being recorded against her) as the CEO and the Complaints Officer formed the opinion that it was unlikely the complaint could be informally resolved. I have already expressed my view that their opinion was reasonably based.

Also, as mentioned, the report of 30 May 2006 to Council asserted that, because the complaint had been substantiated, it was unable to be resolved through the Council's complaints process. This assertion may have been correct in the circumstances of this case but is not correct as a general proposition. Under s.501F(1) of the LGA, a complaints officer may discontinue an investigation at any stage if satisfied a complaint of a minor breach of the council's Code is trivial, frivolous or vexatious. If a complaints officer formed such a view after finalising the investigation, the officer would reflect this in their findings and recommendations in their report.

The Complaints Officer's recommendation was that Council:

- a) ...
- b) *resolve to accept the finding that there is sufficient evidence to substantiate the allegation that on 22 May 2006 Councillor Bowler was on private property without permission; and*
- c) *consider if this action constituted a breach of the Redland Shire Council Councillor's Code of Conduct; and*
- d) *if a breach of the Councillor's Code of Conduct has occurred, that appropriate action be taken against the Councillor.*

The report to Council included, as an attachment, the complaint investigation report itself. This report set out, in detail:

- the purpose of the report
- the objective of the investigation
- the Complaints Officer's authorisation to undertake the investigation
- the scope and methodology of the investigation
- the complainant's allegation
- the account of Cr Bowler and the officers involved in the incident
- an account of the Complaints Officer's visit to the quarry to inspect physical aspects of the site in question
- a discussion of the issues in the investigation.

The final parts of the report contain the outcomes of the investigation:

7.4 Findings

The Councillor and officers entered the site. No permission was sought before they entered the site. When they entered the site they did not report to the site office. The property is clearly signed that visitors must report to the site office.

⁹² LGA, s.250S(2)

The Councillor was aware that visitors to the site were required to report to the office but did not do so because they were not staying very long and she did not see the complainant's vehicle.

The Councillor did not drive straight off the property but stopped on the incorrect side of the road long enough for:

- *a passenger to get out of the vehicle and take photographs;*
- *a person to see the passenger taking photographs and alert the complainant;*
- *the complainant to then direct an employee to prevent the vehicle leaving the site.*

Once the vehicle stopped on the property and a passenger got out and took photographs, the occupants became visitors and should have reported to the office.

7.5 Conclusion

There is sufficient evidence to support the allegation that the Councillor and officers were on the quarry property without permission and disobeying the requirement for visitors to report to the site office.

7.6 Recommendation

It is recommended that the complaint in relation to the Councillor be referred to Council to resolve if a minor breach of the Code of Conduct has been committed by the Councillor. It is recommended that the Chief Executive Officer consider the actions of the officers involved and remind staff of their duties when attending at business properties.

The report quoted three sections of Part 6 of the Code relating to conduct requirements. These were:

- the preamble to Part 6 in relation to councillors conducting themselves in a way that promotes and maintains the public's trust and confidence in the local government and the good rule and government of its area;
- paragraph 6.1.1(a) requiring councillors to show respect for the laws of the State and Commonwealth, and the system of government in general; and
- paragraph 6.3.1 requiring councillors to demonstrate respect for all people.

As an aside, I note that the Complaints Officer's recommendation in the Executive Summary to the report is not entirely consistent with the conclusion in the report itself in that the recommendation is that Council:

(a) resolve to accept the finding that there is sufficient evidence to substantiate the allegation that on 22 May 2006 Councilor Bowler was on private property without permission; ...

One of the findings in the Complaints Officer's report was that "*once the vehicle stopped on the property and a passenger got out and took photographs the occupants became visitors and should have reported to the office*".

This finding appears to have been central to Council's eventual decision that Cr Bowler and the officers should reasonably have complied with the sign and reported to the site office.

In my view, it is by no means clear that Cr Bowler and the officers became visitors (implying an obligation to comply with the sign) when one of the officers got out of the vehicle to take photographs in circumstances where:

- Cr Bowler had turned the vehicle around and was heading back towards the gates; and
- she and the officers were not intending to visit the quarry proper.

It should be kept in mind that this assertion of the Complaints Officer was made at a time when she mistakenly believed that the car park area and the area where Cr Bowler stopped the vehicle were on land owned or occupied by the quarry operator.

I also note that the report does not explain how Cr Bowler's conduct breached the Code although it does refer to certain provisions (quoted above) thereby implying that they are the relevant obligations for Council to consider in assessing the councillor's conduct.

A finding that a councillor was on land without permission may or may not constitute trespass. However, even if a councillor has trespassed on private property, this will not *automatically* be a breach of the Code. The council must also be satisfied that the councillor's conduct is inconsistent with one or more of the ethical obligations required of councillors by the Code.

Sometimes it will be obvious from the investigation of a complaint that the relevant councillor's conduct has breached the Code. For example, if an investigation reveals evidence supporting a complaint that a councillor had shouted abuse at the complainant, the council would consider whether the councillor had breached the obligation to demonstrate respect for all people.

However, in some cases, like the present one, this will not be clear. Therefore, I think it would be good practice in future for complaints officers to specify, in the complaint investigation report:

- the relevant provision or provisions of the Code that may have been breached; and
- how the provision or provisions may have been breached.

Recommendation 3⁹³

That Council amend its procedures to require a complaints officer (whether internal or external to Council), who submits a report recommending that the Council consider whether a councillor has committed a minor breach of the Councillor Code of Conduct, to specify in the report the provision or provisions of the Code that may have been breached and how the provision or provisions may have been breached.

Recommendation 4

That, where a complaints officer's report into an alleged minor breach of the Councillor Code of Conduct does not specify the provision of the Code alleged to have been breached, the Council give reasonable notice of the provision to the relevant councillor in some other way, for example, by notice signed by the CEO.

⁹³ In Appendix 2, this appears as 'Proposed Recommendation 2'.

As discussed in Chapter 4, the Complaints Officer's report was wrong in that it had proceeded on the erroneous basis that the quarry operator owned or leased the land on which the incident occurred. It appears that the Complaints Officer made this error due to reliance on:

- the quarry representative's assertions in his written complaint that Cr Bowler had "entered into my land" and had "trespassed once again on the land"; and
- the fact that the relevant area had been fenced off from the public roadway and appeared to be part of the quarry complex.

Opinion 6⁹⁴

The conclusion in the Complaints Officer's report of 30 May 2006 that Cr Bowler was on the quarry property, and the recommendation in the Direct to Council Report that Council accept there was sufficient evidence to substantiate the allegation that she was on private property without permission, were wrong within the meaning of s.49(2)(g) of the Ombudsman Act in that the quarry operator did not own or lease the land on which the incident occurred.

3.2 General Meeting of 31 May 2006

The minutes of the General Meeting of 31 May 2006 and the evidence of those persons my investigators interviewed indicate that the Complaints Officer's report was discussed in open session at that meeting. The evidence provided by the Mayor, CEO and Complaints Officer indicates that several councillors spoke on the matter, including Cr Bowler. My understanding is that Cr Bowler was present throughout the discussion and participated in the vote on the resolution.

Cr Bowler was, apparently, the last councillor to speak on the matter. During her address to Council, Cr Bowler raised the issue of land tenure. Specifically, Cr Bowler stated that she had received advice that the land on which she and the officers had been present during the incident in question was, in fact, land designated for road purposes belonging to the State Government and neither belonged to, nor was under the lawful control of, the quarry operator. The Mayor, CEO and Complaints Officer all informed my investigators that this was the first occasion on which they had considered this possibility.

The discussion of councillors at the meeting is not recorded. The Minutes record the following:

COUNCIL RESOLUTION

...

That this matter be referred back to the Complaints Officer to investigate the property boundaries of the site and any arrangements that might pertain to surrounding boundaries, as well as any rights or lease provisions on this property. [my emphasis]

CARRIED

A division was called for.

...

*The motion was declared by the Mayor as **CARRIED***⁹⁵

⁹⁴ In Appendix 2, this appears as 'Proposed Opinion 5'.

⁹⁵ Minutes of the Redland Shire Council General Meeting, 31 May 2006, Item 14.1.1

The minutes record that Cr Bowler voted on the resolution along with other councillors. In essence, this means Cr Bowler participated in the decision-making process in respect of an investigation into her own conduct. I discuss this at Chapter 5.

Chapter 4: Road reserve issue

4.1 Investigation of the road reserve issue

Immediately following the 31 May 2006 General Meeting, the Complaints Officer researched the status of the land on which the incident occurred. This research revealed that the land was gazetted for road purposes, and that ownership was with the Crown (as the Department of Natural Resources, Mines and Energy (as it then was)).⁹⁶

On 7 June 2006, the Complaints Officer prepared an Addendum to the original complaint investigation report. On 13 June 2006, the CEO circulated the Addendum to all councillors (including the Mayor and Cr Bowler). The summary of findings and recommendations from the Addendum states:

There was insufficient evidence to establish that the complainant had any tenure rights in the land where the incident occurred.

*However, notwithstanding the lack of tenure, **the complainant was empowered by legislation to exercise control over the land** to manage the risk associated with the quarrying activities which took place on the adjacent or adjoining land. This included ensuring that all persons other than workers complied with signage at the entrance to report to the site office. [my emphasis]*

It is recommended that the matter be referred to the Council in accordance with the provisions of the Redland Shire Council Councillor Code of Conduct and the Local Government Act 1993 to determine if the Councillor's conduct constitutes a minor breach and, if so, appropriate action to be taken.

The 7 June 2006 Addendum also included the following statements:

5.2.3 Clarification with Complainant of Matters Raised by Councillor

[The quarry representative] agreed that he has invited [Cr Bowler] onto his property and that she has accepted that invitation. However, that invitation has always been that she, like any other person, is to either make arrangements to attend the property or to report to the site office on arrival to comply with the safety requirements.

*[The quarry representative] has clarified that his complaint is that the Councillor did not comply with the signage which required visitors to report to the site office. **This signage and the fencing are erected under his obligations under the MQSHA and failure to ensure that they are complied with could result in his prosecution.** [my emphasis]*

...

⁹⁶ Day-to-day control of roads (other than State-controlled roads) generally lies with the relevant local council (s.901(1) of the LGA), although ultimate ownership of the land remains with the State.

5.3 Amended Findings

The Councillor and officers attended at the quarry site. No permission was sought from the complainant before they attended at the quarry. The property is clearly signed that visitors must report to the site office. The Councillor was aware that visitors to the site were required to report to the office but did not do so because they were not staying very long.

The Councillor did not drive straight in and straight out but stopped on the incorrect side of the road for an undetermined period of time. Whilst they were stopped, one of the officers got out of the vehicle and took at least four photographs. An employee of the complainant noticed the vehicle stopped and the officer taking photographs and alerted the complainant. The complainant confronted the occupants of the vehicle at the location where they were still stopped taking photographs.

*The site on which they were stopped was on road reserve and not private property. The site where they were stopped was the entrance to the quarry and was land that may be described as adjacent to or adjoining quarry operations. **For the purpose of the [MQSHA] a quarry includes the area adjacent to or adjoining the quarry operations regardless of land tenure rights. The [MQSHA] requires the person responsible for safety at the quarry to assess and ensure the fitness of all persons before they enter the operating area. The complainant was responsible for the safety at the quarry.** [my emphasis]*

The Councillor and the officers did not report to the site entrance before stopping the vehicle and taking photographs of the quarry operations.

The report then concluded that there was sufficient evidence to support the complaint that Cr Bowler and the officers had been on land under the quarry representative's "safety control" contrary to the lawful signage requiring visitors to report to the site office.

Also on 13 June 2006, the Complaints Officer sent an email to Cr Bowler summarising the Complaints Officer's view of this turn of events:

Prior to the General Meeting, I had assumed that the entrance and car park were on land owned by [the quarry] because, when on site, the layout of the entrance and car park is consistent with the layout of the block and it is fenced and gated.

After the General Meeting, I investigated the ownership of this area. It was during those further investigations that I formed my opinion that the entrance and car park are situated on road reserve.

When interviewed by my officers, the CEO stated:

... the findings in the report of 30 May were that the councillor and the officers entered the site, no permission was sought, didn't report to the office ... etc. There's nothing in there that talks about, in those findings, trespass. To me it's the inappropriate entry of a site and not following the rules.

However, the CEO's view is not consistent with the 30 May report which states that:

Sufficient evidence was found to substantiate the allegation that the Councillor was on the property without permission or authority.

Also on 13 June 2006, the CEO wrote to the Land Services Unit at the (then) Department of Natural Resources, Mines and Water advising that she had become aware of a suspected encroachment of the quarry onto road reserve land, and referring the matter to the Department for further consideration.

4.1.1 Mining legislation

Mining safety in Queensland is governed by the *Mining and Quarrying Safety and Health Act 1999* (MQSHA). The MQSHA applies to everyone who may affect the health or safety of persons who are at a mine, or as a result of mining operations, or whose health or safety may be affected.⁹⁷ A mine includes a quarry,⁹⁸ and is generally defined as:

- (a) *a place where operations are carried on, continuously or from time to time, within the boundaries of land the subject of a mining tenure;*
- (b) *a place where operations are carried on, continuously or from time to time, on land adjoining, adjacent to, or contiguous with, the boundaries of land the subject of a mining tenure and within which is a place mentioned in paragraph (a);*
- (c) *a place where operations are carried on, continuously or from time to time, unlawfully because land at the place is not the subject of a mining tenure*⁹⁹
...

'Operations', for the purposes of the mine safety system, are specifically stated to *not* include "... transport to and from a mine on public roads ...".¹⁰⁰ However, the Chief Inspector of Mines (Metalliferous) has advised my Office that mine and quarry car park areas may nevertheless be subject to certain mine safety requirements (such as traffic management plans) even where the mine or quarry operator does not own the relevant areas.

Additionally:

- (1) *A **quarry** is a place on land where hard rock is excavated, continuously or from time to time, to produce construction or road building material.*
- (2) *A **quarry** includes a place on land where processing of hard rock happens, continuously or from time to time, if the place is on land that adjoins, is adjacent to, or is contiguous with, a place mentioned in subsection (1).*¹⁰¹

Persons visiting a mine or a quarry (as defined above) have general duties under the MQSHA, summarised in s.36(1)(a) of the MQSHA as duties:

... to comply with [the MQSHA], standard work instructions, and procedures applying to the worker or person that form part of a safety and health management system for the mine ...

The MQSHA also prescribes a wide range of duties for quarry operators.

⁹⁷ MQSHA, s.5

⁹⁸ MQSHA, s.9(1)(f)

⁹⁹ MQSHA, s.9(1)(a)-(c)

¹⁰⁰ MQSHA, s.10(2)(e)

¹⁰¹ MQSHA, s.11(1)-(2)

4.1.2 Allegation relating to the MQSHA

Neither the Addendum (dated 7 June 2006) to the original report nor the report to Council of 26 July 2006 (to which the Addendum was also attached) specified any provisions of the MQSHA which Cr Bowler was alleged, or found, to have breached. I also note that Cr Bowler was not reinterviewed by the Complaints Officer before the finalisation of the later report.

The later report asserted that the area where the incident occurred was within the safety control area of the quarry operator for the purposes of the MQSHA. My role is not to reinvestigate whether Cr Bowler and Officers 1 and 2 committed a breach of the MQSHA but to investigate whether Council's actions were unlawful, unjust or unreasonable in reprimanding Cr Bowler for an alleged breach of the Code. I accept that mine safety requirements may apply to land outside of the actual quarry area and even to land unlawfully occupied by a quarry operator. However, the application of a safety and health management system for a mine, or a particular aspect of the system, to such land is something that must be established in the circumstances of each case.

On 8 August 2006, the Regional Inspector of Mines¹⁰² with responsibility for the area in which the quarry is located wrote to the CEO, as follows:

Recently I received a complaint from the operator of a quarry in the Redland Shire. This was with regard to a councillor and two colleagues who failed to comply with the quarry's posted condition of entry rules while in the quarry's car park. I understand that these are located on a sign within the quarry's boundary on the side of the access road leading to the car park.

I would appreciate it if you would advise the Redland Shire councillors and council employees who intend to visit a quarry that activities within a quarry boundary come under the [MQSHA].

...

I would appreciate it if you would make Redland Shire councillors and council employees who intend to visit a quarry aware of their obligations under the Act.

It is unclear whether the Regional Inspector was aware that the land on which the incident occurred was public reserve land. In any event, his letter did not suggest that any further action was to be taken against any person for any specific breach.

I understand no other formal correspondence was received by Council from the Regional Inspector of Mines on this matter. This indicates that the unit of the State Government directly responsible for administering and enforcing the MQSHA chose to take no action other than to send the letter to the CEO.

However, this does not mean that Council was prevented from taking action against Cr Bowler if it was satisfied she had committed a breach of the MQSHA. In saying this, I note that the solicitors' submission makes it clear that Council did not make such a finding and asserts that Council did not need to do so in order to discipline Cr Bowler.¹⁰³ I deal with this assertion at 5.2 of my report.

¹⁰² The Regional Inspector of Mines is an official within the Department of Mines and Energy, reporting to the Chief Inspector of Mines (who has statutory responsibility for investigating mine safety matters).

¹⁰³ See Appendix 2, at paragraphs 9.2.1 to 9.2.8 of the solicitors' submission.

The conclusion of the Complaints Officer's Addendum of 7 June 2006 was that Cr Bowler and the officers were "on land under the safety control of the complainant contrary to the lawful signage requiring visitors to report to the site office". However, the Complaints Officer did not allege that this constituted a breach of any provision of the MQSHA and I am satisfied that the evidence contained in the reports to Council did not establish that Cr Bowler had committed such a breach.

Opinion 7¹⁰⁴

The evidence contained in the Complaints Officer's reports to Council did not establish that Cr Bowler had committed a breach of any provision of the Mining and Quarrying Safety and Health Act.

4.2 Proposed apology

One of Cr Bowler's allegations was that Council had prejudged her. The only evidence I obtained that arguably supported that allegation was a memorandum the Mayor sent to Cr Bowler on 13 June 2006 (one week after the Addendum was circulated) which read:

Councillor Bowler

I've read the addendum report [of 7 June 2006] which has been circulated on this complaint. From my reading of this document it appears that [the quarry representative] did have a right and a requirement to regulate this quarry site under the [MQSHA]. Therefore he was entitled to require any visitor to the site to report to the site office.

I'm sure if there had been any accident or safety issue on the site [the quarry representative] would have been held accountable. Accordingly I believe he's entitled to have all visitors observe this safety requirement, irrespective of how long they might be intending to remain on the site.

As this matter does not reflect well on Council generally, and in the interests of resolving the complaint and saving further embarrassment and publicity, I would like you to consider providing [the quarry representative] with a written apology. I believe that if you were to apologise for this oversight it would potentially assist to resolve the matter without the need for Council to consider it further.

At the date the Mayor sent this memorandum to Cr Bowler, the Complaints Officer had completed the Addendum to the original report. However, the Addendum had not at that stage been considered by Council.

Under Council's General Complaints Process, the individuals or entities who may be involved in resolving, investigating or determining Code matters are:

- the CEO;
- a complaints officer with delegated power; and
- Council (that is, the full council of the Redland Shire Council).

Accordingly, the Mayor has no role to perform in the process other than through full Council. In the present case, the CEO and the Complaints Officer had already concluded that the matter could not be informally resolved and had to be formally considered by Council.

¹⁰⁴ In Appendix 2, this appears as 'Proposed Opinion 6'.

The memorandum gave rise to the perception that the Mayor had made up his mind about the complaint before considering any submission from Cr Bowler in relation to the Addendum to the report.

Opinion 8¹⁰⁵

The Mayor's memorandum of 13 June 2006 recommending that Cr Bowler apologise to the quarry representative was not in accordance with the procedure required by the Local Government Act and the Councillor Code of Conduct for dealing with complaints of minor breaches of the Code by councillors and gave rise to the perception the Mayor had prejudged the issue, and constituted administrative action that was unreasonable within the meaning of s.49(2)(b) and wrong within the meaning of s.49(2)(g) of the Ombudsman Act.

Opinion 9

The evidence does not support the allegation that Council prejudged Cr Bowler.

Opinion 10

The evidence does not support the allegation that Council conducted a biased investigation to intimidate and discredit Cr Bowler as an elected member.

¹⁰⁵ In Appendix 2, this appears as 'Proposed Opinion 7'.

Chapter 5: The reprimand

5.1 The allegation

It is apparent from a consideration of the first report and 7 June 2006 Addendum (provided to the General Meeting on 26 July 2006) that between the meetings of 31 May 2006 and 26 July 2006, the allegation against Cr Bowler changed from:

- being “... *on private property without permission or legitimate cause and consequently ... trespassing*”¹⁰⁶

to:

- being “... *stopped at the quarry site ... on land which was under the exclusive possession or control of the complainant [or the company], in contravention of lawful signage requiring visitors to report to the site office*”.¹⁰⁷

As I have mentioned earlier, the written complaint alleged trespass. Even though it referred to the sign requiring visitors to report to the site office, this was in the context of trespass. The complaint did not make any reference to the mine/quarry safety legislation, or the application of safety requirements under the legislation to the circumstances of the incident. On the other hand, the evidence provided by the CEO in relation to her telephone conversation with the quarry representative suggests that his objection to the councillor’s and officers’ presence in the car park was based on his obligations to ensure the safety of all persons present at the quarry.

These are two separate allegations giving rise to different considerations and possible defences. It is a fundamental requirement of procedural fairness that the decision-maker makes a decision on the same allegation that the person the subject of the allegation has had the opportunity to make a submission on. Where facts come to light during the investigation which require the allegation to be altered, or a new allegation to be made, the person under investigation should be given notice of the changes and the opportunity to be heard in respect of the amended or new allegation.

In this case, although Council did not provide formal notice to Cr Bowler that the allegation had changed or reinterview her in relation to the changed allegation, she obtained a copy of the Addendum on 13 June 2006 which sets out the Complaints Officer’s revised findings and recommendations. As with the 30 May 2006 report, the Addendum and the report submitted to the Council General Meeting on 26 July 2006 do not specify the provision of the Code Cr Bowler was alleged to have breached.

¹⁰⁶ Complaint Investigation Report of 30 May 2006, p.3

¹⁰⁷ Addendum of 7 June 2006, p.4

5.2 General Meeting of 26 July 2006

The Complaints Officer's new report (with the 7 June 2006 Addendum attached) was placed on the agenda for the 26 July 2006 General Meeting of Council.¹⁰⁸ This report included discussion of the complaint against Cr Bowler based on an alleged breach of mine/quarry safety, rather than on trespass. As with the 31 May 2006 General Meeting, the item was discussed in open session. The report's recommendation to Council was that Council resolve:

1. *That there is sufficient evidence to support the allegation that on 22 May 2006 Councillor Bowler was on land under the safety control of the complainant contrary to the lawful signage requiring visitors to report to the site office;*
2. *If this action constituted a breach of the Redland Shire Council Councillors Code of Conduct; and*
3. *If a breach of the Councillors Code has occurred, any action to be taken against the Councillor.*

In response to the report, Cr Bowler proposed a motion to the effect that:

Council resolve to reject the findings of the complaints officer and take no further action because the complaint is frivolous and vexatious.

This motion was lost, with Cr Bowler voting in the affirmative. Council then voted on and adopted the following resolution, with Cr Bowler and three other councillors voting in the negative:

- ...
3. *To accept the findings of the complaints officer that there is sufficient evidence to substantiate the allegation that on 22 May 2006, Cr Bowler was on land under the safety control of the complainant contrary to the lawful signage requiring visitors to report to the site; and*
 4. *That this action by the Councillor constituted a breach of the Councillor Code of Conduct and is a minor breach as defined in section 250M of the Local Government Act 1993, and, therefore, in accordance with sections 250S and 250X of the Local Government Act 1993, reprimand the Councillor in writing.*

I have commented earlier that in some cases the provision of the Code breached by a councillor's conduct will be obvious. However, in my opinion, this was not the case here. I remain uncertain after considering all the evidence (including the Mayor's letter of reprimand) whether Cr Bowler was reprimanded for not showing respect for the law and the system of government in general or for not demonstrating respect for all people (presumably, the quarry representative) or for breaching both provisions.

In relation to the findings made by the Council, I note that the solicitors' submission states:¹⁰⁹

- The Complaints Officer's report did not purport to reach any conclusion on whether Cr Bowler had breached a provision of the MQSHA.
- The relevance of the inquiry into the potential application of the MQSHA was only to establish that the complaint, if true, was of substance.
- It was unnecessary for Council to determine whether there had been a technical breach of legislation in order to reach a conclusion as to whether the conduct and behavioural requirements of the Code had been breached.

¹⁰⁸ Redland Shire Council General Meeting 26 July 2006, Item 14.1.7

¹⁰⁹ See Appendix 2, at paragraphs 9.2.1 to 9.2.8 of the solicitors' submission.

I do not agree with this submission. In some cases, a council may be satisfied that a councillor has demonstrated a lack of respect for the law or a person:

- by conduct that does not constitute a criminal offence; or
- by conduct that may constitute an offence (for example, by punching someone).

In the latter case, council could resolve that a councillor has breached the Code even though the victim does not want to make a formal complaint to the police, assuming council's investigation revealed evidence that the conduct had occurred and was not justified.

However, in the circumstances of this case, it is difficult to see how Cr Bowler could have committed a breach of the Code (whether by showing disrespect for the law or a person) unless Council was satisfied that she had breached a legal duty under the MQSHA to comply with the sign. Any obligation she had to comply with the sign stemmed from the sign's authority under the MQSHA.

In making its finding, Council probably had regard to the finding in the Complaints Officer's report of 30 May 2006 that:

Once the vehicle stopped on the property and a passenger got out and took photographs, the occupants became visitors and should have reported to the office.

Of course, when the Complaints Officer made that finding it was not known that the incident had occurred on road reserve land. The Addendum report recommends that Council resolve:

...
 4. *That there is sufficient evidence to support the allegation that on 22 May 2006 Councillor Bowler was on land under the safety control of the complainant contrary to the lawful signage requiring visitors to report to the site office; ...*

Council accepted this recommendation. However, as I state above, such conduct could only constitute a breach of the Code if it also constituted a breach of a legal obligation under the MQSHA to comply with the sign. Council did not make this finding and acknowledges that it was not qualified to do so.¹¹⁰

The issues I have raised also illustrate why, in this case, Council should have specified the actual provision of the Code Cr Bowler was alleged to have breached and given her the opportunity to make a submission on whether the breach had occurred.

Opinion 11

Council's decision at its General Meeting on 26 July 2006 that Cr Bowler had committed a breach of the Councillor Code of Conduct (by being *on land under the safety control of the complainant contrary to the lawful signage requiring visitors to report to the site office*) constituted administrative action that was wrong, within the meaning of s.49(2)(g) of the Ombudsman Act, in that the Council did not find that her actions in not complying with the signage constituted a breach of the Mining and Quarrying Safety and Health Act and she had no other obligation to comply with the signage.

¹¹⁰ See Appendix 2, at paragraph 9.2.2 of the solicitors' submission.

Opinion 12¹¹¹

Council, in deciding at its General Meeting on 26 July 2006 that Cr Bowler had committed a breach of the Councillor Code of Conduct, failed to provide her with reasonable notice of the provision of the Code she was alleged to have breached to enable her to make a submission to Council. The failure constituted administrative action that was unreasonable and/or unjust within the meaning of s.49(2)(b) and/or wrong within the meaning of s.49(2)(g) of the Ombudsman Act. The failure also amounted to a denial of procedural fairness.

5.3 Mayor's letter of reprimand

The Mayor wrote to Cr Bowler on 26 September 2006, stating:

WRITTEN REPRIMAND – Section 250X(2)(a) of the Local Government Act 1993

At its General Meeting held on 26 July 2006, the Redland Shire Council resolved that on 22 May 2006, you were on land under the safety control of the complainant contrary to the lawful signage requiring visitors to report to the site.

Council further resolved, pursuant to section 250S(3) of the Local Government Act 1993, that this action by you constituted a breach of the Redland Shire Council Councillors' Code of Conduct.

Pursuant to sections 250S(4)(b) and 250X(2)(a) of the Local Government Act 1993, Council further resolved to impose a penalty on you of a written reprimand. In accordance with these resolutions, you are hereby formally reprimanded for the aforesaid breach of the Redland Shire Council Councillors' Code of Conduct.

Section 250S(4) of the LGA provides that, if a council decides a councillor has committed a minor breach of its code, it may do any of the following:

- (a) take no further action in respect of the breach;*
- (b) by resolution, impose a penalty on the councillor under subdivision 5¹¹² (namely a written reprimand or suspension from council meetings for certain periods);¹¹³ or*
- (c) if it considers the breach may be a repeat breach of the code, refer a complaint to its conduct review panel for review.*

Section 250S(5) of the LGA states that, in deciding whether a councillor has breached the code and whether to impose a penalty on the councillor, the council must comply with the principles of natural justice (procedural fairness).

¹¹¹ In Appendix 2, this appears as 'Proposed Opinion 8'.

¹¹² Sections 250X and 250Y of the LGA

¹¹³ Section 250X(2) of the LGA

As Council has a discretion in relation to the action it takes against a councillor for a breach of the Code, procedural fairness requires that the Council provide the councillor with an opportunity to be heard on the appropriate order. This does not mean a council must convene a separate hearing on the issue.¹¹⁴ There is judicial authority, however, to support the proposition that a failure to allow a person in such circumstances to be heard in respect of possible penalties or orders may constitute a denial of procedural fairness and invalidate the penalty subsequently imposed.¹¹⁵

In this case, once Council decided that Cr Bowler had breached its Code, she was denied the opportunity to make a submission about what action, if any, Council should take.

Opinion 13¹¹⁶

Council's resolution of 26 July 2006 that Cr Bowler be reprimanded for breaching the Councillor Code of Conduct constituted administrative action that was unreasonable and/or unjust within the meaning of s.49(2)(b) and/or wrong within the meaning of s.49(2)(g) of the Ombudsman Act in that, having decided that she had breached the Code, Council failed to give her an opportunity to be heard on the appropriate action Council should take in relation to the breach.

Recommendation 5¹¹⁷

That Council rescind its motion of 26 July 2006 in relation to reprimanding Cr Bowler.

Recommendation 6¹¹⁸

That Council amend its Code Guideline Document to provide that, if Council determines that a councillor has committed a breach of the Councillor Code of Conduct (other than a meeting breach), it give the councillor a reasonable opportunity to make a submission on the appropriate action Council should take prior to making any order in respect of the breach.

¹¹⁴ See the commentary of Commissioner Odes QC in *Rush v Western Australia Amateur Football League Inc* [2005] WASC 206.

¹¹⁵ See, for example, *Hall v New South Wales Trotting Club Ltd* [1977] 1 NSWLR 378.

¹¹⁶ In Appendix 2, this appears as 'Proposed Opinion 9'.

¹¹⁷ In Appendix 2, this appears as 'Proposed Recommendation 3'.

¹¹⁸ In Appendix 2, this appears as 'Proposed Recommendation 4'.

Chapter 6: Conflict of interest and procedural fairness

As part of the interviews with the Mayor, CEO, Complaints Officer and Cr Bowler, my investigators raised the issue of a possible conflict of interest inherent in Cr Bowler voting on motions on both 31 May 2006 and 26 July 2006, in relation to her own conduct and on the investigation into her conduct. In this regard, part of the interview between the investigator and the CEO was as follows:

Investigator But when it came to ... either the meeting on 31 May or 26 July, did anyone at all say, you know, Cr Bowler what are you doing voting on this, you're directly involved?

CEO No

Investigator Did anyone raise the conflict point ...?

CEO No. And I can see why they didn't because ... **it was the first opportunity she got to speak to it** and when she spoke to it, that was when things got very nasty and difficult in the chamber, and lots of accusations were flying around and ... I don't [think] the Chair was thinking about [that] nor was anybody. [my emphasis]

...

People actually walked out of the room ... people left the chamber and it was fairly unpleasant ... and it all happened in such a fairly quick space of time ... I don't think that the conflict of interest issue was uppermost in anyone's mind.

The comments of the CEO indicate that the manner in which Council conducted the investigation meant that the first opportunity given to Cr Bowler to respond to the findings and recommendations in the Complaints Officer's report was during the debate on the issue in General Meeting. This created a conflict of interest for Cr Bowler in that it forced her to participate in a decision-making process on a matter involving her. This fact alone is sufficient to indicate the process followed by Council in dealing with the matter was defective.

The Department has not provided any specific guidance on how agenda items relating to code of conduct matters should be handled during council meetings. Neither Chapter 4, Part 4A of the LGA (Codes of Conduct for Councillors) nor Chapter 6, Part 5 (General Complaints Process) specifies whether a councillor under investigation may, or may not, vote on resolutions about the matter. The overriding obligation, however, is contained in s.244 of the LGA, which states:

244 Exclusion from meeting of councillor with material personal interest

- (1) A councillor who has a material personal interest in an issue to be considered at a meeting of the local government, or any of its committees—
 - (a) must disclose the interest to the meeting; and
 - (b) must not be present at or take part in the meeting while the issue is being considered or voted on.

- (2) *A councillor who is barred from a meeting under subsection (1) must not be in the chamber where the meeting is being conducted, including any area set apart for the public.*

Section 6(1) of the LGA provides that:

A person has a material personal interest in an issue if the person has, or should reasonably have, a realistic expectation that, whether directly or indirectly, the person or an associate stands to gain a benefit or suffer a loss ...

The Crime and Misconduct Commission and the NSW Independent Commission Against Corruption (ICAC) advise:

*It is important to recognise that a poorly-managed perceived or apparent conflict of interest can be just as damaging as a poorly-managed actual conflict of interest. The critical factor is that public officials must not only behave ethically, they must also be seen to behave ethically.*¹¹⁹

I am not aware of any direct legal authority on the question of whether a councillor the subject of a complaint being discussed at a council meeting has a real or perceived material personal interest to which s.244 of the LGA applies. It is reasonable to assume, however, that any councillor in such a position would wish to ensure the outcome was favourable to them for the sake of their reputation (among other reasons). Therefore, I cannot see why s.244 would not apply. This may even prevent a councillor from making an oral submission at the council meeting at which the alleged breach is being considered and then withdrawing before the matter is discussed and voted on.

A better procedure would be for the council to give the councillor the opportunity to make a written submission to the council. However, the councillor should not take part in discussing the matter or voting on it in the council meeting and should not be present at the meeting.

On occasions, the absence of a councillor in such circumstances will result in there not being a quorum of the council. This will simply mean discussion will need to be postponed until a quorum can be achieved. A more difficult issue arises where the absence of the affected councillor alters the political balance of council and results in a negative outcome for the councillor. In such cases, if the councillor believes there is any evidence of impropriety, or failure to afford procedural fairness on the part of council, the councillor could make a complaint to the Crime and Misconduct Commission, or my Office, as appropriate.

It is also an accepted element of procedural fairness that the affected person be given adequate time to prepare their case:

*... nothing is clearer today than that a breach of the rules of natural justice is said to occur if a party to proceedings ... is not given a reasonable chance to present his case. It is so elementary and so basic it hardly needs to be said. But of the versions of breach of the rules of natural justice with which in this court we are dealing constantly, perhaps the most common today is the allegation that the defence were prejudiced because they were not given a fair and reasonable opportunity to present their case ... and of course the opportunity to present a case ... is not confined to being given an opportunity to stand up and say what you want to say; it necessarily extends to a reasonable opportunity to prepare your case before you are called on to present it.*¹²⁰

¹¹⁹ *Managing Conflicts of Interest in the Public Sector*, ICAC and CMC, Sydney and Brisbane, 2004 p.10

¹²⁰ *R v Thames Magistrates' Court; ex parte Polemis* [1974] 2 All ER 1219 at 1223, cited with approval in *Rogers v Law Coast Mortgages Pty Ltd* [2002] FCA 181

The potential difficulties created by not providing an adequate prior opportunity to a councillor to respond to an adverse report are evident from this case. The information about the land tenure status was only raised by Cr Bowler once discussion of the complaint had started at the 31 May 2006 meeting. Because the issue raised required further investigation, it was impracticable for Council to continue dealing with the matter at that point.

Had Cr Bowler been provided with the opportunity to respond to the report prior to the meeting, the item may not have been placed on the agenda, and an ultimately futile, and apparently acrimonious, discussion in the General Meeting might have been avoided.

It is important for councils to recognise the benefit to their own processes of providing procedural fairness as well as to the councillor under investigation. The Western Australian Ombudsman comments:

For you as an investigator, acting in accordance with procedural fairness can help you by providing you with:

- *an important means of checking facts and identifying major issues;*
- *comments made by the subject of the complaint which can expose weaknesses in the investigation;*
- *advance warning of the basis on which the investigation report may be challenged.*¹²¹

Opinion 14¹²²

Council's actions in allowing Cr Bowler to address its General Meeting of 26 July 2006, and to vote, on her alleged breach of the Councillor Code of Conduct constituted administrative action that was unreasonable and/or unjust within the meaning of s.49(2)(b) of the Ombudsman Act in that it put her in a situation where, in responding to the allegation, she risked committing a breach of s.244 of the Local Government Act.

Recommendation 7¹²³

That Council amend its Standing Orders to provide that a councillor about whom a complaints report has been given to Council must not be present at any meeting of the Council at which any matter arising from the report is discussed or voted on.

Recommendation 8¹²⁴

That Council amend its General Complaints Process to require that councillors the subject of proceedings under Chapter 4, Part 3A (Code of Conduct for Councillors) and/or Chapter 6, Part 5 (General Complaints Process) be given reasonable notice of, and a reasonable opportunity to respond to, the issues the subject of the proceedings.

¹²¹ WA Ombudsman, *Information Sheet 1: Procedural fairness (natural justice)*, Perth, 2005, pp.2-3

¹²² In Appendix 2, this appears as 'Proposed Opinion 10'.

¹²³ In Appendix 2, this appears as 'Proposed Recommendation 5'.

¹²⁴ In Appendix 2, this appears as 'Proposed Recommendation 6'.

Recommendation 9¹²⁵

That the Department of Local Government, Sport and Recreation take steps to amend the Local Government Act to specify the procedure to be followed by councils in dealing with councillors the subject of proceedings under Chapter 4, Part 3A (Code of Conduct for Councillors) and/or Chapter 6, Part 5 (General Complaints Process) to ensure councillors are given reasonable notice of, and a reasonable opportunity to respond to, the issues the subject of the proceedings.

Responses

1. Cr Bowler was provided with a notice under s.55 of the Ombudsman Act, drawing her attention to the comments in the report in relation to her participation in Council's General Meetings of 31 May 2006 and 26 July 2006. On 30 June 2007, Cr Bowler responded (in part) as follows:

I had no other way to defend myself but to be in the meeting to argue my case. I had the information about the ownership of the land and a few other councillors knew what I was to say. The CEO, Mayor and some councillors berated me and tried to gag me during the discussion ...

The matter came up again at the General Meeting on the 26th July ...

I knew again I had to be in the room to defend myself, as there was no natural justice. I did move a motion through sheer frustration and distress; ...

2. The solicitors' submission¹²⁶ disputed the validity of Opinion 14¹²⁷ as well as the appropriateness of recommendations 6 and 7.¹²⁸

3. The Department was invited to comment on recommendation 8,¹²⁹ although this was not as part of the adverse comment procedure under s.55 of the Ombudsman Act. The Director-General of the Department advised on 26 July 2007 that the recommendation would be forwarded to the Department's Local Government Act Review Team for inclusion as part of a broader review of the LGA.

¹²⁵ In Appendix 2, this appears as 'Proposed Recommendation 7'.

¹²⁶ See Appendix 2, at paragraphs 13.3 and 13.4 of the solicitors' submission.

¹²⁷ In my proposed report, this opinion was Opinion 10.

¹²⁸ In my proposed report, these were recommendations 5 and 6 respectively.

¹²⁹ In my proposed report, this was recommendation 7.

Chapter 7: Internal handling of Code complaints

At the time the Department developed the new councillor code of conduct regime, it was envisaged that external review panels would be established around the State to provide an independent means of resolving certain complaints against councillors. The Department's Model Code of Conduct for Councillors, for example, refers to 'conduct review panels' which might be established by a council (or group of councils).

Both the CEO and Complaints Officer advised that negative comments were made about them (in respect of the investigation) at the 26 July 2006 General Meeting, and that they considered these comments to be inappropriate. The CEO informed my investigators that, due to the nature of the comments made by councillors at the meeting, and the potential for Council officers dealing with future Code complaints to be placed in similarly uncomfortable positions, she has since implemented a policy that all complaints made under the Code against councillors are to be directed to an external review panel.

Although I consider the CEO's action in implementing the policy is readily understandable in the circumstances, I do not consider it necessary for every council to implement a similar policy requiring every allegation made against a councillor to be referred to an external panel or body of some description. This would entail significant delay and expense for councils, and possibly result in the unnecessary escalation of complaints which could otherwise be dealt with informally at the initial stage.

However, once a council decides that a formal investigation of a complaint about a councillor needs to be conducted, there are difficulties inherent in the investigation being carried out by an officer of the council. Such investigations should be carried out by independent, external investigators.

Indeed, the Department's Local Government Bulletin of December 2005 in relation to council general complaints processes states:

External review is ... required for a complaint about a minor breach of a [councillor code of conduct]. The CEO is precluded from reviewing a complaint against a councillor concerning a minor breach of the council's [councillor code of conduct], because of the independence requirement.¹³⁰

In other jurisdictions, the code of conduct regime for councillors has been established in such a way as to avoid this problem arising, or to minimise its consequences. Under these regimes, complaints about ethical standard breaches by local government councillors are referred for some form of independent review. In some jurisdictions this involves all complaints about councillors being investigated by independent persons.

¹³⁰ *Local Government Bulletin 15/05*, Department of Local Government, Planning, Sport and Recreation, Brisbane, 14 December 2005, p.5

Amendments to the local government legislation in Western Australia¹³¹ will implement a new disciplinary framework for councillors from late 2007. This is described as:

*... using a statewide standards panel to handle complaints about minor breaches of rules and empowering the State Administrative Tribunal ... to review the conduct of members ... Councillors found to be in minor breach of rules may face penalties ranging from public censure and a public apology through to an order to undertake training.*¹³²

The WA Standards Panel is to comprise three persons, with a chairperson from the Department of Local Government and Regional Development, a nominee from the WA Local Government Association and a third person with relevant legal knowledge.¹³³

In South Australia, there is also external involvement in some councillor code of conduct investigations. For example, the Adelaide City Council requires the CEO to refer complaints to a person selected from a panel in order to determine whether a complaint is trivial or frivolous. If that person considers the matter warrants investigation, the council then appoints a second person from the panel to conduct the investigation.¹³⁴

In England, complaints about councillors' actions potentially breaching the relevant code of conduct are generally directed to the Standards Board for England, a statutory authority independent of all local governments. An investigation into a councillor's conduct can, if necessary, be referred to the Adjudication Panel for England (an independent judicial tribunal).¹³⁵ Internal investigations of such matters are reported to each council's 'Standards Committee', which is required to include a number of external representatives (that is, members who are neither officers nor councillors nor affiliated with officers or councillors).

Recommendation 10¹³⁶

That, where a complaint is received about a councillor's conduct that potentially involves a minor breach of the Councillor Code of Conduct and Council determines a formal investigation should be conducted, it appoint an investigator external to Council to conduct the investigation.

¹³¹ *Local Government Act 1995* (WA) as amended by the *Local Government (Official Conduct) Amendment Act 2007* (WA)

¹³² WA Department of Local Government and Regional Development website:

<http://www.dlgrd.wa.gov.au/legislation/localgovtocamendact.asp>, accessed on 16 May 2007

¹³³ WA Local Government (Official Conduct) Amendment Bill 2005 Explanatory Memorandum, p.2

¹³⁴ Adelaide City Council, 2001, *Code of Conduct for the Lord Mayor and Councillors of the City of Adelaide*, reviewed 24 May 2004

¹³⁵ See the *Local Government Act 2000* (England).

¹³⁶ In Appendix 2, this appears as 'Proposed Recommendation 8'.

Chapter 8: General principles for investigations

This case has revealed a number of areas of concern in the Council's process for handling complaints against councillors. Accordingly, I have developed a list of important considerations all councils should bear in mind in dealing with complaints about councillor conduct (other than meeting breaches). However, the list is not intended to be exhaustive.

- a. Except in serious cases, councils should attempt to resolve complaints about councillors informally before commencing a formal investigation.
- b. Where a council CEO or other authorised complaints officer determines that informal resolution processes are inappropriate or unlikely to succeed in a particular case, a written record should be made of this decision and the reasons for it.
- c. Where informal resolution attempts fail, the investigator appointed by council should generally be external to council.
- d. A council should ensure that a person appointed to investigate a complaint (whether or not the person is an employee of the council) is not biased and could not be reasonably perceived to be biased.
- e. Investigators should be provided with adequate time to conduct a thorough investigation.
- f. If a report is to be made to council on an investigation and the report contains findings or comments adverse to a councillor, the councillor should be provided with adequate opportunity to respond to the findings and comment prior to the report being considered by council, and given sufficient information for that purpose.
- g. The information provided to a councillor the subject of an adverse report to council should include the provision or provisions of the Councillor Code of Conduct that may have been breached.
- h. Submissions made by the councillor against whom the complaint has been made should be presented to council along with the report.
- i. The councillor the subject of the complaint must not be present at or take part in the meeting while the complaint is being considered or voted on.
- j. If a council decides that a councillor has committed a breach of the Councillor Code of Conduct (other than a meeting breach), it give the councillor a reasonable opportunity to make a submission on the appropriate action council should take prior to making any order in respect of the breach.
- k. Each council should take steps to ensure its councillors are aware of the real or perceived conflict of interest involved in discussing or voting on a resolution about complaints about their own conduct.

Appendix 1: Timeline

22 May 2006	Incident at quarry site The quarry representative makes oral complaint to Mayor and CEO
23 May 2006	Cr Bowler prepares statement
24 May 2006	Council receives written complaint from quarry representative dated 22 May 2006 CEO gives notice to Cr Bowler
30 May 2006	Meeting between Cr Bowler and Complaints Officer to discuss the quarry representative's complaint Initial Investigation Report prepared by Complaints Officer
31 May 2006	Cr Bowler receives copy of initial investigation report Council General Meeting at which report discussed
7 June 2006	Addendum to Investigation Report finalised
13 June 2006	Cr Bowler receives Addendum to Investigation Report
26 July 2006	Second investigation report (with the Addendum attached) submitted to Council General Meeting Council votes at the meeting to accept recommendations in second investigation report and reprimands Cr Bowler for breaching the Councillor Code of Conduct
1 August 2006	Cr Bowler's submission to former Minister
8 August 2006	Letter from Regional Inspector of Mines to Council
26 September 2006	Written reprimand issued to Cr Bowler
11 December 2006	Cr Bowler's submission to former Minister referred to Ombudsman by current Minister