

LATE REPORT FOR COUNCIL MEETING AGENDA 15 AUGUST 2022

4.5 – CODE OF CONDUCT PANEL DETERMINATION REPORT (LATE REPORT)

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| To: | Council |
| Reporting Officer: | Executive Officer |
| Responsible Manager: | General Manager |
| Report Date: | 11 August 2022 |
| File Reference: | 0811 |
| Enclosures: | 1. Code of Conduct Determination Report |

RECOMMENDATION

That Council receive and note the Code of Conduct Panel Determination Report relating to claims against Councillor Darren Fairbrother

PURPOSE

To receive and note a Code of Conduct Panel Determination Report in relation to complaints lodged by Mr Mathew Healey, Councillors Mary Duniam and Andrea Courtney, and Councillors Kevin Hyland and Celisa Edwards against Councillor Darren Fairbrother.

BACKGROUND

Under the *Local Government Act 1993* – Division 3A – Code of conduct, complaints and complaint resolution, Council is required to publish a summary of the findings of any Code of Conduct Panel matter relating to a Code of Conduct Complaint at the next available Council Meeting.

Council received the Determination Report via email on Friday 12 August at 4.40pm. Under section 28ZK (4) of the Act, the General Manager must ensure that a copy of the determination report is tabled at the first open meeting of Council at which it is practicable to do so. On this basis, a late report is presented to Council for consideration at its open meeting on Monday 15 August 2022.

DETAILS

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 complaints lodged by Mr Mathew Healey, Councillors Mary Duniam and Andrea Courtney, and Councillors Kevin Hyland and Celisa Edwards against Councillor Darren Fairbrother. The determination report dated 12 August 2022 is attached for information.

The Code of Conduct Panel has suspended Councillor Fairbrother for a period of three (3) months, effective from the day of the Waratah-Wynyard Council meeting in which the report is included within an item on the agenda. This means that from the date of the suspension, and for the duration of the suspension, he is suspended from exercising the functions and powers of a Councillor under the *Local Government Act 1993* (the Act). This includes, but is not limited to:

- No longer participating as a councillor in Council meetings, Council Workshops, Council Committee meetings or Special Committee meetings.
- No longer receiving communications from the Council provided to councillors.
- No longer being able to request information from the General Manager relating to the performance of the functions of a councillor.
- No longer representing himself as a councillor (including using the title 'Councillor' in any correspondence or on social media) or representing the views of the Council in the capacity of a councillor.
- No longer using Council resources made available to him in his capacity as a councillor.
- No longer receiving a Councillor allowance.

In line with the report, the effective date will be Monday 15 August 2022.

STATUTORY REQUIREMENTS

Local Government Act 1993 – Division 3A – Code of conduct, complaints, and complaint resolution.

28ZK. Notification of determination of code of conduct complaint

(1) In this section –

addendum means an addendum to a determination report referred to in [section 28ZJ\(2\)](#);

determination report means the written determination of a code of conduct complaint by the Code of Conduct Panel as required by [section 28ZJ](#) without any addendum.

(2) Within 28 days after determining a code of conduct complaint, the Code of Conduct Panel is to provide a copy of its determination report to –

- (a) each complainant; and*
- (b) each councillor against whom the complaint is made; and*
- (c) the general manager of the relevant council; and*
- (d) the Director.*

(3) If the Code of Conduct Panel has produced an addendum, it is to provide a copy of it to –

- (a) if the complainant is a councillor, that complainant; and*
- (b) each councillor against whom the complaint is made; and*
- (c) the general manager of the relevant council; and*
- (d) the Director.*

(4) If the general manager receives a determination report but no addendum, the general manager is to ensure that a copy of the determination report is included within an item on the agenda for the first meeting of the relevant council at which it is practicable to do so and which is open to the public.

(5) If the general manager receives a determination report and also an addendum, the general manager is to ensure –

- (a) that a copy of the determination report without the addendum is included within an item on the agenda for the first meeting of the relevant council at which it is practicable to do so and which is open to the public; and*
- (b) that a copy of the determination report with the addendum is included within an item on the agenda for the first meeting of the relevant council at which it is practicable to do so and which is closed to the public.*

(6) If a determination is the subject of a review, [subsections \(4\)](#) and [\(5\)](#) do not apply until the review is complete.

(7) 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.

Penalty: Fine not exceeding 50 penalty units.

(8) Any person who receives an addendum must keep the addendum confidential.

Penalty: Fine not exceeding 50 penalty units.

(9) [Subsection \(8\)](#) does not apply in respect of –

(a) the circulation of the addendum to councillors as part of the documents that are provided to the councillors in relation to a meeting referred to in [subsection \(5\)](#); or

(b) discussing the addendum with another person to whom the addendum is provided as part of the documents provided in accordance with this section.

STRATEGIC IMPLICATIONS

Strategic Plan Reference

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| GOAL 1: Leadership and Governance |
| Desired Outcomes |
| 1.4 We cherish fairness, trust and honesty in our conduct and dealings with all. |
| Our Priorities |
| 13.1 Facilitate the meeting of community needs through strong advocacy and local and regional collaboration for shared outcomes. |

Sustainable Murchison Community Plan 2040

| Community Future Direction Theme | Key Challenges & Opportunities: |
|--|---|
| Governance and working together | Working together for Murchison – Everyone plays a part in achieving the objectives of the Sustainable Murchison Community Plan. There is cooperation, resource sharing and less duplication between Councils. Leadership is provided across all community sectors. |

POLICY IMPLICATIONS

There are no policy implications as a result of this report.

ENVIRONMENTAL IMPLICATIONS

There are no environmental implications as a result of this report.

FINANCIAL IMPLICATIONS

Councillor Fairbrother will not receive a Councillor allowance for the duration of the suspension.

RISK IMPLICATIONS

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.

It is an offence under section 339C of the Act to perform or exercise the functions and powers of a councillor (or attempt to do so) during a period of suspension. Non-compliance with this provision carries a fine of up to 50 penalty units (\$9,050).

CONSULTATION PROCESS

There are no consultation requirements as a result of this report.

CONCLUSION

It is recommended that Council receive and note the reports as presented.

Local Government Act 1993

CODE OF CONDUCT PANEL DETERMINATION REPORT
WARATAH WYNYARD COUNCILLOR CODE OF CONDUCT

Complaints brought by Mr Mathew Healey, and Councillors Kevin Hyland, Celisa Edwards, Mary Duniam, and Andrea Courtney against Councillor Darren Fairbrother

Code of Conduct Panel

- Lynn Mason (Chairperson)
- David Sales (Local Government Member)
- Sam Thompson (Legal Member)

Date of Determination: 12 August 2022

Content Manager Reference: C24108, C24131, C24132

The complaints

This determination report relates to three complaints. On 13 May 2022, Mr Mathew Healey lodged a complaint against the respondent councillor, Cr Fairbrother. On 16 May 2022, two further complaints were lodged against Cr Fairbrother, one by Councillors Kevin Hyland and Celisa Edwards, and the other by Councillors Mary Duniam and Andrea Courtney. The complaints made by Crs Hyland and Edwards, and by Crs Duniam and Courtney, were relevantly identical. The complaint made by Mr Healey was different.

All three complaints related to the same subject matter: Cr Fairbrother's actions in exposing himself on a beach in Boat Harbour in Tasmania, following which he was found guilty of prohibited behaviour, convicted, fined and placed on the Community Protection Offender Register (more commonly known as the sex offenders register).

While the two complaints made by Cr Fairbrother's fellow councillors were relevantly identical, Mr Healey's complaint was different both in the evidence he relied upon and in the sections of the Waratah Wynyard Councillor Code of Conduct that he alleged Cr Fairbrother to have breached.

I. COMPLAINT BROUGHT BY MR MATHEW HEALEY, INTRODUCTION

Summary of the Healey complaint

The complaint brought by Mr Healey (the Healey complaint) was submitted on 13 May 2022, and was sent to the Chairperson for assessment on 19 May 2022.

The complaint alleged that on 27 April 2022 Cr Fairbrother was found guilty in the Magistrates Court of Tasmania of a charge of prohibited behaviour. He was convicted and fined \$800 and his name placed on the Community Protection Offender Register for a period of time. The charge of which he was found guilty was that on 6 January 2021 he flashed his penis at a woman and her son on the beach at Boat Harbour.

The complaint alleged that this, accompanied by statements in the Magistrate's reasons for finding the charge proven, including her Honour's findings about Cr Fairbrother's testimony and behaviour, which led to breaches of the following parts of the Council's Code of Conduct:

Part 3 (1) *The actions of a Councillor must not bring the Council or the office of Councillor into disrepute.*

Part 8 (7) *The personal behaviour of a Councillor must not reflect, or have the potential to reflect adversely on the reputation of the Council.*

Initial assessment, Healey complaint

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

- the complaint substantially related to a contravention of the Council's Code of Conduct (the Code). If the allegations therein were substantiated, they would constitute a breach of the Code;
- the complaint was not frivolous, vexatious or trivial. The complaint appeared to relate to matters of substance under the Council's Code of Conduct and did not appear to be trifling, insignificant or a misuse of the Panel's resources;
- the reasons for not attempting to resolve the complaint directly with the respondent were adequately explained; and
- the complaint was not made in contravention of
 - o a determination made by the Chairperson under subsection (2) or
 - o a determination of the Code of Conduct made under section 28ZI(3).

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

The complainant, respondent councillor and the General Manager were notified of the outcome of the initial assessment by letter dated 2 June 2022.

The Healey Complaint

The complaint alleged that the personal conduct of Cr Fairbrother in committing an act which led to a Magistrate finding him guilty of prohibited behaviour, and determining that he be placed on the Community Protection Offender Register, was behaviour which would reflect, or have the potential to reflect, adversely on the reputation of Waratah-Wynyard Council. The complaint alleged that Cr Fairbrother should have been aware that such conduct, if reported to the appropriate authorities, would either potentially or actually reflect adversely on Council's reputation.

The complaint further alleged that as a result of this conduct at Boat Harbour Beach on 6 January 2021, Waratah-Wynyard Council and the office of Councillor had been brought into disrepute. This statement in the complaint was supported with evidence of a number of comments from within the community and numerous media articles which specifically named Cr Fairbrother as a councillor, and stated the name of the council which he represented, at the same time describing the charges brought against Cr Fairbrother and the reasons the Magistrate gave for her decision to find Cr Fairbrother guilty.

Material considered by the Panel (Healey Complaint)

- The complaint submitted under cover of statutory declaration, dated 13 May 2022, 6 pp, with attachments 1 (33 pp), 2 (8 pp), 3 (4 pp), 4 (10 pp), 5 (4 pp), and 6 (1 p);
- Cr Fairbrother's response to the complaint, submitted under cover of a statutory declaration, dated 20 June 2022, 16 pp;
- Cr Fairbrother's additional response to the complaint, dated 20 June 2022, 6 pp;
- Cr Fairbrother's response to a letter from the Chairperson, requesting specific responses to the allegations in the complaint, dated 12 July 2022, 1 page;
- Mr Healey's commentary on the respondent's response of 20 June 2022, 6 pp;
- The Waratah-Wynyard Councillors Code of Conduct adopted 21 January 2019.

2. COMPLAINTS BROUGHT BY CRS HYLAND, EDWARDS, DUNIAM AND COURTNEY

Summary of the Crs Hyland, Edwards, Duniam and Courtney complaint (the Hyland/Duniam complaints)

The Hyland/Duniam complaints were submitted on 16 May 2022, and were sent to the Chairperson for assessment on 23 May 2022.

The complaints alleged that on 27 April 2022 Cr Fairbrother was found guilty in the Magistrates Court of Tasmania on a charge of prohibited behaviour. He was fined \$800 and placed on the Community Protection Offender Register. The charge on which he was found guilty was that on 6 January 2021 he flashed his penis at a woman and her son on the beach at Boat Harbour.

The complaint alleged that it was this charge and resultant finding of guilt, accompanied by the Magistrate's findings published in her reasons for decision as to Cr Fairbrother's testimony and behaviour, which led to breaches of the following parts of the Council's Code of Conduct:

Part 3 (1) *The actions of a Councillor must not bring the Council or the office of Councillor into disrepute.*

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

Part 7 clause 1(c) *A Councillor must not bully or harass any person.*

Part 8 (7) *The personal behaviour of a Councillor must not reflect, or have the potential to reflect adversely on the reputation of the Council.*

Initial assessment, Hyland/Duniam complaint

Following receipt of the complaint, the Chairperson conducted an initial assessment of the complaint in accordance with the requirements of section 28ZA of the *Local Government Act 1993* (the Act). Having assessed the complaint against the provisions of sections 28ZB and 28ZC of the Act, the Chairperson determined that the alleged breaches of Part 3(1), Part 7(1)(b), and Part 8(7) would be investigated because:

- the complaints substantially related to a contravention of the Council's Code of Conduct (the Code). If the allegations therein were substantiated, they would constitute a breach of the Code;
- the complaints were not frivolous, vexatious or trivial. The complaints appeared to relate to matters of substance under the Council's Code of Conduct and did not appear to be trifling, insignificant or a misuse of the Panel's resources;
- the reasons for not attempting to resolve the complaints directly with the respondent were adequately explained; and
- the complaints were not made in contravention of
 - o a determination made by the Chairperson under subsection (2) or
 - o a determination of the Code of Conduct made under section 28Z1(3).

Under section 28ZB (1)(a) of the Code the Chairperson dismissed the complaint that Cr Fairbrother breached Part 7 (1)(c) of the Code, viz., *A Councillor must not bully or harass any person.*

This determination was made on the grounds that this part of the complaints was frivolous; i.e., no evidence was provided to show that any person has been harassed or bullied by Cr Fairbrother's actions, and the allegation was therefore lacking in substance.

The complainants, respondent councillor and the General Manager were notified of the outcome of the initial assessment by letter dated 2 June 2022.

The Hyland/Duniam Complaints

The complaints alleged that the personal conduct of Cr Fairbrother in committing an act which led to a Magistrate finding him guilty of prohibited behaviour, and determining that he be placed on the Community Protection Offender Register, was behaviour which would reflect, or have the potential to reflect, adversely on the reputation of Waratah Wynyard Council.

The complaint further alleged that as a result of this conduct at Boat Harbour Beach on 6 January 2021, Waratah-Wynyard Council and the office of Councillor had been brought into disrepute. This statement in the complaint was supported by numerous media articles which specifically named Cr Fairbrother as a councillor, and stated the name of the council which he represented, at the same time describing the charges brought against Cr Fairbrother and the reasons the Magistrate gave for her decision to find Cr Fairbrother guilty.

The complaints also referred to comments made to Councillors by community members regarding the charges laid against Cr Fairbrother, and the subsequent finding of guilt, indicating that the community believed that Cr Fairbrother had failed in his duty as a Councillor, on the grounds that Councillors 'should be of high integrity at all times and must focus on the health, well-being and safety of the community as representatives of the community'.

Material considered by the Panel (Hyland/Duniam Complaints)

- The complaints submitted under cover of statutory declaration, dated 16 May 2022, each 16 pp;
- Cr Fairbrother's response to the complaints, submitted under cover of a statutory declaration, dated 20 June 2022, 17 pp;
- Cr Fairbrother's additional response to the complaint, submitted under cover of a statutory declaration dated 20 June 2022, 7 pp;
- Cr Fairbrother's response to a letter from the Chairperson, requesting specific responses to the allegations in the complaint, dated 12 July 2022, 1 page;
- Commentary from Crs Hyland and Edwards submitted under cover of a statutory declaration on the respondent's response of 20 June 2022, 11 July 2022, 4 pp;
- Commentary from Cr Duniam submitted under cover of a statutory declaration on the respondent's response of 20 June 2022, 11 July 2022, 3 pp;
- Commentary from Cr Courtney on the respondent's response of 20 June 2022, 11 July 2022, 2 pp;
- The Waratah-Wynyard Councillors Code of Conduct adopted 21 January 2019.

Investigation (all complaints)

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

The Panel met on 23 June 2022 to consider the complaints.

On 28 June 2022 the parties were asked in a letter from the Chairperson to give their views on the possibility of conducting a joint investigation into the complaint from Mr Healey, and two similar complaints from Crs Hyland, Edwards, Duniam and Courtney. Cr Fairbrother was also asked to provide more specific responses to the alleged breaches of the Code of Conduct to assist the Panel in its investigation. It was agreed that a joint investigation would be conducted into the Hyland/Duniam complaints, but that the Healey complaint would be investigated separately.

After reading the submissions on joint investigation, and Cr Fairbrother's response to the request for his specific statements in rebuttal of the allegations made against him, the Panel met again on 14 July 2022. At that meeting the Panel determined that the investigations could possibly be conducted without hearings, on the basis of the evidence received and material provided. On that day the Panel wrote to Cr Fairbrother and all the complainants via a letter from the Chairperson and asked if any party considered that he or she would be disadvantaged if a hearing were not held. Cr Fairbrother was also asked to make submission on sanction, should the Panel determine that all or any part of the complaints be upheld.

The Panel received Cr Fairbrother's email response on 19 July 2022, in which he stated that he wanted hearings to be held. No submission was made on sanction for any of the complaints.

On 21 July 2022, Cr Fairbrother submitted via email that the hearings should not take place as he was considering appealing the findings of the Magistrates Court. The Panel noted that the statutory timeframe for making an appeal had elapsed, and that while an appeal could still be lodged with the permission of the Court, there was no suggestion from Cr Fairbrother that in fact he had attempted to do this. The Panel therefore determined to proceed to hearing. Cr Fairbrother was informed of the Panel's decision to proceed via email from the Executive Officer on 22 July 2022.

On 22 July 2022 the parties were advised that hearings would be conducted via email from the Executive Officer, and after learning of availability from Cr Fairbrother and all the complainants, it was decided to conduct the hearings on 1 August 2022. The parties were advised that the Panel did not intend to call any other

witnesses, but all parties could advise the Executive Officer should they wish to call witnesses. None of the parties elected to do so.

The Panel is satisfied that each of the parties was afforded natural justice. The parties had ample opportunity to consider the written materials, give or adduce further evidence, and make submissions.

Hearing (Healey complaint)

As per section 28ZH of the Act the Code of Conduct Panel held a hearing into the Healey complaint on 1 August 2022 via Zoom. Mr Healey was accompanied by Mr Regulus Fogagnolo as his support person. The complainant, his support person and the respondent were all sworn/affirmed. Mr Healey and Cr Fairbrother gave evidence and each was permitted to cross-examine the other. The Panel asked questions of the parties. The parties then made closing submissions, after which Cr Fairbrother was again offered the chance to make a submission on sanction, in the event that any or all of the complaint was upheld. Cr Fairbrother did not wish to make such a submission and did not take up the Chairperson's offer of taking further time to consider any submissions that he may wish to make about sanctions.

Hearing (Hyland/Duniam complaints)

As per section 28ZH of the Act the Code of Conduct Panel held a hearing into the four councillors' complaints (Hyland/Duniam complaints) on 1 August 2022 via Zoom. This hearing was separate to and occurred after the Healey complaint hearing. The complainants attending were Crs Hyland, Edwards and Duniam. The complainants and the respondent were all sworn/affirmed. Cr Duniam gave evidence and summed up on behalf of the complainants. Cr Fairbrother gave evidence and each party was permitted to cross-examine the other. The Panel asked questions of the parties. The parties then made closing submissions, after which Cr Fairbrother was again offered the chance to make a submission on sanction, in the event that any or all of the complaint was upheld. Cr Fairbrother did not wish to make such a submission and did not take up the Chairperson's offer of taking further time to consider any submissions that he may wish to make about sanctions.

At the conclusion of the hearings the Panel met to determine the complaints.

Determinations

As per section 28ZI(1)(a) of the Act, the Code of Conduct Panel determines that Cr Darren Fairbrother has breached the Code of Conduct, and therefore the Code of Conduct Panel upholds:

- the complaint made by Mr Healey;
- the complaint made by Crs Hyland and Edwards; and
- the complaint made by Crs Duniam and Courtney.

Reasons for determinations

1. The Panel noted Cr Fairbrother's repeated contention that the alleged conduct and outcome did not fall within the jurisdiction of the Code, as he was not acting in his capacity as a councillor at the time of the incidents. The Panel rejects that contention. Its task is a simple and confined one and does not rely on section 28U. Section 28V(1) allows a person to make a complaint against a councillor in relation to the contravention by the councillor of the relevant council's code of conduct. The making of a complaint sets in chain a course of events, in respect of which the Panel's role is to investigate and determine the complaint. In doing so, the Panel must have regard to the ordinary and natural meaning of the words of the Code.

- a. Part 8(7) states that “The personal conduct of a councillor must not reflect, nor have the potential to reflect, adversely on the reputation of the Council”. Plainly, the emphasis is on a councillor’s personal conduct and behaviour.
 - b. Part 3(1) states that “The actions of a councillor must not bring the Council or the office of councillor into disrepute”.
 - c. Part 7(1)(b) states that “A councillor must not cause any reasonable person offence or embarrassment”.
2. All three complaints referred to parts 8(7) and 3(1) of the Code. Only the four councillors’ two complaints (that is, not Mr Healey’s complaint) referred to part 7(1)(b).
3. The connection or otherwise between a councillor’s (personal) conduct and their performing of functions and exercising of powers as a councillor: with respect to part 8(7), the emphasis is plainly on personal conduct and behaviour. The Panel considers that the ambit of parts 3(1) and 7(1)(b) may include personal conduct outside of a councillor’s functions or powers, depending on the circumstances. In respect of part 3(1), personal conduct, although disconnected from council, may be so egregious or disreputable that the Council itself, or the councillor’s office, is brought into disrepute. The more disconnected or removed from a council context, the more egregious or disreputable the conduct must be in order to establish a breach of that part. Although largely outside the control of a councillor, the extent to which the actions occurred or came to attention in the public domain is relevant.
4. The Panel makes the same observations with respect to part 7(1)(b). Conduct that is particularly offensive or embarrassing may enliven this part of the Code, notwithstanding that the conduct occurred outside of the Council context. In this regard, the complainants’ evidence as to the notoriety brought to Cr Fairbrother, the council and the community is relevant. It is the offence or embarrassment brought to Cr Fairbrother’s fellow councillors that is relevant and falls within the ambit of part 7(1)(b). This is distinct from the offence or embarrassment that was likely felt by the woman and her child to whom Cr Fairbrother exposed himself. The latter does not fall within part 7(1)(b).
5. The Panel accepts that the Code supports a broad community view that the actions of elected representatives must uphold standards of behaviour generally acceptable to the community, and that the community expects that these standards of behaviour will be upheld in public activities, whether those activities are council directed or not. The Panel therefore proceeded on the basis that the conduct of Cr Fairbrother on 6 January 2021 subsequently did fall within these particular parts of the Code.
6. In the Chairperson’s introduction to the hearings, she stated that the hearings were to investigate whether or not Cr Fairbrother’s conduct on 6 January 2021, and since that time, brought the Council or the office of Councillor into disrepute; and whether Cr Fairbrother’s personal behaviour reflected or had the potential to reflect adversely on Waratah-Wynyard Council. In the investigation into the Hyland/Duniam complaints, it also included investigating whether Cr Fairbrother’s conduct had caused any person offence or embarrassment. All parties were asked to restrict their statements and answers to consideration of only those particulars, and to avoid digression into alternative accounts of what may have happened on 6 January 2021, or the validity of the Magistrate’s decision regarding those events.

The Panel took the view that it was not the Panel’s task to reinvestigate the incident on 6 January 2021; that had been done in the Magistrates Court. The Panel accepted that it was the conduct so described by the Magistrate which could have breached the Code of Conduct, and it was this conduct as described which was to be measured against the provisions of the Code. This was explained to the respondent and the complainants.

7. Evidence was provided to the Panel that a significant number of media reports published before and after the Magistrate’s hearing named Cr Fairbrother as a Councillor from Waratah-Wynyard Council. He was not described as a private individual but rather as a community representative whose conduct would be of particular interest to the community, both in his council area and elsewhere in Tasmania. Cr Fairbrother described these newspaper reports as ‘skewed’, but no evidence was presented to support his statement.

8. Mr Healey alleged that the media descriptions of Cr Fairbrother's conduct on 6 January 2021 sapped the community's confidence in Cr Fairbrother's ability to represent it. This was supported by messages to the Council attached to the complaint, describing Cr Fairbrother's behaviour as 'disgraceful', 'degrading' and 'discreditable', and included calls for his resignation. A number of condemnatory social media posts were also included in the complaint.

Cr Duniam stated that Cr Fairbrother's conduct had disgraced their community and the Council. This was evidenced by significant community 'angst and backlash' against Cr Fairbrother since the charges were first made public. In addition, Cr Duniam stated that a petition had been brought to the July 2022 Council meeting, requesting the removal of Cr Fairbrother from the Council. The Petition requested that *the Councillor convicted of Prohibited Behaviour and placed on the Community Protection Register resign*. There were 348 signatories to the petition. She described it as a 'particularly challenging time' for Council officers and Councillors.

In her closing statement Cr Duniam noted that at no time had Cr Fairbrother attempted to apologise to the Council, the Council staff, or the Waratah-Wynyard community for bringing the Council into disrepute. In response, Cr Fairbrother said that the General Manager had not relayed to him any concerns raised by staff regarding the matter under investigation. In light of the petition submitted to Council, and the content of the media articles referencing the Council, the Panel determines that Cr Fairbrother should have been aware of the likely impact the publicity surrounding his conduct would have on the staff of the Council. In making that finding, the Panel is conscious of Cr Fairbrother's presumption of innocence and right to silence. However, following his conviction and the effluxion of the period within which Cr Fairbrother could have lodged an appeal against his conviction, Cr Fairbrother took no action to mitigate the effect that the saga had on Council. He could and should have attempted to distance his actions from the Council.

9. Cr Fairbrother alleged that some of the evidence of community concern submitted in the Hyland/Duniam complaints had been submitted to Council by persons who were in dispute with Cr Fairbrother over unrelated matters. The Panel requested that Cr Fairbrother focus solely on his own personal conduct; on whether or not his personal conduct on 6 January 2021, which gave rise to the conviction in April 2022, breached the Code of Conduct. Cr Fairbrother stated that he considered he had answered those allegations in his submissions of 20 June 2022.
10. The Code is directed to a councillor's conduct. It is Cr Fairbrother's conduct in exposing himself that is relevant. The media reports and public notoriety, although relevant, were not conduct of the part of Cr Fairbrother. The Panel explained this to the parties during each hearing. The Panel proceeded on the basis that although Cr Fairbrother's conduct occurred on the beach, with some subsequent conduct relating to his failure to provide explanations to protect or distance the Council, the alleged breaches of the Code only crystallised upon the charge being found proven and the subsequent media notoriety. This too was explained to the parties. (The Panel notes that this is the most likely basis on which the complaints were regarded by the General Manager as being within time; see section 28V(3)(f) and (4)).
11. The Panel asked Cr Fairbrother why he had not made submissions to show that his personal conduct had not reflected adversely on the reputation of the Council, and had not brought the office of councillor and the Council itself into disrepute. Cr Fairbrother cited his lengthy tenure on Council and referred to a matter in which he had assisted two ratepayers. The Panel is unable to give weight to this response without there being any statements or evidence to support it and to contradict the allegations in the complaint.
12. The Panel asked Cr Fairbrother (in the Hyland/Duniam hearing) why he had not attempted to explain his reasons for deciding not to respond to the demands being made of him: to step aside from Council for a time, to apologise for his conduct, to resign from Council altogether. Cr Fairbrother said that as he considered that his conduct on 6 January 2021 was not a council matter, he had no reason to respond to any questions or demands relating to that as posed through the Council.

He also said that he had intended to answer the questions he had taken on notice at the June council meeting, but that the closing date for submissions to that meeting was earlier than he had expected and he was unable to meet that timeframe. He then did not attend the July meeting, so the questions on notice remained unanswered.

13. The complaints alleged that Cr Fairbrother's conduct continued to reflect badly on the Council with his absence or withdrawal from council meetings subsequent to the Magistrate's verdict. While Cr Fairbrother stated that he did not feel able to attend a council meeting when he had an adversarial relationship with a member of the public attending the meeting in the public gallery, the Panel considered that this did not excuse his lack of communication with the Council and his refusal to answer questions in a timely manner, in the face of considerable public and Council concern about his conduct.
14. In his closing statement in the Hyland/Duniam hearing, Cr Fairbrother stated that he was still unclear about the matters which were being investigated. The Panel considered that the complaints themselves made the subject of the complaints clear. In addition, the Panel made numerous attempts throughout the Hyland/Duniam hearing to clarify that his conduct on 6 January 2021 on Boat Harbour Beach was the conduct which in turn had led to his conviction in the Magistrates Court, and that conduct, taken as proven by the Magistrate, was being investigated to establish whether or not the Code of Conduct had also been breached.
15. The Panel determined that exposing his penis to a mother and her teenage son constituted conduct which the community considered a grave breach of the standards of behaviour it expected from a councillor. Cr Fairbrother has exhibited no remorse for these acts and has continued to deny his culpability. He has continued to maintain that as he considers the Magistrate's finding him guilty was erroneous, therefore there is nothing he should do to protect the interests of the council and community which he committed to serve. The Panel disagrees with this view. Additionally, he has continued to maintain that his personal conduct at Boat Harbour Beach on 6 January 2021 was not a council matter, and therefore he had no need to offer any explanation or defence against the charges brought against him. The Panel disagrees with this view.
16. The Panel therefore determines Councillor Fairbrother did breach Part 3 (1), Part 7 clause 1(b) and Part 8 (7) of the Code of Conduct which was current at the time of the contravention.

Sanctions

Section 28Z1(2) of the Act allows the Panel to impose one or more sanctions. This is Cr Fairbrother's first breach of this Code. The Panel takes into account Cr Fairbrother's contributions to and good work for the Council and his local community. However, this was a serious breach that undermined public confidence in Cr Fairbrother, the Council and his local community. His behaviour was disgusting, disreputable and without justification. Cr Fairbrother took little action to mitigate the effects of his actions on the Council. Cr Fairbrother displayed little insight into the effects of his actions on the Council.

In the hierarchy prescribed by s 28Z1(2), the most severe sanction is suspension for a period not exceeding three months. The Panel needs to impose a sanction that denounces Cr Fairbrother's conduct, deters him and others, and vindicates the complainants and the community. These considerations may justify the imposition of the maximum penalty where it is apparent that no lesser penalty is appropriate in the circumstances, notwithstanding that the councillor may have no prior breaches or that a worse case could be imagined.

Pursuant to section 28Z1(2)(e), in respect of each of the three complaints, Cr Fairbrother is suspended from performing and exercising the functions and powers of his office as councillor for a period of three months. Each suspension will run concurrently commencing on the day of the council meeting at which this determination report is included within an item on the agenda. (The Panel takes the view that it is not empowered to impose the sanctions consecutively).

Right to review

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



Lynn Mason AM

Chairperson



Sam Thompson

Legal Member



David Sales

Member