

Code of Conduct - Councillor Kerry

Originating Officer	Manager Corporate Governance - Kate McKenzie
Corporate Manager	Manager Corporate Governance - Kate McKenzie
General Manager	Chief Executive Officer - Adrian Skull
Report Reference	GC181009R06

REPORT OBJECTIVE

To provide Council with a copy of the final report regarding a Code of Conduct complaint for Councillor Kerry and ensure compliance with section 2.24 of the Code of Conduct for Council Members that states '*A breach of the behavioural code must be the subject of a report to a public meeting of the Council*'.

EXECUTIVE SUMMARY

At its meeting of 11 September 2018, Council considered a Preliminary Report from an independent investigator regarding alleged breaches of the Code of Conduct by Councillor Kerry relating to his conduct with a staff member. The Council found that Councillor Kerry did breach the Code of Conduct and applied various sanctions in accordance with the Elected Member Code of Conduct - Procedure for Investigating Complaints.

RECOMMENDATION

That Council:

- 1. Notes the report in Appendix 1 regarding breaches of the Code of Conduct by Councillor Kerry**
- 2. Confirms Councillor Kerry has breached sections 2.11 and 2.14 of the Code of Conduct**
 - **Confirms the following actions be applied in accordance with section 5 of the Elected Member code of Conduct Procedure for investigating complaints:**
 - **Councillor Kerry be censured**
 - **Councillor Kerry write a letter of apology to the staff member involved in the matter**
 - **Councillor Kerry be advised that all communication from himself to staff be through either the Chief Executive Officer or Manager Corporate Governance until otherwise advised by the Chief Executive Officer.**

GENERAL ANALYSIS

On the 11th July 2018, a Code of Conduct complaint was received regarding Councillor Kerry in relation to an alleged incident that occurred between Councillor Kerry and a staff member. The incident alleged that Councillor Kerry bullied and threatened a member of staff and hence breached sections 2.11 (*not bully or harass Council Staff*) and 2.14 (*that Elected Members must refrain from directing or influencing Council staff with respect to the way in which these employees perform their duties*).

In accordance with the Elected Member Code of Conduct Procedure for Investigating Complaints (the Procedure), the matter was referred to Council (in confidence) and Council determined to appoint an

independent investigator. As a result, EMA Consulting were appointed to conduct the investigation.

This investigation was completed and a Preliminary Report was provided to Council (in confidence) at its meeting of 11 September 2018. At that meeting, Council resolved that:

- Councillor Kerry has breached section(s) 2.11 and 2.14 of the Code of Conduct for Council Members.
- that the following actions be applied in accordance with section 5 of the Elected Member Code of Conduct Procedure for Investigating Complaints:
 - Councillor Kerry be censured.
 - Councillor Kerry write a letter of apology to the staff member involved.
 - Councillor Kerry be advised that all communication from himself to staff be through either the Chief Executive Officer or Manager Corporate Governance until otherwise advised by the CEO.

Council also determined certain information be removed from the Preliminary Report from EMA Consulting to protect individuals' personal information.

In accordance with the requirements of the Code of Council for Council members, the final report is presented to a public meeting of Council attached in **Appendix 1**.

Legal / Legislative / Policy: The requirements of the Code of Code for Council Members and the Procedure for Investigating Complaints have been fulfilled.

Current Budget Allocation The cost of this investigation is approximately \$12k and has been funded from the Corporate Governance budget.

Attachment

#	Attachment	Type
1	Code of Conduct - Councillor Kerry - Appendix 1	PDF File

4 September 2018

City of Marion
PO Box 21
Oaklands Park SA 5046

[REDACTED]

Dear Kate,

Investigation Report – Councillor Nick Kerry

In accordance with the instruction of the City of Marion ("**Council**"), I attach the following report of my findings regarding the issues raised by [REDACTED] (on behalf of employee [REDACTED] about Councillor Nick Kerry.

Instructions

We were instructed to conduct an investigation and make factual findings as to whether certain events did or did not occur, as well as findings as to whether the behaviour by Cr Kerry constitutes bullying or otherwise inappropriate behaviour. You also requested preliminary views in respect of whether there is a basis for the Council to take action against Cr Kerry in respect of any identified inappropriate behaviour. The report is limited to these matters only. We are not instructed to provide advice or recommendations in respect of specific outcomes nor options to assist the parties to resolve the matter.

Legislative Framework

Work Health and Safety

The *Work Health and Safety Act 2012* (SA) ("**WHS Act**") provides an active requirement that a person conducting a business or undertaking (eg Council) and officers of the organisation (eg the CEO, senior management, and Elected Members) must ensure, so far as is reasonably practicable, the health and safety of workers which includes:

- eliminating risks to health and safety; and
- if it is not reasonably practicable to eliminate the risks, minimising those risks as far as is reasonably practicable.

This obligation applies to the extent to which a person has the capacity to influence and control the matter. This also includes the provision and maintenance of a work environment without risks to health and safety of any workers. 'Workers' (for the purpose of the WHS jurisdiction) includes but is not limited to Council employees, contractors, sub-contractors, and volunteers.

Where the investigation concludes that there is potentially a hazard to the health and safety of any persons, the Council must take all reasonable steps to eliminate or minimise the risk. This may include taking steps to make sure that workers comply with their obligations to ensure that their actions or omissions do not adversely affect the health and safety of themselves or other persons.

Once you have determined the outcome(s) to the investigation and taken such actions, you will need to confirm with any affected parties of the following:

- the steps to be taken by the Council to deal with identified safety risks;
- what individuals can do and who to contact in the event that there are reoccurrences; and
- the support mechanisms available to workers.

Stress

In addition to the above risks to health and safety, the Council may be exposed to claims for stress from workers under the *Return to Work Act 2014* (SA) ("**RTW Act**"). Section 7 of the RTW Act states that a disability consisting of an illness or disorder of the mind (eg a stress claim) is compensable if and only if:

- the employment was the significant contributing cause of the disability; and
- the disability did not arise wholly or predominantly from reasonable administrative action taken in a reasonable manner by the employer in connection with the worker's employment.

The test to satisfy a stress claim is relatively high (compared to a non-psychiatric injury) in that the worker needs to establish that employment was 'the significant contributing cause' and not 'a significant contributing cause' of the disability.

Other Considerations

In addition to the above, the alleged conduct should be assessed against the relevant obligations that apply to Elected Members.

Our findings should be considered in the context of this legislative framework.

If you have any further questions please do not hesitate to contact me.

Yours sincerely,

Ming-Lyn Hii
Consultant

Enclosure – Investigation Report

INVESTIGATION REPORT

1. SUMMARY OF INVESTIGATION

1.1 Purpose and Background

In accordance with the Council's instruction on 1 August 2018, I confirm that I have conducted an independent investigation into matter raised about Councillor Nick Kerry. This report provides a summary of the key factual findings from the investigation as to whether certain events did or did not occur on the balance of probabilities and findings as to whether the behaviour constitutes bullying or otherwise inappropriate behaviour. The report also makes a preliminary view in relation to the general outcomes arising from the investigation that are available to the Council to address the issues.

As instructed, I have not provided advice or recommendations in relation to specific outcomes or options to assist the parties to resolve the matter, as this is beyond your instructions.

1.2 Executive Summary

This report finds that Cr Kerry has engaged in inappropriate and unreasonable behaviour that breaches his obligations as a Councillor; being his obligations under safety legislation and his specific obligations under Parts 2 of the Code of Conduct. In light of the repeated and targeted nature of the unreasonable conduct, it meets the definition of workplace bullying.

1.3 Scope and Process

I confirm that the following persons agreed to participate in the investigation process by attending an interview and providing a witness statement:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

I interviewed [REDACTED] first to obtain the relevant details and factual background. I then interviewed the relevant persons who were identified as having (or potentially having) direct knowledge of the relevant events. On your instruction this was limited to only the persons considered necessary to corroborate certain events or provide supporting information. For example, only one person was interviewed from the [REDACTED] team, whereas we are aware that further team members (potentially all of them) were witness to a particular event and could provide further information. It is open to the Council to obtain statements from these persons if it wishes to do so, as this would lend weight to the findings.

I interviewed Cr Kerry last in order to obtain his view on the events raised.

2. ASSESSMENT OF ISSUES

2.1 Findings of Fact (Whether the events occurred or not)

The assessment of the evidence is attached at **Appendix 1**, and my findings about which events did occur are listed below by reference to the numbered issues in Appendix 1. Where a matter or event is not referred to, it is either not found to have occurred on the balance of probabilities, or it may have occurred but is not relevant to the scope of this report.

Matters that are relevant factual background:

1	On 5 October 2017, Cr Kerry stood very closely behind Mayor Hanna during Mayor Hanna's media interview. Cr Kerry repeatedly muttered disapproving comments which included [REDACTED] watched Cr Kerry speak to a journalist.
2	For the City Limits issue in September 2017, [REDACTED] to contact Cr Kerry in respect to amending his article to comply with Council guidelines, but they did not receive a response by the deadline. The article was published in [REDACTED] amended form.
3	For the City Limits issue in February/March 2018, [REDACTED] tried to contact Cr Kerry in respect to amending his article to comply with Council guidelines, but they did not receive a response by the deadline. [REDACTED] also attempted to contact Cr Kerry. The article was published in [REDACTED] amended form.
4	In June 2018, Cr Kerry submitted Questions on Notice to [REDACTED] in relation to what he identified as 'censorship' of his City Limits articles. [REDACTED] emailed and phoned Cr Kerry in order to give him the opportunity to see the responses before publication as a courtesy to determine if he was comfortable to proceed with the questions. This was on the instruction of [REDACTED].

Factual matters that constitute potentially inappropriate behaviour by Cr Kerry:

5	At the end of a Council meeting around September 2017 (after the amended article was published in City Limits), Cr Kerry approached [REDACTED] and made comments along the lines of, "You're trying to gag me" a few times, and "I won't be silenced" and "You are being rude, your actions will be brought to the CEO who will deal with you". He stood over [REDACTED] and spoke with a raised voice whilst pointing at him.
6	In June 2018, in response to [REDACTED] correspondence about the proposed responses to the Questions on Notice, Cr Kerry was rude and defensive and repeatedly asked, "What are you saying, what are you saying". His tone was confronting.
7	On 3 July 2018, upon exiting an Infrastructure and Strategy meeting, Cr Kerry walked past [REDACTED] without saying hello. About 10-15 seconds later, he popped his head and torso backwards around the corner suddenly and stared directly [REDACTED] in an intimidating manner for about 5 seconds without saying anything, and then walked away. This was intimidating for [REDACTED] in the context that Cr Kerry had an appointment booked with the CEO the next day to speak [REDACTED].
8	Cr Kerry (and potentially other Councillors) referred to [REDACTED] and Cr Kerry told the CEO that this is [REDACTED] nickname. This was raised in the context that Cr Kerry believed he was being censored by [REDACTED].
9	Cr Kerry made a comment to [REDACTED] said to him on various occasions, [REDACTED].
10	Cr Kerry suggested to the [REDACTED] that [REDACTED] was [REDACTED].
11	On 9 July 2018, Cr Kerry spoke to [REDACTED] on the phone and made accusations of [REDACTED] 'leaking' to the Mayor and demanding him to 'apologise and confess' repeatedly. The conversation went back and forth with Cr Kerry accusing [REDACTED] of being rude and demanding that he be more respectful, accused him of lying and threatened to 'take this

	further', saying words to the effect that the Mayor cannot protect [REDACTED] and "There's going to be a new Mayor".
12	Cr Kerry has, on occasion, sneered at [REDACTED] in the corridor of the Council.
13	Cr Kerry has, on occasion, tried to physically intimidate [REDACTED], including at the conclusion of Council meetings, where he would often walk towards [REDACTED] and move away at the last second.

2.2 Conclusions (Whether the conduct constitutes bullying or not)

(a) What are the relevant standards of conduct that apply?

Legislative Obligations – General duty to take care

The *Work Health and Safety Act 2012* (SA) ("WHS Act") places certain obligations on businesses and persons, as described in the covering letter to this report. In addition, all workers have an obligation to take reasonable care that their acts or omissions do not adversely affect the health and safety of themselves or other persons (section 28).

Legislative Obligations – Bullying

Bullying is defined in the SafeWork Australia Guide for Preventing and Responding to Workplace Bullying ("Guide") as, 'repeated and unreasonable behaviour directed towards a worker or a group of workers that creates a risk to health and safety'. This is the definition that is adopted for the purpose of assessing breaches of any legislative obligations regarding safety under the *WHS Act*. Where behaviour falls short of the definition of bullying, if it is unreasonable behaviour that creates a risk to safety, it will still be a breach of safety legislation.

Policy Obligations – Code of Conduct for Council Members

Part 2 – 'Behavioural Code' states (in part) that Elected Members must:

- 2.2 act in a way that generates community trust and confidence in the Council;
- 2.3 act in a reasonable, just, respectful and non-discriminatory way when dealing with people;
- 2.6 comply with all Council policies, codes and resolutions;
- 2.11 not bully or harass Council Staff; and
- 2.14 refrain from directing or influencing Council staff in respect to the way in which these employees perform their duties.

Part 3 – 'Misconduct' states that failure to comply with this Part constitutes misconduct. The Part requires (in part) Elected Members to:

- 3.1 act honestly at all times in the performance and discharge of their official functions and duties;
- 3.2 perform and discharge their official functions and duties with reasonable care and diligence at all times; and
- 3.5 not attempt to improperly direct a member of the Council's staff to act in their capacity as a Local Government employee for an unauthorised purpose.¹

(b) Does the conduct breach any standards?

(As determined from the findings – see Appendix 1 below)

The conduct noted in 5 and 6 constitute conduct that a reasonable person in [REDACTED] position would consider to be threatening and intimidating, and therefore constitutes unreasonable conduct which is in breach of safety legislation. Cr Kerry's intimidating comments relate to [REDACTED] amended publication of Cr Kerry's article and his continued reply that the amendments were made in order to comply with Council policy on what can be published. Cr Kerry's comments expressing opposition to being 'silenced' or 'gagged' and threatening to report [REDACTED] to the [REDACTED] all appear to amount to an attempt to compel

██████ to perform his role against Council guidelines. It is recommended that this is in breach of Part 2 (2.3, 2.6, 2.11, 2.14) and Part 3 (3.2, 3.5) of the Code of Conduct.

The conduct in Events 7, 11, 12, and 13 constitute conduct that a reasonable person in ██████ position would consider to be threatening and intimidating, and therefore constitutes unreasonable conduct which is in breach of safety legislation. The tone and manner of the phone conversation in Event 11 was confronting and adversarial, in particular the repetitive nature of the questions or accusations being made by Cr Kerry. The conduct in Events 7, 12 and 13 are physical, or otherwise non-verbal communication, which a reasonable person in ██████ would find intimidating, especially in light of the context in which these events occurred (being threats to ██████ employment) and the fact that Cr Kerry is in a position (or perceived position) of power. This conduct is unreasonable and therefore in breach of Part 2 (2.3, 2.6, 2.11) and Part 3 (3.2) of the Code of Conduct.

The conduct in Events 8, 9, and 10 constitute conduct that a reasonable person in ██████ position would consider to be undermining in his position as ██████ and therefore constitutes unreasonable conduct which is in breach of safety legislation. The conduct is akin to rumour-spreading. The fact that these comments are made behind ██████ back and without reasonable basis contributes to their unreasonableness. This conduct is unreasonable and therefore in breach of safety legislation and in breach of Part 2 (2.3, 2.6, 2.11) and Part 3 (3.2) of the Code of Conduct.

General Comments

In light of the repeated and targeted nature of the unreasonable conduct identified above, such conduct meets the definition of workplace bullying.

A central issue to these matters is Cr Kerry's belief that he is being 'gagged', 'censored' or 'silenced' by Council (either via ██████ or the City of Marion generally). Whether this belief is based on reasonable foundation is pivotal to the findings of whether certain conduct was or was not unreasonable. This matter ought to be further investigated before any findings are confirmed and/or acted upon. This can be done by verifying whether Cr Kerry was (or reasonably ought to have been) aware of the Council's requirements for what can and cannot be published in City Limits and what is the authority of Elected Members to speak to the media (including on what matters, and how such discussion, should take place).

(c) Other Issues

Whether the complaint was raised vexatiously

Cr Kerry stated that the issues with ██████ and that the complaint is in fact a political manoeuvre by ██████. This infers that the complaint was not raised in good faith and/or is without reasonable cause. We are not instructed to make findings in relation to these matters, though for completeness, I make the following observations.

Clause 7.2 of the Procedure for Investigating Complaints provides that an Elected Member who is of the opinion that a breach of Part 3 of the Code of Conduct has occurred, or is currently occurring, must report the breach to the Mayor of the Council or Chief Executive Officer, the Ombudsman or the Office of Public Integrity.² It also states at clause 2.4 that the CEO is responsible for advising the Mayor and referring the complaint to Council. ██████ raising a complaint directly (albeit on behalf of an employee) is not inconsistent with the procedure. The fact that the complaint is found to be with cause lends weight to a finding that it was not raised vexatiously however, if the matters raised in this report and Cr Kerry's statement give rise to concern to Council, it is recommended that those matters be separately investigated.

Bullying of Cr Kerry by ██████

Cr Kerry described a few instances where ██████ allegedly bullied him. For those specific matters (eg Events 1, 2, 4, 5 and 6) this report makes no finding of bullying by ██████. Though those matters are not the subject of this investigation, based on the information available, it appears that ██████ acted appropriately and reasonably in all those circumstances. For clarity, those actions include ██████

Notwithstanding this view, if the matters raised in this report and Cr Kerry's statement give rise to concern to the Council, it is open to the Council to have those matters separately investigated.

2.3 Conclusions

Factual Findings and Conclusions

This report finds that Cr Kerry has engaged in inappropriate and unreasonable behaviour that breaches his obligations as a Councillor; being his obligations under safety legislation and his specific obligations under Parts 2 and 3 of the Code of Conduct.

These conclusions are reached based on the information arising from the witness statement evidence. I note however that Cr Kerry was interviewed in an open manner by reference to his recollection of specific events in order to obtain a witness statement from him on those factual matters. Councillor Kerry was provided full details of this report prior to the Council meeting on the 11th September 2018.

Outcomes

Subject to the above, at the conclusion of the investigation, the following actions are open to Council under the Procedure for Investigating Complaints (as applicable):

- 5.1.1 Take no action and provide the reasons as to why.
- 5.1.2 Pass a censure motion in respect of the Elected Member.
- 5.1.3 Request a public apology, whether written or verbal.
- 5.1.4 Request the Elected Member to attend training on the specific topic found to have been breached.
- 5.1.5 Resolve to move or suspend the Elected Member from a position within the Council (not including the Members Elected position on Council).

We are not instructed to provide a recommendation in respect to specific outcomes however, for completeness, please note the following observations.

Based on the nature of the issues, action 5.1.1 would not be appropriate. Where a resolution relates to actions 5.1.3 or 5.1.4, the action must correspond to the factual findings in this report and should be confined to those matters which gave rise to the unreasonableness. For example, training provided under 5.1.4 may be in relation to the following matters (or a combination thereof):

- Council guidelines on what can be published in printed media on behalf of Elected Members.
- Council guidelines on what matters an Elected Member may speak to the media about and the manner of that communication to the extent it may impact on the City of Marion's reputation and integrity.
- Respectful communications.
- Workplace bullying.