Appendix 2: Submission by solicitors

Investigation by the Queensland Ombudsman into the Redland Shire Council's management of a complaint against a Councillor under its Councillor Code of Conduct

Response to proposed report dated 28 June 2007 on behalf of the Redland Shire Council (RSC), Susan Rankin, and Councillor Don Seccombe (RSC Mayor)

1. Background

1.1 On 28 June 2007, the Queensland Ombudsman (**Ombudsman**) completed a draft report following an investigation into RSC's management of a complaint against a Councillor, under its Councillor Code of Conduct. The draft report contains comment which would reasonably be considered to be adverse to RSC, the RSC Mayor, Cr Don Seccombe, the CEO of RSC, Susan Rankin and (**Respondents**).

1.2 This response is provided on behalf of all Respondents. All have a common interest in relation to the response to the draft report. Where the context requires a response to be limited to one or more of the individual Respondents, that is made clear in the response.

2. Objectives

2.1 The Respondents do not believe that it is within jurisdiction for these events to be the subject of an investigation by the Ombudsman. The issue of jurisdiction is one which needs to be dealt with as a preliminary issue. If the Respondents are correct, then clearly the Ombudsman should discontinue the investigation and should not release any report, particularly as to do so might be damaging to the reputation of one or more of the Respondents. If the matter is outside of the Ombudsman's jurisdiction, then applicable privileges (in section 45 and section 93 of the *Ombudsman Act 2001*) might not be applicable.

2.2 The first objective of this response, therefore, is to seek the discontinuation of the investigation on this basis, as well as an assurance that no report will be released.

2.3 Apart from this, the draft report contains a number of proposed opinions and proposed recommendations. A number of the proposed opinions are to the effect that particular acts and omissions by one or more of the Respondents were 'unreasonable and/or wrong' within the meaning of section 49(2)(b) and (g) of the *Ombudsman Act 2001*. The Respondents reasonably see these as serious allegations, with significant reputational, professional and potentially political consequences. These consequences might be expected to be significantly exacerbated if the Ombudsman acts in accordance with the stated intention to provide the report to the Speaker of the Queensland Parliament for tabling in the Assembly.

2.4 In these circumstances, it is important that any report which is released be accurate, balanced and fair to all concerned. The Respondents do not believe the draft report meets these requirements.

Note: Complaints Officer's name has been blanked out.

2.5 The Respondents also believe that it is unnecessary and unreasonable in the circumstances for the final report – whatever its content – to be placed before the Assembly (an action which, according to the Respondents' understanding, occurs in relation to a small fraction of the reports prepared by the Ombudsman in any year). It is also impermissible, at least at this stage, for this to occur.

2.6 Accordingly, the secondary objectives of this response are to:

(a) identify errors in the draft report, the inclusion of which in the final report might lead to substantial injustice, and to seek a review of the draft report on this basis;

(b) seek a review of the Ombudsman's decision (made prior to and without input from any of the Respondents) to provide the report to the Speaker to be placed before the Assembly.

2.7 Given the complexity and sensitivity of the matter, and also the fact that there are jurisdictional issues involved, the Respondents respectfully request that these reviews be conducted by senior officers within the Ombudsman's office who have not so far been involved in the matter. This request is made without any criticism of the authors of the current draft, recognising that the issues raise complex matters relating to the interpretation of the *Ombudsman Act 2001* and the new provisions of the *Local Government Act 1993* (**LG Act**), in a context which is unusual and perhaps unique. So far as the Respondents are aware, this is the first time that the new provisions of the LG Act have been considered by the Ombudsman.

3. Jurisdiction

3.1 Summary

3.1.1 The Ombudsman has no jurisdiction to investigate the matters of complaint. This is because:

(a) the events fall within the exclusion in section 16 of the *Ombudsman Act 2001*, in that when determining the matter, the Council was acting as a tribunal for the purposes of section 16 and, alternatively;

(b) the events complained of are not 'matters of administration' even within the broad interpretation given to that term in the *Ombudsman Act 2001*.

3.2 Deliberative functions of a Tribunal

3.2.1 The Council is not specifically defined as acting as a Tribunal for the purposes of the exclusion in section 16 of the *Ombudsman Act 2001*. However there are strong indicators that it is acting in that capacity, for example:

(a) The obligation on each Councillor to comply with the Code of Conduct is an obligation under the LG Act.[1]

(b) While contravention of an obligation is not an offence, the Code may be enforced in relation to the contravention.[2]

(c) The Council has power, by resolution, to impose a penalty on the Councillor under subdivision 5 of the LG Act.

(d) It must act in accordance with the provisions of natural justice.[3]

---

[1] LG ACT, section 243A(1).

[2] LG ACT, section 243A(3).

[3] LG ACT, section 250S(5).

3.2.2 Accordingly, the Council, constituted as the enforcement body under subdivision 3 of the LG Act, sits as a form of tribunal with power to decide questions of fact and, at least impliedly, law (at least as to whether the complaint falls within the jurisdiction) and to impose penalties. It does not matter that the penalties are comparatively minor and do not involve financial or custodial penalties. The imposition of a penalty for an obligation imposed by statute is a quasi-judicial function (not an administrative function), one which is quintessentially reserved to a Court or Tribunal rather than an administrative body.

3.2.3 In *Glenister v Dillon*,[4] the Full Bench, considering the equivalent Victorian provision,[5] said:

> *'It is clear from paragraphs (a) and (aa) above and from the exclusion of 'a matter concerning a judicial proceeding' from the matters of parliamentary complaints which may be referred to the Ombudsman – see S.16 – that parliament intended that it was not appropriate for anything relating to judicial or quasi-judicial proceedings to be made the subject of investigation even if it could be said that some act came within the definition of administrative action.'*

3.2.4 The same reasoning applies in relation to the *Ombudsman Act 2001* (Qld). The exclusion is in fact broader; there is no qualification of any kind to the concept of a 'tribunal'.

3.2.5 The term 'tribunal' is not a term of art. The Butterworths Australian Encyclopaedic Legal Dictionary defines 'tribunal' as:

> *'A body which reviews administrative action or makes primary decisions. A tribunal may conciliate or determine disputes or complaints or administer a regulatory scheme. Tribunals may be vested with jurisdiction to review the merits of administrative action, as well as the legal issues involved in it.'*

3.2.6 The concept was also considered in *Ricardo Homes Pty Ltd & Anor v NT Building Practitioners Board*.[6] In that decision the following passage is found:

> *'64. According to Forbes, the word 'tribunal' is not a term of art, and has no ascertainable meaning. However some assistance is given by Osborne, who defines a 'tribunal' as a body 'with judicial or quasi-judicial functions set up by statute and existing outside the usual judicial hierarchy.*
>
> *65. A body exercising quasi-judicial functions has powers which resemble those of a court and engages in activity similar to those undertaking by courts. The hallmark of such bodies is that they are concerned with the adjudication of specific rights and obligations that require the exercise of discretion and decision making. Statutory tribunals are 'often almost entirely adjudicatory in function', although they retain some degree of executive provenance.'*

---

[4] [1976] VR 560 at 567.

[5] The provision is in fact slightly different: section 13(3) of the *Ombudsman Act 1973* (Vic) was relevantly in the following terms:

> *'Nothing in this Act shall authorise the Ombudsman to investigate any administrative actions taken: (a) ...*
>
> *(aa) by a board, tribunal, commission or other body presided over by a Judge, Magistrate, Barrister or Solicitor presiding as such by virtue of a statutory requirement and appointment.'*

[6] [2007] NTNC 011.

3.2.7 The decision in *Ricardo* referred to the decision of O'Connor K – DC J (President) in *N (Number 2) v Director-General, Attorney-General's Department.*[7] The full passage at paragraph 69 is as follows:

> *'In my view the following are some, at least, of the characteristics that a body called a 'tribunal' would be expected to possess. The body would:*
>
> - *be impartial and detached from the ordinary processes of executive government;*
> - *have a defined jurisdiction;*
> - *receive claims or applications;*
> - *determine claims following a process of examining submissions, receiving evidence and assessing that evidence by reference to standards of proof;*
> - *use a process of assessment that gives rise to the making of a reasoned decision applying the relevant law;*
> - *make a final order that is binding.'*

3.2.8 O'Connor K – DCJ gave emphasis to the characteristic of a tribunal that it exercises quasi-judicial functions.

3.2.9 It can be accepted that the Council does not exhibit all of these characteristics when acting in this capacity; for example the Council is not wholly detached from ordinary processes of executive government when making these determinations. However this does not mean it is not a tribunal.

3.2.10 At paragraph 79 of the *Ricardo* decision, his Honour made the following significant points:

(a) A requirement to be bound by the principles of natural justice is a hallmark of a tribunal exercising quasi judicial functions.

(b) It was relevant that the (Board's) decision was binding (although in that case subject to a right of appeal).

(c) It was not significant that the (Board's) procedures were lacking formality and technicality.

(d) It was not significant that the (Board) did not engage in adversarial process.

(e) It was significant that the (Board's) decisions created rights or privileges or had the effect of denying rights or privileges.

(f) It was significant that the (Board) had the power to discipline and, as such, was 'clearly exercising a quasi-judicial function'.

3.2.11 All of the observations resonate in relation to the current issue.

3.2.12 The Council acting pursuant to the jurisdiction given to it by Division 4 of Part 3A of the LG Act is certainly an unusual tribunal: it could not be said to be structurally independent of the Local Government, and there is not even a specific provision requiring that the affected Councillor be disqualified from acting as a member of the tribunal so constituted. This is left to the existing section 244 of the LG Act. However by investing the Council with power to enforce obligations created by the LG Act, and to impose penalties –with an obligation to act in accordance with the requirements of natural justice – Parliament has, as a matter of fact, created a form of tribunal.

---

[7] [2002] NSWADT 33 (8 March 2002).

3.2.13 Accordingly, for the reasons set out above, although it is in some ways an awkward and perhaps unintended result, the Council, when considering complaints under Part 3A of the LG Act, is acting as a tribunal for the purposes of section 16 of the Ombudsman Act 2001. In accordance with the dicta in *Glenister v Dillon*, the Ombudsman therefore has no jurisdiction to investigate the deliberative functions of the Council when so acting, and should also decline to investigate anything 'relating' to those functions.

Ombudsman's response

Was Council acting as a tribunal?

The provisions of the LGA which require local governments to implement a general complaints process, and a councillor code of conduct, were inserted by the *Local Government Legislation Amendment Act 2005* and commenced on 31 May 2005.

The amendments included an amendment to s.534 of the LGA which, since 2005, requires councils to include in their annual reports:

> *(n) each of the following details for a financial year starting on 1 July 2005 or later—*
>
> *(i) the total number of breaches of the local government's code of conduct committed by councillors as decided during the year by the local government;*
>
> *(ii) the name of each councillor decided during the year by the local government to have breached the code, a description of how the councillor breached the code, and details of any penalty imposed by the local government on the councillor;*
>
> *Examples of how breaches of the code of conduct might be described—*
>
> - *misconduct at a local government meeting*
> - *misuse of confidential information*
> - *directing an employee in contravention of section 230(2) of the Act*
>
> *(iii) the number of complaints about alleged code of conduct breaches by councillors, other than frivolous or vexatious complaints, that were referred to the conduct review panel during the year by the local government or the chief executive officer under chapter 4, part 3A;*
>
> *(iv) the number of recommendations made to the local government by the conduct review panel during the year that were adopted, or not adopted, by the local government;*
>
> *(v) the number of complaints resolved under the local government's general complaints process during the year and the number of those complaints that related to an alleged breach by a councillor of the local government's code of conduct;*
>
> ***(vi) the number of complaints made to the ombudsman, and notified to the local government, during the year about decisions made by the local government in relation to enforcement of its code of conduct.*** [my emphasis]

The Explanatory Notes for these amendments[137] provide the following comments:

> *There are no financial implications for the State as a result of establishing a code. The extension of the roles of the Crime and Misconduct Commission and Ombudsman in referring breaches of the code, or* ***the Ombudsman regarding investigations about enforcement of the code by Councils****, will be met within existing resources. [my emphasis]*
>
> *Consultations on the draft Bill have also been held with representatives of the key stakeholders in Government including … the Queensland Ombudsman …*
>
> *[The Bill] amends section 534 [of the LGA] by inserting new requirements relating to councillor code of conduct matters for inclusion in a council's annual report. Code of conduct matters to be reported include:*
>
> - *the number of complaints being investigated by the Queensland Ombudsman about how the council enforces its councillor code of conduct, as notified to the council.*

The Minister at the time of the amendments, the Honourable Desley Boyle MP, said the following in her second reading speech for the amending legislation:

> *The Bill … sets out a number of procedures that councils will have to follow when councillors breach their code or a breach is alleged …*
>
> *In all cases councils will be the final decision maker, applying the principles of natural justice. The processes … are intended to complement the processes of the Crime and Misconduct Commission and Ombudsman. Naturally, if a more serious breach is alleged, one which might constitute official misconduct, this must be referred to the Crime and Misconduct Commission. The Bill also provides for instances where a breach may have occurred but the Crime and Misconduct Commission or Ombudsman has decided not to take action itself. In these cases the conduct review panel must consider the matter.*
>
> *The penalties provisions have attracted some comment because councils and constituents alike have said that the codes of conduct must be enforceable.* ***Some people have argued for tougher penalties such as fines, but these are the prerogative of judicial institutions (courts and tribunals) and therefore inappropriate for democratic institutions*** *…*
>
> ***I am confident, however, that councils will show maturity and judgment in the way they apply their codes of conduct …*** [my emphasis]
>
> *That said; the regulation of human behaviour is always a difficult matter and always subject to refinement. I therefore intend that the Department of Local Government, Planning, Sport and Recreation will closely monitor the implementation of the code of conduct framework. As well, each council will be required to report on the way in which their code of conduct has been applied. Councils' annual reports will have to give details about complaints and code breaches.*
>
> *As Minister for Local Government, I will be watching closely for instances of abuse of the code framework and opportunities to build on the framework.*

[137] Local Government Legislation Amendment Bill 2005 Explanatory Notes, pp.2-3

Prior to the development of the amending legislation, the Department published a discussion paper on the proposed changes, entitled *Draft Legislative Proposals – A regulatory framework for councillor codes of conduct*. This discussion paper included the following comments:

> *The Ombudsman Act 2001 establishes the office of the Queensland Ombudsman primarily for the purpose of investigating administrative actions taken by, in or for certain agencies (this includes local governments) and recommending to agencies ways of improving administrative processes.* ***This jurisdiction will allow the Ombudsman to investigate complaints about how a council is enforcing its councillors' code of conduct.*** [my emphasis]

In my opinion, these comments, along with the wording of s.534 of the LGA, indicate a clear intention of Parliament that the Ombudsman has jurisdiction to review the actions of local councils in administering and enforcing their councillor codes of conduct.

The solicitors' submission acknowledges that Council does not exhibit all the characteristics of a tribunal, and that the construction of Council as a tribunal is an 'awkward and unintended result' of the LGA.

The following factors also support the conclusion that Council, when administering its Code, is not a tribunal:

- There is no statutory appeals process for council decisions (in relation to its Code) prescribed in the LGA, other than that provided for in the *Judicial Review Act 1991* (a mechanism common to almost all Queensland public sector administrative decisions).

- Council made its decision on Cr Bowler's alleged breach of the Code by a resolution pursuant to its normal standing orders for Council general meeting business, in the same way as any other routine item on a meeting agenda.

- Council permitted the person the subject of the proceedings to participate in the decision-making process on the matter.

- Council's decision was made by adopting, without amendment or recorded discussion, the report of an investigator.

Council's Code also provides some indication that it was assumed the Ombudsman would have jurisdiction to review decisions in relation to it. For example, on page 4 of the Code, councillors are directed to read the Code "in conjunction with relevant legislation" among which is listed the Ombudsman Act. There are also references in the Code (on pages 30 and 31) to complaints being referred to or from the Ombudsman in relation to Code breaches.

Finally, it is noteworthy that many provisions in the Code are general standards of expected behaviour, and issues relating to a councillor's compliance with those standards would not be appropriate for referral to a tribunal. For example:

> *6.3.2 Councillors will … listen with an open mind. This includes being tolerant of, and not dismissing, the views held by others which may be different from their own.*
>
> *6.3.4 Councillors will ensure that their appearance … is professional …*
>
> *6.5.1(b) the Deputy Mayor will … support the Mayor at major functions and important occasions.*

There is nothing in the Code which implies that these general obligations are, *prima facie*, to be treated any differently to others which are more specific (such as the duty not to misrepresent Council's position on matters when communicating with the public[138], or the duty to meet with members of the public only in publicly accessible meeting rooms).[139]

This is one of the issues on which I sought Senior Counsel's advice. Senior Counsel confirmed my own view.

In summary, I am satisfied that I have jurisdiction to investigate matters relating to the investigation and punishment of breaches of local government councillor codes of conduct.

3.3 Administrative action

3.3.1 Even if the Council was not acting as a tribunal, it was not engaging in administrative action. Administrative action must be about a 'matter of administration'. That is given a broad interpretation. However it can **not** include enforcement proceedings under a statute or any activity related to that purpose. That would be to violate the necessary distinction between matters of administration and matters of investigation and enforcement. Indeed the Council, exercising Part 3A functions, will often be itself adjudicating on the merit of administrative action, with the power to impose penalties. This cannot itself be an administrative action.

3.3.2 It is certainly unusual for a body such as a Council to be established both as an administrative body set up under statute (the LG Act) and, for some purposes, as an enforcement body with power to impose penalties for actions in breach of the same statute. However that is the effect of the 2005 amendments to the LG Act. Whatever is the correct characterisation of the powers of the Council under section 250S(3) and (4), they cannot be characterised as administrative action.

3.3.3 One way to exemplify this is by reference to the jurisdiction of the Council under section 250S to deal with complaints which have been handled through the General Complaints process in Part 5.

3.3.4 The general complaints process is for resolving complaints by affected persons about:

(a) administrative action of the local government; or

(b) an alleged minor breach of the local government's Code of Conduct by a Councillor.

3.3.5 In both cases, the complaints officer is required to give the local government (established as the Council) a written report. The Council is then required to consider the report and any recommendation in it. In relation to a complaint in respect of a matter of administration, none of the penalty provisions apply. However if the allegation is of a breach of the Code, including a Minor Breach, penalties do apply.

3.3.6 There is therefore a clear distinction between 'matters of administration' – whether by the Council or by Council officers – and an allegation of a breach of the Code. The former might correctly be categorised as administrative action, both in terms of the original action, and the review by Council under the complaints handling process. However the process by which the Council must deliberate and decide whether there has been a Minor Breach of the Code, and if so, what penalty should apply, can **not** be administrative action.

[138] Code, 6.3.6
[139] Code, 11.3.7

3.4 Conclusion

3.4.1 Accordingly, the Ombudsman had no jurisdiction to investigate or make any report in relation to these events, because either they were or were related to the deliberative processes of a Tribunal, or they were in any event not administrative action within the meaning of the *Ombudsman Act 2001*.

3.4.2 The Respondents respectfully request the Ombudsman to discontinue the investigation on the basis it has no jurisdiction.

3.4.3 Given that these matters have not been considered in any decision, and are of some complexity, the Respondents will also respond on the alternative basis that the Ombudsman considers that he **does** have jurisdiction. The remainder of this response is made on this basis, without prejudice to the primary submission in relation to jurisdiction.

Ombudsman's response

Were Council's actions administrative in nature?

Section 14(1) of the Ombudsman Act states "*The Ombudsman may investigate administrative actions of agencies*". The submission does not deny that Council is an 'agency' for the purposes of the Ombudsman Act, but does deny that Council's actions in relation to this matter were 'administrative actions' for the purposes of the Act. The Act defines administrative actions as follows:

> ***7 Meaning of administrative action***
>
> *(1) An **administrative action** is any action about a matter of administration, and includes—*
> *(a) a decision and an act; and*
> *(b) a failure to make a decision or do an act, including a failure to provide a written statement of reasons for a decision; and*
> *(c) the formulation of a proposal or intention; and*
> *(d) the making of a recommendation, including a recommendation made to a Minister; and*
> *(e) an action taken because of a recommendation made to a Minister.*
> *(2) However, an operational action of a police officer or an officer of the Crime and Misconduct Commission is not an **administrative action**.*

As noted above, under the question "Was Council acting as a tribunal?", I am satisfied that Parliament intended the Ombudsman to have jurisdiction to investigate complaints in relation to the manner in which local governments enforce their codes of conduct. The considerations I have referred to under this point also go towards refuting the Council's contention in relation to 'administrative action'.

In *K v NSW Ombudsman*[140], the NSW Supreme Court considered an application from a State government employee for a declaration that the NSW Ombudsman did not have jurisdiction to conduct an investigation into the conduct of that State's Department of Education and Training in relation to the Department's investigation and determination of certain child abuse allegations against the employee.

The NSW Ombudsman Act had been amended to provide the Ombudsman with specific power to investigate "*any child abuse allegation against an employee of a designated*

[140] [2000] NSWSC 771

government agency" and also "*any inappropriate handling of or response to any such child abuse allegation*".

In his judgement, Whealy J referred to the NSW Attorney-General's Second Reading Speech for the Bill which introduced the amendments relating to child abuse matters. The Second Reading Speech contained statements such as:

> [The Bill] *will enable the Ombudsman to oversee certain non-government agencies …*
>
> *It will also be possible for the Ombudsman to take responsibility for investigating … cases should the circumstance demand it.*
>
> *Consistent with its watchdog role, the Ombudsman will oversee agencies, systems and procedures for preventing child abuse …*

Whealy J held that the employee's application should not succeed, and that the Ombudsman did have jurisdiction to investigate the Department. This decision was based on:

1. the traditional view of the powers of the Ombudsman as being extremely wide and not powers which should be read down [see *Botany Council v Ombudsman*[141]];
2. the circumstances arising out of the Royal Commission which led to the introduction of the new legislative scheme;
3. the contents of the Attorney-General's Second Reading Speech (discussed above); and
4. the context and content of the amendments to the Ombudsman Act.

The factual circumstances in *K v NSW Ombudsman*, while obviously unique, do bear some similarities to the present case. As noted in the discussion on the 'tribunal' issue above, the circumstances surrounding the introduction of the local government councillor code of conduct and general complaints process requirements in Queensland indicate a clear intention to give the Ombudsman power to review matters arising from each. As with the NSW example, the Minister introducing the amendments to the relevant Act specifically referred to the powers and role of the Ombudsman in the second reading speech for the amending Bill.

In commentary on this question, Creyke and McMillan state:

> *How, then, is 'administrative' to be defined? The approach taken has been to define the term in the context of the three-way distinction between legislative, executive (administrative) and judicial power. In effect, the approach has been to ask whether the action under challenge is 'legislative' or 'judicial', and if not, by deduction it is 'administrative'. As Ellicott J observed in Burns v Australian National University*[142]*, the term administrative 'is at least apt to describe all those decisions, neither judicial nor legislative in character, which Ministers, public servants, government agencies and others make … in executing or carrying into effect the laws …' Courts have recognised that there is little to be gained by defining 'administrative' narrowly, bearing in mind that legislative and executive action is customarily amenable to judicial review at common law.*[143]

[141] (1995) 37 NSWLR 357
[142] (1982) 40 ALR 707 at 714
[143] Creyke and McMillan, *Control of Government Action: Text, Cases and Commentary*, p.87

Clearly, in the present case, the actions of Council were not legislative in nature (that description being reserved for actions of the Queensland Parliament). That means they can either be characterised as administrative or judicial. Creyke and McMillan note that "*The divide between decisions of an administrative and judicial nature has not been explored as commonly* [as that between administrative and legislative]".[144]

The Tasmanian Supreme Court, however, examined this distinction in *Medical Council of Tasmania v Medical Complaints Tribunal*.[145] Commenting on the characterisation of the decisions of public sector agencies, Evans J stated:

> *Traditionally an enquiry as to whether a decision was administrative involved returning to the historical distinction drawn between judicial, administrative and legislative decisions, a distinction that can be most illusive. In Evans v Friemann[146] … Fox ACJ said of the distinction maintained between the administrative, the legislative and the judicial:*
>
> > It has, in fact, proved very difficult, virtually impossible, to arrive at criteria which will distinguish in all cases the three concepts … They at times overlap …
>
> *Whilst the [Medical Complaints Tribunal] is not a court, it must observe the rules of natural justice … and in a number of ways it is obliged to act in a manner commonly described as acting judicially. This circumstance can be misleading when it becomes necessary to determine whether a particular decision of the Tribunal is administrative. For example, whilst a magistrate is ordinarily required to act judicially, not every decision made by a magistrate is a judicial decision. In Lamb v Moss[147] … the Court said:*
>
> > The rules of natural justice apply primarily to persons or bodies bound to act judicially whether in the discharge of administrative or judicial functions.
>
> *… in terms of the distinction between administrative and judicial functions, the decisive issue in the cases has been whether the function in question was judicial … A power may be judicial when conferred on a court and the same power may be administrative when conferred on a non-judicial entity; R v Joske;[148] … R v Quinn;[149] and Little v Registrar of the High Court[150] …*
>
> *In my view, it is for this reason that the phrase 'administrative character' should not be interpreted as 'purely administrative character' or 'solely administrative character' …*

Most case law on the meaning of the terms 'administrative' and 'administration' in the public sector has arisen in the context of judicial review. The right to seek judicial review in the Supreme Court is clearly distinct from the right to complain about administrative actions to the Ombudsman.

[144] Creyke and McMillan, *Control of Government Action: Text, Cases and Commentary*, p.90
[145] [2005] TASSC 24
[146] (1981) 35 ALR 423 at 433
[147] (1983) 49 ALR 533
[148] (1972-1973) 130 CLR 87 at 99
[149] (1977) 138 CLR 1
[150] (1990) 96 ALR 448

Nevertheless, the following commentary on the Tasmanian judicial review legislation in the *Medical Council* case[151] provides some guidance in interpreting the Queensland Ombudsman Act:

> *There is ample authority from which support can be drawn for the proposition that the Judicial Review Act, being an enabling and ameliorating enactment which confers on citizens important rights in relation to administrative actions under state legislation, it* [sic] *should be given a wide application and the phrase 'decision of an administrative character' should be given a wide construction … It has been accepted that the word 'administrative' carries with it the notion of 'managing', 'executing' or 'carrying into effect', Burns v Australian National University[152] … and that the expression 'decision of an administrative character' includes at least 'the application of a general policy or rule to particular cases; the making of individual decisions', Hamblin v Duffy[153] …*

Various courts in Australia and overseas have been required to consider the limits of the definition of 'administrative action' in relation to Parliamentary Ombudsmen. Courts have, almost always, held that the powers of such an Ombudsman should be interpreted widely.

For example, in *Botany Council v The Ombudsman[154]* the NSW Supreme Court considered the question of the State Ombudsman's jurisdiction. Kirby P (as he then was) stated:[155]

> *Sadly, the experience of the past (and not only the past) has been of the occasional misuse and even oppressive use of administrative power. One modern remedy against such wrongs has been the creation by Parliaments in all jurisdictions of Australia of the office of Ombudsman. Whilst it may be expected that the Ombudsman will conform to the statute establishing his office, a large power is intended. The words of the Ombudsman Act should be given an ample meaning.*

I am satisfied that:

a) Council was not acting as a tribunal at any stage of the matter under consideration;
b) Council's actions at all material times were administrative in nature; and
c) therefore, I have jurisdiction to investigate the complaint of Cr Bowler.

These are issues on which I sought Senior Counsel's advice. Senior Counsel confirmed my own view.

[151] [2005] TASSC 24 at paras 13-14
[152] (1982) 40 ALR 707 at 713
[153] (1981) 34 ALR 333 at 339
[154] (1995) 37 NSWLR 357
[155] (1995) 37 NSWLR 357 at 368

4. Context – the Councillor Code of Conduct

4.1 The Councillor's Code of Conduct adopted by RSC (**Code**) was adopted following 2005 amendments to the *Local Government Act 1993* (Qld) (**LG Act**). As the Code itself recites, it was produced:

> *'To promote the highest ethical and professional standards for Councillors at Redland Shire Council.'*

4.2 All Councillors were required to agree in writing to comply with the contents of the Code at all times when performing duties as a Councillor. Prior to this occurring, RSC put in place a program of training and awareness for all Councillors. Councillors are required to comply with the Code and it is enforceable,[8] however a contravention of the Code is not an offence. The Code contains reference to statutory obligations which Councillors have, breach of which might amount to a breach of legislation as well as a breach of the Code itself.

4.3 From this it can be seen that compliance with the Code is a serious matter, required by the LG ACT, and the procedures under the Code to investigate complaints and to decide on appropriate action should be conducted fairly and with proper respect for the rights of the subject of the complaint. However the Code itself (particularly so far as it deals with 'minor breaches') is not in the nature of a statute. It contains obligations of a general nature; for example:

(a) 5.1: 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.

(b) 6.3.1: 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 no other offence, nor embarrassment, nor harassment are caused.

(c) 6.3.2: Councillors will be fair and listen with an open mind. This includes being tolerant of, and not dismissing, the views held by others which may be different from their own.

4.4 Apart from being general in nature, these obligations are necessarily subjective in how they are applied. There is no limit to the types of situations which might lead to a complaint from a member of the public which amounts to a potential breach of these obligations in the Code. The objective is to give the Councils a simple, readily understood and transparent process for managing the great variety of complaints which might be made about the conduct and behaviour of Councillors.

4.5 Given the general and subjective nature of the obligations and the broad description of the behaviours and conduct which can fall within the Code, it could not have been intended – and should not be inferred - that the purpose was to set up a process whereby something akin to formal 'charges' would have to be laid against Councillors and then dealt with as if the Councillor was the subject of some form of quasi-criminal process. Nothing in the nature of the obligations or the process by which the Council must investigate and pursue complaints would suggest this.

4.6 The draft report, with respect, proceeds from an incorrect assumption that the Code can or should be read and enforced in this way.

4.7 In adopting this approach, the draft report incorrectly characterises what at worst is a lack of procedural nicety in some areas of the process as amounting not only to flaws in the procedure but in fact as administrative action which is 'unreasonable' or 'wrong'.

---

[8] LG ACT section 243A.

Ombudsman's response

I agree that the terms of the Code are widely drawn and that varying degrees of subjectivity may be involved in Council deciding whether the Code has been breached in the circumstances of particular cases. However, this does not suggest that Parliament, in requiring councils to establish councillor codes of conduct, intended that a council, in dealing with possible breaches of its code:

- did not have to comply with procedural fairness; or
- was not subject to investigation by the Ombudsman.

In respect of the second point, it is relevant that my authority to form an opinion about a council's administrative action is not limited to whether the action was contrary to law but includes whether the action was unreasonable, unjust or otherwise wrong.[156]

4.8 In fact there was no unfairness or unreasonableness in any aspect of the process, which complied with the Code and the complaints handling procedure as well as with objective standards of procedural fairness. In reaching the draft conclusions which it has, the draft report has drawn some mistaken conclusions about critical matters of fact and process. If the draft report is issued in its current form, it may set a de facto standard for enquiries of this type which is unwieldy, excessively legalistic and would seriously diminish the effectiveness of the Code in allowing Councils to deal promptly and fairly with day to day complaints about the behaviour and conduct of Councillors.

Ombudsman's response

Council submits that my recommended process for managing complaints is excessively legalistic.

It is true that Council is able to regulate its own administrative procedures and that the LGA does not intend that a formal criminal investigation be conducted in these circumstances. However, the process I have recommended in this report does not suggest that and is, in fact, in line with the Department's guidance (see the Local Government Bulletin 11/05 (DLGPSR, 6 June 2005), pp.7-8):

> *The Act sets out minimum requirements councils must meet in developing their general complaints process. A key requirement is that the process be independent. Councils will have to have a complaints officer who is not involved with the subject of the complaint. This means in effect that the general complaints process will need to provide for both internal and external reviews. 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. These sorts of complaints will need to be investigated by a person who is outside the organisation.*** [my emphasis]

[156] Under s.49(2) of the Ombudsman Act

5. Facts

5.1 The following is a statement of the facts as they appear from information available to the Ombudsman's office.

5.2 **February 2006:** The RSC adopted the Code. Following the adoption of the Code, all the Councillors signed a copy of the Code affirming their understanding that they were bound by it. Councillors were also invited to training sessions in relation to the operation and implementation of the Code. It can be taken that the Councillor concerned had read the Code, and understood the general obligations in relation to the promotion of the public's trust and confidence and respect for people including members of the public. The Code contains a set of standards for behaviour and conduct which are adopted by the Council itself. It is 'owned' by RSC and by each individual Councillor, as a document they agreed to be bound by and to comply with.

5.3 **22 May 2006**: Cr Bowler attended the , in the company of two Council officers. There is little dispute about what occurred: the findings in the investigating officer's report are broadly supported by the description of the facts in Cr Bowler's, solicitor's letter dated 31 May 2006. Cr Bowler entered the quarry without prior notification. She failed to report to the visitors' officer as was directed by a prominent notice at the entry to the site, and by her own admitted prior knowledge of this requirement. She parked the Council vehicle on the right hand side of the road and photographs were taken of the quarry area which had not been authorised by the quarry owner.

5.4 **22 May 2006**: The owner of the quarry, telephoned the Mayor and Ms Rankin to complain. Ms Rankin advised that any complaint should be made in writing.

5.5 **24 May 2006**: supplied a written complaint.

5.6 **24 May 2006**: Ms Rankin appointed as the Investigations Officer pursuant to the Code to undertake an investigation of the matter.

5.7 **24 May 2006**: Ms Rankin advised Cr Bowler that the written complaint had been received, that it was being treated as a potential minor breach under the Code, and that as was appointed to investigate the matter and prepare a report for Council. The memo also advised that the matter would be reported to the next general meeting of Council.

5.8 **24 May – 30 May**: as investigating officer conducted her investigation and drafted her report. She interviewed all relevant people, visited the site, checked photographs and otherwise undertook an appropriate and comprehensive investigation.

5.9 **31 May 2006**: The initial investigation report was tabled at the General Meeting. All Councillors (including Cr Bowler) were provided with copies of the report **prior** to the general meeting. Cr Bowler tabled a legal advice which contested whether or not she had committed trespass. Separately, an issue was raised by her about the land tenure. Once this issue had been raised, Council resolved to refer the matter back to the complaints officer to investigate the property ownership issue. Cr Bowler voted against this resolution.

5.10 **1 June 2006 – 13 June 2006**: The investigating officer investigated issues of land tenure and the application of safety law to the quarry's activities and completed an addendum report. Also on 13 June 2006 the investigating officer sent an email to Cr Bowler summarising her view of the land ownership issue.

5.11 **13 June 2006**: The Mayor sent a memorandum to Cr Bowler stating that it was apparent from the report that was entitled to require any visitor to the site to report to the site office, and requesting Cr Bowler to consider providing a written apology to stating that an apology would potentially assist in resolving the matter without the need for the Council to consider it further.

5.12 **26.07.06**: The matter was dealt with at the general meeting of the Council. A motion by Cr Bowler to reject the findings and take no further action because the complaint was 'frivolous and vexatious' was considered by the Council but not passed. Instead the Council resolved to accept the findings in the investigation report, resolved that this constituted a minor breach of the Code of Conduct and resolved that Cr Bowler be reprimanded in writing.

6. Cr Bowler's Complaint to the Ombudsman

6.1 According to the draft report, Cr Bowler made a complaint to the Ombudsman alleging that:

(a) the quarry representative's complaint was frivolous and vexatious;

(b) Council failed to correctly follow the Councillor Code of Conduct in managing the complaint;

(c) Council conducted a biased investigation to intimidate and discredit her as an elected member; and

(d) Council pre-judged her.

6.2 None of the Respondents were advised of the terms of Cr Bowler's complaint prior to the draft report being received. Consequently, none of the Respondents had an opportunity to understand or to give any specific response to these matters. Instead, a letter from the Ombudsman to RSC dated 12 March 2007 indicated that Ombudsman would examine:

(a) the conduct of and the processes adopted during the Council's investigation;

(b) the findings and recommendations of the Council's investigation;

(c) Council's resolution dated 26 July 2006; and

(d) Council's action to implement the resolution.

6.3 It can perhaps be inferred that the Ombudsman decided not to investigate the third and fourth matters in Cr Bowler's complaint. It can also be accepted that to the extent the Ombudsman had jurisdiction at all, he was not limited by or confined to the complaint in its investigation. The Ombudsman in fact has power to investigate matters on his own behalf.

6.4 However the allegations made by Cr Bowler are recorded in the draft report in their entirety in the first section of the draft report. Those parts of Cr Bowler's complaint which were not pursued and were not the subject of any investigation or any findings should be removed from the draft report. To leave these references in might be damaging to the reputations of the Respondents, who have had no opportunity to comment on or rebut the allegations. It might not be apparent to a reader of the report that these allegations were not investigated and are not the subject of any finding.

Ombudsman's response

The letter of 12 March 2007 (referred to in the above extract) was addressed to the CEO as principal officer of Council and explained the subject matter of my investigation. The letter was signed by the Assistant Ombudsman (Local Government and Infrastructure) under delegated authority. As noted in the above submission, this letter described the nature and context of the intended investigation. It is not necessary for me to repeat a complainant's allegations verbatim to an agency about which the complaint has been made. Furthermore, the nature of Cr Bowler's complaint was further elaborated on during the interviews my officers conducted with the Mayor, CEO and Complaints Officer.

In any event, I have amended my report to clarify my findings in respect of each of Cr Bowler's allegations.

However, it is important that my report accurately records all of Cr Bowler's allegations, particularly as:

- the allegations against Cr Bowler were made public by Council discussing them at two General Meetings which were open to the public and to the media; and
- the eventual reprimand of Cr Bowler was also reported in a subsequent edition of the *Redland Times* newspaper.

6.5 It is striking that Cr Bowler's complaint does not allege that she was not afforded procedural fairness and nor did she raise the issue at any time except in the context of the allegation of bias. Given her full participation in the proceeding, the opportunity she had to take legal advice, the adjournment of proceedings to allow matters she had raised to be investigated (an adjournment which she opposed), the fact that she had the final investigation report almost two weeks before the matter was dealt with by Council and her ability to propose resolutions concerning the Council's determination of the issue (including the peculiar fact that she herself voted on all resolutions) it would have been very surprising if she **had** complained about any lack of procedural fairness.

6.6 ***The Respondents respectfully request that reference to the third and fourth elements in Cr Bowler's complaint be removed from the draft report.***

Ombudsman's response

This is incorrect. Cr Bowler's complaint included an allegation that Council had failed to correctly follow its processes, which is broad enough to include a failure to afford procedural fairness. In any case, a complainant is not obliged to use precise legal terminology in the complaint as long as they adequately explain what it is they are aggrieved about. The solicitors' submission in fact makes the same point in relation to the complaint by the quarry representative.

7. Council's initial handling of the complaint

7.1 The taking of notes

7.1.1 The draft report refers to the fact that immediately following the incident, [redacted] telephoned the Mayor and the CEO complaining about the matter. There is reference in the draft report to information provided by the CEO as to her response. The report contains the following passage:

> *'However, where an individual is making a specific allegation about a Councillor that involves 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.'*

7.1.2 The draft report proposes the following opinion:

> *'Proposed Opinion 1*
>
> *The Mayor and the CEO failed to make and keep adequate records of their oral communications with the quarry representative on 22 May 2006 in relation to his complaint about Cr Bowler. This failure constituted administrative action that was unreasonable and/or wrong within the meaning of section 49(2)(b) and (g) of the Ombudsman Act.'*

7.1.3 The Respondents do not accept that a Council officer has engaged in 'unreasonable and/or wrong' administrative action by failing to keep notes of a discussion of this type. The telephone conversation came 'out of the blue'; it was (from the CEO's account) emotional and at times angry. One can imagine that the main task of a CEO or Mayor receiving a telephone call of this nature is to attempt to defuse the situation and arrive at a way forward rather than take a detailed record of the allegations.

7.1.4 This the CEO did: she suggested that for the Council to deal with the matter through its processes, [redacted] would need to put his complaint in writing. This was appropriate, and in fact required by the general complaints process; see section 17 General Complaints process, paragraph 17.3 and 14.2.2. Until the complaint was in writing, the Council had nothing that it could properly deal with. It would in fact have been wrong, and inconsistent with the Code, for the CEO or the Mayor to have allowed information or material discussed in this conversation to form part of the investigation process.

7.1.5 The draft report suggests that [redacted] oral complaint varied somewhat from his written complaint. Given that his telephone conversation was lengthy and emotional, and the written complaint was focussed and succinct, that is not surprising. Having reflected on the matter, [redacted] apparently limited his written complaint to the matters he specifically wanted the Council to address through its Code.

7.1.6 It would have been inappropriate for the Mayor or the CEO to (in effect) supplement [redacted] written complaint, provided pursuant to the Code, with material from an earlier conversation – particularly when [redacted] had, upon reflection, chosen not to pursue those matters. That would have been unfair to Cr Bowler.

Ombudsman's response

Given their responsibilities, it is understandable that neither the Mayor nor the CEO devoted significant time to considering this matter prior to their receipt of the written complaint. It is also understandable that, during the phone calls, both primarily focussed on defusing the situation rather than making detailed records of what was being said.

However, it is not unusual for members of the public making complaints to do so in an emotional way, and not express their concerns clearly. This is not an excuse for not attempting to comply with the obligation under the Public Records Act to make adequate records.

A brief summary of the key points of the conversation would have been relevant in assessing the later written complaint. I also make the point that the summaries could have been made after the calls ended.

Finally, I disagree that it would have been inconsistent with the Code to include the content of the calls in the material considered in the investigation process.

Making a record of a telephone conversation does not constitute 'supplementing' a complaint. It is both a requirement of the Public Records Act, and sound administrative practice. In this case, the summaries of the calls may have required the Complaints Officer to raise discrepancies between the oral and written complaints with the complainant.

7.1.7 The draft report also suggests that there is no evidence that the Mayor or CEO put the possibility of 'informal resolution' to the quarry representatives. Given that at that stage no complaint for the purposes of the Code had been validly made, it was too early for this to occur. It was also not the time or place: the CEO and the Mayor were dealing with an emotional and angry member of the public who, as the CEO correctly judged, was in no mood at that particular point to consider anything of the sort.

7.1.8 Later, when a formal complaint had been made and had been investigated and a report prepared, the Mayor attempted to broach the prospect of informal resolution with Cr Bowler. However Cr Bowler rejected the prospect of it, and it was necessary for the Council to deal with the complaint formally.

7.1.9 In summary:

(a) The initial telephone calls were not and could not have formed part of the complaint process under the Code.

(b) It is immaterial whether or not notes were kept of the discussion – it is probable that both the CEO and the Mayor have numerous discussions with members of the public, many of which will be in the nature of a complaint but which will not be pursued through the Code, and there is no requirement that notes be kept of these discussions.

(c) If notes had been kept and then provided to the investigator that would have been inconsistent with the Code and potentially would have corrupted the process of investigating the complaint which [redacted] did make in writing pursuant to the Code.

7.1.10 ***The suggestion that the Mayor and CEO have acted 'wrongly' or 'unreasonably' is, with respect, unsound and the Respondents submit with respect that these references and Proposed Opinion 1 should be deleted from the draft report.***

Ombudsman's response

I think it would have been quite proper for the Mayor and for the CEO to have explored with the quarry representative the option of informally resolving his complaint. However, I have not expressed any opinion on this issue that is adverse to the Mayor or the CEO except, in respect of the CEO, for her failure to record the decision that the matter should be formally investigated and her reasons for that decision.

I remain of the opinion that the Mayor and CEO should have made records of their telephone conversations with the quarry representative, particularly as they could reasonably have foreseen that Cr Bowler would challenge any version of events given by the quarry representative.

7.2 Proposed Opinion Two

7.2.1 The draft report contains a proposed opinion two as follows:

> *'Proposed Opinion Two*
>
> *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 administration action that was unreasonable and/or wrong within the meaning of section 49(2)(b) and (g) of the Ombudsman Act.'*

7.2.2 It is inaccurate to say without qualification that a process of informal resolution is 'recommended'; it is only 'recommended' when 'appropriate'. Here, it was not appropriate. The draft report in fact accepts that in the circumstances, the CEO's decision was a reasonable one. The complaint is only that the CEO failed to 'document her reasons'.

7.2.3 Nowhere in the Code is there any requirement that decisions about mechanical or procedural aspects of the process should be recorded in writing or at all. Nor does the Code or any other principle of administration or fairness require the decision to be documented or recorded in any particular form. No prejudice to Cr Bowler or anyone else is suggested to have been caused as a result. It is unreasonable for the Ombudsman to imply an obligation into the Code or its processes

which is not set out in the Code, and then treat any failure to follow this implied obligation as administrative action which was 'unreasonable and/or wrong'.

7.2.4 ***The Respondents submit, with respect, that the Proposed Opinion Two should be deleted.***

7.3 Other Issues

7.3.1 In the preamble to this proposed opinion, the draft report casts doubt on the seriousness of the complaint. It also appears to draw a distinction between the way the two officers in the car were treated and the way Cr Bowler was treated.

7.3.2 The Respondents do not believe this is a sound approach.

7.3.3 It was available for the CEO, as the senior complaints officer, to decide that the allegation was not 'sufficiently serious' to be actionable or that it was 'frivolous or vexatious' within the meaning of the Code. However for the CEO (or the Investigations Officer) to have made a summary determination of this issue at that early stage would have been clearly premature, and might have contributed to a serious undermining of the public perception of the effectiveness of the Code.

7.3.4 It is no part of the Ombudsman's function to determine these issues in retrospect, and the draft report does not do so. However, the commentary in the draft report (perhaps unintendedly) gives the perception that the Ombudsman regards the matter as potentially 'trivial' or 'vexatious'.

7.3.5 It is not obvious that Cr Bowler's actions in attending a private business unannounced, ignoring signs (erected for reasons including safety reasons) and then parking on the wrong side of a public road which carried considerable heavy traffic were 'trivial', and nor is it at all obvious that [redacted] complaint was 'vexatious'.

7.3.6 The suggestion in relation to differential treatment is also difficult to accept. The suggestion ignores:

(a) in a technical sense – the fact that [redacted] had made no complaint against those officers which could be investigated under the same Code;

(b) those officers were not themselves bound by or subject to the same Code;

(c) the matter was dealt with informally (and appropriately) as between the CEO and the two officers concerned.

7.3.7 The suggestion in the report that Cr Bowler's conduct was not 'any more serious' than the actions of officers 1 or 2 also gives insufficient weight in a practical sense to the status which Cr Bowler had and the fact that she was driving the motor vehicle on the day (and therefore was in control of the vehicle) as well as the fact that it was her decision to enter the quarry site. It also gives insufficient weight to the underlying point that Cr Bowler was aware of how her presence at the site, without prior arrangement, might be received by the complainant.

7.3.8 ***The Respondents submit, with respect, that reference to these issues should be removed from the draft report.***

Ombudsman's response

I believe my amendments to the report address these issues. Furthermore, I have expressed opinions:

- that the evidence does not establish that the complaint was frivolous or vexatious; and
- that the CEO's decision to proceed to a formal investigation was a reasonable one.

However, this decision was also a significant one and, therefore, I remain of the opinion that the CEO should have recorded the decision and her reasons for it.

8. Investigation

8.1.1 In her note to the legal officer on 24 May 2006, the CEO (as the Senior Complaints Officer) advised:

> *'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.'*

8.1.2 The CEO advised Cr Bowler on the same day:

> *'As you are aware from the Code of Conduct requirements that this matter must be reported to the next General Meeting of Council. I have requested to complete her investigation and have a report finalised in time for the next general meeting.'*

8.1.3 These actions followed from the RSC Code Guidelines, which, as was appropriate, emphasised speed and efficiency in dealing with complaints under the Code.

8.1.4 The Guideline fixed some time frames for dealing with matters. Urgent matters were required to be dealt with within 10 Business Days. The CEO correctly in the circumstances categorised the matter as urgent. This meant that in order to comply with the Guidelines as well as for other sound reasons, the matter needed to be dealt with expeditiously.

8.1.5 Because the complaint was not one capable of being resolved through the general complaints process, a written report was required to be prepared. In these circumstances, the Guideline Document provides:

> *'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.'*

8.1.6 The draft report suggests that the obligation to submit an investigation report to the General Meeting only applies once the CEO has received the report. This is incorrect, and confuses the terms 'Report' with the term 'Matter' and treats them as the same thing. They are not; the 'Matter' is the complaint made pursuant to the Code. The 'Report' is the report prepared by the investigation officer.

8.1.7 Accordingly, the CEO's direction to the investigating officer, and advice to Cr Bowler, was accurate. In the circumstances, it **was** necessary for the matter to be brought before the next General Meeting. If a report had not been prepared at that time, or if it had been prepared but not in sufficient time to allow the Councillor to adequately respond, the appropriate course at that point would be to adjourn the matter to another meeting to ensure procedural fairness. This was in fact done.

8.1.8 It may be correct that the investigating officer had a short time to properly investigate the matter, but at no time did the investigating officer indicate that she required more time to complete the investigation. The issue as to whether Cr Bowler had sufficient time to respond is a separate one, and is dealt with below.

8.1.9 ***The Proposed Opinion 3 in the draft report is not sound and the Respondents submit with respect that it should be deleted.***

Ombudsman's response

Council's statutory obligation under the LGA was to consider the complaint under its General Complaints Process and, if no resolution of the complaint was possible, report on the matter to full Council for its resolution.

Council's primary obligation was to ensure that, once a decision was made to embark on a formal investigation, that investigation was conducted fairly and competently. The general requirements of procedural fairness override any specific timelines set out in Council's General Complaints Process Guideline document (which is merely an administrative policy and not legally binding). Council is entitled to depart from its administrative policies when special circumstances exist, such as the need to comply with procedural fairness.

The solicitors' submission impliedly agrees with this view (see the commentary above on adjourning the matter to ensure procedural fairness). Any other view leads to potentially absurd results (such as a complaint being made on the morning of a General Meeting having to be investigated and reported to that meeting).

As the solicitors' submission indicates, in paragraph 5.2.6 of the Code Guideline Document, there is a reference to 'urgent matters' rather than the word 'report' which is used in later paragraphs. It is not disputed that a 'matter' in this context is a complaint, whereas a report is a possible outcome of an investigation of a complaint.

Paragraph 5.2.6 also specifies that the timeline for dealing with a complaint for urgent matters is ten days. The phrase 'dealing with' is the operative one in this context, and, on its normal construction, would encompass, where an investigation takes place, all actions necessary to complete the investigation.

Since Council's General Meetings are only held monthly, it cannot have been Council's intention to require all such investigations to be reported to and considered by Council within ten days of receipt of the complaint. Clearly, this will not be possible where a complaint is received more than ten days prior to a scheduled General Meeting.

A better interpretation of the provisions of the Code Guideline Document is that the CEO is expected (personally or via a delegated complaints officer) to consider (and, if necessary, investigate) the matter within ten days of receipt. Any report produced following this process must *then* be given to Council at its next General Meeting, whenever that happens to be.

Having considered this matter further, I have made a recommendation that was not in my proposed report. It appears in this report as Recommendation 1.

8.2 Investigation Officer's Actions

8.2.1 The draft report correctly records that 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. The Department's discussion paper recommends accordingly.

8.2.2 Cr Bowler has made no complaint that, procedurally, she was not afforded natural justice. For reasons discussed above, it would have been surprising if she had.

8.2.3 Proposed opinion 4 is as follows:

> *'Council failed to comply with the principles of procedural fairness in the investigation, as required by S.250S(5) of the Local Government Act, in that it did not provide Cr Bowler with a reasonable opportunity to consider the contents of the report 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) of the Ombudsman Act and/or wrong within the meaning of S.49(2)(g) of the Act.'*

8.2.4 This opinion cannot be sustained. All that happened on 31 May 2006 was that the report was received by Council at its General Meeting. On any view of the Guidelines, that was necessary, because the report had been completed the day before. The Council did not propose or make any resolution adverse to Cr Bowler. The only resolution it made (opposed by Cr Bowler) was to adjourn the matter for further consideration by the Investigation Officer.

8.2.5 Even if the Council had proceeded to determine the matter on that day, there would have been no breach of natural justice, because that was Cr Bowler's preference as evidenced by her opposition to any adjournment. Cr Bowler had a **right** to natural justice, but it was one which could freely be waived.[9]

8.2.6 ***Proposed Opinion 4 is unsound, and, with respect, the Respondents submit it should be deleted.***

8.3 Proposed Recommendation 1

8.3.1 Proposed Recommendation 1 is unnecessary. The complaints process already refers to the requirement that natural justice be provided.[10] The Guideline document requires all reports and documentation to be referred by the senior complaints officer of Council.[11] The policy statement refers again to the requirement to deal with matters in an 'equitable and unbiased manner', with the 'observation of the principles of natural justice'.

8.3.2 ***The Respondents submit, with respect, that Proposed Recommendation 1 should be deleted.***

Ombudsman's response

After considering this part of the solicitors' submission, I accept that, as events transpired, Cr Bowler was not denied procedural fairness in respect of the report presented to Council on 31 May 2006 because, quite unexpectedly, the matter was adjourned during the meeting as a result of issues about land ownership raised by her. Consequently, she had ample opportunity to comment on both that report and the Addendum before the meeting on 26 July 2006.

However, I remain of the opinion that Council's action in giving Cr Bowler the report of 30 May 2006 on the day it was to be discussed by Council was unreasonable and/or unjust and/or otherwise wrong. This is now Opinion 5 in my report. As Cr Bowler said in her response to me:

> *On the 31st of May only a few hours before the General Meeting I received with all councillors a copy of the report for the General Meeting and the recommendation. It was at that time I contacted … my solicitor and asked for advice. Thankfully he suggested a confirmation of the owner of the land I was supposed to be trespassing on, it was then I found it was road reserve owned by the Department of Natural Resources …*

I do not agree with the submission that Cr Bowler waived her right to procedural fairness by taking part in the discussion during the meeting of 31 May 2006. As she herself said in her response to me:

> *… I had no other way to defend myself but to be at the meeting to argue my case … To my surprise the CEO and Mayor … suggested the matter would be investigated further … they weren't going to let me get away, they would find something else … I knew … I had to be in the room to defend myself, there was no natural justice. I did move a motion* [on 26 July] *through sheer frustration and distress; …*

I have also retained the recommendation referred to in the above part of the solicitors' submission (now Recommendation 2) because I consider that the Code Guideline Document should provide greater guidance on the steps to be followed to give procedural fairness to councillors alleged to have breached the Councillor Code of Conduct.

9. Council's Response

9.1 The draft report is critical of the investigation report. The author of the draft report has descended to what are said to be specific 'flaws' in the investigation report. These opinions expressed in the draft report led to the following proposed opinion five:

> *'Proposed Opinion Five*
>
> *The legal officer's report to the 31 May 2006 general meeting failed to establish:*
>
> - *that the conduct of Cr Bowler and officers 1 and 2 in attending the quarry car park constituted trespass or that they were on quarry property without permission and disobeying the requirement for visitors to report to the site office;*
> - *that, having regard to the available evidence, Cr Bowler's conduct constituted, or could reasonably be found to constitute, a breach of the Councillor Code of Conduct.'*

9.2 The draft report's commentary in relation to the investigating officer's report travels well beyond the Ombudsman's jurisdiction to comment on 'administrative action'. The Complaints Officer was acting as an investigator appointed under the Code. The senior complaints officer could equally have appointed an external, independent investigator. In neither event is the investigator engaged in 'administrative action'. In any event it is not clear what expertise or objectively ascertainable principles are called upon to critique the Investigation Officer's process and report.

---

[9] See *Thompson v Ludwig* (1991) 37 IR 437.

[10] In relation to minor breaches, see Code, S.14.2.1.

[11] Guidelines Document S.5.2.7.2.

Ombudsman's response

I have omitted Proposed Opinion 5. However, I am satisfied that the actions of the Complaints Officer, including the preparation of the investigation report, constituted administrative action of the Council for the reasons contained in the earlier discussion under the topic "Were Council's actions administrative in nature?". Nor would my opinion be any different had the investigation been conducted by an external person in that the expression "administrative action of an agency" is defined in s.10 of the Ombudsman Act to include action taken for the agency and action taken for, or in the performance of functions conferred on, an agency, by an entity that is not an agency.

9.3 ***The Respondents submit with respect that the entire section related to the making of the report should be deleted, including Proposed Opinion Five and Proposed Recommendation Two.***

9.4 Even if there was appropriate jurisdiction, the comments in the draft report, as well as the opinion and recommendation, are not sound.

9.5 The draft report contains a number of specific conclusions which are considered individually below:

> *'The report does not state how the findings against Cr Bowler constitute or could constitute, an actual or potential breach of one or more of ... these ... ethical obligations under the Code, although the recommendations implied that the legal officer considered that the necessary nexus existed.'*

9.6 It was unnecessary for her to do so. The Investigation Officer was not the tribunal determining whether provision of the Code had been breached. She was acting as an investigator tasked primarily with finding the facts. The only recommendation made in the report is that the complaint be referred to Council (as was required if a minor breach of the Code of Conduct had potentially been committed).

Ombudsman's response

I have amended my report to make it clear that I do not maintain that it was the Complaints Officer's role to decide if the Code had been breached. However, I think that it is entirely appropriate for a complaints officer to specify the provision of the Code that may have been breached having regard to the findings of the investigation.

After all, the object of the investigation is to ascertain whether the evidence justifies Council considering whether a breach has occurred.

Furthermore, in circumstances where it is not clear from the complaints investigation report what provision of the Code has been breached, I consider that procedural fairness requires that such information be provided to the relevant councillor in some other way (for example, by notice signed by the Mayor or the CEO), and the councillor given reasonable time to make a submission to Council on whether the breach has been substantiated.

9.7 Contrary to the passage in the draft report, this does not 'imply' that the Investigation Officer considered that the necessary nexus existed. The recommendation did no more than appropriately reserve that issue for the Council. To do more would have been to usurp the role given to the Council – not the Investigation Officer – under the Code.

> *'No evaluation was made of the degree of seriousness of the alleged trespass'*

9.8 Cr Bowler was not 'charged' with trespass. Behaviour which a member of the public found to be objectionable was referred to the Council for determination as to whether it breached the behavioural and conduct requirements of the Code. Because the complaint involved at least an implied allegation of trespass, the issue had to be considered, but the issue of the 'seriousness' of any particular trespass is a largely subjective matter. [redacted] obviously regarded the matter as serious; another quarry owner in similar circumstances may have taken a quite different view.

9.9 It was unnecessary and substantially irrelevant for the report to reach a conclusion, based on a value judgment, in relation to the 'seriousness' of what was said by [redacted] to be a trespass.

> *'The report failed to provide an analysis of the weight which might be given to Cr Bowler's version of the facts, or of any defences which might be open to her.'*

Ombudsman's response

I have amended my report to remove the comments objected to in this part of the solicitors' submission.

9.10 Contrary to this suggestion, the report made findings about the facts in a neutral way. There was little requirement for any balancing of one version over another: the facts as found by the report were largely not in contest.

9.11 Beyond this, it would have been quite inappropriate for the Investigation Officer in her report to make assessments, reserved to the Council, of whether or not Cr Bowler had a 'defence'. That was a matter for the Council, having considered the report and having also considered any submissions by Cr Bowler. Any pre-judgment of these issues by the Investigation Officer would have been wholly inappropriate.

Ombudsman's response

I have amended my report to remove the comment referred to in this part of the solicitors' submission.

Evidence of comment by residents

9.12 It is difficult to understand the relevance of this comment. It is not clear what evidence is referred to, unless it is the instructions given to Cr Bowler's solicitor, recorded in his advice dated 31 May 2006 (after the first report was prepared). In her statement (which was annexed to the initial report) Cr Bowler did not refer to any such 'evidence'. However the addendum report, in section 5.2.3, specifically refers to the complainant's acceptance that he had invited the Councillor onto his property in the past – but that the invitation was qualified (as commonsense says it would have been) by the requirement that she, like any other person, should first make arrangements to attend the property or to report to the site office on arrival to comply with safety requirements.

9.13 If indeed there was a 'general invitation' for local residents to visit the quarry, that would not be an answer to the matters raised in the complaint, and nor would it have the effect that the behavioural and conduct requirements of the Code were inevitably satisfied.

Ombudsman's response

I have amended my report to remove that part of my proposed report referred to in the above part of the solicitors' submission.

'The basis of the findings that Cr Bowler and the officers had become visitors when one of the officers alighted from the vehicle in the car park to take photographs was never explained.'

9.14 This comment is also very difficult to understand. If Cr Bowler (or anyone else) attended the quarry, they were either trespassers or visitors. If they were visitors, they were reasonably directed to identify themselves to the visitor's office. Leaving aside the potential discourtesy of not doing so, there were safety issues involved as well.

9.15 in any event, it is of only peripheral relevance to the behavioural and conduct requirements of the Code whether Cr Bowler's legal status was that of 'trespasser', 'visitor' or some other status.

Ombudsman's response

I do not agree that whether Cr Bowler was a trespasser or visitor is an issue of peripheral relevance. The issue is central to whether 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 also be kept in mind that this assertion of the Complaints Officer was made at a time when it was mistakenly believed that the car park area and the area where Cr Bowler stopped the vehicle was land owned or occupied by the quarry operator.

Alleged failure to contain evidence establishing that the complainant was in fact the landholder or held legal control of the car park land.

9.16 This is incorrect. The report **did** contain evidence. The evidence is the statement of [redacted] in his letter dated 22 May 2006. In that correspondence, he said:

> *'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'.'*

9.17 Further down:

> *'If [redacted] 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.'*

9.18 A statement by a person that he is the landholder of particular land is clearly evidence of that fact. All parties, including Cr Bowler, proceeded initially on the basis that it was correct. Any investigations officer could be forgiven for taking at face value a statement by a landholder that he owns a particular area of land.

9.19 As it turned out, all parties including the landholder may have been mistaken about this. When that fact emerged, it was dealt with appropriately and with complete respect for natural justice. However that does not mean that the report did not contain 'evidence' of the landholding issue: plainly it did.

Ombudsman's response

It is correct, as the solicitors' submission states, that the fact that someone states that certain land belongs to them is evidence of that fact. I have amended the relevant section of my report to highlight the evidence the Complaints Officer relied on in the report of 30 May 2006. Unfortunately, that evidence was shown to be misleading.

9.20 This section also includes commentary in relation to what is said to be a difference between the oral discussions with the CEO and his written complaint. The relevance of this has been discussed. The complaint made by [redacted] plainly enlivened the general provisions in the Code dealing with conduct and behaviour. The process does not require members of the public to particularise their complaints by reference to legal obligations, the legislation or anything else. Nor does the Code require it.

9.21 ***All of these comments are unsound, and the Respondents submit, with respect, that they should be removed.***

9.22 The Proposed Opinion Five is also unsound for the following reasons:

(a) it was not for the legal officer's report to 'establish' any particular conclusion;

(b) the issue of whether or not trespass had been committed, although relevant, was not determinative of any issue under the Code, particularly as the matter was dealt with as a minor breach rather than a statutory breach;

(a) it was for the Council – **not** the Investigations Officer – to conclude whether or not the conduct constituted a breach of the Code of Conduct.

9.23 ***The Respondents submit, with respect, that Proposed Opinion Five should be deleted.***

9.24 Proposed Recommendation Two is also unsound. It was for the Council to determine whether any breach of the Code had occurred and, if so, what provision. It is not for the Investigation Officer to formulate 'charges'.

9.25 In many cases it will of course be useful for all parties to have a common understanding of what particular aspects of the Code are being considered. That function is not part of the investigative function, but rather is guidance which could more appropriately be given by the Legal Officer. In this case, the Investigating Officer was in fact also the Legal Officer. In her separate capacity (a capacity which is wholly unrelated to administrative action) the Legal Officer **did** provide this guidance. She did so specifically in her report, which formed part of the general meeting minutes, dated 31 May 2006. In the section entitled 'issues', the Legal Officer specifically identified the precise aspects of the Code which were relevant, namely paragraph 6.1.1(a) and paragraph 6.3.1. Further guidance was given to the Council in relation to procedural requirements, including the requirement that the Council comply with the principles of natural justice.

9.26 These minutes were prepared following the meeting on 31 May 2006. No action was taken at that meeting apart from a referral back to the Investigations Officer to investigate the property boundaries of the site. The minutes of that meeting were available to all Councillors, including Cr Bowler.

9.27 Seen in this context, the suggestion that:

(a) there was a failure to provide Cr Bowler with proper notice of the relevant provisions of the Code being referred to; and

(b) that this was a failure of the investigating officer in preparing the report,

is quite wrong.

9.1.2 ***The Respondents submit, with respect, that Proposed Recommendation Two should be deleted.***

Ombudsman's response

I have not suggested in my report that there is any obligation on a complainant to formulate their complaint with legal precision. However, I explain in the body of my report the significance of the difference between the quarry representative's written complaint and his oral complaint to the CEO.

After reconsidering the other issues raised in the above part of the solicitors' submission, I have deleted previous Proposed Opinion 5. However, I have retained (but amended) Proposed Recommendation 2 (now Recommendation 3). My reasons for doing so appear in 3.1 of my report but I do not make any adverse comment about the Complaints Officer for not specifying the Code breach to which the findings potentially related.

In relation to paragraph 9.27 of the solicitors' submission, I remain of the view that there was a failure to provide Cr Bowler with sufficient notice of the relevant provision of the Code she was alleged to have breached (as discussed at 5.2 of my report).

9.2 Road Reserve Issue

9.2.1 There is a general criticism in this section of the draft report relating to an alleged failure to establish a breach of the *Mining, Quarrying Safety and Health Act 1999* (**MQSHA**).

9.2.2 What conduct can constitute a breach of the MQSHA is a matter of considerable legal complexity, and not one which either the Council or the Ombudsman would be likely to be qualified to define. However the conclusions which do appear in the addendum report are undoubtedly correct, and are supported by the correspondence received from the Regional Inspector of Mines.

9.2.3 Unsurprisingly, the Inspector did not suggest further action would be taken. This is referred to in the draft report as follows:

> '*This is some indication of the low level of seriousness of the breach alleged by the quarry representative.*'

9.2.4 No such indication can be drawn from these circumstances. In any event it is a largely irrelevant issue.

9.2.5 The legal context was relevant and useful in order to understand the basis for [redacted] complaint and in particular the validity of his concern about the failure to respect the sign relating to visitors. However Cr Bowler was not 'charged' by the Council – or anyone else – for a breach of the MQSHA. The conclusion in the addendum report was as follows:

> *'5.4 Conclusion*
>
> *There is sufficient evidence to support the allegation that the Councillor and officers were on land under the safety control of the complainant contrary to the lawful signage requiring visitors to report to the site office.'*

9.2.6 Proposed Opinion Six is in the following terms:

> *'Proposed Opinion Six*
>
> *The legal officer's[12] reports to Council (including the addendum) do not contain sufficient evidence to establish that Cr Bowler had committed a breach of any provisions of the Mining and Quarrying Safety and Health Act 1999.'*

9.2.7 Proposed Opinion Six is unsound, because:

(a) It was not for the Investigation Officer, or indeed for the Council, to establish whether there had been a breach of a criminal provision in the MQSHA.

(b) The report did not purport to do so, and did not reach any conclusion about this matter.

(c) The relevance of the inquiry into the potential application of the MQSHA was only to establish that the complaint, if true, was of substance.

(d) It was unnecessary for the 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.

9.2.8 ***The Respondents submit, with respect, that Proposed Opinion Six should be deleted.***

Ombudsman's response

I have addressed these issues in my report at 5.2.

10. Proposed Apology

10.1 The draft report deals with the Mayor's letter dated 13 June 2007. No issue about this matter was raised by Cr Bowler at any time. Cr Bowler declined to apologise or take any other form of conciliatory action (as was her right), and accordingly the complaint was unresolved and had to be dealt with by the Council.

10.2 Proposed Opinion Seven is as follows:

> *'Proposed opinion seven*
>
> *The Mayor's memorandum of 13 June 2007 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 dealing with complaints of minor breaches of the Code by Councillors, and constituted administrative action that was unreasonable and/or wrong under section 49(2)(b) and (g) of the Ombudsman Act.'*

10.3 This opinion misunderstands the nature of the Mayor's actions. A communication between the Mayor and a Councillor on **any** issue is most unlikely to be 'administrative action': it is a wholly internal communication within the Council. Leaving this aside, it was quite appropriate for the Mayor, as the head of Council, to express his view to Cr Bowler about the matter. The complaint handling provisions in the Code, consistent with the LG ACT and the Guidelines, give considerable emphasis to informal resolution of matters wherever that is possible. Nowhere does it suggest that there comes a point when informal resolution becomes impossible or inappropriate.

10.4 In this case, the evidence is that the Senior Complaints Officer (the CEO, Susan Rankin) discussed with the Mayor whether there was any way to bring this difficult matter to a conclusion without the Council having to deal with it. Following that discussion, the Mayor offered to make the request to Cr Bowler in his capacity as Mayor. This was a matter which was consistent with the complaints handling procedure.

10.5 It could never be inappropriate for the Mayor to provide his fellow Councillors with advice about how to manage a dispute with a member of public, whether it was being concurrently handled by the Code or not. The views expressed by the Mayor were consistent with and justified by the report which all members of Council had received. It was the last chance that all parties had to resolve the matter without Council consideration of the report.

10.6 The attempt did not succeed, and Cr Bowler was at liberty to reject the suggestion. However it cannot be reasonably suggested that the Mayor's action – even if it was administrative action – was 'wrong' or 'unreasonable'.

10.7 ***The Respondents submit, with respect, that Proposed Opinion Seven should be deleted.***

Ombudsman's response

I agree that the Code Guideline Document does not prevent an attempt being made to informally resolve a complaint at any stage.

There would certainly have been nothing inappropriate in the Mayor suggesting to Cr Bowler (in a memorandum or orally) that the matter might be suitable for informal resolution, and offering to arrange a meeting between Cr Bowler and the quarry representative for that purpose. The Mayor may even have broached with Cr Bowler whether she was prepared to apologise to the quarry representative in an effort to 'calm things down'.

However, the Mayor's memorandum went beyond this, and implied that Cr Bowler had breached the MQSHA and should therefore provide a written apology to the quarry representative "for this oversight".

At this stage, Cr Bowler had not had an opportunity to speak on the substance of the allegation in Council, and Council was yet to determine the matter. Therefore, Cr Bowler could reasonably have concluded from the memorandum that the Mayor, as Chair of the General Meeting, would not deal with the matter impartially when it came before the Council on 26 July 2006.

11. The Reprimand

11.1 In this section, there is a continuing suggestion that there was a failure of natural justice because the provisions of the Code suggested to have been breached were not specifically pleaded or particularised.

11.2 Proposed Opinion Eight is as follows:

> '*Proposed Opinion Eight*
>
> *Council failed to comply with the principles of procedural fairness in deciding at its General Meeting on 26 July 2006 that Cr Bowler had committed a breach of the Councillor Code of Conduct in that it did not provide her with reasonable notice of the provision of the Code she was alleged to have breached to enable her to prepare a submission to Council.*'

11.3 This has largely been dealt with in relation to an earlier opinion: it is factually wholly incorrect. The Legal Officer had given specific direction to the Council and to Cr Bowler in relation to the relevant provisions in the Code.

11.4 The proposed Opinion Eight refers to a consequence which is said to flow – namely that Cr Bowler did not have reasonable notice to 'enable her to prepare a submission to Council'. In fact Cr Bowler participated fully in all aspects of the Council's process – to an extent which is in fact criticised by the draft report. There is no suggestion from Cr Bowler at any time that she was disadvantaged or did not feel that she was 'enabled' to prepare any submission she wished to make.

11.5 In any event, the relevant provisions of the Code were advised to Cr Bowler sufficiently to satisfy any notion of natural justice required by the process.

11.6 ***The Respondents submit, with respect, that Proposed Opinion Eight should be deleted.***

12. Mayor's letter

12.1 In this section, there is an incorrect statement to the effect that Cr Bowler 'was denied the opportunity to make a submission – for example, that the matter was trivial and vexatious and Council should take no further action.

12.2 This statement is entirely contrary to the facts. The facts, which are recorded in the draft report at page 31, are that Cr Bowler in fact **proposed a motion** to the effect that Council take no further action because the complaint is frivolous and vexatious. Far from being denied an opportunity to make submissions, Cr Bowler was in fact afforded the right to propose resolutions for consideration by Council on the specific matter. She would undoubtedly have been given an opportunity to speak to the submission before it was voted on by Council.

12.3 Proposed Opinion Nine otherwise 'rolls up' matters dealt with or referred to in previous opinions, which have already been dealt with in this submission. All of the matters have been dealt with.

12.4 Proposed Opinion Nine is unsound.

12.5 ***The Respondents submit, with respect, that Proposed Opinion Nine should be deleted from the report.***

Ombudsman's response

I agree that Cr Bowler had the opportunity to speak at both General Meetings (31 May 2006 and 26 July 2006) and did, in fact, propose a motion (on 26 July 2006) that the matter be declined on the basis that it was trivial, frivolous or vexatious.

However, I do not consider she was given reasonable notice of the provision of the Code she had allegedly breached. My reasons for this opinion are set out at 5.2 of my report.

I appreciate that the Legal Officer gave some direction to Council in relation to provisions of the Code that may have been relevant. However, Council never informed Cr Bowler of the specific provision of the Code she was alleged to have breached. Therefore, I remain of the view that she was not given procedural fairness in this respect.

In relation to the Council's decision to reprimand Cr Bowler, although I have amended Proposed Opinion 9 (now Opinion 12), I remain of the view that she should have been given the opportunity to make a submission on what action, if any, Council should take having found that she had breached the Code. My reasons for this opinion are set out in 5.3 of my report.

13. Other Recommendations and Opinions

13.1 Proposed Recommendation Three

13.1.1 These submissions demonstrate that there is no basis for this recommendation.

13.1.2 The ***Respondents submit, with respect, that that it should be deleted.***

13.2 Proposed Recommendation Four

13.2.1 The recommendation is unnecessary: there is no evidence that the Council has acted inconsistently with this principle, notwithstanding the suggestion in the draft report that it did.

13.2.2 ***The Respondents submit, with respect, that it should be deleted.***

13.3 Conflict of interest and procedural fairness

13.3.1 This section deals with a sensitive and legally complex issue: namely the extent to which Councillors should themselves be entitled to participate in Council proceedings regarding a complaint made against them pursuant to the Code.

13.3.2 It can be accepted that it is ordinarily undesirable for a Councillor to participate in matters which affect a Councillor personally. Indeed section 244 of the LG Act appears to prohibit this. Deliberations in relation to an allegation of breach of the Code do appear to fall into this category.

13.3.3 One of the solutions proposed by the Ombudsman is to deny a Councillor the right to participate in debate or to vote on a resolution under the Code which affects them.

13.3.4 There is danger in this approach without further consideration. If adopted, it could lead to political manipulation of the process which might lead to unfair outcomes. A complaint might be made against the entire Council, in which case the process would immediately be stymied. Alternatively, a complaint might be made against carefully selected Councillors. Under the Ombudsman's proposed process, they would be automatically disentitled from participation in the process other than for the purpose of making submissions in their defence.

13.3.5 This is a matter deserving of further attention, although it cannot be said that Cr Bowler was disadvantaged in any way by being allowed to participate in Council debate and to vote in relation to motions relevant to it.

Ombudsman's response

I remain of the view that the recommendations referred to in the above part of the solicitors' submission should be retained for the reasons I have already given in responding to other parts of the submission.

In relation to 13.3 of the submission, I acknowledge that the exclusion of one or more councillors, the subject of an alleged Code breach, from a meeting at which the alleged breach is to be discussed and voted on, may skew the outcome. I mention this possibility in the body of my report.

However, the procedure followed by the Council in this case, which included allowing Cr Bowler to discuss and vote on the matter, is clearly inappropriate. In most circumstances, procedural fairness could be given to a councillor by giving them details of the alleged breach and inviting them to make a submission within a reasonable period.

Therefore, I wrote to the Director-General of the Department of Local Government, Sport and Recreation inviting him to comment on my proposed recommendation that the LGA be amended to specify the procedure to be followed by councils in dealing with breaches of councillor codes of conduct to ensure councillors were given reasonable notice of, and a reasonable opportunity to respond to, the relevant issues.

The Director-General advised on 26 July 2007 that my proposed recommendation would be forwarded to the Department's Local Government Act Review Team for inclusion as part of a broader review of the LGA.

The possibility that the process for dealing with an alleged breach could be manipulated by a council also highlights the importance of the Ombudsman having jurisdiction to independently investigate a complaint from a councillor that they have been treated unreasonably or unfairly by a council.

13.3.6 It is, however, quite unfair for the draft report to suggest that the process, necessary as a result of the requirements of the LG Act and the Code, indicates that the process followed by the Council in dealing with the matter was 'defective'. As the draft report records, there is little guidance in relation to this difficult matter from the Department, and little or no legal authority relevant to the point.

13.3.7 All that can be said in this case is that Cr Bowler had a full and appropriate opportunity to make submissions, table advice, participate in debate and ultimately to participate in the decision of the Council in relation to the matter.

13.3.8 ***The Respondents submit, with respect, that further consideration needs to be given to this issue before a recommendation is made.***

13.4 Proposed Opinion Ten

13.4.1 The Council's actions in 'allowing' Cr Bowler to address the general meeting and to vote on the alleged breach was **not** 'unreasonable and/or unjust' in any sense. It is for the individual Councillor to excuse himself or herself where there is a potential conflict of interest and all Councillors are routinely reminded of these requirements at the commencement of each meeting. The Council did not 'put her in a position' where she 'risked' committing a breach of section 244 of the LG Act – that was as a consequence of her actions, and the strong inference from the evidence is that any attempt to preclude her from doing so would itself have been controversial.

13.4.2 It would have been open to Cr Bowler to decide, having regard to obligations of which she was certainly aware, to respond, as a non-participating Councillor, to the allegations against her, and then excuse herself from the chamber. She did not do this. However this does not justify Proposed Opinion Ten.

13.4.3 ***The Respondents submit, with, respect that Proposed Opinion Ten should be deleted.***

13.5 Proposed Recommendation Five

13.5.1 This recommendation is too blunt an instrument to deal with a complex issue, and might well potentially lead to unfairness unless and until clarity is given (perhaps by the legislature) in relation to how these matters should be dealt with.

13.5.2 ***The Respondents submit, with respect, that the only recommendation regarding this matter should be that the matter is given further consideration by the Council and by the legislature.***

13.6 Proposed Recommendation Six

13.6.1 This recommendation is unnecessary. Contrary to suggestions in the draft report, there is no evidence that Cr Bowler was not given reasonable notice of the issues or a reasonable opportunity to respond to them. Nor has she made any such complaint. The Code and the guidelines already deal adequately with the issue of natural justice, and the Council has the benefit of legal advice as and when required in this regard.

13.6.2 ***The Respondents submit, with respect, that Proposed Recommendation Six should be deleted.***

13.7 Proposed Recommendation Seven

13.7.1 This recommendation relates to the Department, and not to the Council. The only comment the Respondents wish to make is that the matter relating to Cr Bowler involved no action inconsistent with the issues dealt with by the recommendation.

13.8 Proposed Recommendation Eight

13.8.1 In fact RSC has determined that this is how it will proceed in future, as have most other Councils. However the recommendation potentially goes too far: not all Councils will be able to afford to engage and pay for an external investigator in relation to all complaints, and to require them to do so would be unnecessary and potentially onerous.

13.8.2 ***The Respondents would agree with the recommendation if the words 'give consideration to appointing' replaces the word 'appoint' in the third line of the recommendation.***

Ombudsman's response

I acknowledge that it is a councillor's responsibility under the LGA to exclude themselves from council meetings where a matter is being discussed or voted on in which they may have a material personal interest (see s.244 of the LGA).

Nevertheless, Council did not offer Cr Bowler any alternative way of formally making a submission to it.

14. Proposal to place the final report before the Assembly

14.1 The Respondents have a number of concerns about this decision.

Damage to Reputation

14.2 The report is drafted in terms which might be likely to cause considerable reputational damage to the Respondents if tabled publicly in any form, and does not reflect a balanced or accurate set of conclusions about the events, for the reasons otherwise discussed in this response.

No Basis for Disclosure

14.3 The stated basis of this action is said to be section 52 of the Ombudsman Act. However section 52 only authorises reports to be given to the Speaker (for tabling in the Assembly) reports on matters arising out of the performance of the **Ombudsman's** functions. Section 52 does **not** authorise delivery to the Speaker of reports about matters of administration by an agency.

14.4 The relevant provisions in respect of external disclosure of these reports are section 50 (to the Minister) and section 51 (to the Premier and the Speaker). Neither of those are applicable. To be enlivened, section 50 requires evidence of breach of duty or misconduct, of which there is none.[13] The section 51 power is only enlivened when the matters set out in section 51(3) are satisfied. This in fact involves a process of consultation with the principal officer of the agency after a final report is prepared and recommendations have been made. None of the required steps have yet been taken.

Decision Without Consultation

14.5 The proposal to provide the report to the Speaker is expressed as a decision – that is, it appears the Ombudsman has decided to make this step without seeking any feedback or response from those (including the Respondents) who will be affected by it. The Respondents may be very substantially affected by the disclosure. There are others who may also be affected, including Cr Bowler, [redacted] (the original complainant) and the two Council officers involved in the incident. There is no indication that their interests have been considered, or their input sought prior to the decision to make this public disclosure.

14.6 ***For these reasons, the Ombudsman's decision to deliver a copy of the report to the Speaker for tabling in the Assembly should be withdrawn.***

---

[13] Cr Bowler is the only named person in relation to which there is evidence which might even arguably amount to misconduct. The Respondents do not contend that the report should be provided to the Minister on this basis.

Ombudsman's response

The solicitors' submission that the subject matter of this report is not appropriate for a report to Parliament under s.52 of the Ombudsman Act is entirely misconceived. The relevant provisions of the Ombudsman Act are as follows:

52 Report to Assembly on ombudsman's initiative

If the ombudsman considers it appropriate, the ombudsman may give to the Speaker at any time, for tabling in the Assembly, a report on a matter arising out of the performance of the ombudsman's functions.

12 Functions of the ombudsman

The functions of the ombudsman are-

(a) to investigate administrative actions of agencies-

(i) on reference from the Assembly or a statutory committee of the Assembly; or

(ii) on complaint; or

(iii) on the ombudsman's own initiative; and

(b) to consider the administrative practices and procedures of an agency whose actions are being investigated and to make recommendations to the agency-

(i) about appropriate ways of addressing the effects of inappropriate administrative actions;

(ii) for the improvement of the practices and procedures; and

(c) to consider the administrative practices and procedures of agencies generally and to make recommendations or provide information or other help to the agencies for the improvement of the practices and procedures; and

(d) *the other functions conferred on the ombudsman under this or any other Act.*

There has also been judicial commentary in cases related to publication of material by other Ombudsman Offices:

Ainsworth v Ombudsman (1988) 17 NSWLR 276 at 283-284 per Enderby J (Supreme Court of NSW):

> *The office is a unique institution. It does not deal directly or in any legal way with legal rights. It investigates complaints and reports to Parliament. An Ombudsman is a creature of Parliament. It has always been considered that the efficacy of his office and his function comes largely from the light he is able to throw on areas where there is alleged to be administrative injustice or where other remedies of the courts and the good offices of members of Parliament have proved inadequate.*

Aboriginal and Torres Strait Islander Commission v Commonwealth Ombudsman (1995) 63 FCR 163 (Enfield J, Federal Court):

> (at para 2.3): *The Ombudsman has no power to put her recommendations into action, or compel any action on the part of the relevant individual, department or authority. However, there are at her disposal a number of quite persuasive mechanisms to gain the desired results, including the option to make public various aspects of the investigation … The right of publication is powerful notwithstanding the limitations or restrictions built into the section …*
>
> (at para 4.3): *The provision in … the Act that reports containing adverse opinions may not be made 'unless' the procedural fairness guidelines are followed does not mean that the Ombudsman may not report opinions that are critical of an individual. In fact, the subsection clearly infers that she may. Whilst there are many opinions critical of a person that stop short of suggesting the guilt of an offence, it was expressly contemplated that both implied and express criticisms would be made …*
>
> *The Act balances the protection of the reputation of the individuals concerned through the entitlement to procedural fairness against the obvious public importance of investigating misconduct and unlawfulness in the public sector and the Ombudsman's statutory duty to report her opinions on such investigations accompanied by reasons.*

I am satisfied that this report is a report on a matter arising out of the performance of the Ombudsman's function to investigate the administrative actions of agencies on complaint. I am also satisfied that it is appropriate to give the report to the Speaker for tabling in the Assembly.

Paragraph 14.5 of the solicitors' submission asserts that my decision to table this report was taken without consultation. This is incorrect. A full copy of the proposed report was provided to the CEO, Mayor and Complaints Officer.

Although I flagged my intention to provide the report to the Speaker, they were invited to make any submission they wished to make on "any part" of the proposed report's contents. This included whether the report should be presented to the Speaker for tabling in the Assembly. They were allowed six weeks to respond to the proposed report.

The proposed report was part of the preparation process for my final report. As O'Leary J (NT Supreme Court) stated In ***Alice Springs Town Council v Watts***:[157]

> *The preparation of a report is clearly a different thing from the 'making' of a report. A report is 'made' when the Ombudsman reports his opinion and his reasons for that opinion as required by … the Act.*

I have taken the solicitors' submission into account in determining that it is appropriate to table my final report in the Assembly.

I sought Senior Counsel's advice on this issue. Senior Counsel advised that the report is on a matter arising out of the performance of the Ombudsman's functions within the meaning of s.52 of the Ombudsman Act, and if the Ombudsman considers it appropriate to give the report to the Speaker, the Ombudsman is authorised to do so.

[157] (1982) 18 NTR 1 at p.7

Bibliography

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

Creyke, R; McMillan, J, 2005. *Control of Government Action: Text, Cases and Commentary*, Sydney, LexisNexis

Crime and Misconduct Commission, 2007, *Facing the Facts*, Brisbane

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

Department of Local Government, Planning, Sport and Recreation, 2006. *Local Government Bulletin 01/06: Codes of Conduct for Councillors*, Queensland Government, Brisbane

Department of Local Government, Planning, Sport and Recreation, 2005. *Local Government Bulletin 11/05: Local Government Legislation Amendment Act 2005*, Queensland Government, Brisbane

Department of Local Government, Planning, Sport and Recreation, 2005. *Local Government Bulletin 16/05: Model Code of Conduct for Councillors*, Queensland Government, Brisbane

Independent Commission Against Corruption and Crime and Misconduct Commission, 2004. *Managing Conflicts of Interest in the Public Sector*, Sydney and Brisbane, 2004

New South Wales Ombudsman, 2004. *Investigating Complaints: A Manual for Investigators*, Sydney

New South Wales Ombudsman, 2005. *Natural Justice/Procedural Fairness: Public Sector Agencies fact sheet No. 14*, Sydney

Ombudsman Western Australia, 2005. *Information Sheet 1: Procedural fairness (natural justice)*, Perth

Redland Shire Council, 2003. *Employee Code of Conduct*, Edition 1, Cleveland

Redland Shire Council, 2006. *Councillor Code of Conduct*, Cleveland

Redland Shire Council, 2006. *Guideline Document GL-3037-001*, Edition 1, Cleveland

Cases

Aboriginal and Torres Strait Island Commission v Commonwealth Ombudsman (1995) 63 FCR 163

Ainsworth v Ombudsman (1988) 17 NSWLR 276

Alice Springs Town Council v Watts (1982) 18 NTR 1

Annetts v McCann (1990) 170 CLR 596

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321

Botany Council v The Ombudsman (1995) 37 NSWLR 357

Burns v Australian National University (1982) 40 ALR 707

Edwardes v Kyle (1995) 15 WAR 302

Evans v Friemann (1981) 35 ALR 423

Hall v New South Wales Trotting Club Ltd [1977] 1 NSWLR 378

Hamblin v Duffy (1981) 34 ALR 333

"K" v NSW Ombudsman [2000] NSWSC 771

Kanda v Government of Malaya (1962) AC 322

Kioa v West (1985) 62 ALR 321

Lamb v Moss (1983) 49 ALR 533

Little v Registrar of the High Court (1990) 96 ALR 448

Medical Council of Tasmania v Medical Complaints Tribunal [2005] TASSC 24

R v Joske; Ex parte ABCE and BLF (1972-1973) 130 CLR 87

R v Quinn; Ex parte Consolidated Foods (1977) 138 CLR 1

R v Thames Magistrates' Court; ex parte Polemis [1974] 2 All ER 1219

Rogers v Law Coast Mortgages Pty Ltd [2002] FCA 181

Rush v Western Australia Amateur Football League Inc [2005] WASC 206

QUEENSLAND
ombudsman