

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
DEVONPORT CITY COUNCIL CODE OF CONDUCT**

Complaint brought by Mr Malcolm Gardam against Councillor Annette Rockliff

Code of Conduct Panel

- Jill Taylor (Chairperson)
- Liz Gillam (Local Government Member)
- Graeme Jones (Legal Member)

Date of Determination: 23 September 2022

Content Manager Reference: C24009

Summary of the complaint

A code of conduct complaint was submitted by Mr Malcolm Gardam to the General Manager of the Devonport City Council on 13 April 2022.

The complaint alleged that Councillor Annette Rockliff breached the following parts of the Devonport City Council's Model Code of Conduct, adopted in January 2019, at the Council's Annual General Meeting (AGM) on 8 November 2021:

Part 1.1 - A councillor must bring an open and unprejudiced mind to all matters being decided upon in the course of his or her duties, including when making planning decisions as part of the Council's role as a Planning Authority

Part 1.2 - A councillor must make decisions free from personal bias or prejudice.

Part 1.3 - In making decisions, a councillor must give genuine and impartial consideration to all relevant information known to him or her, or of which he or she should have reasonably been aware.

Part 1.4 - A councillor must make decisions solely on merit and must not take irrelevant matters or circumstances into account when making decision

Part 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*

Part 7.2 - A councillor must listen to, and respect, the views of other councillors in Council and committee meetings and any other proceedings of the Council, and endeavour to ensure that issues, not personalities, are the focus of debate.

Part 8.1 - When giving information to the community, a councillor must accurately represent the policies and decisions of the Council

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 Chairperson arrived at this conclusion as Mr Gardam advised he had made “every endeavour” to try to resolve the matter including an offer to attend a meeting with Cr Rockliff.
- the complaint in relation to parts 1.2, 1.3, 1.4, 7.1 (b) & (c) and 8.1 of Devonport City Council's Code of Conduct be dismissed.

the complaint in relation to parts 1.1, 7.1 (a) and 7.2 of Devonport City Council's Code of Conduct should be further investigated.
- these parts of the complaint should not be dismissed on the grounds of being frivolous, vexatious, or trivial. The reasons for this conclusion were that, if proven, Cr Rockliff demonstrated a bias towards Mr Gardam, treated him unfairly and did not show respect to Mr Gardam.
- 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.

On this basis, the Chairperson determined to investigate parts 1.1, 7.1 (a) and 7.2 of the complaint.

The complainant, respondent councillor and the General Manager were notified of the outcome of the initial assessment by letter dated 16 May 2022.

Investigation

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

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

- Mr Gardam's complaint under cover of a statutory declaration dated 13 April 2022 with Attachments 1, 2, 3, 4, and 5
- Cr Rockliff's response to complaint under cover of statutory declaration dated 25 May 2022
- Mr Gardam's statutory declaration dated 10 June 2022
- Submission by Mr Gardam dated 20 July 2022
- Annual General Meetings – Good Practice Guidelines dated February 2018.
- Devonport City Council Code of Conduct adopted in January 2019
- YouTube recording of AGM held on 8 November 2021

Hearing

As per section 28ZH of the Act the Code of Conduct Panel held a hearing on 15 September 2022 by Zoom. Jill Taylor and Liz Gillam attended the Office of Local Government offices in Hobart and Graeme Jones, Cr Rockliff and Mr Gardam attended from separate locations. The Chairperson confirmed that the complainant and respondent were in a private location and no one else was present. When Mr Gardam advised by email on 10 August 2022 that he did not wish to call any witness he advised that Mr Graeme Nevin would be his support person. Mr Jones pointed out that Mr Nevin was a lawyer and could not be present at the hearing in that capacity. Mr Gardam assured the hearing that he would not be taking any advice from Mr Nevin, and he was only there as support. Panel members and Cr Rockliff did not have any objections to that arrangement. Both Mr Gardam and Cr Rockliff affirmed to tell the truth during the hearing.

The Chairperson outlined the procedure for the hearing and the process that would follow the conclusion of the hearing. The Chairperson reminded Mr Gardam and Cr Rockliff that the hearing only related to the Parts of the Code mentioned during the preamble to the hearing.

At the outset of the hearing both Mr Gardam and Cr Rockliff stated that they stood by the evidence they had submitted and acknowledged that the Panel had viewed the video recording of the AGM held on 8 November 2021.

The matter before the AGM that prompted Mr Gardam's complaint was a motion put to the meeting that Council dispose of an asset, namely Providore Place. Mr Gardam spoke in support of this motion which was put by Mr Vellacott. In his complaint, Mr Gardam alleged that the interaction between Cr Rockliff as chair and him as a speaker in favour of the motion demonstrated a bias towards him, did not treat him respectfully and was unfair in her treatment of him.

Mr Gardam alleged that Cr Rockliff continually interrupted him as he tried to provide a context to the motion by providing the history of the acquisition of this asset by Council. Mr Gardam claimed that Cr Rockliff was trying to gag him as he spoke to the motion and added that he needed to provide the historical context in order to convince people to vote for the motion. When he put it to Cr Rockliff at the AGM that she was trying to gag him, she responded "yes". Mr Gardam added that Cr Rockliff also interrupted Mr Nevin when he spoke to the motion but did not interrupt the two speakers against the motion, Mr Grant Goodwin, and Cr Murphy, even though Cr Murphy made reference to relevant historical facts.

The Panel having viewed the video recording noted that Mr Gardam was interrupted by Cr Rockliff several times during his allowable 3-minute presentation when he referred to historical events. It was put to Cr Rockliff by the Panel that, provided a speaker did not use inappropriate language or make derogatory remarks about others, including councillors or the Council, it was up to them as to how they utilised their time. Cr Rockliff replied that generally this was the case but not in relation to discussion on a motion. Cr Rockliff added that she ruled not to allow historical events to be mentioned as everyone knew the history. When queried about this by the Panel, Cr Rockliff said that she "knew all those present were aware of the history."

The Panel questioned Mr Gardam as to whether he considered Cr Rockliff was being fair, given that he anticipated he and Cr Rockliff would "lock horns" at the outset of his statement in support of the motion. Mr Gardam responded that he did anticipate Cr Rockliff would interrupt him, but she had done so unfairly by not allowing him to speak freely to the motion. He said that he and Mr Nevin were subjected to unfair interruptions by Cr Rockliff.

When given an opportunity to respond to Mr Gardam's complaint, Cr Rockliff told the hearing that at the time the complaint was lodged she was dealing with several personal and professional issues and the complaint, itself, "was low down in her priorities". The Panel asked Cr Rockliff whether she has subsequently listened to the audio tape of the meeting to which she responded "no". Cr Rockliff added that she stood by her rulings at the meeting, and it was up to the Panel to determine whether this was in accord with the Code.

When questioned by the Panel as to whether any conflict existed between her and Mr Gardam, Cr Rockliff said she would not describe it a conflict, but they had "buted heads" from time to time. Mr Gardam agreed with this statement, adding that he had respect for a lot of the things Cr Rockliff had done as Mayor.

In summary, Mr Gardam re-iterated that Cr Rockliff did not demonstrate that she had an open mind in relation to the motion being discussed and was disrespectful and unfair in her treatment of him.

When given the opportunity to summarise, Cr Rockliff said that it had been a difficult time for her but that she did not treat Mr Gardam unfairly on this occasion or any other.

The Panel observed that in her opening address to the AGM, Cr Rockliff did not provide specific information to attendees on some procedural aspects. When questioned on this by one of the attendees she replied that she “would let them know” if they had overstepped the mark. The Panel recommends that Council review, and provide greater detail on, the procedures to be followed at an AGM so that it is clear to all attendees how the meeting is to be conducted.

Determination

As per section 28ZI of the Act the Code of Conduct Panel determines that Cr Annette Rockliff has breached part 7.1 (a) of the Code of Conduct, and therefore the Code of Conduct Panel upholds that part of the complaint. The Panel determines that Cr Annette Rockliff has not breached Parts 1.1 and 7.2 of the Code of Conduct and dismisses those part of the complaint

Reasons for determination

The Code of Conduct Panel considered the information provided by Mr Gardam and the response by the Mayor, Cr Annette Rockliff along with supporting statutory declarations and the video tape of the Annual General Meeting held on 8 November 2021. The Code of Conduct Panel concludes that Cr Rockliff did breach Part 7.1.(a) of the Code of Conduct which was current at the time of the alleged contravention on 8 November 2021. Furthermore, the Code of Conduct Panel conclude that Cr Rockliff did not breach Parts 1.1 and 7.2 of the Code in relation to the same incident.

In upholding a breach against Part 7.1(a), the Panel had regard to meeting procedure convention, where a speaker is given a nominated time to speak for or against a motion and provided that the statement does not contain anything offensive or controversial, the speaker should be permitted to speak without interruption. The Panel, in viewing the video recording of the meeting observed that speakers for the motion were interrupted, whereas those against were not. It noted that one of the speakers against the motion also referred to the history of the building. The Panel concluded that historical events were relevant to the motion and that Mr Gardam was inappropriately silenced on this. He, like all speakers, were given three minutes to put their view and this should have been without interruption, unless their comments were offensive.

The Panel dismisses the alleged breach of Part 1.1 of the Code in the absence of any evidence proving Cr Rockliff did not have an open and unprejudiced mind to the matter under consideration. The Panel accepts that Mr Gardam believes this was not the case but did not support his contention with evidence. Cr Rockliff stated categorically that she was not biased towards Mr Gardam, or the motion being put before the meeting. The Panel concludes that this part of the Code was not breached by Cr Rockliff.

The Panel also dismisses the alleged breach of Part 7.2 of the Code, which requires a councillor to listen and respect the views of other councillors. Whilst it could be put that the application may have a broader meaning in the context of a council meeting beyond treatment of councillors, the Panel has made a literal interpretation. The Panel concludes that this part of the Code was not breached by Cr Rockliff.

Sanction

Section 28ZI (2) states that

(1) After completing its investigation of a code of conduct complaint, the Code of Conduct Panel is to determine the complaint by –

(a) upholding the complaint; or

(b) dismissing the complaint; or

(c) upholding part of the complaint and dismissing the remainder of the complaint.

(2) If the code of conduct complaint or part of it is upheld, the Code of Conduct Panel may impose one or more of the following sanctions on the councillor against whom the complaint is made:

(a) a caution;

(b) a reprimand;

(c) a requirement to apologise to the complainant or other person affected by the contravention of the code of conduct;

(d) a requirement to attend counselling or a training course;

(e) a suspension from performing and exercising the functions and powers of his or her office as a councillor for a period not exceeding 3 months.

(3) If the code of conduct complaint or part of it is dismissed, the Code of Conduct Panel may determine that the complainant may not make a further complaint in relation to the same matter for a period not exceeding 12 months unless the complainant provides substantive new information in the further complaint.

On this occasion, the Panel determines that no sanction shall be applied.

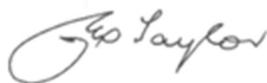
Timing of the Determination

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 periodic unavailability of Panel members and delay in ascertaining mutually convenient times for the hearing.

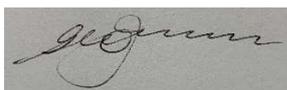
Right to review

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



Graeme Jones

Legal Member



Liz Gillam

Member

DATE: 23 September 2022