

COUNCILLOR CONDUCT PANEL

In the matter of an Application by Councillor Kate Hely
concerning Councillor Alexander Lew
of the Stonnington City Council

HEARING PURSUANT TO PART 6 OF THE *LOCAL GOVERNMENT ACT 2020*

Applicant:	Councillor Kate Hely, represented by Ms Corrina Dowling, Barry Nilsson Lawyers
Respondent:	Councillor Alexander Lew, represented by Ms Rachel Walsh of Counsel, instructed by Kingston Reid
Date of Hearing:	9 and 10 May 2022
Panel Members:	The Hon Shane Marshall AM (Chairperson) Mr Matt Evans

DETERMINATION

Pursuant to section 167(1)(d) of the *Local Government Act 2020* the Panel dismisses the Application

Shane Marshall
Chairperson

Matt Evans
Panel Member

15 July 2022

STATEMENT OF REASONS FOR DECISION

Introduction

1. The matter before the Panel is an application by Cr Kate Hely of Stonnington City Council ("the Council") against Cr Alexander Lew, also of the Council, for the Panel to make a finding of serious misconduct against Cr Lew. The application was made pursuant to s 154 of the *Local Government Act 2020* ("the Act"). Section 154(1) of the Act empowers a Panel to hear an application that alleges serious misconduct by a councillor. In this case the application was made by another councillor under s 154(2)(b) of the Act. The Principal Councillor Conduct Registrar considered the application and referred it to this Panel for hearing (see s 155(1) and s 156 of the Act).
2. In s 3 of the Act, "serious misconduct" is defined to include in paragraph (f) of the definition:
"bullying by a Councillor of another Councillor or member of council staff."

"Bullying" is also defined in s 3 of the Act as:
"by a Councillor means the Councillor repeatedly behaves unreasonably towards another Councillor or a member of Council staff and that behaviour creates a risk to the health and safety of that other Councillor or member of Council staff."
3. Councillor Hely's allegations were confined by the commencement of the hearing of the application to three major matters of concern described in a document setting out issues that remained live.

Scheme of the legislation

4. The purpose of the Act is to provide for local government as a distinct and essential tier of government, in effect a third tier after Federal and State government for each municipal district (see s 1). It is a tier of government with councillors democratically elected and accountable to their local communities (see s 4). The role of each Council is to provide good governance for the benefit and well being of each municipal community (see s 8). The overarching governing principles referred to in s 9, include (2)(c):
"the economic, social and environmental sustainability of the municipal district, including mitigation and planning for climate change risks, is to be promoted."

Under s 18, the Mayor is to chair Council meetings and to be the principal spokesperson for the Council. Section 20 deals with the circumstances in which a Mayor ceases to become Mayor. It is the role of a Councillor to represent the interests of the municipal community in the decision making in which councillors participate. Section 28(2)(c) of the Act obliges councillors to "acknowledge and support the role of the Mayor".
5. Councillors are also required to act in accordance with the standards of conduct referred to in s 139(3)(a) of the Act; see s 28(2)(e) of the Act. Those standards appear in regulations made pursuant to the Act; see Reg 12 of the Local Government (Governance and Integrity) Regulations 2020 ("the Regulations"). The standards are set out in Schedule 1 to the Regulations. Clause 1 of Schedule 1 is headed "Treatment of others". It requires councillors to treat other councillors,

amongst others, with “dignity, fairness, objectivity, courtesy and respect.” “Abusive behaviour” is enjoined in clause (1)(c). Under Cl 4 there is a responsibility on councillors not to engage in behaviour which would bring discredit on Council. Clause 4(2) states that “(i)n performing the role of a Councillor, a Councillor must not deliberately mislead ... the public about any matter related to the performance of their public duties”.

No limitation on robust public debate

6. Clause 5 of Schedule 1 to the Regulations provides that “(n)othing in these standards is intended to limit, restrict or detract from robust public debate in a democracy.” From the tenor of the standards of conduct provided for by the Act and Regulations, robust political debate about issues is to be engaged in, but not robust insulting, threatening or humiliating behaviour. In the context of the scope of the implied freedom of political communication in the Commonwealth Constitution the following remarks of Kirby J in *Coleman v Power* (2004) 220 CLR 1; [2004] HCA 39 must be borne in mind:

“One might wish for more rationality, less superficiality, diminished invective and increased logic and persuasion in political discourse. But those of that view must find another homeland. From its earliest history, Australian politics has regularly included insult and emotion, calumny and invective, in its armoury of persuasion... They are part and parcel of the struggle of ideas. Anyone in doubt should listen for an hour or two to the broadcasts that bring debates of the Federal Parliament to the living rooms of the nation. This is the way present and potential elected representatives have long campaigned in Australia for the votes of constituents and the support of their policies. It is unlikely to change...”

7. Having regard to the standards of conduct referred to in the Act, in the local government context, political debate can be robust but at the very least it must not involve behaviour towards another councillor which involves repeated unreasonable behaviour, which also constitutes a risk to the health and safety of another councillor. Unreasonable behaviour was held by the Panel in *O'Reilly v Toms* 5 September 2019, to mean behaviour that a reasonable person would regard in the circumstances as unreasonable. In the local government context, the Act also requires civility set out in the standards of conduct, the breach of which may result in an arbiter or Panel finding misconduct or serious misconduct.

Allegation 1 - The splitting of a motion

8. Councillor Hely's first allegation is that Cr Lew's behaviour in respect of an issue of splitting a motion before Council was unreasonable.
9. The first incident referred to in order to make good the Cr Hely's claim concerned Cr Lew's request at a Council meeting on 3 May 2021 that a motion on the agenda be split, his conduct in the debate on the procedure and his comment about the performance of an Acting Chair when dissent was moved in a ruling of Cr Hely.
10. In order to consider this matter the Panel has viewed the video of the Council meeting on 3 May 2021. We observed that a speech of Cr Lew in support of parts of the motion being split from the remainder and dealt with separately involved Cr Lew engaging in a wide ranging discussion which went beyond the terms of his motion. He then moved dissent in the chair for accepting a

point of order. Cr Lew later raised a point of order which appeared to be grandstanding to a sympathetic audience in the public gallery. The Mayor engaged in robust discussion in response. Another councillor, Cr Koce expressed disappointment in the tone of Cr Lew.

11. Councillor Lew accused Cr Hely of acting in an “uneducated manner” in ruling the way she did about the motion being split and not in the way requested by Cr Lew. In the course of that debate, Cr Lew engaged in what might be colloquially described as a “dummy spit” by ungraciously offering Cr Hely a copy of his rule book on Council procedure and suggesting that one rule applied to everyone except her. The matters before the Chair were complicated for a first time Mayor and on the occasions when dissent in the chair was moved, Cr Klisaris took the chair and it was evident that she had previous experience in so doing. In the course of the discussion, Cr Hely said that she was “learning so much tonight”. Cr Griffin, a political ally of Cr Lew, said to Cr Hely towards the end of the meeting that she handled matters “with great grace.” Cr Lew told Cr Klisaris that she had done “a terrific job chairing” when in the chair during points of order. Cr Hely would have been justified in considering that the last comment was meant to contrast her performance in Cr Lew’s eyes. It was definitely “a bit of a dig” in colloquial terms. While the conduct of Cr Lew at the 3 May meeting on the issue of splitting the motion involved ungracious and hostile behaviour towards Cr Hely it was in the context of a topic on which there were strong views. While disrespectful and in some respects peurile we do not consider that the conduct of Cr Lew on this occasion rose to being unreasonable. He engaged in robust debate on meeting procedure because the way the motion was dealt with was critical to the way he considered the issue before the Council should be determined. It was understandable that an inexperienced chair like Cr Hely might have thought that Cr Lew was targeting her, but to react strongly to her ruling and hurt her feelings did not arise from any deliberate desire in Cr Lew to do so independently of his desire to advocate for his views on the matter under discussion. We do not consider his behaviour, while in some respects discourteous (especially the “uneducated” comment) rose to the level of being unreasonable. It was a reaction to the chairing of the meeting by a Mayor inexperienced in meeting procedure which frustrated Cr Lew’s attempt to achieve his desired outcome. No doubt he would have reflected on the behaviour and considered it unwise to attack the person and not the issue with the throw away adjective, “uneducated”. Cr Hely alleges that Cr Lew slammed down his copy of the governance rules during the course of the meeting. We did not observe any “slamming down” from the video of the meeting.
12. The second aspect of the splitting issue was said to be Cr Lew’s request for legal advice about whether the meeting procedure adopted by Cr Hely on 3 May 2021 was valid and whether it affected the validity of the resolution made. Although the Council had obtained advice from Maddocks (a law firm) that the procedure adopted was valid, we consider that it cannot be said to be unreasonable for Cr Lew to obtain his own legal advice.
13. Councillor Hely next relies on the fact that “the Age” newspaper reported on the 3 May 2022 meeting in an article on 5 May 2022. The article referred to Cr Lew getting Cr Hely “turfed out of the chair on two occasions”. It was open to Cr Lew to move dissent in the chair. We do not consider that the fact that his behaviour in that regard was reported in a daily newspaper means that Cr Lew’s behaviour was unreasonable.

14. Councillor Hely next, on this issue, relied on an email sent on 16 May 2021 by Cr Lew and to the Deputy Mayor (Cr Klisaris). The email suggested, in effect, that Cr Klisaris chair the next meeting of the Council and that Cr Hely observe to see how it is done properly. The email was inappropriate. It would have been preferable for Cr Lew to approach Cr Hely on the topic and discuss it privately if he thought it would be a useful idea to help Cr Hely. By involving Cr Klisaris he embarrassed Cr Hely unnecessarily. His behaviour in this respect was taking the issue of his concern with the way the 3 May meeting was chaired to a puerile level. It was insulting behaviour and in combination with the events that preceded it was unhelpful. However we do not consider that it was so offensive that it amounted to unreasonable behaviour in the context of a robust dispute about the meeting which underpinned the discussions and differences of opinion about the relevant motion at the 3 May meeting.
15. The next incident relied on by Cr Hely on the topic of splitting of a motion was the fact that Cr Lew tabled counsel's advice sought by him. Cr Lew did so in a Council meeting on 17 May 2021. In tabling the advice which was critical of the way Cr Hely dealt with the splitting of the motion, and disagreeing with the Maddock's advice to the contrary, Cr Lew concluded by saying "So I'd ask that you Madame Mayor read that legal advice because we all make mistakes from time to time, but it is important that we learn from those mistakes". That comment while insensitive was part of the discourse between Cr Lew and Cr Hely concerning the manner of dealing with Council procedure. Although unnecessary and unhelpful it did not amount to unreasonable behaviour. It was little more than an unwise rhetorical flourish, dressed up as purported friendly advice.
16. Councillor Batagol considered the comments "belittling" and Cr Morgan considered them patronising. However in our view they, objectively, do not rise beyond ungracious asides designed to help Cr Lew bolster his own position rather than an attempt to humiliate or belittle Cr Hely.
17. While we have concerns about the disrespectful nature of some of the behaviour of Cr Lew with respect to the role of Cr Hely concerning the "splitting issue" we do not consider that the behaviour of Cr Lew on this issue taken as a whole, to be behaviour which a reasonable person would consider to be unreasonable in the circumstances, in the context of robust political debate.

Allegation 2 - The urgent COVID motion

18. The second allegation relied on by Cr Hely to argue that Cr Lew engaged in unreasonable behaviour towards her was related to Cr Lew's conduct in the course of proposing an urgent motion at a Council meeting on 7 June 2021. The motion sought that the Council write to the State Government in support of ending the COVID related lockdown in Stonnington because of its effect on the large number of small businesses in Stonnington. During the reply comments on his motion (referred to as "summing up") Cr Lew engaged in an unwarranted attack on Cr Hely. This occurred one day after the two Councillors had met to discuss ways of working together in the future. Councillor Lew accused Cr Hely of putting "any left wing woke issue front and centre", including "LGBTI" and "indigenous" issues. The Mayor (Cr Hely) was just one of six Councillors who did not support the motion. There was no reason to attack her for not doing so and especially no reason to compare her lack of support for the motion to support for "woke issues". Cr Lew's comments in that regard were appalling. They disregarded normal

respectful discourse and played the person not the issue. However it must be borne in mind that this was in the context of an issue, being assistance to small business, that was close to Cr Lew's heart making him emotional on the issue. Rather than being demeaning to Cr Hely it was in some respect an unintended compliment that she is considered to be a person concerned about social justice for the LGBTQI and indigenous people. This was not a case of deliberately unreasonable behaviour but an example of vigorous political discourse. Although being conduct which is to be discouraged, in the context of a "hot button" political issue it was not behaviour which was unreasonable, especially having regard to the consequences for Cr Lew of such a finding. Whether it was misconduct or not (as distinct from serious misconduct) is not an issue which the Panel needs to concern itself with for reasons discussed later. Even so issues may have arisen about the timing of the conduct on 7 June 2021 being more than 3 months before the filing of the application on 14 September 2021.

19. The second matter on this topic relied on by Cr Hely is the Facebook post of Cr Lew made on 8 June 2021 in which he expressed disappointment that Cr Hely "voted with the Greens to defeat the motion". Cr Hely complains that the Facebook post misstated the wording of the motion. We do not see that it is unreasonable to use social media to present an opinion about the characterisation in political terms concerning the effect of a Councillor taking a particular position on a motion which coincided with the position taken by those belonging to a political party.
20. The next issue raised by Cr Hely in this respect concerns two emails sent by Cr Lew to her on 6 June 2021 about her failure to support the motion. The emails contain personal advice to Cr Hely on how she should position herself politically. Councillor Lew supported Cr Hely to become Mayor and expressed disappointment that her positions on various issues were to the left of his. In our view those emails concerned political "puffery" and do not reveal unreasonable behaviour but an attempt to seek to draw Cr Hely closer to the preferred political positions favoured by Cr Lew and considered by him to have been abandoned by her.
21. The next matter relied on by Cr Hely was the email sent by Cr Lew to Cr Hely on 9 June 2021 to confirm whether a mediation previously arranged between them was proceeding. Councillor Hely decided to go ahead with the mediation in light of what she considered to be attacks on her by Cr Lew the previous day. The email from Cr Lew claimed that Cr Hely was using the continuation of the mediation processes to stymie dissent. In all the circumstances in the ongoing robust debate we see nothing unreasonable in Cr Lew's response despite it being an unhelpful one if he desired a return to civil relations between the two Councillors.
22. The next matter complained about by Cr Hely on this topic was Cr Lew's Facebook post on 10 June 2021 about the failed motion concerning the COVID lockdown. Councillor Lew was still aggrieved at Cr Hely's lack of support for the motion and said in the social media post:-

"As left-wing "independent" Mayor Kate Hely was arguing that it was "not her role" to email the Victorian Government urging them to end the Lockdown."
23. Although Cr Lew's post appeared to contravene Council's social media policy against personal criticism of fellow councillors, in the context of a robust debate about whether Cr Hely should have supported the motion, it was not an unreasonable post. The wisdom of it is an entirely different matter. The categorisation of Cr Hely as "left" only serves to identify Cr Lew's leaning as being "right" and someone who vilifies anyone more progressive than him as "left". It also

reveals some inadequacy of reasoning on Cr Lew's behalf in strongly pressing for an end to a lockdown which the State Government had no interest in prolonging and was taking health advice from the Chief Health Officer in relation to the same. One might also query the effectiveness of a "Stonnington only" early end to the lockdown or the suitability of such an approach.

24. Also complained about under this heading is a comment Cr Hely alleges that Cr Lew made in "Councillor Only Time" on 15 June 2021. Cr Lew allegedly told the group of Councillors that he was attacking Cr Hely on social media because of him being, in effect, forced through a mediation process. Accepting for the purposes of argument that so much was said, we do not consider that it adds anything to any of the robust debate between the two Councillors about one's insistence on continuing mediation and the other's belief that mediation is being weaponised against him in the context of the debate about the urgent motion. We see no unreasonableness in the comment as it was made in the context of the dispute between two local government politicians.
25. The final aspect of the alleged unreasonableness on this issue is the allegation that Cr Lew varied the Council's Wikipedia page to alter the characterisation of the political leaning of Councillors including Cr Hely.
26. The City of Stonnington's Wikipedia page is one that is capable of alteration by anyone using Wikipedia given it operates under open source software. If one looked at the Wikipedia page today information can be discovered about the political affiliations of Councillors. Today's page merely mentions each particular Councillor with party affiliation or independent status listed next to them. Councillors Hely and Batagol were listed as independents and Cr Koce as a Liberal. Someone without authorisation of the affected Councillors or the Council had previously changed Cr Hely's affiliation and Cr Batagol's affiliation to "left leaning independent" and Cr Koce to "left leaning Liberal Party member who votes with the Greens".
27. Councillor Hely asserts that this alteration was done by Cr Lew. Councillor Hely considered herself independent and described herself in evidence before the Panel as a "centrist independent". Councillor Hely says that combined with the Facebook page description of her, Cr Lew was attempting to have her identified in the minds of the public as left leaning, a description which she contends to be false.
28. Whoever performed the alteration was engaged in a puerile political stunt, childish in the extreme. It was not directed solely at Cr Hely but at two other Councillors as well.
29. Counsel for Cr Lew submitted that there is no evidence, or no satisfactory evidence, to blame Cr Lew for the changes. She also noted that the Wikipedia entry is not the property of Council or of any Councillor and is open to be changed by anyone. She also observed that the source of the edit was not the subject of evidence from a computer expert. In any event, the changes made are no more than an expression of opinion by the person making the alterations of his or her views of the Councillors. It would have been open to any of the affected Councillors to similarly alter the characterisation of Cr Lew to refer to him as an "ultra conservative right-wing Liberal". We did not consider the changes even if made by Cr Lew, unreasonable. At the worst it is again puerile conduct in the heat of a political battle.

30. It is critical in our above analysis that Cr Hely was not singled out for attention but that Cr Lew was expressing disappointment with Councillors who did not hold opinions held by him when he considered that they should have held those opinions. That was simply part of the robust political struggle on Council.

Allegation 3 - The Spill Motion

31. The third allegation of unreasonable behaviour by Cr Lew concerned his desire to have the position of Mayor spilled to remove Cr Hely as Mayor. It is not, of itself, unreasonable for a councillor, who considers himself a political opponent of a Mayor to agitate among other councillors for that Mayor no longer to be the Mayor. It depends, however, on how it is done. Under Council procedure the only way a Mayor can cease to be the Mayor is to stand down and call for a spill of the position.
32. The first alleged instance of unreasonable behaviour on this topic relates to comments Cr Hely said Cr Lew made to her on 20 July 2021 during Councillor Only Time. These comments appear to relate to concerns about Cr Hely's mother liking a Facebook post of a member of the public who Cr Lew has engaged in a bitter dispute with and who is a person who appeared to use anti-semitic language. We consider that there is nothing unreasonable in Cr Lew asking why Cr Hely's mother would like a Facebook post of such a nature. A simple google search of Cr Hely's mother identifies her as having that relationship.
33. The second alleged instance of unreasonable behaviour is the sharing of comments about Cr Hely by Cr Lew with the Stonnington Ratepayers Association's Facebook page. That, in our view, is no more than Cr Lew expressing his outrage through his supporters that the post of such a person could be liked by the Mayor's mother. We find nothing unreasonable in that conduct.
34. Councillor Hely next relied on an email dated 27 July 2021 sent by Cr Lew to Cr Morgan but copied to Cr Hely and Cr Sehr. In the email Cr Lew complained that Cr Hely was chairing meetings in a biased fashion against him. He was entitled to express that opinion, even if it was wrong. It is not an example of unreasonable behaviour.
35. The next matter relied on by Cr Hely is an email of 30 July 2021 from Cr Lew to all Councillors. It expressed dissatisfaction with Cr Hely's ability to chair meetings and called for the position of Mayor to be vacated and a new Mayor elected.
36. While embarrassing for Cr Hely, and critical of her, in urging her to "vacate" the position of Mayor, it is a political position Cr Lew was entitled to take as a political opponent of Cr Hely and, no doubt, was tinged with disappointment as he had originally supported the Council resolution proposing that Cr Hely be Mayor when she first joined Council. We do not consider the email to be evidence of unreasonable conduct. However we note that the reference to Council purchasing a new car for Cr Hely to "combat your personal embarrassment of driving a non-electric vehicle, after declaring your support for the "Climate Emergency"" was false and misleading. Although not of itself constituting serious misconduct it may have constituted "misconduct" although as we later refer to in these reasons that was not a matter pressed before us.

37. The next matter relied on by Cr Hely was a series of events on 2 April 2021. The first was a telephone call from Cr Lew to Cr Hely telling her about his belief that she had no support from other Councillors to remain as Mayor. The second was a radio interview conducted by Mr Tom Elliott of 3AW with Cr Lew on the afternoon of 2 April 2021. In that interview Cr Lew initially claimed that there would be a spill of the position of Mayor as the other Councillors had lost confidence in Cr Hely but later conceded that it was up to the Mayor to stand down and that she could not be removed in the way he originally suggested. Councillor Lew joined in with radio commentator, Mr Elliott, in factually incorrect comments about the circumstances in which the Mayor had an electric car purchased for her by Council. The interview involved character assassination of Cr Hely. It is something that is part and parcel of the usual denigration of political opponents in Federal and State politics. Councillor Codes of Conduct strongly discourage this type of behaviour by Councillors and label it as misconduct. However as we discuss later in this decision we are not required to make any finding about “misconduct” as distinct from “serious misconduct”. The disinformation about the car failed to acknowledge that it was within the budget for the purchase of a Mayor’s car and that Cr Hely had never said that it was purchased because she was embarrassed to drive a petrol fuelled car given that Council had previously declared a climate emergency. These accusations by Cr Lew, embarrassingly joined in by Mr Elliott, were false. But many radio commentators thrive on sensational accusations some of which bear no resemblance to the truth.
38. The third matter raised by Cr Hely on the topic of the spill of the Mayor’s position was an email Cr Lew sent, following the radio interview, to all Stonnington Councillors supporting the spill. This occurred just before the Council meeting of 2 August 2021. The next matter relied on was that Cr Lew attended that Zoom meeting of Council on Council premises near where Cr Hely was present and that was meant to intimidate her. We see nothing unreasonable in Cr Lew foreshadowing a position he would take at the meeting by a pre-meeting email. We also see nothing unreasonable in Cr Lew being on Council premises for the Zoom meeting. It is not as if he and Cr Hely were in the same room.
39. The next matter on this topic concerns Cr Lew’s behaviour at the 2 August 2021 meeting. We have viewed the video of the meeting. We did not observe Cr Hely to look intimidated by Cr Lew. In exchanges with Cr Lew, Cr Hely “gave as good as she got” in colloquial terms. Cr Lew’s procedural motions were dealt with appropriately by her. Clearly he was attempting to make chairing of the meeting difficult for her in his efforts to convince others that she should not rerun as Mayor. She held her ground and resisted his political gamesmanship successfully. We see nothing unreasonable in his conduct. It was part of legitimate political discourse as was everything that occurred on 2 April 2021, with the exception of the Tom Elliott interview. While being an example of inappropriate character assignation as well as disinformation, on its own, the interview may be considered as part of a robust political campaign to unseat the Mayor, which failed. It was not in itself unreasonable to behave like that in a robust manner but it was, conduct which in all likelihood breached the standards of conducted expected of a Councillor. However as explained below that is not a matter for our present consideration.
40. Additionally on this topic, Cr Hely relies on an email of 4 August 2021 by Cr Lew. That email contained matters of legitimate political discourse and contained nothing unreasonable.

41. Extra reliance was placed on the media coverage of Cr Lew's attempts to replace the Mayor. The media reporting is not something that lies at the feet of Cr Lew, with the exception of the radio interview. It was up to the media to report the issue of the tensions on Council in a responsible way, which it mostly did. To the extent that it did not, that is not a matter for which Cr Lew bears responsibility.
42. The next matter raised was Cr Lew's Facebook post of 4 August which was the subject of a paid promotion, between 4 and 8 August 2021. The Facebook post claimed that Cr Hely had lost the confidence of most of the Councillors and the Stonnington community. That statement was one of Cr Lew's belief. It was one from his subjective point of view, not demonstrably untrue. It was part of his efforts in the robust political debate he was having with the Mayor. The single vice in the Facebook page was the distribution of the radio interview with Mr Elliott which, as noted above, contained critical errors of fact. The Facebook post and its attachment were in effect, political propaganda in the course of robust discourse.
43. The next issue raised on this topic was the phone call from Cr Lew to Cr Hely on 26 August 2021 in which Cr Lew hinted at raising an issue about Mayoral overspending before an internal arbiter. We see nothing unreasonable in that conduct. In the same vein Cr Hely referred to Cr Lew's behaviour at an Audit and Risk Committee meeting. Again we see nothing occurring in that meeting which goes beyond legitimate political discourse.
44. Also relied on by Cr Hely is an alleged statement made by Cr Lew in a Councillor Briefing on 30 August 2021. The alleged comment was made by Cr Lew to Cr Sehr, that she should talk to the media rather than Cr Hely given Cr Sehr, "does such a good job of it," We see this as part of a political strategy to undermine Cr Hely but not to be unreasonable in the context of legitimate robust political discourse.
45. Next relied on by Cr Hely is a telephone call on 1 September 2021 from Cr Lew to Cr Hely concerning a matter to do with his family's safety. We see no basis for it being relied on as part of unreasonable behaviour on Cr Lew's part. Similarly not an arguable matter of unreasonableness is a claim by Cr Lew to be an expert on harassment and bullying.
46. The penultimate matter relied on is Cr Lew's conduct at a Council meeting on 6 September 2021. We viewed a video of that meeting. In that meeting questions were put by Councillors to Council officers. Councillor Lew behaved with a lack of grace in that meeting, referring to the Mayor's ruling as "made up" by her and engaged in ad hominem humorous asides. While childish and aggressive behaviour it was conduct that reflected poorly on Cr Lew not Cr Hely. However in the circumstances of a robust political debate in the third tier of government it was not so objectionable as to be considered unreasonable behaviour.

Conclusion on serious misconduct

47. We have carefully considered all the matters raised by Cr Hely said to constitute Cr Lew engaging in serious misconduct. Although we have concerns about the Tom Elliot interview of 2 April 2021 as being a misleading attempt to unfairly undermine Cr Hely we do not consider that matter, in isolation, to be bullying as described in the definition of that term in the Act. It was a relatively isolated incident of relevant poor behaviour which reflects adversely on Cr Lew but of itself is unlikely to have generated a risk for the health and safety of Cr Hely.

48. Consequentially we make no finding of serious misconduct or bullying in accordance with section 167(1)(a) of the Act. Accordingly we dismiss the application under section 167(1)(d) of the Act. That is our determination. We were not invited by the applicant to act under section 167(1)(b) to consider whether Cr Lew has breached one or more of the prescribed standards of conduct in relation to the matters occurring between 14 May and 14 September 2021 (the date of the application), including the events of 2 August 2021, and in particular the radio interview. As Cr Lew was informed by counsel for Cr Hely that no issue of “misconduct” would be pursued against him in the course of the hearing before the Panel it would constitute a denial of natural justice if we considered that matter.
49. Our determination is that the application is dismissed.