Tackling Anti-LGBTIQA+ Councillor Misconduct

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Abstract

In Australia, there have been increasing culture wars on the topic of LGBTIQA+ inclusion in local government. *Hely & Lew* concerned comments from a male councillor (Lew) accusing a female councillor (Hely) of inappropriately prioritizing LGBTIQA+ issues that were alleged to be serious misconduct. In its determination, the Councillor Conduct Panel that hears allegations of serious misconduct found that this was simply "an example of vigorous political discourse" and "although being conduct which is to be discouraged, in the context of a 'hot button' political issue it was not behaviour which was unreasonable". Whilst the Panel found that the behaviour of Lew towards Hely was "hostile", "disrespectful", "unreasonable", "inappropriate", "aggressive" and "appalling", it found that the behaviour did not constitute serious misconduct. This article reflects on this decision and how it undermines efforts to improve local government culture and to increase the number of women and LGBTIQA+ people elected to councils, as research shows that prejudice of this kind is a major barrier to lesbian, bi+ and queer women standing for local government—and no doubt affects heterosexual women too. In this spirit, the article rewrites the Panel's determination in ways that are more sensitive and sensitized to issues of prejudice and exclusion.

Keywords: local government; misconduct; LGBTIQA+.

[A] PREFACE

Introduction

In Australia, there have been increasing culture wars on the topic of LGBTIQA+ inclusion in local government. Over 10 local councils have removed books from libraries, including Logan, Brisbane, Scenic Rim, Southern Downs, Cairns, Townsville, Central Highlands, Banana, Gladstone, Somerset, Western Downs, Bundaberg, and Rockhampton in Queensland and Sydney in New South Wales, with Cumberland in New

South Wales reversing its book ban (Bye 2023; Sathicq 2023; Stolz 2023; Bowles 2024; Jackson 2024; Pearce 2024; Russon 2024). Several local councils have legislated trans and non-binary bathroom bans under local laws, including Wellington in Victoria (Allen 2025). Verbal abuse, threats of violence, and intimidation from neo-Nazi protests have led to the cancellation of drag story time events by several local councils (Kermode & Phillips 2025).

The issue of LGBTIQA+ inclusion came to a head at a Stonnington City Council meeting on 7 June 2021. At that meeting, Councillor Alexander Lew accused Mayor Kate Hely of inappropriately prioritizing LGBTIQA+ issues. Councillor Hely made an application for a finding of serious misconduct against Councillor Lew. The matter was heard by a Councillor Conduct Panel which dismissed the application.

In this article, I provide an overview of and then "re-imagine, re-write and re-invent" the Councillor Conduct Panel's decision, in the style of queer judgment (Ferreira & Ors 2025: 3). Taking this approach, the article will "function as both critique and law reform" (ibid: 6), explaining the background to the councillor conduct framework in Victoria and the determination of the Councillor Conduct Panel, rewriting that determination as a method of critique, and then concluding with options for law reform to more effectively address councillor misconduct.

One of the limitations of this approach is that "the form or genre of judgment remains largely the same in order to make the judgment useful for judges who are constrained by the institutional realities of being a judge" (Ferreira & Ors 2025: 7) or, in this case, a Councillor Conduct Panel. What this means is that more creative processes of responding to councillor misconduct are constrained and I "play politely with law—making decisions that toy with discrete legal concepts or identities without overhauling normative ways of writing" (ibid).

That said, I also adopt the approach of theatrical jurisprudence in noticing "what's at stake when law is brought into the realities of being" (Leiboff 2019: 138) to reflect on how decision-makers' personal experiences influence their ability to comprehend the experiences of others and how this is brought into play in their decisions. These dramaturgical details of decision-makers' personal histories—that come out in the article—are needed to understand what drove their thinking and reasoning. In acknowledging these, I also acknowledge my own positionality in the work and my relation to some of the actors in the decision, as recognizing "our personal experience" is part of being a queer jurisprudent (Ferreira & Ors 2025: 11).

Queer judgment also demands that different "formats [are] adopted to express our voices in the judgments and the commentaries that do not always conform to typical, formal judgment" (Ferreira & Ors 2025: 12). As such, the voice used across this article is not always consistent: it starts with a typical legal academic tone summarizing the councillor conduct framework in Victoria and the determination of the Councillor Conduct Panel, with moments of my personal voice interceding to reflect on my connection to some of the characters involved; then it proceeds into a redetermination that slides from the words of the Councillor Conduct Panel as originally written into my own words, taking on the persona of the Panel in "an act of ethical reimagination" (Sharpe 2017: 420); and it then concludes with a return to the typical legal academic voice providing recommendations for change to the councillor conduct framework in Victoria. This includes the incorporation of stories—both historical and personal—as theatrical jurisprudence demands that "we ought to pay attention to these small stories and the lives embedded in them, as a practice of reminding each of us how our lives shape our reading of law" (Leiboff 2019: xi).

The councillor conduct framework in Victoria

In Australia, local governments are constituted and regulated by state parliaments or, in the case of the Northern Territory, its Legislative Assembly. In Victoria, its Constitution enables the Parliament of Victoria to make laws with respect to the responsibilities of councillors (Constitution Act 1975 (Vic) section 74B(1)(h)). In this respect, the Victorian Parliament has legislated a Model Councillor Code of Conduct that includes the standards of conduct expected to be observed by councillors while performing their duties and functions as councillors, including a prohibition on discrimination, harassment (including sexual harassment), and vilification (Local Government Act 2020 (Vic), sections 28(2)(e), 139(1)). A breach by a councillor of the Model Councillor Code of Conduct is misconduct and continued or repeated misconduct by a councillor after a finding of misconduct has been made in respect of them or bullying or sexual harassment of another councillor or member of council staff is serious misconduct (section 3).

Application

A council by resolution, a councillor, or a group of councillors may apply to the Principal Councillor Conduct Registrar, a public servant appointed by the Secretary to the Department of Government Services, for the establishment of a Councillor Conduct Panel to make a finding of serious

misconduct against a councillor within 12 months of the alleged serious misconduct occurring (Local Government Act 2020 (Vic), sections 148, 149(1)(f), 154). The Principal Councillor Conduct Registrar will examine the application to determine if it is not frivolous, vexatious, misconceived, or lacking in substance and if there is sufficient evidence to support the allegation of serious misconduct (section 155(1)). If so satisfied, the Principal Councillor Conduct Registrar will then form a Councillor Conduct Panel to hear the matter by appointing two members from the Councillor Conduct Panel List (sections 149(1)(g), 155(1A), 156), which is a list of eligible persons established by the Minister for Local Government from which members of a Councillor Conduct Panel must be selected (section 153(1)).

Hearing

The Councillor Conduct Panel may then hear the application by a councillor (Local Government Act 2020 (Vic), section 154(1)). The Councillor Conduct Panel must conduct a hearing (section 163(1)) and serve a written notice of the time and place of hearing on the applicant, the respondent, and the council (s 160). The hearing must be conducted in accordance with the following:

- ◊ the proceedings must be conducted with as little formality and technicality as statutory requirements and the proper consideration of the matter permit (section 163(2)(a));
- ◊ there is no right to representation at the hearing except if the Councillor Conduct Panel considers that a party requires representation to ensure that the hearing is conducted fairly (section 163(2)(b));
- ◊ the proceedings must not be open to the public (section 163(2)(c));
- ◊ the Councillor Conduct Panel is not bound by rules of evidence but may inform itself in any way it thinks fit (section 163(2)(e));
- ◊ the Councillor Conduct Panel is bound my rules of natural justice (section 163(2)(f));
- ◊ the procedure of the Councillor Conduct Panel is otherwise in its discretion (section 163(2)(g)).

In addition, the Councillor Conduct Panel may:

- ◊ request a person to attend a hearing and answer questions (section 161(1)(a));
- ◊ request the applicant, the respondent, or the council to provide information (section 161(1)(b)); and

- ◊ direct the applicant or the respondent to attend a hearing or provide information (s 161(1)(c)).

Findings and directions

After the Councillor Conduct Panel has conducted the hearing, the Panel may:

- ◊ make a finding of serious misconduct against a councillor (section 167(1)(a));
- ◊ make a finding of misconduct against a councillor (section 167(1)(b));
- ◊ make a finding that remedial action is required (section 167(1)(c)) and direct the respondent to attend mediation, training, or counselling (section 167(6)); or
- ◊ dismiss the application (section 167(1)(d)).

In addition, if the Councillor Conduct Panel makes a finding of misconduct or serious misconduct against a councillor, the Panel may:

- ◊ direct the councillor to make an apology (sections 167(3)(b), 167(4)(a)); or
- ◊ suspend the councillor from office for a period not exceeding one month in the case of misconduct (section 164(4)(b)) or 12 months in the case of serious misconduct (section 167(3)(c)).

If a councillor has been subject to a finding of serious misconduct, they may be reprimanded (section 167(3)(a)), and if a councillor is subject to two or more findings of serious misconduct, they are no longer qualified to be a councillor at all (section 34(2)(i)).

After the Councillor Conduct Panel has made its determination, it must give a copy of its decision and statement of reasons for the decision to the council, the applicant and respondent, the Minister for Local Government, and the Principal Councillor Conduct Registrar, which must be tabled at a council meeting and recorded in the minutes of that meeting (section 168). The Principal Councillor Conduct Registrar will publish the determination made by the Councillor Conduct Panel and any reasons given for that determination (section 149(1)(i)). The decision is reviewable by the Victorian Civil and Administrative Tribunal (section 170).

Determination of the Councillor Conduct Panel: *Hely & Lew*

The determination of the Councillor Conduct Panel in the matter of an Application by Councillor Kate Hely concerning Councillor Alexander Lew of the Stonnington City Council (hereafter *Hely & Lew*) concerned comments from a male councillor (Councillor Lew) accusing a female councillor (Councillor Hely) of inappropriately prioritizing LGBTIQA+ issues by putting "any left wing woke issue front and centre", including "LGBTI" issues, during debate on an urgent business motion relating to COVID at the council meeting on 7 June 2021 (*Hely & Lew*: paragraph 18). Stonnington City Council comprises the inner south-eastern suburbs of metropolitan Melbourne and has one of the largest LGBTIQA+ communities in Victoria. Councillor Hely was the Mayor of Stonnington City Council at the time.

Based on these comments, and other allegations, on 14 September 2021, Councillor Hely applied to the Principal Councillor Conduct Registrar for the establishment of a Councillor Conduct Panel to make a finding of serious misconduct against Councillor Lew, alleging that he had bullied her. The Principal Councillor Conduct Registrar considered the application and referred it to a Councillor Conduct Panel comprising the Honourable Shane Marshall AM, a former judge of the Federal Court of Australia, and Mr Matt Evans, a former Monash City Councillor, for hearing. Both were—Shane Marshall is no longer—part of the Councillor Conduct Panel List established by the Minister for Local Government from which members of a Councillor Conduct Panel are selected. As queer and theatrical jurisprudence demand thinking through how personal experiences shape judgment, it is necessary to provide some brief biographical details about the Councillor Conduct Panel.

Matt Evans completed a degree in planning at Royal Melbourne Institute of Technology and is a consultant in the telecommunications sector. Not much is known about his family history. However, as myself and a colleague have noted in other work on theatrical jurisprudence, Shane Marshall was:

> The first in his family to attend university, completing a double degree in economics and law at Monash University. He came from a family of waterside workers in Port Melbourne, his mother was a migrant factory worker, and he was a descendant of a leader of the famed Eureka Stockade (Leiboff & Mulcahy forthcoming).

Shane Marshall also graduated as dux of St Bede's College in Mentone, where I also studied, and, like him, I barrack for Collingwood and went on to

study law at Monash University (though I studied it alongside performing arts not economics). He "came into law as an outsider with experiences vastly different from the norm at the time, but also with an attunement to experiences of exclusion forged from his working-class background" and brought this background to bear on his judgments (ibid). However, in this case, there is a notable lack of consideration of the gendered dimensions of Councillor Lew's comments by these two male decision-makers, nor of their impact on LGBTIQA+ and indigenous people.

Serious misconduct

The Councillor Conduct Panel heard the application, made no findings of serious misconduct against Councillor Lew, and dismissed the application. In its reasons for its decision, the Councillor Conduct Panel found that, whilst the comments were "unwarranted", "appalling", and "disregarded normal respectful discourse", they were simply "an example of vigorous political discourse" and "although being conduct which is to be discouraged, in the context of a 'hot button' political issue it was not behaviour which was unreasonable" or capable of constituting serious misconduct (*Hely & Lew*: paragraph 16). Furthermore, the Councillor Conduct Panel cautioned that the comments were made during debate on an issue "that was close to Cr Lew's heart making him emotional on the issue" and reasoned that "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 … people" (ibid).

Having regard to the standards of conduct referred to in the Local Government Act 2020, the Councillor Conduct Panel held that "political debate can be robust but at the very least it must not involve behaviour towards another councillor which involves repeated unreasonable behaviour" that is "insulting, threatening or humiliating behaviour" (ibid: 6-7). In so doing, the Councillor Conduct Panel cited the remarks of Kirby J in *Coleman v Power* (2004):

> 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 (paragraph 239).

In making this judgment, Kirby J cited Weston Bate's *Lucky City: The First Generation at Ballarat, 1851-1901*, which quotes Charles Jones, a political candidate running for the electoral district of Ballaarat East in 1864 (and Melbourne City Councillor from 1862-1865) who used a campaign speech to refer to Irish Catholics as "ignorant" "savages" and "specimen of the Cardinal's lambs, whom it was proposed should fatten upon Victorian pastures" (Bate 1978: 139). At that election, Jones defeated John Humffray, a gold digger who played the role of peacemaker in the lead up to the battle at the Eureka Stockade, in which Shane Marshall's great-great-grandfather fought. (Jones later went on to become the Member for Ballaarat West, where I live.) It is notable that Kirby J's conclusion that those who are of the view that political discourse in Australia should be improved "must find another homeland" has resonance with Jones' argument against the "import" of Irish Catholics into Victoria (ibid). Shane Marshall himself attended a Catholic high school in Victoria. What is also notable is that the primary source cited for the claims as to the nature of political discourse is historic, being over a century-and-a-half old and, even at that time, resulted in violence, with an angry mob tearing at the uniform of police guarding Jones after he gave his speech (ibid; see also Kiddle 1967: 251-262).

Some commentators have argued that *Coleman v Power* suggests that "a typical lack of civility in political debate in Australia was protected communication under the implied freedom" of political communication (Gelber 2005: 320; see also Stone 2005: 849-850). It is notable, however, that this case concerned criminal charges for using insulting words against police officers. Theatrical jurisprudence demands attention to "how different lives affect the reading, shaping and interpreting of law … based on the personal and through experience" (Leiboff 2019: 14). Kirby J, a prominent gay jurist and Distinguished Ambassador of the Australian Research Centre in Sex, Health and Society (where I work), would have been acutely attuned to the effects of criminalization, having grown up in an environment in which police enforced laws that criminalized homosexual conduct (Kirby 2011). Nevertheless, the sources cited suggest their application to speech by politicians. Perhaps the reason that Kirby J cited this speech by Jones is because of his belief that "Australians are very sceptical" of legal protections that would protect the speech of religious organizations or their adherents (Karp 2021), but it may be more generally due to a belief that restrictions on speech are fundamentally disempowering, reflected in his conclusion that "history, and not only in other societies, teaches that attempts to suppress … opinions, even when wrong-headed and insulting, are usually counter-

productive and often oppressive and ultimately unjustified" (*Coleman v Power* 2004: paragraph 260).

Misconduct

As Councillor Hely did not invite the Councillor Conduct Panel to consider whether Councillor Lew had committed misconduct by breaching what is now the Model Councillor Code of Conduct and, further, informed Councillor Lew that no issue of misconduct would be pursued against him in the course of the hearing before the Panel, the Panel determined that it would constitute a denial of natural justice if they considered that matter (*Hely & Lew*: paragraph 48).

The determination and accompanying statement of reasons for the decision were tabled at the 25 July 2022 Stonnington City Council meeting and recorded in the minutes of that meeting and published online.

Re-determination of *Hely & Lew*

In what follows, I rewrite two paragraphs of *Hely & Law*: paragraphs 18 and 48. Paragraph 18 concerns some of the Councillor Conduct Panel's findings on the allegation surrounding the urgent COVID motion and paragraph 48 concerns the Councillor Conduct Panel's conclusion on serious misconduct. The words underlined are taken verbatim from *Hely & Law*; the words not so are my own.

In this rewriting, some decisions have been made about terminology and time. First, I use the acronym "LGBTI" rather than the more capacious "LGBTIQA+", which captures asexual and other diverse sexual orientations and gender identities, as "LGBTI" is the term that is used by Councillor Lew that is subject of the claim of serious misconduct. Further research needs to attend to the particular impacts of stigma and discrimination against asexual people in this context.

Second, I also play with the timing by applying the law, including the Local Government Act 2020 ("the Act"), that exists at the time of writing rather than at the time of the decision, including changes made by the Local Government Amendment (Governance and Integrity) Act 2024, most notable of which is the substitution of standards of conduct with a Model Councillor Code of Conduct. The reason for this is to ensure the applicability of the law reform recommendations that follow to the current legislative framework.

[B] *HELY & LEW*

[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. Cr 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.

[18A] It could be argued that Cr Lew's comments were simply an example of vigorous political discourse. The Model Councillor Code of Conduct stipulates that it is not intended to limit, restrict, or detract from robust public debate of issues in a democracy (Local Government (Governance and Integrity) Regulations 2020 sch 1 cl 5). This does not, however, give Cr Lew free rein to breach the standards of conduct. Debate must be done in a respectful manner (ibid: cl 5), which involves using professional and respectful language and keeping criticism focussed on the idea or issues being debated, rather than making it personal. In his "summing up", Cr Lew's comments were not relevant to the motion, being to write to the State Government in support of ending the COVID lockdown in Stonnington and instead became personal.

[I8B] It could also be argued that Cr Lew's comments were reasonable because they were made in the context of a "hot button" political issue, being the COVID lockdown. However, Cr Lew's comments were focussed on "LGBTI" and "indigenous issues", which are not "hot button" political issues and should not be treated as such and, in any case, these comments were irrelevant to the motion being debated about the COVID lockdown.

[18C] Cr Lew's comments were made during debate on an issue that was close to his heart, being assistance to small business because of the COVID lockdown, making him emotional on the issue. As Kirby J in *Coleman v Power* noted, political debate regularly includes emotion and freedom of political communication should protect "the obsessive, the emotional and the inarticulate" [260]. However, Cr Lew's comments were irrelevant to the political debate about the COVID lockdown and, had that debate made him emotional, he could and should have channelled those emotions into comments on the motion under debate, not irrelevant comments about "LGBTI" and

"indigenous issues". These comments were not made in support of his motion, but rather to attack Cr Hely.

[18D] It could be argued that, rather than being demeaning to Cr Hely, Cr Lew's comments were an unintended compliment that she is concerned about social justice for LGBTI and indigenous people. However, this argument is undermined by Cr Lew's use of the term "woke". Whilst the term "woke" was originally used to refer to heightened awareness of social inequalities and injustices, it is now widely regarded as a pejorative term of ridicule and mockery. It was used here to suggest that Cr Hely's concern for these issues is performative or superficial. In this regard, Cr Lew's comments were clearly not complimentary but were, rather, demeaning to Cr Hely.

[18E] Law dictates that the provisions in the Model Councillor Code of Conduct must be read so as not to infringe the implied constitutional freedom of communication concerning governmental or political subjects defined by the High Court of Australia in *Lange v Australian Broadcasting Corporation* [1997] HCA 25 and the right to freedom of expression codified in the *Charter of Human Rights and Responsibilities*.

[18F] Earlier in this decision we cited the remarks of Kirby J in *Coleman v Power* that "Australian politics has regularly included insult and emotion, calumny and invective, in its armoury of persuasion" and, on this basis, while "one might wish for more rationality, less superficiality, diminished invective and increased logic and persuasion in political discourse … those of that view must find another homeland." For that claim, Kirby J cites Weston Bate's *Lucky City: The First Generation at Ballarat, 1851-1901*, which quotes a political candidate running for the electoral district of Ballaarat East in 1864 who referred to Irish Catholics as "ignorant" "savages" and "specimen of the Cardinal's lambs, whom it was proposed should fatten upon Victorian pastures." Whilst these comments may have been considered part and parcel of political debate historically, recent reports bring into question whether such comments are reasonable in contemporary Australian politics.

[I8G] Following extensive consultation with the sector, in May 2022, the Victorian Government's Local Government Culture Project undertaken by PriceWaterhouseCoopers Consluting in partnership with academics Professor Emeritus Anona Armstrong and Dr Yongqiang Li produced an Insights Report that identifies issues that influence council culture and councillor conduct. The Insights Report found that women and LGBTIQA+ people "are often not inspired to stand for election or work in the LG sector. When they do, they may face harassment, lack of formal support and retribution for calling out poor behaviour."

[I8H] Furthermore, in November 2021, the Australian Human Rights Commission's Independent Review into Commonwealth Parliamentary Workplaces produced the *Set the Standard* report that makes recommendations to ensure that parliamentary workplaces

are safe and respectful. The *Set the Standard* report concluded that "while the parliamentary chambers are designed for robust debate, those spaces must also be safe and respectful" and the standing orders of parliament should "require that the language used in the chamber does not contribute to the exclusion of women, First Nations people, LGBTIQ+ people, CALD people, or people with a disability."

[18I] Finally, in August 2021, the Victorian Pride Lobby produced the *Breaking the Rainbow Ceiling* report that surveyed lesbian, bi+, and queer women on their barriers and motivators to stand for office. The *Breaking the Rainbow Ceiling* report found that some respondents "feared public attacks or backlash based on their gender or sexual orientation. This included a fear of stigma, discrimination, bullying, sexual harassment or abuse – and, now, a fear of violence or assaults, including by elected representatives" and political opponents, and that "politics was seen by respondents as a male-dominated environment where women are ignored and, if they do speak up, are marked out and made to move on."

[18J] In short, these reports suggest that while political debate may be robust, it must also be respectful and not exclusionary and, as we have said earlier, must not constitute a risk to the health and safety of another councillor. Whilst Kirby J's remark in *Coleman v Power* must be borne in mind, namely that "public officials are expected to be thick skinned and broad shouldered in the performance of their duties" [258], it is worth remembering that the latter attribute is often imputed to men. These recent reports demonstrate that historical standards of political debate may contribute to the exclusion of women and LGBTI people from public officialdom. Indeed, section 15(3) of the *Charter of Human Rights and Responsibilities* notes that the right to freedom of expression is not absolute but may be subject to lawful restrictions reasonably necessary to respect the rights and reputation of other persons.

[18K] In this case, the Model Councillor Code of Conduct requires that councillors must treat others with dignity, fairness, objectivity, courtesy, and respect (Local Government (Governance and Integrity Regulations) 2020 sch 1 cl 2(1)), and limits behaviour by councillors that is demeaning, abusive, obscene, or threating (cl 2(1)(a)), behaviour that intentionally causes or perpetuates stigma, stereotyping, prejudice, or aggression (cl 2(1)(b)), or behaviour that is discrimination or vilification (cl 2(1)(b)). The purpose of the limitations set out in the Model Councillor Code of Conduct is to ensure that councillors discharge their duties and functions appropriately and in a civil and respectful way. This is undoubtedly important, as the reports above demonstrate that disrespectful debate can exclude women and LGBTI people from standing for or working in local government, thereby impairing their right to take part in public life. In any case, these provisions must be interpreted in accordance with the stated intention of the Model Councillor Code of Conduct to not limit, restrict, or detract from robust public debate of issues in a democracy (cl 5).

[18L] The limitations set out in the Model Councillor Code of Conduct may result in a councillor being suspended from office for up to three months (or twelve months in the case of serious misconduct), being removed from any position in which they represent the council including as chair of a delegated committee, and being ineligible to hold office as mayor or deputy mayor for up to twelve months, in accordance with section 167 of the Act. A councillor would not be subject to a cost order or a criminal penalty for breaching the limitations set out in the Model Councillor Code of Conduct, and therefore the consequences of a finding of misconduct against a councillor are not unreasonably restrictive in consideration of the importance of respectful debate. In sum, the Model Councillor Code of Conduct includes reasonable limits on the right to freedom of expression under the *Charter of Human Rights and Responsibilities* and the implied constitutional freedom of political communication, namely that political debate by and between councillors must be respectful.

[18M] Whether Cr Lew's comments were serious misconduct in the form of bullying requires a finding that his behaviour both: (a) was unreasonable; and (b) created a risk to the health and safety of Cr Hely.

[18N] We find that Cr Lew's behaviour towards Cr Hely was unreasonable. Cr Lew's comments were disrespectful towards Cr Hely and shifted the criticism from the issue being debated, namely the COVID lockdown, to a personal attack on Cr Hely on issues unrelated to the debate, namely "LGBTI" and "indigenous issues". There was no reason for these comments in the context of the political debate, and they were unreasonable.

[18O] We do not find, however, that Cr Lew's behaviour created a risk to the health and safety of Cr Hely. In doing so, we are cognisant that health and safety includes psychological health and safety. Cr Lew's comments understandably could have hurt Cr Hely's feelings, but there is no evidence before us to suggest that they created a risk to her health or safety, psychological or otherwise. Therefore, Cr Lew's comments were not bullying and were thus not serious misconduct. Whether Cr Lew's comments were misconduct (as distinct from serious misconduct) is an issue which the Panel will concern itself with later in these reasons.

[…]

[48] Consequently we make no finding of serious misconduct or bullying in accordance with section 167(1)(a) of the Act. Cr Hely did not invite the Panel to consider whether Cr Lew had committed misconduct. Nevertheless, if we are satisfied that Cr Lew breached the Model Councillor Code of Conduct, we may make a finding of misconduct against Cr Lew, provided that the breach occurred at or after 14 June 2021, being three months before the date of the application, in accordance with section 167(1)(b) of the Act.

[49] Whether Cr Lew's behaviour was misconduct requires a finding that: (a) his behaviour breached the Model Councillor Code of Conduct; (b) the breach occurred at or after 14 June 2021, being three months before the date of the application.

[50] We find that Cr Lew breached the Model Councillor Code of Conduct. As we noted earlier, the Model Councillor Code of Conduct requires that councillors must treat others with dignity, fairness, objectivity, courtesy, and respect, and limits behaviour by councillors that is demeaning, abusive, obscene, or threating, behaviour that intentionally causes or perpetuates stigma, stereotyping, prejudice, or aggression, or behaviour that is discrimination or vilification. We have already found that Cr Lew's behaviour towards Cr Hely was disrespectful, unfair, discourteous, and demeaning. We further find that Cr Lew's behaviour was stigmatising, discriminatory, and vilifying towards LGBTI and indigenous people.

[51] Stigma is a process of labelling and stereotyping that culminates in status loss and discrimination. In his comments, Cr Lew distinguished issues affecting small businesses from what he labelled "LGBTI" and "indigenous issues". He associated negative attributes to those identified differences by labelling issues affecting LGBTI and indigenous people as "woke", which presented a wildly oversimplified idea that these issues are performative or superficial. He separated and distanced small businesses from LGBTI and indigenous people, creating a dynamic of "us" and "them". This culminated in discrimination against LGBTI and indigenous people.

[52] Discrimination occurs if a person treats a person with an attribute unfairly because of that attribute. In this case, Cr Lew treated LGBTI and indigenous people unfairly because of their sexual orientation, gender identity, sex characteristics, and race. He did so by treating the issues of those with these attributes as something that should not be put, in his words, "front and centre". This was unfair as it was unequal treatment compared to others, being small businesses that were the subject of his motion and whose issues, he suggested, by implication, should be put front and centre. In sum, Cr Lew's comments were stigmatising and discriminatory towards LGBTI and indigenous people because of their sexual orientation, gender identity, sex characteristics, and race.

[53] Vilification occurs if a person engages in public conduct that is hateful or seriously contemptuous of, or reviling or severely ridiculing, a person or group of persons because of their protected attribute. In this case, Cr Lew's public comments expressed dislike for and a feeling that LGBTI and indigenous issues are beneath consideration, in a way that was abusive or angrily insulting or disrespectful and dismissive. The comments did not rise to the level of intense dislike to render them hateful, but they seriously expressed the feeling that LGBTI and indigenous issues are beneath consideration in a way that rendered them seriously contemptuous of LGBTI and indigenous based on their sexual orientation, gender identity, sex characteristics, and race. This was reflected in Cr Lew's criticism of issues facing

those with these protected attributes being put "front and centre". His comments were offensive, insulting, disrespectful, and dismissive of LGBTI and indigenous people. This was reflected in Cr Lew's use of the term "woke", being a pejorative term of ridicule and mockery, to describe issues impacting LGBTI and indigenous people, which further underscores his contempt of those with these protected attributes. The comments were angrily presented as evident in his emotionality, but did not rise to the level of extremity to render them reviling or severely ridiculing. Nevertheless, we have found that Cr Lew engaged in public comments that were seriously contemptuous of LGBTI and indigenous people because of their sexual orientation, gender identity, sex characteristics, and race.

[54] We have found that Cr Lew's behaviour was disrespectful, unfair, discourteous, and demeaning towards Cr Hely, and that his behaviour was stigmatising, discriminatory, and vilifying towards LGBTI and indigenous people. This behaviour was a breach of the Model Councillor Code of Conduct. What remains is for us to decide if the breach occurred at or after 14 June 2021, being three months before the date of the application.

[55] What is clear from the foregoing is that there was a pattern of behaviour towards Cr Hely that commenced prior to 14 June 2021, escalated through social media, and continued past that date, as evident in his comments made on 15 June 2021 at "Councillor Only Time" in relation to this same issue. Whilst we have found that his comments at that meeting were not unreasonable and thusly a breach in and of themselves, they do represent an ongoing pattern of behaviour, some of which was a breach, which continued past 14 June 2021. To look at each incident in isolation is to ignore the consistent pattern of behaviour towards Cr Hely that cumulatively formed a breach of the Model Councillor Code of Conduct. In that sense, the breach was connected and contiguous behaviour that continued after 14 June 2021.

[56] There is no evidence before us to suggest that Cr Lew's behaviour towards LGBTI and indigenous people continued after the isolated incident on 7 June 2021. It may have, but we have no evidence before us that it did. Nevertheless, we have found that Cr Lew's disrespectful, unfair, discourteous, and demeaning behaviour towards Cr Hely breached the Model Councillor Code of Conduct and that this breach continued past 14 June 2021. We therefore make a finding of misconduct against Cr Lew.

[57] Cr Hely informed Cr Lew that no issue of misconduct would be pursued against him during the hearing before the Panel. We therefore considered whether this finding – and consideration of whether Cr Lew had engaged in misconduct – would constitute a denial of natural justice in breach of section 163(2)(f) of the Act. In doing so, we are mindful of the enjoinder, in section 163(2) of the Act, that the proceedings must be conducted with little formality and technicality and that the Panel is not bound by rules of evidence but may inform itself in any way it thinks fit and has discretion over

its own procedures. Furthermore, Cr Lew had representation at the hearing despite section 163(2)(b) of the Act stipulating that there is no right to such. Cr Lew was heard and made representations on his behaviour, including through his counsel. Whilst Cr Hely may have informed Cr Lew that no issue of misconduct would be pursued against him during the hearing before the Panel, that only reflected the position of Cr Hely through her representation; it did not preclude the Panel from, at its own discretion, considering whether Cr Law had engaged in misconduct. Section 167(1)(b) of the Act empowers us to do just that.

[58] Having found that Cr Lew committed misconduct, we direct Cr Lew to make a written apology to Cr Hely. That apology is to sincerely acknowledge that Cr Lew was disrespectful, unfair, discourteous, and demeaning towards Cr Hely, and is to be tabled at the next Council meeting. Furthermore, we suspend Cr Lew from the office of councillor for one month.

[59] We also find that remedial action is required. We are aware that Cr Hely and Cr Law previously arranged a mediation and that Cr Hely sought for that process to continue but that Cr Lew felt that the process was being weaponized to stymie dissent. We consider that mediation would be helpful to restore civil relations between the two councillors. We therefore direct Cr Lew to attend the mediation with Cr Hely. That said, we are conscious that whilst successful mediation may redress the impact of this conflict on the two councillors, it will not address the impact of Cr Lew's behaviour on affected communities, including LGBTI and indigenous people.

[60] Earlier, we found that Cr Lew's behaviour was stigmatising, discriminatory, and vilifying towards LGBTI and indigenous people. Whilst we could not find that this behaviour was misconduct, as there was no evidence before us that it continued past 14 June 2021, we may make a finding that remedial action is required regardless of whether a finding of misconduct has been made, as per section 167(1)(c) of the Act. On this basis, we direct Cr Lew to undertake professional development training on LGBTI inclusion and professional development training on indigenous inclusion as it relates to his role and responsibilities as a councillor through training providers determined by the Council's chief executive officer. This training should remedy Cr Lew's stigmatising and discriminatory treatment of LGBTI and indigenous people.

[61] We finally direct Cr Lew to undergo counselling. As we noted earlier, Cr Lew was emotional but seemingly unable to channel those emotions into comments on the motion under debate, instead attacking Cr Hely and, through her, LGBTI and indigenous people. Counselling should enable Cr Lew to control his emotions and resolve social and personal problems he evidently has with LGBTI and indigenous people. We also direct the Council's chief executive officer to make counselling available to Cr Hely to deal with any hurt she may be feeling because of Cr Lew's poor behaviour.

> [62] Exclusionary language of the kind by Cr Lew has its consequences. Cr Lew has faced these consequences through the sanctions described above. The consequences of his exclusionary language are, however, felt by others. Cr Hely is understandably hurt, but so too would be LGBTI and indigenous people. All have been disrespected by Cr Lew. What is perhaps most concerning is that research shows that this kind of conduct dissuades women, LGBTI people, and indigenous people from standing for or working in local government. We hope that the remedial actions we have directed go some way to ameliorating this unfortunate consequence. Local government in Australia should be open to all without exclusion, and women, LGBTI people, and indigenous people who want to stand for or work in this sector should not be compelled to "find another homeland".

[C] POSTSCRIPT

Whilst acknowledging the limits of queer law reform (Adler 2018), in this postscript, I proffer some recommendations to strengthen the councillor conduct framework in Victoria to redress some of the issues encountered in *Hely & Lew*.

The redetermination directs Councillor Lew to undertake professional development training on LGBTI and indigenous inclusion. Under section 33A of the Act, a councillor is required to complete regular professional development training to understand their role and responsibilities. If they fail to complete professional development training, their allowance is withheld (Local Government Act 2020 (Vic), section 33B). It is not, however, misconduct. Therefore, a new subclause should be inserted in clause 1 of the Model Councillor Code of Conduct to require that a councillor must complete professional development training as required under section 33A of the Act. This reform would mean that failure to complete professional development training is grounds for misconduct.

LGBTIQA+ inclusion cannot rely on professional development training alone. In the development of the Local Government (Governance and Integrity) Amendment Regulations, the Government considered including conduct required in relation to "LGBTQIA+ inclusiveness", but ultimately this was not included in the Model Councillor Code of Conduct.[1] In light of the issues encountered in *Hely & Law*, the Government should reconsider this and include a new subclause in clause 2(1) of the Model Councillor Code of Conduct regarding LGBTIQA+ inclusiveness.

Furthermore, as noted in the redetermination above, it is a well-established principle of workplace health and safety laws that health

[1] For further information, see Local Government Reforms 2024.

includes psychological health (Occupational Health and Safety Act 2004 (Vic), section 5). However, this is not explicitly referenced in the Model Councillor Code of Conduct. Therefore, subclause 2(2)(a) of the Model Councillor Code of Conduct should be amended to include specific reference to psychological health and safety. This would be strengthened by the Government's planned Occupational Health and Safety (Psychological Health) Regulations, which will provide necessary clarification on what amounts to psychological hazards.

These recommendations would strengthen the Model Councillor Conduct of Conduct by including provisions on LGBTIQA+ inclusiveness and psychological health and safety, as well as requirements to complete professional development training. However, more needs to be done to tackle discrimination, sexual harassment, vilification, and other breaches of human rights.

Unlike other duty-holders, councillors do not have a positive duty to eliminate discrimination, sexual harassment, or vilification against members of their municipal community (cf Equal Opportunity Act 2010 (Vic), section 15). This is because their duty only extends to other councillors or members of council committees (section 73). So, whilst the Model Councillor Code of Conduct requires that councillors not engage in discrimination or vilification (Local Government (Governance and Integrity) Regulations 2020 (Vic), schedule 1, clause 2(1)(c)) or demeaning, abusive, obscene, or threatening sexual behaviour (clause 2(1)(a)), they do not have a positive duty to eliminate such discrimination, vilification, or sexual harassment—this only extends to fellow councillors or members of council committees and, even then, only to discrimination and sexual harassment, not vilification. Therefore, a new subclause should be inserted in clause 2 of the Model Councillor Code of Conduct to require that councillors must take positive reasonable and proportionate measures to eliminate discrimination, sexual harassment, or vilification within the municipal community.

As noted in the Guidance on the Model Councillor Code of Conduct, "councillors are a public authority under the Charter, and it is unlawful for a Councillor to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a human right" (Local Government Victoria 2024: 40, referencing Charter of Human Rights and Responsibilities Act 2016 (Vic), sections 4(1)(e), 38(1)). This includes the right to protection against discrimination (Charter of Human Rights and Responsibilities Act 2016 (Vic), section 8(3)). It is not, however, misconduct if a councillor acts in a way that is incompatible with a human

right or fails to properly consider a human right in their decision-making. Therefore, a new subclause should be inserted in clause 2 of the Model Councillor Code of Conduct to reflect this requirement under the Charter of Human Rights and Responsibilities.

These recommendations would again strengthen the Model Councillor Code of Conduct by including a positive duty to eliminate discrimination, sexual harassment, and vilification and a duty to consider and act compatibly with human rights. However, it is also necessary to address structural issues within the councillor conduct framework itself. These include the burden on victims of raising and proceeding complaints of serious misconduct and the limited ability of impacted members of the public to make complaints.

The current situation where councillors have discretion on whether to report serious misconduct, in accordance with section 154(2) of the Act, leads to the perverse scenario that councillors may not exercise that discretion because of the fear of reprisal. If there is an obligation to report, councillors may not experience reprisal for doing so. Therefore, consideration should be given to inserting a mandatory obligation on councillors to report a reasonable belief that a councillor has committed serious misconduct to the Principal Councillor Conduct Registrar under clause 3 or 4 of the Model Councillor Code of Conduct. In such situations, the Principal Councillor Conduct Registrar would still examine the allegation and determine whether to form a Councillor Conduct Panel to hear the matter or dismiss it because it is frivolous, vexatious, misconceived, or insubstantial, in accordance section 155(1)(a) of the Act.

Another significant problem is that serious misconduct investigations by Councillor Conduct Panels are framed as a dispute between two sides trading accusations rather than as an inquiry to determine if a councillor has committed serious misconduct. In part, this is because the complainant is framed as a party to the proceedings, even though the procedures must be conducted with little formality or technicality, as required under section 163(2)(a) of the Act. This means that the burden of raising and proceeding complaints typically falls to councillors that have experienced the respondent councillor's misconduct. Therefore, part 6, division 7 (sections 153-174) of the Act should be amended to clarify that the applicant to a Councillor Conduct Panel need not be party to the proceedings. This would reduce the overly formal, technical, and disputational dimensions of Councillor Conduct Panel proceedings.

There is also limited ability for members of the community to make misconduct complaints against a councillor, even though the Victorian

Ombudsman states that "Councils must have processes in place to manage complaints about Councillors" (Victorian Ombudsman 2021: 5). Therefore, section 107(3) of the Act should be amended to stipulate that council complaint policies must include complaints about dissatisfaction with the conduct of a councillor.

These reforms would redress the burden on victims of raising and proceeding complaints and address the ability of impacted members of the public to make complaints. If complaints are to succeed, however, there is a need for clarity in the Model Councillor Code of Conduct. In this regard, there is some confusion over the application of the Model Councillor Code of Conduct. Clause 2 of the Model Councillor Code of Conduct requires that a councillor must treat others with respect, but clause 5 states that "nothing in the Model Councillor Code of Conduct is intended to limit, restrict or detract from robust public debate of issues in a democracy". These can be read together, as was done in the redetermination, to require that debate must be respectful, but to resolve any potential inconsistency, clause 5 of the Model Councillor Code of Conduct should be amended to clarify that debate must be carried out in a respectful manner.

Poor behaviour and misconduct by councillors can cause significant trauma for individual victims, detrimental impacts on others, and significant expenditure of money, time, and resources for the council. Dealing with these requires a two-pronged approach of legislative reform and cultural change. Failure to deal with these issues, and the prejudice that underpins them, will impact the willingness of women, LGBTIQA+ people, indigenous people, and other marginalized groups to stand for and work in local government.

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