

Local Government Act 1993

HOBART CITY COUNCIL CODE OF CONDUCT DETERMINATION REPORT*

Complaint by Ms Joanna Pinkiewicz and Ms Jenny Herrera against Councillor Holly Ewin

(Ref : C19558)

Determination made on 18 February 2020

Code of Conduct Panel:

Jill Taylor (Chairperson), Sam Thompson (Legal Member) and Katherine Schaefer (Member)

1. Summary of the complaint

On 1 November 2019 a Code of Conduct Complaint (the complaint) made by Ms Joanna Pinkiewicz and Ms Jenny Herrera against Councillor (Cr) Holly Ewin was forwarded to the Chairperson of the Code of Conduct Panel for initial assessment. Mr Nick Heath, General Manager, Hobart City Council confirmed that the complaint met the requirements of Section 28V of the *Local Government Act 1993* (the Act).

The complaint alleged that Cr Ewin had breached Part 7.1(a), (b) and (c) and Parts 8.6 and 8.7 of the City of Hobart Elected Member Code of Conduct (the Code), which was adopted by Council on 18 February 2019. Cr Ewin uses the pronoun they/their. Ms Herrera and Ms Pinkiewicz will be referred to as the complainants.

Specifically, the complaint alleged that Cr Ewin breached Part 7.1 (a), (b) and (c) and Parts 8.6 and 8.7 by posting “false and defamatory” comments about the organisation Women Speak Tasmania (WST) on the councillor’s Facebook page on 22 October 2019. According to the complaint, Ms Pinkiewicz and Ms Herrera are both members of WST.

The relevant Parts of the Code of Conduct were, and are, as follows: -

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; and*
- (c) must not bully or harass any person*

PART 8 – Representation

- 6. An Elected Member must show respect when expressing personal views publicly.***
- 7. The personal conduct of an Elected Member must not reflect, or have the potential to reflect, adversely on the reputation of the Council.***

The Chairperson undertook an initial assessment and on 6 November 2019 advised that further investigation was warranted in relation to the complaint.

* Section 28ZK (7) of the *Local Government Act 1993* requires that any person who receives a determination report must keep the determination report confidential until the report is included within an item on the agenda for a meeting of the relevant council. Failure to do so may result in a fine of up to 50 penalty units.

A Code of Conduct Panel was formed to investigate the complaint. On 8 November 2019 Cr Ewin was provided with a copy of the complaint and invited to provide a response. On 13 November 2019, Cr Ewin queried the validity of the complaint. Cr Ewin contended that in respect of a previous complaint made by two other members of WST, the Panel's determination stated that those complainants could not lodge another complaint against Cr Ewin in relation to the same matter for 12 months.¹ Cr Ewin further contended that the complaint, although made by different people, was vexatious.

On 12 December 2019, the Panel met to progress the complaint and to address Cr Ewin's contentions. Later that day Cr Ewin was advised that, in accordance with Section 28V of the Act, a complaint may be made by one or two people, and that WST as an organisation was not a party to the complaint, therefore the complaint was valid. It appears to the Panel that WST is a lobby group. It is not a body corporate, nor was it a party to either this or the previous complaint referred to earlier. The Chairperson of the Panel, in undertaking the initial assessment, determined that the complaint by Ms Pinkiewicz and Ms Herrera was a separate complaint from one previously lodged by other members of WST, and the alleged breach of the Code occurred on a different occasion. This complaint was therefore to be considered separately.

At that time, Cr Ewin was invited to submit any response to the complaint within 7 days.

On 13 December 2019 Cr Ewin advised that they would not be submitting any response to this complaint as they considered it to be "vexatious and the matter had already been dealt with in a previous ruling."

The Panel met again on 18 December 2019 and formed the provisional view that, in accordance with section 28ZG(2)(a) and (b), the complaint should be investigated without a hearing. Section 28ZG (2) states:

- (2) *The Code of Conduct Panel may determine that a code of conduct complaint may be investigated without a hearing if it reasonably considers that –*
- (a) *neither the complainant nor the councillor against whom the complaint is made will be disadvantaged if a hearing is not held and it is appropriate in the circumstances not to hold a hearing; or*
 - (b) *a hearing is unnecessary in the circumstances because the investigation can be adequately conducted by means of written submissions or examination of documentary evidence or both.*

On 13 January 2020, the complainants and Cr Ewin were advised of the Panel's provisional view. The parties were invited to make objection. The parties were also provided with a list of the documentation that the Panel intended to consider as part of its investigation and asked to confirm receipt of all of that documentation.

The complainants advised that they had a copy of the relevant documentation and were satisfied with the complaint being investigated without a hearing. No response was received from Cr Ewin.

¹ Complaint made by Isla MacGregor and Bronwyn Williams against Cr Holly Ewin (Ref C162268), determination made 15 October 2019. That panel was, in part, differently constituted.

2. Investigation

The Panel met on 7 February 2020 to investigate and determine the complaint without a hearing. The Panel received the following documents as evidence in its investigation:

- Written complaint by Ms Pinkiewicz and Ms Herrera dated 28 October 2019;
- A statutory declaration by Ms Joanna Pinkiewicz dated 28 October 2019;
- A statutory declaration by Ms Jenny Herrera dated 29 October 2019;
- A document titled “Holly Ewin fb page 22 October 2019” which included undated photograph of an email to Cr Ewin, and Cr Ewin’s response.

The complaint referred to a Facebook post made, on the face of it, by Cr Ewin on their Facebook page. The complaint included a document headed “Holly Ewin Hobart City Councillor, 22 October 2019 at 13:34pm, purported to portray the post. A copy of this document is annexed to this Report as Attachment 1.

The post was in the following terms: -

“trans and gender-diverse people belong. hate speech must be de-platformed. i guess i just keep saying this til i'm blue in the face- or get sacked? 😊;) #aintnolady

[images: email from a concerned citizen regarding my views on a certain group, and my response]”

The post included screenshots of an email sent to Cr Ewin and Cr Ewin’s email in reply. The name of the sender of the email to Cr Ewin and the sender’s contact details were obscured and/or cropped out. The email to Cr Ewin related to Cr Ewin’s “disagreement with the ‘Women Speak’ organisation”. The email went on to criticise Cr Ewin’s earlier comments regarding WST. (Those comments were the subject of the earlier Code of Conduct panel determination, referred to in the above footnote). The second email was Cr Ewin’s reply, the contents of which are addressed later.

Ms Pinkiewicz and Ms Herrera alleged that, as members of WST, Cr Ewin’s Facebook post suggested that they promote “segregation and violence in our community” and “hate speech”, and have “hateful ways”. They also claimed that Cr Ewin posted the following statement – “I guess I just keep saying this til i’m blue in the face – or get sacked”.

Ms Pinkiewicz and Ms Hererra claimed that there was no evidence that Cr Ewin could substantiate these statements. They also contended that Cr Ewin intends to continue making such statements about WST, despite being formally cautioned as a result of a previous complaint which was upheld in part - the complaint referred to earlier in this determination report.

In an email dated 6 November 2019, Ms Pinkiewicz stated that the email sent to Cr Ewin, depicted in Cr Ewin’s Facebook post, was not sent by any member or person known to WST. It is unnecessary for the Panel to make a finding. Whether or not the email was sent by a member of WST is not determinative of whether Cr Ewin breached the Code.

Ms Pinkiewicz and Ms Herrera also alleged that on 21 May 2019, Cr Ewin posted a letter on the Councillor’s Facebook page written by Ms Pinkiewicz, containing her full name and phone number. Subsequently Ms Pinkiewicz’s name was crossed out, but the phone number remained. The Panel noted that no evidence was provided in relation to this allegation. The complainants made no

submissions regarding it. The screenshot of the letter on Cr Ewin's Facebook obscured the correspondent's name and contact details. It need not be considered further.

As noted previously, Cr Ewin did not provide a response to the complaint refuting all or part of it. The only evidence before the Panel was that provided by the complainants. That evidence was provided under the cover of a statutory declaration (section 28ZE(3)). Although the screenshot of Cr Ewin's post appeared to be the product of copying the text rather than a screenshot in picture form, in the absence of any submission or evidence to the contrary from Cr Ewin, the Panel accepts the purported screenshot as accurate.

3. Determination

The Panel's task is to investigate (Sections 28ZE and 28ZH) and determine (Sections 28ZI) the complaint. In particular, the Panel must consider whether, on the basis of the evidence provided by the complainants, Cr Ewin breached the Code. That evidence is limited to the screenshot of Cr Ewin's Facebook post.

In order to consider whether Cr Ewin has breached the Code in the ways alleged by the complainants, it is necessary to construe the statements made by Cr Ewin in the Facebook post, including the email that they sent. Putting to one side Cr Ewin's reference to being sacked (there being no breach of the Code identified), there are two relevant statements:

- Cr Ewin posted that "hate speech must be de-platformed".
- Cr Ewin's post contained a screenshot of an email that the councillor sent, the relevant part being "I firmly believe the views espoused by the group promote segregation and violence in the community".

As to the email, it is Cr Ewin's act of publishing it on Facebook, not the act of (privately) sending it to the unidentified recipient that is alleged to breach the Code.

Next, it is necessary to consider the imputations conveyed by those statements. In drawing imputations, the Panel is not to apply a literal interpretation, but must consider the natural and ordinary meaning of Cr Ewin's words. This may include nuance and insinuation.² The Panel finds that the first statement implies that WST as an organisation engages in hate speech. Importantly, this is not the same as asserting that WST is a hate group. The Panel finds that the second statement is an expression of Cr Ewin's view that WST's expression of its views, as an institution, promotes segregation and violence. Importantly, this is not the same as an assertion that WST's members are segregationists or violent.

The Panel's task is to assess those statements against the Code of Conduct. Before doing that, it is appropriate to comment on the Code of Conduct Panel's determination of a complaint made by two different members of WST. That determination, which was upheld in part, is publicly available. The complainants are different. There can be no suggestion that any issue estoppel may arise. Nor can there be any suggestion that the direction made pursuant to s 28ZI (3) in respect of the earlier complaint may operate as a bar to this complaint. The Panel notes that there are similarities between the two complaints, largely because the genesis appears to be Council's consideration of trans and gender diverse posters in public convenience facilities. However, there is an important distinction between this complaint and the previous complaint made by other members of WST.

² Although in the context of the law of defamation, Wigley J's statement of principle in *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496 at [72]-[85] is relevant.

In this case, the two relevant statements made by Cr Ewin impugned the views expressed by WST as an organisation. They did not impugn WST itself, nor individual members' views, nor the character or conduct of individual members. The Panel's reasoning is as follows.

The Panel determined that the complaint alleging a breach of Part 7.1(a) be dismissed. Part 7.1(a) states that an elected member must treat all persons fairly. 'Fair' is relevantly defined in the Macquarie Dictionary as "free from bias, dishonesty, or injustice". The Panel must consider whether Cr Ewin's statements were biased, dishonest or unjust. The email posted by Cr Ewin on 22 October 2019 did not state that WST was a hate group but expressed Cr Ewin's view that the group's expression of its views promoted segregation and violence in the community. Cr Ewin's statements were limited to their comment on the group's speech, not on the character of the group itself or the character of its members, less still the character of any identifiable members. A councillor has political functions (section 28(1) and (2)). Robust political discourse and a divergence of views is to be expected. The Panel is not satisfied that Cr Ewin's statements were biased, dishonest or unjust to the requisite standard. This part of the complaint is dismissed.

The Panel dismisses the complaint alleging a breach of Part 7.1(b). Part 7.1(b) relates to a councillor's *treatment of* a specific person or persons. Mere subjective offence or embarrassment is insufficient. A breach will only occur where the respondent Councillor's conduct caused a "reasonable person offence or embarrassment". In that way, the Code is not concerned with trifles. Moreover, the Code must be read against a Councillor's political functions and the implied freedom of political communication. Cr Ewin did not name any person in the email which was posted on the Councillor's Facebook page. In the Panel's opinion it is reasonable to assume that because no person was named in the comments made by Cr Ewin, no reasonable offence or embarrassment was caused to Ms Pinkiewicz or Ms Herrera or to any other person. There was no evidence or explanation of how the complainants, or any other identifiable persons, were offended or embarrassed. The Panel repeats its observation above that Cr Ewin's comments were limited to their (Cr Ewin's) assessment of the group's expression of its views rather than the group itself, less still any identifiable members.

The Panel dismisses the complaint alleging a breach of Part 7.1(c). It is the Panel's view that harassment and/or bullying in that part of the Code requires unwarranted and unacceptable behaviour towards an individual over a sustained period. The evidence before the Panel only identified one occasion where Cr Ewin expressed an opinion on Facebook. That occasion did not name either Ms Pinkiewicz or Ms Herrera, nor any other person. That Cr Ewin may have made previous comments regarding WST does not establish that an individual was harassed or bullied. This part of the complaint is dismissed.

The Panel dismisses the complaint in respect of Part 8.6. The Panel has already explained the key distinction between this complaint and the earlier complaint made by other members of WST. In the earlier Code of Conduct complaint, Cr Ewin was found to have personalised the comments about WST and its members, thus not showing an appropriate level of respect. In relation to this complaint, Cr Ewin commented on a view expressed in relation to the email dated 22 October 2019, which was addressed to the Councillor and provides relevant context. Relevantly, Cr Ewin was responding to the email that was sent to them. The Panel is not satisfied that Cr Ewin failed to show respect when expressing their views on their public Facebook page. This part of the complaint is dismissed.

The Panel dismisses the complaint in respect of Part 8.7. The Panel acknowledges that Cr Ewin has strongly held views in relation to transgender issues and has the right to express those views. Given that, the Panel determined that a reasonable person would accept that the comments made by Cr Ewin were the councillor's opinion and not those of Council. The Panel concluded that Cr Ewin's comments have not reflected adversely on the reputation of Council, nor do they have the potential to do so. Commenting on an issue before Council does not, in and of itself, bring Council into disrepute. Council is a deliberative polity. There are political functions to a councillor's functions; see section 28(1) and (2). Robust debate and commentary are to be expected. Something more than a lack of respect (Part 8.6), reasonably offensive or embarrassing behaviour (Part 7.1(b)), or unfairness (Part 7.1(a)) would be required. In the Panel's opinion, behaviour of that type would not, in and of itself, reflect, or have the potential to reflect, adversely on the reputation of the Council. This is distinct from behaviour that reflects, or has the potential to adversely reflect on the reputation of a person, such as the councillor, or a councillor's behaviour that is such a gross departure from accepted standards and norms that it not only reflects adversely on the councillor's reputation but also on the reputation of Council itself. The distinctions between the Council as an institution (Sections 18 and 29) and its functions (Section 20), and a councillor (Section 25) and the councillor's functions (Section 28), are important. This part of the complaint is dismissed.

Pursuant to section 28ZI(1)(b), the Panel dismisses the whole complaint lodged by Ms Pinkiewicz and Ms Herrera against Cr Ewin.

4. Timeframe for Determination of complaint

Section 28ZD (2) (a) of the Act requires explanation of the reasons why the Panel did not complete its investigation and determination of the complaint within 90 days of the initial assessment. In this instance that 90-day period has been exceeded for the following reasons:

- Additional correspondence with parties to the complaint
- Additional time to follow up with Cr Ewin seeking a response to the complaint
- Short periods of unavailability of Panel members

5. Right to Review

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



Jill Taylor
Chairperson



Sam Thompson
Legal Member



Katherine Schaefer
Member

Annexure: Document titled "Holly Ewin fb page 22 October 2019".

ATTACHMENT I

Holly Ewin, Hobart City Councillor

22 October at 13:34

trans and gender-diverse people belong. hate speech must be de-platformed. i guess i just keep saying this til i'm blue in the face-or get sacked? 😞;)

#aintnolady

[images: email from a concerned citizen regarding my views on a certain group, and my response]

Good morning Councillor Erwin

I wish to comment on the following re your disagreement with the 'Women Speak' organisation....

Cr Ewin "compared its members to Nazis and labelled them "transphobes" and a "hate group", "full of fear, anger and hate", requiring "counselling".

Do all those *with whom you personally disagree* receive this sort of public scathing and vitriolic response from you? As an elected official I would have expected more from you than just 'spitting it all out' via insults and verbal abuse.

It seems a very immature response for a lady of your age and experience to people who do not share all of your opinions....

It takes time to learn self control - only children or teenagers open their mouth and say whatever they are thinking...

I look forward to reading future accounts of your dealing with situations in your role as Councillor, in a manner that draws people to you and your personal views because your communication is positive and mature and attractive - no one gives much credence to a speaker who is intent on verbal abuse and insults.

Kind regards

Hi 

Not everyone I disagree with cops a mouthful from me as Women Speak has (although I will say that the media has very disappointingly misrepresented me- all the posts in question are still on my public Facebook page if you would like to have a lol for yourself); but I do stand by my comments nonetheless.

I firmly believe the views espoused by the group promote segregation and violence in our community. I believe our community is overwhelmingly inclusive, kind and caring, and I believe hate speech in all its forms against any marginalised group must be deplatformed. As such, I am following this matter up with the Australian Human Rights Commission; because if this group were disseminating hateful views based on race, we simply wouldn't be having this conversation.

Trans and gender diverse folks, such as myself, deserve the same level of respect, inclusion and safety as everyone else. And on that note, I will also let you know that I am non-binary; and as such, am definitely not a "lady", so probably won't be behaving as one any time soon.

Thanks for taking the time to write to and listen to me!

Holly/Jax

In solidarity for policy and change,
Holly Ewin
(they/them)
Hobart City Councillor
[0408 631 831](tel:0408631831)

68George Harrison, Monica Winzenberg and 66 others

21 comments