

Local Government Act 1993

CODE OF CONDUCT PANEL DETERMINATION REPORT

GLENORCHY CITY COUNCIL CODE OF CONDUCT

Complaint brought by Alderman Jan Dunsby against Alderman Kelly Sims

Code of Conduct Panel

- Lynn Mason (Chairperson),
- Sally Darke (Local Government Member)
- Sam Thompson (Legal Member)

Date of Determination: 27 May 2021

Content Manager Reference: C21834

Summary of the complaint

Ald Dunsby's complaint dated 1 February 2021 was referred to the Chairperson for initial assessment on 10 February 2021.

The complaint alleged that a series of emails was sent between Aldermen and Glenorchy City Council staff from 19 January 2021 to 22 January 2021. The email series concerned the procedure to be used to enable Aldermen to attend an upcoming Glenorchy Planning Authority meeting to be held on 21 January 2021. Amongst these emails were two from Ald Sims wherein, it was alleged, Ald Sims failed to treat Ald Dunsby fairly and caused her offence or embarrassment. It was further alleged that these emails constituted bullying and/or harassment of Ald Dunsby. It is those two emails only that were the subject of Ald Dunsby's complaint.

The Code in force at the time of the alleged breaches was adopted by Council in January 2019. The sections of the Code which Ald Dunsby alleged Ald Sims breached are:

PART 7 – RELATIONSHIPS WITH COMMUNITY, ELECTED MEMBERS AND COUNCIL EMPLOYEES

7.1. 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 Panel's task is to assess Ald Sims' two emails, which are the subject of the complaint, against the Code. The Panel must determine whether the two emails, either taken individually or in combination, breached the Code in the ways alleged by Ald Dunsby.

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 complaint substantially related to a contravention of The Glenorchy City Council's Code of Conduct, namely Parts 7.1 (a), (b) and (c);

- the complaint was not frivolous, vexatious or trivial;
- 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 that the complaint should be referred to a Panel for investigation. The complainant, respondent councillor and the General Manager were notified of the outcome of the initial assessment by letter dated 2 March 2021.

The Complaint

During most of 2020, Glenorchy City Council met via electronic means in response to the restrictions placed on all Tasmanian residents by the COVID-19 pandemic. At a council workshop on 14 December 2020, the Mayor advised that even though the notices issued by the Tasmanian Government under the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* were still in place, she wanted face-to-face meetings to recommence from January 2021. Ald Dunsby requested that, as she was physically unable to attend the council chambers, she be allowed to participate by Zoom in a meeting of the Glenorchy Planning Authority (GPA), to be held on 21 January 2021. This request was approved as the emergency provisions still allowed for electronic attendance at meetings.

In response to an email from the Council's executive officer to all aldermen, which stated that the GPA meeting was to be held face-to-face, with Ald Dunsby attending via Zoom, Ald Sims emailed several aldermen and members of staff at 11.04 am on 20 January 2021. Ald Sims objected to what she called *special treatment* for Ald Dunsby, and described the situation as *one rule for Jan and one rule for me*. This was the first email the subject of the complaint. Ald Dunsby emailed Ald Sims at 1.19 pm on 22 January 2021, asking her to retract her email and provide a written apology for what Ald Dunsby described as *this appalling attack on your colleagues*.

Subsequently at 2.45 pm on 22 January 2021 Ald Sims emailed Ald Dunsby, accusing her of having made *defamatory, nasty, offensive and disrespectful comments* to her over the previous three years. Ald Sims said that she was disappointed in the way Ald Dunsby had spoken at the council workshop on 14 December 2020, when the matter of face-to-face attendance was discussed, and also disappointed with *the way decisions like this are made* (about how meetings were to be conducted in 2021). This was the second email the subject of the complaint.

The text of the two emails is set out later in this report.

Investigation

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

On 2 March 2021 Ald Dunsby and Ald Sims were notified by the Executive Officer that the complaint was to be investigated by a Code of Conduct Panel (the Panel). As part of that notification, the parties were informed that copies of relevant information provided to the Panel would be provided to both the complainant and the respondent.

The Panel met on 9 March 2021 to commence its investigation.

On 10 March 2021 the Panel requested Ald Dunsby to clarify her complaint, viz., which exact words or sentences in each of the emails written by Ald Sims (the subject of the complaint) constituted breaches of the Code, and precisely which clause or clauses of the Code were breached by these

¹ Section 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.

words or sentences. On 17 March 2021 the Panel received a partial response to this request. This was sent to Ald Sims.

On 29 March 2021 Ald Dunsby was asked to stipulate in writing exactly which clauses of the Code she alleged to have been breached by the words that Ald Sims used in the two relevant emails. The Panel received her response on 30 March 2021, and this was sent to Ald Sims.

On 12 April 2021 the Panel received Ald Sims's response to the complaint. This was sent to Ald Dunsby. The Panel met on 20 April 2021 to consider the material provided by Ald Dunsby and the response from Ald Sims, and determined to conduct a hearing into the matter. On 22 April 2021 Ald Dunsby and Ald Sims were informed that a hearing was to take place in Hobart on 13 May 2021, and were provided with a list of the materials which the Panel would take into account in its investigation. This included an audio recording of the council workshop held on 14 December 2020.

Ald Dunsby advised the Panel that owing to health issues restricting her mobility, she was unable to attend a hearing in person but could attend via Zoom. The Chairperson agreed to allow this. At 2.50 pm on 11 May 2021 Ald Sims advised the Executive Officer that she was unwell and would be unlikely to be able to attend the hearing on 13 May unless she could do it remotely (via Zoom). The Executive Officer advised Ald Sims that the Chairperson had agreed to defer the hearing until Ald Sims felt well enough to attend. Ald Sims responded that she would prefer to proceed with the hearing if she could attend via Zoom. The Chairperson agreed to this.

By letter dated 12 May 2021 Ald Sims was asked to make a submission on the sanction which might be imposed by the Panel in the event that any part of the complaint was upheld. Ald Sims did not provide a written submission and when asked for submission during the hearing, Ald Sims declined to do so.

Material considered by the Panel

Following the parties being advised that the Panel would conduct a hearing, Ald Dunsby and Ald Sims provided further material to the Panel. The Panel confirmed that each party had received all of the documentation set out below.

The Panel's investigation was based on the following documentation:

- The Glenorchy City Council *Aldermanic Code of Conduct*, January 2019;
- the complaint from Ald Dunsby, submitted by email to the General Manager on 1 February 2021, attached to a Statutory Declaration, dated 1 February 2021, including specific reference to
 - an email from Ald Sims to Bryn Hannan, cc Aldermen, 20 January 2021 at 1104 (the first email the subject of the complaint); and
 - an email from Ald Sims to Ald Dunsby, cc Aldermen and the Council's Director of Strategy and Development and the Council's Director of Corporate Services, 22 January 2021 at 1445 (the second email the subject of the complaint);
- the email from Ald Dunsby to the Panel, received 17 March 2021;
- material re specifics of the complaint from Ald Dunsby, received 30 March 2021;
- response from Ald Sims, attached to a Statutory Declaration, dated 12 April 2021;
- excerpt from audio recording of the council workshop held on 14 December 2020;
- email from Ald Sims to the Executive Officer, Code of Conduct Panel, sent 0936 on 8 May 2021; and
- email from Ald Sims to the Executive Officer, Code of Conduct Panel, sent 1436 on 10 May 2021.

The Panel's Executive Officer ensured that each party had those materials. Contrary to a submission made by Ald Sims, it was appropriate for the materials upon which she wished to rely to be provided to Ald Dunsby in order to ensure that the hearing was procedurally fair and the Panel complied with the rules of natural justice. The Panel is satisfied that each party had an opportunity to provide and rely on material, to give evidence and cross-examine the other, and to make submissions.

The hearing was held via Zoom on 13 May 2021. No additional witnesses were called. Ald Dunsby and Ald Sims each took an affirmation, and both parties stated under oath that they were not recording the hearing in any way. At the outset of the hearing, the parties were reminded that the hearing would focus on the two emails which were the subject of the complaint, and that the investigation was not an exploration of other issues which were raised in material provided to the Panel. The parties were asked to be respectful to each other and to the Panel members, and to be courteous in any future communications with the Executive Officer.

Determination

Pursuant to section 28ZI (1)(c) of the Act, the Code of Conduct Panel upholds part of the complaint against Ald Sims, and dismisses part of the complaint.

The Panel considered each of the allegations in the complaint and whether any or all of the words and sentences used in Ald Sims's emails were unfair to Ald Dunsby, whether a reasonable person would be offended or embarrassed by the content of the emails, and whether, by sending the emails, Ald Sims bullied or harassed Ald Dunsby. These are the tests established by Part 7.1(a), (b) and (c) of the Code. The Panel has considered each of these in turn. Before addressing each allegation it is appropriate to make some general observations.

Ald Sims referred frequently to what she called the culture of the council. She stated in her response to the complaint that her emails were factual and reflected the *poor culture and communication that has led at Glenorchy City Council for many years*. Ald Sims considered that the Mayor and/or the General Manager had failed to adequately communicate the options available to aldermen to attend meetings, and that the decision to allow Ald Dunsby to attend the GPA workshop via Zoom was contrary to a decision reached during the council workshop on 14 December 2020.

The Panel noted that while there was discussion at the 14 December workshop about the proposed return to face-to-face meetings, no decision was made clearly defining the process to be used by aldermen so long as the COVID-19 emergency provisions remained in place.

Ald Sims considered that Ald Dunsby had a duty to inform other aldermen that she intended to attend the GPA workshop via Zoom, so that she (Ald Sims) would be aware that the Zoom option might also be available to herself.

The Panel disagrees with Ald Sims's view. Information about how meetings or workshops are to be conducted should be provided by the Mayor or council officers. It is not an individual councillor's responsibility to keep other aldermen informed on such matters. Even if it were an individual councillor's responsibility, and even if Ald Dunsby failed to fulfil that responsibility, that would not justify the tone of Ald Sims's two emails.

Moreover, Ald Sims's emails were sent to other councillors and members of staff. The emails targeted Ald Dunsby and addressed her particular situation. That Ald Sims did so was unnecessary and was likely to contribute to any unfairness or offence felt by Ald Dunsby.

When questioned during the hearing, Ald Sims said that she had *been wronged* by the Mayor and/or the General Manager. Ald Sims was frustrated with the council generally, and with the Mayor in particular. Ald Sims was unhappy with the council's culture. She said that she meant no offence to Ald Dunsby but was *not sorry* for her two emails. Ald Sims contended that the (intended) effect that her emails had, namely, to improve the council's culture, outweighed the (negative) effect of calling someone (in this case, Ald Dunsby) out. The Panel disagrees.

It is against this background that the two emails the subject of Ald Dunsby's complaint are to be considered.

The first email was from Ald Sims, using her Council email address, to an administrative officer at the Council. It was in reply to an email from the administrative officer regarding attendance at the GPA meeting. The email is reproduced below, with the recipients' email addresses redacted:

Ald Sims's email to Ald Dunsby and others, 20 January 2021, 11.04 am

From: Ald Kelly Sims

Date: 20 January 2021 at 11:04:10 am AEDT

To: Bryn Hannan

Cc: Ald Kristie Johnston, Bec Thomas, Ald Jan Dunsby, Sam Fox, Ald Angela Ryan, Marian Maclachlan

Subject: Re: GPA meeting

Yes I have a concern, there appears to be one rule for Jan and one for the rest of us. This was discussed buy all and the outcome was that individuals do not get special treatment and must attend in person.

I recall Jan stating it should be ok for her and Peter when it suits them and the Mayor, but thats clearly ignoring the rights of others. Who's to judge on how ill we are and who gets to access fair treatment? We also raised the importance of being healthy when representing the community (mentally stable & not physically ill). Why was this dismissed after the discussion? Is it one rule for Jan and one for me perhaps, as that was the tone of the discussion on the day... if Peter and Jan need to seek approval from the Mayor... what about the rest of us.. was that to intentionally ensure we couldn't access the same fair process? That comment was offensive, it was deliberately promoting and even driving bias!

It's discrimination to state that only Jan (and/or Peter) can call in to attend online and the rest of us must attend in person. I know it was facilitated this way for a reason and recall the comments made, but some of those comments are classed as bullying, discrimination or bias treatment of others - if not extended to all.

Regards

Kelly Sims

Ald Dunsby then responded to Ald Sims's email. The Panel has noted Ald Dunsby's response above.

On 22 January 2021 Ald Sims replied to Ald Dunsby, copying in the other recipients (set out above). That email is set out below:

Ald Sims's email to Ald Dunsby and others, 22 January 2021 at 2.45 pm

Dear Jan

Perhaps then you should provide a written apology for the defamatory, dismissive, nasty, offensive and disrespectful comments you have made of me over the past 3 years. I've had the bullying (vote blocking etc) aimed at me from a group in the public eye for quite some time now. A certain group in this team don't appear to value (like) my opinions, yet they are often implemented in the end - like this one... go figure. I do believe we should be inclusive and people can attend if physically and mentally able too, I don't agree in making one rule to suit a pair of people that excludes others with various or private conditions etc. The rule suits you and peter as planned for and discussed on the day. Its apparent this was since discussed further and decided upon without the group - afterwards.

You said at the workshop that this mechanism should be for you and peter and not for others that don't have the same type of issues... what criteria did you have in mind. The discussion on the day made your views clear.

I have a collection of evidence for the lead up to this conversation and why I am disappointed at the way you spoke and the way decisions like this are made.

Happy to discuss it via phone if you like, I didn't think it would be of value considering the treatment ive an countered form you to date -not overly kind or warm!

Regards
Kelly Sims
Alderman

As noted above, the complaint alleged that these emails breached Part 7.1 of the Code.

1. Clause 7.1 (a) A councillor must treat all persons fairly

The Panel determines that these emails treated Ald Dunsby unfairly. The statement that *the outcome was that individuals do not get special treatment and must attend in person* (email 20 January 2021) is factually incorrect. While the issue of mental and physical capacity was raised at the workshop on 14 December 2020, there was no suggestion that physical infirmity would preclude attendance at council meetings and workshops as long as the COVID-19 emergency provisions remained in place. The emails also imply that Ald Sims has been discriminated against by an unspecified action of Ald Dunsby.

In the last sentence of the second paragraph of the email of 20 January 2021, Ald Sims refers to a comment purportedly made by Ald Dunsby at the 14 December 2020 workshop. Ald Sims stated in the hearing that Ald Dunsby had said in the workshop on 14 December 2020 that it was important that any procedures relating to being able to attend Council via Zoom should not be 'misused'. Ald Sims interpreted this as an attack on herself, and accused Ald Dunsby of bullying and discrimination and 'bias treatment'. The audio recording of the workshop does not support this interpretation, and Ald Dunsby denied that she had targeted Ald Sims with that remark.

Ald Sims considered that Ald Dunsby should apologise to her for what she called the *defamatory, dismissive, nasty, offensive and disrespectful comments you have made of me over the past 3 years*. No evidence was provided to support this statement.

Ald Sims alleged that a decision contrary to the discussion at the workshop on 14 December 2020 was made subsequent to the workshop, and implied that this alleged decision provided unwarranted favourable treatment for Ald Dunsby and Ald Bull. The Panel determines that no evidence was presented which supported this allegation.

For these reasons the Panel determines that by sending the two emails Ald Sims treated Ald Dunsby unfairly and breached clause 7.1 (a) of the Code.

2. Clause 7.1 (b) A councillor must not cause any reasonable person offence or embarrassment

The Panel finds that Ald Dunsby was offended by the strong implication that she sought preferential treatment unavailable to other aldermen, for her own benefit. Ald Sims's allegation was not substantiated by the material provided to the Panel nor the statements made in the hearing. The Panel determines that the unfounded accusation that Ald Dunsby made offensive comments in the workshop on 14 December 2020, comments which *promoted bias*, would be offensive and embarrassing to Ald Dunsby.

The Panel determines that a reasonable person would be offended and embarrassed by the unsubstantiated allegations in the email of 22 January 2021 about unnamed aldermen, and would be offended and embarrassed by the inference that preferential treatment would be provided to two aldermen, including Ald Dunsby, to the detriment of others.

The Panel determines that sending the two emails to the aldermen and to various members of the staff of Council caused embarrassment for Ald Dunsby, and therefore breached the Code.

For these reasons, by sending the two emails Ald Sims caused Ald Dunsby offence and embarrassment and breached clause 7.1 (b) of the Code.

3. **Clause 7.1 (c) *A councillor must not bully or harass any person***

In considering whether Ald Sims, by sending the two emails, was in breach of clause 7.1(c) of the Code, the Panel found that, most frequently, bullying is considered to be a pattern of recurring behaviour in which one party behaves unreasonably towards another, usually involving behaviour which is intimidating, humiliating, degrading, or ridiculing another person. Frequently there is an imbalance of power in the relationship. In this matter, there is not an imbalance of power, and the complaint is confined to behaviour over only three days, and two emails.

Harassment typically involves a course of conduct that causes annoyance or upset to a person, that is persistent over a period of time. It will be more clearly apparent where it includes aggressive pressure or intimidation. Again, this complaint is confined to behaviour over only three days, and two emails, and the Panel does not find that this behaviour constitutes harassment.

This is not to say that a single instance or action could not give rise to bullying or harassment. However, the Panel finds that these two emails, while intemperate and unnecessary (and, as found above, unfair and offensive) did not constitute bullying or harassment.

The Panel therefore determines that none of the statements made in the emails of 20 January 2021 and 22 January 2021 constitute bullying or harassment of Ald Dunsby, and therefore do not breach clause 7.1(c) of the Code.

Reasons for determination

For the reasons stated above, pursuant to section 28ZI(1)(c), the Panel finds that Ald Sims breached Part 7.1(a) and (b) of the Code and upholds that part of the complaint. The Panel finds that Ald Sims did not breach Part 7.1(c) of the Code, and dismisses that part of the complaint.

In investigating this complaint, the Panel found that Ald Sims's frustration over what she saw as unfair and biased treatment of herself by some aldermen and council officers led her to attack council's procedures through outspoken criticism directed at Ald Dunsby. Ald Sims considered that she should have been afforded the opportunity to attend the GPA workshop via Zoom. The fact that this was not arranged was not Ald Dunsby's fault, and Ald Sims should have addressed the issue through the Mayor or the General Manager.

Ald Sims consistently stated that she did not believe that her emails of 20 and 22 January were unfair and offensive to Ald Dunsby, and consistently blamed Ald Dunsby, the Mayor, and other aldermen for what she considered to be bias and discrimination against herself. There does not appear to have been any attempt by Ald Sims to address the matter directly with the Mayor, whose role it is to ensure that aldermen are treated equitably and are all aware of facilities available to them to assist them in carrying out their roles. In short, Ald Sims's two emails unfairly blamed and singled out Ald Dunsby. During the course of the hearing, Ald Sims displayed a lack of insight into her own conduct, and instead blamed others for her conduct.

Sanction

In accordance with section 28ZI (2) of the Act, the Code of Conduct Panel may impose one or more sanctions on Ald Sims. The Panel takes into consideration that this is the first time Ald Sims has had a complaint upheld (in whole or in part) against her. The starting point is whether the Panel should impose a sanction. For the reasons above, the Panel is satisfied that it should.

Pursuant to section 28ZI(2)(a), the Panel imposes a caution on Ald Sims.

Pursuant to section 28ZI(2)(c), the Panel requires Ald Sims to apologise to Ald Dunsby for treating her unfairly, and for causing her offence. This apology is to be made without reservation at the ordinary Council meeting at which this report is tabled. In the event that either Ald Dunsby or Ald

Sims does not attend that meeting, the apology is to be made by Ald Sims at the next council meeting attended by Ald Dunsby.

The Panel considered requiring Ald Sims to undertake disability awareness training, but determines that given statements made by Ald Sims regarding her own knowledge of this area, and training already provided to Glenorchy City Council aldermen, this was not warranted.

Right to review

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



Lynn Mason
Chairperson



Sam Thompson
Legal Member



Sally Darke
Community Member

DATE : 27 May 2021