

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.

Local Government Act 1993

CODE OF CONDUCT PANEL DETERMINATION REPORT

WEST TAMAR CODE OF CONDUCT

Complaint brought by Ms Tracey Kelly against Councillor (Cr) Christine Holmdahl

Code of Conduct Panel

- Jill Taylor, (Chairperson),
- David Sales (Local Government Member)
- Amber Cohen (Legal Member)

Date of Determination: 2 September 2023

Content Manager Reference: C27790

Summary of the complaint

A code of conduct complaint was submitted by Ms Tracey Kelly to the General Manager, West Tamar Council on 27 March 2023.

The complaint alleges that Cr Christine Holmdahl breached the following parts of the West Tamar Council Code of Conduct, amended on 19 March 2019.

Ms Kelly alleged that Cr Holmdahl breached Part 8.2 of the Code which states –

“A councillor must not knowingly misrepresent information that he or she has obtained in the course of his or her duties”.

As per the *Local Government Act 1993* (the Act), Schedule 8A – Savings and Transitional Provisions, the Code of Conduct Panel is required to determine the complaint under the West Tamar Council’s former Code of Conduct, amended on 19 March 2019 and which was in force at the time of the alleged breach of the code of conduct. West Tamar Council approved a new version of the Code of Conduct on 21 February 2023 which postdates the dates of the incidents alleged in Ms Kelly’s complaint.

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 advised that she did not contact the councillor to attempt to resolve the complaint as she was on workers compensation and felt that any contact would negatively impact on her mental health. The Chairperson accepted this as a reasonable explanation for not endeavouring to resolve the matter prior to lodging the complaint.
- the complaint substantially related to a contravention of Part 8.2 of the West Tamar Council’s Code of Conduct.
- the complaint should not be dismissed on the grounds that it was frivolous, vexatious or trivial. The reason for this conclusion was that if Cr Holmdahl was aware of the extent of the “toxic work culture” in the Council at the time public statements were attributed to her, it may constitute a breach of the Code.

- having made enquiries of the Code of Conduct Executive Officer, there was no relevant direction under section 28ZB(2) or 28ZI of the Act that would apply to the complainant and the complaint.¹

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

The complainant, respondent councillor and the General Manager were notified of the outcome of the initial assessment by letter dated 6 April 2023.

Investigation

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

Cr Holmdahl responded to Ms Kelly's complaint in a statutory declaration dated 5 May 2023 in which she stated that when approached by the Examiner newspaper in September 2022 she advised that she was not aware of the extent of the staff dissatisfaction and in October 2022, she did not make any comments directly to the Examiner but rather through the Council's media officer that she "had no further comment".

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

1. Complaint by Ms Kelly under cover of a statutory declaration dated 20 March 2023
2. The then current West Tamar Code of Conduct last amended by Council on 19 March 2019
3. Statement by Cr Holmdahl under cover of a statutory declaration dated 5 May 2023 in response to complaint by Ms Kelly
4. Witness statement by Jessica Greene under cover of a statutory declaration dated 19 May 2023
5. Witness statement by Peter Kearney under cover of a statutory declaration dated 18 May 2023, with attachments
6. Witness statement by Kathleen Milbourne under cover of statutory declaration dated 19 May 2023, with attachments
7. Witness statement by Joy Allen under cover of statutory declaration dated 19 June 2023
8. Witness statement by Cr Ricky Shegog under cover of statutory declaration dated 19 May 2023. Cr Shegog submitted a further statutory declaration dated 30 August 2023 with editorial changes to his original statement
9. Witness statement by Julie Tolputt under cover of statutory declaration dated 16 May 2023 with file notes attached
10. Witness statement by Andrew Beeston under cover of statutory declaration dated 18 May 2023 with photostop of a message he had sent to Cr Holmdahl via her Facebook page
11. Statement by Cr Holmdahl under cover of a statutory declaration dated June 2023 responding to witness statements submitted by Ms Kelly, with attachments –
 - a. Council Bullying, Harassment and Equal Employment Opportunity Policy dated 20 August 2019 and
 - b. Procedures for dealing with Council Bullying, Harassment and Equal Employment Opportunity policy dated 20 August 2019.

Confidential report not to be provided to Complainant -

Copy of redacted Cohorte report dated July 22 under cover of statutory declaration by Cr Holmdahl dated July 2023.

Following Cr Holmdahl's response to Ms Kelly's complaint, on 20 May 2023 Ms Kelly submitted seven (7) witness statements as listed in the above documents. Copies of the witness statements were forwarded to Cr Holmdahl who provided comment in respect to each statement under cover of a statutory declaration dated June 2023. Cr Holmdahl subsequently advised on 16 August 2023 that she

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.

did not require any of Ms Kelly's witnesses to be available at the hearing for the purposes of cross examination.

The essence of Ms Kelly's complaint was that Cr Holmdahl knowingly misrepresented the circumstances pertaining to staffing issues at the Council when statements attributed to her were reported in the Examiner newspaper on 22 September 2022 and 20 October 2022. Based on the written evidence, it was not clear to the Panel what Cr Holmdahl knew and when she became aware of the extent of the staffing issues. The Panel decided that it would request a copy of the Cohorte report on the basis that it would give validation to the sequence of events developing within the Council office and the content of the report may be relevant to the complaint. A redacted version of the report was forwarded under cover of a statutory declaration made by Cr Holmdahl in July 2023. The Panel was able to confirm key dates in terms of the contracting of Cohorte, the delivery of the report and Council's consideration of it. The panel accepted the statutory declaration annexing the report would be treated as protected under section 338A of the Act and that any reference to its content in the determination report should be included only in an addendum to the report pursuant to section 28ZJ(2).

Hearing

As per section 28ZH of the Act the Code of Conduct Panel held a hearing on 22 September 2023 at the Executive Building, 15 Murray Street, Hobart. Both Ms Kelly and Cr Holmdahl attended virtually. Ms Kelly was supported by Ms Susan Anthony and Cr Holmdahl was supported by Cr Greg Kieser (Mayor, George Town Council).

Ms Kelly told the hearing that she was a huge supporter of Cr Holmdahl when she was first elected as Mayor but felt let down by Cr Holmdahl and Council when she needed support during the period of leave during her workers' compensation claim.

It was Ms Kelly's opinion that the General Manager was aware of bullying in the workplace and that Cr Holmdahl was also aware of this because she and the General Manager sought legal advice in April/May 2021 prior to Ms Kelly's absence prior to June 2021. Cr Holmdahl refuted this statement, saying that at that time she was unaware of the extent of the staff discontent but had heard "chatter". She said this made her uncomfortable, as she hadn't experienced this type of issue at Council in the past. Cr Holmdahl stated that she was inexperienced in dealing with staffing dissatisfaction. She said that prompted her to think Council needed to seek general legal advice on how to deal with such matters and she advised the General Manager accordingly.

Ms Kelly acknowledged that Cr Holmdahl was unaware of the sexual harassment allegations until after the review and staff survey were completed but contended that Cr Holmdahl was aware of the level of staff dissatisfaction. Ms Kelly came to this conclusion because she knew of three staff who had approached Cr Holmdahl with concerns about the staffing situation. Cr Holmdahl acknowledged that she spoke to three staff members but did not query them about the details of their concerns, rather suggesting that they discuss their concerns with the General Manager.

Once Ms Kelly lodged her workers compensation claim, the legal advice to Council was not to make contact directly with Ms Kelly until the claim was resolved, nor to discuss the matter of staff dissatisfaction until the Cohorte report was delivered. Cr Holmdahl said she complied with this legal advice and therefore did not gain any further information regarding the staffing situation. In light of this advice, Cr Holmdahl said that there was no discussion in Council meetings or workshops regarding the staffing situation until after the Cohorte report was delivered.

When invited to respond to Ms Kelly's complaint Cr Holmdahl said that she stood by the information she provided in her statutory declarations claiming that she had not knowingly misrepresented the staffing situation. Cr Holmdahl submitted that the following statement attributed to her which appeared in the Examiner of 22 September 2022 was accurate-

"until we did this survey, we did not know the extent of the sort of claims that staff are making"

Cr Holmdahl added that Council staff wanted the Cohorte report to remain confidential, although someone had leaked it to the Examiner. This prompted a journalist at the Examiner to contact her again in October

2022. Cr Holmdahl advised that she did not make any statement to the Examiner on this occasion, but rather advised the Council Communication Manager, that she had no further comment.

In her final submission, Ms Kelly said that it was clear Cr Holmdahl knew of the staffing situation in April/May 2021 when she confirmed that she in consultation with the General Manager sought a legal opinion on how to manage the situation. The Panel concluded that this was Ms Kelly's opinion, but no evidence was produced that demonstrated Cr Holmdahl had anything other than a general knowledge that there was a serious level of staff dissatisfaction within the Council.

In her final submission, Cr Holmdahl said that whilst she was aware of some dissatisfaction among the staff in Council, it was all circumstantial until such time as the Cohorte report was presented to Council and at that point staff had requested that the report remain confidential. Therefore, Cr Holmdahl did not consider it her role to make any public statement other than "no comment."

Witness statements

A total of seven (7) witness statements were forwarded to the Panel by Ms Kelly. These were forwarded to Cr Holmdahl and she responded to these in her statutory declaration in June 2023.

The following is a summary of each of the witness statements and Cr Holmdahl's response:

Cr Jessica Greene stated that she became aware that there was some poor workplace behaviour in March 2021, and she was advised by the Mayor and General Manager that confidential processes were underway. In July 2021 she and three other councillors wrote to the General Manager expressing concern about the "unsafe workplace". Cr Greene stated that the Mayor addressed the four councillors at a workshop, pointing out that that they had possibly breached *the Local Government Act* by going directly to the General Manager. Cr Holmdahl also advised that a lawyer had been engaged to provide advice to Council on how to manage the process. In her response, Cr Holmdahl said that she was unable to comment on what Cr Greene had been told by staff. She added that she had not been privy to discussions about the details of staff concerns.

Ex-councillor Peter Kearney who was a councillor until October 2023, also confirmed that he was aware of staff concerns in early 2021 and was a signatory to the letter sent to the General Manager by Cr Greene, Cr Allen and Cr Lyons dated 27 July 2021. Cr Holmdahl responded to Mr Kearney's statement in a similar vein to Cr Greene.

Ms Kathleen Milbourne who was an Australian Services Union member representative in 2021, provided copies of emails between her and the General Manager regarding her concerns about the staffing situation at Council. Ms Milbourne indicated that she had copied Cr Holmdahl into these emails. Cr Holmdahl responded that these emails essentially related to Ms Kelly's workers compensation claim and that she, Cr Holmdahl, was not aware of the details of the Ms Kelly's claim.

Cr Joy Allen stated that she became aware of a workplace incident with staff including Tracey Kelly in June 2021. Cr Allen said that she was given copies of staff surveys conducted in 2017, 2018 and 2019 containing details of bullying, sexual harassment and bad culture. Cr Allen added that she had reported Ms Kelly's initial contact to the Mayor. Cr Allen was also a signatory to the letter by the four councillors to the General Manager dated 27 July 2021. Cr Holmdahl said that she was unable to comment on any conversations between Ms Kelly and Cr Allen. Cr Holmdahl also indicated that she was unaware of the previous surveys at the time but had requested copies of them once the complaint was lodged. Cr Holmdahl advised that there was no reference to sexual harassment in those surveys and no mention of bullying in 2017 and 2018.

Cr Ricky Shegog provided a statutory declaration dated 19 May 2023 and provided a further statutory declaration dated 30 August 2023. There were some minor editorial changes from the first to the second statement. Cr Shegog's statements were similar to that provided by Cr Allen. Cr Holmdahl noted the similarity and said that her comments in relation to Cr Allen were the same for Cr Shegog. However, Cr Holmdahl provided a copy of an email sent to her by Cr Shegog on 2 August 2021 at 10.48pm in which he stated that he "did not accept the approach" (to send the letter to the General Manager) and disagreed with the letter the four councillors had sent to the General Manager.

Ms Julie Tolputt provided a statutory declaration dated 16 May 2023 to which she attached a number of file notes she had made relating to a meeting she had with a former General Manager. Ms Tolputt stated that her file notes provide evidence of Cr Holmdahl's knowledge of serious specific staff issues. Cr Holmdahl stated that she has no discussion with the former General Manager in relation to the staffing situation at West Tamar

Council. She did attend a lunch with the former General Manager and some friends who were providing support to her following the death of her husband. The Panel concludes that the file notes provided by Ms Tolputt are hearsay and do not contain direct evidence therefore, the Panel has given it little weight.

Mr Andrew Beeston, who was formerly the Youth Development Officer, stated in his statutory declaration that during the period July to September 2021, when he was absent on stress leave, he heard the Mayor on radio saying that "staff morale was high and employee retention was good." Cr Holmdahl responded by saying this event was twelve months before the Cohorte report was released and as previously stated she was unaware of the extent of the staffing unrest at Council.

The Panel concludes that the witnesses who provided statutory declarations were aware of a developing situation regarding staff dissatisfaction with the West Tamar Council. However, there was no evidence presented that gave an account of the detail of discussions with Cr Holmdahl.

Determination

As per section 28ZI of the Act the Code of Conduct Panel determines that Cr Holmdahl has not breached the Code of Conduct, and therefore the Code of Conduct Panel dismisses the complaint.

Reasons for determination

The Code of Conduct Panel considered the information provided by Ms Kelly and the response by Cr Holmdahl, along with supporting statutory declarations presented by witnesses. The Panel accepts that Ms Kelly had a difficult experience at Council and understands the feeling she expressed that she was unsupported at a time when she needed support. However, it is not the Panel's task to determine whether things could or should have been done differently in relation to the staffing issues, but whether Cr Holmdahl breached Part 8.2 by misrepresenting these circumstances. The Panel concludes that Cr Holmdahl was aware that there were some concerns being expressed by staff, hence her suggestion of seeking legal advice. However, no evidence was produced that leads the Panel to determine Cr Holmdahl knew in detail the level of dissatisfaction which was later revealed in the Cohorte report.

Therefore the Panel dismisses the complaint by Ms Kelly that Cr Holmdahl breached Part 8.2 of the West Tamar Council Code of Conduct which was current at the time of the alleged incidents.

Timing of the Determination

In accordance with section 28ZD (1) a Code of Conduct Panel is to make every endeavour to investigate and determine a code of conduct complaint within 90 days of the chairperson's determination that the complaint is to be investigated.

The Panel has been unable to determine the complaint within 90 days, owing to granting extension for responses, delays in obtaining documentation from Council, commitments during the period by Panel members and identifying a mutually convenient time to hold the hearing.

Right to review

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



Jill Taylor

Chairperson



Amber Cohen

Member



David Sales

Member

DATE : 2 October 2023