

Local Government Code of Conduct Panel

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PRIVATE AND CONFIDENTIAL

Mr Nick Heath
General Manager
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Dear Mr Heath

Code of Conduct Panel Determination Report – *Local Government Act 1993 (Section 28ZJ)*

In accordance with section 28ZK of the *Local Government Act 1993* (the Act) the Code of Conduct Panel has made its determination in relation to the complaint lodged on 23 September 2019 by Ald Briscoe and Denison against Cr Holly Ewin. A copy of the Determination Report is enclosed.

As per section 28ZK (2) of the Act, copies have also been provided today to Ald Briscoe, Ms Denison, Cr Ewin, and to the Director of Local Government.

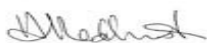
Section 28ZK (7) of the *Local Government Act 1993* requires that any person who receives a determination report must keep the determination report confidential until the report is included within an item on the agenda for a meeting of the relevant council. Failure to do so may result in a fine of up to fifty penalty units.

In accordance with section 28ZK (4) of the Act, you are to ensure that the Report is tabled at the first meeting of the Council at which it is practicable to do so and which is open to the public.

As the code of conduct complaint has been upheld in part, Ald Briscoe and Ms Denison are entitled, under section 28ZO of the Act, to a full refund of the lodgement fee. Please arrange a refund of this fee within 28 days of the date of this letter.

I may be contacted on (03) 6232 7013 or by email at lgconduct@dpac.tas.gov.au if you have any queries.

Yours sincerely



Helen Medhurst
Executive Officer
Code of Conduct Panel

28 January 2020

Encl. Determination Report

Local Government Act 1993

HOBART CITY COUNCIL CODE OF CONDUCT DETERMINATION REPORT *

**Complaint by Alderman (Ald) Jeff Briscoe and Alderman (Ald) Tanya Denison
against Councillor (Cr) Holly Ewin
Determination made on 23 January 2020**

Code of Conduct Panel:

Jill Taylor (Chairperson), Sam Thompson (Legal Member) and Liz Gillam (Member).

I. Summary of the complaint

Alderman (Ald) Jeff Briscoe and Ald Tanya Denison lodged a Code of Conduct complaint against Councillor (Cr) Holly Ewin on 23 September 2019. The complainants and the respondent are councillors elected to the Hobart City Council. Ald Briscoe and Ald Denison prefer the title Alderman, whilst Cr Ewin prefers the title Councillor. Cr Ewin uses the pronouns 'they' and 'their'. This determination report uses the parties' preferred titles and pronouns.

The 23 September 2019 complaint followed an initial complaint dated 5 August 2019 which was not compliant with Section 28V of the *Local Government Act 1993* (the Act). The original complaint was submitted by three complainants whereas the Act does not allow for more than two complainants. The complaint of 5 August 2019 was subsequently amended to delete reference to the third person (Ald Zucco), and new statutory declarations dated 23 September 2019 were submitted by Ald Briscoe and Ald Denison. It is this new complaint of 23 September 2019 only that is to be considered.

The complaint alleged that Cr Ewin had breached the City of Hobart Elected Member Code of Conduct (the Code) that was adopted by Council on 18 February 2019. Specifically, the complaint alleged that Cr Ewin breached Part 7 by posting several offensive comments about the complainants on the Councillor's Facebook page between 6 June 2019 and 26 July 2019. The complaint also alleges that Cr Ewin breached the Code in a radio interview that was conducted with Ryk Goddard of ABC Radio Hobart on 23 July 2019.

On 18 October 2019, the complainants wrote to the Panel requesting an amendment to their complaint. However, on 28 October 2019 they advised that they wished to withdraw the amendment request. The Panel accepted the withdrawal. On 1 November 2019, the Panel wrote to the complainants pointing out that Part 7 of the Code contained sub-paragraphs and asked them to identify which sub-paragraphs were relevant to their complaint and align them with dates and a description of each alleged breach of the Code.

The complainants provided a table containing this information on 1 November 2019, which the Panel subsequently provided to Cr Ewin. The table included sub-paragraphs of Part 8 of the Code in addition to Part 7. The Panel determined that as the nature of the complaint had not been varied, and having regard to sections 28X(1) and 28ZE(1) and (2) of the *Local Government Act 1993* (the Act), the inclusion of additional Parts of the Code was acceptable. Cr Ewin did not demur at the hearing.

* 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.

The complainants' table is reproduced in full below: -

Date	Description	Component/s of Code of Conduct
23-07-2019 <i>Interview on ABC Radio</i>	Clr Ewin made the statement “unfortunately the people who voted against it weren't present at the Committee meeting um and it didn't sound like they read the information that I submitted with the motion either 'cause there was just such a lot in there and they were voting along ideological lines which is a real shame” (Clr Ewin also shared this audio on her Facebook page)	7.1(a) 7.1(b) 7.2 8.5 8.6 8.7
26-07-2019 <i>Facebook post made by Clr Ewin after being informed by General Manager of complaint – Facebook page: Holly Anastasia Ewin ('friends' privacy setting)</i>	Clr Ewin posted “three of my colleagues on council have put in a semi-official complaint about me, for saying people should listen to experts and not vote along ideological lines. Yes, those are the words I used, if you can believe it. #theaudacity (meanwhile on the front page of the paper on the same day...) photograph of Mercury newspaper headline “MP's War on Bullies”	7.1(a) 7.1(b) 7.1(c) 8.2 (misrepresentation about nature of complaint) 8.5 8.6 8.7
6-06-2019 <i>Facebook post – Facebook page: Holly Anastasia Ewin ('public' privacy setting)</i>	Clr Ewin posted “I was just outvoted on trans inclusivity by 3 openly conservative cis men, because two progressive women councillors were absent... “ Holly's own responses to comments include: we don't “let the bastards get us down”, “it was stitched up beforehand, in response to a question regarding if Aldermen are receiving gifts from organisations, “it's not impossible”	7.1(a) 7.1(b) 7.1(c) 7.2 8.1 (misrepresentation about nature of item) 8.5 8.6 8.7

It is convenient to refer to these as the three events. The first two, being the 23 July 2019 radio interview and the 26 July 2019 Facebook post, related to a council motion in support of pill testing. The third, being Cr Ewin's 6 June 2019 Facebook posts and their comments on that post in response to their followers' comments, related to a council motion regarding transgender inclusive signage in public bathrooms.

The relevant Parts of the Code of Conduct were and are as follows: -

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*

2. *An Elected Member must listen to, and respect, the views of other Elected Members 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 – Representation

1. *When giving information to the community, an Elected Member must accurately represent the policies and decisions of the Council.*
2. *An Elected Member must not knowingly misrepresent information that they have obtained in the course of their duties.*
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.*

The Chairperson undertook an initial assessment and determined on 1 October 2019 that the whole complaint was to be investigated and determined by the Code of Conduct Panel.

A Code of Conduct Panel was formed to investigate the complaint. On 15 October 2019 Cr Ewin was provided with a copy of the complaint and invited to provide a response. Cr Ewin responded to the complaint in writing on 23 October 2019.

2. Investigation

The Panel met on 30 October 2019 to review the complaint and Cr Ewin's response. It was at this meeting that the Panel decided that the complainants should be asked to clarify the sub-paragraphs of Part 7 of the Code which Cr Ewin was alleged to have breached. The Panel also determined that its investigation should be conducted by means of a hearing and that it should call Mr Nicholas Heath, the General Manager of the Hobart City Council, as a witness.

When advised that he would be called as a witness, Mr Heath requested that he provide a statutory declaration in lieu of giving evidence. The Panel agreed to Mr Heath submitting a statutory declaration for its consideration. Mr Heath subsequently submitted a statutory declaration dated 19 November 2019. The Panel accepted the statutory declaration, subject to agreement from Ald Briscoe, Ald Denison and Cr Ewin that they did not require Mr Heath to attend the hearing for the purpose of cross-examination. The parties advised that they did not wish to cross-examine Mr Heath, and he was advised accordingly with the proviso that he be on stand-by if required whilst the hearing was underway.

The hearing proceeded on 13 December 2019. Ald Briscoe and Cr Ewin made an affirmation and Ald Denison swore an oath.

The Chairperson outlined the substance of the complaint and the procedure of the hearing, including identification of the written evidence before the Panel, as listed below, and confirmed that all parties had received copies of:

- Amended complaint by Ald Briscoe and Ald Denison together with statutory declarations signed on 23 September 2019
- Attachments A, B, C and D to the complaint
- Extracts of Parts 7 and 8 of the City of Hobart Elected Member Code of Conduct

- Statutory declaration by Cr Holly Ewin dated 23 October 2019
- Statutory declaration by Ald Denison and Ald Briscoe dated 29 October 2019
- Summary document of complaint and relevant Parts of the Code that are alleged to have been breached by Cr Ewin submitted by complainants dated 1 November 2019
- Statutory declaration by Mr Nicholas Heath dated 19 November 2019

Ald Denison gave evidence first. She said that the comments made by Cr Ewin in the interview with Ryk Goddard on ABC radio, which suggested that Ald Denison and Ald Briscoe voted on ideological lines, were “an appalling accusation” and offensive. Ald Denison said that by making such a statement, Cr Ewin’s did not acknowledge the in-depth consideration that she put into her contribution to Council matters. Ald Denison said that she had always acted professionally and with respect. Ald Denison told the Panel that Cr Ewin’s collective description suggested that she and Ald Briscoe always voted the same way, something that Ald Denison rejected. Ald Denison pointed to her and Ald Briscoe’s respective voting history, noting that often they voted differently but that they had respect for each other’s positions on various matters. She identified the building heights and cable car matters as examples. Ald Denison said that she was devastated that Cr Ewin had referred to some of the elected members as “bastards” and accused them of receiving gifts. Ald Denison said that these statements undermined the position of councillor. Ald Denison said that she was very upset by a response by one of Cr Ewin’s followers, which was to the effect that the follower would “egg someone’s car”. Ald Denison claimed that Cr Ewin’s Facebook post had incited this type of response and the Councillor should immediately remove such comments.

Ald Briscoe gave evidence second. He detailed his academic and professional background and experience as a means of demonstrating his ability to consider a range of issues before Council. In particular, he referred to his qualifications in chemistry which, he said, gave him a good understanding of the issue of pill testing, which was the subject of debate in respect of which Cr Ewin accused the complainants of being ideologically opposed. Ald Briscoe said that despite Cr Ewin stating that they did not name individuals, the names of those opposing the motion were mentioned that evening on the Mercury newspaper’s website. Ald Briscoe said he was “troubled, concerned and offended” by Cr Ewin’s remarks on ABC radio regarding voting along ideological grounds. He went on to say that he had always taken his role of councillor seriously and that elected members often had different opinions, which he respected. He tendered a copy of Cr Ewin’s signed declaration of office in which Cr Ewin committed to observing the Councillor Code of Conduct. The document was shown to Cr Ewin, who did not object to it being included in the evidence. The Panel admitted the document as evidence and marked it B2. A page from the minutes of the Council meeting on 22 July 2019, showing councillors’ votes on a motion relating to pill testing, was also tendered without objection by Cr Ewin. It was taken and marked B1.

Ald Briscoe said that he and Ald Denison had attempted to avoid this matter escalating to a Code of Conduct hearing. They emailed Mr Heath seeking mediation. In his statutory declaration, Mr Heath advised that he had discussed the matter with Cr Ewin. Mr Heath’s statutory declaration, admitted as evidence without objection, exhibited a text message exchange with Cr Ewin:

Mr Heath: Holly – have u had a chance to consider what we discussed on Friday re ‘voting along ideological’??

Cr Ewin: I haven’t dedicated much headspace to it, but as you’ve probably guessed, I’m not interested in apologising for nothing I’ve done wrong.

Mr Heath: [thumbs up emoji] - spoke to Anna today. We can organise external mediation if you want, but it's your call. Otherwise, you can politely decline and see what they do.

Cr Ewin: I politely decline.

Cr Ewin responded to the complaint by saying that there was no dispute as to the substance of it. Cr Ewin admitted to the contents of the ABC radio interview and the Facebook posts and comments. Cr Ewin went on to say that the posts were on their private Facebook page and not an official one as councillor. Cr Ewin gave evidence of having both a private page and a public page. Cr Ewin said that they try to moderate their Facebook posts on their Facebook page.

Cr Ewin told the hearing that an apology would be forthcoming if they considered their actions to be "wrong". Cr Ewin maintained that their actions were not wrong, saying that all councillors had the right to express an opinion. Additionally, Cr Ewin felt particularly targeted with (code of conduct) complaints, stating that there had been occasions when they had been the target of others' offending behaviour. The Panel told the parties that it only had jurisdiction to consider the complaint before it. Cr Ewin said that the Code needs improving, and that behaviour also needs changing.

Cr Ewin advised that they did not dispute Mr Heath's statutory declaration, but that the declaration did not cover all the exchanges between them. As stated in Cr Ewin's statutory declaration, the Councillor recalled approaching Mr Heath to ask whether in his opinion the Councillor had done anything wrong and whether an apology should be forthcoming. Cr Ewin said that Mr Heath said that he did not think the Councillor had done anything wrong, adding that, in his opinion, he thought it best to resolve the matter through mediation.

At this point, the Panel determined that Mr Heath should be called to provide his version of the interaction which took place with Cr Ewin, as his statutory declaration was silent on the point.

There was a short adjournment while Mr Heath was requested to attend the hearing.

Mr Heath attended the hearing and made an affirmation. Panel members questioned Mr Heath, following which he was cross-examined by Cr Ewin and by Ald Briscoe.

Mr Heath told the Panel that he recalled having a conversation with Ald Zucco about this complaint and that he advised Ald Zucco that he would attempt to arrange mediation as a means of resolving the matter if all involved were agreeable. Mr Heath said that he thought mediation was a preferable to going through a formal process culminating in a Code of Conduct Panel hearing. When asked by Cr Ewin whether he had said that Cr Ewin "had done nothing wrong", Mr Heath said he recalled the conversation but had no memory of saying those words or words to that effect. Mr Heath said that his recollection of the discussion was "hazy" as Cr Ewin was interstate at the time. Cr Ewin suggested to Mr Heath that the conversation took place in his office. Ald Briscoe asked whether Mr Heath remembered having a similar conversation with him as he (Mr Heath) did with Ald Zucco. Mr Heath replied he did recall some discussion but not the detail of the conversation.

Mr Heath was then relieved as a witness and departed the hearing room.

Cr Ewin expressed frustration that Mr Heath did not recall the detail of the conversation between them. The Panel advised Cr Ewin that it was not the role of a General Manager to assess whether a councillor had breached the Code.

The Panel then asked whether Cr Ewin could accept that – in relation to the Code of Conduct - it was not a matter of what the sender of a message intended but rather how that message was felt or interpreted by the recipient. Cr Ewin replied by saying "to some extent". However, Cr Ewin stuck by their conduct on Facebook and other mediums, although they may consider in

future “toning them down”. When asked about one follower on the Councillor’s Facebook page threatening to egg a car belonging to one of the elected members, Cr Ewin said that they (Cr Ewin) had taken that post down.

The Panel asked Cr Ewin if the Councillor understood the requirement of elected members to comply with all the provisions of the Code of Conduct, pointing out that the Councillor had agreed to this when signing the declaration of office (exhibit B2). Cr Ewin re-iterated that the behaviour did not breach the Code. Cr Ewin said that in future they would “refrain from speaking about other people’s decisions or motives but other people on council do this regularly, they speak about other people’s decisions, other people’s motives”. Cr Ewin said, “I am still yet to be convinced that I ever said anything out of line because, to my mind I have stated facts.”

With respect to Cr Ewin, two points need to be made. Firstly, the Panel is concerned only with this complaint. The conduct of others, such as whether they may have breached the Code in other ways, is irrelevant to the Panel’s task. Secondly, the assertion that the comments were accurate is not necessarily determinative of the complaint. Accurate or truthful conduct may still, depending on the circumstances, breach the Code. The wording of the Code must be considered.

The complainants were then given an opportunity to summarise their complaint by way of submissions. Ald Denison said that she felt threatened by the Facebook comment that someone was going to “egg her car”, which was prompted by Cr Ewin’s post. She referred to Cr Ewin’s evidence, in which Cr Ewin repeatedly stated that the Councillor “had done nothing wrong” but admitted to calling some aldermen “bastards” and accusing them of accepting gifts in exchange for deeds.

In summarising, Ald Briscoe rejected Cr Ewin’s contention that there had been deliberate attempts to silence Cr Ewin. Ald Briscoe submitted that complying with the Code of Conduct is “a small price to pay” for elected members, which all elected members should recognise. Ald Briscoe said that this matter could have been resolved earlier through internal channels, avoiding the need to progress to a formal Code of Conduct complaint. Cr Ewin responded that neither of the complainants had approached the Councillor with this in mind.

When given the opportunity to make further submissions, Cr Ewin did not want to add anything other than to say that neither of the complainants had approached the Councillor to resolve the matter internally (i.e., without a Code of Conduct complaint).

3. Determination

Prior to outlining the determination it is convenient to first set out the Panel’s task. The Panel’s task is to investigate (sections 28ZE and 28ZH) and determine (sections 28ZI) the complaint. In particular, the Panel must consider whether, on the basis of the evidence provided by the parties, Cr Ewin breached the Code. The Panel cannot consider complaints that are not before it, nor can it consider the conduct of persons other than the respondent councillor. However, the Panel is not limited to considering conduct that offends the particular complainants. A complainant may make a complaint with respect to a councillor’s conduct that affected another person (so much so is made clear by the wording in section 28ZI(2)(c) of the Act). This is relevant to the third event, in respect of which other councillors were the subject of Cr Ewin’s Facebook post.

In undertaking its task, the Panel's applicable standard of proof is the balance of probabilities and the hearing is to be conducted by way of inquiry. In doing so, the Panel received some documents and heard evidence from Ald Briscoe, Ald Denison, Cr Ewin and Mr Heath. The parties were afforded the opportunity to cross-examine witnesses and make submissions.

Cr Ewin accepted that they had made the comments as described in the written complaint and by Ald Briscoe and Ald Denison at the hearing. With one exception, there was no dispute as to the facts. The sole exception is whether or not Mr Heath told Cr Ewin that the Councillor had "done nothing wrong" or said words to that effect. Putting that exception to one side, the Panel's task is therefore to consider whether Cr Ewin's admitted conduct, namely the ABC radio interview of 23 July 2019 and Cr Ewin's Facebook posts and/or comments of 6 June 2019 and 26 July 2019 (the three events), breached the Code in the ways alleged in the complaint. Whilst some of the sub-paragraphs of Parts 7 and 8 of the Code related to all three events, others did not. These have been identified below.

The sole exception should be considered next. Cr Ewin's evidence was that Mr Heath said that the Councillor had "done nothing wrong" or words to that effect. Mr Heath's evidence was that he did not recall saying that, and he doubted that he would have "commented on the merits" of the dispute. His evidence was delivered carefully, and the Panel formed the view that he was doing his best to recall a conversation that occurred some time ago and in unexceptional circumstances. Mr Heath's text message exchange with Cr Ewin, annexed to his statutory declaration, is broadly supportive of Mr Heath not having told Cr Ewin that the Councillor had "done nothing wrong". Telling Cr Ewin that the Councillor had "done nothing wrong" is inconsistent with offering to facilitate mediation. It would be surprising for an experienced general manager to proffer a view to one councillor about a dispute with other councillors. On the other hand, Cr Ewin was adamant and unshaken in their evidence. Cr Ewin's evidence was that the Councillor would apologise if they thought that they had done something wrong. It is unnecessary for the Panel to make a finding about whether Mr Heath said those words or words to that effect. As the Panel pointed out to Cr Ewin during the hearing, it is not the general manager's task to assess whether or not a councillor has breached the Code, notwithstanding Mr Heath's experience and that this was Cr Ewin's first term as a councillor. The onus rested with Cr Ewin alone to comply with the Code.

Before considering whether Cr Ewin breached the Code in the ways alleged by the complainants, it is appropriate to comment on the nature of the complainants' allegations in light of the Facebook posts. The Code is concerned with a councillor's conduct. That conduct may, plainly enough, include a councillor's conduct on social media platforms. It may include a councillor's Facebook posts and comments on Facebook posts or other media (videos, photographs etc). Some of the documents provided in support of the complaint depicted comments by other persons on Cr Ewin's Facebook posts. The conduct of those third parties is not in issue. In response to a question from the Panel, Ald Briscoe and Ald Denison stated that they did not impugn those third parties' comments. Such a concession is appropriate because the Code is concerned only with the respondent councillor's conduct. The complainants must establish that the respondent councillor breached the Code in the ways particularised by them. At its highest, the complainants' case with respect to others' Facebook comments on Cr Ewin's posts was that the Councillor's own post had "encourage[ed]" others to post. The Panel has considered Cr Ewin's conduct on that basis.

Alleged breaches of Parts relating to all events

Part 7 (1) (a) A councillor must treat all persons fairly.

In relation to Part 7.1 (a), the Panel determined that the complaint had been proven in relation to all three events. Cr Ewin did not dispute the comments made on ABC radio nor the Facebook posts. The complainants detailed the unfairness of Cr Ewin's name-calling and imputations regarding their behaviour. Both complainants told the Panel that in the time that they have been councillors, many of their colleagues have had different opinions on an array of issues (including different opinions between them). However, they respected this and accepted the right to different views. They said that the comments made by Cr Ewin proved that the Councillor did not afford them the same courtesy that had been afforded to other councillors (with whom Cr Ewin had agreed), and therefore had treated them unfairly.

'Fair' is relevantly defined in the Macquarie Dictionary as "free from bias, dishonesty, or injustice". The Panel must consider whether Cr Ewin's conduct was biased and/or dishonest. It is necessary to consider the imputations conveyed by the Councillor's conduct with respect to the three events. In drawing imputations, the Panel is not to apply a literal interpretation, but must consider the natural and ordinary meaning of Cr Ewin's words. This may include nuance and insinuation.¹ Those imputations, and the Panel's comments on them, are:

- The complainants were wilfully ignorant in voting against the pill testing motion and voted along ideological grounds. The comments amounted to a tacit assertion that the complainants themselves breached the Code; particularly Part 1, which deals with a councillor's decision-making obligations.
- The complainants and Ald Zucco complained against Cr Ewin because Cr Ewin had said that "people should listen to experts and not vote along ideological lines". In the Panel's view, Cr Ewin mischaracterised the complaint - see the above imputation.
- The complainants and Ald Zucco were bullies. Such an imputation is compelled by Cr Ewin's sharing of a photograph of the Mercury newspaper headline "MP's War on Bullies".
- Councillors who voted against a motion relating to transgender signage in public bathrooms were biased towards viewpoints held by "openly conservative cis [non-transgender] men".
- Councillors who voted against a motion relating to transgender signage in public bathrooms were "bastards".
- Councillors who voted against a motion relating to transgender signage in public bathrooms had dishonestly or surreptitiously orchestrated the motion's defeat ("stitched up beforehand").
- Councillors who voted against a motion relating to transgender signage may have received gifts from organisations ("it's not impossible"), and therefore may have committed a criminal offence. This is an example of an imputation that, although not conveyed literally, was conveyed clearly by the overall tone and tenor.

Fairness is to be assessed objectively. A councillor's statutory functions (section 28) and the robust nature of political debate are to be borne in mind. One should not too easily find 'unfairness'. Cr Ewin's conduct and those imputations are properly considered in combination.

¹ Although in the context of the law of defamation, Wigney J's statement of principle in *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496 at [72]-[85] is relevant.

Whilst one alone may not constitute unfairness, their collective effect did. The Panel concluded that the complainants had not been treated fairly by Cr Ewin. This part of the complaint is upheld.

Part 7(1) (b) A councillor must not cause any reasonable person offence or embarrassment.

In relation to Part 7. 1 (b) the Panel determined that the complaint had been proven in relation to the three events. Ald Briscoe pointed to his long tenure as a councillor and his good record over many years. Cr Ewin did not dispute this evidence. Ald Briscoe said that the comments made by Cr Ewin were embarrassing to him, especially the allegation that he was taking an “ideological position” on the pill testing issue. Ald Denison was equally embarrassed by Cr Ewin’s comments, stating that it was offensive to be described as a “bastard” and accused of accepting gifts in return for favours. Ald Briscoe and Ald Denison’s evidence was to the effect that they were offended and embarrassed. In the Panel’s view, subjective offence or embarrassment is insufficient to make out a breach of Part 7.1(b). The Code creates an objective test; the standard is one of a reasonable person. Having regard to the language used by Cr Ewin and the repetition of the remarks (on both ABC radio and on Facebook), the Panel accepts that Ald Briscoe and Ald Denison were reasonably offended and embarrassed. This part of the complaint is upheld.

Part 8.5 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.

Part 8.5 of the Code has two disjunctive limbs. It requires proof that Cr Ewin’s personal views were expressed publicly and that they, in fact, either (i) undermined a decision made by the Council, or (ii) brought the Council into disrepute. The Panel will deal with the limbs in reverse order.

Cr Ewin’s comments, whilst being derogatory generic statements about some colleagues, did not in the opinion of the Panel bring the Council into disrepute. Commenting on an issue before Council does not, in and of itself, bring the Council as an institution into disrepute. Council is a deliberative polity. A councillor has political functions. Robust debate and commentary are to be expected - see sections 20, 25 and 28 of the Act. As to the first limb, Cr Ewin had voted in favour of the motion which was passed at the meeting of Council on 22 July 2019, and therefore Cr Ewin’s expression of personal views did not undermine the Council’s decision. As to Cr Ewin’s Facebook post and comments of 6 June 2019, they were insufficient to undermine Council’s decision or bring the Council, as an institution, into disrepute. Although they may have been offensive, unfair and inelegantly expressed, Cr Ewin’s expression of their personal views did not bring the Council into disrepute.

The Panel therefore concluded that Cr Ewin did not undermine the decision of Council nor did Cr Ewin’s actions bring the Council into disrepute. This part of the complaint is dismissed.

Part 8.6 An Elected Member must show respect when expressing personal views publicly.

In relation to Part 8.6 the Panel determined that the complaint was proven in relation to the three events. Cr Ewin’s view was that all elected members have the right to express an opinion which is why the councillor made the comments on radio and posted statements on Facebook. Cr Ewin expressed the view that the Code and the complaint infringed their freedom of speech. In the Panel’s view, councillors may have strongly held views. They are elected representatives and, as councillors, have political functions (see Section 28). However, the Code of Conduct adopted by the Council imposes limits and requirements on councillors, although the Code must not be read as derogating from a person’s constitutionally protected freedom of political

communication.² The Panel's observations are applicable to the majority of the complaint before it. Cr Ewin expressed the view that the Councillor's "obligation to speak the truth trumps the Code". The Panel disagrees. As has been stated, the Code must not be read as limiting Cr Ewin's implied freedom of political communication, but rather it sets boundaries that are not less than the implied freedom. In that sense, the implied freedom is relevant in informing when a councillor's conduct infringes the Code.

The Panel determined that the content of the communications made by Cr Ewin showed a lack of respect for other elected members. The Panel acknowledges that within the confines of a Council meeting a range of views are expressed on several matters. Often there is robust discussion and it is the Chair's role to maintain order. The implied freedom is relevant. The requirement to show respect must not be construed too literally so as to sanitise debate.

However, Cr Ewin's language went beyond simply showing a lack of respect for a particular viewpoint. Cr Ewin's language targeted the complainants, and others. It showed a manifest lack of respect for them as persons, as distinct from a mere lack of respect for their positions or as distinct from mere discourtesy. Such a conclusion is compelled by the Panel's findings as to the imputations, set out above, of Cr Ewin's comments.

Cr Ewin's conduct and those imputations are properly considered in combination. Whilst one may not have been sufficient to breach Part 8.6 of the Code, the Panel determined that the nature of the opinions collectively and expressed publicly by Cr Ewin did not afford respect to Ald Briscoe and Ald Denison. This part of the complaint is upheld.

Part 8.7 The personal conduct of an Elected Member must not reflect, or have the potential to reflect, adversely on the reputation of the Council

In relation to Part 8.7 the Panel determined that the complaint was not proven in relation to the three events. There was no evidence put before the Panel that supported the complaint that Cr Ewin's comments had reflected, or had the potential to reflect, adversely on the reputation of Council. As the Panel has explained above, commenting on an issue before Council does not, in and of itself, bring Council into disrepute. Council is a deliberative polity. There are political functions to a councillor's functions; see section 28(1) and (2). Robust debate and commentary is to be expected. Something more than a lack of respect (Part 8.6), reasonably offensive or embarrassing behaviour (Part 7.1(b)), or unfairness (Part 7.1(a)) is required. In the Panel's opinion, behaviour of that type does not, in and of itself, reflect, or have the potential to reflect, adversely on the reputation of the Council. This is distinct from behaviour that reflects or has the potential to reflect adversely on the reputation of a person, such as the councillor, or a councillor's behaviour that is such a gross departure from accepted standards and norms that it not only reflects adversely on the councillor's reputation but also on the reputation of Council itself. The distinctions between the Council as an institution (Sections 18 and 29) and its functions (Section 20), and a councillor (Section 25) and the councillor's functions (Section 28), are important. This part of the complaint is dismissed.

² *Howard v Code of Conduct Panel*, Unreported, Magistrates Court of Tasmania, 18 July 2019 at [49]-[60] (Magistrate S Brown). The Panel has considered Ald Briscoe's comments regarding compliance with the Code being a "small price to pay" in light of the implied freedom of political communication.

Alleged breaches of Parts relating to Facebook post of 6 June 2019 and ABC Radio interview of 23 July 2019

Part 7.1 (c) must not bully or harass any person

In relation to Part 7.1 (c) the Panel determined that the complaint was not proven in relation to the events on 6 June and 23 July 2019. It was the Panel's view that harassment and/or bullying in this part of the Code requires unwarranted and unacceptable behaviour towards an individual over a sustained period. The Panel determined that Cr Ewin did not demonstrate sustained personal attacks on Ald Briscoe and Ald Denison. The Councillor had not named the complainants personally, although some comments may have led to some people being able to identify the complainants. The Panel determined that there was insufficient evidence to substantiate this part of the complaint. This part of the complaint is dismissed.

Part 7.2 An Elected Member must listen to, and respect, the views of other Elected Members 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

In relation to Part 7.2 the Panel determined that the complaint was not proven in relation to the two events listed above. This part of the Code is limited to conduct occurring in either a Council meeting, a committee meeting or "any other proceedings" of the Council. There was no evidence that Cr Ewin failed to listen to or respect other councillors in any of those proceedings, nor that Cr Ewin had focussed on personalities rather than issues during those proceedings. Cr Ewin's conduct outside of Council proceedings does not fall within the ambit of Part 7.2 of the Code. This part of the complaint is dismissed.

Alleged breaches of Parts relating to Facebook post and comments of 6 June 2019

Part 8.1 When giving information to the community, an Elected Member must accurately represent the policies and decisions of Council

In relation to Part 8.1, the Panel determined that the complaint was not proven in relation to Cr Ewin's Facebook post and comments of 6 June 2019. There was no evidence presented that Cr Ewin had misrepresented the policies or decisions of Council (as distinct from the reasons behind votes on such policies or decisions). This part of the complaint is dismissed.

Alleged breaches of Parts relating to Facebook post of 26 July 2019

The breach against Part 8.2 was alleged in relation to the event of 26 July 2019.

Part 8.2 An Elected Member must not knowingly misrepresent information that they have obtained in the course of their duties.

In relation to Part 8.2, the Panel determined that the complaint was not proven in relation to Cr Ewin's Facebook post of 26 July 2019. There was no evidence that Cr Ewin had knowingly misrepresented information obtained through the course of the councillor's duties. Whilst it may be the case that Cr Ewin misrepresented Ald Denison and Ald Briscoe's reasons for voting against the pill testing motion (although the Panel does not make such a finding for the purpose of this part of the complaint), there was no evidence that the information – namely, the complainants' votes – was obtained in the course of Cr Ewin's duties. The complainants' respective voting records, in respect of motions debated and voted upon in the open portion of a Council meeting, are matters of public record and not information that Cr Ewin obtained in the course of the Councillor's duty. This part of the complaint is dismissed.

For these reasons, pursuant to section 28Z(1)(c), the Panel upholds part of the complaint and dismisses the remainder of it.

Sanction

The Panel's draft findings in Part 3 of this report were provided to the parties, and Cr Ewin was invited to make submissions regarding what sanctions, if any, should be imposed in light of those findings. Cr Ewin's submissions were to the following effect:

- Cr Ewin disagreed that "stating the fact of my colleagues voting along ideological lines regarding pill testing could be construed as offensive".
- "I respect my colleagues as fellow human beings but will not respect their decisions or actions on these issues. I fundamentally disagree with the politics of respectability. Respect existence or expect resistance. I do not believe I owe anybody an apology and would strongly resent being legally bound to apologise for calling out bad behaviour by people who should, if they have in fact done their due diligence, know better."

The Panel accepts that Cr Ewin, like all councillors, has a political function and may hold strong views about contentious issues. However, the Code is to temper and govern a councillor's conduct. Cr Ewin's conduct, although not necessarily outrageous, went beyond the bounds set by the Code. In response to a question from the Panel, Cr Ewin stated:

"I didn't expect to be elected and am now just along for the ride".

A previous code of conduct complaint against Cr Ewin was upheld in part by Determination Report 15 October 2019 - Hobart City Council - Complaint by Ms Isla MacGregor and Ms Bronwyn Williams against Councillor Holly Ewin - Partially upheld - Tabled 21 October 2019.

Although the conduct the subject of that complaint predates the subject of this complaint, the Panel's report was not made until after this complaint was received. Thus, it is not a 'prior conviction' in that sense. Nonetheless, it is relevant. In the Panel's view, Cr Ewin's answers given in the hearing, such as being "just along for the ride", display a lack of insight into a Councillor's functions and obligations.

The Panel takes into account Cr Ewin's relative inexperience and that, at the time of the three events, no complaints had been upheld in whole or in part. It also acknowledges the contentious debates that gave rise to Cr Ewin's conduct and that a value judgment is required. The Panel accepts that Cr Ewin did not intend to breach the Code (in that that is not what Cr Ewin set out to do). Nonetheless, Cr Ewin's conduct did, in fact, breach the Code. Cr Ewin's conduct was repeated, spanning several different days and two different mediums.

In their complaint form, the complainants sought an apology. The Panel has already referred to their evidence about the effect that Cr Ewin's conduct has had on them. In submissions, Cr Ewin "strongly resent[ed]" being directed to apologise. Notwithstanding that a forced apology may be of somewhat limited value to a complainant, the Panel is satisfied that the repeated nature of Cr Ewin's conduct warrants an apology. For the above reasons, the Panel is also of the view that Cr Ewin would benefit from training.

Section 28ZI (2) prescribes a descending hierarchy in terms of severity of sanction. The starting point is whether any sanction should be imposed. The Panel is satisfied that it should. In the 15 October 2019 report, Cr Ewin was cautioned. For the above reasons, something more severe than a caution is required on this occasion. The Panel therefore imposes the following sanctions:

- Pursuant to section 28ZI(2)(c), Cr Ewin is to apologise to Ald Briscoe and to Ald Denison. Such an apology is to be made orally in the Council meeting when this report is tabled. A written copy of the apology, signed by Cr Ewin, is to be given to the Hobart City Council General Manager within 7 days of the tabling of this report. The Panel determines that the apology should be as follows:

“I, Councillor Holly Ewin, unreservedly apologise for not showing respect for you as fellow councillors, which may have caused you offence or embarrassment.

- Pursuant to section 28ZI(2)(d), Cr Ewin is to attend a training course regarding Cr Ewin's obligations as a Councillor. The training and its time and place are to be determined by the Chief Executive Officer of the Local Government Association of Tasmania. The training must be commenced within 6 weeks of the tabling of this determination at a Hobart City Council meeting and be completed within 6 months. The training should include –
 - A councillor's responsibility to all constituents of the municipality
 - A councillor's legal and moral relationship with fellow councillors
 - A councillor's responsibility in making public statements on social media and other communication channels.

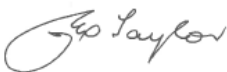
3. Determination of complaint

Section 28ZD (1) (a) of the Act requires the Panel to investigate and determine the complaint within 90 days of the initial assessment. In this instance that 90-day period has been exceeded for the following reasons:

- Additional correspondence between parties to the complaint
- Additional time to follow up with a witness and seek a statutory declaration
- Short periods of unavailability of Panel members and parties to the complaint
- The need to re-schedule the hearing

4. Right to Review

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



Jill Taylor
Chairperson



Sam Thompson
Legal Member



Liz Gillam
Member