

## Council Meeting Supplementary Agenda - 24 November 2021



Meeting will be held in the Council Chamber at Level 2, Philip Laing House  
144 Rattray Street, Dunedin - Councillors  
ORC YouTube Livestream - Members of the Public

### Members:

Cr Andrew Noone, Chairperson	Cr Gary Kelliher
Cr Michael Laws, Deputy Chairperson	Cr Kevin Malcolm
Cr Hilary Calvert	Cr Gretchen Robertson
Cr Michael Deaker	Cr Bryan Scott
Cr Alexa Forbes	Cr Kate Wilson
Cr Carmen Hope	

Senior Officer: Sarah Gardner, Chief Executive

Meeting Support: Dianne Railton, Governance Support Officer

24 November 2021 01:00 PM

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1.1 <a href="#">CODE OF CONDUCT COMPLAINT INVESTIGATION REPORT</a>	2
To receive the independent investigation report, prepared by Steph Dyhrberg, Partner, Dyhrberg Drayton Employment Law under the ORC Code of Conduct, in relation to a complaint from the Chief Executive about the conduct of Councillor Michael Laws.	
1.1.1 <a href="#">Attachment 1: Updated Final Investigation Report Redacted 24.11.21</a>	4

### 1.3. Code of Conduct Complaint: Investigation Report

**Prepared for:** Council  
**Report No.** GOV2158  
**Activity:** Governance Report  
**Author:** Amanda Vercoe, General Manager Governance, Culture and Customer  
**Endorsed by:** Cr Andrew Noone, Chairperson  
**Date:** 24 November 2021

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#### **PURPOSE**

- [1] To receive the independent investigation report, prepared by Steph Dyhrberg, Partner, Dyhrberg Drayton Employment Law, under the ORC Code of Conduct, in relation to a complaint from the Chief Executive about the conduct of Councillor Michael Laws.

#### **EXECUTIVE SUMMARY**

- [2] The Chair received a complaint under the ORC Code of Conduct on 16 August 2021 from the Chief Executive, in relation to conduct by Councillor Michael Laws.
- [3] Under Section 12.2 of the Code of Conduct, the Chair chose to refer the complaint to an independent investigator. Steph Dyhrberg was selected from the list of Otago independent investigators.
- [4] Attached is the subsequent independent investigation report, received from Steph Dyhrberg on 10 November 2021. The report has some small redactions:
- a. To protect the privacy of natural persons, including that of deceased natural persons (LGOIMA Section 7(2)(a))
  - b. To withhold details of a Public Excluded Paper to Audit and Risk Subcommittee (LGOIMA Sections 7(2)(b)(ii), 7(2)(e) and 7(2)(h))

#### **RECOMMENDATION**

*That the Council:*

- 1) **Notes** this report.

#### **BACKGROUND**

- [5] Nil.

#### **DISCUSSION**

- [6] Nil.

#### **OPTIONS**

- [7] This is an administrative cover paper for the investigation report, so options are not provided.

## **CONSIDERATIONS**

### **Strategic Framework and Policy Considerations**

[8] Not applicable.

### **Financial Considerations**

[9] The cost of the independent investigation report will be met within existing budget provisions.

### **Significance and Engagement Considerations**

[10] Not applicable.

### **Legislative and Risk Considerations**

[11] The ORC Code of Conduct is required under the Local Government Act 2002. The ORC's Code was adopted at the start of the triennium and is based on the Local Government New Zealand template.

### **Climate Change Considerations**

[12] Not applicable.

### **Communications Considerations**

[13] Not applicable.

## **NEXT STEPS**

[14] This is an administrative cover paper for the investigation report, so next steps have not been provided.

## **ATTACHMENTS**

1. Updated Final Investigation Report Redacted 24.11.21 [**1.3.1** - 16 pages]

**Otago Regional Council**

Report of Independent Investigation into  
Code of Conduct Complaints by Sarah Gardner, Chief Executive Otago Regional Council,  
in relation to Councillor Laws' conduct  
Version 2 5 November 2021

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**1. Introduction**

- 1.1. Sarah Gardner, Chief Executive Otago Regional Council (**ORC**), made a formal written complaint dated 16 August 2021, in relation to conduct by Councillor Michael Laws alleged to breach the Otago Regional Council Code of Conduct (**the Code of Conduct**). The complaint was sent to the Chairperson of the ORC, Cr Andrew Noone.
- 1.2. The Complaint concerns Cr Laws' reported comments to the Otago Daily Times (**the ODT**):
- in an article published on 21 July 2021 concerning the ORC's role in an incident where rubble was dumped in the Clutha River (**the Clutha River Article**); and
  - in an article published on 23 July 2021 regarding a summary report on public consultation in relation to the minimum flow limit for the Manuherikia River (**the Manuherikia River Report Article**).
- 1.3. The Complaint alleges the Clutha River Article resulted in ORC employees suffering verbal abuse and *'created a potential risk for harm both psychologically and physically for ORC staff'*. The Complaint alleged Cr Laws' reported comments in the Clutha River Article breached his obligations under the Code of Conduct to:
- treat all employees with courtesy and respect and not publicly criticise any employee (clause 5.2);
  - observe the requirements created by the obligations that the Council and Chief Executive have as employers (clause 5.2 – by implication of prejudicing ORC's ability to provide a safe and healthy working environment);
  - demonstrate respect for other working within the ORC (clause 3, value 5);
  - foster community confidence and trust in the ORC (clause 3, value 2); and
  - express views to the media in a way that is not inconsistent with the Code of Conduct (clause 6).
- 1.4. The Complaint implies the Manuherikia River Report Article contributed to a *'general feeling of unease regarding staff safety and wellbeing'* in relation to the Manuherikia work/consultation and meetings. It also alleged Cr Laws' reported comments in the Manuherikia River Report Article breached obligations under the Code of Conduct to:
- observe the requirements created by the obligations that the Council and Chief Executive have as employers (clause 5.2 – by implication, prejudicing ORC's ability to provide a safe and healthy working environment);
  - treat all employees with courtesy and respect and not publicly criticise any employee (clause 5.2);

- demonstrate respect for others working within the ORC (clause 3, value 5);
  - express views to the media in a way that is not inconsistent with the Code of Conduct (clause 6); and
  - foster community confidence and trust in their Council (clause 3, value 2).
- 1.5. Council Governance, Culture and Customer General Manager Amanda Vercoe (who was delegated the functions, powers and duties of the Chief Executive for the purpose of dealing with the complaint) engaged the writer, Steph Dyhrberg of Dyhrberg Drayton Employment Law, to undertake an independent investigation of the complaint. I confirmed availability and that I had no conflict of interest.
- 1.6. As is required under the Code of Conduct, Ms Gardner and Cr Laws were advised of my appointment to conduct an investigation.
- 1.7. The relevant information was provided, being:
- Ms Gardner's written complaint and its 17 attachments; and
  - The Otago Regional Council Code of Conduct.

## **2. Preliminary Assessment**

- 2.1. As required by Appendix C to the Code of Conduct I undertook a preliminary assessment of the complaint to determine whether:
1. The Complaint is trivial or frivolous and should be dismissed;
  2. The Complaint is outside the scope of the Code and should be redirected to another Agency or process;
  3. The Complaint is non-material; or
  4. The Complaint is material and a full investigation is required.
- 2.2. In making the assessment Appendix C allows me, as Investigator, full discretion to make the preliminary assessment after whatever initial inquiry I consider necessary.
- 2.3. Before I made the preliminary assessment, I wrote to Cr Laws and Ms Gardner, inviting them to respond to the complaint in writing, including in relation to whether the alleged breaches, if established, would be material in terms of the Code of Conduct. Ms Gardner did not provide any further submission.
- 2.4. Cr Laws' response cautioned strongly against interpretation of the Code of Conduct in a way that would operate *'as a blanket gag upon all councillors upon all the actions of all staff'*. Cr Laws noted he had not identified any individual staff members, either by title or name. He also expressed his view the Code of Conduct is *'designed to protect individual staff members*

*from unfair or insulting commentary, bullying or harassment*'. He highlighted the distinction between clause 5.2 of the Code of Conduct, the clause relied on in the complaint, and clause 4.2, which requires concerns about an individual member of staff to be referred to the Chief Executive in the first instance. Cr Laws provided links to two media articles concerning the impact of Code of Conduct Complaints on the democratic process.

*Trivial or frivolous*

- 2.5. After carefully reviewing the materials provided, I considered the complaint and Ms Gardner's concerns, taken at face value, were not *'trivial or frivolous'*. When read together, the ordinary meaning of *'trivial or frivolous'* is *'of little value'* and *'having disregard or lack of diligence to the merit of the claim'*. The information before me included two ORC Incident Responders suffering verbal abuse from a member of the public who made direct reference to the Clutha River Article. I was less inclined to draw a possible connection between the Manuherikia River Report Article and concerns regarding ORC staff safety and wellbeing, given Ms Gardner's acknowledgement consultation in relation to this work has previously been fraught.
- 2.6. I considered there to be sufficient basis for an investigation as to whether Cr Laws' comments breached his obligation to treat ORC employees *'with courtesy and respect'*. I considered the interpretation issue regarding whether the prohibition on public criticism of *'any employee'* can, and should, be interpreted as ORC employees collectively to need further exploration as part of the investigation.
- 2.7. As part of assessing the merit of the claim, and in light of Cr Laws' expressed concerns about the chilling effects of political or otherwise improperly motivated complaints on the democratic process, I considered whether there was any evidence the complaint was politically motivated or had any improper purpose. At the time of my preliminary assessment there was no evidence before me that would support such a finding.

*Scope of complaint*

- 2.8. Noting my comment above regarding further consideration being required in relation to the protection against public criticism afforded to ORC employees, the Complaint clearly set out a number of alleged breaches which, if established, could be within the scope of the Code of Conduct.

*Materiality*

- 2.9. I assessed the alleged breaches, if established, could potentially be material. Clause 12.3 of the Code of Conduct defines materiality as follows:

*An alleged breach under this Code is material if, in the opinion of the Mayor/ Chair or independent investigator, it would, if proven, bring the Council into disrepute or, if not addressed, adversely affect the reputation of a member.*

- 2.10. The ordinary meaning of disrepute is *'lack or decline of reputation; a state of being held in low esteem'*.<sup>1</sup> Another ordinary meaning is *'a loss or lack of credit or repute, bad reputation, disgrace, disfavour'*.<sup>2</sup>
- 2.11. I considered the alleged breaches, if established, had the potential to damage the reputation of the Council in the eyes of the public. I therefore considered the complaint was potentially material.
- 2.12. I advised Ms Gardner and Cr Laws I would be undertaking a full investigation. I invited further submissions or information. Both responded with additional information and Cr Laws provided a submission.

### **3. Implications of the New Zealand Bill of Rights Act 1990**

- 3.1. Cr Laws expressed further concerns regarding whether the ORC's Code of Conduct contravenes the New Zealand Bill of Rights Act 1990 (**NZBORA**), particularly in relation to elected members' freedom of thought and speech. Cr Laws contended the Code of Conduct breached NZBORA and the latter is authoritative.
- 3.2. Clause 6 of the Code of Conduct expressly recognises councillors' right to express a personal view to the media or via social media. However, clause 6(2) places limits on this right by requiring comments to the media to:
- be consistent with the Code of Conduct; and
  - not purposefully misrepresent the views of the ORC or the views of other members.
- 3.3. As the Independent Investigator my task was to determine, on the balance of probabilities, whether the conduct set out in the complaint breached the Code of Conduct. My role did not extend to adjudicating the enforceability or legality of the Code of Conduct itself. However, I considered Cr Laws' submission regarding the suggested conflict between the obligations created under the Code of Conduct and NZBORA to be relevant to the enquiries and findings I needed to make.
- 3.4. The Local Government Act 2002 requires local authorities to adopt a code of conduct for their members and specifies some matters that must be covered. As such, ORC's Code of Conduct is empowered by statute to create reasonable limits on the rights and freedoms of its members. NZBORA would indicate a qualifier be read into this: provided such limits are *'demonstrably justified in a free and democratic society'*.
- 3.5. I informed Cr Laws my preliminary view was the limit on public criticism of *'any employee'* is justifiable, noting an ORC employee is unable to defend themselves against any public criticism, and referencing the obligations ORC owes in relation to the employment rights and safety of its employees. However, I did not consider an expansive definition of *'any employee'* to effectively place a prohibition on public criticism of the actions of ORC

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<sup>1</sup> Merriam Webster Dictionary

<sup>2</sup> Collins English Dictionary



generally would be justifiable or required by the wording of the Code of Conduct. This is the lens I have adopted in conducting my investigation.

#### **4. Process**

- 4.1. Neither Ms Gardner nor Cr Laws felt an interview was required before I made a substantive assessment. Ms Gardner suggested I may wish to interview the Chair, Andrew Noone, to confirm she had verbally raised concerns regarding Cr Laws' media commentary prior to her complaint. As this issue did not directly relate to my investigation, I did not consider it necessary to interview Cr Noone.
- 4.2. As the complaint relates to published and undisputed comments, the focus of my investigation was less concerned with determining what occurred (given this was able to be determined through objective evidence). Instead, my focus was on determining whether Cr Laws' comments constituted a breach of the Code of Conduct. I accepted the factual context against which Cr Laws' comments were made was relevant to the investigation. However, both parties provided extensive background information and I considered this provided sufficient context. I therefore agreed with the parties that my investigation could be conducted on the papers.
- 4.3. I provided Ms Gardner and Cr Laws with a draft copy of this report for review and feedback on 22 October. Cr Laws provided a submission in response to the draft report on 24 October 2021 and a further submission on 28 October 2021. Ms Gardner provided feedback via email on 29 October 2021. Later that day Ms Gardner provided an email she had received from [REDACTED], to support her feedback. Both parties' feedback has been reflected as I thought necessary in this final report.

#### **5. Information Obtained**

- 5.1. Ms Gardner provided a significant volume of information in her complaint and the 17 attachments included with the complaint.
- 5.2. Cr Laws provided a substantive response in relation to Clutha River Article, together with a timeline of the Clutha River Dumping Issue, dated 21 July 2021, and an extract from the Local Govt NZ publication on Code of Conduct, on 3 October 2021. Cr Laws provided his response in relation to the Manuherikia River Report Article via email on 4 October 2021.

##### *Information in relation to the Clutha River Article – Ms Gardner's complaint*


- 5.3. Ms Gardner's complaint provided a reasonably detailed background in relation to the Clutha River dumping incident and investigation, which ultimately lead to the Clutha River Article. Of this background, the following was of particular relevance to my inquiry:
  - On 19 July 2021 Ms Gardner emailed councillors about media interest in the matter and noted ORC had received a warning letter due to the suggestion ORC had given advice (Attachment 3).

- On 20 July 2021 Ms Gardner sent a copy of the warning letter to councillors (Attachment 4).
  - On 20 July 2021 Ms Gardner sent a copy of the warning letter to councillors (Attachment 4).
  - On 21 July 2021 the ODT published the Clutha River Article (Attachment 7), which attributed the following comments to Cr Laws:
    - *It was 'extraordinarily embarrassing' that the council had advised a company which it later took enforcement actions against.*
    - *'If advice was given, then there seems to be a whole series of people let down – from the construction company, to Fish & Game, to local residents and to the environment.'*
    - *He was unhappy about the council's 'lack of transparency' to the public and to councillors.*
    - *'Given that drive – upping policy, upping staff and upping rates to pay for those staff and policy – it is extraordinary to me that in the middle of 2021, you would have ORC staff advising people that they can do something that is clearly not right.'*
  - On 21 July 2021 [REDACTED], filed a Job Sheet (Attachment 8) reporting a verbal assault he and another Incident Responder had been subjected to by a member of the public. The Job Sheet records that the individual referenced the article and the dumping of material in the Clutha river.
  - On 21 July 2021 an individual (who from the information provided appears to be the same member of the public referred to in the Job Sheet) emailed Cr Noone describing what had occurred and admitting he had *'gone on attack'* because he felt a double standard had been applied after reading the Clutha River Article and learning of the ORC's involvement.
- 5.4. Ms Gardner considered Cr Laws' comments to have been made without reasonable regard to the likely negative media and commentary generated within the community which ORC staff serve. She considered adverse reaction by some members of the public created a potential risk of physical and psychological harm to ORC staff, which could have been avoided if Cr Laws had not made comments criticising ORC staff. Ms Gardner formed the view Cr Laws' comments had prejudiced ORC's ability to provide a healthy and safe working environment for employees, in breach of obligations under the Code of Conduct. She considered there to be a link between Cr Laws' comments and the actions of the member of the public due to the direct references the member of the public made to the Clutha River Article.
- 5.5. Ms Gardner considered Cr Laws failed to *'treat all employees with courtesy and respect'* and breached his obligation not to publicly criticise any employee. She recognised Cr Laws'

comments did not identify a particular staff member but considered his comments publicly criticised ORC's employees and considered this enough to amount to a breach of the Code of Conduct. Further, Ms Gardner considered Cr Laws' comments in the Clutha River Article failed to demonstrate respect for others working within the ORC in the manner expected of a councillor under the obligations created by the Code of Conduct.

- 5.6. Ms Gardner also considered Cr Laws' comments in the Clutha River Report Article undermined (rather than fostered) community confidence in the ORC. Attachment 17 of her complaint includes 10 pages of screenshots of Facebook comments posted on the ODT's Facebook Page underneath the Clutha River Article. Some of these comments are criticisms of local authorities generally. Some are critical of ORC, directly asking questions as to whether the ORC *'even know which way is up'*, labelling the ORC *'hypocritical'*, and stating *'heads should roll'*. Other comments are critical of the builder, Cr Laws, Southlanders, or approaches to environmental protection more generally.
- 5.7. Ms Gardner recognised Cr Laws is free to express a view to the media but noted this must be done in a way that is consistent with the obligations created under the Code of Conduct.

*Information in relation to the Clutha River Article – Cr Laws' Response*

- 5.8. Cr Laws provided extensive background information (comprising 14 pages and a detailed chronology of issues relating to the Clutha River Dumping (enclosed as Appendix A)) regarding the matters leading up to the Clutha River Article. Cr Laws response is attached to this report. Due to the volume of information, I do not intend to repeat it in this report. However, the key themes involved:
  - Public interest in this matter existed four months prior to the publication of the Clutha River Article. Cr Laws provided excerpts from three ODT articles relating to the incident published in March 2021, including an article where Otago Fish & Game Officer Bruce Quirey called the alleged dumping *'irresponsible'*.
  - Information relating to the ORC's possible involvement in the incident was not immediately forthcoming and Cr Laws formed concerns about a lack of transparency with councillors, the ORC Chair, the governance team and the media. In this regard Cr Laws referred to:
    - 
    - A statement ORC staff provided the ODT on 16 July 2021 which refers to *'the offending party'* thereby implying a single external party involvement in the incident.

- Ms Gardner informing the governance team (for the first time) of the EPA investigation, the suggestion of staff involvement in the incident, and the warning letter ORC had received in an email on the evening of 19 July 2021, following inquiries by the ODT. Cr Laws noted he had become independently aware of possible ORC involvement by this time as *'it was proving a hot topic amongst persons involved in the demolition and construction trades'*.
  - Ms Gardner was aware Cr Laws began seeking further information and investigating the matter prior to the comments in the Clutha River Article and the complaint. Cr Laws referred to the document enclosed as Appendix A, which was entitled *'CHRONOLOGY: Clutha River Dumping Issue'* and which he compiled and then circulated on 21 July 2021. Cr Laws stated the Chairman forwarded this document to Ms Gardner along with a series of questions. Cr Laws also referred to an Official Information Act (OIA) request he submitted to the EPA on 22 July 2021 for the stated purpose of obtaining the full EPA report into the dumping and seeking all correspondence between the EPA and the ORC in relation to this matter.
  - Criticism of the ORC in relation to this matter existed in the public domain without Cr Laws' comments. Cr Laws referred to comments in the ORC Daily Media Wrap on 19 July 2021 in relation to the Clutha Dumping which included a query from the ODT noting a statement *'the ORC have let the river down'* from Fish and Game. Cr Laws also referred to queries by the ODT noted in the ORC Media Wrap on 20 July 2021 which included questions about advice given by council staff about dumping waste material in rivers and whether the ORC withheld information about the incident. Further, Cr Laws noted ORC Chairman Cr Noone was also quoted in the Clutha River Article as stating *'... the situation was not ideal'*.
- 5.9. I note information Cr Laws obtained via his OIA request has been put to one side for the purpose of this investigation as the information was not available to him at the time of the Clutha River Article.
- 5.10. Cr Laws considered Ms Gardner was attempting to use the Code of Conduct and this investigation process as a public gag to prevent criticism where ORC staff do wrong. Cr Laws considered Ms Gardner's complaint to strike *'at the very heart of local government and democratic accountability and an elected member's ability to robustly engage on issues that they consider to be important to the communities that they serve'*.
- 5.11. Cr Laws considered his comments in the Clutha River Article were not to blame for any reputational damage. Instead, he considered the primary cause for any adverse media or community comment was caused by ORC staff and their collective actions.
- 5.12. Cr Laws emphasised his comments did not identify any ORC employees and no information was disclosed that would allow individual identification. Cr Laws considered Ms Gardner's concerns as to *'physical or psychological harm'* being visited on ORC employees because of his remarks *'absurd'*. Cr Laws provided a couple of analogies where he submitted that, if an individual commits an illegal act that receives negative comment and the individual's occupation is published, it would be absurd to now consider all members of that profession

endangered by a risk of physical or psychological harm. Cr Laws noted the bar manager was *'clearly disgruntled at being interrupted by ORC staff, and seized on any issue that might advance his foul-mouthed frustration'*. He noted that without hearing from the bar manager it was not possible to determine his motivation. Further, Cr Laws noted his view the ORC staff were not in any physical danger from the altercation and there is no evidence they were psychologically afflicted as a consequence.

*Information in relation to the Manuherikia River Report Article – Ms Gardner's complaint*

- 5.13. Ms Gardner's complaint set out the background to the difficulties the ORC appears to have faced in meeting its obligations for managing water quantity and quality in Otago in relation to the Manuherikia River. From this information I understood work in relation to setting minimum flow limits has been ongoing for a number of years. This work is clearly an area of public interest given the use of the Manuherikia River for irrigation and therefore its economic importance in the area, as well as concerns for the ecological, recreational and scenic value of the river and its surroundings.
- 5.14. Of the background information provided in the complaint, the following was of particular relevance to this investigation:
- On 21 July 2021 the ORC released a summary report on the results of public consultation.
  - On 22 July 2021 the ODT published an article titled *'Clear support on Manuherikia River Flow'* (Attachment 14).
  - On 22 July 2021 Cr Laws sent a series of emails to Ms Gardner regarding the ODT article and the process which had been undertaken (Attachment 13). In this email thread Cr Laws initially questioned why, as an elected Dunstan Ward Councillor, he was receiving this information from an ODT article before he had received the full report and had the opportunity to ask questions. In a further email Cr Laws writes:
    - *'This is moronic.'*
    - *'Does the ORC have any credibility left after this?'*
    - *'This is beyond incompetence... this is something else.'*
  - On 23 July 2021 the ODT published the Manuherikia River Report Article (Attachment 15). The article included the following statements:
    - *The Otago Regional Council deputy chairman has described the findings of a report released yesterday on submissions made on five flow scenarios for the Manuherikia River as 'bogus'*
    - *'... alleged the report, which supposedly shows support for a flow of more than 3000 litres per second for the river, had no validity ...'*

- *“I would have to state this report is crap.”*
  - *He was stunned anyone could think online surveys could have ‘any validity in the real world’*
  - *His ire was directed at the process undertaken by ORC staff in releasing the data.*
  - *‘I’m really annoyed ORC staff decided to release today the results of a survey that if you had any inkling you would know it was bogus.’*
  - On 5 August 2021 Ms Gardner was forwarded an email from [REDACTED], [REDACTED], which advised concerns regarding the upcoming Manuherikia sessions in the Council Chamber had been discussed in the Health and Safety Representatives’ quarterly meeting. Her email states there was *‘a general feeling of unease regarding staff safety and wellbeing due to the Manuherikia work/consultation and meetings’* (Attachment 16).
- 5.15. Ms Gardner considered Cr Laws’ comments as reported in the Manuherikia River Report Article to also have been made without reasonable regard to the likely negative media and commentary generated within the community which ORC staff serve. As with the Clutha River Article, she considered adverse reaction by some members of the public created a potential risk of physical and psychological harm to ORC staff, which could have been avoided if Cr Laws had not made the comments reported in the Manuherikia River Report Article. She considered Cr Laws’ comments led to the concerns expressed by members of the ORC health and safety representative body. Ms Gardner acknowledged the consultation process had previously been fraught, but suggested Cr Laws’ comments unnecessarily fuelled the tensions that were already present in the community.
- 5.16. Ms Gardner considered Cr Laws’ comments in the Manuherikia River Report Article failed to *‘treat all employees with courtesy and respect’* and breached his obligation not to publicly criticise any employee. She recognised Cr Laws’ comments did not identify a particular staff member. However, she considered his words publicly criticised employees of ORC and considered this enough to amount to a breach of the Code of Conduct. Ms Gardner also considered Cr Laws’ comments in the Manuherikia River Report Article failed to demonstrate respect for others working within the ORC in the manner expected of a councillor under the obligations created by the Code of Conduct.
- 5.17. Ms Gardner also considered Cr Laws’ comments in the Manuherikia River Report Article undermined (rather than fostered) community confidence in the ORC. She based her opinion on feedback in comments posted by members of the public on the Manuherikia River Report Article (Attachment 15) and comments posted on the ODT’s Facebook Page underneath the Manuherikia River Report Article (Attachment 17). Of the three public commentators whose comments are shown on the Manuherikia River Report Article, one states, *‘the policy planner and their manager should be fired’* and are *‘100% incompetent’*. However, another is critical of Cr Laws. The third is an observation that is not relevant to this investigation. Of the Facebook comments, two are critical of the use of online submissions and one is critical of

'wasted' rate payer money. No comments directly mention the ORC and the majority appear to be a debate about water rights generally with some comments that are critical of Cr Laws.

*Information in relation to the Manuherikia River Report Article – Cr Laws' response*

- 5.18. Cr Laws noted he consider this incident to be the '*second botch-up of the ORC comms team*', the first being the '*botching of the mail-out of the Long-Term Plan consultation document*'. He expressed concern the Manuherikia Report was never run through the governance team. In his view this report '*was unprofessional*' and '*easily able to be manipulated*'. Cr Laws similarly considered the public presentation of the results to be unprofessional and expressed concern about this not having been seen or approved by the governance team prior to publication.
- 5.19. Cr Laws considered he had a responsibility, as a Dunstan Ward Councillor, to '*undo the community damage caused by the unprofessional ORC survey and to properly condemn its conclusions and publication as "crap"*'. He considered he needed to make public comment immediately to undo the '*public damage*'.
- 5.20. Cr Laws noted there was a long '*unfortunate*' history in relation to consultation efforts with regards to the Manuherikia River spanning a four-year period and considered his public comments had no bearing on this. Cr Laws queried the causal link between his statements and ORC staff feeling endangered.

**6. Analysis**

- 6.1. Clause 3 of the Code of Conduct sets out the values the Code of Conduct is designed to give effect to. These values are then expressed through specific obligations under the Code of Conduct. I consider '*treating others with respect*' under clause 3 value 5 is not a distinct obligation in and of itself. I have therefore determined it appropriate to consider whether Cr Laws' comments breached his obligations to '*treat all employees with courtesy and respect and not publicly criticise any employee*' under clause 5.2 or to '*demonstrate respect for others working within the ORC*' under clause 3 value 5 as part of the same assessment, rather than as two separate breaches of the Code of Conduct.
- 6.2. The language of the obligation under clause 5.2 appears to draw a distinction between the target of the behaviours by using the words '*all*' and '*any*'. Taking into account what appears to be a deliberate drafting choice, and internal consistency of meaning, '*any*' employee should be read as having a distinct meaning from '*all*' employees.
- 6.3. I have interpreted the obligation relating to not publicly criticising any employee as being limited to individually identifiable employees (as opposed to '*all*' employees in the first part of the sentence). This is consistent with the requirements of the NZBORA that any limit on a right (in this case the right to freedom of expression) should only be to an extent that can be justified in a free and democratic society. It is also consistent with the requirement created by clause 4.2 of the Code of Conduct whereby concerns regarding individuals must be raised with the Chief Executive in the first instance.

- 6.4. I have also interpreted the prohibition against public criticism as being limited to direct criticism of, or personal attacks on, individually identifiable employees (as opposed to criticism of the work performed more generally). All actions of the ORC are performed by its officers and staff. All actions of the ORC will therefore involve ORC employees. As discussed above, clause 6 of the Code of Conduct expressly recognises councillors' right to express a personal view to the media. This right would be extremely restricted, beyond an extent that could be justified in a free and democratic society, if councillors were prohibited from criticising ORC's (and therefore its employees') work.
- 6.5. Ms Gardner's feedback on the draft report noted that, while Cr Laws did not name a particular staff member in a pure sense, there are many people within the Clutha community who know who the staff involved were. However, there is no information to suggest Cr Laws knew this information himself. I consider the causal link between Cr Laws' comments and their identification within their community to be too remote to constitute identification of individual employees. I note the reality of New Zealand society is that people within the community will often be able to deduce which individuals may be involved in a particular matter. The councillors serving these communities must still be permitted to express their personal views.
- 6.6. I have interpreted the general obligations relating to courtesy and respect as applying to internal behavior and not to media comment. These obligations apply to all employees. For the reasons discussed above, general public criticism must still be permitted.
- 6.7. Cr Laws' comments, particularly his comment the ORC's actions were '*extraordinarily embarrassing*' and the implication of his comments regarding '*upping rates of pay to those staff*', were not courteous. It is clear Cr Laws was frustrated by what occurred. However, his comments were directed at the ORC as an entity, and not identifiable individuals.
- 6.8. I consider Ms Gardner's position that criticising ORC employees generally would be enough to constitute a breach of the Code of Conduct would go beyond the requirements of a reasonably justifiable limit on Cr Laws' rights. Ultimately, I do not consider Cr Laws' comments breached his obligations relating to courtesy, respect, and public criticism.
- 6.9. For published comments to prejudice the ORC's ability to provide a safe and healthy workplace to its employees, there must be a real, rather than remote, risk of harm. There also must be a causal link between the comments and any risk created.
- 6.10. Interpreting any public criticism of council actions as creating a risk of physical or psychological harm to employees, and to be a breach of the Code of Conduct, would effectively prevent any media criticism of council activities. This would be inconsistent with clause 6 and the NZBORA: councillors have a right to make media comment, within limits.
- 6.11. Queries from the ODT in the ORC's Daily Media Wrap on 19 and 20 July suggests the ODT were aware of the possible link between an ORC employee's advice and the dumping of the material. There was, therefore, a high likelihood of the ODT publishing this information, with or without Cr Laws' comments. I note comments by Cr Noone were also quoted in the Clutha River Article. Cr Laws' comments cannot, therefore, be taken in isolation as the determining



factor in any individual's response. The Job Sheet filed by the ORC employee shows the individual referenced the article and the dumping of material in the Clutha river. However, Cr Laws' comments were not referenced. The email to Cr Noone (Attachment 9) also shows the individual expressing other frustrations, for example regarding the Council's lack of action in clearing the gutters. I consider there is an insufficient causal link between Cr Laws' comments and the verbal abuse suffered by the ORC employees to constitute a risk to employees' health and safety.

- 6.12. I also note the behavior discussed in the article, which occurred in Balclutha, was geographically distanced from the incident outside the [REDACTED] in Dunedin. I do not consider criticism of the actions of individuals in one area could reasonably be foreseen to create a risk of harm to individuals in a geographically distinct area.
- 6.13. As worded in the complaint, Cr Laws' comment regarding a '*lack of transparency*' and there being '*a whole series of people let down*' appears to breach an obligation to '*foster community trust and confidence*'. However, the full wording of clause 3 value 2 of the Code of Conduct is '*Public trust: members, in order to foster community confidence and trust in their Council, will work together constructively in an accountable and transparent manner*'. The obligation is to work together in an accountable and transparent manner. The ability to criticise is a central tenant of accountability and transparency. Further, if this clause were intended to apply to media statements, rather than actions while working with other council members, it would prevent all critical statements to the media. I do not consider this clause to apply to media comments and therefore do not consider Cr Laws' comments to breach the Code of Conduct.
- 6.14. As I have found Cr Laws' comments in the Clutha River Article do not breach any of the above obligations, I find they were consistent with the Code of Conduct.
- 6.15. Taking into accounts my comments above, I note Cr Laws' comments the report '*was crap*' and '*if you had any inkling you would know it was bogus*' in the Manuherikia River Report Article were neither courteous nor respectful. In his submission dated 25 October 2021 Cr Laws expressed his view this assessment was '*unfair and discriminatory*'. Cr Laws expanded on this in his further submission on 28 October. I accept '*crap*' and '*bogus*' are '*part of the New Zealand vernacular*'. I also accept that, when viewed on a scale of words an individual may use to express frustration, these words are '*quite mild*'. I do not accept this means they were not discourteous or disrespectful.
- 6.16. Cr Laws' comments in the Manuherikia River Report Article were, however, a criticism of work performed by the ORC more generally. They do not name an individual employee or give enough information to allow an employee to be identified. I therefore conclude Cr Laws' comments in the Manuherikia River Report Article did not breach his obligations relating to courtesy, respect, and public criticism of '*any*' employee.
- 6.17. The timing of the ORC Health and Safety Representatives expressing concerns regarding work/consultation and meetings in relation to the Manuherikia River could, at face value, suggest a link to the Manuherikia River Report Article. However, further examination reveals these concerns were raised immediately following a scheduled quarterly meeting and the

timing may have been coincidental. [REDACTED] (Attachment 16) makes no mention of any impact of media commentary. Given the history of a difficult consultation process over a period of four years, I cannot safely make a finding Cr Laws' comments contributed to the health and safety concerns. I do not find his comments in the Manuherikia River Report Article to have breached his obligations by prejudicing the ORC's ability to provide its employees with a healthy and safe workplace.

- 6.18. For the reasons stated above, I do not consider clause 3 value 2 of the Code of Conduct to apply to media comments. Cr Laws' comments reported in the Manuherikia River Report Article do not breach this obligation.
- 6.19. As I have found Cr Laws' comments in the Manuherikia River Report Article do not breach any of the above obligations, I find they were consistent with the Code of Conduct.

## **7. Summary of Findings**

- 7.1. Having carefully considered the information before me, I find Cr Laws' comments in both articles did not breach his obligations under the Code of Conduct. Consequently, the complaint is not upheld.

## **8. Other Matters**

- 8.1. Through the investigation of this matter it is clear to me there were significant frustrations on both sides. Both of the situations referred to in the complaint appear to originally stem from a perceived inadequacy of communication. This is something I would encourage the ORC to consider.
- 8.2. While I have found Cr Laws' comments do not breach the Code of Conduct, I observe some of Cr Laws' comments were discourteous and inflammatory. Concerns can be expressed professionally, without the need to publicly call a piece of work '*crap*' or '*bogus*'. Cr Laws' feedback on the draft report raised issue with this observation. I found these words did not breach the Code of Conduct as I concluded they were not directed at '*any employee*'. The object the comments were directed at does not alter my assessment of the words themselves. Having considered these comments against the relevant context, including the clear frustration Cr Laws experienced, but also the concerns ORC employees expressed in relation to Cr Laws' comments, I consider this observation to be appropriate. As public figures, councillors have a platform on which they can express their views. ORC staff do not. It would not be unreasonable to expect councillors to be mindful of this and express their views in a considered manner.
- 8.3. Cr Laws made a number of submissions regarding the motive for the complaint as an attempt to shield ORC staff from criticism of mistakes. I have also interpreted his comments regarding Ms Gardner being aware he was investigating matters relating to the Clutha River Dumping as implying the complaint had an element of retaliation for his actions.
- 8.4. I consider Ms Gardner held genuine concerns regarding staff welfare. The information contained in the email from [REDACTED] to Ms Gardner dated 29 October 2021 supports the

reasonableness of these concerns. My finding that Cr Laws' comments did not prejudice the ORC's health and safety obligations should not be interpreted as Ms Gardner's concerns being invalid. Ms Gardner is entitled to be concerned about what she clearly regards as critical or inflammatory media statements that may impact on her staff, but I have found Cr Laws did not breach the Code of Conduct.

**Steph Dyhrberg**

Partner

Dyhrberg Drayton Employment Law

**Attachments**

- Code of Conduct Complaint (dated 16 August 2021)
- Attachments 1-17 of the Complaint
- Councillor Laws' Substantive Response (dated 3 October 2021)
- Appendix A: Chronology: Clutha River Dumping Issue
- Email from Councillor Laws containing response to Manuherikia River Report Article (dated 4 October 2021)
- Otago Regional Council Code of Conduct
- Submission – Cr Laws in relation to Draft Report (dated 25 Oct 2021)
- Further Submission – Cr Laws in relation to Draft Report (dated 28 Oct 2021)
- Email from Sarah Gardner containing feedback on Draft Report (dated 29 October 2021)
- Email from Sarah Gardner (dated 29 October 2021) attaching email [REDACTED], regarding summary of events prepared by Darroch Forest Lawyers (dated 29 October 2021)