



Local Government Standards Panel

Complaint Number	SP 2019-009
Legislation	<i>Local Government Act 1995</i>
Complainant	Mr Stanley Scott
Respondent	Councillor Benjamin Bell
Local Government	Shire of Toodyay
Regulation	Regulation 7 of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Mr Michael Connolly (Presiding Member) Cr Peter Rogers (Member) Mrs Emma Power (Member)
Heard	2 September 2020 Determined on the documents
Finding	1 x Breach of Regulation 7(1)(b)

FINDING AND REASONS FOR FINDING

Delivered 8 October 2020

DEFAMATION CAUTION

The general law of defamation, as modified by the *Defamation Act 2005*, applies to the further release or publication of all or part of this document or its contents. Accordingly, appropriate caution should be exercised when considering the further dissemination and the method of retention of this document and its contents.



Summary of the Panel's decision

1. On 2 September 2020, the Panel found that Councillor Benjamin Bell, a councillor of the Shire of Toodyay ("**the Shire**") did commit a minor breach pursuant to the *Local Government Act 1995 (WA)* ("**the Act**") regulation 7 of the *Local Government (Rules of Conduct) Regulations 2007* ("**the Regulations**") when he made a Facebook Post that was intended to cause detriment to the Complainant as set out in paragraph 18 below.

The Panel's Role

2. Under section 5.110(2) of the Act the Panel is required to consider a minor breach complaint and make a finding as to whether the alleged minor breach occurred.
3. The Act provides for the circumstances in which a council member commits a minor breach.¹
4. The Panel may make a finding that a councillor has committed a minor breach of the Act and Regulations based on evidence from which it may be concluded that it is more likely that the alleged breach occurred than it did not occur.²
5. In order to find a breach, it must be established that each element of the relevant Regulation is more likely than not to have been breached or met.
6. In considering whether a minor breach is established the Panel must consider:
 - a. all evidence provided and, where there are conflicting circumstances, inferences or evidence, must come to a reasonable conclusion that any circumstance, inference or evidence relied upon is more likely than not to have occurred or be accurate³; and
 - b. the seriousness of any allegation made, as well as the gravity of the consequences flowing from a particular finding⁴.
7. The Panel does not possess investigative or supervisory powers.⁵ The Panel makes decisions about complaints regarding minor breaches solely upon the evidence presented to it and, where appropriate, materials published by the relevant local authority's website.
8. It is the responsibility of both complainants and respondents to provide the Panel with all information they wish the Panel to consider when making its determination.
9. The Panel also must have regard to the general interests of local government in Western Australia⁶.
10. The Panel is obliged to give notice of the reasons for any finding it makes under section 5.110(2) of the Act.

¹ Section 5.105 of the Act

² Section 5.106 of the Act

³ *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1

⁴ *Briginshaw v Briginshaw* (1938) 60 CLR 336

⁵ *Re and Local Government Standards Panel* [2015] WASC 51 (at paragraph 24)

⁶ Section 8(6) of Schedule 5.1 of the Act



Jurisdiction and Procedural Fairness

11. On 11 February 2019 the Panel received a complaint from Mr Stan Scott acting as complaints officer of the Shire (**“the Complaints Officer”**). The same enclosed a Complaint of Minor Breach Form dated 11 February 2019.
12. Due to the fact that Cr Bell had been found to have committed six prior minor breaches, at its meeting of 26 April 2019, the Panel made the decision:
 - a. that if the alleged minor breach was found to have been committed, the same may be a recurrent breach; and
 - b. to send the complaint to the Departmental Chief Executive Officer (**“Department CEO”**) under section 5.111 of the Act, to determine whether the Department CEO would make an allegation to the State Administrative Tribunal (**“SAT”**) under section 5.112(2) of the Act.
13. The complaint was duly referred to the Department CEO on 9 May 2019.
14. On 30 July 2020 the Director General referred complaint SP 2019-009 back to the Panel pursuant to section 5.112(4) of the Act on the basis that, if the allegation was made out, SAT would not consider any further penalties for Cr Bell than those already available to the Panel.
15. In the complaint form, the Complainant alleges that, on 10 February 2019 Cr Bell breached regulation 7 of the Regulations when he wrote a Facebook Post that was intended to cause detriment to the Complainant as set out in paragraph 18 below (**“the Complaint”**).
16. The Panel convened on 2 September 2020 to re-consider the Complaint.
17. The Panel:
 - a. accepted the advice of the Department that, based on information published on the Western Australian Electoral Commission’s website, Cr Bell was:
 - i. elected to the Council of the Shire in October 2017 for a term expiring in October 2019 and re-elected for a term commencing October 2019 and expiring October 2023;
 - ii. a Councillor at the time of the alleged breach; and
 - iii. a Councillor when the Panel met on 2 September 2020;
 - b. was satisfied the Complaint was made within two years after the alleged breach occurred⁷;
 - c. was satisfied that the Shire’s Complaints Officer had dealt with the Complaint in accordance with the administrative requirements in the Act for dealing with complaints of a minor breach⁸;
 - d. was satisfied the Department had provided procedural fairness to Cr Bell; and
 - e. found it had jurisdiction to consider the Complaint.

⁷ Section 5.107(4) and 5.109(2) of the Act (as at the time of the Complaint)

⁸ Section 5.107 and 5.109 of the Act



The Specifics of the Complaint

18. The Complainant provided the following arguments and comments in respect to the Complaint:

a. On 10 February 2019 the following Post appeared on Cr Bell's face book page - badged as "Benjamin Bell Councillor for the Shire of Toodyay":

"Does anyone have an issue with the current Council, who are presently under investigation by the State Government for potential inappropriate decision making, holding a special council meeting next week to decide whether to renew the employment contract of the CEO, who himself is under investigation by the State Government because of the Department's concern over the way the Shire has been run for the past 5 years?"

("the Post").

b. The Post generated significant interest and numerous negative responses about the Chief Executive Officer (**"the CEO"**).

c. At the Shire of Toodyay February Ordinary Meeting of Council Cr Bell moved the following motion:

"That Council:

- 1. Notes that under Section 9.1 of the CEO's current Contract of Employment, his employment shall terminate on the expiry date specified in Clause 3 of his contract unless a new contract is negotiated;*
- 2. Notes the expiry date specified in Clause 3 of the CEO's contract is 22 July 2019;*
- 3. Notes that under Section 3.3 of the CEO's current Contract of Employment, there is no compulsion on the Council to agree to a new contract; and*
- 4. Resolves not to enter into a new contract with the CEO."*

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("the Motion").

d. It appears that the intention the Facebook Post, in light of Cr Bell's public position on the CEO contract, was to cause detriment to the CEO, and to influence the decision making of other Councillors.

e. There have been 6 previous complaints lodged against Councillor Bell in relation to Facebook posts. These complaints were determined by the Standards Panel and its findings were distributed on 25 January 2019. This latest post was made with full knowledge of the Standards Panel findings.

f. Cr Bell has once again set out to denigrate the Complainant as CEO in the performance of his duties and to misrepresent the Authorised Inquiry which is an investigation into the Shire of Toodyay, not the CEO.

g. Cr Bell meets the requirements for a breach that:



- i. he was a Council Member at the time;
 - ii. he made the post as a Councillor;
 - iii. the office of a Council Member was used improperly;
 - iv. he used his office improperly to disadvantage the Local Government and the CEO.
 - h. These breaches also have a direct and serious impact on all Shire staff.
19. The Complainant also provided a copy of the Post.

Respondent's Response

20. By an email dated 10 April 2019, Cr Bell's legal representative, Squire Patton Boggs, provided a response to the Complaint.
21. It is denied that Cr Bell has committed any minor breach.
22. Cr Bell's legal representative makes the following comments in respect to the Complaint:
 - a. Guidance published by the Department sets out that complaints are inappropriate if they are:
 - i. complaints made with the intent of addressing personal grievances or disagreements;
 - ii. complaints made to express dissatisfaction with council member's lawfully made decisions or performance of their role; or
 - iii. complaints made as a political tool or in an attempt to limit freedom of political expression.
 - b. In light of Cr Bell's prior breaches of Regulation 7, he has actively ensured that his media conduct was considered and conscious of his obligations to his fellow Shire officers, Shire employees and the Shire itself since receiving that decision.
 - c. Cr Bell considers that his conduct the subject of this Complaint is in compliance with these obligations and the best interests of the Shire's constituents.
 - d. Mr Scott's conduct in lodging various complaints shows that they are lodged in a frivolous or vexatious manner in an attempt to address Mr Scott's personal grievances with Cr Bell.
 - e. It is apparent from the number and substance of the complaints that Mr Scott (also referred to as "**the CEO**") has a personal grievance with Cr Bell.
 - f. Cr Bell maintains that the statements he makes in public, online or in print are purely statements of Cr Bell's personal opinions and political expression.
 - g. The Panel should refuse to consider this complaint on the grounds that it is frivolous or vexatious.



- h. Mr Scott alleges that Cr Bell has breached Regulation 7 of the Conduct Rules by:
 - i. using the Post to cause detriment to the CEO and to influence the decision making of other Councillors; and
 - ii. denigrating Mr Scott as CEO in respect to the performance of his duties; and
 - iii. misrepresenting the Authorised Inquiry which is an investigation of the Shire of Toodyay, not the CEO.
- i. Mr Scott alleges that Cr Bell's comments in the Facebook Post were designed to disadvantage him as CEO of the Shire. Therefore, the allegation relates to Regulation 7(1)(b).
- j. Regulation 7(1) states that a councillor must not make "improper" use of their office to gain an advantage or to cause detriment.
- k. Whether or not the CEO may have suffered detriment as a result of the Facebook Post is debatable, but is irrelevant in these circumstances.
- l. Cr Bell's actions cannot have breached Regulation 7(1) unless they were an "improper" use of my position as a council member.
- m. Regulation 3(1) contains a list of principles to guide the proper exercise of a councillor's powers. Although the principles are for guidance purposes only these principles have bearing on whether Cr Bell's conduct was "improper".
- n. In publishing the Facebook Post, Cr Bell considers that he has:
 - i. relied upon information that he honestly believed to be accurate and of importance to the community, therefore complying with Regulation 3(1)(b);
 - ii. openly and accountably aired my concerns in a public forum via a public social media platform and under his own name, therefore complying with Regulation 3(1)(e); and
 - iii. not done anything that would be counter to, or in breach of, Regulation 3(1)(a), (c), (d), (f), (g) or (h).
- o. The Complaint alleges that the Facebook Post was incorrect or misleading in breach of Regulation 3(1)(a), (b) and (f) as it infers that Cr Bell's statement that the CEO is under investigation by the State Government is incorrect.
- p. Cr Bell understands that the Department's Authorised Inquiry into the Shire is tasked with investigating the functions and operations of the Shire as a whole. Given that the CEO is tasked with the day to day management of the Shire, Cr Bell considers it is reasonable to conclude that the Authorised Inquiry will investigate the individual with ultimate responsibility for the functions and operations of the Shire, being Mr Scott, the CEO.
- q. Cr Bell considers that Mr Scott's argument that he is not personally under investigation is a semantic argument without basis and that the position Cr Bell has taken in the Facebook Post is a legitimate interpretation of the



Authorised Inquiry. Accordingly, Cr Bell does not consider that his comments regarding the Authorised Inquiry were factually incorrect or misleading.

- r. Cr Bell has complied with the standards of 'proper' conduct set out in Regulation 3.
 - s. Cr Bell submits that the comments contained in the Facebook Post were published in what he genuinely considered to be the best interests of the community he serves and the Shire itself.
 - t. His comments complied with, and were in the spirit of, the principles contained in Regulation 3(1). Therefore, his actions were not "improper" and were not in breach of Regulation 7(1).
 - u. Additionally, Regulation 7(1) provides that a councillor must not make improper use of "the person's office as a council member".
 - v. Cr Bell's personal Facebook page carries the disclaimer that:

"All statements made by me on this Facebook page are done in my capacity as a resident and ratepayer of the Shire of Toodyay. At no time should any statement made by me on this, my private Facebook page, be taken as anything but my own personal views".
 - w. It is evident, both in the content of the Facebook Post and as expressly stated in this disclaimer set out above that Cr Bell's statements in the Facebook Posts are his personal opinions and are not statements that can, or should be, attributed to my office as a council member.
 - x. Accordingly, Cr Bell submits that my statements do not breach Regulation 7(1) as they were not made in his capacity as a council member.
23. Cr Bell also provided a screen shot of the disclaimer on his personal Facebook Page.

Regulation 7

24. Regulation 7 prohibits councillors engaging in conduct to either gain an advantage for themselves (or another party) or cause detriment to another party and specifically provides as follows:
- "7. Securing personal advantage or disadvantaging others***
- (1) *A person who is a council member must not make improper use of the person's office as a council member —*
 - (a) *to gain directly or indirectly an advantage for the person or any other person; or*
 - (b) *to cause detriment to the local government or any other person.*
 - (2) *Subregulation (1) does not apply to conduct that contravenes section 5.93 of the Act or The Criminal Code section 83.*
25. The Complainant has not made any allegation that there was any intention to provide an advantage to any particular party, so the Panel has only considered regulation 7(1)(b) of the Regulations in this decision.



Panel's Consideration

Regulation 7(1)(b)

26. To make a finding of a minor breach of regulation 7(1)(b) of the Regulations the Panel must be satisfied to the required standard that:
- a. Cr Bell was an elected member at the time of the alleged breach and the time of the determination;
 - b. Cr Bell made use of his office as Council member of the Shire;
 - c. when viewed objectively, such use was an improper use of Cr Bell's office in that it:
 - i. involved a breach of the standards of conduct that would be expected of a person in the position of councillor by reasonable persons; and
 - ii. was so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty; and
 - d. Cr Bell engaged in the conduct in the belief that detriment would be suffered by another person.

Cr Bell was an Elected Member at the relevant times

27. Cr Bell was an elected member at the time of the alleged breach and at the date the Panel considered the Complaint.
28. This element is met.

Cr Bell made use of his office as Council Member of the Shire

29. Cr Bell asserts that the Post was made in his capacity as a private individual and that the disclaimer shown on his personal Facebook Page indicates he was not acting in his capacity as councillor.
30. Various elements may indicate whether a Councillor is acting in their capacity as a councillor when making public comment such as:
- a. the name or title attributed to the Councillor in the communication;
 - b. the subject matter or contents of the communication and the degree to which the same are related to the Council or City or local community;
 - c. the public or private nature of the communication; and
 - d. the audience with which the communication is shared.
31. In this case:
- a. the Post is clearly shown to be made by "*Benjamin Bell - Councillor for Toodyay Shire*"; and
 - b. Cr Bell is discussing matters specific to the Shire and the CEO of the Shire.
32. This indicates that Cr Bell was acting in his capacity as a councillor and made use of this office.
33. The fact that Cr Bell may have subsequently added a disclaimer to his personal Facebook Account (as provided with his response) is immaterial.



34. Further, the argument that a councillor is not using their office when they express personal opinions or statements is flawed and disingenuous.
35. The standards of behaviour expected of councillors are of a generally higher standard than a member of the public due to their public position.
36. Councillors must always remain aware of situations where it is likely they may be considered to be acting in their capacity as an elected member.
37. The Panel finds that it is more likely than not that Cr Bell made use of this office as an elected member when making the Post.
38. This element is met.

Cr Bell's use was improper

39. Firstly the Panel affirms that it does not find the Complaint to be frivolous or vexatious in nature. This would require that such Complaint could have no reasonable apprehension of success. Due to Cr Bell's recent findings of minor breach, and the nature of Cr Bell's conduct that led to such minor breach findings, it was reasonable for the Complainant to make the Complaint.
40. Deciding if conduct is an improper use of office requires something more than simply a demonstration of poor judgment or a lack of wisdom⁹. It requires an abuse of power or the use of the councillor's position in a manner that such councillor knew (or ought to have known) was not authorised.
41. Impropriety does not depend on a councillor's consciousness of impropriety. It is to be judged objectively and does not involve an element of intent¹⁰.
42. Any decision as to what is "improper" cannot be made in isolation but must be considered in the relevant context including the specifics of the relevant event as well as councillor's formal role and responsibilities.
43. In addition to the guiding principles set out in Regulation 3 of the Regulations, breaches of any code of conduct adopted by a local authority may also indicate that certain conduct by a councillor is improper.
44. The Shire has a Code of Conduct adopted 18 October 2007 ("**the Code**") which prescribes guidelines for dealing with others including the following specific provisions:

- a. **"1.3 Exercise Fairness and Impartiality**

We will perform all our duties impartially and in the best interests of the Shire, uninfluenced by fear or favour. We will conduct our business respectfully, courteously and fairly. We will refrain from any form of conduct which may cause any reasonable person unwarranted offence or embarrassment...."

⁹ Complaint of Minor Breach No. SP 3 of 2013

¹⁰ *Chew v R* [1992] HCA 18



b. “3.1 Our Shire Relationships

We will all work together courteously and effectively as part of the Shire team. Our teamwork will be based on our mutual respect for each other and our committed co-operation to achieve the Shire’s goals and implement its strategies. In all our official dealings with each other we will be frank and honest and always endeavour to resolve any serious conflict through discussion. If necessary, this can be facilitated by either the Shire President, Deputy Shire President and/or the Chief Executive Officer. To achieve this teamwork, all elected members will:

.....

c) refrain from publicly criticising staff in a way that casts aspersions on their professional competence and credibility;

.....

At the same time, staff will recognise that elected members’ views and opinions often reflect valid community viewpoints that should be considered in conjunction with professional opinion. Staff will therefore make every effort to assist elected members in the performance of their role, and to achieve the satisfactory resolution of issues that may arise in the performance of their official role.”

c. “3.4 Communication and Public Relations

To ensure accountability and transparency in our activities we will effectively communicate with and promote participation by all sections of our community. All aspects of our Shire-related communication, including verbal, written or personal communications, will be accurate, polite and professional. We will not publicly reflect adversely upon any decision of the Council or the Chief Executive Officer/staff. Unless confidentiality is essential, our administrative and management practices will be open and accessible.

Elected members will be responsive to community views and accurately and adequately communicate the adopted policies, procedures and decisions of the Shire. In doing so elected members will demonstrate their respect for the Council’s majority decision making processes. Confidential information will not be communicated until we are sure that it is no longer treated as confidential. Information relating to Council decisions on approvals, permits and so on will only be communicated in an official capacity by a designated officer of the Shire.

....”

d. “3.5 Avoid Derogatory Statements

We will not make any allegations that are derogatory or improper. We will always act in the best interests of the Shire and refrain from any type of communication, in our public or professional duties, which may cause any reasonable person unwarranted offence or embarrassment. When we are uncertain about the probable impact of our communications we should seek access to legal advice.”



45. The Complainant asserts that Cr Bell has acted improperly by:
 - a. using the Post to attempt to influence the decision making of other Councillors; and
 - b. denigrating Mr Scott as CEO in respect to the performance of his duties and therefore cause detriment to the CEO; and
 - c. misrepresenting the Authorised Inquiry, which is an investigation into the Shire of Toodyay, not the CEO.
46. Cr Bell asserts that he at all times acted in accordance with the guiding principles set out in Regulation 3 of the Regulations.
47. The Panel notes that Cr Bell is not responsible for comments made by third parties following the Post.
48. The Post is as follows:

“Does anyone have an issue with the current Council, who are presently under investigation by the State Government for potential inappropriate decision making, holding a special council meeting next week to decide whether to renew the employment contract of the CEO, who himself is under investigation by the State Government because of the Department’s concern over the way the Shire has been run for the past 5 years?”
49. There are a number of elements of the Post to be considered when making a decision of whether the same is “improper”.
50. Cr Bell refers to the “present” Council being under investigation by the State Government. This completely ignores the fact that Cr Bell himself is a part of that Council and, therefore, also equally subject to the relevant Inquiry.
51. This appears to be purposefully misleading to give the impression that:
 - a. Cr Bell himself was not involved in the Inquiry, only the other councillors were; and
 - b. the “present Council” was not competent to make a decision in respect to the CEO’s contract.
52. The Panel finds that it is more likely than not that such statement:
 - a. is not respectful or courteous in breach of clause 1.3 of the Code;
 - b. publicly reflects adversely upon the decision of the Council to consider the CEO’s contract in breach of clause 3.4 of the Code; and
 - c. makes an allegation that is derogatory or improper against the Council as a whole in breach of clause 3.5 of the Code.
53. In addition, Cr Bell’s statement that *“the CEO, who himself is under investigation by the State Government because of the Department’s concern over the way the Shire has been run for the past 5 years?”* strongly implies that the CEO was being personally and separately investigated due to improper conduct by the CEO.
54. The Panel finds that this comment is more likely than not in breach of clause 3.1(c) of the Code in that it publicly criticises staff in a way that casts aspersions on their professional competence and credibility.



55. At the stage the Post was made, the Inquiry into the Shire had been recently announced. The draft report regarding the Inquiry was not provided to the Shire until 21 July 2020. Cr Bell could have no reasonable expectation that the contents would find all other councillors (excepting Cr Bell) and the CEO responsible for inappropriate decision making as was implied in the Post.
56. Further, the Post generally expresses disagreement with, and contempt towards:
- the prior decision by the Council to consider the CEO's contract; and
 - any decision that may be made by Council relating to the matter,
- thereby breaching clause 3.4 of the Code to not publicly reflect adversely upon the decision of the Council as well as the guiding principle 3(1)(d) to avoid damage to the reputation of the local government.
57. The Panel has also considered the breach in the light that Cr Bell had, a short while before the Post was made, been given several decisions by the Panel confirming that similar comments on Facebook were in breach of Regulation 7 of the Regulations. Due to this, the Panel also considers that Cr Bell has acted recklessly and breached the guiding principle set out in Regulation 3(1)(a) to act with reasonable care and diligence.
58. It is not appropriate for councillors to attempt to distance themselves from their actions by claiming they were only expressing their personally held opinions. It is the manner of asserting those opinions that may be deemed improper.
59. Given the above, the Panel finds that it is more likely than not that the Post by Cr Bell was improper as:
- the contents of the Post were breach of the Code and the guiding principles set out in Regulation 3; and
 - the conduct was of such a nature that a reasonable individual would consider the same to be inappropriate or not in keeping with the conduct that would be expected of a councillor; and
 - the conduct is deserving of a penalty.
60. This element is met.

Cr Bell intended to cause a disadvantage

61. "Detriment" means loss, damage or injury. It is construed widely and includes financial and non-financial loss and adverse treatment, such as humiliation, denigration, intimidation, harassment, discrimination and disadvantage.
62. It is not necessary to find whether any detriment was actually suffered¹¹, but an intent to cause such detriment must be established.
63. The Complainant asserts that the Post was written to:
- cause detriment to the CEO; and

¹¹ *Yates and Local Government Standards Panel* [2012] WASAT 59 at [72]



- b. to influence the decision making of other Councillors.
64. Cr Bell asserts that the Post was published in what Cr Bell genuinely considers to be the best interests of the community he serves and the Shire itself.
65. The Panel finds that it is more likely than not that the Post was not written in an attempt to influence other councillors. Due to the vote that took place at the January Ordinary Council Meeting, it is more likely that Cr Bell was expressing his frustrations that the remainder of the Council did not vote in accordance with his alternate motion to not reconsider the employment contract of the CEO.
66. The Panel further finds that the Post cannot be reasonably seen to be in the best interests of the community and the Shire. If Cr Bell wished to debate against and vote against the renewal of the CEO's contract, then it is appropriate to do this at the relevant Council meeting, not to disparage the competency of the remainder of the Council or adversely reflect on the prior decision of the Council.
67. The Panel does find, to the required standard, that the Post was specifically intended to:
 - a. denigrate the performance of the CEO and imply that he was under investigation due to wrongdoing; and
 - b. negatively refer to the current Council in order to make them appear incompetent.
68. As such, in this case, the Panel finds it is more likely than not that Cr Bell made the Post with the intention to:
 - a. denigrate prior performance of the CEO so as to detriment the CEO;
 - b. denigrate the abilities and decisions of the remaining councillors of the Shire to cause a detriment to the remaining councillors; and
 - c. comment negatively on, therefore bring into disrepute, the Shire itself.
69. This element is met.

Conclusion

70. Given the above, the elements required to find a breach of regulation 7(1)(b) of the Regulations have been met.



Panel's Findings

71. Cr Bell did commit a breach of Regulation 7(1)(b) of the Regulations and therefore did commit a minor breach.

A handwritten signature in blue ink, appearing to read 'Mick Connolly'.

Mick Connolly (Presiding Member)

A handwritten signature in black ink, appearing to read 'Emma Power'.

Emma Power (Member)

A handwritten signature in black ink, appearing to read 'Peter Rogers'.

Peter Rogers (Member)



Local Government Standards Panel

Complaint Number	SP 2019-009
Legislation	<i>Local Government Act 1995 (WA)</i>
Complainant	Mr Stan Scott
Respondent	Councillor Benjamin Bell
Local Government	Shire of Toodyay
Regulation	Regulation 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007 (WA)</i>
Panel Members for Penalty Consideration	Mr Michael Connolly (Presiding Member) Cr Peter Rogers (Member) Mrs Emma Power (Member)
Heard	2 September 2020 Determined on the documents
Penalty Considered	10 November 2020
Outcome	Public Censure and Public Apology

DECISION AND REASONS FOR DECISION

Delivered 12 January 2021

DEFAMATION CAUTION

The general law of defamation, as modified by the *Defamation Act 2005 (WA)*, applies to the further release or publication of all or part of this document or its contents. Accordingly, appropriate caution should be exercised when considering the further dissemination and the method of retention of this document and its contents



Introduction

1. At its meeting on 2 September 2020, the Panel found that Councillor Benjamin Bell, a councillor for the Shire of Toodyay ("**the Shire**"), committed a minor breach under the Local Government Act 1995 (WA) ("**the Act**") and regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (WA) ("**the Regulations**") when he made a Facebook Post that was intended to cause detriment to the Complainant ("**the Minor Breach**").

Jurisdiction and Law

2. Due to the fact that Cr Bell had been found to have committed six prior minor breaches, at its first consideration of this Complaint on 26 April 2019, the Panel made the decision:
 - a. that if the alleged minor breach was found to have been committed, the same may be a recurrent breach; and
 - b. to send the complaint to the Departmental Chief Executive Officer ("**Department CEO**") under section 5.111 of the Act, to determine whether the Department CEO would make an allegation to the State Administrative Tribunal ("**SAT**") under section 5.112(2) of the Act.
3. The complaint was duly referred to the Department CEO on 9 May 2019.
4. On 30 July 2020 the Director General referred complaint SP 2019-009 back to the Panel pursuant to section 5.112(4) of the Act on the basis that, if the allegation was made out, SAT would not consider any further penalties for Cr Bell than those already available to the Panel.
5. On 2 September 2020 the Panel reconsidered the Complaint and found Cr Bell committed a minor breach pursuant to section 7(1)(b) of the regulations.
6. The Panel then convened on 10 November 2020 to consider how it should deal with the sanction for the Minor Breach.
7. The Panel accepted the advice of the Department of Local Government, Sport and Cultural Industries ("**the Department**") that on this date there was no available information to indicate that Cr Bell had ceased to be, or was disqualified from being, a councillor.
8. If the Panel finds that a councillor has committed a minor breach, it must give the councillor an opportunity to make submissions to the Panel about how it should deal with the breach under section 5.110(6).¹
9. By a letter dated 8 October 2020, Cr Bell was:
 - a. notified of the Panel's finding of the Minor Breach;
 - b. provided with a copy of the Panel's Finding and Reasons for Finding; and
 - c. offered an opportunity to make submissions as to how the Minor Breach should be dealt with under section 5.110(6) of the Act.
10. Cr Bell did not make any submissions regarding how the Minor Breach should be dealt with.

¹ *Local Government Act 1995* (WA), s 5.110(5).



Possible Sanctions

11. Section 5.110(6) of the *Local Government Act 1995* (WA) (“**the Act**”) provides that the Panel is to deal with a minor breach by:
- (a) *ordering that no sanction be imposed; or*
 - (b) *ordering that —*
 - (i) *the person against whom the complaint was made be publicly censured as specified in the order;*
or
 - (ii) *the person against whom the complaint was made apologise publicly as specified in the order;*
or
 - (iii) *the person against whom the complaint was made undertake training as specified in the order;*
or
 - (iv) *the person against whom the complaint was made pay to the local government specified in the order an amount equal to the amount of remuneration and allowances payable by the local government in relation to the complaint under Schedule 5.1 clause 9;*
- or*
- (c) *ordering 2 or more of the sanctions described in paragraph (b).*

Panel’s Consideration

12. Section 5.110(6) is about penalty. The Panel does not have the power to review any finding of a breach.
13. The Panel may order under section 5.110(6)(a), that no sanction be imposed with respect to the complaint, not to reverse the Panel’s finding of a breach, but to indicate that in all the circumstances the relevant councillor should not be penalised further.
14. Guidance as to the factors which the Panel may consider in determining the appropriate penalty to impose include, but are not limited to, the following:
- a. the nature and seriousness of the breaches;
 - b. the councillor's motivation for the contravention;
 - c. whether or not the councillor has shown any insight and remorse into his/her conduct;
 - d. whether the councillor has breached the Act knowingly or carelessly;
 - e. the councillor's disciplinary history;
 - f. likelihood or not of the councillor committing further breaches of the Act;
 - g. personal circumstances at the time of conduct, and of imposing the sanction;



- h. need to protect the public through general deterrence and maintain public confidence in local government; and
 - i. any other matters which may be regarded as aggravating conduct or mitigating its seriousness².
15. In this case the conduct of Cr Bell was deemed to be of particular seriousness as the Facebook Post:
- a. was made in a public forum;
 - b. misleadingly implied that the CEO of the Shire was being personally investigated due to improper conduct;
 - c. publicly criticised the CEO in a way that casts aspersions on their professional competence and credibility;
 - d. reflect adversely upon the decision of the Council; and
 - e. caused damage to the reputation of the local government.
16. This conduct is clearly not in keeping with the standards of behaviour that people reasonably expect of elected members.
17. The standards of behaviour expected of councillors are of a generally higher standard than a member of the public due to their public position.
18. Although the Panel appreciates that it has been some time since the Complaint was first made, the relevant delay was caused due to the referral of the matter to the Department CEO due to repeated findings of minor breach against Cr Bell.
19. Further, at the time the relevant conduct occurred, Cr Bell had already been found to have committed several minor breaches for substantially similar conduct. This indicates to the Panel that Cr Bell did not feel his prior conduct was significant and that he was dismissive of the impact his conduct may have on third parties.
20. In these circumstances, the Panel considers that the appropriate sanctions are that Cr Bell be publicly censured and make a public apology.
21. A censure is a public statement of disapprobation of a councillor's conduct. The Panel considers this to be an appropriate penalty as it will send a message to the community and other councillors that Cr Bell's conduct was unacceptable and deserving of a serious penalty.
22. Making a public apology is also a significant sanction, being a personal admission by the individual of wrongdoing. It is a suitable and appropriate penalty when a councillor's conduct:
- a. adversely affects particular individuals³; and/or
 - b. does not meet the standards other councillors seek to uphold.
23. The Panel confirms that at the time the Complaint was made, Schedule 5.1 clause 9 was not in effect and, consequently, the Panel does not order that Cr Bell recoup to the Shire the costs of the Department incurred in respect to the Complaint.

Panel's decision

² *Chief Executive Officer, Department of Local Government and Communities and Scaffidi [2017] WASAT 67 (S)*

³ *Treby and Local Government Standards Panel [2010] WASAT 81 [127] (Pritchard J).*



24. The Panel orders pursuant to section 5.110(6)(b)(i) and section 5.110(6)(b)(ii) and section 5.110(6)(c) of the Act that, in relation to the Minor Breach of regulation 7(1)(b) of the Regulations, Cr Bell:
- a. make a public apology in terms of the attached Order; and
 - b. be publicly censured in terms of the attached Order.

A handwritten signature in blue ink, appearing to read 'Mick Connolly'.

Mick Connolly (Presiding Member)

A handwritten signature in black ink, appearing to read 'Emma Power'.

Emma Power (Member)

A handwritten signature in black ink, appearing to read 'Peter Rogers'.

Peter Rogers (Member)



ORDER

Delivered 12 January 2021

DEFAMATION CAUTION

The general law of defamation, as modified by the *Defamation Act 2005 (WA)*, applies to the further release or publication of all or part of this document or its contents. Accordingly, appropriate caution should be exercised when considering the further dissemination and the method of retention of this document and its contents

THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Councillor Benjamin Bell, a councillor for the Shire of Toodyay **publicly apologise**, as specified in paragraph 3, or failing compliance with paragraph 3, then paragraph 4 below shall apply.
2. Councillor Benjamin Bell, a councillor for the Shire of Toodyay, be **censured** as specified in paragraph 5 below.

Public Apology

3. On the ordinary council meeting first occurring after the expiration of **28 days** from the date of service of this Order on him, Councillor Bell shall:
 - a. attend the relevant ordinary council meeting;
 - b. ask the presiding person for his or her permission to address the meeting to make a public apology to the public;
 - c. make the apology immediately after Public Question Time or during the Announcements part of the meeting, or at any other time when the meeting is open to the public, as the presiding person thinks fit; and
 - d. address the Council and public as follows, without saying any introductory words before the address, and without making any comments or statement after the address:

"I advise this meeting that:

- i. A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened *the Local Government (Rules of Conduct) Regulations 2007 (WA)* when I made a Facebook Post that was intended to cause detriment to Mr Stan Scott.
- i. The Panel found that I breached regulation 7(1)(b) of the said Regulations as my conduct was in breach of the Shire's Code of Conduct and deserving of a penalty and, further, my comments were misleading, derogatory and likely to cause detriment to Mr Stan Scott.
- ii. I accept that I should not have made the misleading and derogatory comments.
- iii. I now apologise to Mr Stan Scott, my fellow Councillors and the public."



4. If Councillor Bell fails to, or is unable to, comply with the requirements of paragraph 3 above then, within the next **28 days** following the ordinary council meeting referred to in paragraph 3 above, THEN the Chief Executive Officer shall arrange for the following notice of public apology to be published in no less than 10 point print or font:
- on the Facebook Page of the Shire of Toodyay;
 - on an appropriate page of the website of the Shire of Toodyay; and
 - be published in every Shire of Toodyay public or community newsletter (whether in electronic or print copy) (if any):

PUBLIC APOLOGY BY COUNCILLOR BENJAMIN BELL

A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened the Local Government (Rules of Conduct) Regulations 2007 (WA) when I made a Facebook Post that was intended to cause detriment to Mr Stan Scott.

The Panel found that I breached regulation 7(1)(b) of the said Regulations as my conduct was in breach of the Shire's Code of Conduct and deserving of a penalty and, further, my comments were misleading, derogatory and likely to cause detriment to Mr Stan Scott.

I accept that I should not have made the misleading and derogatory comments.

I now apologise to Mr Stan Scott, my fellow Councillors and the public.

Public Censure

5. Within the period of 29 days to 43 days from the day following the date of service of this Order on Councillor Bell, the Chief Executive Officer of the Shire of Toodyay shall arrange for the following Notice of Public Censure to be published, in no less than 10 point print or font:
- on the Facebook Page of the Shire of Toodyay;
 - on an appropriate page of the website of the Shire of Toodyay; and
 - be published in every Shire of Toodyay public or community newsletter (whether in electronic or print copy) (if any).



NOTICE OF PUBLIC CENSURE

The Local Government Standards Panel has found that Councillor Benjamin Bell, a Councillor of the Shire of Toodyay, breached regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007 (WA)* when he made a Facebook Post that was intended to cause detriment to Mr Stan Scott.



Councillor Bell's conduct was in breach of the Shire's Code of Conduct and deserving of a penalty and the comments were found by the Local Government Standard's Panel to be misleading, derogatory and likely to cause detriment to Mr Stan Scott.

The Panel censures Councillor Bell for the breach regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007 (WA)*.

**LOCAL GOVERNMENT
STANDARDS PANEL**



NOTICE TO THE PARTIES TO THE COMPLAINT

RIGHT TO HAVE PANEL DECISION REVIEWED BY THE STATE ADMINISTRATIVE TRIBUNAL

The Local Government Standards Panel (the Panel) advises:

- (1) Under section 5.125 of the *Local Government Act 1995* the person making a **complaint** and the person complained about each have the right to apply to the **State Administrative Tribunal (the SAT)** for a review of the Panel's decision in this matter. In this context, the term "decision" means a decision to dismiss the complaint or to make an order.
- (2) By rule 9(a) of the *State Administrative Tribunal Rules 2004*, subject to those rules an application to the SAT under its review jurisdiction **must be made within 28 days** of the day on which the Panel (as the decision-maker) gives a notice [see the Note below] under the *State Administrative Tribunal Act 2004 (SAT Act)*, section 20(1).
- (3) **The Panel's Breach Findings and these Findings and Reasons for Finding – Sanctions**, constitute the Panel's notice (i.e. the decision-maker's notice) given under the *SAT Act*, section 20(1).

Note:

- (1) This document may be given to a person in any of the ways provided for by sections 75 and 76 of the *Interpretation Act 1984*. [see s. 9.50 of the *Local Government Act 1995*]
- (2) Subsections 75(1) and (2) of the *Interpretation Act 1984* read:
 - (1) *Where a written law authorises or requires a document to be served by post, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, **service shall be deemed** to be effected by properly addressing and posting (by pre-paid post) the document as a letter to the last known address of the person to be served, and, **unless the contrary is proved, to have been effected at the time when the letter would have been delivered in the ordinary course of post.*** [Bold emphases added]
 - (2) *Where a written law authorises or requires a document to be served by registered post, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, then, if the document is eligible and acceptable for transmission as certified mail, the service of the document may be effected either by registered post or by certified mail."*
- (3) Section 76 of the *Interpretation Act 1984* reads:

"Where a written law authorises or requires a document to be served, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, without directing it to be served in a particular manner, service of that document may be effected on the person to be served —

 - (a) *by delivering the document to him personally; or*
 - (b) *by post in accordance with section 75(1); or*
 - (c) *by leaving it for him at his usual or last known place of abode, or if he is a principal of a business, at his usual or last known place of business; or*
 - (d) *in the case of a corporation or of an association of persons (whether incorporated or not), by delivering or leaving the document or posting it as a letter, addressed in each case to the corporation or association, at its principal place of business or principal office in the State."*