

ARBITRATION PURSUANT TO DIVISION 5 OF PART 6 OF THE LOCAL GOVERNMENT ACT 2020

Internal Arbitration Process – Latrobe City Council

(IAP 2023-8)

Applicant: Cr Tracie Lund
Respondent: Cr Melissa Ferguson
Arbiter: Dr Meredith Gibbs
Date of Hearing: 14 August 2023

DETERMINATION

Pursuant to s147(1) of the *Local Government Act 2020* (**Act**) the Arbiter makes a finding of misconduct against Cr Melissa Ferguson.

STATEMENT OF REASONS FOR DECISION

Background and procedural matters

1. On 8 June 2023, the Applicant made Application IAP 2023-8 (**Application**) seeking a finding of misconduct against the Respondent.
2. The Applicant alleges that the Respondent, Cr Ferguson, repeatedly breached the Latrobe City Council’s Councillor Code of Conduct (February 2021) (**Council Code**) and therefore engaged in misconduct by her use of social media, in particular Cr Ferguson’s twitter account of various names with the twitter handle @Melferg246 from around 8 April 2023 to the date of the Application. The allegations relate to Cr Ferguson’s posting of tweets and re-tweets concerning the LGBTIQ+ community.
3. The specific clauses of the Council Code alleged to have been breached are:
 - a. failing to treat the municipal community and members of the public with dignity, fairness, courtesy and respect (clauses 3.1, 3.1.4, 17.3);
 - b. failing to take positive action to eliminate discrimination based on gender identity (clauses 3.1.1, 17.1, 17.4.1);
 - c. failing to support the Council in fulfilling its obligation to achieve and promote gender equality (3.1.2, 17.1, 17.4.2);
 - d. engaging in obscene behaviour in dealings members of the public (clause 3.1.3);
 - e. making comments on social media that are offensive (clause 10.6.5 [sic clause 10.6.6]); and
 - f. behaving in a manner that brings discredit or disrepute upon the Council (clause 4.3.1, 10.6.3).

4. The Council Code reflects the standards of conduct required to be met by Councillors when performing the role of a Councillor, as set in Schedule 1 of the *Local Government (Governance and Integrity) Regulations 2020 (Standards of Conduct)*. The relevant clauses of the Standards of Conduct alleged to have been breached are clauses 1 and 4.
5. The Application attached a number of tweets and re-tweets allegedly made by Cr Ferguson in her role as Councillor as examples of conduct in breach of the Council Code.
6. A Directions Hearing was held on 6 July 2023 at which the Arbiter explained the arbitration process to the parties. The Arbiter set out a timetable for the exchange of submissions and supporting documentation (including provision of copies of relevant tweets), and the following day issued a series of Directions to that effect. An in-person Hearing was set down for Thursday, 27 July 2023 to be held at a suitable neutral location where, at the request of the Respondent, Cr Ferguson would be provided a separate room in which to wait before and after the Hearing.
7. In the weeks following, the Arbiter received requests for alterations to the timetable and Hearing date, and subsequent adjustments were made. The parties adhered to the adjusted dates.
8. A Hearing of the matter took place on 14 August 2023 at the Morwell Innovation Centre, Morwell. As requested, Cr Ferguson was provided with a separate room in which to wait.
9. Both parties provided written submissions prior to the Hearing and oral submissions at the Hearing. The parties provided over 40 tweets and re-tweets for consideration by the Arbiter.
10. No witnesses were called by either party.
11. The Respondent requested that one tweet not be considered because it had been posted on a date outside the period specified by the Applicant in the Application. Upon examination it was confirmed that the relevant tweet was within the relevant period. The Arbiter held that the tweet could be considered. The Respondent then requested that the tweet be kept confidential because she said that she had “over-shared” in posting the tweet, had taken the tweet down quickly and did not want the tweet to be reproduced for fear of repercussions. The Arbiter held that the tweet would either not be reproduced in the Arbiter’s reasons or if it was necessary to do so, it would be redacted before being made public.
12. In this Statement of Reasons the term “tweet” is used to refer to both tweets and re-tweets except where the context requires a distinction be made between the two.

Councillor Lund’s submissions

13. Cr Lund submitted that the Respondent’s tweets:
 - a. criticise transgender activists and support the view that predators are using the rainbow to prey on children constitute discrimination based on gender identity and undermine Council’s obligation to achieve and promote gender equality;
 - b. contain offensive and obscene comments directed at, and focusing on, the LGBTIQ+ community and which have been shared in a public forum;
 - c. spread harmful and hurtful misinformation targeted at the LGBTIQ+ community and members of the broader municipal community, and fail to treat them with dignity, fairness, courtesy and respect; and
 - d. have brought discredit or disrepute upon the Council, as evidenced by the Council releasing a press release on the matter on or about 12 April 2023 (https://www.latrobe.vic.gov.au/news-and-media/Councillor_Social_Media_Use) (**Council Press Release**), an ABC news article titled “Latrobe City Council condemns transphobia, passes new motion in wake of Melissa Ferguson tweets”, dated 2 May 2023 (**ABC News Article**) and a tweet by a third party (referred to below as Tweet 3).

14. Cr Lund submitted that Cr Ferguson was acting in her role as Councillor when making the tweets. She argued that regardless of the use of various names on Cr Ferguson's twitter account, twitter accounts are public and the public cannot be expected to know when a Councillor is acting in a personal capacity and when acting in the role of Councillor. Cr Lund submitted that the changing of names on Cr Ferguson's twitter account was a deliberate move to deceive and confuse people about the role in which Cr Ferguson was acting.
15. More generally, Cr Lund submitted Cr Ferguson's behaviour was inconsistent with what is expected of a Councillor and is in breach of the Council Code.
16. At the Hearing, Cr Lund referred to three of Cr Ferguson's tweets as particular examples of conduct in breach of the Council Code.

Tweet 1

17. The first tweet (**Tweet 1**) was a re-tweet by "Cr Melissa Ferguson" of a tweet by "Gays Against Groomers" which stated:

Predators are hiding behind the rainbow and using it as a shield to prey on children. Our organization will not allow our community to be scapegoats for this perversion and abuse any longer.

The tweet then displayed a cartoon "How to flash in the Woke Era" which showed:

- a. First the wrong way "to flash in the Woke Era": a man clothed in a raincoat which he has open, indecently exposing himself to a woman who says "Pervert" and then a mug shot of the man having been arrested for indecent exposure; and
 - b. Second the right way "to flash in the Woke Era": the same man indecently exposing himself to a woman who says "Pervert" but this time the man is naked except that for a rainbow-coloured scarf and then a mug shot of the woman having been arrested for "hate speech, bigotry, TERF and discrimination".
18. Cr Lund submitted that Tweet 1 is offensive because it suggests that trans people are predators, perpetrating perversion and abuse and preying on children, and therefore in breach of the Council Code.

Tweet 2

19. The second Tweet (**Tweet 2**) referred to by Cr Lund was a tweet by "Cr Melissa Ferguson" which stated:

Also via workplace training or any other programs etc. It's big business \$\$\$\$. So many feed on the radical push confused kids into trans / gender bender – funded gravy train, while the rest of youth prob go without funding in the communities. Imagine the profiteering off that [emoji of a face vomiting]

20. Cr Lund submitted that this tweet was offensive to trans children by likening them to a "gender bender" and also offensive to those responsible for workplace training or other similar programs behind what Cr Ferguson calls the "radical push", and therefore in breach of the Council Code.

Tweet 3

21. Cr Lund referred to a third tweet (**Tweet 3**) as evidence of how Cr Ferguson's tweets have brought discredit or disrepute upon the Council. Tweet 3, made by "ivy fae (angry arc)", states, "Anyone under Latrobe City Council? One of your councillors is a TERF". These words are followed by what appears to be a screen shot of Cr Ferguson's twitter account showing Cr Ferguson's photo, the name "Cr Melissa Ferguson" and "Latrobe City Council".

Alleged victimisation tweets

22. Cr Lund also submitted that Cr Ferguson had breached clause 19 of the Council Code (relating to bullying, vilification and victimisation) when making tweets claiming that she (Cr Ferguson) was being silenced and unable to continue to use her freedom of thought and speech to discuss issues by being threatened with the need to comply with the Council Code. Cr Lund was unable to point to a particular tweet as an example of this type of tweet. She argued that Cr Ferguson's comments amounted to victimisation of the person (such as Cr Lund) making a complaint against Cr Ferguson for breach of the Council Code.

Sanctions

23. Cr Lund submitted because Cr Ferguson's behaviour had been going on for some time and that Cr Ferguson's tweets have caused considerable harm to the LGBTIQ+ community in the local area, should the Arbiter make a finding of misconduct, appropriate sanctions would be at least one month's suspension from acting as a Councillor and an apology.

Councillor Ferguson's submissions

24. Cr Ferguson denied all allegations against her. She provided detailed written submissions to support her case and further tweets. At the Hearing, she spoke to Cr Lund's points made at the Hearing.
25. Cr Ferguson submitted:
- a. She has not directed anything at an individual, community group or entity;
 - b. She has not incited any hate or violence towards anybody;
 - c. She has not campaigned to have her twitter account exposed to the local municipality;
 - d. Her twitter account was shown to people by others known to each other and who subjectively chose to find offence;
 - e. Her twitter account is a personal account, and the tweets were made in her personal capacity not in her role as Councillor;
 - f. She cannot be held responsible for any re-tweets as she did not author the original tweets;
 - g. The Applicant is in breach of the Council Code, in particular the obligation to comply with the Victorian *Charter of Human Rights and Responsibilities Act 2006*, by presenting tweets as evidence against her in this matter;
 - h. She has the right to freedom of opinion and expression as set out in articles 19 and 20 of the International Covenant on Civil and Political Rights, as expressed in Australian Law;
 - i. There is a broad community with very many different opinions, ideas and thoughts and people should be able to hold differing views and not be silenced;
 - j. Her twitter activity is a legitimate engagement with the issues and current debates around LGBTIAQ+ issues. Some tweets are responses to academic papers or supported by academic articles;
 - k. The tweets were about Cr Ferguson learning, researching and thinking deeply about these issues and were not intended to be an attack on the community or any individual; and
 - l. She is being attacked for holding a different political opinion to the Applicant.
26. Cr Ferguson submitted that her twitter account is a private account, and the tweets were made in her personal capacity. She said that she can only be considered to be performing as a Councillor when participating in decisions of the Council, representing the interests of the municipal community in decision making or contributing to the strategic direction of Council. As she was not engaging in any of those activities while tweeting, Cr Ferguson was not acting as a Councillor when making the tweets in question.

27. She also referred to a disclaimer on her twitter page: *“Thoughts and opinions belong to me, as per my human rights. They are not that of any other entity.”*
28. Cr Ferguson admitted that the prefix “Cr” did appear before her name on a portion of the tweets in question. She submitted that there is no law pertaining to the use of prefixes and that she removed the prefix *“in case the subjective opinios [sic] of the use of prefixes should occur”*. Cr Ferguson stated that she did not use the prefix to coerce the public.
29. Cr Ferguson also submitted that she did not have local followers initially. She submitted that others passed on her tweets and brought people over to her account in order to portray her as making an attack on the local community, which it was never intended to be.
30. Cr Ferguson also addressed Cr Lund’s submissions on Tweets 1 - 3.

Tweet 1

31. Cr Ferguson submitted that she could not be held responsible for Tweet 1 because it was a re-tweet. She had not authored the tweet.
32. In her written submission Cr Ferguson argued that what is “offensive” is subjective and that in a diverse world and community it is impossible to know how something will be perceived by every single individual.

Tweet 2

33. With respect to the comment about the “gravy train”, Cr Ferguson submitted that if the comment was so offensive, why had it been published in the ABC news article and distributed Australia-wide through the Press.

Tweet 3

34. Cr Ferguson submitted that she had not brought discredit or disrepute upon the Council. She argued that the Council did not have governance rules around what constitutes bringing the Council into disrepute or what number of complaints needed to be received before the Council should put out a press release. She said that there had only been four complaints out of 77,500 residents and that she had not been allowed to read the complaints or given an opportunity to address them before the Council Press Release was made.

Alleged victimisation tweets

35. Cr Ferguson identified a number of tweets that she said were relevant to Cr Lund’s submissions on this point. Cr Ferguson submitted that she was not suggesting that Cr Lund was making the threat to take action under the Council Code. The threat to use the Council Code against her was made by a third party, not Cr Lund and was therefore not relevant to this matter.

Sanctions

36. Cr Ferguson submitted that it would be inappropriate for her to be suspended from her role as Councillor. She indicated that she *“was fine”* with any other sanction.

Findings of the Arbiter

37. Pursuant to s147(1) of the Act the Arbiter makes a finding of misconduct against Cr Melissa Ferguson on the basis that the Respondent has breached clauses 1(a), 1(b), 1(d), 2(d) and 4(1) of Schedule 1 of the *Local Government (Governance and Integrity) Regulations 2020*.

Sanctions

38. Pursuant to s147(2)(a) of the Act the Arbiter directs Cr Ferguson to:

- a. make a verbal apology for her conduct on twitter which is to be provided at the Council meeting at which this decision (and statement of reasons) is tabled in accordance with s147(4) of the Act; and
- b. provide a written apology for her conduct on twitter which is to be included in a tweet on her twitter account (twitter handle @Melferg246) within one week of the Council meeting at which this decision (and statement of reasons) is tabled in accordance with s147(4) of the Act.

In each case, the apology must unreserved and reference that Cr Ferguson has engaged in misconduct by breaching the standards of conduct in clauses 1(a), 1(b), 1(d), 2(d) and 4(1) of Schedule 1 of the *Local Government (Governance and Integrity) Regulations 2020* through her tweets about the LGBTIQ+ community.

39. Pursuant to s147(2)(e) of the Act the Arbiter directs Cr Ferguson to attend training to increase her understanding of:

- a. diversity, equity and inclusion with particular reference to the LGBTIQ+ community and what behaviour is required of a Councillor in meeting the Standards of Conduct;
- b. the appropriate use of social media and the role and responsibilities of being a Councillor which is to include Council's standards and expectations for Councillor use of social media for at least the following:
 - i. naming of accounts and twitter handles;
 - ii. standards for how Councillors are to communicate when they are acting in the role of Councillor and when they are acting in a personal capacity so as to comply with the Council Code;
 - iii. re-tweets, follows, likes and other forms of endorsement of third-party material;
 - iv. engaging in respectful debate in accordance with the Standards of Conduct and handling of varying points of views on social media; and
 - v. examples of engaging in debate on social media that does and does not breach the Council Code but still allows for robust public debate.

The Council (through the Chief Executive Officer and/or Council Officers) is to organise the above training which may be in one or more sessions.

Reasons

40. The key issues in this matter are:

- a. Whether the tweets were made by the Respondent in her role as Councillor;
- b. Whether the Respondent is to be held responsible for re-tweets when she did not author the original tweet;
- c. Whether the Respondent's tweets are offensive and demonstrate that the Respondent has behaved in a manner that:
 - i. brings discredit or disrepute upon the Council;
 - ii. fails to:
 - treat the municipal community and members of the public with dignity, fairness, courtesy and respect;
 - take positive action to eliminate discrimination based on gender identity;

- to support the Council in fulfilling its obligation to achieve and promote gender equality; and
- iii. is obscene in her dealings with members of the public;
- d. Whether the Respondent's twitter activity is a legitimate exercise of her right to freedom of speech.

Capacity in which the tweets were made

41. Cr Ferguson accepted that she made a number of tweets under the name "Cr Melissa Ferguson". She later changed her twitter name and at some point, included a disclaimer on her account. All tweets were made under the twitter handle @Melferg246.
42. As evidenced by Tweet 3, at least on one occasion Cr Ferguson also stated on her twitter account that she was associated with Latrobe City Council. Tweet 3 (and other tweets before me) also demonstrates that it was possible to identify the twitter account as being held by a Latrobe City Councillor.
43. Section 28(2)(e) of the Act states "In performing the role of a Councillor, a Councillor must ... (e) act in accordance with the standards of conduct" (that is, the standards set out in Schedule 1 of the *Local Government (Governance and Integrity) Regulations 2020*) and are included in the Council Code.
44. The Council Code acknowledges that Councillors are permitted to express independent views through the media (clause 10.6) but requires Councillors to:
 - a. make it clear that any unofficial comment is a personal view, and does not represent the position of the Council as a whole (clause 10.6.1);
 - b. ensure any personal opinions or views expressed publicly are identified as the Councillor's own and not those of Council (clause 10.6.5);
 - c. not bring the Council into disrepute through any words or actions (clause 10.6.3);
 - d. ensure any communications are not offensive, derogatory, insulting or otherwise damaging to the reputation of Council, members of the public, Council officers and Councillor (clause 10.6.6).
45. I have identified approximately 20 tweets where the twitter account name is stated as "Cr Melissa Ferguson". I also note that at some point the name of the Latrobe City Council was also shown together with the name "Cr Melissa Ferguson". As a result, I find that these tweets could reasonably be interpreted as having been made by Cr Ferguson in her role as Councillor.
46. Although the Respondent later changed the name of the account, all tweets were made under the same twitter handle (@Melferg246) and could therefore be traced back to the name "Cr Melissa Ferguson". As a result, I consider that these later tweets could also reasonably be interpreted as having been made by the Respondent in the role of Councillor.
47. Cr Ferguson submitted that she placed a disclaimer on her twitter page with the inference that it would be clear that her tweets were not made in her capacity as a Councillor, at least from the time that the disclaimer was posted. In my view, because the same twitter handle was being used throughout, this creates ambiguity about the role in which the Respondent was acting.
48. The disclaimer stated "*Thoughts and opinions belong to me, as per my human rights. They are not that of any other entity.*" The disclaimer does not refer to the Council or the Respondent's role as a Councillor. While it might be inferred from the disclaimer that the Respondent was not speaking for the Council (as "another entity"), the disclaimer does not make it clear whether her opinions are held in her personal capacity or in her capacity as a Councillor. They could be thoughts and opinions belonging to the Respondent in her personal capacity or in her capacity as Councillor.

49. Given that the tweets were under the same twitter handle as that previously identified as being associated with the Latrobe City Council and the Respondent as Councillor, I find that a reasonable interpretation could include that she was acting in her Councillor role in posting these tweets also.
50. The Council Code plainly requires Councillors to ensure that it is very clear when opinions and views are being expressed by Councillors in their personal capacity and when they do so in their role as Councillor. The Respondent has not provided the required clarity and as a result, has not acted consistently with clauses 10.6.1 and 10.6.5 of the Conduct Code.
51. In making these findings I do not suggest that there is a “bright line” that delineates when a Councillor is acting in his or her personal capacity and when acting in the role of Councillor. Some, including the Applicant, take the view that a Councillor in holding a public office can always be reasonably inferred to be acting in their public role. In my view, it is therefore all the more important that when acting in a personal capacity there is no doubt that a Councillor is doing so. Further, as elected officials, Councillors are held to a high standard of conduct and knowingly agree to these standards, as evidenced in this case, by signing the Councillor Code. Clause 10.6 of the Councillor Code (discussed above) clearly outlines these high standards which apply even when Councillors are expressing personal views.

Responsibility for re-tweets

52. The Respondent argued that she could not be held responsible for any given re-tweet because she did not author the original tweet. I disagree.
53. In this context, if a tweet is re-tweeted without rejection or denunciation of its contents, there is an implicit endorsement or approval of its contents. In the tweets I have examined, I find that they have been re-tweeted in a manner where it would be reasonable to interpret them as endorsing the contents of the original tweet.
54. As a result, I hold that the Respondent is responsible for re-tweets.

The substance of the tweets

55. Tweet 1 was a re-tweet by “Cr Melissa Ferguson” of a tweet by “Gays Against Groomers”. Tweet 2 was a tweet by “Cr Melissa Ferguson” which Cr Lund submitted was offensive to trans children by likening them to a “gender bender” and also offensive to those responsible for workplace training or other similar programs.
56. Cr Ferguson’s position was that it is impossible to know who will be offended by what and that offence is subjective. While offence is taken personally, in my view whether behaviour or words are offensive can be measured by whether a reasonable person in the position of the offended person (in this case a trans person) would take offence.
57. I agree with Cr Lund’s submission that the words and the cartoon depiction in Tweet 1 suggests that trans people in general are predators, perpetrating perversion and abuse, and preying on children. In relation to Tweet 2, I consider that it portrays trans children in a negative light and training providers as on the “gravy train”.
58. I consider these sentiments to be offensive and disrespectful of trans people in the sense that a trans person would reasonably find this characterisation of trans people as offensive and disrespectful. I consider calling training providers as being on the “gravy train” as disrespectful of the work they do. Expression of these opinions do not support the Council in fulfilling its obligation to achieve and promote gender equality, nor is it consistent with a Councillor’s obligation to consider and be responsive to the diversity of interests and needs of the municipal community. In addition, it is behaviour that brings discredit upon the Council.

59. Tweet 3 was provided as evidence of the Respondent's twitter activity bringing discredit or disrepute upon the Council. The Applicant also referred to the Council Press Release and the ABC New Article as further evidence of disrepute being brought upon the Council by the Respondent's twitter activity.
60. The fact that the Council felt it necessary to issue the Press Release suggests that it was concerned that Cr Ferguson's twitter activity would be damaging to the Council's reputation. The Council Press Release reaffirms the Council's commitment to "*fostering an inclusive community*" and "*to support all people irrespective of age, gender, ability, cultural background, religion or sexual identity*". It states:
- We are committed to ensuring that our Council provides a safe and an inclusive environment for all members of the community while supporting councillors to undertake their roles.*
61. At the Hearing, Cr Ferguson suggested that the issue of whether something can be said to bring discredit upon the Council related to how many people complained. She stated that there had only been four complaints out of 77,500 residents. In my view the test of whether a Councillor's behaviour bring discredit upon the Council is not about how many complaints have been made about the Councillor's behaviour. Rather, it is whether a reasonable person, viewing the relevant behaviour, would think less of the Council by virtue of the Councillor's behaviour and association with the Council.
62. While some individual tweets are not in themselves offensive and may be a legitimate engagement with academic articles on LGBTIQ+ issues, others are not. In my view there are many tweets that are offensive, disrespectful to trans people by inferring that trans people are paedophiles, grooming children and using their gender identity to legitimise paedophilic activity, disrespectful to other members of the public by stating that academics are trying to normalise paedophilia, are discriminatory and do not support the Council in its obligation to achieve and promote gender equality or treat members of the public with dignity, fairness, courtesy and respect. Examples of the latter category of Cr Ferguson's' tweets include:

*Re-tweet of Gays Against Groomers tweet which states, "If the American people do not do something soon, it will be legal to f*** kids. The government will eventually enforce it. These monsters are coming after ALL children. They are consuming them. The 'Trans Bill of Rights' will be the end of all things good and beautiful." and re-tweets its own tweets which states "This 'Trans Bill of Rights' is co-sponsored by Movement Advancement Project (MAP) PEDOPHILES [sic]."*

There is a predatory emergence going on when re-tweeting Rachael Wong's tweet which states, "If ever you needed evidence of the link between the fetishisation of womanhood by a growing number of trans-identifying males & porn, here it is."

It's also very concerning when academics are trying to normalise pedophiles [sic].

Re-tweet of Terfcats' tweet stating, "It doesn't line up with their objective of grooming children into queer theory ideology, which they openly admit".

When you support these political narratives you support atrocities when re-tweeting a Gays Against Groomers tweet which states "Trans ideologues will tell you that it is society's fault that trans people feel ostracized and suffer from so much mental anguish. They demand that we confirm to their interpretation of reality so that trans people can finally feel whole".

Re-tweet of REDUXX tweet “Two Aussie women were informed by Twitter that they had broken the law after posting criticism of a trans-identified male who induced lactation to ‘breastfeed’ a child. Enough is enough. Babies are not props for men with fetishes to use to affirm their ‘identity’.”

Re-tweet of Angie Jones’ tweet “In 2023 observing reality in the form of ‘gender critical views’ get women fired from their job & labelled a ‘Nazi’ but drag performers can give a guy a hand job on social media, then get invited to read stories about sexuality & gender identity to 1-8 year olds in Parliament.”

Joe are fuking for real?



63. After reviewing the body of tweets, I find that the Respondent’s twitter activity has brought discredit on the Council. I have held (above) that the Respondent’s tweets were made in her role as Councillor. Therefore, her behaviour is clearly linked to the Council. Given my findings above that many tweets are offensive and disrespectful, I consider that the Respondent’s behaviour damaged the Council’s reputation.
64. The Applicant also alleges that the Respondent, in making the tweets, has failed take positive action to eliminate discrimination based on gender identity. I consider that the twitter activity is discriminatory and is not action that supports the elimination of discrimination based on gender identity.

Alleged victimisation tweets, the Victorian Charter of Human Rights and freedom of speech

65. The Respondent made a number of submissions related to her right to express her opinions and beliefs. She submitted that the Applicant is in breach of the Council Code, in particular the obligation to comply with the *Victorian Charter of Human Rights and Responsibilities Act 2006*, by presenting tweets as evidence against her in this matter; she has the right to freedom of opinion and expression as set out in article 19 of the International Covenant on Civil and Political Rights (ICCPR), as expressed in Australian Law; and that there is a broad community with different opinions and people should be able to hold differing views and not be silenced.
66. I have reviewed the material submitted by the Respondent in support of these submissions.
67. Relevant Commonwealth and Victorian laws do indeed protect a person’s right to freedom of expression as set out in article 19 of the ICCPR. But the right to freedom of expression is not unlimited. Clause 19(3) of the ICCPR provides that the exercise of the right to freedom of expression:

...carries with it special duties and responsibilities. It may therefore be subject to certain restrictions ... such as are provided by law and are necessary: (a) For respect of the rights or reputations of others ...
68. This limitation on the right to freedom of speech is reflected in Australian Law, for example by the *Racial Discrimination Act 1975* (Cth), the *Racial and Religious Tolerance Act 2001* (Vic) and the *Victorian Charter of Human Rights and Responsibilities Act 2006* (section 15 in particular).
69. It is also reflected in the Standards of Conduct which are the subject of this matter. After setting out the standards of conduct for Councillors that have been referred to above, the Standards of Conduct provide:

5 Standards do not limit robust political debate
Nothing in these standards is intended to limit, restrict or detract from robust political debate in a democracy.

70. These provisions demonstrate that there is a balance to be attained between the right to express one's personal opinions and the rights of others not to be harmed by the expression of those opinions. In achieving robust political debate, particularly on matters such as those before me, the line between appropriate and inappropriate expression must be carefully struck. The subject matter is sensitive to many. However, that does not mean that all debate must be shut down. What it does mean is that the *manner* in which these matters are expressed must be respectful, fair, done with courtesy and affording all engaging in the debate dignity. For a Councillor, that is what is required by clause 1 of the Standards of Conduct.
71. Therefore, in my view the Respondent's submission that her tweets are in some way justified by the right to freedom of expression must be rejected.
72. The submissions that the Applicant is in breach of the *Victorian Charter of Human Rights and Responsibilities Act 2006*, by presenting tweets as evidence against Cr Ferguson in this matter or that certain of Cr Ferguson's tweets were victimising the Applicant because she had made the Application are outside my jurisdiction in this matter.

Sanctions

73. I have considered both parties submissions on appropriate sanctions. I have taken into account the Respondent's submissions that she did not intend to harm the LGBTIQ+ or the local community by her twitter activity and that her tweets were not intended as attacks. However, the twitter platform is public and once a tweet is posted the author essentially loses control over how and when that material is reproduced and by whom it can be seen. Further, while intention is important, offence can reasonably be taken even when that is not intended.
74. I have also taken into account that the Respondent tried to identify that tweets were being made in her personal capacity by posting a disclaimer. However, as discussed above, the disclaimer was ineffective and left ambiguity about the capacity in which she was acting.
75. I also note that while the Council Code provides some detail and expectations around the use of media by Councillor, there is no evidence before me that the Council has provided Councillors with clear guidance on matters specific to what is appropriate social media engagement such as use of twitter names, the type of disclaimers that would effectively communicate to the public on social media that a Councillor is acting in his or her personal capacity and so on. I recommend that the Council consider extending the training on use of social media that I have directed for the Respondent to all Councillors.

Dr Meredith Gibbs

Legal Member

Date: 24 August 2023