

CODE OF CONDUCT PANEL REPORT
BREAK O'DAY COUNCIL COUNCILLOR CODE OF CONDUCT

Complaint against Cr Kylie Wright

Date of Determination: 25 February 2019

Code of Conduct Panel: Lynn Mason (Chairperson), Penny Cocker, Steven Bishop (legal member)

Summary of the Complaint

The complaint from the Mayor of Break O'Day Council (*the Council*), Cr Mick Tucker, was submitted to the Executive Officer of the Code of Conduct Panel (*the Panel*) on 5 October 2018, and after assessment was provided to the Panel. The complaint related to a post on the community Facebook site 'Break O'Day Forum' which went onto the site on 4 October 2018. Cr Wright was the administrator of the Break O'Day Forum Facebook page at that time. The sections of the Code which Cr Tucker alleged Cr Wright breached are:

Part 3 - Use of Office

1. *The actions of a councillor must not bring the Council or the office of councillor into disrepute.*
2. *A councillor must not take advantage, or seek to take advantage, of his or her office or status to improperly influence others in order to gain an undue, improper, unauthorised or unfair benefit or detriment for himself or herself or any other person or body.*

Part 7, clause 1

A councillor –

- a) *must treat all persons with courtesy, fairness, dignity and respect; and*
- b) *must not cause any reasonable person offence or embarrassment; and*
- c) *must not bully or harass any person.*

Part 7, clause 2

A councillor must listen to, and respect, the views of other councillors in Council and committee meetings and any other proceedings of the Council, and endeavour to ensure that issues, not personalities, are the focus of debate.

Part 8 - Representation

1. *When giving information to the community, a councillor must accurately represent the policies and decisions of the Council.*
2. *A councillor must not knowingly misrepresent information that he or she has obtained in the course of his or her duties.*
4. *A councillor must clearly indicate when he or she is putting forward his or her personal views.*
5. *A councillor's personal views must not be expressed in such a way as to undermine the decisions of the Council or bring the Council into disrepute.*
6. *A councillor must show respect when expressing personal views publicly.*
7. *The personal conduct of a councillor must not reflect, or have the potential to reflect, adversely on the reputation of the Council.*

Cr Tucker also alleged that Cr Wright had breached Council's *Personal Use of Social Media* Policy. The Chairperson of the Panel informed Cr Tucker and Cr Wright that the Panel would not investigate the alleged breach of Council's *Personal Use of Social Media* policy, as the Panel may only undertake investigations into alleged breaches of the Code of Conduct.

The Complaint

On 27 September 2018 the *Valley and East Coast Voice* newspaper published a letter from then Councillor Hannah Rubenach-Quinn, announcing her intention to retire from Council, and citing some alleged behaviours by council colleagues which had influenced her decision to resign.

On 2 October 2018 both then Councillor Ms Rubenach-Quinn and Cr Tucker were interviewed on ABC Radio North.

On 4 October 2018 Mr Paul Wright shared a post by Mr Ross Quinn, a candidate in the upcoming council elections, on the Break O'Day Forum Facebook page. The post cited in the complaint read:

After Hannah's announcement on 15th September with a press release and on social media that she will not be standing at the next elections, you would think the reasons given would have sparked some concern from the management of the council? At the last council meeting on 17th September with the exception of Clr Janel Drummond and Clr Kylie Wright corresponding prior with Hannah not one word was mentioned, it was business as usual, although Hannah did mention the meeting seemed to have been run more professionally than in the past.

When ABC radio asked to interview Hannah on 2nd October, it is only natural they would ask the Mayor for a response, to feign innocence of knowledge (more than 2 weeks later) in this day and age is unacceptable!

The best Mayor Tucker could come up with was accusing Hannah of "sour grapes"!

Sour grapes for what? For trying to implement better transparency of Council.

This 'Trumpest' attitude has no place in our local government, to pretend there isn't a problem when the community knows otherwise is unacceptable. It is no secret that former Council employees and at least one former Councillor has left due to work place bullying.

The Council as a whole is responsible, the Councillors and the General Manager who have condoned this behaviour, whether out of support or fear of being targeted, it needs to change!

What of Council's employees? Not only do they have to deal with the vagaries of Councillors but when an environment of fear and intimidation is present do they have the peace of mind to perform their role without intimidation?

The BODC Code of Conduct is clear and if Mayor Tucker is unable or unwilling to enforce it then the code clearly states it is the General Managers [sic] role to enforce, if he is unwilling or unable to enforce the code then perhaps he needs to lift his game?

If any Council staff/Councillors, past or present would like to privately share their experiences, I would be more than willing to listen in the hope of weeding out this culture from our Council.

Procedure

Cr Wright responded to the complaint on 6 November 2018. In summary, Cr Wright made the following points:

- That removal of the Facebook post could have been deemed to be a breach of the Code clause 7.1.a, viz., *A councillor must treat all people with fairness dignity and respect;*
- That the subject of bullying in the council had already been part of public discourse, in the ABC radio interview with Cr Tucker and then Cr Rubenach-Quinn, aired on 2 October 2018, and that subsequent to that interview, the Mayor (Cr Tucker) had not advised councillors that alleged bullying within council was not an appropriate topic for public discussion; and that therefore a further public comment on the subject of bullying had not brought the council into disrepute, as alleged;
- That the issue of representation as a councillor was not applicable in her not having removed a post on a Facebook page on which she was an administrator, as she undertook this role as a private citizen;
- That had she been informed of the offence caused by the post, she could have removed it immediately.

The Panel met on 14 November 2018 to consider the complaint and response. As a result of this meeting, the Panel asked Cr Wright to provide further information,

including copies of the letters from both Cr Tucker and then Cr Rubenach-Quinn printed in the *Valley and East Coast Voice*.

On 19 November 2018 Cr Wright's response was sent to Cr Tucker, who was also told that Cr Wright had been asked to provide more information for the Panel.

On 23 November 2018 Cr Wright responded to the Panel's request for information, and provided copies of letters published in the *Valley and East Coast Voice* from both Hannah Rubenach-Quinn and Cr Tucker. Cr Wright also provided a copy of the radio interview conducted on 2 October 2018. Cr Wright told the Panel that she had first been aware of the post when she received notification of the Code of Conduct complaint against her on 3 November 2018, and that she had removed the post from the Facebook page on that day.

On 6 December 2018 Cr Wright's response and additional material were sent to Cr Tucker. On 10 December 2018 Cr Tucker was invited to respond to the material sent to him on 6 December, should he wish to do so.

On 10 December 2018 Cr Wright told the Panel that while Cr Tucker had stated that she had *allowed* the post by Ross Quinn to be shown on the Facebook page, she considered that she was unaware of any means by which she could have prevented this from happening, and furthermore, that she could have removed it had she been made aware of it.

On 11 December 2018 Cr Tucker responded to the Panel, stating in summary:

- That the General Manager had sent a copy of the council's social media policy to all councillors and staff on 17 September 2018;
- That the post 'allowed' by Cr Wright on 4 October 2018 had *allowed these false statements* (by Hannah Rubenach-Quinn on Facebook on an earlier date) *to be posted and shared many times*;
- That this was *a deliberate act to try to sway voters to vote for her as councillor Kylie Wright was standing against me as Mayor for Break O'Day and was the only other candidate for Mayor against me*.

On 19 January 2019 Cr Tucker and Cr Wright were advised that a hearing into the complaint would be conducted on 11 February 2019. Neither party called any witnesses, nor requested representation by an advocate. The hearing was duly conducted on 11 February with both parties attending.

At the hearing Cr Tucker alleged that as administrator of the Facebook page Cr Wright should have known that the item had been posted and as a councillor, should have removed it from the page.

Cr Wright told the Panel that she had taken over the page from a previous Break O'Day councillor, and had had no part in setting it up. She said that in accordance with the way the page was set up, she had no power as an administrator to vet posts prior to their appearing on the page. She reiterated that as soon as she had heard that the post caused some offence she had removed it, and that had she been informed of the purported problem at the time the complaint against her was made, she could have removed the post immediately; instead of which, the post remained in place from 4 October 2018 until 3 November 2018.

At the conclusion of the hearing both Cr Tucker and Cr Wright were given the opportunity to ask questions, and to provide any further comments about the complaint.

Following these statements, the Panel stated clearly that it had not reached any decision about whether or not to uphold or dismiss the complaint, and would not do so without further deliberation; but each party was asked that in the event the complaint was upheld, what sanction did he or she think would be appropriate. Cr Tucker provided his view in the hearing; Cr Wright, with the permission of the Panel, sent her view of sanction to the Panel by email on 14 February 2019.

The Chairperson of the Panel noted in the hearing that the time prescribed in s28ZD of the Act for investigation and hearing of a Code of Conduct complaint had been exceeded. The date set for the hearing was necessitated by the availability of a legal member to sit with the Panel, 11 February 2019 being the earliest date available. The Chairperson apologised to both parties for this unavoidable delay.

Material considered by the Panel

- Code of Conduct complaint submitted by Cr Tucker on 5 October 2018
- Post by Mr Ross Quinn placed on the Break O'Day Forum Facebook page on 4 October 2018
- Email from Cr Wright to the Executive Officer, sent 9.40 pm on 6 November 2018, with an attachment entitled 'Statutory Declaration witnessed'.
- Email from Cr Wright to the Executive Officer, sent 7.06 pm on 23 November 2018, with attachments
 - *Open letter to residents of Break O'Day* from Hannah Rubenach-Quinn, published 27 September 2018
 - *Response from Mayor Mick Tucker* published 11 October 2018
 - Recording of the interview of Hannah Rubenach-Quinn and Cr Tucker on ABC Radio, 2 October 2018
- Email from Cr Wright to the Executive Officer, sent 5.38 pm on 10 December 2018
- Email from Cr Tucker to the Executive Officer, sent 12.44 pm on 11 December 2018

Determination

The Code of Conduct Panel dismisses the complaint against Cr Wright.

Reasons for the Determination

Part 3 - Use of Office

- 1. The actions of a councillor must not bring the Council or the office of councillor into disrepute.*
- 2. A councillor must not take advantage, or seek to take advantage, of his or her office or status to improperly influence others in order to gain an undue, improper, unauthorised or unfair benefit or detriment for himself or herself or any other person or body.*

Cr Wright is alleged to have breached part 3.1 of the Break-O-Day Council Code of Conduct by 'allowing' as the administrator of the Break O'Day Forum Facebook page, a post that was characterised as critical of and damaging to the reputation of Councillors and the Council.

Part 3.1 of the Code of Conduct places an obligation on Councillors not to allow their actions to bring the Council or the office of Councillor into disrepute. The question before the Panel is therefore whether the failure or inaction of Cr Wright to remove the post amounted to an 'action' to bring Council or Councillor/s into disrepute.

The Break O'Day Council Code of Conduct incorporates the *Local Government Model Code of Conduct* (the Model) that was introduced by the *Local Government (Model Code of Conduct) Order 2016* (the Order).

There is no definition section within the Model or Break O'Day Council Code of Conduct. Section 3(2) of the Order states that the *Acts Interpretation Act 1931* (Tas) applies to assist with interpretation. Section 15AA of the *Acts Interpretation Act 1931* (Tas) supports an interpretation that would best achieve the object of the enactment. Section 15AB of the *Acts Interpretation Act 1931* (Tas) also allows reference to extrinsic materials to obtain the common or ordinary meaning if ambiguous.

The natural meaning of the word 'action' is per the Oxford English Dictionary, '*a thing done, an act*' or '*a fact or process of doing something, typically to achieve an aim.*'

Ordinarily, for there to be a thing done, something positive must occur.

Section 13 of the *Criminal Code* (Tas) treats the distinction as follows:

- (1) No person shall be criminally responsible for an act, unless it is voluntary and intentional; nor, except as hereinafter expressly provided, for an event which occurs by chance.*

(2) *Except as otherwise expressly provided, no person shall be criminally responsible for an omission, unless it is intentional.*

In *Criminal Law* by Her Excellency Kate Warner (at p 161, see attached extract), it was stated that:

Section 13(2) provides that no person shall be criminally responsible for an omission unless it is intentional except as otherwise expressly provided... Additionally, there can be no omission in law in the absence of a duty to act.

The ordinary and natural meaning of part 3.1 of the Code of Conduct does not suggest that it applies to inaction or omissions.

If it were intended to cover both acts and omissions, the provision may have instead said *Councillors must not bring the Council or the office of councillor into disrepute*, which would catch both action and inaction.

Interpretation of Penal Statutes

These penalties can result in notification to the Minister, who, in the event of a third suspension of a Councillor, may remove a Councillor from office. It is therefore properly characterised as a penal provision.

Traditionally statutes creating offences are to be strictly construed. Doubts and ambiguities are to be resolved in favour of the citizen so that he or she is not put at risk of penalties without a clear expression of that objective by the legislature (see for example, *Smith v Corrective Services of New South Wales* (1980) 147 CLR 134; *Piper v Corrective Services Commission of New South Wales* (1986) 6 NSWLR 352; *North Coast Grazing Pty Ltd v Commissioner of Taxation* (1987) 15 FCR 104; *Murphy v Farmer* (1988) 165 CLR 19; *Battaglini v Interfren Pty Ltd* (1989) 16 NSWLR 378; *Chew v The Queen* (1992) 173 CLR 626).

Application to the Code of Conduct

The Panel is of the view that the Code of Conduct only prohibits positive conduct. Part 3.1 makes no express reference to inaction or omissions. In applying the ordinary meaning of the word to present circumstances, there was no 'action.'

If Cr Wright had been aware of the post and not removed it, that decision may have fallen within the definition of an 'action.' However this is not the case. There was no voluntary and intentional act of Cr Wright to harm the reputation of Council or Councillor/s.

Had the drafter intended to catch conduct by omission, the drafter may have either omitted the word 'action' altogether or included the words 'any omission' to cover situations such as this one.

The Panel therefore finds that Cr Wright did not engage in actions that brought the Council or Councillor/s into disrepute.

The Panel finds that in unknowingly leaving the post by Mr Quinn on the Break O' Day Forum Facebook page, Cr Wright did not take advantage of her office as a councillor to improperly influence others in order to obtain an undue, improper, unauthorised or unfair benefit or detriment for herself or any other person.

Part 7, clause 1

A councillor –

- a) must treat all persons with courtesy, fairness, dignity and respect; and*
- b) must not cause any reasonable person offence or embarrassment; and*
- c) must not bully or harass any person.*

The Panel does not consider that failing to remove the Facebook post amounted to a failure to treat persons with courtesy, fairness, dignity and respect. The Panel finds that the allegations of bullying within the Council had already been aired publicly, and that therefore the post would not have caused any reasonable person offence or embarrassment, and saw no evidence that this had occurred. The Panel finds that Cr Wright's failure to remove the post did not constitute bullying or harassment of any person.

Part 7, clause 2

A councillor must listen to, and respect, the views of other councillors in Council and committee meetings and any other proceedings of the Council, and endeavour to ensure that issues, not personalities, are the focus of debate.

The Panel finds that the alleged offence did not occur in a council or council committee meeting, or in any proceeding of the council, and that therefore this section of the Code was not breached.

PART 8 - Representation

- 1. When giving information to the community, a councillor must accurately represent the policies and decisions of the Council.*
- 2. A councillor must not knowingly misrepresent information that he or she has obtained in the course of his or her duties.*
- 4. A councillor must clearly indicate when he or she is putting forward his or her personal views.*
- 5. A councillor's personal views must not be expressed in such a way as to undermine the decisions of the Council or bring the Council into disrepute.*
- 6. A councillor must show respect when expressing personal views publicly.*

7. *The personal conduct of a councillor must not reflect, or have the potential to reflect, adversely on the reputation of the Council.*

The Panel finds that Cr Wright was not giving information to the community, nor misrepresenting information she had obtained as a councillor, nor putting forward a personal view.

The Panel finds that Cr Wright's behaviour in not removing a Facebook post of which she had no knowledge did not constitute personal conduct which reflected, or had the potential to reflect, adversely on the reputation of the council.

Right to Review

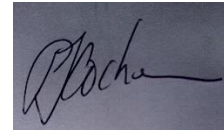
Under s28ZJ of the Act, a person aggrieved by the determination of the Panel is entitled to apply to the Magistrates Court (Administrative Appeals Division) for a review of the determination on the ground that the Panel has failed to comply with the rules of natural justice.



Lynn Mason
(Chairperson)



Steven Bishop
(legal member)



Penny Cocker