



Local Government Standards Panel

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| Complaint Number | SP 12 of 2018 [DLGSC 20180241] |
| Legislation | <i>Local Government Act 1995</i> |
| Complainant | Mayor Gary Brennan |
| Respondent | Councillor Brendan Kelly |
| Local Government | City of Bunbury |
| Regulation | Regulation 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007</i> |
| Panel Members | Mr Mark Beecroft (Presiding Member) Ms Elanor Rowe (Member) Ms Rebecca Aubrey (Member) |
| Heard | 19 September 2018 Determined on the documents |
| Outcome | Public apology |

SANCTION DECISION AND REASONS FOR DECISION

Published 21 October 2018

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.



Introduction

1. On 2 July 2018 the Panel found that Councillor Brendan Kelly (“Cr Kelly”), a member of the City of Bunbury (“City”), committed a breach of regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (the Regulations) by publishing comments in two Facebook posts following a Council decision on 23 January 2018 to add a representative of the Bunbury Geographe Chamber of Commerce and Industry (BGCCI) to the membership of the Council’s Policy Review and Development Committee (“the Policy Committee”).
2. On 17 July 2018, the Panel published its Finding and Reasons for Finding that Cr Kelly had breached regulation 7(1)(b).
3. The Panel reviewed all the evidence presented to it and said:

“Consideration of Post 3

70. Applying the tests for improper use of office outlined in paragraphs 27 to 32 above the Panel is satisfied to the required standard that Cr Kelly made improper use of his office when publishing Post 3. This is because:

- (a) It is more likely than not that a reasonable reader of Post 3 would form the view that Cr Kelly was, in his capacity as a Councillor, criticising a recent Council decision to appoint a member of the BGCCI to the Policy Committee.
- (b) The Panel has no reason to doubt the accuracy of the minutes of the OCM published on the City’s website. These minutes record that Cr Kelly and the other dissenting Councillors requested that their votes “against” be recorded. Cr Kelly does not submit that he was denied an opportunity to express his opposition to the Recommendation before Council voted. Councillors can present their views on a matter before Council votes. Once Council had made the Decision Cr Kelly had a duty to respect and be faithful to it, unless and until Council revisits the matter. It was not appropriate for him to continue the debate in social media after the Decision had been made.
- (c) Although a councillor can advise the public after a council meeting why they voted against a proposal they must be careful to word their comments in a way that indicates respect for the views of all other councillors and a commitment to their council’s decision.
- (d) It is likely that the Councillors who voted in favour of the Recommendation would be offended by Cr Kelly’s comment that there were no compelling arguments to support the Recommendation. This implies they did not give proper consideration to the matter. It is unprofessional to make such comments in the public domain and shows disrespect for the views of the several Councillors who voted in favour of the Recommendation.
- (e) It is also likely that Councillors who voted in favour of the Recommendation would be offended by Cr Kelly’s comment that the Decision would be seen as elitist and the BGCCI seen as self-interested. It is reasonable to interpret these comments as implying that Councillors who supported the Recommendation were giving favourable treatment to a body who would use the Policy Committee for its own benefit rather than for the benefit of the community.
- (f) It is more likely than not that a reasonable reader of Post 3 would consider Cr Kelly to be accusing Councillors who voted in favour of the Recommendation



of threatening its independence and allowing an outsider to take on Councillors' responsibilities.

- (g) It is not in the interests of the City or the Council for members of the public to see one Councillor criticising how other Councillors voted.
- (h) The Code of Conduct warns Councillors about the risk of damaging the City when they speak publicly. It says Councillors need to be positive, informative and appropriate when speaking in public. Cr Kelly did not take sufficient care to ensure his comments met the standards espoused in the Code of Conduct.
- (i) The Panel is satisfied to the required standard that any reasonable person who reads Post 3, knowing about the Decision and the rules that govern the conduct of councillors, would come to the view that Cr Kelly did not meet the standards of professionalism and respect for the Decision, and for his fellow Councillors, that he is expected to uphold.

73. The Panel finds that Cr Kelly made a conscious decision before publishing Post 3 to tell a significant number of members of the public that Councillors who voted in favour of the Recommendation had not properly considered the issues before voting.

74. Cr Kelly submits his comments were merely to "stimulate public discussion" on the issue. The Panel does not accept this. He could have stimulated further discussion by simply advising the public that the Decision had been made and the close vote indicated Council was divided. He could have told the public that he would wait to see how the new membership of the Policy Committee worked.

75. Cr Kelly's claim that he wanted to stimulate further discussion supports an inference that he wanted to keep his views about the Decision in the public domain.

76. On 2 February 2018 the Mayor wrote to Cr Kelly expressing concern about Cr Kelly's "negative observations" on social media about a Council decision. The Mayor asked Cr Kelly to reflect on his actions and consider the effect of his public statements on Council's good standing in the community.

77. There is no evidence that Cr Kelly acknowledged the Mayor's concerns. Despite receiving the Mayor's letter Cr Kelly added Post 4.

78. In Post 4 on 6 February 2018, 10 clear days after the Decision, Cr Kelly repeated his view that the Decision was wrong; "... (it) still doesn't pass the pub-test ... Elitist it is ..." and makes an adverse comment about the level of debate before Council "bestowed" a vote on BGCCI. The fact that Cr Kelly published Post 4 after the Mayor's letter shows Cr Kelly was determined to blame other Councillors in public for what he considered to be a bad decision.

80. The only reasonable inference is that by making the comments in Post 3 Cr Kelly intended to adversely affect the public's perception of how well the Councillors who voted to accept the Recommendation performed their roles and met their responsibility to make sound decision. This amounted to an intention to damage the Councillors who voted in favour of a BGCCI representative joining the Policy Committee.

Consideration of Post 4

89. Having considered the principles that apply to this element outlined in paragraphs 27 to 32 above the Panel finds that Cr Kelly also made improper use of his office when publishing this Post. He did so despite the Mayor having written to him on 2 February 2018.

90. The Panel does not accept this Post was an acceptable response to any of the Mayor's comments. Cr Kelly's reference to his being "accused of being precious" is irrelevant. The Post is improper because:



- (a) It is more likely than not that a significant number of people who followed Cr Kelly on the “Brendan Kelly for Bunbury” Facebook page would also have followed him on the “Brendan Kelly” page.
- (b) Post 4 must be considered in the context of Post 3 because it is more likely than not that a significant number of people who read Post 4 would have read or been aware of Post 3, realising they were linked.
- (c) In Post 4 Cr Kelly criticised the Decision, saying it still did not meet the pub-test and was elitist. He implied that Council debate was inadequate or inappropriate.
- (d) Although a councillor may advise the public after a council meeting why they voted against a proposal they must be careful to word their comments in a way that indicates respect for the views of all other councillors and a commitment to their council’s decision.
- (e) It is likely that the Councillors who voted in favour of the Recommendation would be offended by Cr Kelly’s comments in Post 4 referring to the “pub-test”, “elitist” and the level of debate.
- (f) It is more likely than not that a reasonable person who read Post 4, and who was aware of Post 3, would consider Cr Kelly to be reiterating his criticism of the Decision and his view that Councillors who voted in favour of the Recommendation did not meet their responsibility to make well-considered decisions.
- (g) The Code of Conduct warns Councillors who wish to speak publicly about the risk of damaging the City and the need to be positive, informative and appropriate. Cr Kelly did not take sufficient care to ensure his comments met the standards espoused in the Code of Conduct.
- (h) The Panel is satisfied to the required standard that any reasonable person who read Post 4, knowing about Post 3, the Decision and the rules that govern the conduct of councillors, would come to the view that Cr Kelly did not meet the standards of professionalism and respect for the Decision, and for his fellow Councillors, that he is expected to uphold.

92. The Panel finds that Cr Kelly made a conscious decision before publishing the Post to again criticise the Decision.

95. The only reasonable inference is that by again challenging the Decision in Post 4 Cr Kelly intended to adversely affect the public’s perception of how well the Councillors who voted for the Recommendation performed their roles as Councillors, and how well they met their responsibility to make sound decisions. As with Post 3, this amounted to an intention to damage the Councillors who voted in favour of the Recommendation.

Jurisdiction

4. The Panel convened on 19 September 2018 to consider how it should deal with the breach. The Panel accepted the Department’s advice that on this date there was no available information to indicate that Cr Kelly had ceased to be or was disqualified from being a councillor.



Possible sanctions

5. Section 5.110(6) of the Act provides that the Panel is to deal with a minor breach by —
- “(a) *dismissing the complaint; 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*
- (c) *ordering 2 or more of the sanctions described in paragraph (b).”*
6. Section 5.110(6) is about penalty. The Panel does not have the power to review any finding of a breach. The Panel may dismiss a complaint under section 5.110(6)(a), not to reverse the Panel’s finding of a breach but to indicate that in all the circumstances the councillor should not be penalised and the breach should not be recorded against the councillor’s name.

Cr Kelly’s submissions

7. 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
8. In a letter dated 18 July 2018, Cr Kelly was notified of the Panel’s findings, providing him with a copy of its Finding and Reasons for Finding published on 17 July 2018 and inviting him to make submissions on how the Panel should deal with the breach under section 5.110(6).
9. On 22 July 2018, the Department received an email from Cr Kelly attaching correspondence relating to the Finding and Reasons for Finding however the matter had already been dealt with by the Panel. Cr Kelly did not include any response to how the breach should be dealt with in his correspondence.
10. Cr Kelly was reminded that he had until 1 August 2018 to submit his views on how the breach should be dealt with (including reasons) for the Panel to consider.
11. In a letter dated 27 July 2018 Cr Kelly wrote to the Department and advised that he accepted the determination of the Panel that he was in breach of regulation 7(1)(b):
- “Cr Kelly accepts that the manner in which he brought a serious breach of accepted practise and the associated irregularities about a Council decision to the attention of the electors, ratepayers and residents of the City of Bunbury was inappropriate.”*

¹ Section 5.110(5) of the Act.



12. Cr Kelly requested the Panel deal with the Complaint by way of public censure.

Panel's consideration

13. Cr Kelly has not previously committed any minor breaches.

14. The Panel does not consider that dismissal of the Complaint is appropriate as this would indicate that the breach is so minor that no penalty is warranted.

15. Nor does the Panel consider that ordering Cr Kelly to undergo further training is appropriate or an adequate sanction.

16. In his letter dated 27 July 2018, Cr Kelly apologises for the manner in which he acted which he says was inappropriate. However, he then takes the opportunity, when responding to the Findings and Reasons for Findings, to continue to justify his conduct and further criticise the decision-making process of Council, and his fellow Councillors, in relation to the Council Decision.

17. The options left for the Panel to consider are to order the publication of a Notice of Public Censure or to order Cr Kelly to make a Public Apology (or both).

18. Cr Kelly requests that the Panel deal with the Complaint by way of an order that a Notice of Public Censure be published. A Notice of Public Censure is published by the local government's CEO at the expense of the local government, and such expense is significant where the Notice is to be published in a newspaper or newspapers.

19. In the present case, on the evidence available to the Panel, the Panel does not consider that it should order a public censure.

20. Cr Kelly made the comments publicly on Facebook, and the harm caused by those comments to his fellow Councillors was likely serious, widespread amongst the community and enduring. A public apology is appropriate as it reflects the impact of Cr Kelly's publicly made statements.

21. An apology in public is also appropriate when a councillor's conduct does not meet the standards other councillors seek to uphold. It serves as an acknowledgement that Cr Kelly's conduct was unacceptable and demonstrates that councillors are accountable for treating their fellow Councillor's with courtesy and respect.

22. The Panel considers a public apology to those who suffered the damage, Cr Kelly's fellow Councillors who voted in support of the Recommendation to include a BGCCI representative on the Policy Committee, is the appropriate penalty.



Panel's decision

23. Having regard to the Findings, the matters set out herein, and the general interests of local government in Western Australia, the Panel's decision on how the Minor Breach is to be dealt with under s5.110(6) of the Act, is that pursuant to subsection (b)(ii) of that section, Cr Kelly is ordered to publicly apologise to his fellow Councillors, in the terms of the attached Order.

Mark Beecroft (Presiding Member)

Elanor Rowe (Member)

Rebecca Aubrey (Deputy Member)

Date of Reasons – 21 October 2018



ATTACHMENT

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| Panel Members | Mr Mark Beecroft (Presiding Member) Ms Elanor Rowe (Member) Ms Rebecca Aubrey (Member) |
| Heard | 19 September 2018 Determined on the documents |
| Outcome | Public apology |

ORDER FOR PUBLIC APOLOGY

Published 21 October 2018

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THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Councillor Kelly (“Cr Kelly”), a Councillor for the City of Bunbury (City), publicly apologise to his fellow Councillors as specified in paragraph 2 below.
2. At the City’s first ordinary council meeting Cr Kelly attends after the expiration of 28 days from the date of service of this Order on him Cr Kelly shall:
 - (a) ask the presiding person for his or her permission to address the meeting to make a public apology to all other City Councillors;
 - (b) 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;
 - (c) address the Council 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 a provision of the *Local Government (Rules of Conduct) Regulations 2007* when, on an uncertain date in January or February 2018 and on 6 February 2018, I published comments on Facebook concerning a Council decision on 23 January 2018.
- (ii) The Panel found that by behaving in this manner I made improper use of my office as Councillor with the intention of damaging my fellow councillors who had voted in favour of a recommendation to include a BGCCI representative on the Council’s Policy Review and Development Committee, thereby committing a breach of regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007*.
- (iii) I accept that I should not have acted in such a manner and I apologise to my fellow Councillors for having done so.”

3. If Cr Kelly fails or is unable to comply with the requirements of paragraph 2 above he shall cause the following notice of public apology to be published in no less than 10 point print, as a one-column or two-column display advertisement in the first 10 pages of the South Western Times newspaper.



PUBLIC APOLOGY BY COUNCILLOR BRENDAN KELLY

A formal complaint was made to the Local Government Standards Panel alleging that I contravened a provision of the *Local Government (Rules of Conduct) Regulations 2007* on an uncertain date in January or February 2018 and on 6 February 2018, when I published comments on Facebook concerning a Council decision on 23 January 2018.

The Panel found:

(1) I breached regulation 7(1)(b) of the Rules of Conduct Regulations when I made improper use of my office when I published comments on Facebook with the intention of damaging my fellow Councillors who had voted in favour of a recommendation to include a Bunbury Geographe Chamber of Commerce and Industry representative on the Council's Policy Review and Development Committee.

(2) By behaving in this way to my fellow Councillors, I failed to meet the standards of conduct expected of a councillor

I apologise to my fellow Councillors for acting in such a manner.

Date of Order – 21 October 2018



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."