

Local Government Act 1993

HUON VALLEY COUNCIL CODE OF CONDUCT DETERMINATION REPORT *

RELATING TO THE CONDUCT OF COUNCILLORS

(ref : C 19903)

Complaint by Mr Geoffrey Swan against Councillor Michael Newell

Determination made on 9 June 2020

Code of Conduct Panel:

Jill Taylor (Chairperson), Gretel Chen (Legal Member) and Liz Gillam (Member)

I. Summary of the complaint

On 18 December 2019, a Code of Conduct Complaint (the complaint) made by Mr Geoffrey Swan against Councillor (Cr) Michael Newell was forwarded to the Executive Officer. The Executive Officer referred the complaint to the Chairperson of the Code of Conduct Panel for initial assessment. Mr Emilio Reale, General Manager, Huon Valley Council confirmed that the complaint met the requirements of Section 28V (3) of the *Local Government Act 1993* (the Act).

The complaint alleged that Cr Newell had breached the Huon Valley Code of Conduct (the Code), which commenced on 27 April 2016 and was reviewed on 27 March 2019.

Specifically, the complaint alleged that Cr Newell breached Part 3.1 and Part 7.1 (a), (b) and (c) on three occasions.

Firstly, commencing on or about 21 August 2019 Cr Newell participated as a founding member of a Facebook group entitled "*Call out the Huon valleys (sic) biggest whinger*". Mr Swan alleges he was the target of abuse and ridicule by this group.

Secondly, in the online edition of the Mercury newspaper on 26 October 2019 and in the print edition of the Mercury newspaper on 27 October 2019, Cr Newell reaffirmed his views of Mr Swan albeit with some changes to the wording previously used. Specifically, Cr Newell was quoted as saying in relation to an earlier Conduct Panel determination "*I accept the panel's ruling but do not regret in any way my comments and will continue to support and stick up for valued members of the community*" and "*In hindsight maybe I could have used different wording, but the meaning would be the same.*"

Thirdly, during the 30 October 2019 meeting of the Huon Valley Council, when the Code of Conduct Panel determination relating to the earlier complaint against him was tabled, Cr Newell stated that he accept(ed) the Code of Conduct Panel decision but ha(d) not changed his position in relation to making statements that were the subject of a previous complaint. Further,

¹ Later changed to "whingers".

Cr Newell referred to a “faceless group of people” which Mr Swan alleges was a reference to him and others.

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

PART 3 – Use of Office

3.1 *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*

The Chairperson undertook an initial assessment of the complaint and, on 15 January 2020, advised both the complainant and the respondent as well as the General Manager that further investigation was warranted.

A Code of Conduct Panel was formed to investigate the complaint. Cr Newell was advised of the complaint on 16 January 2020 and was invited to respond.

On 31 January 2020, Cr Newell provided his response, and advised that he was having difficulty understanding the complaint and was unable to provide a considered response. He said he was therefore being denied procedural fairness.

The Panel met on 3 February 2020 to consider Cr Newell's response. The Panel agreed that Mr Swan should be asked to further particularise the complaint to enable both Cr Newell and the Panel to understand the conduct and breaches alleged.

The Chair of the Panel wrote to Mr Swan on 5 February 2020 and requested him to:

- Give a clear and precise statement of each incident where it was alleged Cr Newell had breached the Code and outline the evidence relied on in relation to each breach.
- Give a clear and precise statement of each incident where it was alleged that Cr Newell's behaviour was directed to or at Mr Swan.
- Indicate the time, date and location of each of the alleged breaches and the part of the Code alleged to have been breached.

On 3 February 2020 the Chair wrote to Cr Newell to respond to his concerns as to procedural fairness, and advised Cr Newell that Mr Swan had been requested to clarify his complaint as it related to each of the alleged incidents.

Mr Swan provided further particulars on 11 February 2020. The particulars were forwarded to Cr Newell. On 13 March 2020, Cr Newell provided a brief response to Mr Swan's particulars saying that he “*pleaded not guilty to all three charges*” and that the comments complained of related to “*people worldwide who use social media to attack and put down people*”.

2. Investigation

A hearing was held on 8 May 2020. Owing to the restrictions imposed because of the covid-19 virus, the hearing was held by telephone. The Panel sat together and Mr Swan and Cr Newell attended via telephone from separate, private locations. Cr Newell took the oath and confirmed that he was alone. Mr Swan took the oath and confirmed that his wife was present as a support person.

The Chairperson provided an overview of the hearing procedure and listed the documentation before the Panel. These documents had been listed in a letter sent to both parties on 29 April 2020. Both Mr Swan and Cr Newell confirmed that they had received all the listed documents.

Mr Swan spoke first.

In relation to the first incident, alleged to have commenced on 21 August 2019 when Cr Newell became a founding member of, and posted to, a Facebook page entitled "*Call out the Huon valleys (sic) biggest whinger²*" Mr Swan stated the following:

- Cr Newell was a founding member of the Facebook group;
- as a member of that group, Cr Newell "liked" comments and posted entries on the page;
- Cr Newell was a member of the group for at least four weeks;
- the group was a "hate" group and some of the postings were disgusting.

Mr Swan referred the Panel to various screen shots of the Facebook page to support his allegations.

The posts on the Facebook page note Cr Newell as a founding member.

Cr Newell was invited to question Mr Swan and respond to the Facebook allegations.

Cr Newell said that he was approached by Mr Luke Woolley, who he described as a friend, about joining a Facebook discussion group he was setting up. Mr Woolley told Cr Newell that the group was called "*Call out the Huon Valley's biggest whinger*". Cr Newell said that he joined the group but did not understand about being a founding member as he did not have to use a password to access the group. Cr Newell said he thought the group would be a bit of *light-hearted fun*.

Cr Newell said that he was a member of about 114 Facebook groups at the time, which included charity, football and social groups. Cr Newell said that about four weeks after becoming a member of the group his daughter brought some content to his attention. He said that there was some disturbing stuff posted on the site and it was then that he withdrew from the group. Cr Newell admitted that sometimes he had commented on the Facebook page but had never "posted" to it. He subsequently stated that he had posted on the page once, but not in relation to Mr Swan. He told the Panel he was no longer a member of the group and did not understand how he became a "founding member" of the Facebook group.

In relation to the second incident, where the Mercury newspaper online edition on 26 October 2019 and in the Mercury newspaper on 27 October 2019 quoted Cr Newell as saying in

² Later changed to "whingers".

relation to an earlier Conduct Panel determination “*I accept the panel’s ruling but do not regret in any way my comments and will continue to support and stick up for valued members of the community,*” and “*In hindsight maybe I could have used different wording, but the meaning would be the same*”, the Panel was provided with a copy of the relevant Mercury article.

Cr Newell did not dispute the accuracy of the quotes attributed to him.

Cr Newell told the Panel that he was approached by the Mercury offering him an opportunity to respond to comments made by Mr Swan. Cr Newell said that he believed his comments were not targeted at Mr Swan and that if Mr Swan was offended by them then “*that’s life*”. Cr Newell said that he received dozens of messages of support after the Mercury article.

He repeated the views that he expressed to the Mercury several times during the course of the hearing.

In relation to the third incident, the comments alleged to have been made by Cr Newell at a Huon Valley Council meeting on 30 October 2019, the Panel was provided with a recording of the relevant meeting.

Cr Newell did not dispute the accuracy of the recording.

The Panel listened to the recording and notes the following comments made by Cr Newell:

- “I accept the Panel’s decision although, and as I told the Panel, I would definitely not change my time over again ...the moment we say anything we get shot down by this faceless group.”
- “I did make those comments and I stick by those comments. I’m sick of having to put up with these gutless people” (warning from the Mayor) “I’m sick of having to put up with these faceless people that sit behind keyboards they never put their hands up for public office they do nothing but knock.”
- “I stand by my comments. I’m sorry I wish I could have used different words but the meaning would have been exactly the same and I stick by them.”

Mr Swan said he found Cr Newell’s description of members of the Huon Valley community as “*gutless*” and “*faceless*” offensive and that Cr Newell’s statements had a negative impact on him.

In relation to the third incident, Cr Newell said that he had the support of all, but two, fellow councillors at the Council meeting when the determination was tabled. He told the Panel that the Mayor cautioned him when he “*probably went a bit far*”, presumably when he had initially used the word “*gutless*”, but that he had nevertheless received nothing but positive messages about his statements at the Council meeting.

In his concluding remarks, Cr Newell said that he believed that Mr Swan has a vendetta against him, which Mr Swan denied. Cr Newell said that he will always be “*truthful and that will get him in trouble from time to time*”. He said that he only joined the Facebook group as a bit of “*light-hearted fun*”, but when he saw “*the other side of the fence*” he discontinued.

Cr Newell said he believed that he was not a councillor 24 hours a day and not constantly on the job. He said that he “*never posts as a councillor*” on social media.

Cr Newell told the Panel, on several occasions, that he stood by the comments that were the subject of the previous Code of Conduct complaint, although he said he may have used *different wording*. The words that were the subject of the previous Code of Conduct complaint were “bloody coward” and “parasite”.

Cr Newell did not specify what other words he might have used in substitution for those words. It is difficult for the Panel to conceive of any synonyms for “bloody coward” or “parasite” that would not cause a reasonable person offence.

The Panel noted that whilst Cr Newell stated that he accepted the previous Panel’s determination, in relation to which he received a caution, his statements to the Mercury newspaper and the October 2019 Council meeting indicate otherwise.

Cr Newell told the Panel that he represents “all of his community” but his public statements and membership of an obviously divisive Facebook group appear somewhat antithetical to that position.

4. Determination

In relation to the first incident, Cr Newell’s involvement in the “Call out the Huon Valleys (sic) biggest whinger” Facebook group, the Panel determines that Cr Newell has breached Parts 3.1 and 7.1(b) of the Code.

It is the Panel’s view that:

- a) in joining the Facebook group;
- b) commenting on the Facebook page, albeit only once; and
- c) remaining a member of that group for approximately four weeks

Cr Newell brought the Council or the office of Councillor into disrepute and caused Mr Swan offence or embarrassment.

Cr Newell acknowledged that he joined and participated in the Facebook group for approximately four weeks. The Panel is of the view that the name of the Facebook group should have made it obvious to Cr Newell that the express purpose of the group was to identify particular individuals within the Huon Valley community and make them the focus of negative attention. The Panel does not accept Cr Newell’s assertion that he believed the group would be “*light-hearted and a bit of fun*”. It is difficult to conceive how identifying particular individuals within a community as “whingers” could reasonably be construed as either “light-hearted” or “a bit of fun” – not least of all for those identified.

The Panel further finds that Cr Newell’s participation in the Facebook group did cause a reasonable person, namely Mr Swan, offence or embarrassment.

Cr Newell contends that he joined the group in his private capacity and not as a Councillor and that as such, his conduct could not amount to a breach of the code of conduct. The Panel does not accept Cr Newell’s contention.

The Act includes amongst the functions of a Councillor:

- *representing the community* (s28(1)(a));

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- *acting in the best interests of the community (s28(1)(b); and*
- *facilitating communication by the council with the community (s28(1)(c).*

Merely because a councillor does not expressly link his/her actions to his/her role as councillor at any given time does not necessarily mean that he/she is not carrying out one or more of the functions of a councillor. The Act provisions cited above are expressed broadly. Had Parliament intended the functions of a councillor to be limited to those instances when there was an overt or direct link to Council business it could be expected to have used words to that effect. It did not.

Parts 3.1 and 7.1 of the Code of Conduct are also expressed in wide terms. They refer to the actions of a Councillor. There are no words of limitation included in either provision. Elsewhere within the code words of limitation are used, for example, in connection with making a decision as part of a planning authority or when carrying out his/her public duty. The use of words of limitation in other parts of the code suggest that Parliament intended them not to apply in Parts 3.1 or 7.1.

It is the Panel's view that in each of the three instances the subject of the complaint Councillor Newell was acting in the capacity of councillor.

In relation to the second and third incidents, Cr Newell's comments to the Mercury newspaper in October 2019 and his comments at the Huon Valley Council meeting on 30 October 2019, the Panel determines that Cr Newell breached Part 7(1)(b) of the Code.

The Panel determines that Cr Newell's statements caused a reasonable person, namely Mr Swan, offence or embarrassment.

In relation to the alleged breaches against Part 7.1 (a) of the Code, the Panel is not satisfied that a breach is made out and determines that that part of the complaint be dismissed. Specifically, the Panel is not satisfied that Cr Newell's conduct amounted to *treatment*.

In relation to the alleged breaches against Part 7.1 (c) of the Code, the Panel is not satisfied that Cr Newell's conduct amounts to bullying or harassment (at this stage) and determines that that part of the complaint be dismissed.

5. Sanction

On 21 May 2020, the Panel wrote to Cr Newell and advised him of those parts of the complaint that had been upheld and offered him an opportunity to comment on sanction.

The same day Cr Newell responded saying he "was very disappointed if found guilty of any breaches" but in the event of the complaint being upheld, he thought a caution was an appropriate sanction.

The Panel met on 26 May 2020 to determine sanction.

The Panel is of the view that Cr Newell's participation in the Facebook group entitled "Call out the Huon Valleys (sic) biggest whinger(s)", demonstrated poor judgment and was inconsistent with his role as Councillor. Whilst Cr Newell advised the Panel that he understood he represented the whole of the Huon Valley community, his actions in joining and participating in what was obviously a divisive local Facebook group demonstrated otherwise. His statements to

the Mercury newspaper and the October 2019 council meeting also revealed a failure to understand his role as a representative of the community. Cr Newell's conduct was made worse by the targeted and insulting nature of his statements at the October 2019 Council meeting.

Cr Newell demonstrates limited insight into his behaviour. By repeatedly stating that he does not regret statements previously found to have been a breach of the Code of Conduct, he shows little regard for either the Code or the Panel.

Cr Newell has previously been cautioned by a Panel in respect to his statements about Mr Swan alluded to in this complaint. Cr Newell has shown minimal remorse for his conduct. In the circumstances the Panel considers that it is appropriate to impose a sanction that will impress upon Cr Newell the importance of elected members complying with the Code of Conduct.

It is the Panel's decision that Cr Newell be suspended for a period of six weeks from the date this determination is tabled at the Council meeting and that he is to undertake individual counselling in relation to the role of a councillor. In particular Cr Newell is to have counselling addressed to the representative nature of the role and the tension between the role of councillor and private citizen. The counselling is to be commenced within six weeks from the tabling of the determination at the Council meeting.

6. Delay in determining complaint

Section 28ZD (1)(a) of the *Local Government Act* 1993 (the Act) requires the determination to be made within 90 days after the initial determination by the Chairperson to investigate and determine the complaint or provide reasons why this requirement could not be met. In this instance the 90-day period concluded on 16 April 2020. Reasons for the delay including the need to seek clarification from Mr Swan and a request by Cr Newell for an extension to his response following the provision of Mr Swan's additional information. Further delays occurred in arranging Panel meetings and establishing a hearing date due to restrictions imposed in relation to the covid-19 virus.

7. 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 grounds that the Code of Conduct Panel has failed to comply with the rules of natural justice.



Jill Taylor
Chairperson



Gretel Chen
Legal Member



Liz Gilliam
Member

HUON VALLEY COUNCIL CODE OF CONDUCT PANEL DETERMINATION REPORT *
RELATING TO THE CONDUCT OF COUNCILLORS

(Reference C 20299)

Complaint made by Mr Geoffrey Swan against Cr Michael Newell

Date of Determination: 8 June 2020

Code of Conduct Panel:

Lynn Mason (Chairperson), Katherine Schaefer (community member with experience in local government), Sam Thompson (legal member)

Summary of the Complaint

The complaint made by Mr Swan was referred to the Executive Officer of the Code of Conduct Panel (the Panel) on 4 March 2020.

Pursuant to section 28ZA(1)(e) of the *Local Government Act 1993* (the Act), The Chairperson advised on 6 April 2020 that the complaint should be referred to a Panel for investigation. The complaint detailed four occasions on which it was alleged that Cr Newell had breached the Huon Valley Council Code of Conduct relating to the Conduct of Councillors (the Code): on 10 September 2019, 22 September 2019, 4 October 2019, and 25 February 2020.

The Code in force at the time of the alleged breaches was approved by Council in March 2019. The sections of the Code which Mr Swan alleged Cr Newell breached are:

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

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 8 – Representation

7. *The personal conduct of a Councillor must not reflect, or have the potential to reflect, adversely on the reputation of the Council.*

The Complaint

1. The complaint alleged that in a Facebook post on 10 September 2019, Cr Newell stated that he had deleted a particular Facebook post of his within a group. It is further alleged that this statement by Cr Newell was a lie, as the post had been deleted by the group's Administrator.

* 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.

2. The complaint alleged that Cr Newell lied publicly about the timing of his resignation from the Call out the Huon Valleys (sic) Biggest Whingers Facebook group, and that during his time in the group, he was complicit in inciting hatred, discrimination, fear and harm to Mr and Mrs Swan.
3. The complaint alleged that in a letter written by Cr Newell on or about 4 October 2019 to a community member, Cr Newell lied about his continued participation in the Call out the Huon Valleys (sic) Biggest Whingers Facebook group, and actively participated in exchange and ridicule of Mr Swan in the public arena.
4. The complaint alleged that in a Facebook post on 25 February 2020, Cr Newell abused a Huon Valley resident on Facebook.

Procedure

Cr Newell was requested to provide a response to the Panel by 21 April 2020. Following a further request from the Executive Officer, the Panel received Cr Newell's response in a letter dated 22 April 2020. The Panel accepted the response.

The Panel met on 20 April 2020 to consider the complaint. Cr Newell's response to the complaint, received on 22 April, responded specifically only to the alleged breach of the Code on 10 September 2020.

Meanwhile on 30 March 2020, the Panel received further material from Mr Swan, and this was sent to Cr Newell. After considering this material and Cr Newell's response, the Panel wrote to Mr Swan on 30 April 2020, requesting that he provide clearer copies of the material provided on 30 March 2020, and requesting also that the redactions in that material be removed. Clearer copies of the material, unredacted, were received by the Panel on 5 May 2020. On 3 May 2020 the Panel also received Mr Swan's comments on Cr Newell's response to the complaint.

On 29 April 2020, pursuant to section 28ZG (1) of the Act, the Panel advised the parties that a hearing into the matter was to be conducted on 13 May 2020. Both parties were requested to provide any further information relevant to the investigation to the Panel prior to the hearing. Mr Swan sent further material on 8 May 2020.

The hearing was conducted on 13 May 2020, using a web-based meeting platform. No witnesses were called. Mrs Swan attended as a support person for Mr Swan. Both parties took the Oath before giving evidence, and both Mr and Mrs Swan, and Cr Newell, swore that they were not recording the hearing.

Material considered by the Panel

- The Huon Valley Code of Conduct relating to the conduct of Councillors, March 2019;
- The Complaint by Mr Swan, 3 March 2020, 16pp;
- Additional material from Mr Swan, 30 March 2020, 17pp;
- Letter from Cr Newell to the Panel, 22 April 2020, 1 p;
- Letter from Mr Swan to the Executive Officer, 3 May 2020, 4pp;
- Unredacted and clearer files provided by Mr Swan, 3 May 2020, including
 - Undated screen shots of Facebook posts, headed 'Cr Newell evidenced as supporting an abusive post about Swan', 1p;
 - Date of Incident 4 October 2019, 5 pp;
 - Date of Incident 22 September 2019, 2pp;
 - Date of Incident 25 February 2020, 2 pp;

- Date of Incident 10 September 2019, 4 pp;
- Sample Facebook posts (screen shots) from the Call out the Huon Valleys (sic) Biggest Whingers Facebook group, 36pp.
- Letter from Mr Swan to the Chairperson, Code of Conduct Panel, 8 May 2020, 3 pp;
- Submission on sanction from Cr Newell, 25 May 2020, 1p.

Determination

Pursuant to section 28ZI (1)(b), the Code of Conduct Panel dismisses parts of the complaint against Cr Newell, and upholds the remainder.

Reasons for the Determination

1. 10 September 2019

The complaint alleged that in a Facebook post on 10 September 2019, Cr Newell stated that he had deleted a particular Facebook post and that this statement by Cr Newell was a lie, as the post had been deleted by the Administrator. The complaint alleged that this constituted a breach of parts 3 (1), 7 (1) and 8 (7) of the Code.

The Facebook posts relating to this incident showed a post by the Administrator stating that he had deleted the offending post. When the Panel asked Mr Swan to confirm this, the Panel was given no evidence that the Administrator had done so. The Administrator was not called to give evidence, nor did he make a statutory declaration. Cr Newell repeatedly swore that he had deleted the post himself. Cr Newell submitted that the Administrator may have made a further comment after the Administrator's initial post. The Panel determined that it could not be satisfied that Cr Newell lied about deleting the post.

It follows that the Panel is not satisfied that Cr Newell breached the Code in the ways alleged by the complainant. Pursuant to section 28ZI(1)(b), this part of the complaint is dismissed.

2. 22 September 2019

The complaint alleged that Cr Newell lied publicly about the timing of his resignation from the Call out the Huon Valleys (sic) Biggest Whingers Facebook group, and that during his time in the group, he was complicit in inciting hatred, discrimination, fear and harm to Mr and Mrs Swan. The complaint alleged that this constituted a breach of parts 3 (1), 7 (1) and 8 (7) of the Code.

On 22 September 2019 Cr Newell wrote to a member of the public, stating that he was not a member of the group to which she was referring, viz., the Call out the Huon Valleys (sic) Biggest Whingers Facebook group. He said that he had left the group *when it started to get nasty*. When questioned by the Panel, Cr Newell said that he was unsure of the exact timing of his departure from the group, but that he thought it was between mid-September 2019 and the end of that month. Mr Swan provided evidence that both he and another community member were named and described in disparaging and disrespectful terms in a series of posts made on 26 August and 27 August 2019. Cr Newell was a founding member of the group and was therefore a member from its inception on 19 August 2019 until at least mid-September 2019.

Mr Swan provided material showing Facebook posts made on unspecified dates as evidence to support his allegation that the site was inciting hatred against Mr and Mrs Swan, was advocating harm to them and discriminating against them, and was inducing fear for their personal safety.

The Panel was told by Cr Newell that he did not personally contribute any comments about Mr and Mrs Swan and that, as he belonged to a large number of Facebook groups, he could have been unaware of the nature of the posts on the site.

The Panel determines that while it may be unwise for Cr Newell to be a member of approximately 140 Facebook groups (in his evidence), with the result that he may not be aware of the nature of posts being made thereon, this is not of itself a breach of the Code. For a breach to have occurred, Cr Newell must have instigated the actions which breach sections 3 (1), 7 (1), and 8 (7) of the Code. It is the conduct of Cr Newell, not the conduct of others in the group, which is relevant. The Panel has no evidence that Cr Newell was aware of the relevant posts made on 26 and 27 August 2019, nor that he made any contribution to any of those posts.

The Panel finds that Cr Newell was still a member of the Call out the Huon Valleys (*sic*) Biggest Whingers Facebook group on 18 September 2019. He wrote to a community member via Facebook on 22 September 2019 at 12.21 pm, stating that he had left the group 'when it started to get nasty'. The Panel determines that because it is possible that Cr Newell left the Facebook group between 18 September and 22 September 2019, it cannot be satisfied that Cr Newell lied in his email of 22 September 2019.

Pursuant to section 28ZI(1)(b), this part of the complaint is dismissed.

3. 4 October 2019

The complaint alleged that in a letter written by Cr Newell on or about 4 October 2019 to a community member, Cr Newell lied about his having left the Call out the Huon Valleys (*sic*) Biggest Whingers Facebook group 'as soon as it started to get nasty', and actively participated in exchange and ridicule of Mr Swan in the public arena on 28 September 2019. The complaint alleged that this constituted a breach of parts 3 (1), 7 (1) and 8 (7) of the Code.

The Panel has considered above whether Cr Newell lied about when he left the Facebook group. For the reasons given above, this part of the complaint is dismissed.

On or about 18 September 2019 Mr Allan Ford, a founding member of the Huon Valley Call out the Huon Valleys (*sic*) Biggest Whingers Facebook group, posted that at the Huon Valley Council meeting on 18 September 2019, it was *Lord Mayor I Swan out For a duck Last night*. In the same series of posts, Mr Ford posted that *He started talking and the mayor said some words witch (sic) I did not understand but it put him in his place fast*. Cr Newell signified on Facebook that he thought these posts were amusing.

This Facebook group has several hundred members, so Cr Newell's response to this ridicule of Mr Swan is in the public domain. In addition, the ridicule was based on an interaction between the Mayor and Mr Swan immediately after a council meeting which Cr Newell attended, in the council meeting chamber.

The Panel determines that by approving this ridicule of Mr Swan, Cr Newell brought the office of councillor into disrepute. The Panel determines that this treatment of Mr Swan was unfair and likely to cause Mr Swan offence and embarrassment. The Panel further determines that an elected member ridiculing a community member who is legitimately participating in the affairs of his local council reflects adversely on the reputation of the Council.

The Panel determines that by his approval of the Facebook post made by Mr Allan Ford shortly after the Huon Valley Council ordinary Council meeting on 18 September 2019, Cr Newell breached parts 3 (1), 7 (1) and 8 (7) of the Code. Pursuant to section 28ZI(1)(b), this part of the complaint is upheld.

4. 25 February 2020

The complaint alleged that in a Facebook post on a site intended to promote the re-election of a member of Parliament, Cr Newell breached the Code in responding to a question by that community member. The resident asked Cr Newell, who strongly supported the member of Parliament, to list what the parliamentarian had done in the past six years. Cr Newell's response included the words

“Why don’t you ask Robert yourself Shane or better still have the guts to stand to put your own hand up for public office instead of sitting behind a keyboard and sniping others who have the courage to do it.”

The complaint alleged that this constituted a breach of parts 3 (1), 7 (1) and 8 (7) of the Code.

Pursuant to section 28Z1(1)(b), this part of the complaint is dismissed. While the remarks are intemperate and could be offensive, they were made in the context of a political contest, and the Panel considers that this generally allows more robust exchange of views. The Panel notes that though Cr Newell must have been well aware that the community member had in fact stood unsuccessfully for the Huon Valley Council in the same election as Cr Newell; his Facebook post implies that this has never happened.

Conclusion

The Panel heard that Cr Newell considered that he identifies on Facebook only as Mick Newell, not as Cr Newell, and that therefore his actions were not in breach of the councillors’ code of conduct. Given his profile as a radio announcer, as a Councillor who received over 5000 votes in the 2018 council elections, and a person who has had a public profile since 2013 because of his participation in a popular television show, the Panel does not accept that the community will fail to associate any comments from him with his role as a Councillor. He is a Councillor and the Panel is of the view that the role brings with it responsibilities in public life beyond those of ordinary citizens; and Facebook is part of public life. In accordance with section 28 of the Act, the role of a Councillor in part is to act in the best interests of the community, and to facilitate communication by the council with the community. These functions do not relate only to those sections of the community who gave a Councillor votes in the most recent elections, but apply to fair and equitable treatment of all community members.

Sanction

In accordance with section 28Z1 (2) of the Act, if the Panel decides to impose a sanction after upholding a complaint, it may impose one or more of a number of sanctions on a councillor.

In determining an appropriate sanction, the Panel took into account that Cr Newell has had two previous complaints in part upheld against him since his initial election to Council in November 2018, and was issued with a caution in the Determination Report of 2 September 2019.

The Panel therefore imposes a reprimand on Cr Newell.

Right to Review

Under s28ZJ of the Act, a person aggrieved by the determination of the Panel is entitled to apply to the Magistrates Court (Administrative Appeals Division) for a review of the determination on the ground that the Panel has failed to comply with the rules of natural justice.



Lynn Mason
(Chairperson)



Sam Thompson
(Legal member)



Katherine Schaefer
(Community member with
experience in local government)

Local Government Act 1993
HUON VALLEY COUNCIL CODE OF CONDUCT DETERMINATION REPORT *
RELATING TO THE CONDUCT OF COUNCILLORS
Local Government Act 1993
(Reference C 20181)

Complaint made by Mr Geoffrey Swan against Cr Mike Wilson

Date of Determination: 8 June 2020

Code of Conduct Panel:

Lynn Mason (Chairperson), Sam Thompson (legal member), Katherine Schaefer (community member with experience in local government)

Summary of the Complaint

The complaint made by Mr Swan was referred to the Executive Officer of the Code of Conduct Panel (the Panel) on 7 February 2020.

The Chairperson of the Panel undertook an initial assessment of the complaint and on 27 February 2020 advised that part of the complaint should be referred to a Panel for investigation. The complaint detailed two occasions on which it was alleged that Cr Wilson had breached the Huon Valley Council Code of Conduct relating to the Conduct of Councillors (the Code) - 15 August 2019 and 9 January 2020.

Pursuant to section 28ZB(1)(a) of the *Local Government Act 1993* (the Act), the Chairperson dismissed that part of the complaint relating to events which took place on 9 January 2020. The Chair decided that, pursuant to section 28ZA(1)(f) of the Act, the balance of the complaint (relating to alleged breaches on 15 August 2019) was to be investigated by the Panel.

The Code in force at the time of the alleged breaches on 15 August 2019 was approved by Council in March 2019. The sections of the Code which Mr Swan alleged Cr Wilson breached are:

PART 2 – CONFLICT OF INTERESTS THAT ARE NOT PECUNIARY

2. *A Councillor must act openly and honestly in the public interest.*

PART 3 – USE OF OFFICE

1. *The actions of a Councillor must not bring the Council or the office of Councillor into disrepute.*

PART 8 – Representation

7. *The personal conduct of a Councillor must not reflect, or have the potential to reflect, adversely on the reputation of the Council.*

The Complaint

The complaint alleged that Cr Wilson, while appearing as a witness at a Code of Conduct hearing on 15 August 2019, stated under oath that mints of some kind were always handed out at Huon Valley Council ordinary meetings. The complainant stated that he considered this to be a lie, as he had been attending these council meetings for approximately five years and he had never seen mints handed out. The complainant said that he had not attended the ordinary council meeting held on 6 February 2019.

* 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.

Procedure

Cr Wilson was asked to provide a response to the Panel by 12 March 2020. The Panel received Cr Wilson's response on 16 March 2020, although Cr Wilson stated that it had been sent on 1 March 2020, the date on the response. The Panel accepted the response.

The Panel met on 11 March 2020 to consider the complaint. The Panel agreed that while the matter of handing out sweets before a council meeting is, on the surface, a trivial matter, the essence of the complaint was whether or not Cr Wilson had told a lie under oath about this; and that he had repeated the alleged lie when questioned at that hearing by the complainant.

The Panel did not have access to an audio recording of the Code of Conduct panel hearing on 15 August 2019. After considering Cr Wilson's response, the Panel wrote on 18 March 2020 to the Chairperson of the Hearing on 15 August 2019 to request her recollection of the statements made at that hearing. The Panel also wrote to the General Manager of the Huon Valley Council, to ask:

- *Whether it is customary for a member of staff to distribute sweets to councillors prior to council meetings, once councillors are in the meeting chamber?*
- *If so, does this occur at all Council meetings?*
- *To the best of your knowledge, how long has this practice been in place?*

On 27 April 2020 the Panel wrote to Mr Swan to inform him that, in accordance with Sections 28ZG (2) (a) and (b) of the Act, the Panel was of a mind not to conduct a hearing into this complaint, and to request his submission on whether he considered that he would be disadvantaged if a hearing were not held. Similarly, the Panel wrote on 27 April 2020 to Cr Wilson, and as well as requesting his submission on a hearing, asked Cr Wilson what penalty he considered would be appropriate if the Panel decided to uphold any part of, or all of, the complaint.

On 29 April 2020 the Panel received an email from Mr Swan in which he asked if he could provide another Statutory Declaration regarding mints being handed around at council meetings. The Panel refused this request on the grounds that three Statutory Declarations were provided with Mr Swan's complaint, that Mr Swan had had ample opportunity to provide evidence of his allegations, that Cr Wilson had already responded to the earlier statutory declarations, and that no further material was necessary to enable the Panel to reach a determination.

On 1 May 2020 the Panel received Mr Swan's submission on a hearing, in which he agreed that no hearing should be necessary as the matter should be 'cut and dried, with no possible misinterpretation of the facts'.

On 4 May 2020 the Panel received a letter from Cr Wilson reiterating his statement that mints are available at council meetings and are 'passed around'. Cr Wilson made no submission on sanction or hearing.

On 7 May 2020 the Panel met and decided that the determination could be reached by means of written submissions and examination of documentary evidence, and that neither party would be disadvantaged if a hearing was not held. Pursuant to section 28ZG (3) of the Act, the Panel proceeded to hear and determine the complaint.

Material considered by the Panel

- The Huon Valley Code of Conduct relating to the conduct of Councillors, March 2019;
- Audio recording of the Huon Valley Ordinary Council meeting, 6 February 2019;
- Huon Valley Council Code of Conduct Determination Report, 2 September 2019;

- The Complaint by Mr Swan, 7 February 2020, including Statutory Declarations from Dr Elizabeth Smith, Mrs Jennifer Hadaway, and Mr Robert Hawkins;
- Letter from Cr Wilson to the Chairperson, Code of Conduct Panel, 1 March 2020;
- Letter from the General Manager, Huon Valley Council, to the Chairperson, Code of Conduct Panel, 6 April 2020;
- Statutory Declaration from Mrs Jillian Taylor, Chairperson, Code of Conduct Panel, 8 April 2020;
- Submission on hearing from Mr Swan, 1 May 2020;
- Letter from Cr Wilson, 4 May 2020.

Determination

Pursuant to section 28ZL(1)(b), the Code of Conduct Panel dismisses the complaint against Cr Wilson.

Reasons for the Determination

The Panel noted that the matter of whether or not mints are distributed at Huon Valley Council meetings is in itself trivial; but based its investigation on deciding whether or not sufficient evidence was provided to show that Cr Wilson had lied about this practice under oath. The Panel considered that if Cr Wilson did lie under oath as alleged by the complainant, Cr Wilson might have breached Parts 2(2), 3(1) and 8(7) of the Code. The anterior question was whether Cr Wilson did in fact lie about mints always being handed out.

The complaint heard by a different panel on 15 August 2019, dealt with an occurrence at the Council meeting on 6 February 2019. Dr Elizabeth Smith confirmed in her Statutory Declaration, which was evidence in that hearing, that mints were handed out by a Council staff member to the Councillors and members of the public at that meeting, as this meeting occurred immediately following severe bushfires had affected the municipality. This was the meeting which Mr Swan did not attend. The distribution of mints on that occasion is not disputed by the complainant nor by Cr Wilson.

The Huon Valley Council Code of Conduct Determination Report, 2 September 2019, stated that Cr Wilson made his statements at the hearing on 15 August 2019 under oath. The Chairperson at that hearing wrote in her Statutory Declaration that Cr Wilson had said that mints were regularly handed out before the council meetings started. That the statement was made under oath is therefore not disputed.

The matter for this Panel to determine was whether mints were regularly handed out to Councillors and to people sitting in the public gallery, or whether mints on other occasions were confined to sharing only between Councillors; and whether Cr Wilson's statement on 15 August 2019 could reasonably be interpreted as referring only to the latter practice.

The complaint is based on the assumption that when Cr Wilson made his statement about mints at the hearing on 15 August 2019, he meant that mints were always handed to both Councillors and members of the public gallery before Council meetings started. Cr Wilson contended that while he said that mints were always handed out, he meant that they were shared between Councillors; in his words, *they are regularly offered around the table at meetings*.

The General Manager of the Council stated that:

It is not a Council practice where Council staff regularly hand out mints to the Councillors or members of the public prior to a Council meeting. Rather it has been the practice of, mainly, Councillors to share mints while they are sitting at the Council table while waiting for the meeting to commence.

...

My observations are that mints are shared between individual Councillors and not necessarily every single Councillor.

The Panel determines that it cannot be satisfied that Cr Wilson meant, by his statement about mints, that such sweets were always made available to members of the public before Council meetings. The Panel considers that the language attributed to Cr Wilson in the complaint, and affirmed by Cr Wilson in his responses to the complaint, can reasonably be interpreted as acknowledging that mints are always shared between some or all Councillors before Council meetings, and that therefore, Cr Wilson did not lie under oath.

The Panel is not satisfied that Cr Wilson lied. It follows that the Panel is not satisfied that Cr Wilson breached the Code in the ways alleged by the complainant. Pursuant to section 28ZJ(1)(b), the complaint is dismissed.

Pursuant to Section 28ZJ (3), the Panel determines that the complainant may not make a further complaint in relation to the allegation that Cr Wilson lied under oath at the Code of Conduct Panel hearing on 15 August 2019 regarding the distribution of mints, sweets or lollies.

Timing of Determination

In accordance with section 28ZD (1) (a), the Panel is required to investigate and determine a complaint within 90 days of the Chairperson's decision to investigate the complaint. The 90 day period for this complaint expired on 27 May 2020. Investigation of this complaint occurred over Easter, and this caused a relatively brief delay in reaching the Determination. Further delay was caused by the fact that several investigations into alleged breaches of the Code of Conduct within Huon Valley Council were occurring simultaneously, and the resultant need to give the parties adequate time to respond to the Panel.

Right to Review

Under s28ZJ of the Act, a person aggrieved by the determination of the Panel is entitled to apply to the Magistrates Court (Administrative Appeals Division) for a review of the determination on the ground that the Panel has failed to comply with the rules of natural justice.



Lynn Mason
(Chairperson)



Sam Thompson
(Legal member)



Katherine Schaefer
(Community member with
experience in local government)