

Local Government Act 1993

HOBART CITY COUNCIL CODE OF CONDUCT

Complaint by Ms Isla MacGregor and Ms Bronwyn Williams against Councillor Holly Ewin

(Ref C16268)

Determination made on 15 October 2019

Code of Conduct Panel:

Jill Taylor (Chairperson), Sam Thompson (Legal Member) and Penny Cocker (Member).

1. Summary of the complaint

On 6 July 2019 a Code of Conduct Complaint (the complaint) was received by the Code of Conduct Panel from Ms Isla MacGregor and Ms Bronwyn Williams against Councillor (Cr) Holly Ewin through the General Manager of the Hobart City Council, Mr Nick Heath. Mr Heath confirmed that the joint complaint met the requirements of Section 28V of the Act.

The complaint alleged that Cr Ewin had breached Part 7.1(a), (b) and (c) and Parts 8.4, 8.5, 8.6 and 8.7 of Schedule 1 of the City of Hobart Elected Member Code of Conduct that was adopted by Council on 18 February 2019 (the Code). It is against that version of the Code that the complaint is to be assessed.

Specifically, the complaint alleged that Cr Ewin breached Part 7.1 (a), (b) and (c) by posting several derogatory comments about the organisation Women Speak Tasmania (WST) on the councillor's Facebook page between 20 May 2019 and 14 June 2019. Ms MacGregor and Ms Williams are spokespeople for WST.

The complaint further alleged that Cr Ewin had breached Parts 8.4, 8.5, 8.6 and 8.7 in relation to the Facebook posts and because Cr Ewin had made false and defamatory remarks about members of WST at a Hobart City Council meeting held on 17 June 2019.

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

PART 7 – Relationships with community, Councillors and Council employees

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 8 – Representation

- 4. An Elected Member must clearly indicate when they are putting forward their personal views.*
- 5. An Elected Member's personal views must not be expressed publicly in such a way as to undermine the decisions of the Council or bring the Council into disrepute.*
- 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.*

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.

The Chairperson undertook an initial assessment and advised on 17 July 2019 that further investigation was warranted in relation to the complaint against Cr Ewin.

A Code of Conduct Panel was formed to investigate the complaint made by Ms MacGregor and Ms Williams. On 30 July 2019 Cr Ewin was provided with a copy of the complaint and invited to provide a response. Cr Ewin submitted a response addressed "To whom it may concern" dated 10 August 2019. However, in accordance with the requirements of Section 28ZE(3), Cr Ewin was requested to make the response under cover of a Statutory Declaration. Cr Ewin provided a statutory declaration dated 14 August 2019, which was non-compliant, in that it had a strike-out that had not been initialled by the deponent and the witness. This was drawn to Cr Ewin's attention. In its place, the councillor submitted a compliant statutory declaration dated 9 September 2019. The Panel has therefore not taken into account the statutory declaration dated 14 August 2019.

2. Investigation

The Panel met on 3 September 2019 to review the evidence before it. The Panel formed the preliminary view that in accordance with Section 28ZG (2) a hearing was not required as neither party would be disadvantaged, and the parties' written submissions adequately covered the complaint. On 13 September 2019, Cr Ewin and the complainants were advised of the Panel's preliminary view. They were also provided with details of the written evidence before the Panel and asked to confirm that they had received all the written material (listed below). The parties were also invited, in the event that they wanted to request a hearing, to put their reasons in writing within 7 days for the Panel's consideration. The complainants responded saying that they did not require a hearing but would attend if Cr Ewin wanted to proceed to a hearing. Cr Ewin did not request a hearing. In accordance with Section 28ZG(2), the Panel determined to investigate the complaint without a hearing.

The Panel met on 18 September 2019 to consider the written evidence and determine whether Cr Ewin had breached the relevant Parts of the Hobart City Council's Code of Conduct. The complaint was signed jointly by Ms MacGregor and Ms Williams, a course permitted by Section 28V (5).

The Panel considered the following written evidence in determining the complaint:

- Complaint by Ms MacGregor and Ms Williams dated 6 July 2019 with the following nine PDF documents:
 - Eight screenshots of relevant Facebook posts on the page titled "Holly Ewin, Hobart City Councillor"
 - Transcript of Hobart City Council meeting held on Monday 17 June 2019 related to discussion of agenda item 25
- Statutory Declaration of Isla MacGregor dated 6 July 2019
- Statutory Declaration of Bronwyn Williams dated 6 July 2019
- An email dated 10 August 2019 from Cr Holly Ewin addressed to "To whom it may concern"
- An email dated 27 August 2019 from Ms MacGregor and Ms Williams containing a response to Cr Ewin's email of 10 August 2019
- Statutory Declaration of Cr Holly Ewin dated 9 September 2019

Ms MacGregor and Ms Williams made the following allegations in relation to a series of Facebook posts made by Cr Ewin between 20 May 2019 and 14 June 2019. Their complaint states that:

1. On 20 May 2019, Cr Ewin accused Women Speak Tasmania of 'equating trans people to sex-crazed predators'.

2. An undated post made by Cr Ewin compares the members of Women Speak Tasmania to 'Nazis'.
3. On 21 May 2019, Cr Ewin referred to the members of Women Speak Tasmania as 'terfs'. The Panel understands this to be an acronym for a 'trans-exclusionary radical feminist'.
4. An undated post made by Cr Ewin suggests the members of Women Speak Tasmania are 'full of fear, anger and hate' and have 'unresolved trauma' that requires 'counselling'.
5. On 8 June 2019, in a Facebook post, Cr Ewin compares the members of Women Speak Tasmania with the 'Tassie nanas'. The complainants found this comment offensive as they interpreted it as being a reference to their older age. The Panel presumes Cr Ewin was referring to the pro-refugees group 'Tassie Nannas'. After considering all of the text in Cr Ewin's comment, provided by the complainants in Screenshot #5, the Panel disagrees with the complainants' interpretation.
6. On 11 June 2019, Cr Ewin refers to 'a small group of people whose only public work focuses on excluding trans people'.
7. In an undated post Cr Ewin refers to the members of Women Speak Tasmania as 'transphobes'.

In their complaint, Ms MacGregor and Ms Williams stated that the comments made by Cr Ewin were false, defamatory, offensive and unsubstantiated. They said that there was no evidence to support Cr Ewin's claim that they were a "hate group focused on excluding trans people". They added that they advocate for a society where the rights of female people and trans people are both respected.

In addition to the Facebook posts, Ms MacGregor and Ms Williams referred to the transcript of part of a Hobart City Council meeting held on 17 June 2019, where, they claim, Cr Ewin again made false and derogatory statements about WST. The transcript was apparently prepared by or at the request of the complainants. Its accuracy was not challenged by Cr Ewin. The Panel proceeded to determine the complaint on the basis that the transcript was accurate.

According to the complainants, Cr Ewin said that WST "were hell bent on excluding transwomen at any cost..." and in their communications "WST equate trans identity with predatory behaviour". Cr Ewin concluded that this communication was "at best misinformed, or at worst, hate speech". The complainants stated that Cr Tanya Denison raised a point of order, during Council discussions, about this remark, suggesting that Cr Ewin withdraw the accusation that WST were a "hate group". Cr Ewin was also asked by the Lord Mayor "to be careful about her language" and avoid being offensive. However, Ms MacGregor and Ms Williams submitted that Cr Ewin did not comply with this request and went on to conclude that WST should not be viewed as a relevant stakeholder in a poster design (the subject of the debate), adding that "It gives hateful Individuals a licence to hold on to their discriminatory beliefs and increases violence in our community".

Ms MacGregor and Ms Williams' complaint also refers to comments made by Cr Ewin in relation to Cr Thomas, Cr Behrakis and Cr Briscoe. The complaint notes those as being "[o]n an unrelated matter". The complaint does not allege a breach of the Code. The Panel therefore makes no findings with respect to that allegation.

In a response addressed "To whom it may concern" dated 10 August 2019, Cr Ewin claims that WST have misgendered the councillor in their public and private communications causing harassment. Cr Ewin further claimed that WST have actively discriminated against trans people, particularly trans women. This is a claim that Ms MacGregor and Ms Williams deny and add that any harassment on social media against Cr Ewin is not undertaken by any members of WST.

In the statutory declaration dated on 9 September 2019, Cr Ewin did not deny that comments made by the councillor would constitute a breach in the Code of Conduct for elected representatives and did not deny making such comments.

The Panel must still consider whether the comments were made and, if they were, whether they breached the Code. The applicable standard of proof is the balance of probabilities. The Panel accepts that Cr Ewin made the comments alleged in the complaint and particularised in this document. Cr Ewin

further added that any apology sought by the complainants would not be forthcoming on the part of the councillor. Cr Ewin did undertake to be “more diligent and explicit” in making distinctions between comments as a councillor and otherwise when providing comments and statements publicly.

3. Determination

Whilst the Panel accepts that some derogatory and unsubstantiated comments were made by Cr Ewin at the Hobart City Council meeting held on 17 June 2019, they were part and parcel of lively debate which occurs at many council meetings where wide-ranging opinions on issues are debated. It is the Panel’s view that these matters are properly dealt with by the chair of those meetings and this had happened at the Council meeting of 17 June 2019.

The Panel accepts that the councillor and complainants each had strongly held views regarding the issues and matters in question. In determining the complaint, it is unnecessary for the Panel to consider those issues and matters in detail. It suffices to note that:

- At some stage prior to 20 May 2019, Cr Ewin had proposed that trans and gender diverse posters be displayed at Council’s public convenience facilities or bathrooms (‘the matter’).
- From 20 May 2019 onwards, Cr Ewin made a number of Facebook posts or comments. These are referred to earlier in this determination.
- On 6 June 2019, Council’s Parks and Recreation Committee met. One of the complainants – Ms MacGregor – delivered a presentation on behalf of WST regarding the matter. Cr Ewin was present at that committee meeting.
- With respect to the complaint, the matter culminated in the discussion at the Council meeting of 17 June 2019 when Council was considering an agenda item (according to the transcript, Agenda Item 25) relating to, in Cr Briscoe’s words, the installation of “trans and gender diverse posters in public convenience facilities”.

It is unnecessary to consider the matter further. 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 parties, Cr Ewin breached the Code.

As has been noted, Cr Ewin alleged that the councillor had been harassed by members of WST. The complainants denied that they themselves harassed Cr Ewin. It is unnecessary for the Panel to make a finding as to this. The Code is concerned with conduct by a councillor. Those circumstances, if found proven by the Panel, could not be relevant in determining whether Cr Ewin breached the Code. Similarly, any allegation of WST’s members breaching the *Anti-Discrimination Act 1988* is not relevant to the Panel’s task, which is confined by the *Local Government Act 1993* and the Code to the councillor’s conduct. Nor is the conduct of Cr Ewin’s supporters relevant.

In relation to the purpose of Part 7 of the Code, the Panel acknowledges that it is beholden of an elected member to maintain a high standard of behaviour as a representative of Council. To this extent, a councillor must avoid making negative public comment or promulgating negative views about any member or groups within the community. This applies not only to a councillor’s conduct in a council meeting or at council events, but also to a councillor’s public commentary such as Facebook posts. Councillors may hold strongly held views. They are elected representatives and, as councillors, have political functions (see Section 28). However, the Code of Conduct adopted by the Council imposes limits and requirements on councillors.

The Panel determined that the complaint in respect of Part 7.1(a) be dismissed. That clause in the Code relates to the manner in which a councillor treats a particular person or persons. Whilst Cr Ewin’s comments could be taken as derogatory and unnecessary for the most part, they were not specifically directed personally at either of the complainants. As such, the Panel was not satisfied that there was any direct treatment of any individual that breached Part 7.1(a).

The Panel upholds the complaint in respect of 7.1(b). A relevant distinction between Parts 7.1(a) and 7.1(b) is that the former relates to a councillor’s *treatment of* a specific person or persons, whereas the latter relates to whether a councillor’s conduct causes *any reasonable person* offence or embarrassment.

Whilst Cr Ewin had not named any person in the Facebook posts or in the councillor's contribution to the debate at the Hobart City Council meeting on 17 June 2019, the councillor did make mention of WST. WST is a relatively small group and the complainants are known spokespersons for the group. Therefore, it is reasonable to assume that comments made by Cr Ewin could reasonably be seen to cause them offence or embarrassment. The Panel finds that Ms MacGregor and Ms Williams were reasonably offended and embarrassed by the comments made by Cr Ewin.

The Panel determined that the complaint in respect of Part 7.1(c) be dismissed. It was 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. As Cr Ewin's commentary on Facebook and in the course of the Council meeting of 17 June 2019 was not attributed personally against the complainants this part of the complaint could not be sustained.

The Panel determined that the complaint in respect of Part 8.4 be dismissed. The heading on Cr Ewin's Facebook page is "Holly Ewin, Hobart City Councillor" which enables viewers to see that the councillor is a member of the Hobart City Council. Although Cr Ewin did not expressly say that they were expressing a personal view rather than speaking on behalf of Council, the Panel concluded that a reasonable person would assume that the comments posted by Cr Ewin are personal views. Cr Ewin has not suggested in any way that the postings are the views of Council. Relevantly, Cr Ewin's Facebook page refers to Cr Ewin as "Councillor", singular. There is nothing to suggest that the page purports to represent or speak on behalf of the Council as an institution.¹ This part of the complaint is dismissed.

The Panel determined that the complaint in respect of Part 8.5 be dismissed. This clause in the Code has two discrete limbs, relating (respectively) to Council's decision and bringing Council into disrepute. The Panel considers the limbs to be disjunctive. In relation to the matter discussed at the Hobart City Council meetings of May and June 2019, no decision was made by Council in regarding the wording of the poster, which was the council matter in question and the matter about which Cr Ewin expressed personal views. On both occasions the matter was referred to committee for further investigation. Therefore, Cr Ewin was not speaking out about a decision of Council. Cr Ewin's commentary did not undermine the decisions to refer the matter to committee. This part of the complaint is dismissed. In terms of bringing the Council into disrepute, the same considerations apply. 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. Robust debate and commentary is to be expected. Cr Ewin's Facebook posts were commentary and, in the Panel's view, did not bring Council into disrepute. The Panel concluded that this aspect of the complaint was not made out.

The Panel upholds the complaint in respect of Part 8.6. Whilst it could be argued that Cr Ewin was expressing personal views, this part of the Code requires Councillors to show respect when expressing personal views. The Facebook posts made by Cr Ewin were critical and unsubstantiated, showing the councillor's lack of respect to the group WST and its spokespersons, Ms MacGregor and Ms Williams. The Panel considers that Cr Ewin could be perceived as showing a negative bias towards the complainants. Section 28 of the Act requires councillors to represent their community, which implies that all groups within the community should be afforded the same level of treatment and respect. The Panel finds that Cr Ewin's Facebook posts failed to show respect towards the complainants.

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. As the Panel has stated above in relation to Part 8.5 of the Code, Council is a deliberative polity. Cr Ewin's role had political functions. Robust debate and commentary are to be expected. The effect, or potential effect, of a councillor's conduct on Council's reputation must be considered in light of those principles. Given that, the Panel determined that a reasonable person would accept that the comments made by

¹ Council is a body corporate (Section 19(1)), with prescribed functions and powers (Section 20), and constituted by councillors, mayors and deputy mayors (Part 4 of the Act). In contrast, councillors are elected representatives with both individual (Section 28(1)) and collective (Section 28(2)) functions. The mayor is the spokesperson: Section 27(1)(e). Part 8 of the Code must be read in light of those, and other, provisions of the Act.

Cr Ewin were the councillor's opinion and not those of Council.² Whilst even by Cr Ewin's own admission, the comments need to be more "diligent and explicit", 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 (see Part 8.7 of the Code).

For these reasons, pursuant to Section 28ZI(1)(c), the Panel upholds part of the complaint and dismisses the remainder of it. Specifically, the Panel finds that Cr Ewin breached Parts 7.1(b) and 8.6 of the Code. The remainder of the complaint is dismissed.

4. Sanction

On 3 October 2019, the Panel wrote to Cr Ewin and the complainants advising that part of the complaint was to be upheld and attached a copy of the draft determination.³ All parties were invited to comment on the appropriateness of sanctions, if any, to be imposed. Cr Ewin replied that no sanctions should be imposed and advised that no apology would be forthcoming. The complainants had requested a public apology at the time of lodging the complaint and confirmed that this was still appropriate from their perspective. The Panel considered the evidence before it and the parties' responses. The Panel has only considered the complaint as it relates to Cr Ewin's Facebook posts and comments and did not consider any posts or comments by others on the councillor's Facebook page for the reason that such material is not the product of Cr Ewin's conduct. The conduct of Cr Ewin's supporters or the councillor's detractors is not relevant to the Panel's task.

Section 28ZI (2) prescribes a descending hierarchy in terms of severity of sanction. The starting point is whether any sanction should be imposed.

The Panel took into account that Cr Ewin was a first-time councillor of less than 12 months' experience at the time of the complaint and that this was the first complaint against Cr Ewin.

In the Statutory Declaration dated 9 September 2019, Cr Ewin stated "I need to be more diligent and explicit in making distinctions between comments that are my own, versus those made in my official capacity as a councillor." However, in that same Statutory Declaration, Cr Ewin still suggests that Women Speak Tasmania is a "hate group". The Panel acknowledges that elected members need a greater awareness of their responsibilities as councillors and the onus is on them to comply fully with the requirements of the Code of Conduct. Imposing a sanction is important in reminding all elected members of their responsibilities.

The Panel takes into account the heated political issue involving supporters of both the councillor and the complainants. Although robust debate is to be expected, the panel found that Cr Ewin's conduct went beyond the limits imposed by the Code.

On the other hand, the complainants' request for a public apology was also considered by the Panel.

Based on the evidence before it, the Panel determined that a public apology would be too severe a penalty, given the relative inexperience of Cr Ewin and the first-time nature of the complaint.

The Panel noted Cr Ewin's position of not providing an apology. Given that the Panel could have determined that an apology was appropriate in this matter, it is relevant to point out that in accordance with Section 28ZM(2) of the Act, a councillor must comply with any sanction imposed by the Panel within the period specified by the Panel in its determination report. A failure to do so is an offence punishable

² The Panel accepts that a councillor's expression of a personal opinion may, in certain circumstances, breach Part 8.7 of the Code.

³ A copy of this determination was provided in draft. The Panel made amendments to the draft determination prior to finalisation, but in the Panel's view these were immaterial to the question of what sanction, if any, the Panel should impose.

by a fine not exceeding 50 penalty units. Further consequences may arise under Section 339E by virtue of Section 28ZM (4) and (5).

The Panel concluded a sanction, albeit one towards the lower end of the scale in Section 28ZI (2), was required in this instance. Pursuant to Section 28ZI(2)(a), the Panel imposes a caution on Cr Ewin.

5. Further complaints

Pursuant to Section 28ZI (3), the Panel determines that the complainants may not make a further complaint in relation to the conduct of Cr Ewin that has been the subject of this determination for a period of 12 months. This determination applies only to the subject of this complaint. That is, to use the language used in Council's meeting of 17 June 2019, Council's consideration of "trans and gender diverse posters in public convenience facilities" and Council's consultation with Women Speak Tasmania.

This determination does not affect the rights of the complainants, or of any other person, to make a complaint about a new matter.

6. 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.

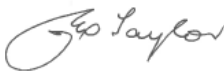
7. Final Observation

The Panel considers it appropriate to mention Section 28ZK (7), which provides:

'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.

Penalty: Fine not exceeding 50 penalty units.'

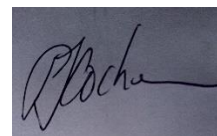
The Panel reminds the parties that the provision extends beyond a person disclosing the determination report itself. In the Panel's view, the provision applies also to publication of information that discloses any part of a determination report, such as the fact that a panel has upheld a complaint in whole or in part.



Jill Taylor
Chairperson



Sam Thompson
Legal Member



Penny Cocker
Member