

CONFIDENTIAL

**CODE OF CONDUCT
INVESTIGATION**

Findings and Recommendations

ROTORUA LAKES COUNCIL

August 2021

Audit and Risk Committee

**Attention: Mr Wallace Bain
Independent Chair**



Mark Abbot BBS M1stD

24 August 2021



Jenny Rowan QSO

24 August 2021

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Process and Methodology

This investigation covers complaints made by Officers and Elected Members of Rotorua Lakes Council concerning Councillor Reynold Macpherson, and is subject to Council's Code of Conduct (2019-2022) (the Code).

The Complaint(s):

The following complaints are currently in scope of this investigation:

14 April 2021	Chief Executive, Mr Geoff Williams	Cr Macpherson's Facebook post titled "Lake Rotorua is now a toilet not a taonga" and subsequent correspondence.
15 April 2021	Cr Fisher Wang	Cr Macpherson's Facebook post and subsequent correspondence concerning the "bussing in homeless people from other centres" and associated budget impacts.
15 April 2021	Rural Community Board Chair Shirley Trumper	Cr Macpherson's Facebook post and subsequent postings and correspondence concerning "Pros and Cons of a Management Restructure".

Scope of Investigation (as per Terms of Reference):

The appointed Investigation Panel is to act on behalf of the Rotorua Lakes Council Audit and Risk Committee and is to determine:

- a) Whether Councillor Macpherson has breached the Code of Conduct (2019-2022) for Elected Members and, if so, in what respect(s); and
- b) If a breach or breaches is established, whether that or those breaches is / are material; and
- c) A recommendation option for resolution.

Recommendations from the Investigation:

In the event that a breach is established, recommended options for resolution of the complaint will be provided including:

- a) What actions should be taken to remedy the impact of any material breaches and resolve the complaint(s);
- b) What consequences by way of sanction under the Code of Conduct for Elected Members, if any, should be applied;
- c) What actions could be taken to reduce the risk of further similar breaches, if any, in the future.

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The Investigation Panel:

Rotorua Lakes Council has commissioned EQUIP to propose independent candidates to comprise the Investigation Panel (the Panel) to undertake the review of complaints. The Panel, agreed and selected by the Audit and Risk Committee, consists of independent consultants to local government, being Mark Abbot and Jenny Rowan.

Methodology:

The investigation and subsequent decision making process will be determined by the Panel and will reflect the principles of natural justice and fairness. This requires that affected parties to:

- a) Have a right to know that an investigation is underway;
- b) Have access to all relevant information; and
- c) Are provided with an opportunity to be heard.

In the event that any party is not available to be interviewed, or chooses not to be interviewed, the Panel will consider any written statements including media coverage to form the substantive record of events.

In Scope and Observations:

The following are in the scope of this investigation:

1. Independent investigation of Complaints made against Cr Macpherson, as noted.
2. Clarification of Notice of Complaint timeframes regarding receipt by Audit and Risk Committee as per "Receipt of Notice of Complaint(s): Audit and Risk Committee Timeframes" below.

In support of "Recommendations from the Investigation", noted above (c), and to provide mechanisms for Council to minimise the incidence of future breaches, or to efficiently deal with the consequence of future breaches, the investigators will also provide general observations intended to assist Council in matters related, but not confined, to:

- a) Considerations for future Code of Conduct revisions;
- b) General policy and strategy considerations to support efficient and effective democratic operations;
- c) Responsibilities of both Elected Members and the Council organisation in terms of their joint and several commitments as employer, notably in terms of health, safety and wellbeing considerations of Elected Members and Council staff / officers;
- d) Commentary in relation to Council's, and Elected Members, adherence to their responsibilities enshrined in the Local Government Act regarding collective decision-making; wider community representation; appropriate use of systems and protocols, such as standing orders; etc

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Legislation and Code Principles

For the purposes of this investigation and for the convenience of readers should this report become public, relevant sections of the Local Government Act 2002 (LGA) follow:

(Excerpt from Local Government Act 2002, Schedule 7)

15 Code of Conduct

- (1) *A local authority must adopt a code of conduct for members of the local authority as soon as practicable after the commencement of this Act.*
- (2) *The code of conduct must set out—*
 - (a) *understandings and expectations adopted by the local authority about the manner in which members may conduct themselves while acting in their capacity as members, including—*
 - (i) *behaviour toward one another, staff, and the public; and*
 - (ii) *disclosure of information, including (but not limited to) the provision of any document, to elected members that—*
 - (A) *is received by, or is in the possession of, an elected member in his or her capacity as an elected member; and*
 - (B) *relates to the ability of the local authority to give effect to any provision of this Act; and*
 - (b) *a general explanation of—*
 - (i) *the Local Government Official Information and Meetings Act 1987; and*
 - (ii) *any other enactment or rule of law applicable to members.*
- (3) *A local authority may amend or replace its code of conduct, but may not revoke it without replacement.*
- (4) *A member of a local authority must comply with the code of conduct of that local authority.*
- (5) *A local authority must, when adopting a code of conduct, consider whether it must require a member or newly elected member to declare whether or not the member or newly elected member is an undischarged bankrupt.*
- (6) *After the adoption of the first code of conduct, an amendment of the code of conduct or the adoption of a new code of conduct requires, in every case, a vote in support of the amendment of not less than 75% of the members present.*
- (7) *To avoid doubt, a breach of the code of conduct does not constitute an offence under this Act.*

16 Members to abide by standing orders

- (1) *A member of a local authority must abide by the standing orders adopted under clause 27.*
- (2) *A constable, or an officer or employee of a local authority, may, at the request of the chairperson, remove or exclude a member from a meeting if that member is required to leave the meeting by a ruling made under the standing orders and that member—*
 - (a) *refuses or fails to leave the meeting; or*
 - (b) *having left the meeting, attempts to re-enter the meeting without the permission of the chairperson.*

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The tenet of the Act are captured in the Code, supported by guiding principles.

For the purposes of reference, the guiding principles are stated on p-6 of the Code with selected extracts from these guiding principles as follows:

Te Arawa / Mana Whenua and Community Pride:

Decisions made will be in the best interests of the Rotorua Community...

Collective Responsibility:

Members should give regard to the agreed view / position of the Council by ensuring they express fairly and in a positive and supportive manner when representing the Council both in written and oral presentations.

Integrity and Honesty (Trust):

Not making statements or doing anything that will, or is likely to, mislead or deceive.

Being open to constructive feedback.

Respect:

Not engaging in aggressive, offensive, abusive or bullying behaviour.

Not making personal attacks.

Ensuring that the Council complies with its obligations under section 39 of the LGA and clause 36 of Schedule 7 of the LGA to be a good employer.

Not publicly criticising Council staff.

It must be understood that Elected Members are made aware of their obligations under both the LGA and the Code. This understanding is reinforced through the Rotorua Lakes Council induction process for new and returning members at each triennium.

Consideration could be given to ensuring the mandatory attendance of Elected Members to a comprehensive induction process with that aligned to the establishment of Strategic Intent and Vision as a requirement and priority of Councillors, and therefore to reinforce the behaviours and interactions appropriate to one who is elected to represent the region.

However, as per clause 15(7) of the LGA's Schedule 7, there is no offence under the LGA or other legislation in terms of a breach of the Code and this can often cause an impasse where the Elected Member may choose to ignore the actions required as a consequence of review.

This likelihood should not be the cause of avoidance of this process. Transparency in local government remains a critical component of the democratic process ensuring awareness of behaviours, expectations, and consequence.

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Receipt of Notice of Complaint(s):

Audit and Risk Committee Timeframes

As part of this independent investigation, the Panel has also been asked to comment on the assertion by Cr Macpherson that these complaints are null and void on the basis of Council failing to adhere to timeframes stated in its Code of Conduct (Elected Members) 2019-2022.

Cr Macpherson's argument is based on a letter received from Mayor Chadwick dated 13 April 2021 confirming their meeting of 1 April 2021. This confirmation noted Cr Macpherson's intent for the issues discussed not be dealt with under Step 1 (of the Code) and that the complaints received would be referred to the Audit and Risk Committee.

Cr Macpherson argues that the 13 April was therefore the date Mayor Chadwick referred the complaints to the Audit and Risk Committee and therefore the date that these were received by that committee.

However, formal notification and receipt of the complaints was not made until 27 April 2021, with the Committee convening to meet following receipt of notice, and then physically meeting on 5 May 2021 to consider its approach. This timeframe is consistent with the requirements of the Code of Conduct.

As independent investigators we are satisfied that the Committee has acted in accordance with both the statement and the intent of the Code of Conduct (2019-2022) with regard to this timeframe:

"The Audit and Risk Committee will convene within 5 days of receiving a formal complaint and will consider the complaint and identify and assess the options that are available to resolve the complaint..."

Irrespective of our level of satisfaction, a recommendation will follow with regards to the next review of the Code of Conduct to remove any ambiguity caused through semantics and ensure appropriate timeframes are noted for the benefit of both parties.

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Review of Complaints

Complaint	One
Date of Complaint:	14 April 2021
Complainant:	Mr Geoff Williams Chief Executive, Rotorua Lakes Council
Basis of Complaint:	Cr Macpherson's Facebook post titled "Lake Rotorua is now a toilet not a taonga" and subsequent correspondence and actions.

The Panel has reviewed the Notice of Complaint raised by Chief Executive Williams against Cr Macpherson (14 April 2021) and Cr Macpherson's response to the CE's initial complaint (Memo 9 March 2021) along with interviews and review of media posts, all as outlined in the review methodology provided.

The Panel is satisfied that the complaint is valid, and that Cr Macpherson has breached the Code particularly the guiding principles of Collective Responsibility, Integrity and Honesty, and Respect.

In summary:

1. As a sitting Councillor and therefore elected to represent the wider community of Rotorua through collective responsibility and decision-making, Cr Macpherson is entitled to, has full access to and disclosure of, and must therefore be cognisant of, the background and supporting information in relation to infrastructure and asset decisions including projects, capital spend, renewals and maintenance delivery, both proactive and reactive.
2. As above, Cr Macpherson has full disclosure to the funding decisions made, of which he is a contributor as an Elected Member. This disclosure is manifested through Councillors' contribution to the Long Term and Annual Plan processes, aligned with the day-to-day business of Council through Committee meetings and workshops.
3. On the basis of points 1 and 2 above, it can be concluded that the two statements made by Cr Macpherson in his Facebook post of 3 March 2021 were made knowing them to be false and were therefore made on the basis of intending to mislead or deceive.
4. We agree that the post has brought into question the capability and credibility of Council staff and contractors responsible for asset maintenance and infrastructure care. Irrespective of the event in question, there are clear processes and protocols around the interaction by Elected Members with staff to consider this implication as inappropriate. Both the Chief Executive and Cr Macpherson have introduced the behaviour with and toward Council Officers and fellow Councillors to enable those relationships to be noted in this review and for the investigation to be concerned with.
5. While Cr Macpherson's defence states ignorance of the fact in not having read an email from Council to Councillors relative to the event in question it is noted that, as above, he has the facts along with a duty to represent these fairly and truthfully. Ignorance is therefore not a defence.

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6. Cr Macpherson's assertion that his Facebook post was made in his capacity as "RDRR" member and not as a sitting Councillor is not plausible nor conceivable given the following:
 - a. The Councillor canvassed in the 2019 elections under the platform of "Residents and Ratepayers" and it is expected that "followers" will naturally maintain that connection.
 - b. Respondents to posts under the RDRR banner and general media reference his status as elected member. For example, in his 9 March memo under the heading "Why should you apologise" Cr Macpherson quotes an "anonymous contributor to the RDRR Facebook page (emphasis added):

*"To persecute **a Councillor** for stating the obvious, is bullying, gagging or plainly falsely accusing the supposed messenger as a scapegoat."*

Recommendations covering the three complaints are dealt with collectively under "Recommendations" and "Investigator Observations" below.

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Complaint	Two
Date of Complaint:	15 April 2021
Complainant:	Cr Fisher Wang Elected Member Representative
Basis of Complaint:	Cr Macpherson's Facebook post and subsequent correspondence concerning the "bussing in homeless people from other centres" and associated budget impacts.

The Panel has reviewed the Notice of Complaint raised by Cr Wang against Cr Macpherson (15 April 2021) and Cr Macpherson's response (Memo to Mayor 18 March 2021) along with interviews and review of media posts, all as outlined in the review methodology provided.

The Panel is satisfied that the complaint is valid and that Cr Macpherson has breached the Code particularly the guiding principles of Collective Responsibility, Integrity and Honesty, and Respect.

In summary:

1. As a sitting Councillor, and therefore elected to represent the wider community of Rotorua through collective responsibility and decision-making, Cr Macpherson is entitled to, has full access to and disclosure of, and must therefore be cognisant of, the background and supporting information relative to all council decisions. In the event that he has any doubt as to these, he is aware of the channels to follow in order to become familiar with them.
2. As above, Cr Macpherson has full disclosure to all decisions made, of which he is a contributor as an Elected Member. This disclosure is manifested through Councillors' contribution to the Long Term and Annual Plan processes, aligned with the day-to-day business of Council through Committee meetings and workshops.
3. Based on points 1 and 2 above, it can be concluded that the statements made by Cr Macpherson in his Facebook post of 10 March 2021 were made knowing them to be false and were therefore made on the basis of intending to mislead or deceive. Cr Macpherson states that his statements cannot qualify as a lie because "it was my honestly held belief at the time", however Council debate and discussion will not support that.
4. Cr Macpherson may note that a retraction of a Facebook post appears to have corrected a position and therefore needed no further response. We believe that this cannot be the case as the original content had circulated for sufficient time as to give it credence and cause reputational harm to Council across its community, which we suspect to be the objective of the post.
5. It must be an expectation that Cr Macpherson maintain respect for Cr Wang as his peer. To dispel Cr Wang's concerns through the subsequent and retrospective altering of media content, or to promote the support of external media channels as justification is unacceptable behaviour from any elected member, and one who is aware of the appropriate response channels.

Recommendations covering the three complaints are dealt with collectively under "Recommendations" and "Investigator Observations" below.

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Complaint	Three
Date of Complaint:	15 April 2021
Complainant:	Rural Community Board Chair Shirley Trumper Community Board Representative
Basis of Complaint:	Cr Macpherson's Facebook post and subsequent postings and correspondence concerning "Pros and Cons of a Management Restructure".

The Panel has reviewed the Notice of Complaint raised by Rural Community Board Chair Trumper against Cr Macpherson (15 April 2021) and Cr Macpherson's response (Memo to Mayor 18 March 2021) along with interviews and review of media posts, all as outlined in the review methodology provided.

The Panel is satisfied that the complaint is valid and that Cr Macpherson has breached the Code particularly the guiding principles of Collective Responsibility, Integrity and Honesty, and Respect.

In summary:

1. As previously noted, Cr Macpherson cannot separate his capacity as "RDRR" member and that of a sitting Councillor; commentary provided in responses is made on the basis of information and interactions that Cr Macpherson had, and has, as an elected member. In some cases, this involves the disclosure of information that is deemed "confidential" and can only be held by a Councillor as such.
2. It is not Cr Macpherson's duty or right as a Councillor to comment or critique the structure of the organisation or the role of management. That right is delegated to, and sits with, the Chief Executive as a requirement under the LGA. Cr Macpherson will be aware of that through the induction process made available to him on his election as Councillor. He will also be aware, through that process, of the channels available to him to raise any concerns regarding the management of the organisation which requires that to be notified via the Mayor, and not the media.
3. Further issues around collective responsibility and lack of respect are reflected in the responses to the initial 13 March post, notably the introduction of RLC contracts and tendering processes where Cr Macpherson describes examples of these as "corrupted decision making". The rider "in my opinion" fails to remedy this breach.
4. Inflammatory and derisive commentary appear to further incite a lack of confidence in Council as evidenced by offensively racist comment with this seemingly delivered to undermine both the political and operational aspects of Council.
5. It is noted that, while Cr Macpherson attended discussions prior to the Trility hearings, his engagement in the debate and decision-making process was purposefully withdrawn to the extent of near silence. However, later commentary via Facebook on the proposed venture turned to vehement negativity. It should be remembered that Cr Macpherson has been elected to represent the community at large and to engage in robust debate and decision-making. It would appear, through his actions, that he cannot rationalise these matters.

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6. Chair Trumper's concern regarding receipt of Cr Macpherson's email / memo of 19 March 2021, along with commentary concerning the requirements of the Harmful Digital Communications Act, is equally justified and does constitute, we believe, a level of behaviour designed to intimidate and unduly influence. We have noted recommendations concerning harassment and bullying under our collective recommendations.

Recommendations covering the three complaints are dealt with collectively under "Recommendations" and "Investigator Observations" below.

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Recommendations:

The Panel was disappointed that Cr Macpherson chose to “boycott (this) probe into his conduct” (Reference Daily Post 29 July 2021) rather than discuss the rationale and any logic in support of his actions and reactions.

The defence, as stated in written correspondence and general and social media platforms, is centred on:

1. Refusal or failure to read correspondence. We have noted that ignorance is not sufficient defence in this or any matter relative to an elected member where the facts are clearly available.
2. Protection of, or consistency with, the Harmful Digital Communications Act. While the implications of this legislation may be brought into any future review of the Code, it is difficult to see how alterations to posts within a defined timeframe absolve any fault or failure by the poster. Similarly, responding to complaints within the timeframe of the Act fail to negate the initial action.
3. A fixation for prescriptive process. This is signalled by a challenge to the Code’s review of notice of complaint to Audit and Risk Committee. A response to the content of the allegations made, rather than the process to deal with them, would have provided more insight into Cr Macpherson’s motives. It is understood that loopholes are availed to avoid penalty or punishment with civil or criminal charges; in the context of local democracy the provision of truth and substance would be more helpful.

Via general media coverage (Daily Post 29 July 2021), Cr Macpherson is reported to have “complained to the Ombudsman with his concerns about whether Geoff Williams, as chief executive of the council, could make a code of conduct complaint. He also raised concerns about whether the behaviour of the Mayor and other elected members exhibited what was in his opinion ‘predetermination’ regarding the current code of conduct complaints. Ombudsman....responded on May 12 saying the Ombudsman would not take further action on the complaint”.

It would appear unlikely and illogical that the Ombudsman would entertain any action where Cr Macpherson chooses to engage only via the media.

Actions proposed

The following actions are recommended to remedy the impact of any material breaches and resolve the current complaints:

1. The Mayor to provide written confirmation of the expected standards of behaviour of an elected member, along with supporting documentation including the Councillor’s obligations under legislation including the Local Government Act and the Code.
2. Cr Macpherson to be required to undertake a refresher course (or first-time course should he have not participated already) covering Induction for Elected Members.
3. A formal apology to the community by Cr Macpherson, and not the Mayor, in recognising the harm that the respective posts have caused.

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4. Council has the right to remove an elected member from Council Committee or subcommittee. While recognising the media fallout in support of an “embattled” councillor this remains a viable option in that the action is determined by Council and not the Councillor (as per 2 and 3 above). Council should be bold enough to make this censure public.
5. Standing Orders are an example of process and protocol designed to ensure the mechanics of local government operate effectively and efficiently. The LGA notes (s16) “Members to Abide by Standing Orders” as noted above – “Legislation and Code Principles”. The Mayor and Committee Chairs are advised to familiarise themselves in relation to Standing Orders and to unrelentingly exercise their rights under these.
6. There are legal aspects, as yet unexplored by Council, to be considered. These include the CE’s obligations as a PCBU under the Health and Safety at Work Act 2015 to ensure a safe work place for staff and contractors and general obligations of Councillors in their relationship with the organisation as employer, generally. Interviews and meetings suggest that the three complaints in question are symptomatic of on-going and unrelenting behaviour directed at staff and peers. Explore and engage the legal options available. All Councillors should be educated as to their responsibility as an employer.
7. Council should be up-front in advising the cost to ratepayer and constituent in dealing with these on-going issues, irrespective of the complaint in question. The fact that this investigation is the latest in a string of related issues is not a failing of Council but can be dealt with by Council for what it is. Be transparent with cost and impact.