

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

BURNIE CITY COUNCIL CODE OF CONDUCT

Complaint brought by Councillor Amina Keygan against Councillor Ken Dorsey

Code of Conduct Panel

- Jill Taylor (Chairperson)
- Penny Cocker (Local Government Member)
- Anthony Mihal (Legal Member)

Date of Determination: 1 August 2022

Content Manager Reference: C23924

Summary of the complaint

A code of conduct complaint was submitted by Councillor (Cr) Amina Keygan to the General Manager, Burnie City Council on 29 March 2022.

The complaint relates to comments made by Cr Dorsey that were reported in the Advocate Newspaper on 2 January 2022, and comments published by Cr Dorsey on Facebook on or about 1 January 2022. Those comments related to the death of 17 penguins killed by a dog on the Burnie foreshore on 1 January 2022. The comments were critical of the Council and councillors.

The Complainant alleges that by making the comments, Cr Dorsey breached the following parts of the Burnie City Councillor's Council Code of Conduct, approved on 19 February 2019 ("the Code").

PART 3 – Use of office

- (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*

PART 8 – Representation

- (1) *When giving information to the community, a councillor must accurately represent the policies and decisions of the Council.*
- (2) *A councillor must not knowingly misrepresent information that he or she has obtained in the course of his or her duties.*
- (3) *A councillor must not speak on behalf of the Council unless specifically authorised or delegated by the Mayor or Lord Mayor.*

- (5) *A councillor'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) *A councillor must show respect when expressing personal views publicly.*
- (7) *The personal conduct of a councillor must not reflect, or have the potential to reflect, adversely on the reputation of the Council.*

The impugned comments in the Advocate Newspaper were published in an article with the headline "Burnie City Councillor Ken Dorsey Slams Lack of Penguin Protections". The specific comments made in connection with death of the penguins were, "I can't be more disappointed right now with my fellow councillors, our mantra right now is 'it's not our responsibility'" and, "we are a do-nothing Council".

The impugned comments published on Facebook include those in a post in which Cr Dorsey 'shared' an article published on the Advocate Newspaper website about the death of the Penguins and wrote the following:

I have been fighting to protect the Penguins with opposition from councillors who want to wait for the University? We can't even put up signs? Outrage is the best term I have for this, waiting for the University to do something is like waiting for the snow in February (unless they want free land). When discussed in Open Council, Council officers argued against taking action, the result – more deaths. 20 million years of inhabiting the Burnie shoreline to be undone by unconcerned Councillors. Unbelievable.

The Complainant said that 55 comments were made on the post, including the following that were made by Councillor Dorsey, which the complainant also sought to impugn:

We are incapable of making simple decisions

Council chose to do nothing

We declared Burnie to be a penguin sanctuary that included education signage [sic] and promotions. We did nothing. If we try nothing, we can't judge effectiveness and we now know that doing nothing obviously didn't work.

Interpretive signs will do nothing.

It doesn't take a lot of planning to erect signs that we agreed to a few years ago. It does this group of people [sic]. Hopeless.

Too hard for councillors to take a simple stand – we wait. The city waits, art galleries wait, sport centres wait. Watch this space while we wait for more deaths. Hopeless.

While penguins are being killed – we wait. Hopeless! What I expect to those who voted to do nothing will cry crocodile tears – and say they are. They cared enough to do nothing more than wait.

We are a do-nothing council

I can't be more disappointed with my fellow councillors

Our mantra right now is it's not our responsibility

Further comments were made by Cr Dorsey on a post published by the Burnie Penguin Observation Centre which also shared the same Advocate Newspaper article about the death of the Penguins. Those comments were as follows:

I am so sorry, the Council bears some responsibility and I am forever remorseful. I am angry and embarrassed by our Council's lack of action. We knew there were feral cats in the rockery, but we chose to do nothing. Requesting signs was ignored – these are not good people. Good people act.

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 *Local Government Act 1993* (the Act). Having considered the provisions of sections 28ZB and 28ZC of the Act, the Chairperson determined to dismiss the

part of the complaint relating to Part 7.1 (a), (b) and (c) of the Code in accordance with 28ZB (1) (b) as that part of the complaint did not substantially relate to a contravention of those parts of the Code.

The Chairperson determined that the balance of the Complaint was to be investigated and determined by the Code of Conduct Panel because she did not consider that any of the matters in section 28ZB(1) and 28ZC(1) of the Act applied to the remaining parts of the complaint, namely Parts 3.1, 8.1, 8.2, 8.3, 8.5, 8.6 and 8.7.

The complainant, respondent councillor and the General Manager were notified of the outcome of the initial assessment and the reasons for it by letter dated 26 April 2022.

Investigation

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

The Panel considered the written complaint submitted under a statutory declaration dated 29 March 2022, Cr Dorsey's response under statutory declaration dated 17 May 2022, an email with further submissions from Cr Dorsey dated 20 May 2022, and an extract from minutes of meeting of Burnie City Council held on 18 August 2020 submitted by Cr Dorsey.

The Panel determined that further information was required to investigate the complaint. The Panel wrote to Cr Keygan on 31 May 2022 requiring the following information:

- Part 8.1 – Identify and provide copies of the policies of the Council that you say Cr Dorsey misrepresented and identify the decisions of the Council, including their dates, that you say Cr Dorsey misrepresented.
- Part 8.2 – Identify the specific information obtained by Cr Dorsey in the performance of his councillor duties that you say Cr Dorsey misrepresented.
- Part 8.5 – Identify the Council decision, including the date of that decision, about which you say Cr Dorsey expressed a personal view.
- Part 8.7 – Describe the behaviour of Cr Dorsey, including dates, that you say adversely affected the reputation of the Council and how you say that behaviour adversely affected the reputation of Council [LIST information]. Cr Keygan alleged that in making the impugned comments, Cr Dorsey had misrepresented Council in relation to its position on the protection of the penguins. She alleged that Cr Dorsey had publicly stated that Burnie “was a do nothing” Council in relation to this issue, which she claimed was untrue. Cr Keygan provided information on how Council had addressed this matter over recent years, working with other instrumentalities where appropriate, regarding the protection of penguins on the Burnie foreshore.

Cr Dorsey provided further submissions to the Panel by email on 2 June 2022. Cr Keegan provided her response to the request for information and further submissions by email to the Panel on 7 June 2022.

Cr Dorsey did not dispute that he had made the relevant comments. He said that he had apologised at a subsequent Council meeting and had removed the entire social media post.

In accordance with section 28ZG(2)(b) of the Act, the Code of Conduct Panel determined that the complaint could be investigated without a hearing because it could be adequately conducted by means of the written submissions provided by the parties and an examination of the documentary evidence. In the Panel's view, neither party would be disadvantaged if a hearing was not held and it was appropriate not to hold a hearing in the circumstances. Those circumstances included that the parties submitted that a hearing was not necessary. The Panel's only task was to determine whether the making of the comments was a breach of the Code, because Cr Dorsey did not dispute that he made the relevant comments or the relevant facts generally.

The Complainant included other matters of complaint against Cr Dorsey relating to alleged conduct on 29 July 2021 and earlier. Section 28V(3)(f) provides that a complaint must be lodged within 6 months after the alleged contravention of the Code. The Complainant submitted that those earlier matters of complaint were a series of separate incidents that taken together form the subject matter of her complaint and therefore pursuant to 28V (4) of the Act, the time for her to make her complaint runs from the last of the series of incidents on 2 January 2022.

The matters of Complaint from 29 July 2021 relate to Cr Dorsey's criticism of the Cradle Coast Authority and an allegation that he made a misleading statement about how much the Burnie City Council would save by ceasing its membership of the Authority. The Complainant alleged Cr Dorsey breached the Code when his comments criticising the Mayor of Devonport in connection with another determination of the panel and that Council's Providore Place Development on 23 August 2020. The complainant alleged that Cr Dorsey breached the Code when on 20 October 2020 he asked a Question on Notice about whether or not she apologised for her absence at a briefing of councillors when she had already told him she had. Further alleged breaches included a post on Facebook on 8 January 2019 in which Cr Dorsey wrote about a motion to the Local Government Association of Tasmania to change the name 'alderman' to 'councillor' including that councillors had 'voted for mediocrity', comment made on 10 December 2019 that "four councillors voted to consider the region in preference to Burnie", comments published in the Advocate Newspaper on 16 July 2019 including that there was a lack of community involvement on the part of some councillors.

The phrase 'a series of separate incidents' means a succession of similar or similarly related incidents that occur over a period of time. The Panel could not determine that there was any unifying feature of the above incidents, such that they could be considered to form the subject matter of one complaint. They are separate incidents that relate to different matters. They are not similar except to the extent that they all involve allegations about the conduct of Cr Dorsey and some relate to what he has alleged to have written on Facebook or said to journalists. The Panel cannot find that they are a series of separate incidents.

Accordingly, the Panel disregarded those matters of complaint and any document submitted by the Complainant that did not relate directly to Cr Dorsey's conduct on 1 and 2 January 2022.

Determination

As per section 28ZI of the Act the Code of Conduct Panel does not find that Cr Dorsey breached the Code of Conduct, and therefore the Code of Conduct Panel dismisses the complaint.

Reasons for determination

The Panel concluded that Cr Dorsey expressed strong opinions publicly about his belief that the Council could have done better in providing a sanctuary for penguins on the Burnie foreshore. However, statements made by Cr Dorsey, whilst critical of the role Council played, were not such that the Panel could find that they were a breach of the Code. There is a line between legitimate criticism and expression of opinion by a councillor about his or her fellow councillors or council and statements that are misleading, insulting, abusive or otherwise causative of reputational damage. The line must be clearly crossed before the Panel can determine that a breach of the Code has occurred. Here, the Panel could not be satisfied that the line was crossed.

In relation to the specific alleged breaches of the Code the Panel determined as follows-

Part 3.1 and Part 8.5 – Bringing the Council into disrepute

As indicated previously, whilst Cr Keygan expressed strong personal views and was critical about, in his view, the way Council had failed to protect penguins, the Panel could not find that in doing so he clearly brought the Council or role of councillor into disrepute. A Councillor can express strong criticism about a council without bringing it into disrepute as an organisation. Similarly, a councillor can strongly criticise his or her fellow councillors without bringing the office of councillor into disrepute. For the Panel to find that there is a breach of these parts of the Code, it needs to be positively satisfied that the organisation or the 'role of councillor' was in fact brought into disrepute. There was no such evidence. This Part of the complaint is dismissed.

Part 8.1 – accurately representing policies and decisions of Council

The Panel requested Cr Keygan to provide details of any policies or decisions made by Council that she alleged Cr Dorsey had misrepresented. Her response of 7 June 2022 did not identify any specific policies or decisions of Council; only that Council resolved to declare Burnie a "Fairy Penguin Safe Haven" on 18 August 2020. As no evidence was presented that Cr Dorsey misrepresented any particular policy or decision of Council the Panel dismisses this Part of the complaint.

Part 8.2 – not knowingly misrepresenting information

This part of Cr Keygan's complaint was that Cr Dorsey had misrepresented information he gained through his role as a councillor. The effect of Cr Keygan's submissions were that Cr Dorsey had information about the Council's partnerships and funding relating to the protection of penguins and he misrepresented that information by his statements to the effect that the Council had done nothing to protect the penguins. In order to find that Cr Dorsey had misrepresented information, the Panel must be able to identify the specific information that is alleged to have been misrepresented and identify specifically how the councillor misrepresented the information. Here the Panel cannot because Cr Dorsey's comments were not about specific information he had gained in the course of his duties. He was expressing an opinion about the activities, actions and perceived lack of action on the part of the Council and his fellow councillors. The Panel dismisses this Part of the complaint.

Part 8.3 – not speaking on behalf of Council

There was no evidence that Cr Dorsey indicated that he was speaking on behalf of Council in the article in the Advocate newspaper of 1 January 2022. In fact, he was quite clearly indicating that the views were his in saying, "I couldn't be more disappointed with my fellow councillors...". In relation to the Facebook posts, it was similarly plain on their face that Cr Dorsey was personally criticising the Council, not speaking on its behalf. The Panel dismisses this Part of the complaint.

Part 8.5 – not undermining decisions of Council

Whilst Cr Dorsey spoke publicly of his frustration with what he perceived as inaction by Council and his fellow councillors his remarks could not be construed as anything other than a councillor expressing a personal view. In order to be satisfied that in expressing those personal views, the councillor undermined a decision of Council, the Panel must be able to identify the specific decision that it is alleged the councillor undermined. The Complainant could not identify such any such decision when asked to do so by the Panel. There was no evidence before the Panel from which the Panel could identify such a decision. The Panel dismisses this Part of the complaint.

Part 8.6 – showing respect when expressing views publicly

Cr Dorsey lamented that in his opinion his fellow councillors did not show the same level of commitment as he. He described the Council as a "do nothing council" despite, according to Cr Keygan, Council having made efforts over recent years to address the penguin problem through partnerships and funding. Whilst this may have been strong criticism of his colleagues, and even arguably unfair criticism, the Panel cannot find it amounted to disrespect of them. That finding might have been open if for example the councillor used abusive language or the criticism was outlandish. Nothing the Panel could discern made the expression of criticism in itself disrespectful. The Panel dismisses this Part of the complaint.

Part 8.7 – not reflecting adversely on reputation of Council

The Panel concludes that whilst Cr Dorsey has been critical and outspoken on the penguin issue, a reasonable person would construe these as Cr Dorsey's personal opinion about the action or inaction of the Council. A councillor can criticise his or her own council without potentially reflecting adversely on the council's reputation. No organisation has a reputation of being perfect and beyond criticism. In order to find that the Councillor's criticism could potentially harm the Council's reputation, again, the Panel would have to identify some particular feature of the criticism that goes beyond a legitimate expression of personal opinion. The Panel cannot and there is no evidence of actual reputational damage. The Panel dismisses this Part of the complaint.

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 the following factors:

- A request by the respondent for a time extension
- The Panel requiring further information from the complainant
- Short periods of unavailability of Panel members

Right to review

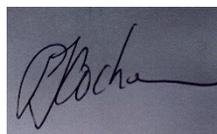
A person aggrieved by the determination of the Code of Conduct Panel, on the ground that the Panel failed to comply with the rules of natural justice, is entitled under section 28ZP of the Act to apply to the Magistrates Court (Administrative Appeals Division) for a review of that determination.



Jill Taylor
Chairperson



Anthony Mihal
Member



Penny Cocker
Member

DATE – 1 August 2022