

Local Government Act 1993

**CODE OF CONDUCT PANEL DETERMINATION REPORT
GEORGE TOWN COUNCIL CODE OF CONDUCT**

Complaint brought by Cr. Heather Barwick against Mayor Greg Kieser

Code of Conduct Panel

- Sue Smith (Chairperson),
- Penny Cocker (Local Government Member)
- Sam Thompson (Legal Member)

Date of Determination: 23 July 2021

Content Manager Reference: C22125

Summary of the complaint

A code of conduct complaint was submitted by Councillor (Cr) Heather Barwick to the General Manager of George Town Council on 7 April, 2021.

The complaint alleges that at George Town Council's meeting on 23 March 2021 Mayor Greg Kieser breached the following parts of the George Town Council's Code of Conduct, adopted by Council on 21 January 2019.

Part 7 – Relationships with Community, Councillors and Council Employees

1. A Councillor –

- (a) Must treat all persons fairly ; and*
- (b) Must not cause any reasonable person offence or embarrassment.*

The complaint relates to a threat allegedly made by Mayor Kieser to Cr Barwick during a recess taken during the Council meeting of 23 March 2021. According to Cr Barwick, the Mayor knelt down next to her and said, "If you ever swear at a staff member again, I will physically throw you out the door".

Initial assessment

Following receipt of the complaint, the Chairperson conducted an initial assessment of the complaint in accordance with the requirements of section 28ZA of the Act. Having assessed the complaint against the provisions of sections 28ZB and 28ZC of the Act, the Chairperson determined that:

- the complainant had made a reasonable effort to resolve the complaint. The Chairperson arrived at this conclusion because of the difficulty of resolving complaints between a Mayor and Councillor.
- the complaint substantially related to a contravention of George Town Council's Code of Conduct, namely Part 7: Part 1. (a) and (b)
- the complaint should not be dismissed on the grounds that it was frivolous, vexatious or trivial. The reasons for this conclusion were that if proven the offence was of a serious nature.
- having made enquiries of the Code of Conduct Executive Officer, there was no relevant direction under section 28ZB(2) or 28ZI of the Act that would apply to the complainant and the complaint.¹

On this basis, the Chairperson determined to investigate the complaint.

¹ Sections 28ZB(2) and 28ZI of the Act enable the Chairperson or the Panel (as applicable) to issue a direction to a complainant in prescribed circumstances not to make a further complaint in relation to the same matter unless the complainant provides substantive new information in the further complaint.

The complainant, respondent councillor and the General Manager were notified of the outcome of the initial assessment by letter dated 11 May 2021.

Investigation

In accordance with section 28ZE of the Act, the Code of Conduct Panel investigated the complaint.

The Panel determined that further information was required to investigate the complaint. Pursuant to section 28ZE(4), on 21 May 2021 the Panel wrote to the Council's General Manager and Executive Support & Governance Officer on requesting they each provide a Statutory Declaration outlining their knowledge of the incident at the George Town Council Meeting of 23 March 2021.

In response to the Panel's request, the General Manager and Executive Support & Governance Officer each made a statutory declaration. Each statutory declaration was to the effect that whilst each was aware that during a 5 minute recess there had been interaction between the Mayor and Cr Barwick, neither had heard the conversation that took place.

The following documents have been presented to the Panel to consider as evidence in this matter:

- The Complaint lodged by Cr Barwick under cover of statutory declaration dated 6 April 2021
- Cr Barwick's witness statements provided by way of statutory declarations from :
 - Debbie Rainbow
 - Justine Brooks
 - Gideon Mitchell
 - Peter Parkes
- Witness statement from Louise Dickenson (Council's Executive Support & Governance Officer) under cover of statutory declaration dated 27 May 2021
- Witness statement from Shane Power (General Manager) under cover of statutory declaration dated 28 May 2021
- Cr Kieser's response to the complaint under cover of statutory declaration dated 8 May 2021
- Cr Barwick's statutory declaration dated 6 June 2021
- George Town Council Code of Conduct – January 2019.

The complaint alleged that at a Council meeting on 23 March 2021, the complainant moved a motion about a grant of money to a member of the community. The subsequent debate was somewhat disorderly. During the process, the Mayor gave the complainant a formal caution after a point of order by two Councillors. The Mayor then advised the complainant that if 3 formal warnings were issued, she would be asked to leave the meeting. A second formal warning was issued to Cr Barwick 10 minutes later.

There was an exchange regarding a motion that Cr Barwick had put and an amendment that she later sought to make to it. The proceedings were somewhat confusing. Ms Dickenson attempted to explain to Cr Barwick that her motion could not be amended as the proceedings had moved on to another matter. Cr Barwick responded with "*that's bullshit*". During the Panel's hearing, Cr Barwick did not dispute that she had said those words, although she contended that she was not swearing **at** Ms Dickenson but rather expressing her frustration with the situation. In the Panel's view, any difference is immaterial in the circumstances. It is not necessary for the Panel to consider Cr Barwick's response in further detail. The point is that her response provides context to what the Mayor later said to Cr Barwick (which is the subject of the complaint). It suffices to note that Cr Barwick's response was disruptive and inappropriate. It upset Ms Dickenson.

Further into the meeting, a 5 minute adjournment was called by the Mayor. At this time Mayor Kieser squatted down beside Cr Barwick and, according to Cr Barwick, made a personal threat against her. Cr Barwick stated that the Mayor's words were, "*If you ever swear at a staff member again I will physically throw you out the door*". Cr Barwick felt it was a "physical aggressive personal threat against me but he did it in front of the public gallery. It was intimidating and a humiliating experience for me." Cr Barwick stated that the Mayor's words would not have been heard by others.

The Mayor rejected Cr Barwick's account. In his statutory declaration he stated that after the adjournment was called the General Manager informed him that there had been an incident between Cr Barwick and Louise

Dickenson. The Mayor understood that Cr Barwick had sworn at Ms Dickinson. The respondent stated that he left his chair and discreetly knelt down next to Cr Barwick “so as not to inflame the situation or to cause embarrassment” and said, “Heather, you have 2 formal warnings and it appears you have now had a swearing incident with Louise. Any additional issues and I will eject you from the meeting”.

As there were clearly two different interpretations of the words spoken by the Mayor, the Panel believed it was necessary, to ensure natural justice to both parties, that a hearing be held.

Hearing

Pursuant to section 28ZH of the Act, the Code of Conduct Panel held a hearing on 2 June 2021 via Zoom.

The following witnesses appeared at the hearing:

- Cr Heather Barwick
- Mayor Greg Kieser

Cr Barwick requested that she be represented by Mr Andreas Ernst. Mayor Kieser made no objection. Pursuant to section 28ZH(6), the Panel consented. All three took the oath and the complainant addressed the Panel through Mr Ernst. Mr Ernst introduced the issue of the closeness of Mayor Kieser to Cr Barwick during their conversation and called it “posture bullying”. He suggested that the Mayor’s relative height and position (kneeling down and putting his head close to Cr Barwick) constituted posture bullying. Mr Ernst also queried whether any investigation into the supposed incident with Ms Dickinson had taken place before the Mayor approached Cr Barwick during the adjournment. A visual example was shown by Mr Ernst and Cr Barwick of how close Mayor Kieser was during the altercation.

Mayor Kieser explained that his reasons for kneeling on both knees beside Cr Barwick were to make visual contact with her because of his height and her disabilities, and to ensure privacy so as to not cause an embarrassment in what was a private conversation. He believed he used the appropriate tone. When asked whether he believed that it would have been better to address the issue of a Caution and potential ejection from the meeting within the formal meeting process so that there were witnesses, audio and it was minuted, the Mayor stated that elected councillors have four year terms and he felt it is important to foster relationships to ensure a good Council culture, and he would act no differently in similar circumstances to ensure no public embarrassment to councillors.

Determination

Pursuant to section 28ZI(1)(b) of the Act, the Code of Conduct Panel determines that Mayor Kieser has not breached the Code of Conduct, and therefore the Code of Conduct Panel dismisses the complaint.

Reasons for determination

The Code of Conduct Panel considered the information provided by Cr Barwick in the complaint, and the response by Mayor Kieser, along with supporting statutory declarations and/or evidence presented by witnesses.

Cr Barwick’s statutory declaration and her evidence during the hearing was that the Mayor said *“if you ever swear at a staff member again I will physically throw you out the door.”*

Under cross-examination, Cr Barwick conceded that she has hearing difficulties although she asserted that she was wearing her hearing aids at the time of the incident.

The relevant inquiry is whether Mayor Kieser threatened to “physically throw [Cr Barwick] out the door”. The Mayor denied saying those words and suggested that Cr Barwick had hearing difficulties. The Panel is not satisfied that Mayor Kieser used the words *“physically throw you out the door”*. The Panel considers it more likely that Mayor Kieser used the words, *“Heather, you have 2 formal warnings and it appears you have now had a swearing incident with Louise. Any additional issues and I will eject you from the meeting”*. Such language is more consistent with the Panel’s observations of the Mayor during his evidence. Moreover, Cr Barwick has hearing difficulties. The Panel prefers the Mayor’s evidence over Cr Barwick’s.

It is that finding of fact that must be assessed against the Code. That is, was what Mayor Kieser said and did unfair or likely to cause a reasonable person offence or embarrassment? That is the test set by Part 7.1 of the Code. For the above reasons, the Panel finds that it was not. Mayor Kieser offered a compelling reason for why he knelt down close to Cr Barwick and said the words privately, rather than announcing them publicly

during the meeting. The Mayor's conduct and the words that he used were a proportionate response to the disruption caused by Cr Barwick. It was appropriate for the Mayor to address Cr Barwick's swearing or swearing at a staff member.

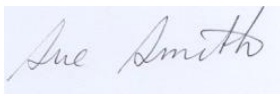
This is not to suggest that Cr Barwick does not feel genuinely aggrieved. Different people may have different perspectives of a single event. However, the Code of Conduct Panel concludes that there is no evidence that Mayor Kieser did not treat Cr Barwick fairly, or that he caused her offence or embarrassment, and therefore there was no breach of Part 7 – Relationships with Community, Councillors and Council Employees 1 (a) and (b) of the Code of Conduct which was current at the time of the alleged contravention on 23 March 2021.

Direction regarding further complaints

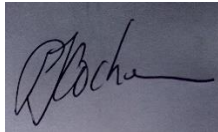
Under Section 28ZI (3) of the Act the Code of Conduct Panel instructs Cr Heather Barwick not to make a further complaint in relation to the same matter for a period of 12 months unless Cr Barwick provides substantive new information in the further complaint.

Right to review

A person aggrieved by the determination of the Code of Conduct Panel, on the ground that the Panel failed to comply with the rules of natural justice, is entitled under section 28ZP of the Act to apply to the Magistrates Court (Administrative Appeals Division) for a review of that determination.



Sue Smith
Chairperson



Penny Cocker
Member



Sam Thompson
Member

DATE : 23 July 2021