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Local Government Act 1993

CODE OF CONDUCT PANEL DETERMINATION REPORT

CITY OF HOBART ELECTED MEMBER CODE OF CONDUCT

Complaint made by Ms Lynne Robertson against Cr Bill Harvey

Code of Conduct Panel

- Lynn Mason (Chairperson)
- David Sales (Local Government Member)
- Frank Neasey (Legal Member)

Date of Determination: 19 December 2022

Content Manager Reference: C24208

Summary of the complaint

The Code of Conduct complaint (the complaint) related to Cr Harvey's alleged conduct at a public event (Gender Identity in Law, Impacts on Women, Children, and People with Gender Dysphoria), held at the Hobart Town Hall on 26 February 2022. It is alleged that at that event, in particular in the Town Hall foyer, Cr Harvey denigrated and made a verbal threat against the future employment of a security firm contracted by the event organisers allegedly as a condition of their rental agreement with the Council, to (i.e.; in the presence of) Council staff members. Additionally, it is alleged that Cr Harvey behaved aggressively, and that his behaviour towards Council employees and members of the public (in particular event organisers) was bombastic, disrespectful and unreasonable. It is alleged that Cr Harvey spoke abusively to the complainant and to another member of the organising committee of the public event.

In the part of the complaint being investigated it is alleged that Cr Harvey had breached the following sections of the Code of Conduct (the Code):

Part 2 - Conflict of interests that are not pecuniary

2. An Elected Member must act openly and honestly in the public interest.

Part 3 – Use of Office

1. The actions of an Elected Member must not bring the Council or the office of Elected Member into disrepute.

2. An Elected Member must not take advantage, or seek to take advantage, of their office or status to improperly influence others in order to gain an undue, improper, unauthorised or unfair benefit or detriment for themselves or any other person or body.

3. In their personal dealings with the Council (for example as a ratepayer, recipient of a Council service or planning applicant), an Elected Member must not expect nor request, expressly or implicitly, preferential treatment for themselves or any other person or body.

Part 7 - Relationships with community, Elected Members, and Council employees

7.1. An Elected Member –

(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.

7.3 An Elected Member must not contact or issue instructions to any of the Council's contractors or tenderers, without appropriate authorisation.

7.4 An Elected Member must not contact an employee of the Council in relation to Council matters unless authorised by the General Manager of the Council.

Part 8 – Representation

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.

Initial assessment of the complaint

Following receipt of the complaint, the Chairperson of Code of Conduct Panel conducted an initial assessment of the complaint in accordance with the requirements of section 28ZA (1) of the *Local Government Act 1993* (the Act). Having assessed the complaint against the provisions of sections 28ZB and 28ZC of the Act, the Chairperson determined that:

- part of the complaint, namely that part alleging a breach of Part 1 of the Code and Part 2 of the Code (except clause (2)), be dismissed on the basis that that part of the complaint did not substantially relate to a contravention of the Code, in accordance with section 28ZB(1)(b) of the Act. Further it was determined that the part of the complaint alleging a breach of Part 8 of the Code (except clauses (5), (6) and (7)) also be dismissed, on the basis that that part of the complaint was frivolous, in accordance with section 28ZB(1)(a) of the Act.
- the balance of the complaint substantially related to a contravention of the Council's Code of Conduct. If the allegations therein were substantiated, they would constitute a breach of the Code;
- the complaint was not frivolous, vexatious or trivial. The complaint appeared to relate to matters of substance under the Council's Code of Conduct and did not appear to be trifling, insignificant or a misuse of the Panel's resources;
- the reasons for not attempting to resolve the complaint directly with the respondent were adequately explained; and
- the complaint was not made in contravention of
 - a determination made by the Chairperson under subsection (2); or
 - a determination of the Code of Conduct made under section 28Z1(3).

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

The complainant, respondent councillor and the Chief Executive Officer (CEO) of Hobart City Council were notified of the outcome of the initial assessment by letter dated 28 June 2022.

Material considered by the Panel

- The City of Hobart Elected Member Code of Conduct 18 February 2019;
- The complaint from Ms Lynne Robertson, undated, accompanied by a Statutory Declaration dated 23 May 2022;

- Statutory Declaration from Cr Bill Harvey, 57pp, 17 August 2022;
- Statutory Declaration from Ms Kimbra Parker, Council employee, July 2022;
- Statutory Declaration from Mr Paul Synott, Council employee, 16 August 2022;
- Handwritten statement of the incident by Ms Robertson and Ms Isla McGregor, 4 pp, 29 August 2022; and
- Response from Ms Robertson to Cr Harvey's response, received 29 August 2022.

Procedure

In accordance with section 28ZE of the Act, the Code of Conduct Panel investigated the complaint as it related to the clauses of the Code cited above.

On 10 August 2022 the Panel received a request from Cr Harvey for an extension of time to provide his response to the Panel. This was granted and the response received on 17 August 2022. The Panel met on 19 August 2022 to consider the complaint and the response, and Cr Harvey's response was sent to Ms Robertson for her information and response, if she wished to provide one. A response from Ms Robertson was received on 29 August 2022.

The Panel met again on 2 September 2022, and on 5 September 2022 the first attempt to set a date for a hearing into the complaint was made (in accordance with section 28ZG of the Act). On 5 October 2022 the parties were notified that a hearing would be held on 9 December 2022.

The Hearing

The hearing was conducted on 9 December 2022 in Hobart, at the Hobart Town Hall, with Ms Robertson attending by video conference. Cr Harvey was accompanied by Cr Dr Zelinda Sherlock **as his support person. Cr Dr Sherlock did not attend the entire hearing, but left at 10.18 am, 46 minutes after the hearing started.** The complainant, the respondent and his support person were all sworn/affirmed at the outset of the hearing.

Ms Robertson and Cr Harvey gave evidence and each was permitted to question the other. The Panel asked questions of the parties. Two witnesses were called by the Panel: Mr Paul Synott and Ms Kimbra Parker. Both Ms Parker and Mr Synott are employees of the Council. Both witnesses were sworn or affirmed prior to answering questions from the complainant and respondent, and from the Panel. Neither Ms Robertson nor Cr Harvey called witnesses.

The parties then made closing submissions, after which Cr Harvey was offered the chance to make a submission on sanction, in the event that any or all of the complaint was upheld. Cr Harvey submitted that if any part or all of the complaint were upheld, a caution would be the most appropriate sanction, if a sanction were to be imposed at all.

Determination

Pursuant to section 28ZI(1)(b), the Panel dismisses the complaint against Cr Harvey.

Reasons for determination

Introduction

1. The Panel heard (and received) a number of statements from the complainant and the respondent concerning the events on 26 February 2022. Many of these statements were directly contradictory. The Panel's task was to weigh the evidence before it and to determine what weight to give to each of the statements made, including those of other witnesses, and to determine whether, on the whole of the evidence, it was persuaded that such conduct as it found Cr Harvey to have engaged in constituted a breach or breaches of the Code.

2. The Panel accepted that Cr Harvey had attended the protest in Franklin Square prior to arriving at the Town Hall, and that he had stood with the protestors in front of the Town Hall before he entered the building.
3. The Panel accepted Ms Robertson's statement that she did not recognise Cr Harvey as an elected member of the Council, and that as a result, she asked him to sign in to attend the public forum being held in the Ball Room at the Town Hall, as she regarded him as a member of the public with no other reason to be entering the building. Her task at the forum was to ensure that those people attending the forum were ticketed and signed in for the event.
4. Ms Robertson asserted that Cr Harvey had gone up the staircase from the foyer, and had returned to the foyer shortly afterwards. Both parties agreed that this had happened, although they disagreed on whether or not Cr Harvey had been 'escorted' up the staircase by security guards, or whether he had simply walked upstairs. The Panel considered this difference of opinion immaterial to its determination of the complaint.
5. Ms Robertson asserted that on Cr Harvey's return he spoke to both Mr Synott and Ms Parker (the Council employees) regarding the security firm engaged by the forum organisers. The Panel accepts that Cr Harvey had a conversation with Ms Parker at that time. The Panel is not persuaded that Mr Synott was included in that conversation, nor that he was aware of what was said. The evidence of neither Cr Harvey, Ms Parker nor Mr Synott supports that contention.

Specific clauses of the Code

Part 2 – An Elected member must act openly and honestly in the public interest.

2. *An Elected Member must act openly and honestly in the public interest.*

Ms Robertson considered that by attending the protest against the forum in both Franklin Square and in front of the Town Hall, Cr Harvey was not acting in the public interest, since the intention of the forum was to provide factual information about Gender Identity in Law, Impacts on Women, Children, and People with Gender Dysphoria. She considered that Cr Harvey, as an elected member and community leader, had a duty in public to remain neutral on the issues under discussion.

The Panel disagrees with this view. Cr Harvey was not an active participant in the protests; as an elected member, Cr Harvey is not constrained by his office, provided he ensures that he abides by Council policies. He did not fail to act openly and honestly in the public interest in listening to the views of those opposed to the forum.

No evidence was presented to substantiate the allegation that Cr Harvey had made '*false accusations against the speakers and organisers of the forum*' and that he had branded them as '*bigoted and transphobic*', such allegation(s) being made by Ms Robertson in her complaint in reference to alleged breaches of Part 2 of the Code.

Part 3 – Use of Office

1. *The actions of an Elected Member must not bring the Council or the office of Elected Member into disrepute.*
2. *An Elected Member must not take advantage, or seek to take advantage, of their office or status to improperly influence others in order to gain an undue, improper, unauthorised or unfair benefit or detriment for themselves or any other person or body.*
3. *In their personal dealings with the Council (for example as a ratepayer, recipient of a Council service or planning applicant), an Elected Member must not expect nor request, expressly or implicitly, preferential treatment for themselves or any other person or body.*

3.1 The Panel determines that Cr Harvey did not bring the Council or his office into disrepute; no evidence was presented to indicate that this had happened, other than the statements made by the complainant, and the handwritten record jointly signed by Ms Robertson and Ms McGregor. In the Panel's view it required some

evidence, beyond a bald allegation, that either the Council or Cr Harvey's office had, as a matter of fact, been brought into disrepute by his conduct.

3.2 Ms Robertson alleged that Cr Harvey had said to Ms Parker and Mr Synott that *'he was going to make sure that the security company ...should never be allowed to work at the venue again.'* Ms Robertson described this statement as the nub of her complaint. The Panel is not persuaded that Cr Harvey said these words. The allegation was denied by Cr Harvey, and refuted by Ms Parker, who was the only person (the Panel finds) close enough to Cr Harvey to have been able to hear what he said. The Panel accepts that Mr Synott, as he said at the hearing, could not hear the conversation, as he was not only otherwise engaged in his duties, he was several metres away.

In conclusion, the Panel is not satisfied that Ms Robertson was close enough to Cr Harvey and Ms Parker to hear such a threat being made. When asked by the Panel about her recollection of hearing those words, Ms Robertson was only able to answer with words to the effect of 'Well, if he didn't say it, it wouldn't be in the complaint.'

Cr Harvey stated that what he had said in the conversation with Ms Parker was to raise his concerns about the apparent lack of understanding by the security personnel of the rights of elected members to enter the Town Hall at any time to attend to their duties; he denied having threatened to ensure that they could not work at the Town Hall again.

The Panel accepts that this was the gist of Cr Harvey's conversation with Ms Parker, who also supported that account in her statutory declaration and at the hearing.

3.3 In addition, the Panel determines that Cr Harvey did not breach Part 3 (3). There was simply no evidence before the Panel at all to substantiate this allegation.

Part 7 - Relationships with community, Elected Members, and Council employees

7.1. *An Elected Member –*

(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.

7.3 *An Elected Member must not contact or issue instructions to any of the Council's contractors or tenderers, without appropriate authorisation.*

7.4 *An Elected Member must not contact an employee of the Council in relation to Council matters unless authorised by the General Manager of the Council.*

7.1 The Panel accepts that Cr Harvey was frustrated and annoyed when he was stopped from entering his place of work (the Town Hall) by an unidentified woman (Ms Robertson). Cr Harvey had been on the Council for many years and knew that in practice as an elected member he had 24/7 access to the Town Hall. However, the Panel is not persuaded that he treated Ms Robertson unfairly, caused her any offence or embarrassment, nor that he bullied or harassed her, nor that he acted in any of these ways in respect of any other person once he entered the Town Hall foyer. The Panel is not persuaded that Cr Harvey's refusal to allow Ms McGregor to record a private conversation with Ms Parker on his return to the foyer was a breach of any part of this clause.

7.3 Ms Robertson was questioned by the Panel regarding the alleged breach of clause 7.3. Ms Robertson agreed that this part of her complaint could not be substantiated and was not pursued.

7.4 The Panel heard that Cr Harvey had spoken to the Council CEO while he was in the elected members' area of the Town Hall, to report his concern about being stopped from entering the building. When he returned to the foyer, he also spoke to Ms Parker about the incident. The Panel does not consider that Cr Harvey needed the General Manager's authority to hold a conversation privately about his treatment by security personnel engaged by forum organisers, as it is not satisfied that such a conversation involved a

discussion of 'a council matter' as such. The holding of such a conversation therefore could not amount to a breach of clause 7.4.

Part 8 – Representation

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.*

There was no evidence at all before the Panel of Cr Harvey expressing any personal views publicly. Further, as stated earlier in this determination, no evidence persuaded the Panel that he had brought the Council into disrepute by his conduct.

The Panel is also satisfied that nothing in Cr Harvey's conduct had the potential to reflect adversely on the Council's reputation. He admitted that at times during the incident he was frustrated and annoyed, but no evidence was presented to affirm that he had been abusive or disrespectful.

For the above reasons, the Panel dismisses the complaint against Cr Harvey in accordance with section 28ZI(1)(b) of the Act.

Additional matters

Evidence was given during the hearing that, as a matter of course, hirers of the Town Hall were not advised of the rights of other persons, including elected members, to access the building during the conduct of private events in the Town Hall. Had this information been provided to the hirers and their security personnel, it is likely that this complaint would not have eventuated. It is suggested that Hobart City Council may wish to review policy in this area.

Timing of the Determination

The time taken to reach a determination in this matter has exceeded five months. It is unusual for an investigation and subsequent determination to take this amount of time. In this case the delays were owing to the unavailability of the Panel, the parties, and the witnesses to attend a hearing at an earlier time.

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.



Lynn Mason AM
Chairperson



Frank Neasey
Legal Member



David Sales
Member

Date: 19 December 2022