## Whau Local Board

### OPEN MINUTE ITEM ATTACHMENTS

<table>
<thead>
<tr>
<th>ITEM</th>
<th>TABLE OF CONTENTS</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Excluded</td>
<td></td>
<td></td>
</tr>
<tr>
<td>A.</td>
<td>Recommendations of the Conduct Review Independent Panel under the Auckland Council Code of Conduct cover report</td>
<td>3</td>
</tr>
<tr>
<td>B.</td>
<td>Report of the Conduct Review Independent Panel regarding Complaint 2 (redacted)</td>
<td>11</td>
</tr>
<tr>
<td>C.</td>
<td>Report of the Conduct Review Independent Panel regarding Complaint 3 (redacted)</td>
<td>23</td>
</tr>
<tr>
<td>D.</td>
<td>Issues to consider when making information from a code of conduct review available to the public</td>
<td>31</td>
</tr>
</tbody>
</table>

Note: The attachments contained within this document are for consideration and should not be construed as Council policy unless and until adopted. Should Councillors require further information relating to any reports, please contact the relevant manager, Chairperson or Deputy Chairperson.
Confidential Meeting of the Whau Local Board
03 July 2019

Recommendations of the Conduct Review Independent Panel under the Auckland Council Code of Conduct

File No.: CP2019/11153

Matataputanga Confidentiality

Reason: The public conduct of the part of the meeting would be likely to result in the disclosure of information for which good reason for withholding exists under section 7.

Interests: s7(2)(a) - The withholding of the information is necessary to protect the privacy of natural persons, including that of a deceased person.

In particular, the report contains sensitive material around the conduct of an elected member of the Whau Local Board. The Whau Local Board will consider whether to make the information public after the local board meeting.

Grounds: s48(1)(a)

The public conduct of the part of the meeting would be likely to result in the disclosure of information for which good reason for withholding exists under section 7.

Te take mō te pūrongo

Purpose of the report

1. To consider the recommendations of the Conduct Independent Review Panel in relation to three separate code of conduct complaints against Whau Local Board member Duncan MacDonald.

Whakarāpopototanga matua

Executive summary

2. The Auckland Council Code of Conduct (the code) is required by legislation and elected members must abide by it.

3. Three complaints under the code were received about Whau Local Board member Duncan MacDonald – two in January 2019 and one in March 2019.

4. The three complaints have been considered by the Conduct Review Independent Panel (the panel). The panel has provided the council with three reports from its investigation. These reports are presented for the Whau Local Board’s consideration.

5. The panel provided separate recommendations for each of the three complaints:

   - Complaint 1 – the panel considers that the complaint relates to Member MacDonald’s conduct as a member and Chair of the ABA rather than in his capacity as a member of the Whau Local Board. Therefore there was no breach of the code of conduct.

   - Complaint 2 – the panel considers that the complaint in relation to improper contact with Council staff has been made out and that Member MacDonald be censured for his breach of Article 7.8. The other aspects of the complaint were either not made out or Member MacDonald was not acting in his capacity as an elected member.

   - Complaint 3 – the panel considers that Member MacDonald’s conduct was not conducive to producing a productive relationship with the community. He accorded no respect to the Complainant and did not act in a manner that encourages and values community involvement in local democracy. The panel recommends that Member MacDonald be censured for his breach of Article 7.3.
6. Given the independent and robust nature of the panel’s process it is not for the Whau Local Board to reconsider the complaints. The Whau Local Board is advised to note the panel’s three reports and endorse their recommendations.

7. The Whau Local Board must decide if the panel’s reports are made public. Whether or not to publish the reports needs to be considered carefully. The Local Board must weigh up factors such as the need for the council to promote transparency against risks such as reputational damage or privacy concerns. If the Local Board decides not to publish any or all of the reports, they could still be requested under the Local Government Official Information and Meetings Act (LGOIMA) and the Council would need to assess any each request individually.

Ngā tūtohunga
Recommendation/s
That the Whau Local Board:

a) note the three reports from the Conduct Review Independent Panel on the Code of Conduct complaints against Whau Local Board member Duncan MacDonald

Complaint 1
b) agree that the Conduct Review Independent Panel’s report on Complaint 1 (Attachment A) will remain confidential at this time and will not be restated in the public minutes.

Complaint 2
c) endorse the panel’s recommendation for Whau Local Board member Duncan MacDonald to be censured for his breach of Article 7.8.
d) agree that the Conduct Review Independent Panel’s report on Complaint 2 (Attachment B) will be included in the public minutes with appropriate redactions to parts of the complaint that were not upheld as well as removal of all identifying information with the exception of Member MacDonald’s name.

Complaint 3
e) endorse the panel’s recommendation for Whau Local Board member Duncan MacDonald to be censured for his breach of Article 7.3.
f) agree that the Conduct Review Independent Panel’s report on Complaint 3 (Attachment C) will be included in the public minutes redacting all identifying information with the exception of Member MacDonald’s name.

Report restated in the public minutes
g) approve that the “Recommendations of the Conduct Review Independent Panel under the Auckland Council Code of Conduct cover report, the local board resolutions and Attachment D be restated in the public minutes, noting that the other attachments are discussed in recommendations b, d) and f).

Horopaki
Context
8. The Local Government Act 2002 requires local authorities to adopt a code of conduct and for elected members to comply with it. A code of conduct must set out:

the conduct of members toward one another, staff and public:
how information is disclosed

Recommendations of the Conduct Review Independent Panel under the Auckland Council Code of Conduct
Confidential Meeting of the Whau Local Board
03 July 2019

legislation that applies to the actions of members
the relationship between elected members and management.

9. The Auckland Council Code of Conduct (the code) applies to both the Governing Body and
local board members. It was adopted by the Governing Body in November 2010 and
amended in August 2013.

10. Three complaints under the code were received about Whau Local Board member Duncan
MacDonald – two in January 2019 and one in March 2019.

11. The code provides for unresolved complaints to be referred to the convenor of the Conduct
Review Independent Panel (the panel). The Convenor of the panel, Derek Firth, can then
refer the complaint to mediation and/or the panel for investigation.

12. In the case of the three complaints made against Member MacDonald, the Convenor
decided that mediation would be inappropriate, so a full panel investigation was undertaken
in May/June 2019. Derek Firth, Commercial Barrister (Convenor), Graeme MacCormick
(retired District Court Judge) and Professor Ron Paterson of the Law School of the
University of Auckland were appointed as the panel.

13. The three complainants and Member MacDonald each provided submissions to the panel.
An oral hearing was held on the 7 June at which the complainants and Member MacDonald
were invited to present their submissions (note that Member MacDonald was unable to
attend the hearing but invited the panel to proceed in his absence).

14. Under the code, the panel’s recommendations are to be reported to the relevant local board
for consideration. The code requires that the panel’s recommendation is considered with
neither the complainant nor the respondent at the meeting.

15. The code provides for the panel to issue guidelines for its procedures. Those guidelines
state that the panel’s recommendation:

“...will be made available only at the relevant meeting at which it is scheduled to be
considered. Copies of the recommendation are to be given to the parties at that
point.

It will be for the Governing Body or Local Board as the case may be to decide
whether the [panel’s] recommendation in any given instance is to be made public
and/or considered in open meeting.”

16. In addition the Standing Orders of the Whau Local Board section 7.4.3 state that “...the local
board or committee may provide for the release to the public of information, which the
meeting considered while the public were excluded.”. The advantages and risks around
making the panel’s report public are discussed further in Appendix D and paragraphs 27 –
43 below.

Tātaritanga me ō ōhutuho
Analysis and advice

17. Each of the three complaints is considered separately below.

Complaint 1

18. The complaint was around the nature of responses from Member MacDonald to requests for
information on the allocation of funds and spending of the Avondale Business Association.

19. The panel considers that Complaint 1 relates to Member MacDonald’s conduct as a member
and Chair of the Avondale Business Association and not as a member of the Whau Local
Board. Therefore it considers there is no breach of the code of conduct. The panel’s full
report can be found as Attachment A.
Complaint 2
20. There were a number of different aspects to Complaint 2 including offensive language, conduct in relation to the Avondale Business Association and sending emails and images to Council staff in the attempt to influence them and discredit the complainant.
21. The panel considers that the complaint in relation to improper contact with Council staff has been made out and that Member MacDonald be censured for his breach of Article 7.8. The other aspects of the complaint were either not made out or Member MacDonald was not acting in his capacity as an elected member. The panel's full report can be found as Attachment B.

Complaint 3
22. Complaint 3 related to words spoken by Member MacDonald to a member of the public (the complainant) when walking his dog early in the morning.
23. The panel considers that Member MacDonald's conduct was not conducive to producing a productive relationship with the community. He accorded no respect to the Complainant and did not act in a manner that encourages and values community involvement in local democracy. The panel considers that Member MacDonald has breached Article 7.3 of the code of conduct and should be censured for this breach. The panel's full report can be found as Attachment C.

Summary
24. The panel has conducted a rigorous independent process to come to its conclusions, with the benefit of having all the information before them including considering the submissions of the three complainants and Member MacDonald. Therefore it is not for the Whau Local Board to reconsider the complaint.
25. On this basis, it is recommended that the Whau Local Board note the panel's reports and endorse the panel's recommendations.
26. Specifically it is recommended that the Whau Local Board endorse the panel’s recommendation for Member MacDonald to be censured for breaches of both Article 7.8 and 7.3 of the Code of Conduct.

Determining if the panel's reports are confidential or made public
27. As noted in paragraph 15 and 16 the Whau Local Board needs to decide if the panel's reports are kept confidential or made public.
28. There is a need to achieve a balance between the rights of the local board member, the council, public interest and the complainant when deciding whether to release reports containing personal information. The decision on whether the panel's reports should be published needs to be carefully considered.
29. Attachment D provides the considerations for determining if the panel's report should be made public. A summary of the advantages and risks for making the panel's report public are set out in Table 1 below.

Table 1: Advantages and risks to publication of the panel's reports

<table>
<thead>
<tr>
<th>ADVANTAGES TO PUBLICATION</th>
<th>RISKS TO PUBLICATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Promotes transparency, strengthening public trust and confidence in council processes and decision-making</td>
<td>Risk of reputational damage to council and elected member</td>
</tr>
<tr>
<td>Reduces the risk of the report being made public knowledge by other means (via complainant)</td>
<td>Can be disproportionate to the level of severity of misconduct (given the elected member is being censured)</td>
</tr>
<tr>
<td>May be released through a LGOIMA request anyway</td>
<td>There is a (low) risk that council could be liable for any consequences of releasing personal information (if the information is</td>
</tr>
</tbody>
</table>

Recommendations of the Conduct Review Independent Panel under the Auckland Council Code of Conduct

Page 4
30. There was a previous code of conduct complaint considered by the Whau Local Board in June 2018. In that case the report of the panel was subsequently made public. However the publication of any report of the panel, needs to be considered on a case by case basis. In particular it is noted in the previous case the local board member was acting in their capacity as an elected member.

**Complaint 1**

31. The panel considers that Complaint 1 relates to Member MacDonald’s conduct as a member and Chair of the Avondale Business Association and not as a member of the Whau Local Board.

32. Where a local board member is not acting in their capacity as an elected member, there is reduced public interest in accountability for any specific behaviour and an elected member should have a higher expectation of privacy. The complaint will also not be useful as an educational opportunity for other elected members.

33. There may be general public interest in transparency around the functioning of the complaints process. There are also still risks around the report being made public by other means (via the complainant or a LGOIMA request).

34. On balance it is recommended that the panel’s report on Complaint 1 be kept confidential.

**Complaint 2**

35. There were a number of different aspects to Complaint 2 including offensive language, conduct relating to matters of the Avondale Business Association and sending emails and images to Council staff in the attempt to influence them and discredit the complainant.

36. The panel considers that the complaint in relation to improper contact with Council staff has been made out and recommends that Member MacDonald be censured for his breach of Article 7.8. The other aspects of the complaint were either not made out or Member MacDonald was not acting in his capacity as an elected member.

37. The parts of the complaint which were upheld will have higher public interest and there should be a lower weight given to an elected member’s privacy. There is a greater need for transparency to show why the elected member was censured.

38. However there are large parts of the complaint that the panel considers were either not made out or where Member MacDonald was not acting in his capacity as an elected member. Many issues within these parts of the complaint are contested between the complainant and Member MacDonald. If these aspects of the complaint were made public then there would potentially be risks to the reputation of Member MacDonald and potential harassment. As noted above, if a local board member is not acting in their capacity as an elected member, there is reduced public interest in accountability for any specific behaviour and an elected member should have a higher expectation of privacy.

39. There is a potential risk around breaching the complainant’s privacy if their name is left in the panel’s report. This could deter future complainants coming forward on other matters. To mitigate this risk it is recommended that the complainant’s name and any identifying information is redacted.
40. On balance it is recommended that the panel’s report on Complaint 2 is published with the parts of the complaint which were not made out or where Member MacDonald was not acting in his capacity as an elected member redacted. In addition, all identifying information with the exception of Member MacDonald’s name should be redacted.

Complaint 3

41. Complaint 3 was upheld on the basis that Member Macdonald was acting in his capacity as an elected member. As noted above, where a complaint is upheld there is higher public interest in the release of the information and there should be a lower weight given to an elected member’s privacy. There is a greater need for transparency and to show why the elected member was censured.

42. As with Complaint 2 there is a potential risk around breaching the complainant’s privacy if their name is left in the panel’s report. This could deter future complainants coming forward on other matters. To mitigate this risk it is recommended that the complainant’s name and any identifying information is redacted.

43. On balance it is recommended that the panel’s report on Complaint 3 is published with all identifying information with the exception of Member MacDonald’s name redacted.

Ngā whakaaawe a me ngā tirohanga a te rōpū Kaunihera
Council group impacts and views

44. There are no particular impacts to the Council group from the recommendations in this report.

Ngā whakaaawe a rohe me ngā tirohanga a te poari a rohe
Local impacts and local board views

45. This report is confidential and no views have been sought from the local board on this topic prior to this meeting.

46. If the Whau Local Board decides to make the panel’s report public, with the inclusion of Member MacDonald’s name there is a risk of reputational damage to both the Whau Local Board and Member MacDonald.

Tauākī whakaaawe a Māori
Māori impact statement

47. There are no particular impacts to Māori from the recommendations in this report.

Ngā ritenga a pūtea
Financial implications

48. There are no financial implications from the recommendations in this report.

Ngā raru tūpono me ngā whakamaurutanga
Risks and mitigations

49. The main risk associated with this report is to do with the decision of whether or not to publish the panel’s report. These risks are summarised under the heading ‘considerations for publication’ in table 1 and are further detailed in Attachment D.

Ngā koringa a muri
Next steps

50. Louise Mason, General Manager Local Board Services will write to the complainants and Member MacDonald to inform them of the Whau Local Boards’ decisions resulting from this report.
Ngā tāpirihanga
Attachments

<table>
<thead>
<tr>
<th>No.</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>D</td>
<td>Issues to consider when making information from a code of conduct review available to the public</td>
<td></td>
</tr>
</tbody>
</table>

Ngā kaihaina
Signatories

<table>
<thead>
<tr>
<th>Authors</th>
<th>Rachel Wilson - Local Board Advisor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Authorisers</td>
<td>Louise Mason - GM Local Board Services</td>
</tr>
<tr>
<td></td>
<td>Glenn Boyd - Relationship Manager Henderson-Massey, Waitakere Ranges, Whau</td>
</tr>
</tbody>
</table>

Recommendations of the Conduct Review Independent Panel under the Auckland Council Code of Conduct
IN THE MATTER of the
Code of Conduct of the
Auckland Council for
Elected Members

AND IN THE MATTER
of a complaint by
[Redacted] (the
Complainant), a
member of the public,
against Duncan
Macdonald (the
Respondent) a
member of the Whau
Local Board

REPORT OF THE CODE OF THE CONDUCT
INDEPENDENT REVIEW PANEL

INTRODUCTION

1. Under Clause 15(2)(a) of Schedule 7 of the Local Government Act 2002 all local authorities
   are required to adopt a Code of Conduct which must set out, inter alia:

   "Understandings and expectations adopted by the local authority about the manner in
   which members may conduct themselves while acting in their capacity as members, ..."

2. Clause 15(4) provides that a member must comply with the Code.

3. On 1 November 2010, the Auckland Council ("the Council") adopted a Code of Conduct for
   elected members ("the Code"). The Code was amended by the Council on 22 August 2013.

4. The Complainant is a member of the public who has taken a very active interest in the local
   affairs of Avondale. In his original complaint made on 31 January 2019, the Complainant lists
   the following matters complained about:

   [Redacted]

   [Redacted]

   [Redacted]
f) Sending images and emails to Council staff in attempt to influence them and discredit the Complainant.

5. The Chief Executive of the Auckland Council referred the matter for internal consideration under Article 8.2 of the Code, under his supervision.

6. There were further communications, discussed below.

7. At the time of the matters mentioned in paragraph 4, the Respondent was a member of the Whau Local Board.

8. The complaint was then referred to a Convenor, Conduct Independent Review Panel, which the Council was required to set up under Article 8.5 of the Code. Pursuant to Article 8.4 of the Code, the Convenor was of the view that mediation was inappropriate and that the matter should be referred to a panel for full investigation.

9. Derek Firth, Commercial Barrister (Convenor), Graeme MacCormick (retired District Court Judge) and Professor Ron Paterson of the Law School of the University of Auckland were appointed as the Panel under the Code.

10. GUIDELINES FOR MAKING A COMPLAINT UNDER THE CODE OF CONDUCT INDEPENDENT REVIEW PANEL (the Guidelines) were established in about January 2013.

11. The Panel proceeded in accordance with those Guidelines, including having an oral hearing. None of the members of the panel has any conflict of interest. They have not discussed the details of the complaints with any other person.

12. The Complainant attended in person with his father. The Respondent had indicated that he was not able to attend but that he expected the hearing to proceed in his absence. It was unfortunate that the Panel did not have the opportunity to meet with and hear from the Respondent in person.

13. [Redacted], Local Board Services has acted as Secretary for the panel and attended the hearing.
14. The background to the complaints is that the Complainant maintains that he is a business owner in Avondale...
December 2018, using his contacts in Council to discredit the Complainant.

31. The Complainant alleged that in December 2018, the Respondent sent emails to Council staff, attaching images copied from the Complainant’s personal social media account implying, falsely, that he had engaged in criminal activity. He said that the Respondent did not act with integrity or honesty and he never personally approached the Complainant about his concerns. This conduct is said to be in breach of Article 7.8.

RESPONSE TO COMPLAINTS

35. In response, the Respondent refers to the New Zealand Bill of Rights Act 1990 and freedom of speech. He refers to Article 2.3 of the Code and denies that any of his alleged offending occurred while acting in his capacity as a member of the Whau Local Board.
38. In relation to each of the specific complaints, the Respondent says:

RELEVANT PROVISIONS OF CODE OF CONDUCT AND RELEVANT LAW

41. The following provisions of the Code of Conduct are relevant:

2.3 Code of Conduct
The Local Government Act 2002 requires local authorities to adopt a Code of Conduct which must set out:
a) understandings and expectations adopted by the Local Authority about the manner in which members may conduct themselves while acting in their capacity as members, including:
i) behavior towards one another, staff and the public;
ii) disclosure of information...
(emphasis added)

7.3 Relationships with the Community
Effective council decision-making depends on productive relationships between elected members and the community at large.

Members should ensure that individual citizens are accorded respect in their dealings with the Council, and have their concerns listened to and deliberated on in accordance with the requirements of the Local Government Act and other relevant legislation.

Members should act in a manner that encourages and values community involvement in local democracy.

7.7 The Conflicts of Interest
...It is a requirement of this Code of Conduct that all elected members fully acquaint themselves with, and adhere strictly to, [Council’s Conflicts of Interest Policy] requirements....

7.8 Ethics
The Auckland Council seeks to promote the highest standards of ethical conduct amongst its elected members. Accordingly, elected members will:

- claim only for legitimate expenses as laid down by any determination of the Remuneration Authority then in force, and any policy of the Council developed in accordance with that determination;
- not influence, or attempt to influence, any Council employee to take actions that may benefit the member, or the member’s family or business interests;
- not use Council resources for personal business;
- not solicit, demand, or request any gift, reward or benefit by virtue of their position.

42. One legal precedent of which we are aware, which appears to be directly on point, is the decision of the High Court of England and Wales in Ken Livingstone v The Adjudication Panel for England [2006] EWHC 2533 (Admin).

43. Mr Livingstone was the Mayor of London. He was the subject of a complaint of failing to comply with the Code of Conduct of the Greater London Authority.

44. The complaint arose as a result of a brief exchange between the Mayor and a reporter of the Evening Standard on the evening of 8 February 2005. The Mayor had been hosting a reception at City Hall for a Member of Parliament to mark the 20th anniversary of the MP making public that he was gay. The reporter and a photographer were waiting outside to try to have words with people leaving the reception.

45. As he left the City Hall when the reception had ended, the Mayor was confronted by the reporter and the photographer.
46. The Mayor reacted robustly and rudely by asking the reporter if he had thought of having treatment. He asked the reporter what he did before – was he a German war criminal?

47. The reporter said that he wasn’t: he was Jewish and took significant offence. But even after saying he was Jewish, the Mayor persisted and said “Well you might be [offended], but actually you are just like a concentration camp guard. You are just doing it cause you are paid to?”

48. The recorded conversation did not lead any further.

49. Apparently, the Mayor had been targeted by the group of newspapers which included the owner of the Evening Standard. The Mayor believed that the media group’s racist bigotry also extended to being ‘anti-gay’. Thus, he was suspicious of the motives of the Evening Standard sending a reporter and photographer to wait outside the reception having regard to what it was celebrating.

50. Unlike the Auckland Council Code of Conduct, the UK equivalent expressly provides for two obligations which apply even when the member is not acting in an official capacity.

51. An exception to an obligation to comply with the UK Code only while acting in an official capacity appears in paragraph 4 which provides:

   4. A member must not in his official capacity, or any other circumstance, conduct himself in a manner which could reasonably be regarded as bringing his office or authority into disrepute.

   And

   5. (a) A member must not in his official capacity, or in any other circumstance, use his position as a member improperly to confer on or secure for himself or any other person, an advantage or disadvantage.

52. The applicable relevant provision of the UK Code provided that (subject to the two exceptions noted above) it should not have effect in relation to the activities of a member undertaken other than in an official capacity.

53. The issue for the Court was, therefore, whether the comments which the Mayor made when confronted with a “door stepping” journalist were made while acting in his official capacity or “in any other circumstance”.

54. The Court proceeded on the basis that paragraph 4 did apply to the circumstances. It also considered the argument of freedom of speech.

55. While accepting that in some circumstances the right of freedom of speech does extend to abuse, the Court noted the legal constraint that what is said must not be unlawful.
56. The Court also stated:

There is a danger in regarding any misconduct as particularly affecting reputation of the office rather than the man. If a councillor commits sexual misconduct or is convicted of theft, I do not think the reputation of the office is thereby necessarily brought into disrepute. His certainly will be, if the high-profile case is correct, anything done by the appellant which can be regarded as improper may fall within paragraph 4, however remote from his official position.... Misuse of the office can obviously bring disrepute on the office, but personal misconduct will be unlikely to do so...

57. Although finding that the Mayor’s comments were intertemperate, and unnecessarily offensive, there had been no breach of the Code. He was not acting in his official capacity. An application of the provisions of paragraph 4 was neither proportionate nor necessary.

58. The Livingstone decision, while not binding on this Panel in considering a complaint of breach of the Auckland Council Code of Conduct, is persuasive authority of the need for a fairly strict view to be taken when determining whether or not a member is acting in his or her capacity as a member.

DISCUSSION

59. In our view, the Code of Conduct should not be interpreted in a way that stifles the naturally cut and thrust of local politics. The Code is intended to apply only where the conduct of a member clearly exceeds the boundaries of proper behavior, as set out in its provisions.

60. In the present case, it is clear that the Complainant and the Respondent are fierce political opponents in relation to the affairs of Avondale.

61. In accordance with the provisions of the Code and the empowering statute, the Local Government Act 2002, we must assess whether, in relation to the matters complained about, the Respondent breached the Code while acting in his capacity as a Local Board member.

62. The Livingstone decision (applying the quite similar UK Code) supports a fairly strict and clinical approach to the issue of whether an elected officer was acting in the capacity of a local authority member in respect conduct that results in an official complaint.

63. Taking these considerations into account, we have reached the following findings in relation to the specific complaints in the present case.
December 2018, using his contacts in Council to discredit the Complainant

72. Article 7.8 of the Code is headed ‘Ethics’ and, after a statement that the Council “seeks to promote the highest standards of ethical conduct amongst its elected members”, specifies that members will, inter alia, “not influence, or attempt to influence any Council employee to take actions that may benefit the member, or the member’s family or business interests”.

73. The Panel upholds this aspect of the complaint. The Respondent crossed a line when he emailed Council staff and sought to denigrate the Complainant, to further his (the Respondent’s) business interests. Even though the matters being debated related to the ABA, an organisation in which the Respondent was known by relevant Council staff to be the
leading figure, those staff would still have seen the Respondent as a Local Board member of the Auckland Council that employed them.

Freedom of Speech

77. The Respondent relies on this.

78. While freedom of speech is a general right conferred by the New Zealand Bill of Rights Act 1990, some rights come with responsibilities and are curtailed by statutory provision or contract. In the case of elected Council and Local Board members, their right to absolute freedom of speech is curtailed by the statutory provisions providing for the Codes of Conduct and their contents. Statutory provisions may over-ride the Bill of Rights Act as exceptions to or limitations of it. In addition, it is arguable that by accepting office as an elected member, one agrees to the limitation of the absolute freedom of expression accorded other members of the community (subject, of course, to the general limits that apply to everyone, such as the requirement not to incite racial or ethnic disharmony).

RECOMMENDATION

79. In summary, the complaint in relation to improver contact with the Council staff has been made out.

80. We recommend that the Respondent be censured for this breach of Article 7.8.
Dated this 19th day of June 2019

Derek Firth
Convener
On behalf of the Panel
IN THE MATTER of the Code of Conduct of the Auckland Council for Elected Members

AND IN THE MATTER of a Complaint by [Redacted] (the Complainant), a member of the public, against Duncan Macdonald (the Respondent) a member of the Whau Local Board

INTRODUCTION

1. Under Clause 15(3)(a) of Schedule 7 of the Local Government Act 2002 all local authorities are required to adopt a Code of Conduct which must set out, inter alia:

   “Understandings and expectations adopted by the local authority about the manner in which members may conduct themselves while acting in their capacity as members, ...”

2. Clause 15(4) provides that a member must comply with the Code.


4. On 14 March 2019 the Complainant made a complaint to the Chief Executive of the Council regarding the conduct of the Respondent at approximately 6.20am on the morning of 6 March 2019. The complaint arises out of words allegedly spoken by the Respondent to the Complainant as the Complainant walked his dog.

5. The Complainant alleges that the Respondent pulled up nearby in a white van and called out words to the effect “you better watch yourself; I am sick of all that shit you are spreading about me on Facebook”; “This is my final warning”; “You should look out for me” and “You better be careful”.

6. The Complainant was genuinely concerned at the nature and tone of these threats and made his complaint within eight days of the incident.
7. The Auckland Council CEO referred the matter for internal consideration under Article 8.2 of the Code, under his supervision.

8. At the time of the matters mentioned in Paragraph 4, the Respondent was a member of the Whau Local Board.

9. The complaint was then referred to a Convenor, Conduct Independent Review Panel, which the Council was required to set up under Article 8.5 of the Code. Pursuant to Article 8.4 of the Code, the convenor was of the view that mediation was inappropriate and that the matter should be referred to a panel for full investigation.

10. Derek Firth Commercial Barrister (Convenor), Graeme MacCormick (retired District Court Judge) and Professor Ron Paterson of the Law School of the University of Auckland were appointed as the Panel under the Code.

11. GUIDELINES FOR MAKING A COMPLAINT UNDER THE CODE OF CONDUCT INDEPENDENT REVIEW PANEL (the Guidelines) were established in about January 2013.

12. The Panel proceeded in accordance with those Guidelines, including having an oral hearing. None of the members of the panel has any conflict of interest. They have not discussed the details of the complaints with any other person. They have considered only the written materials from the parties and the oral statements of the Complainant at the hearing on Friday 7 June 2019 (which was held in a meeting room, Auckland Town Hall, Queen Street, Auckland.)

13. The Complainant attended in person.

14. The Respondent advised that he was not able to attend but that he expected the hearing to proceed in his absence. It was unfortunate that the Panel did not have the opportunity to meet with and hear from the Respondent in person.

15. Local Board Services has acted as Secretary for the panel and attended the hearing.

DETAILS OF COMPLAINT AND RESPONSE

16. It is common ground that the Complainant, [redacted], has taken a keen interest in the local affairs of Avondale and participated in various local interest groups. He has also made many comments on social media regarding his views of local affairs. These have included regular criticisms of the Respondent as a Local Board member and as an official of the Avondale Business Association.

17. The Complainant acknowledges all of this and says that he first became involved with a community group called [redacted]. He and his colleagues had a number of concerns, which are not particularly relevant to the complaint.

18. He refers to a public meeting at which the Respondent arrived late and allegedly rudely took a place at the front of the speaking area. The public meeting, which the Complainant helped organize, was intended to enable electoral candidates to state their positions and policy
before interested members of the local community. The meeting appears to have been the only occasion when the Complainant and the Respondent had met prior to their early morning encounter. However, the Complainant acknowledges that he has been critical of the Respondent online regarding his behavior as an elected official.

19. The Complainant states that, while walking his dog along Blockhouse Bay Road at 6.20am on 6 March 2019, a white van stopped on the other side of the road and he eventually identified the driver as the Respondent.

20. The Complainant has a clear recollection of the Respondent making the specific statements described in paragraph 5 above.

21. The Complainant was concerned for his physical safety. He lodged a complaint with the Police, but they elected not to take it further at that stage. The Complainant says that he is “now very conscious of walking around our neighbourhood, particularly when dark”, and is “fearful that [the Respondent] will try and escalate matters further”.

22. The Complainant submits that “[i]t is unacceptable that [the Respondent] considers it appropriate to threaten members of the public, even though he may not appreciate criticism of his actions as a public official”. He describes the Respondent’s conduct as “a very poor standard of behaviour”.

23. The Complainant says that given his previous contact with the Respondent, he clearly viewed the Respondent as a Whau Local Board member when confronted during the 6 March incident.

24. In his response, the Respondent refers to the New Zealand Bill of Rights Act 1990, the rights to freedom of expression and freedom of association, and he relies on Article 2.3 of the Code of Conduct saying that he was not speaking to the Complainant in his capacity as a member of the Whau Local Board.

25. The Respondent says that the Complainant has been “trolling” him personally on Facebook sites for many years ever since he tried unsuccessfully to get rid of “Dale the Spider” in collusion with the same people from the Western Leader. He says that the Complainant has lately been accusing him personally of stealing money from the Avondale Business Association (ABA) and selling dodgy appliances.

26. The Respondent does not dispute the gist of what he is alleged to have said to the Complainant and is unapologetic for it. He says that by 10am the same morning the Complainant had deleted all of his online “trash” and says “it looks to me that our little chat had its desired effect”.

27. The Respondent says that the Complainant’s online activities have resulted in him and his family receiving threats of violence at 3am in the morning. He claims that the Complainant
was part of a concerted attack, using Google and Facebook reviews on him, the ABA and his appliance business.

28. The Respondent further submits:

What does he expect? He seems to think it is right to make up lies and dish out personal abuse at community leaders and think that we have no right to ask him to stop and his actions fall way below that expected of him by his peers.

It is my belief that the Complainant is not a member of the public per se but he is an aspiring politician in cahoots with a team of other local politicians trying to discredit me prior to this year’s elections.

29. The Respondent does not believe he has done anything wrong under Article 7 of the Code.

RELEVANT PROVISIONS OF CODE OF CONDUCT AND RELEVANT LAW

30. The following provisions of the Code of Conduct are relevant:

2.3 Code of Conduct
The Local Government Act 2002 requires local authorities to adopt a Code of Conduct which must set out:
- understandings and expectations adopted by the Local Authority about the manner in which members may conduct themselves while acting in their capacity as members, including:
  i) behavior towards one another, staff and the public;
  ii) disclosure of information....

The Local Government (Auckland Council) Act 2009 requires each member of each Local Board to comply with the Code of Conduct adopted by the governing body.

(emphasis added)

7.3 Relationships with the Community
Effective council decision-making depends on productive relationships between elected members and the community at large.

Members should ensure that individual citizens are accorded respect in their dealings with the Council, and have their concerns listened to and deliberated on in accordance with the requirements of the Local Government Act 2002 and other relevant legislation.

Members should act in a manner that encourages and values community involvement in local democracy.

31. One legal precedent of which we are aware, which appears to be directly on point, is the decision of the High Court of England and Wales in Ken Livingstone v The Adjudication Panel for England [2006] EWHC 2533 (Admin).
32. Mr Livingstone was the Mayor of London. He was the subject of a complaint of failing to comply with the Code of Conduct of the Greater London Authority.

33. The complaint arose as a result of a brief exchange between the Mayor and a reporter of the Evening Standard on the evening of 8 February 2005. The Mayor had been hosting a reception at City Hall for a Member of Parliament to mark the 20th anniversary of the MP’s making public that he was gay. The reporter and a photographer were waiting outside to try to have words with people leaving the reception.

34. As he left the City Hall when the reception had ended, the Mayor was confronted by the reporter and the photographer.

35. The Mayor reacted robustly and rudely by asking the reporter if he had thought of having treatment. He asked the reporter what he did before – was he a German war criminal?

36. The reporter said that he wasn’t, he was Jewish and took significant offence. But even after saying he was Jewish, the Mayor persisted and said “Well you might be [offended], but actually you are just like a concentration camp guard. You are just doing it cause you are paid to?”

37. The recorded conversation did not lead any further.

38. Apparently, the Mayor had been targeted by the group of newspapers which included the owner of the Evening Standard. The Mayor believed that the media group’s racist bigotry also extended to being ‘anti-gay’. Thus, he was suspicious of the motives of the Evening Standard sending a reporter and photographer to wait outside the reception having regard to what it was celebrating.

39. Unlike the Auckland Code of Conduct, the UK equivalent expressly provides for two obligations which apply even when the member is not acting in an official capacity.

40. An exception to an obligation to comply with the UK Code only while acting in an official capacity appears in paragraph 4, which provides:

4. A member must not, in his official capacity, or in any other circumstance, conduct himself in a manner which could reasonably be regarded as bringing his office or authority into disrespect.

And

5. (a) A member must not, in his official capacity, or in any other circumstance, use his position as a member improperly to confer an or secure for himself or any other person, an advantage or disadvantage.

41. The applicable relevant provision of the UK Code provided that (subject to the two exceptions noted above) it should not have effect in relation to the activities of a member undertaken other than in an official capacity.
42. The issue for the Court was, therefore, whether the comments which the Mayor made when confronted with a “door stepping” journalist were made while acting in his official capacity or “in any other circumstance”.

43. The Court proceeded on the basis that paragraph 4 did apply to the circumstances. It also considered the argument of freedom of speech.

44. While accepting that in some circumstances the right of freedom of speech does extend to abuse, the legal constraint is that what is said must not be unlawful.

45. The Court noted:

There is a danger in regarding any misconduct as particularly affecting reputation of the office rather than the man. If a councillor commits sexual misconduct or is convicted of theft, I do not think the reputation of the office is thereby necessarily brought into disrepute. His certainly will be. If the high-profile test is correct, anything done by the appellant which can be regarded as improper may fall within paragraph 4, however remote from his official position... Misuse of the office can obviously bring disrepute on the office, but personal misconduct will be unlikely to do so...

46. Although finding that the Mayor’s comments were interlaced, and unnecessarily offensive, there had been no breach of the Code. He was not acting in his official capacity. An application of the provisions of paragraph 4 was neither proportionate nor necessary.

47. The Livingstone decision, while not binding on this Panel in considering a complaint of breach of the Auckland Council Code of Conduct, is persuasive authority of the need for a fairly strict view to be taken when determining whether or not a member is acting in his or her capacity as a member.

**DISCUSSION**

48. In our view, the Code of Conduct should not be interpreted in a way that stifles the natural cut and thrust of local politics. The Code is intended to apply only where the conduct of a member clearly exceeds the boundaries of proper behavior, as set out in its provisions.

49. The Respondent gives the impression that he believes the legal position would be one-sided if he cannot respond in kind to the treatment which he perceives he has wrongly been subjected to by the Complainant.

50. Nonetheless, the law, as expressed in the Code, holds elected members to a higher standard (of compliance with its provisions), irrespective of their personal views of the fairness of any public criticism to which they have been exposed. Politicians, including Local Board members, are expected to have thick skins and to maintain an appropriate standard of behaviour in their own conduct as elected officials.

51. It is clear that much of the criticism that the Respondent faced from the Complainant was in his capacity as a Local Board member. Accordingly, when responding, he was acting in his
capacity as a Local Board member and was subject to the Auckland Council Code of Conduct requirements. Our approach is consistent with the reasoning of the Court in the Livingstone decision when applying the UK Code, albeit that the facts in the present case are quite different.

52. In our view the Respondent crossed the line defined by Article 7.3 of the Code, dealing with Relationships with the Community. He did not, as a member, “act in a manner that encourages and values community involvement in local democracy”. His conduct did quite the opposite: it discouraged and denigrated the Complainant’s exercise of his democratic rights as a local community member.

53. While freedom of speech is a general right conferred by the New Zealand Bill of Rights Act 1990, some rights come with responsibilities and are curtailed by statutory provision or contract. In the case of elected Council and Local Board members, their right to absolute freedom of speech is curtailed by the statutory provisions providing for the Codes of Conduct and their contents. Statutory provisions may over-ride the Bill of Rights Act as exceptions to or limitations of it. In addition, it is arguable that by accepting office as an elected member, one agrees to the limitation of the absolute freedom of expression accorded other members of the community (subject, of course, to the general limits that apply to everyone, such as the requirement not to incite racial or ethnic disharmony).

54. However badly the Respondent felt he had been treated by the Complainant, it was inappropriate for him, as a local member, to threaten a citizen active in local democracy in the way that he did.

55. The Respondent’s conduct was not conducive to producing a productive relationship with the community. He accorded no respect to the Complainant and did not act in a manner that encourages and values community involvement in local democracy.

56. In our opinion, in speaking to the Complainant as he did, the Respondent breached Article 7.3 of the Code.
RECOMMENDATION

57. We recommend that the Respondent be censured for his breach of Article 7.3.

Dated this 19th day of June 2019

__________________________
Derek Firth
Convenor
On behalf of the Panel
Issues to consider when making information from a code of conduct review available to the public

The Auckland Council Code of Conduct (the code) applies to both the Governing Body and local board members. It was adopted by the Governing Body in November 2010 and amended in August 2013.

The code provides for unresolved complaints to be referred to the Convenor of the Conduct Review Independent Panel (the panel). The Convenor of the panel, can then refer the complaint to mediation and/or the panel for investigation.

If it is a panel investigation, the panel’s recommendations are reported to the relevant local board for consideration. The code provides for the panel to issue guidelines for its procedures. Those guidelines state that the panel’s recommendation:

“...will be made available only at the relevant meeting at which it is scheduled to be considered. Copies of the recommendation are to be given to the parties at that point.

It will be for the Governing Body or Local Board as the case may be to decide whether the [panel’s] recommendation in any given instance is to be made public and/or considered in open meeting.”

In addition the Standing Orders of the Whau Local Board section 7.4.3 states that “...the local board or committee may provide for the release to the public of information, which the meeting considered while the public were excluded”.

Benefits and risks around releasing code of conduct information

Each report by the panel contains personal information of the elected member and complainant. There is a need to achieve an appropriate balance between the rights of the elected member, the council, public interest and the complainant when deciding whether to release personal information.

Decision makers should exercise judgement on a case-by-case basis when considering whether to publish a report containing personal information. The key benefits of publication are outlined in Table 1 and the key risks of publication are outlined in Table 2 with additional considerations listed below.

In general, the council tries to follow the principles and considerations within Local Government Official Information and Meetings Act. The council has also considered the recent final opinion of the Ombudsman in March 2019 (on the Local Government Official Information and Meetings Act investigation request from Stuff for information about code of conduct complaints against local board members).

Table 1: Key benefits to publication

<table>
<thead>
<tr>
<th>Benefit</th>
<th>Irrespective of the outcome of any specific complaint, there may be general public interest in transparency around the functioning of the council complaints process and decision-making.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Promotes transparency, strengthening public trust and confidence in council processes and decision-making.</td>
<td>Reduces the risk of the report being made public knowledge by other means.</td>
</tr>
<tr>
<td>There is the potential for the complainant to make the panel’s report public. If the information is not presented fairly then this could cause additional</td>
<td></td>
</tr>
<tr>
<td>The information may be released through a LGOIMA request</td>
<td>issues for the elected member or the council.</td>
</tr>
<tr>
<td>--------------------------------------------------------</td>
<td>--------------------------------------------------</td>
</tr>
<tr>
<td>As with all information held by the council, each of the panel's reports is subject to the LGOIMA. The council needs to consider each LGOIMA request including the purpose of the request and the nature and content of the information on its own merits. It is possible further information from the panel's reports may be released.</td>
<td></td>
</tr>
<tr>
<td>LGOIMA does provide grounds for information to be withheld, including where it is necessary to protect a person's privacy (s 7(2)(a)). The strength of the privacy interest will need to be assessed on a case by case basis, taking into account the specific facts of the situation. Information may only be withheld where the need to protect a person's privacy outweighs countervailing public interest factors that favour release.</td>
<td></td>
</tr>
<tr>
<td>All grounds for withholding official information in section 7 of the LGOIMA are subject to a 'public interest test' that is, agencies must balance the public interest in disclosing information against the need to withhold it. Public interest means the issue is one of legitimate public concern.</td>
<td></td>
</tr>
</tbody>
</table>

| Can serve as good education and guidance for future conduct | Decisions of the panel can clarify how the code of conduct applies in particular situations. This can be useful when educating and providing guidance to elected members in the future. |

| Public interest in the accountability of elected members | There is a clear public interest in the accountability and transparency of elected members. Anyone elected to a local board should expect their involvement to be carefully scrutinised. |

**Table 2: Key risks to publication**

<table>
<thead>
<tr>
<th>Risk of reputational damage to council and elected member</th>
<th>Publication of the panel's reports could create reputational damage for the council, the local board or the elected member.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Can be disproportionate to the level of severity of misconduct</td>
<td>If the breach of the code of conduct is low level or not substantiated, then making the details of the complaint public could be disproportional to the level of the severity of the misconduct.</td>
</tr>
<tr>
<td>There is a (low) risk that council could be liable for any consequences of releasing personal information (if the information is released under a LGOIMA request, council is protected from such</td>
<td>Information released after a LGOIMA request is protected under section 41 LGOIMA. This means that if personal information is made available in good faith, Auckland Council is not legally liable for any consequences of that release. However, proactive releases of official information are not subject to the same protection and must comply</td>
</tr>
</tbody>
</table>

1 TV3 Network Services Ltd v Broadcasting Standards Authority [1995] 2 NZLR 720 at 733
| Risk of improper pressure or harassment of the elected member | The release of private information could subject the elected member to improper pressure or harassment and/or cause reputational damage especially if the complaint was not substantiated.

Privacy and wellbeing of the complainant and the elected member | There is a potential risk around breaching the complainant’s privacy if their name is left in the panel’s report. This could also deter future complainants coming forward on other matters.

While anyone elected to a local board should expect their involvement to be carefully scrutinized, it is also important to consider the elected members right to privacy. This should include any potential damage to their reputation and career and the physical safety or personal wellbeing of the elected member. This should be considered against the misconduct and whether the effect is proportionate.

The elected member’s seniority and length of service should also be considered. For senior or long serving Members, there is generally a higher expectation to meet Code of Conduct standards.

Other factors
The local board should also consider the contextual questions outlined below as well as other relevant factors in making this decision:

- Did the alleged conduct in the complaint occur in the public sphere? Or have any aspects been disclosed to the public by the complainant or other persons? The public disclosure of information weakens the strength of privacy interests.
- Will the release of the information prejudice any upcoming decision of the local board or related ongoing matter?
- Is the information subject to an ‘obligation of confidence’ where this would likely prejudice the future supply of similar information? (Section 7(2)(c)(i) LGOIMA)
- What is the nature and seriousness of the misconduct? This should include the seriousness and impact of the misconduct on the complainant. Could the lack of disclosure exacerbate the negative impact on the complainant and result in further claims, complaints or litigation?
- What is the content and level of detail of personal information to be released? Can general information about the handling of the complaint be provided to satisfy public interest, without disclosing personal information about the elected member?
- The need to disclose the information. Is it necessary? What is the aim of the disclosure and what will be achieved? Is this proportionate to the misconduct involved? To whom is the information to be disclosed?
- Is there any expectation that council will release such information proactively? The previous panel’s report was publicly released, however each report should be
considered on a case by case basis.