



Local Government Standards Panel

Complaint Number	20230251
Legislation	<i>Local Government Act 1995</i>
Complainant	Belmont Resident and Ratepayer Action Group (BRRAG) Inc
Respondent	Councillor Jenny Davis
Local Government	City of Belmont
Regulation	Regulation 18 of the <i>Local Government (Model Code of Conduct) Regulations 2021</i>
Panel Members	Mr Tim Fraser (Presiding Member) Mrs Emma Power (Member) Cr Peter Rogers (Member)
Heard	8 August 2023 Determined on the documents
Finding	Breach x 1 Regulation 18(1)(b)

FINDING AND REASONS FOR FINDING

Delivered 14 September 2023

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 8 August 2023, the Panel found that Councillor Jenny Davis a councillor of the City of Belmont ("**the City**") did commit a minor breach pursuant to the *Local Government Act 1995 (WA)* ("**the Act**") and Division 4 and Regulation 18 of the *Local Government (Model Code of Conduct) Regulations 2021* ("**the Regulations**") when she made certain comments to a member of the public at the City of Belmont Annual Civic Dinner on 3 December 2022 further set out in paragraph 17 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 and the *Local Government (Administration) Regulations 1996* provide for the circumstances in which a council member commits a minor breach.
4. Section 5.105(1) of the Act provides that a council or committee member commits a minor breach if the council or committee member contravenes a rule of conduct. Division 4 of the Regulations sets out the rules of conduct for council members and candidates.
5. Regulation 34D of the *Local Government (Administration) Regulations 1996* also provides that the contravention of a "*local law as to conduct*" is a minor breach pursuant to the Act.
6. 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.¹
7. 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.
8. 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 accurate²; and
 - b. the seriousness of any allegation made, as well as the gravity of the consequences flowing from a particular finding³.
9. The Panel does not possess investigative or supervisory powers.⁴ The Panel makes decisions about complaints regarding minor breaches solely upon the evidence presented to it and, where appropriate, materials in the public domain or published by the relevant local authority's website.
10. 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.
11. The Panel also must have regard to the general interests of local government in Western Australia⁵.

¹ Section 5.106 of the Act

² *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1

³ *Briginshaw v Briginshaw* (1938) 60 CLR 336

⁴ *Re and Local Government Standards Panel* [2015] WASC 51 (at paragraph 24)

⁵ Section 8(6) of Schedule 5.1 of the Act



12. The Panel is obliged to give notice of the reasons for any finding it makes under section 5.110(2) of the Act.

Jurisdiction and Procedural Fairness

13. On 2 June 2023 the Panel received a complaint from Mr Stuart Downing acting as complaints officer of the City (**“the Complaints Officer”**). The same enclosed a Complaint of Minor Breach Form dated 28 May 2023.

In the complaint form, the Complainant alleges that Cr Davis has breached regulation 18 of the Regulations when she approached a member of the public at a City of Belmont Annual Civic Dinner on 3 December 2023 and allegedly made comments that denigrated and humiliated him as referred to in paragraph 17 below (**“the Complaint”**).

14. The Panel convened on 8 August 2023 to consider the Complaint.
15. The Panel:
 - a. accepted the advice of the Department of Local Government, Sport and Cultural Industries (**“the Department”**) that, based on information published on the Western Australian Electoral Commission’s website, Cr Davis was:
 - i. elected to the Council of the City in October 2021 for a term expiring in October 2025; and
 - ii. a Councillor when the Panel met on 8 August 2023;
 - b. was satisfied the Complaint was made within six months after the alleged breach occurred⁶;
 - c. was satisfied that the City’s Complaints Officer had dealt with the Complaint in accordance with the administrative requirements in the Act for dealing with complaints of a minor breach⁷;
 - d. was satisfied the Department had provided procedural fairness to Cr Davis; and
 - e. found it had jurisdiction to consider the Complaint.

The Specifics of the Complaint

16. The Complainant provided the following comments and arguments in respect to the Complaint as summarised by the Panel:
 - a. Vaughn Barker and his partner Steve Vaughn, as hardworking and reliable volunteers of the City of Belmont, were invited as guests at the annual Civic Dinner held on Saturday 3 December 2022.
 - b. There were probably 100 or more guests in attendance.
 - c. Towards the end of the night, Cr Jenny Davis approached them. According to Mr Barker she proceeded to insult and humiliate him.
 - d. Cr Barker engaged in a long list of insults including:

⁶ Section 5.107(4) and 5.109(2) of the Act

⁷ Section 5.107 and 5.109 of the Act



- i. calling him the nastiest person she had ever met.
 - ii. repeating numerous times that he was a basket case, brought up his mental health conditions, and told him he should leave the function.
 - iii. saying he did not have any friends in Belmont because no one likes him, and everyone pretends to be his friend;
 - iv. disparaging his marriage, saying it was only a marriage of convenience;
 - v. bringing up his mental health issues;
 - vi. using swear words and profanity.
- e. Mr Barker asked her to leave them alone repeatedly, but Cr Davis proceeded to sit at their table, telling the wife of the community award winner:
- " They might look like nice guys, but they're horrible people. Steve and Vaughn Barker are among the most horrible people she has ever met."*
- f. According to Mr Barker Cr Davis then attacked his husband Steve Vaughn saying, *"He's got a lot of friends in this room, and a shame no one is a dentist."* whilst tapping her teeth.
- g. When he asked her to stop this, Cr Davis continued with the abuse including hate speech and homophobic slurs.
- h. According to Mr Barker Cr Davis also turned to abuse to former councillor Janet Powell offensively telling everyone at the table,
- "She has to wear a badge because everyone forgets who she is."*

Capacity as Councillor

- i. Cr Davis was acting in her capacity as Councillor as she was at a council sanctioned event.
- j. Cr Davis invited guests to her table in her capacity as councillor whilst wearing her councillor badge.
- k. The event was held at one of the facilities of the City of Belmont.
- l. There is no option other than to think she was at the time acting in the capacity as a councillor.

Detriment

- m. Mr Barker has suffered significantly as a result of the actions of Cr Davis, He felt embarrassed and humiliated in front of many residents in the room, as well as councillors some of who he had regarded as his friends.
- n. He found her comments about his mental health issues distressing and hurtful as well of those about his husband. It has always been difficult for gay men to be accepted in society and the hate speech and homophobic slurs he received from Cr Davis was a reminder of the lack of acceptance that still exists.
- o. Prior to this incident Mr Barker was a very valued volunteer at the City of Belmont. His spare time was utilised offering his services for many of the events at the City.
- p. Mr Barker made a complaint to the City regarding the incident.
- q. When he first made the complaint, he believed something would be done and the matter taken seriously but has been let down by the outcome.



- r. Mr Barker believed that as it happened at a workplace, the City of Belmont had a duty of care in the responsible service of alcohol, and they had failed.
- s. As a result of the outcome of the council decision he had no alternative but to resign from his volunteering duties as he did not feel safe. He felt that he could not be protected from further outbursts by Cr Davis and that the decision by Council amounted to him being called a liar about what had happened.
- t. This incident has been at a high cost to Mr Barker as he had to give up the volunteering. The incident has been talked about around the Belmont community and is known about by many people.
- u. Given prior complaints known to him, Mr Barker's fear of not being safe is not unreasonable in all of the circumstances.
- v. Consideration should also be given to the detriment caused to the City of Belmont including:
 - i. Other councillors who saw some or all of the incident were put in a position of having to recall what they had seen or not seen with one of their colleagues;
 - ii. The ratepayer has to fund the costs associated with the investigation.
 - iii. The incident happened at a City of Belmont function attended by residents, MLA Cassie Rowe and others that were accepting awards.
 - iv. It has been discussed by locals and the outcome that council supported was that such behaviour is acceptable.
- w. As a result of the council decision and subsequently finding out that the matter should have gone to the Standards Panel as a minor breach to start with, Mr Barker has suffered further distress.

Previous Decision by council

- x. Mr Barker originally sent a complaint regarding the incident to the Town.
- y. This matter was dealt with by the Council.
- z. An Independent Investigation took place with participation from Mr Barker. The report was provided to councillors for the meeting in February 2023.
- aa. The City refused provide the report to the Complainant.
- bb. According to the minutes of the February 2023 ordinary council meeting, it appears that the Independent Investigator may well have found that the complaint against Cr Davis was substantiated. It was broken down into two parts.
- cc. The Complainant believes the two parts may have been:
 - i. Was Cr Davis intoxicated at the time; and
 - ii. Did the alleged conduct alleged by the complainant take place.
- dd. The Minutes show Council was asked two questions:
 - i. to Confirm the alleged breach on page six of Confidential Attachment 14.1.2 has been substantiated; and
 - ii. Confirm the alleged breach on page eight of Confidential Attachment 14.1.2 has been substantiated



- ee. The Council did not support either of these questions as shown in the Minutes.
 - ff. The Complainant believes the CEO of the City has not followed the correct protocol for a complaint of this nature as the Complainant believes it is potentially a minor breach.
 - gg. Mr Barker should not be disadvantaged because the complaint was heard and decided by the Council who are colleagues of Cr Davis. Some of them witnessed parts of the incident and appear to be vague on what had happened.
 - hh. It would appear that Mr Christie may have been unaware of Regulation 18 and that it is a Standards Panel matter.
17. The Complainant also provided the following supporting material:
- a. Extract from City of Belmont Policy Manual - Regarding Civic Dinner – Community Guests;
 - b. Letter of Complaint from Mr Barker to the CEO regarding the incident;
 - c. Email dated 7 March 2023 from Mr Barker regarding resigning from his volunteering roles with the City; and
 - d. Letter from guest at the Civic Dinner noting events he witnessed.

The Respondent's Response

- 18. By an email dated 6 July 2023, Cr Davis provided a response to the Complaint via her legal representative.
- 19. Cr Davis denies that she has committed any minor breach.
- 20. Cr Davis' legal representative provided extensive comments and arguments regarding the Complaint as substantially summarised by the Panel:
 - a. Cr Davis submits that the Panel ought to find either:
 - i. the Complaint is vexatious, misconceived and/or without any substance and ought to be dismissed pursuant to section 5.110(3A) Act; or
 - ii. In the alternative, Cr Davis did not commit a minor breach because the alleged conduct did not occur.

Complaint Is Vexatious, Misconceived and/or Without Substance

- b. Cr Davis submits that the Complaint is vexatious, misconceived and/or without substance for the following reasons:
 - i. The alleged conduct set out in the Complaint has already been the subject of an independent investigation which was commissioned by the City of Belmont following a complaint made on 12 December 2022 by Mr Barker.
 - ii. The results of that investigation were put before the Council at an ordinary council meeting on 28 February 2023.
 - iii. The Council voted that neither of the allegations made by Mr Barker, which are effectively replicated in the present Complaint, were substantiated.
 - iv. As such, Cr Davis submits that the Panel should conclude that the present allegations have already been found, following an independent



investigation, to be without substance. This is particularly so, given that the Panel does not have the power to conduct investigations and is limited to the materials which are before it.

- v. Cr Davis submits that the Complaint is misconceived:
 - A. because it is effectively an effort by a third party to commence an appeal against the properly made decision of Council to dismiss Mr Barker's original complaint.
 - B. As the Act does not provide a legal right to an appeal from the dismissal of an alleged breach of a requirement imposed by Division 3 of the Regulations.
 - C. The Council not only followed principles of natural justice and fairness by commissioning an independent investigator to interview all parties concerned, but also followed both the Act and the City of Belmont "Complaint Investigation - Behaviour Complaints Policy".
 - D. As the Complaint is effectively a misconceived attempt to have an impermissible "second bite at the cherry". The Complainant should not be permitted to subvert the proper process for considering a complaint by seeking to repeat it to another forum.
- vi. In support of Cr Davis' submission that the Complaint is vexatious, she wishes to draw the Panel's attention to the following matters:
 - A. The Complaint alleges that the breaches occurred at an event at which the Complainant was not present and about which the Complainant can have no first-hand knowledge.
 - B. Whilst it is accepted that Mr Barker was present at the dinner, Cr Davis submits that the fact that the Complaint is not made by Mr Barker, but rather by a third party with which he is apparently associated, is evidence that the Complaint is vexatious.
 - C. Cr Davis believes that the Complainant (along with other members of the Belmont Resident and Ratepayer Action Group **[BRRAG]**) have, over the last two years, engaged in a sustained public campaign against Cr Davis and has repeatedly sought to smear her name by repeatedly making spurious allegations against her in a variety of forums.
 - D. The Complainant provided examples as to prior interactions with BRRAG which are not replicated here by the Panel.
 - E. The Complaint is, in respect of its most serious allegations (namely that Cr Davis made comments to Mr Barker which amount to "hate speech and homophobic slurs") vague and non-specific in its terms. Cr Davis submits that this lack of detail is indicative of the fact that the Complaint lacks credibility and is, in truth, vexatious.
- c. Cr Davis has already had to defend herself against this allegation when it was made to the Council (which she submits was the proper forum in which it ought to have been made, investigated and resolved).
- d. It is unfair and oppressive to require her to continue to defend herself against the same allegation, which is presented without any additional facts or substantial evidence.



- e. Mr Barker, after being notified that Council had determined that his original complaint was not substantiated, immediately approached the media and sought to publicly smear Cr Davis' reputation. Cr Davis submits that this is consistent with the conduct of a person who was motivated to act in bad faith.
- f. For these reasons, Cr Davis submits that the Panel ought to refuse to deal with the Complaint.

Alleged Breaches Did Not In Fact Occur

- g. If the Panel is not satisfied that the Complaint is misconceived, vexatious and/or without substance, Cr Davis submits that the Panel should find that the alleged breaches did not occur.
- h. Cr Davis denies that the conduct occurred as alleged (second issue) and submits that there is insufficient evidence to conclude that it did occur.
- i. It is not in dispute that Cr Davis was a member of Council at the relevant time.
- j. Cr Davis submits that there is insufficient evidence before the Panel to satisfy the required standard the conduct occurred. Cr Davis submits that there is evidence which is capable of positively satisfying the Panel that the alleged breach did not occur.
- k. Whilst Cr Davis accepts that she had a conversation with Mr Barker on the night in question, she strongly denies having behaved in the manner alleged by the Complaint.

Complaint lacks credibility and corroboration

- l. The Complaint is based solely upon the uncorroborated allegations of a person who, as outlined above, is associated with BRRAG. Cr Davis submits that the Group has a documented history of antipathy towards her. The Complainant herself was not present at the Civic Dinner and relies solely upon what Mr Barker has told her.
- m. Cr Davis observes that aside from Mr Barker's letter to the CEO, there is no positive evidence provided in support of the allegations made in the Complaint.
- n. Even though the conduct allegedly occurred in a crowded social setting the Complainant has provided no proof whatsoever in support of the Complaint.
- o. Cr Davis also strongly denies the allegation that she was intoxicated as alleged in the Complaint.
 - i. None of the people who have provided letters in support of her conduct on the night in question describe her behaving in a way which would suggest that she was intoxicated.
 - ii. The dot-point letter from a person with the name and address redacted denies Cr Davis the opportunity to make submissions regarding the credibility and motivation of the author.
 - iii. Cr Davis submits that the letter is not evidence intoxication but at best, it recounts the author's observation that "*drink staff were providing plenty of alcohol to the table*".
- p. Cr Davis submits that the Panel should infer two facts from the Complainant's failure to provide evidence in support of her claim, in circumstances where such evidence should have been available:



- i. that no corroborative evidence exists; and
- ii. no such evidence exists because the alleged conduct simply did not occur.
- q. The Complaint lacks credibility because it is made by, and on behalf of, persons who appear to be motivated by political considerations.

Evidence which contradicts that Cr Davis behaved in the manner alleged

- r. Cr Davis relies upon positive evidence which, in addition to establishing her general good character, also contradicts that the alleged conduct occurred.
- s. Cr Davis submits that the six-character witness annexures supplied are compelling evidence which clearly contradicts the Complainant's attempt to paint her as having been intoxicated and aggressive on the night in question.

Prior good character

- t. Cr Davis submits that as a matter of both logic and principle, a person who is of prior good character can be assumed to be less likely to have behaved poorly than a person who has a history of poor behaviour. Similarly, a person of prior good character is more capable of being believed when it comes to competing versions of events.
- u. Cr Davis is a person of impeccable prior character. She has been on Council for two terms and has thus been in the public eye for a considerable period. The character witness annexures evidence this.
- v. Cr Davis is staunchly opposed to all forms of discrimination and bigotry. She is deeply offended at and steadfastly rejects the Complainant's suggestion that she is a person who holds homophobic views or would make homophobic statements.

Third issue - Use of office

- w. As Cr Davis was present at the Civic Dinner in her capacity an elected member of Council, it is accepted that, if the Panel is satisfied to the requisite standard that the alleged conduct occurred, that this element is also met.

Fourth issue - Impropriety

- x. Cr Davis accepts that if the Panel is satisfied to the requisite standard that the alleged conduct occurred, and that the conduct constituted a use of office, that the Panel is likely to be satisfied that such a use of her office was improper, according to the way that term has been interpreted previously by the SAT.

Fifth issue - Detriment

- y. Cr Davis submits that, if the Panel is satisfied to the requisite standard that the alleged conduct occurred, it is likely to also be satisfied that the fifth element is met.

Conclusion

- z. Cr Davis strongly denies having behaved in the manner alleged in the Complaint.
- aa. The Complainant should not be afforded the opportunity to continually pursue an already discredited, politically motivated, allegation through multiple forums.
- bb. It is submitted on behalf of Cr Davis that the evidence produced in support makes it implausible that the allegations in the Complaint are true.



21. Cr Davis's legal representation also provided the following:
 - a. 8 Annexures containing statements as to Cr Davis' character from:
 - i. parties who attended the Civic Dinner; or
 - ii. parties who otherwise know Cr Davis.

Regulation 18

22. Regulation 18 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:

“ 18. Securing personal advantage or disadvantaging others

(1) A council member must not make improper use of their office —

(a) to gain, directly or indirectly, an advantage for the council member or any other person; or

(b) to cause detriment to the local government or any other person.

(2) Subclause (1) does not apply to conduct that contravenes section 5.93 of the Act or The Criminal Code section 83.”

23. To make a finding of a minor breach of regulation 18 of the Regulations the Panel must be satisfied to the required standard that:
 - a. Cr Davis was an elected member or a candidate at the time of the alleged breach and the time of the determination;
 - b. Cr Davis made use of her office as Council member or candidate of the City;
 - c. when viewed objectively, such use was an improper use of Cr Davis' 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 Davis engaged in the conduct in the belief that detriment would be suffered by another person.
24. As the Complainant has not alleged any advantage was intended to be gained, the Panel has only considered regulation 18(1)(b) in this case.

Code of Conduct

25. The City adopted their code of conduct during the Special Council Meeting 23 February 2021 (**“the Code of Conduct”**).
26. The relevant provisions of the Code of Conduct are as follows:

“ 4. Personal Integrity

(1) A council member, committee member or candidate should -



- (a) *act with reasonable care and diligence; and*
 - (b) *act with honesty and integrity; and*
 - (c) *act lawfully; and*
 - (d) *identify and appropriately manage any conflict of interest; and*
 - (e) *avoid damage to the reputation of the local government.*
-”

“5. Relationship with others

- (1) *A council member, committee member or candidate should —*
 - (a) *treat others with respect, courtesy and fairness; and*
 - (b) *respect and value diversity in the community.*
- (2) *A council member or committee member should maintain and contribute to a harmonious, safe and productive work environment.*

“8. Personal integrity

....

- (2) *A council member or committee member —*
 - (a) *must not be impaired by alcohol or drugs in the performance of their official duties; and*
 - (b) *must comply with all policies, procedures and resolutions of the local government; and*
 - (c) *must dress in a manner that recognises the importance of their position, in particular when attending meetings or representing the City in an official capacity; and*
 - (d) *must treat all people equally and respect diversity within the City to ensure everyone has the same opportunities in their dealings with the City. “*

“9. Relationship with others

A council member, committee member or candidate —

- (a) *must not bully or harass another person in any way; and*
-”

PANEL’S CONSIDERATION

Regulation 18(1)(b) – Allegation 1

Cr Davis was an Elected Member or a Candidate at the relevant times

27. Cr Davis 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 Davis made use of her office as Council Member of the City



29. As Cr Davis was attending the City's annual Civic Dinner in her capacity as an elected member, the Panel finds to the required standard that any conduct engaged in by her during that function was in her capacity as a council member of the City.

30. This element is met.

Cr Davis' use was improper

31. Deciding if conduct is an improper use of office requires something more than simply a demonstration of poor judgment or lack of wisdom. 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.

32. Impropriety does not depend on a councillor's consciousness of impropriety. It is to be judged objectively and does not involve an element of intent.

33. 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.

34. In the case of impropriety arising from an abuse of power, a councillor's alleged knowledge or means of knowledge of the circumstances in which the power is exercised and his or her purpose or intention in exercising the power will be important factors in determining whether the power has been abused⁸.

35. The Complaint has alleged that Cr Davis' conduct in insulting Mr Barker and being intoxicated at the annual Civic Dinner was improper.

36. Cr Davis denies that the conduct occurred or that she was impaired by alcohol.

37. In addition to the evidence supplied by the Complainant and Cr Davis, The Panel was also provided by the City with a copy of the Confidential Independent Investigation Report undertaken by the City of Belmont ("**the Investigation Report**").

38. The Panel intends to rely on the findings of the Investigation Report as the same was undertaken by a third disinterested party who had the opportunity and resources to thoroughly investigate the alleged incident.

39. The relevant findings of the Investigation Report remain confidential, as such the Panel will not repeat them here.

40. Despite this, the Panel is satisfied to the required standard that:

- a. an incident did occur between Cr Davis and Mr Barker at the City's annual Civic Dinner;
- b. Mr Barker reasonably found Cr Davis' conduct to be threatening and was distressed by the incident;
- c. Cr Davis did make a derogatory comment regarding Mr Barker;
- d. Cr Davis' argument in her response that the conduct did not occur is not substantiated; and
- e. Cr Davis' conduct was likely to have been influenced by alcohol consumption.

⁸ Treby and Local Government Standards Panel [2010] WASAT 81 (at 31); Chew v The Queen (1992) 173 CLR 626 (at 640 - 641 [Dawson JJ]); R v Byrnes (1995) 183 CLR 501 – (at 514 - 515 [Brennan, Deane, Toohey and Gaudron JJ] and at 521 [McHugh J]).



41. Given the above the Panel finds to the required standard that Cr Davis' conduct was in breach of the Code as follows:
 - a. Clause 5(1)(a) – Cr Davis did not treat Mr Barker with respect or courtesy;
 - b. Clause 8(2)(a) – Cr Davis was impaired by alcohol in the performance of her official duties as an elected member at the annual Civic Dinner; and
 - c. Clause 9(a) – Cr Davis acted in a manner that could be seen to be bullying or harassing Mr Barker.
42. The Panel notes it is interesting that the Minutes of the Ordinary Council Meeting of 28 February 2023 (Item 14.1) indicate that the Council did not confirm the alleged breaches found to have occurred in the Confidential Investigation Report.
43. For the purposes of clarification, the Panel confirms:
 - a. it is allowable under the Act for a Complainant to make a complaint under both Decision 3 of Regulations to the City and Council and also under Division 4 of the Regulations to the Panel. Each of these is a different process to be undertaken by different bodies; and
 - b. under the Act the Complaint's Officer of the City may refer an alleged breach to the Panel. In this case the Complaints Officer of the City is not the CEO and he, therefore, did not have the requisite power to refer the matter to the Panel as alleged by the Complainant.
44. The Panel comments:
 - a. that the Complaint largely relies on speculation as to the contents of the Investigation Report and verbal accounts of third parties. This conjecture alone is not enough to substantiate a breach and the Panel considers that making the Complaint was substantially motivated by political motives to punish Cr Davis for past interactions with BRRAG; and
 - b. Cr Davis' continued denial that the incident occurred, when the same was largely substantiated by the independent Investigation Report, is disappointing to the Panel.
45. Given the above, the Panel finds that it is more likely than not that Cr Davis' conduct was improper as:
 - a. the conduct was in breach of the Code of Conduct;
 - b. 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
 - c. the conduct is deserving of a penalty.
46. This element is met.

Regulation 18(1)(b) – Cr Davis intended to cause a disadvantage

47. "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.



48. It is not necessary to find whether any detriment was actually suffered⁹, but an intent to cause such detriment must be established.
49. In this case the Complainant has argued that Cr Davis caused a detriment both to Mr Barker and to the City. However, it is the intent of the conduct which the Panel must consider.
50. In this case, due to the personal and derogatory nature of certain of the comments by Cr Davis, the Panel finds that it is more likely than not that Cr Davis meant to insult and embarrass Mr Barker at a public event and thereby cause him a detriment.
51. The Panel considers that Cr Davis did not have any active intention to cause a detriment to the City by bringing the City into disrepute and that her actions were instead aimed at Mr Barker and possibly exacerbated by alcohol consumption.
52. Despite this the situation was, nonetheless, embarrassing for the City given the public nature of the event, the parties present and the subsequent required investigation.
53. The Panel therefore finds it was more likely than not that:
 - a. Cr Davis did have an intention to cause a detriment to Mr Barker when she made certain comments to him at the annual Civic Dinner of the City; and
 - b. Cr Davis did not have any intention to cause a detriment to the City due to her conduct at the annual Civic Dinner of the City
54. This element is met.

Conclusion

55. The elements required to find a breach of regulation 18 of the Regulations have been met.

⁹ *Yates and Local Government Standards Panel* [2012] WASAT 59 at [72]



Panel's Findings

56. Cr Davis did commit a breach of Regulation 18(1)(b) of the Regulations and therefore did commit a minor breach.

Signing

A handwritten signature in black ink, appearing to be 'T Fraser'.

Tim Fraser (Presiding Member)

A handwritten signature in black ink, appearing to be 'E Power'.

Emma Power (Legal Member)

A handwritten signature in black ink, appearing to be 'P Rogers'.

Peter Rogers (Deputy Member)



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Panel Members for Penalty Consideration	Mr Tim Fraser (Presiding Member) Councillor Peter Rogers (Member) Ms Elanor Rowe (Deputy Member)
Heard	8 August 2023 Determined on the documents
Penalty Considered	31 October 2023
Outcome	Public Apology

DECISION AND REASONS FOR DECISION

20 November 2023

DEFAMATION CAUTION

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Introduction

1. At its meeting on 8 August 2023, the Panel found that Councillor Jenny Davis (“Cr Davis”), a councillor for the City of Belmont (“the City”), committed one minor breach under the Local Government Act 1995 (WA) (“the Act”) and Regulation 18 of the *Local Government (Model Code of Conduct) Regulations 2021* (“the Regulations”) when she made certain comments to a member of the public at the City’s Annual Civic Dinner on 3 December 2022 (“Minor Breach”).
2. On 14 September 2023, the Panel published its Finding and Reasons for Finding (“Findings”) stating that Cr Davis had breached Regulation 18. The Panel reviewed all the evidence presented to it and made the following observations:
 - “45. *Given the above, the Panel finds that it is more likely than not that Cr Davis’ conduct was improper as:*
 - a. *the conduct was in breach of the Code of Conduct;*
 - b. *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*
 - c. *the conduct is deserving of a penalty.*

.....
 49. *In this case the Complainant has argued that Cr Davis caused a detriment both to Mr Barker and to the City. However, it is the intent of the conduct which the Panel must consider.*
 50. *In this case, due to the personal and derogatory nature of certain of the comments by Cr Davis, the Panel finds that it is more likely than not that Cr Davis meant to insult and embarrass Mr Barker at a public event and thereby cause him a detriment.*
 51. *The Panel considers that Cr Davis did not have any active intention to cause a detriment to the City by bringing the City into disrepute and that her actions were instead aimed at Mr Barker and possibly exacerbated by alcohol consumption.*
 52. *Despite this the situation was, nonetheless, embarrassing for the City given the public nature of the event, the parties present and the subsequent required investigation.”*

Jurisdiction and Law

3. The Panel convened on 31 October 2023, to consider how it should deal with the Minor Breach. 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 Davis had ceased to be, or was disqualified from being, a councillor.

Possible Sanctions



4. Section 5.110(6) of 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).*
5. Section 5.110(6) is about penalty. The Panel does not have the power to review any finding of a breach. Under section 5.110(6)(a), the Panel may order that no sanction be imposed; not to reverse the finding of a breach, but to however indicate that in all the circumstances the relevant councillor should not be penalised further.
6. Sub-section 5.110(6)(b)(iv) (in respect of a monetary sanction) was introduced in 2019 to allow the Panel to require a councillor to personally bear the cost of dealing with a complaint, which in other circumstances, would be paid by the local government concerned. This ensures the cost of a breach is borne by the councillor individually, and not simply passed onto the local government and therefore, ultimately, rate payers.

Cr Davis'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. By a letter dated 14 September 2023, Cr Davis was:
- i. notified of the Panel's Finding of the Minor Breach;
 - ii. provided with a copy of the Panel's Findings; and
 - iii. offered an opportunity to make submissions as to how the Minor Breach should be dealt with under section 5.110(6) of the Act.

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



9. On 12 October 2023, the Department received a response (“Response”) from Cr Davis’s solicitor, *Holborn Lenhoff Massey*. In summary, it was submitted:
- a. Cr Davis was a person of impeccable prior character;
 - b. she had already experienced significant negative consequences, including damage to her reputation and to her physical and mental health; and
 - c. the Panel should deal with the Minor Breach by ordering that no further sanction be imposed. Alternatively, Cr Davis should be publicly censured.

Panel’s Consideration

10. The purpose of the imposition of a sanction under the Act is generally for the protection of the public and the maintenance of standards of council members. Furthermore, it reflects the disapproval of a contravention of the Regulations, dissuades councillors from other local governments from engaging in similar conduct and facilitates the maintenance of appropriate standards of behaviour by councillors. Guidance on the factors which the Panel may consider in determining the appropriate penalty to impose, include, but are not limited to:
- 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. the likelihood or not of the councillor committing further breaches of the Act;
 - g. the councillor’s personal circumstances at the time of the conduct, and at the time of imposing the sanction;
 - h. the 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 seriousness.
11. Cr Davis’s behaviour, the subject of the Minor Breach Finding, was considered a serious matter. When deciding what sanction to impose, the Panel must consider how the penalty will help to guide other councillors and dissuade them from engaging in similar conduct.
12. The Panel does not consider it appropriate to impose no sanction in relation to the Minor Breach, as this would indicate that it was so minor that no penalty is warranted.



13. In this case, the Panel finds it fair and reasonable that Cr Davis makes a public apology to Mr Barker, being the party who she acted improperly towards. The standards of behaviour expected of elected members are of a generally higher standard than a member of the public, due to their prominent positions in the community. Cr Davis's conduct was clearly highly offensive and potentially damaging.
14. Making a public apology is a significant sanction, being a personal admission by the individual of wrongdoing. It is a suitable and appropriate penalty when an elected member's conduct:
- a. adversely affects a particular individual or party; and / or
 - b. does not meet the standards other councillors seek to uphold.
15. An apology will go a little way to make amends for Cr Davis's conduct and to help repair the damage caused.

Panel's Decision

16. 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 Cr Davis is ordered to make a public apology pursuant to subsection (b)(ii) in terms as set out in the attached Order.

Signing

Tim Fraser (Presiding Member)

Elanor Rowe (Deputy Member)

Peter Rogers (Deputy Member)



ORDER

20 November 2023

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 Jenny Davis (“Cr Davis”), a councillor for the City of Belmont, publicly apologise, as specified in paragraph 2 below, or failing compliance with paragraph 2, then paragraph 3 below.

Public Apology

2. At the ordinary council meeting first occurring after the expiration of 28 days from the date of service of this Order on him, Cr Davis 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 (Model Code of Conduct) 2021* when I made certain comments to a member of the public at the City’s Annual Civic Dinner held on 3 December 2022.
- ii. The Panel found that by behaving in this manner I committed one breach of Regulation 18 of the said Regulations.



iii. I accept that I should not have acted in such a manner, and I now apologise to Mr Vaughn Barker, for having done so.”

3. If Cr Davis fails to, or is unable to, comply with the requirements of paragraph 2 above in the required timeframe then, within the next 28 days following the ordinary council meeting referred to in paragraph 2 above:
- a. Cr Davis 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 “*Southern Chronicles*” newspaper; and
 - b. the Chief Executive Officer of the City of Belmont shall arrange for the following notice of public apology to be published in no less than 10-point print or font:
 - i. on the Facebook page of the City of Belmont; and
 - ii. in an appropriate place on the website of the City of Belmont; and
 - iii. in the next occurring issues of all City of Belmont community and public newsletters (if any) (whether in electronic or print copy).

PUBLIC APOLOGY BY COUNCILLOR JENNY DAVIS

A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened the *Local Government (Model Code of Conduct) Regulations 2021* when I made certain comments to a member of the public at the City’s Annual Civic Dinner held on 3 December 2022.

The Panel found that by behaving in this manner I committed one breach of Regulation 18 of the said Regulations.

I accept that I should not have acted in such a manner, and I now apologise to Mr Vaughn Barker, for having done so.

Date of Order: 20 November 2023



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."*