

DERWENT VALLEY COUNCIL CODE OF CONDUCT
Complaint by Ms Rebecca Thorpe against Mayor Ben Shaw

Determination made on 22 May 2019

Local Government Act 1993

Code of Conduct Panel:

Jill Taylor (Chairperson), Richard Grueber (Legal Member) and Rob Winter (Member)

1. Summary of the complaint

On 26 July 2018, Ms Rebecca Thorpe lodged a Code of Conduct Complaint (the Complaint) against then Mayor, Martyn Evans and Councillor (Cr) Ben Shaw. As a result of the Local Government elections held in October 2018, Ben Shaw was elected as Mayor and Martyn Evans elected as a Councillor.

Ms Thorpe alleged that, Mayor Shaw and Cr Evans had both breached several provisions of the Derwent Valley Council's Code of Conduct. Without specifying the specific parts of the Code that were alleged to have been breached, Ms Thorpe stated in her complaint form that the alleged contraventions were related to the following parts of the Code:

- Decision making
- Conflict of interest
- Use of information
- Gifts and Benefits
- Relationships with community
- Representation

Attached to her complaint form, Ms Thorpe provided additional information relating to the alleged breaches by both Mayor Shaw and Cr Evans under each of the Parts listed above. During the initial assessment period, the Executive Officer, at the request of the Chairperson, wrote to Ms Thorpe on 21 August 2018 requesting more precise information as to what alleged event took place on what date. Ms Thorpe responded in writing on 3 September 2018. Whilst this response was not in the format requested, the Chairperson considered that there was sufficient information to further investigate these complaints. The supporting documentation attached to Ms Thorpe's complaint contained information relating to events prior to the period 6 months before the date of her complaint. In accordance with Section 28V (3) (f), the Chairperson dismissed the part of Ms Thorpe's complaint relating to events prior to 26 January 2018.

2. Investigation

A Panel was formed to further investigate the matter and met on 1 October 2018. The Panel was of the opinion, that despite an attempt by the Chairperson to seek clarification on some aspects of the complaint and Ms Thorpe's subsequent response, it appeared that Ms Thorpe did not fully understand certain requirements of the Code of Conduct process. To facilitate clearer direction to Ms Thorpe, it was decided that a template be developed for her to complete and return. The proforma required Ms Thorpe to align each of the alleged breaches with the date they occurred, identify the specific part of the Code of Conduct alleged to have been breached, and which elected member had allegedly breached the Code of Conduct. A covering letter with the template attached was sent to Ms Thorpe on 2 October 2018.

On 16 October 2018, Ms Thorpe provided a response to the Panel's request, but again did not provide the information in the format required by the Panel. In the meantime, both respondents had been provided with Ms Thorpe's complaint dated 27 July 2018 together with its attachments. Both respondents advised they were confused as to the precise nature of Ms Thorpe's complaint, making it difficult for them to respond.

Given the confusion that existed and Ms Thorpe's apparent inability to provide specific details required by the Panel, it decided to hold a preliminary hearing. The purpose of this hearing was to establish the precise nature of the alleged breaches as outlined in the template forwarded to Ms Thorpe on 2 October 2018. The Executive Officer attempted to arrange a preliminary hearing during October but was unable to arrange

a mutual time for respondents who claimed to have business commitments. The preliminary hearing was finally arranged and held on 29 November 2018. At that time, it appeared that a significant portion of the complaint was against both Mayor Shaw and Cr Evans jointly. In accordance with Section 28V (2) the Panel agreed that the matter would be dealt with concurrently.

At the preliminary hearing Ms Thorpe was represented by her advocate, Mr Chris Lester. Both Mayor Shaw and Cr Evans attended. Evidence at this preliminary hearing was given under oath/affirmation. The Chairperson outlined the purpose of the preliminary hearing as described above and advised the parties of the documentation the Panel had before it. The parties confirmed they were in receipt of all documents.

Through her advocate, Ms Thorpe identified five complaints against Mayor Shaw and three against Cr Evans, none of which were jointly against the respondents. At this point the Panel determined that the complaints lodged by Ms Thorpe against Mayor Shaw and Cr Evans should proceed separately.

The table below identified the alleged Code breaches against Mayor Shaw as established at the preliminary hearing. The table also identifies further action required by Ms Thorpe.

Date of alleged breach	8 February 2018
Details of alleged breach	Mayor Shaw denigrated Ms Thorpe in public by laughing at her and upsetting her
Parts of Code alleged breached	7.1 (a) and (c)
Elected member who is alleged to have breached code	Mayor Shaw
Action	Ms Thorpe to provide Panel with names of any witnesses to this incident

Date of alleged breach	3 February 2018 at 9.18am
Details of alleged breach	Mayor Shaw sent a private message to Ms Erin Kelly discussing Ms Thorpe's business
Parts of Code alleged breached	1.1 and 1.2, 3.1, 5.3, 7.1 (a) and (b), 8.2, 8.3, 8.5, 8.6, and 8.7
Elected member who is alleged to have breached code	Mayor Shaw
Action	Panel will write to Ms Kelly requesting a copy of the private message and a covering statutory declaration

Date of alleged breach	19 April 2018
Details of alleged breach	Mayor Shaw approached Ms Kelly outside a Council meeting and asked her if she would contact Ms Thorpe and ask her to stop everything
Parts of Code alleged breached	2.2, 7.1 (a) (b) and (c)
Elected member who is alleged to have breached code	Mayor Shaw
Action	Panel to contact Ms Kelly requesting her to provide a statutory declaration regarding this alleged incident

Date of alleged breach	23 April 2018
Details of alleged breach	Mayor Shaw made phone calls to friends of Ms Thorpe saying that she had threatened his wife.
Parts of Code alleged breached	7.1 (a) (b) and (c)
Elected member who is alleged to have breached code	Mayor Shaw
Action	Ms Thorpe to provide the names of people who received such a call from Mayor Shaw

Date of alleged breach	26 April 2018 at 1.54pm
Details of alleged breach	Mayor Shaw sent private message to Ms Kelly discussing personal issues about Ms Thorpe and her family. It included a statement that he knew "stuff" about her but was not going to use it.
Parts of Code alleged breached	7.1 (a) (b) and (c)
Elected member who is alleged to have breached code	Mayor Shaw

This matter was further delayed by the intervening Christmas/New Year and the ensuing holiday period. On 9 January 2019 an email was received from Ms Thorpe which contained a statutory declaration (dated 3 January 2019) and attachments signed by Ms Erin Kelly.

The Panel met again on 22 January 2019 to discuss the additional information provide by Ms Thorpe, which amounted to the statutory declaration and attachments completed by Ms Kelly. However, the statutory declaration submitted by Ms Kelly had not been properly executed nor did it contain the specific information required by the Panel. On 23 January 2019, the Executive Officer wrote to Ms Kelly requesting she provide specific information through a further statutory declaration. The Panel agreed that a hearing should be convened on 25 February 2019. Ms Kelly's statutory declaration was sent on 6 February 2019. In the meantime, Mayor Shaw, who had been provided with a record of the preliminary hearing held on 29 November 2018, submitted a response to the complaint by way of a statutory declaration dated 20 February 2019.

3. Summary of Hearing

The hearing was convened on 25 February 2019 at the Courthouse adjacent to the Derwent Valley Council offices. On 22 February 2019, Mayor Shaw advised the Panel that he was unable to attend the hearing with only 5 days' notice. However, Mayor Shaw had been advised on 25 January 2019 that the hearing was scheduled for 25 February 2019 and he would be advised of the actual time closer to that date. Mayor Shaw stated that he was prepared for the hearing to proceed in his absence and confirmed that the statutory declaration dated 20 February 2019 was his response to Ms Thorpe's complaints.

Ms Thorpe and her advocate Mr Lester attended the whole hearing and Ms Kelly attended for part of the hearing to provide her witness evidence. All witnesses gave evidence under oath or affirmation.

The Chairperson outlined the substance of the complaint and the procedure the Panel would follow, including options available to the Panel if the complaint was upheld. The Chairperson stated that Mr Lester, on behalf of Ms Thorpe, would highlight key aspects of the complaint. The witness, Ms Kelly, would then attend to discuss the evidence contained in her statutory declaration of 6 February 2019. Mayor Shaw's statutory declaration of 20 February 2019 would then be read into the record of the hearing. Panel members were given the opportunity to ask questions of Mr Lester and Ms Kelly and Mr Lester was advised he could question Ms Kelly about her evidence, if required.

The Chairperson detailed the documents which had been circulated to all parties. These were:

- Code of Conduct Complaint 26 July 2018 with the following attachments:
 - Statutory declaration signed by Ms Thorpe dated 26 July 2018
 - Four pages entitled "codes broken by Martyn Evans"
 - Three pages entitled "codes broken by Ben Shaw"
 - Four Facebook pages headed "Ben"
 - Copy of "Function and Powers of Council"
 - Copy of Facebook page headed "Ian Johnson"
 - Copy of what appears to be a street map of businesses, presumably in New Norfolk
- Copy of Derwent Valley Councillor Code of Conduct approved on 2 April 2017
- Further documentation from Ms Thorpe received on 3 September 2018

- A response from Ms Thorpe sent on 14 October 2018 in response to the Panel's request that she provide more specific details viz., details of incident, date it occurred, part of code that was alleged to have been breached and by which elected member
- Statutory declaration and attachments from Mayor Ben Shaw dated 20 February 2019
- Statutory declaration and attachments from Ms Erin Kelly dated 6 February 2019

Mr Lester, on behalf of Ms Thorpe, was asked to speak to the five individual complaints as outlined above. Mr Lester sought indulgence from the Panel to commence his presentation by referring to some incidents that had preceded the complaint lodged by Ms Thorpe. He stated this was necessary to provide a context to the incidents that occurred during the 6 months prior to 26 July 2018. Mr Lester stated that this "sorry saga" commenced in 2017 when Council allowed a private organisation to control a street market.

Complaint date 3 February 2018

In her statutory declaration dated 6 February 2019 Ms Kelly said that she had spoken to Mayor Shaw about a copy of the New Norfolk street map which had depicted Ms Thorpe's shop with skull and crossbones, and she had asked Mayor Shaw what Council's involvement was. Mayor Shaw had responded by saying it was not a Council matter and that he felt Ms Thorpe and Ms Kelly were trying to degrade him. According to Ms Kelly, Mayor Shaw had told her that Rebecca Thorpe should stop blaming him for the market issues. In his statutory declaration, Mayor Shaw said the discussion between him and Ms Kelly was in relation to the setting up of the market and some issues Ms Kelly had with that. He went on to state that Ms Thorpe was not the subject of the conversation between them on that date.

Ms Kelly had provided a Facebook message by Mayor Shaw which essentially said that Council were partly to blame because they didn't put any restrictions on the street market and went on to say, "you know its my attitude all the time I don't like process and all that shit that goes with it".

The Panel concluded that a conversation had taken place between Ms Kelly and Mayor Shaw but were not presented with any evidence that the purpose of the conversation was to discuss Ms Thorpe's business.

Complaint date 8 February 2018

Ms Thorpe alleged that then Deputy Mayor Shaw treated her disrespectfully at a Council workshop held on 8 February 2018. Ms Thorpe, Ms Kelly and Mayor Shaw all attended the workshop, at which Ms Thorpe read out a statement relating to a series of misfortunes that had impacted on her, especially the need to close her business due to the establishment of the street market. At the hearing, Mr Lester said that during Ms Thorpe's presentation Mayor Shaw was engaged on his phone (texting or viewing data) and smiling. He added that Mayor Shaw's behaviour was totally unacceptable and hurtful to Ms Thorpe. When she attended to give evidence, Ms Kelly confirmed that Mayor Shaw was engaged with his phone during Ms Thorpe's presentation and was laughing. She also advised the panel that Mr Ian Lacey (Tidy Towns) had noticed the Mayor's behaviour and had commented to Ms Kelly after the meeting that it was inappropriate. Mr Lacey was contacted in March 2019 and asked to provide a statutory declaration in regards to this event, but advised that he could not remember the details as the meeting had occurred some 12 months ago. In his statutory declaration, Mayor Shaw acknowledged that Ms Thorpe was upset before the start of the meeting but denied laughing at her. The evidence provided by Ms Kelly and Mr Lester, on behalf of Ms Thorpe, suggests that Mayor Shaw was looking at his phone and smiling whilst Ms Thorpe delivered her personal statement to the Council workshop. In his statutory declaration dated 20 February 2019 Mayor Shaw denies laughing at Ms Thorpe but did not deny that he was using his phone and smiling or laughing while doing so.

Complaint dated 19 April 2018

Ms Kelly in her statutory declaration advised that she attended a Council meeting on 19 April 2018 and was approached by Mayor Shaw to "have a chat after the meeting", which she agreed to. When they met after the meeting Ms Kelly said that Mayor Shaw had asked her to "ring Rebecca and ask her to stop her vendetta against him". According to Ms Kelly, Mayor Shaw went on to say that "he had numerous pieces of information about Rebecca Thorpe's personal life that he wasn't going to use but could if she kept it up". In support of this, Ms Thorpe presented a copy of a Facebook message sent to her by Mayor Shaw on 26 April 2018, in which he stated that "lots of people are sending me things about your life telling me to use against you but I have no interest in repeating or hearing about because that is your business and that's what I tell them".

Ms Kelly stated that Mayor Shaw had told her Ms Thorpe had tried to discredit him personally and that he stated, "he would do what was necessary to stop Rebecca Thorpe". In his statutory declaration Mayor Shaw said that the conversation on 19 April 2018 has been "embellished" by Ms Kelly. Mayor Shaw said that on that night he had asked Ms Kelly to tell the truth about their conversations to Ms Thorpe and he had asked Ms Kelly to ask Ms Thorpe to take down the posters displayed in her shop window which were derogatory and untrue in his opinion. Ms Kelly's evidence and Mayor Shaw's statutory declaration confirmed that a discussion had taken place between them but the explanation as to the details of this conversation were conflicting.

Complaint dated 23 April 2018

In her complaint Ms Thorpe alleged that Mayor Shaw had told a friend of hers that she, Ms Thorpe, had threatened his wife. Through Mr Lester, Ms Thorpe said that she had not threatened Mayor Shaw's wife but had told the mutual friend that Mayor Shaw's wife felt threatened. The friend in question was Ms Sally Maree Smith and she provided a statutory declaration dated 3 April 2019 at the request of the Panel. Essentially Ms Smith's statement said that she received a message from Mayor Shaw on 21 April 2018 asking if she was a friend with Ms Thorpe. On that same day she had a phone call with Mayor Shaw where he asked Ms Smith to speak to Ms Thorpe asking her to "back off". Mayor Shaw told her he didn't want any backlash because of the impact on his wife and children. Ms Smith called Ms Thorpe and repeated the message from Mayor Shaw. In his statutory declaration Mayor Shaw said he had a phone conversation with a mutual friend of Ms Thorpe and himself, seeking the friend's opinion about how to try and work thing out between him and Ms Thorpe. Mayor Shaw said in his statement that his wife and children were scared and embarrassed to go out in the CBD because some people had believed the lies and it wasn't fair. However, Mayor Shaw said that he and his friend agreed it was not a good time to catch up with Ms Thorpe, and he did not proceed. Evidence presented confirms that a telephone conversation had occurred between Mayor Shaw and Ms Sally Smith but neither of them stated in their statutory declarations that Mayor Shaw had said Ms Thorpe had threatened his wife.

Complaint dated 26 April 2018

Mr Lester advised that details contained in the record of the preliminary hearing of 29 November 2018 were incorrect. Mayor Shaw had not contacted Ms Kelly but had contacted Ms Thorpe direct. Mr Lester said that the content of Mayor Shaw's message amounted to a threat to Ms Thorpe.

Noting this discrepancy, the Panel determined, in the interests of procedural fairness, that Mayor Shaw should be provided with the correct information and asked whether he wished to make any further comment. Accordingly, Mayor Shaw was provided with this information on 17 April 2019 and advised that if he wished to respond he should do so by 29 April 2019. Mayor Shaw advised he was going overseas until 5 May 2019 and would not be able to respond until he returned.

Mr Lester contended that this was the most serious breach of the Code. Mayor Shaw has told Ms Thorpe he knew some personal issues about her and her family. Through her advocate, Ms Thorpe said she felt intimidated by Mayor Shaw. Mr Lester said that Ms Thorpe had interpreted Mayor Shaw's Facebook post of 26 April 2018 as a threat, in other words she was left with the impression that if she did not proceed with her claim against him he would not use the information but if she did, he would. Ms Kelly's evidence at the hearing in relation to the complaint event of 19 April stated that Mayor Shaw said he would do what was necessary to stop Ms Thorpe. Mr Lester told the Panel that Ms Thorpe had not discussed any of her personal issues with Mayor Shaw but had previously provided Cr Evans with information about her son.

On his return from overseas, Mayor Shaw provided a statutory declaration dated 9 May 2019 with copies of Facebook messages he sent to Ms Thorpe, claiming these had been an attempt at mediation and not making statements about his knowledge of her family.

DETERMINATION

3 February 2018

The Panel dismisses the complaint of 3 February 2018. Ms Thorpe alleged that Mayor Shaw's action on 3 February 2018 breached the following Parts of the Code.

PART 1 - Decision making

1. *A councillor must bring an open and unprejudiced mind to all matters being decided upon in the course of his or her duties, including when making planning decisions as part of the Council's role as a Planning Authority.*
2. *A councillor must make decisions free from personal bias or prejudgement.*

There was no evidence presented to the Panel that the alleged breach of 3 February 2019 had implications for any decisions made by Mayor Shaw that contributed to decision making of the Council.

PART 3 - Use of Office

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

There was no evidence presented to the Panel that actions by Mayor Shaw brought the Council or office of a councillor into disrepute.

PART 5 - Use of information

1. *A councillor must only access or use Council information needed to perform his or her role and not for personal reasons or non-official purposes.*
2. *A councillor must only release Council information in accordance with established Council policies and procedures and in compliance with relevant legislation.*

There was no evidence presented to the Panel that Mayor accessed or used any Council information in relation to the complaints that were made by Ms Thorpe.

PART 7 - Relationships with community, councillors and Council employees

1. *A councillor: -*
 - a) *must treat all persons with courtesy, fairness, dignity and respect; and*
 - b) *must not cause any reasonable person offence or embarrassment;*

Whilst both Ms Kelly and Mayor Shaw acknowledged a conversation took place between them, there was no evidence produced that Mayor Shaw had discussed Ms Thorpe in a discourteous manner.

PART 8 - Representation

2. *A councillor must not knowingly misrepresent information that he or she has obtained in the course of his or her duties.*
3. *A councillor must not speak on behalf of the Council unless specifically authorised or delegated by the Mayor.*
- 4.
5. *A councillor'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. *A councillor must show respect when expressing personal views publicly.*
7. *The personal conduct of a councillor must not reflect, or have the potential to reflect, adversely on the reputation of the Council.*

In relation to this complaint by Ms Thorpe, there was no evidence produced that Mayor Shaw had acted inappropriately as a representative of the Derwent Valley Council.

8 February 2018

In relation to the complaint of 8 February 2018, the Panel upholds Part 7 (1) (a) and dismisses Part 7 (1) (c). Part 7 (1) of the Code states:

PART 7 - Relationships with community, councillors and Council employees

1. A councillor: -

- a) must treat all persons with courtesy, fairness, dignity and respect; and*
- b) must not cause any reasonable person offence or embarrassment; and*
- c) must not bully or harass any person.*

Based on the evidence presented on behalf of Ms Thorpe by her advocate, Mr Lester and confirmed by her witness Ms Kelly, the Panel finds that Mayor Shaw was engaged with his mobile phone during Ms Thorpe's presentation, and was laughing. Whilst Mayor Shaw stated in his submission he did "not laugh at Ms Thorpe", and the panel makes no finding that he did so, the Panel concluded that there was sufficient evidence to find that his behaviour in utilising his mobile phone and laughing whilst Ms Thorpe was clearly very upset whilst making her presentation lacked courtesy, fairness and respect for Ms Thorpe.

19 April 2018

In relation to the complaint of 19 April 2018, the Panel dismisses the complaint against Parts 2.2 and 7 (1) (a), (b) and (c).

Part 2.2 of the Code states:

PART 2 - Conflicts of interest that are not pecuniary

1.

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

Part 7 (1) (a), (b) and (c) is listed above.

Owing to the differing accounts of the conversation that took place between Ms Kelly and Mayor Shaw, no compelling evidence was presented to the Panel.

23 April 2018

The Panel dismisses the complaint of 23 April 2018 which alleges a breach under Part 7 (1) (a), (b) and (c), as outlined above.

Whilst Ms Thorpe and Mayor Shaw submitted differing versions of the matter which occurred on this date, the witness, Ms Sally Smith, was unable to confirm either versions. In fact, witness evidence put to the Panel was that the discussion between the witness and the Mayor was an attempt to resolve the matter between Ms Thorpe and Mayor Shaw.

26 April 2018

The Panel dismisses the complaint of 26 April 2018 which alleged a breach under Part 7 (1) (a), (b) and (c) as outlined above.

The Panel understands that Ms Thorpe has been upset in relation to her dealings with the Derwent Valley Council and especially Mayor Shaw.

Mayor Shaw's Facebook message of 26 April 2018 and his conversation with Ms Kelly on 19 April 2018 could each be interpreted as veiled threats to Ms Thorpe to release private information if she did not desist in pursuing her concerns. They could also be interpreted as clumsy reassurance to her that Mayor Shaw would not do that. This is a serious allegation and the Panel should not make an adverse finding unless positively satisfied that Mayor Shaw's communications were intended by him to threaten Ms Thorpe. In light of Mayor Shaw's denial that he intended to threaten Ms Thorpe and the absence of any further evidence to support either interpretation, the Panel is not satisfied that Mayor Shaw intended his communications to threaten Ms Thorpe.

4. Sanction

At the conclusion of its deliberations, the Panel wrote to Mayor Shaw and provided him with a copy of the draft determination. He was given 14 days to comment on an appropriate sanction in relation to the finding on Ms Thorpe's complaint of the event that occurred on 8 February 2019. Mayor Shaw indicated that he

did not believe any penalty was warranted but conceded that a caution seemed to be the minimal sanction available under Section 28ZI (2) of the *Local Government Act 1993*.

In accordance with Section 28ZI (2) the Panel determines that Mayor Shaw should be given a caution in relation to its findings that he breached Part 7 (1) (a) of the Derwent Valley Council's Code of Conduct on 8 February 2018.

5. Summary

This has been a protracted and complex code of conduct complaint due to several factors, outlined in this report, which have delayed the finalisation of the matter. Section 28ZD (1)(a) requires the determination to be made within 90 days after the initial determination by the Chairperson to investigate and determine the complaint, or the provision of reasons why this requirement could not be met. In this instance the 90-day period concluded on 4 December 2018. There were several reasons why the Panel was unable to meet this requirement. Firstly, whilst the complainant provided a significant amount of information on two occasions, it was not obvious which breaches of the code occurred on what date. The Panel therefore held a preliminary hearing to elicit specific detail and provide that information for Mayor Shaw to respond to. The process of finalising this complaint extended over the Christmas/New Year period and into the summer holiday period. Added to this was Mayor Shaw's continued questioning of the reason for requesting information from him and his unavailability to meet requested timeframes during the process of determining this complaint.

The Panel concluded that Mayor Shaw's use of social media has potentially complicated the matter and it recommends that Council develop guidelines on the use of social media by all elected members.

Additionally, it can be interpreted that the Mayor, by communicating with Ms Kelly and Ms Smith, breached confidentiality. It would be more preferable for Mayor Shaw to make contact with Ms Thorpe in an attempt to resolve this matter, as going through a third party has the potential to breach confidentiality.

Finally, whilst the Panel dismissed a number of the complaints lodged by Ms Thorpe against Mayor Shaw, it considers that a more pro-active and conciliatory approach by Mayor Shaw at the outset might have resulted in a more positive outcome for Ms Thorpe.

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



Richard Grueber
Legal Member



Rob Winter
Member