

*Local Government Act 1993*

HUON VALLEY COUNCIL CODE OF CONDUCT DETERMINATION REPORT \*

RELATING TO THE CONDUCT OF COUNCILLORS

(ref : C 19903)

Complaint by Mr Geoffrey Swan against Councillor Michael Newell

Determination made on 9 June 2020

Code of Conduct Panel:

Jill Taylor (Chairperson), Gretel Chen (Legal Member) and Liz Gillam (Member)

I. Summary of the complaint

On 18 December 2019, a Code of Conduct Complaint (the complaint) made by Mr Geoffrey Swan against Councillor (Cr) Michael Newell was forwarded to the Executive Officer. The Executive Officer referred the complaint to the Chairperson of the Code of Conduct Panel for initial assessment. Mr Emilio Reale, General Manager, Huon Valley Council confirmed that the complaint met the requirements of Section 28V (3) of the *Local Government Act 1993* (the Act).

The complaint alleged that Cr Newell had breached the Huon Valley Code of Conduct (the Code), which commenced on 27 April 2016 and was reviewed on 27 March 2019.

Specifically, the complaint alleged that Cr Newell breached Part 3.1 and Part 7.1 (a), (b) and (c) on three occasions.

Firstly, commencing on or about 21 August 2019 Cr Newell participated as a founding member of a Facebook group entitled "*Call out the Huon valleys (sic) biggest whinger*". Mr Swan alleges he was the target of abuse and ridicule by this group.

Secondly, in the online edition of the Mercury newspaper on 26 October 2019 and in the print edition of the Mercury newspaper on 27 October 2019, Cr Newell reaffirmed his views of Mr Swan albeit with some changes to the wording previously used. Specifically, Cr Newell was quoted as saying in relation to an earlier Conduct Panel determination "*I accept the panel's ruling but do not regret in any way my comments and will continue to support and stick up for valued members of the community*" and "*In hindsight maybe I could have used different wording, but the meaning would be the same.*"

Thirdly, during the 30 October 2019 meeting of the Huon Valley Council, when the Code of Conduct Panel determination relating to the earlier complaint against him was tabled, Cr Newell stated that he accept(ed) the Code of Conduct Panel decision but ha(d) not changed his position in relation to making statements that were the subject of a previous complaint. Further,

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<sup>1</sup> Later changed to "whingers".

\* 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.

Cr Newell referred to a “faceless group of people” which Mr Swan alleges was a reference to him and others.

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

***PART 3 – Use of Office***

*3.1 The actions of a Councillor must not bring the Council or the office of Councillor into disrepute.*

***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*

The Chairperson undertook an initial assessment of the complaint and, on 15 January 2020, advised both the complainant and the respondent as well as the General Manager that further investigation was warranted.

A Code of Conduct Panel was formed to investigate the complaint. Cr Newell was advised of the complaint on 16 January 2020 and was invited to respond.

On 31 January 2020, Cr Newell provided his response, and advised that he was having difficulty understanding the complaint and was unable to provide a considered response. He said he was therefore being denied procedural fairness.

The Panel met on 3 February 2020 to consider Cr Newell's response. The Panel agreed that Mr Swan should be asked to further particularise the complaint to enable both Cr Newell and the Panel to understand the conduct and breaches alleged.

The Chair of the Panel wrote to Mr Swan on 5 February 2020 and requested him to:

- Give a clear and precise statement of each incident where it was alleged Cr Newell had breached the Code and outline the evidence relied on in relation to each breach.
- Give a clear and precise statement of each incident where it was alleged that Cr Newell's behaviour was directed to or at Mr Swan.
- Indicate the time, date and location of each of the alleged breaches and the part of the Code alleged to have been breached.

On 3 February 2020 the Chair wrote to Cr Newell to respond to his concerns as to procedural fairness, and advised Cr Newell that Mr Swan had been requested to clarify his complaint as it related to each of the alleged incidents.

Mr Swan provided further particulars on 11 February 2020. The particulars were forwarded to Cr Newell. On 13 March 2020, Cr Newell provided a brief response to Mr Swan's particulars saying that he “*pleaded not guilty to all three charges*” and that the comments complained of related to “*people worldwide who use social media to attack and put down people*”.

## 2. Investigation

A hearing was held on 8 May 2020. Owing to the restrictions imposed because of the covid-19 virus, the hearing was held by telephone. The Panel sat together and Mr Swan and Cr Newell attended via telephone from separate, private locations. Cr Newell took the oath and confirmed that he was alone. Mr Swan took the oath and confirmed that his wife was present as a support person.

The Chairperson provided an overview of the hearing procedure and listed the documentation before the Panel. These documents had been listed in a letter sent to both parties on 29 April 2020. Both Mr Swan and Cr Newell confirmed that they had received all the listed documents.

Mr Swan spoke first.

In relation to the first incident, alleged to have commenced on 21 August 2019 when Cr Newell became a founding member of, and posted to, a Facebook page entitled "*Call out the Huon valleys (sic) biggest whinger<sup>2</sup>*" Mr Swan stated the following:

- Cr Newell was a founding member of the Facebook group;
- as a member of that group, Cr Newell "liked" comments and posted entries on the page;
- Cr Newell was a member of the group for at least four weeks;
- the group was a "hate" group and some of the postings were disgusting.

Mr Swan referred the Panel to various screen shots of the Facebook page to support his allegations.

The posts on the Facebook page note Cr Newell as a founding member.

Cr Newell was invited to question Mr Swan and respond to the Facebook allegations.

Cr Newell said that he was approached by Mr Luke Woolley, who he described as a friend, about joining a Facebook discussion group he was setting up. Mr Woolley told Cr Newell that the group was called "*Call out the Huon Valley's biggest whinger*". Cr Newell said that he joined the group but did not understand about being a founding member as he did not have to use a password to access the group. Cr Newell said he thought the group would be a bit of *light-hearted fun*.

Cr Newell said that he was a member of about 114 Facebook groups at the time, which included charity, football and social groups. Cr Newell said that about four weeks after becoming a member of the group his daughter brought some content to his attention. He said that there was some disturbing stuff posted on the site and it was then that he withdrew from the group. Cr Newell admitted that sometimes he had commented on the Facebook page but had never "posted" to it. He subsequently stated that he had posted on the page once, but not in relation to Mr Swan. He told the Panel he was no longer a member of the group and did not understand how he became a "founding member" of the Facebook group.

In relation to the second incident, where the Mercury newspaper online edition on 26 October 2019 and in the Mercury newspaper on 27 October 2019 quoted Cr Newell as saying in

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<sup>2</sup> Later changed to "whingers".

relation to an earlier Conduct Panel determination *"I accept the panel's ruling but do not regret in any way my comments and will continue to support and stick up for valued members of the community,"* and *"In hindsight maybe I could have used different wording, but the meaning would be the same"*, the Panel was provided with a copy of the relevant Mercury article.

Cr Newell did not dispute the accuracy of the quotes attributed to him.

Cr Newell told the Panel that he was approached by the Mercury offering him an opportunity to respond to comments made by Mr Swan. Cr Newell said that he believed his comments were not targeted at Mr Swan and that if Mr Swan was offended by them then *"that's life"*. Cr Newell said that he received dozens of messages of support after the Mercury article.

He repeated the views that he expressed to the Mercury several times during the course of the hearing.

In relation to the third incident, the comments alleged to have been made by Cr Newell at a Huon Valley Council meeting on 30 October 2019, the Panel was provided with a recording of the relevant meeting.

Cr Newell did not dispute the accuracy of the recording.

The Panel listened to the recording and notes the following comments made by Cr Newell:

- "I accept the Panel's decision although, and as I told the Panel, I would definitely not change my time over again ...the moment we say anything we get shot down by this faceless group."
- "I did make those comments and I stick by those comments. I'm sick of having to put up with these gutless people" (warning from the Mayor)"I'm sick of having to put up with these faceless people that sit behind keyboards they never put their hands up for public office they do nothing but knock."
- "I stand by my comments. I'm sorry I wish I could have used different words but the meaning would have been exactly the same and I stick by them."

Mr Swan said he found Cr Newell's description of members of the Huon Valley community as *"gutless"* and *"faceless"* offensive and that Cr Newell's statements had a negative impact on him.

In relation to the third incident, Cr Newell said that he had the support of all, but two, fellow councillors at the Council meeting when the determination was tabled. He told the Panel that the Mayor cautioned him when he *"probably went a bit far"*, presumably when he had initially used the word *"gutless"*, but that he had nevertheless received nothing but positive messages about his statements at the Council meeting.

In his concluding remarks, Cr Newell said that he believed that Mr Swan has a vendetta against him, which Mr Swan denied. Cr Newell said that he will always be *"truthful and that will get him in trouble from time to time"*. He said that he only joined the Facebook group as a bit of *"light-hearted fun"*, but when he saw *"the other side of the fence"* he discontinued.

Cr Newell said he believed that he was not a councillor 24 hours a day and not constantly on the job. He said that he *"never posts as a councillor"* on social media.

Cr Newell told the Panel, on several occasions, that he stood by the comments that were the subject of the previous Code of Conduct complaint, although he said he may have used *different wording*. The words that were the subject of the previous Code of Conduct complaint were “bloody coward” and “parasite”.

Cr Newell did not specify what other words he might have used in substitution for those words. It is difficult for the Panel to conceive of any synonyms for “bloody coward” or “parasite” that would not cause a reasonable person offence.

The Panel noted that whilst Cr Newell stated that he accepted the previous Panel’s determination, in relation to which he received a caution, his statements to the Mercury newspaper and the October 2019 Council meeting indicate otherwise.

Cr Newell told the Panel that he represents “all of his community” but his public statements and membership of an obviously divisive Facebook group appear somewhat antithetical to that position.

#### **4. Determination**

In relation to the first incident, Cr Newell’s involvement in the “Call out the Huon Valleys (sic) biggest whinger” Facebook group, the Panel determines that Cr Newell has breached Parts 3.1 and 7.1(b) of the Code.

It is the Panel’s view that:

- a) in joining the Facebook group;
- b) commenting on the Facebook page, albeit only once; and
- c) remaining a member of that group for approximately four weeks

Cr Newell brought the Council or the office of Councillor into disrepute and caused Mr Swan offence or embarrassment.

Cr Newell acknowledged that he joined and participated in the Facebook group for approximately four weeks. The Panel is of the view that the name of the Facebook group should have made it obvious to Cr Newell that the express purpose of the group was to identify particular individuals within the Huon Valley community and make them the focus of negative attention. The Panel does not accept Cr Newell’s assertion that he believed the group would be “*light-hearted and a bit of fun*”. It is difficult to conceive how identifying particular individuals within a community as “whingers” could reasonably be construed as either “light-hearted” or “a bit of fun” – not least of all for those identified.

The Panel further finds that Cr Newell’s participation in the Facebook group did cause a reasonable person, namely Mr Swan, offence or embarrassment.

Cr Newell contends that he joined the group in his private capacity and not as a Councillor and that as such, his conduct could not amount to a breach of the code of conduct. The Panel does not accept Cr Newell’s contention.

The Act includes amongst the functions of a Councillor:

- *representing the community* (s28(1)(a));

- *acting in the best interests of the community (s28(1)(b); and*
- *facilitating communication by the council with the community (s28(1)(c).*

Merely because a councillor does not expressly link his/her actions to his/her role as councillor at any given time does not necessarily mean that he/she is not carrying out one or more of the functions of a councillor. The Act provisions cited above are expressed broadly. Had Parliament intended the functions of a councillor to be limited to those instances when there was an overt or direct link to Council business it could be expected to have used words to that effect. It did not.

Parts 3.1 and 7.1 of the Code of Conduct are also expressed in wide terms. They refer to the actions of a Councillor. There are no words of limitation included in either provision. Elsewhere within the code words of limitation are used, for example, in connection with making a decision as part of a planning authority or when carrying out his/her public duty. The use of words of limitation in other parts of the code suggest that Parliament intended them not to apply in Parts 3.1 or 7.1.

It is the Panel's view that in each of the three instances the subject of the complaint Councillor Newell was acting in the capacity of councillor.

In relation to the second and third incidents, Cr Newell's comments to the Mercury newspaper in October 2019 and his comments at the Huon Valley Council meeting on 30 October 2019, the Panel determines that Cr Newell breached Part 7(1)(b) of the Code.

The Panel determines that Cr Newell's statements caused a reasonable person, namely Mr Swan, offence or embarrassment.

In relation to the alleged breaches against Part 7.1 (a) of the Code, the Panel is not satisfied that a breach is made out and determines that that part of the complaint be dismissed. Specifically, the Panel is not satisfied that Cr Newell's conduct amounted to *treatment*.

In relation to the alleged breaches against Part 7.1 (c) of the Code, the Panel is not satisfied that Cr Newell's conduct amounts to bullying or harassment (at this stage) and determines that that part of the complaint be dismissed.

## 5. Sanction

On 21 May 2020, the Panel wrote to Cr Newell and advised him of those parts of the complaint that had been upheld and offered him an opportunity to comment on sanction.

The same day Cr Newell responded saying he "was very disappointed if found guilty of any breaches" but in the event of the complaint being upheld, he thought a caution was an appropriate sanction.

The Panel met on 26 May 2020 to determine sanction.

The Panel is of the view that Cr Newell's participation in the Facebook group entitled "Call out the Huon Valleys (sic) biggest whinger(s)", demonstrated poor judgment and was inconsistent with his role as Councillor. Whilst Cr Newell advised the Panel that he understood he represented the whole of the Huon Valley community, his actions in joining and participating in what was obviously a divisive local Facebook group demonstrated otherwise. His statements to

the Mercury newspaper and the October 2019 council meeting also revealed a failure to understand his role as a representative of the community. Cr Newell's conduct was made worse by the targeted and insulting nature of his statements at the October 2019 Council meeting.

Cr Newell demonstrates limited insight into his behaviour. By repeatedly stating that he does not regret statements previously found to have been a breach of the Code of Conduct, he shows little regard for either the Code or the Panel.

Cr Newell has previously been cautioned by a Panel in respect to his statements about Mr Swan alluded to in this complaint. Cr Newell has shown minimal remorse for his conduct. In the circumstances the Panel considers that it is appropriate to impose a sanction that will impress upon Cr Newell the importance of elected members complying with the Code of Conduct.

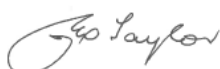
It is the Panel's decision that Cr Newell be suspended for a period of six weeks from the date this determination is tabled at the Council meeting and that he is to undertake individual counselling in relation to the role of a councillor. In particular Cr Newell is to have counselling addressed to the representative nature of the role and the tension between the role of councillor and private citizen. The counselling is to be commenced within six weeks from the tabling of the determination at the Council meeting.

## 6. Delay in determining complaint

Section 28ZD (1)(a) of the *Local Government Act* 1993 (the Act) requires the determination to be made within 90 days after the initial determination by the Chairperson to investigate and determine the complaint or provide reasons why this requirement could not be met. In this instance the 90-day period concluded on 16 April 2020. Reasons for the delay including the need to seek clarification from Mr Swan and a request by Cr Newell for an extension to his response following the provision of Mr Swan's additional information. Further delays occurred in arranging Panel meetings and establishing a hearing date due to restrictions imposed in relation to the covid-19 virus.

## 7. 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



Gretel Chen  
Legal Member



Liz Gilliam  
Member