

**ARBITRATION PURSUANT TO DIVISION 5 OF PART 6 OF THE**

***LOCAL GOVERNMENT ACT (2020)***

**Internal Arbitration Process – Hobsons Bay City Council, IAP 2023-20**

Applicant: Councillor Antoinette Briffa

Respondent: Councillor Daria Kellander

**DECISION**

The Arbiter has determined that there was a breach of the relevant Standards in relation to Allegation 1 of this Application and that therefore a finding of misconduct is made.

Cr Kellander is suspended from the office of Councillor for a period of 7 days in relation to this breach. This suspension is to commence the day after the next Council meeting following this decision.

In relation to Allegations 2 and 3, no breach of the relevant Standards has been found and therefore no findings of misconduct are made.

Dr Lily O'Neill

Arbiter

1 March 2024

## REASONS FOR DECISION

### The Application and Hearing

1. The Application dated 31 October 2022 by the Applicant, Cr Antoinette Briffa, alleges that the Respondent, Cr Daria Kellander, breached several of the Standards of Conduct as contained in Schedule 1 of the *Local Government (Governance and Integrity) Regulations 2020* ('Standards of Conduct'). The Application seeks findings of misconduct to be made against Councillor Kellander.
2. The allegations contained in the Application relate to an email and a Facebook post made by Cr Kellander. In summary, the comments made by Cr Kellander relate to a meeting called by Cr Briffa, about which Cr Briffa wrote (in part):

'Given the election for the next Mayor and Deputy Mayor is on 10 November, I would like the Councillor group to get together to discuss who is interested in standing for these roles, any questions councillors have for each candidate, what support the prospective candidates have from each councillor, and what support/training the prospective candidates might need ahead of the vote.'

(email from Cr Briffa to all councillors, dated 21 September 2023, Subject: In confidence: Discussion re next Mayor & Deputy).

3. The response to this email from Cr Kellander included a 29 October 2023 email (to all councillors and two council staff), and a 31 October 2023 Facebook post on her councillor Facebook page.
4. The 29 October 2023 email stated:

'Hi All,

I'd like to note that given that this meeting is now 2 days away, only one Councillor has reached out to me to share an intention to run for mayor. This is unlike previous years. Noting that the current mayor wanted to have this meeting behind closed doors a month in advance to anoint the "new mayor" I suggest that a deal has already been done, of which I have no interest in being part of. Operation Sandon made it very clear that predetermining decisions in pre organised meetings of the Councillor group like this, was collusive conduct and denies the community the ability to see decisions made. This conduct should stop and I will not be a party to this discussion.

Kind regards Daria'

5. The 31 October 2023 Facebook post stated:

'I'll be out trick or treating with my 4-year old tonight, and not in a closed door Councillor only meeting being told who they've chosen for Mayor. Happy Halloween.

Tonight, Council is holding a closed door Councillor only meeting to predetermine who the Mayor / Deputy Mayor will be. To date only one Councillor has reached out to me to share an intention to nominate for Mayor, who I suspect will be unsuccessful. This is unlike previous years. Noting that the current Mayor wanted to have this meeting behind closed doors a month in advance to anoint and mentor the "new Mayor" I suggest that a deal has already been done, of which I have no interest in being a part of.'

6. The Application and accompanying material from Cr Briffa alleges that Cr Kellander breached several Standards of the Standards of Conduct (the relevant ones being appended to this Decision), being:

**Allegation 1:** That Cr Kellander 'failed to treat other Councillors and the Mayor with fairness, objectivity, courtesy and respect in her email to them and several staff on 29 October 2023.' A breach of Standard 1 – Treatment of others is alleged in relation this allegation.

**Allegation 2:** That 'Cr Kellander's public social media post of 31 October failed to treat other Councillors and the Mayor with fairness, objectivity, courtesy and respect.' A breach of Standard 2 – Performing the role of Councillor is alleged in relation to this allegation.

**Allegation 3:** 'Cr Kellander (a) failed to ensure her behaviour does not bring discredit upon the Council, and (b) deliberately misled the public about the conduct of the other Councillors, the Mayor and the process of the election of Mayor by publishing her social media post of 31 October, and allowing that post and the responses maligning Councillors, the Mayor and the Council to remain published.' A breach of Standard 4 – Councillor must not discredit or mislead Council or the public is alleged in relation to this allegation.

7. In a Directions Hearing on 11 January 2024, I set this matter down for a full hearing on 5 February 2024, to be heard online. Neither the Applicant nor the Respondent called any witnesses. Oral evidence was given at the hearing by both the Applicant and the Respondent. The hearing was transcribed.

### **Applicant's Evidence**

8. Cr Briffa's evidence comprised her application, written material provided pre-hearing, and oral evidence given during the hearing. She gave evidence during the hearing that the councillor only meeting she called was a meeting that was held every year to discuss the upcoming mayoral elections. It was not intended to function as a de-facto election. She believed that this meeting served as a courtesy to other councillors to have a private discussion about who was thinking of running for Mayor and deputy Mayor, as well as to provide guidance about what each role requires. She was very upset at the implication, contained in both the email and Facebook post, that there was something improper about calling such a meeting.
9. Cr Briffa was further aggrieved by the reference in the email, and in comments to the Facebook post, to the Independent Broad-based Anti-Corruption Commission's (IBAC) investigation 'Operation Sandon'. In the hearing she stated 'any allegation ... of being corrupt, I find really offensive and disturbing.' I note that while the email referred to 'collusive conduct', both Cr Briffa and Cr Kellander in the hearing used the term 'corrupt'. I am satisfied that, for the purposes of adjudicating the issues in this matter, the two terms can be used interchangeably.

#### **Respondent's Evidence**

10. Cr Kellander's evidence comprised written material provided pre-hearing, and oral evidence given during the hearing. She gave evidence during the hearing that she did not believe it was appropriate to have a Councillor only meeting to have detailed discussions about upcoming mayoral elections. She believed that they acted to ensure the 'deal has already been done' to elect a mayor. She conceded that while it would be appropriate to discuss whether a councillor may want to run for Mayor with other councillors on an informal basis, it was not appropriate to do so at Council premises, with all Councillors invited, without the public being present. I note that the purpose of the meeting, according to Cr Briffa's email, was also to air 'any questions councillors have for each candidate, [and] what support the prospective candidates have from each councillor'.
11. In both the hearing and her written material, Cr Kellander referenced the Australian Constitution's implied freedom of political communication and the extent to which this freedom is applicable to the Standards of Conduct from the *Local Government (Governance and Integrity) Regulations 2020* (Vic). She cited the Councillor Conduct Panel Decision of *Hely v Lew* (2022) which had cited part of Kirby J's judgment in *Coleman v Power* (2004) 220 CLR 1 ('*Coleman*'). For example, in her pre-hearing written material she wrote, quoting some of Kirby J's judgment:

*'the standards of my conduct when engaged in debate ought to be judged by the standards required of all politicians (including Federal politicians) ... I am engaged in the struggle of ideas. In Australia I am entitled to use insult and emotion, calumny, and invective in my armoury of persuasion' (p. 1).*

12. Cr Kellander stated that she had not meant to imply that Cr Briffa was corrupt in calling the meeting. In the hearing she stated that she had read IBAC's Operation Sandon report and conceded that the Operation Sandon investigation primarily involved findings of improper conduct by councillors in relation to planning matters, including for personal benefit, and that those matters could not be compared to the meeting called by Cr Briffa. In the hearing she also conceded that she understood why it might be inferred that was the implication she was trying to make, and offered to apologise to Cr Briffa.

### **Arbiter's Findings and Reasoning**

13. A debate about what is appropriate behaviour around election time very clearly falls within 'robust political debate' as outlined in Section 5 of the Standards. Cr Kellander's argument is that such matters should occur with the public present. Cr Kellander is entitled to hold the view that it was inappropriate to hold a Councillor only meeting to discuss the upcoming mayoral elections. She is also entitled to broadcast that view. However, engaging in 'robust political debate' does not give free reign to breach the other Standards.
14. Allegation 1 is that Cr Kellander's 29 October 2023 email breached Standard 1 – Treatment of Others. I find that she did breach this Standard when she referred to 'Operation Sandon' and 'collusive conduct' in relation to the meeting being called. The Australian Macquarie Dictionary ('the Dictionary') defines collusion to be, among other things, an 'agreement or cooperation, usually secret, for the purpose of fraud, deception, or the gaining of an advantage at the expense of others.'
15. I find that referring to 'Operation Sandon' and 'collusive conduct' as an explanation for why she thought the meeting was inappropriate contains a clear implication that she believed that the meeting was collusive conduct. I make this finding despite Cr Kellander saying that it was not her intention to imply collusive conduct.
16. Collusive conduct is an extremely serious breach of public trust and allegations of collusion should not be made lightly. They could cause extreme damage to Cr Briffa's reputation. These comments are clearly in breach of the need to 'treat other Councillors ... with dignity, fairness, objectivity, courtesy and respect' (Standard 1). For this breach I order that Cr Kellander be suspended from the office of Councillor

for a period of 7 days pursuant to my power under s 147(2)(b) of the *Local Government Act 2020 (Vic)*. This suspension is to commence the day after the next Council meeting following this decision.

17. Allegation 2 is in relation to Cr Kellander's 31 October 2023 Facebook post, specifically that this post breached Standard 1 – Treatment of Others. I note that Cr Kellander did not reference Operation Sandon or collusive conduct, but instead stated, in part, that 'Council is holding a closed door Councillor only meeting to predetermine who the Mayor / Deputy Mayor will be ... I suggest that a deal has already been done'.
18. As I have stated previously, Cr Kellander is entitled to her view that this meeting was inappropriate. Standard 1 requires her to express this view while treating her fellow Councillors, among others, with 'dignity, fairness, objectivity, courtesy and respect'.
19. I am in two minds about whether this post, taken as a whole, contains the same lack of dignity, fairness, objectivity and respect, and particularly the suggestion of collusion, as the 29 October 2023 email. The Dictionary states that 'predetermine' means, among other things, 'to determine or decide beforehand'. Further, the Dictionary defines the word 'deal' as, among other things, 'a bargain or arrangement for mutual advantage, as in commerce or politics, often a secret or underhand one'. Taken together, these definitions are very close to the definition of collusion. However, in light of the importance of Standard 5's 'robust political debate' protection, I am inclined to give Cr Kellander the benefit of the doubt. I therefore find that her post did not amount to treatment that would contravene Standard 1, and therefore Cr Kellander did not breach Standard 1 in relation to Allegation 2.
20. Allegation 3 is that Cr Kellander breached Standard 4 'Councillor must not discredit or mislead Council or public' in her 31 October 2023 Facebook post, and in allowing certain comments by members of the public to remain published on that Facebook page. For the same reasons as outlined in paras 13, 17-19, I find that Cr Kellander's Facebook post did not breach Standard 4.
21. In relation to Facebook comments by members of the public, I think that Councillors, in certain circumstances, can be found to have breached the Standards for allowing comments by others to remain published on their Councillor social media pages. For example, I was provided with a comment from a member of the public that was published on former MP Bernie Finn's Facebook page that contained a nasty reference to Cr Briffa's gender identity – allowing that kind of comment to remain published would breach the Standards in my view.

22. However, I am not convinced that the comments I have been provided with that were posted on Cr Kellander's Facebook page could be said to discredit or mislead Council or the public. This is primarily because I do not think a reasonable person would give them much weight. I would describe the tenor of most of these comments as a social media pile-on, without much credibility.
23. One comment referenced Operation Sardon's recommendation that local councils improve transparency around their decision making, among other related matters. This comment does not mention collusion or corruption. I think that allowing this comment to remain online falls into the 'robust political debate' protection. (I also note that Cr Kellander offered to remove this post during the hearing.) I therefore find no breach of the relevant standards in relation to Allegation 3.

### **Implied freedom of political communication**

24. The broader point that Cr Kellander made about how Standard 5 interacts with the other four standards needs to be addressed here. I say this primarily because the High Court has provided more recent case law on the implied freedom of political communication than *Coleman*.
25. A more directly analogous case to the facts at issue here was decided by the High Court in 2019, that of *Comcare v Banerji* [2019] HCA 23 ('*Banerji*'). This case clarified that the implied freedom of political communication is not unfettered and could be limited by the Australian Public Service's (APS) Code of Conduct.
26. Ms Banerji was an employee of a federal government department who had her employment terminated because of many tweets from her anonymous Twitter account that were highly critical of her Department, fellow employees, and government policies and politicians.<sup>1</sup> Ms Banerji did not dispute that these tweets contravened the APS Code of Conduct.<sup>2</sup> Rather, she asserted that she had an implied freedom of political communication that protected this speech.
27. In *Banerji*, a majority in the High Court emphasised that the implied freedom of political communication is not a personal right of free speech.<sup>3</sup> Rather, successive Australian court decisions have emphasised that '[i]t is a restriction on legislative power', i.e. prevents governments' from passing certain laws, and that:

[T]he question of whether the law imposes an unjustified burden on the implied freedom of political communication is a question of the law's effect on political communication *as a*

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<sup>1</sup> *Comcare v Banerji* [2019] HCA 23 [2] (majority judgment Kiefel CJ, Bell, Keane, Nettle JJ).

<sup>2</sup> *Ibid* [18]

<sup>3</sup> *Ibid* [19, 20]

*whole*. More specifically, even if a law significantly restricts the ability of an individual or a group of persons to engage in political communication, the law will not infringe the implied freedom of political communication unless it has a material unjustified effect on political communication as a whole.<sup>4</sup>

28. The Court said that laws that prohibit or limit political communication can still be valid if they do not have an impact on the ‘totality of political communication’.<sup>5</sup> The next question is whether such an ‘effective burden’ on political communication can be justified.<sup>6</sup> This question requires applying a two part test, namely, (1) is the law in question for a ‘legitimate purpose consistent with the system of representative and responsible government mandated by the *Constitution*’ (2) ‘whether that law is reasonably appropriate and adapted to the achievement of that objective.’<sup>7</sup>
29. On the first question of the test, the Court found that the APS Code of Conduct was designed to maintain and protect ‘an apolitical and professional public service’, and that this public service was essential to representative and responsible government, and that therefore the Code of Conduct had a legitimate purpose.<sup>8</sup> On the second question of the test, the Court emphasised that the Code of Conduct was a ‘plainly reasoned and focussed response to the need to ensure that the requirement of upholding the APS Values and the integrity and good reputation of the APS’.<sup>9</sup>
30. The Standards of Conduct in the *Local Government (Governance and Integrity) Regulations 2020* (Vic) clearly fall within an analogous category to the APS Code of Conduct. For example, the explanatory memorandum to the *Local Government Bill 2019* (Vic), as was, states that the Standards of Conduct were introduced to ensure that ‘standards of integrity and oversight’ of Councillors are met (p.1). Following *Banerji*, the Standards of Conduct are not invalid because of the implied right to political communication. Any suggestion otherwise should be rejected.

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<sup>4</sup> Ibid [20]

<sup>5</sup> Ibid [29]

<sup>6</sup> Ibid

<sup>7</sup> Ibid

<sup>8</sup> Ibid [31]

<sup>9</sup> Ibid [42]

## Appendix

### Relevant Standards of Conduct from the *Local Government (Governance and Integrity) Regulations 2020 (Vic)*

#### 1 Treatment of others

A Councillor must, in performing the role of a Councillor, treat other Councillors, members of Council staff, the municipal community and members of the public with dignity, fairness, objectivity, courtesy and respect, including by ensuring that the Councillor—

- (a) takes positive action to eliminate discrimination, sexual harassment and victimisation in accordance with the **Equal Opportunity Act 2010**; and
- (b) supports the Council in fulfilling its obligation to achieve and promote gender equality; and
- (c) does not engage in abusive, obscene or threatening behaviour in their dealings with members of the public, Council staff and Councillors; and
- (d) in considering the diversity of interests and needs of the municipal community, treats all persons with respect and has due regard for their opinions, beliefs, rights and responsibilities.

#### 2 Performing the role of Councillor

A Councillor must, in performing the role of a Councillor, do everything reasonably necessary to ensure that the Councillor performs the role of a Councillor effectively and responsibly, including by ensuring that the Councillor—

- (a) undertakes any training or professional development activities the Council decides it is necessary for all Councillors to undertake in order to effectively perform the role of a Councillor; and
- (b) diligently uses Council processes to become informed about matters which are subject to Council decisions; and
- (c) is fit to conscientiously perform the role of a Councillor when acting in that capacity or purporting to act in that capacity; and
- (d) represents the interests of the municipal community in performing the role of a Councillor by considering and being responsive to the diversity of interests and needs of the municipal community.

#### 4 Councillor must not discredit or mislead Council or public

- (1) In performing the role of a Councillor, a Councillor must ensure that their behaviour does not bring discredit upon the Council.
- (2) In performing the role of a Councillor, a Councillor must not deliberately mislead the Council or the public about any matter related to the performance of their public duties.

### **5 Standards do not limit robust political debate**

Nothing in these standards is intended to limit, restrict or detract from robust public debate in a democracy.