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## Local Government Standards Panel

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Complaint Number	SP 2018-107
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Councillor Chontelle Sands</b>
<b>Respondent</b>	<b>Deputy Mayor Lee-Anne Smith</b>
Local Government	<b>City of Cockburn</b>
Regulation	Regulation 7 of the <i>Local Government (Rules of Conduct)</i> <i>Regulations 2007</i>
Panel Members	Mrs Emma Power (Presiding Member) Ms Sarah Rizk (Member) Councillor Paul Kelly (Member)
Heard	9 April 2019 Determined on the documents
Finding	Two (2) minor breach of Regulation 7

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### FINDING AND REASONS FOR FINDING

Delivered 29 April 2019

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#### 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 9 April 2019, the Panel found that Deputy Mayor Lee-Anne Smith, the deputy Mayor of the City of Cockburn ("**the City**"):
  - a. did commit a minor breach pursuant to the Local Government Act 1995 (WA) ("**the Act**"), regulation 7(1)(b) of the Local Government (Rules of Conduct) Regulations 2007 ("**the Regulations**") when, at a special Meeting of Council held 22 August 2018, she falsely stated that Cr Chontelle Sands was the subject of two minor breach complaints and an investigation by the Department of Local Government, Sport and Cultural Industries ("**the Department**") as set out in paragraph 19 below;
  - b. did commit a minor breach pursuant to the Act and regulation 7(1)(b) of the Regulations when at a special Meeting of Council held 22 August 2018, she stated that Cr Chontelle Sands had lied about having an impartiality interest in respect to a matter previously considered by the Council as set out in paragraph 19 below; and
  - c. did not commit a minor breach pursuant to the Act and regulation 7(1)(a) of the Regulations when she engaged in the conduct described above.

## 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.<sup>1</sup>
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.<sup>2</sup>
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 accurate<sup>3</sup>; and
  - b. the seriousness of any allegation made, as well as the gravity of the consequences flowing from a particular finding<sup>4</sup>.
7. The Panel does not possess investigative or supervisory powers.<sup>5</sup> 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.

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<sup>1</sup> Section 5.105 of the Act

<sup>2</sup> Section 5.106 of the Act

<sup>3</sup> *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1

<sup>4</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336

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



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 Australia<sup>6</sup>.
10. The Panel is obliged to give notice of the reasons for any finding it makes under section 5.110(2) of the Act.

### **Regulation 7**

11. 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.*

### **Jurisdiction and Procedural Fairness**

12. On 6 November 2018 the Panel received an email enclosing a letter dated 5 November 2018 from Mr Stephen Cain, the complaints officer of the City (**“the Complaints Officer”**). The same attached a Complaint of Minor Breach Form (with an explanatory letter and attachments) dated 4 November 2018.
13. In her letter of complaint Cr Sands alleges that Deputy Mayor Smith has breached:
  - a. regulation 7(1)(a) and regulation 7(1)(b) of the Regulations by securing an advantage to herself and causing a detriment to Cr Sands by deliberately issuing false statements regarding Cr Sands in the terms specified in paragraph 19 below (**“Allegation 1”**); and
  - b. regulation 7(1)(a) and regulation 7(1)(b) of the Regulations by securing an advantage to herself and causing a detriment to Cr Sands by deliberately issuing false statements regarding an alleged undeclared impartiality interest of Cr Sands as specified in paragraph 19 below (**“Allegation 2”**),  
  
(together **“the Complaint”**).
14. The Panel notes that the comments were also subsequently published in various local media publications. However, this is not considered a separate breach as the quotes are simply a reproduction of the comments made in respect to Allegation 1 and Allegation 2 and arise from the same conduct.
15. The Panel convened on 9 April 2019 to consider the Complaint.
16. The Panel:

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<sup>6</sup> Section 8(6) of Schedule 5.1 of the Act



- a. accepted the advice of the Department that, based on information published on the Western Australian Electoral Commission's website, Deputy Mayor Smith was:
  - i. last elected to the Council of the City in October 2017 for a term expiring in October 2021;
  - ii. a Councillor at the time of the alleged breach; and
  - iii. a Councillor when the Panel met on 9 April 2019;
- b. was satisfied the Complaint was made within two years after the alleged breach occurred<sup>7</sup>;
- 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 breach<sup>8</sup>;
- d. was satisfied the Department had provided procedural fairness to Deputy Mayor Smith; and
- e. found it had jurisdiction to consider the Complaint.

### **The Specifics of the Complaint**

17. The relevant background of the Complaint is that at a Special Meeting of Council held 22 August 2018 ("**the Special Meeting**") an agenda Item (item 10) being a Notice of Motion was raised in respect to the Council passing a vote of no confidence in Deputy Mayor Smith.
18. Cr Sands presented an alternative motion on the matter, spoke for some time regarding the same and, in particular, several alleged breaches by Deputy Mayor Smith of the City's Code of Conduct.
19. Following Cr Sand's speech and another councillor speaking in the alternative, Deputy Mayor Smith posed various questions and, during her speech the following exchange was made including the relevant comments the subject of the Complaint shown bold:

*"Deputy Mayor: Yes, just my last question. I am fully aware that tonight is about me. It is not about other Elected Members Code of Conduct.*

*This is about me tonight, however I do have to ask everybody sitting around the table, have there been occasions where you have been at breaches of the Code of Conduct?*

*Cr Sands I just need to ask the question, you have been on Council 10 months and I know this is about me, but is it true that already you have had to make one apology to staff?*

*You have had to make one Face book retraction for directing staff and organising an event of your own?*

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<sup>7</sup> Section 5.107(4) and 5.109(2) of the Act

<sup>8</sup> Section 5.107 and 5.109 of the Act



**Are you aware that you currently are under investigation by the Department of Local Government for two submitted breaches?**  
("Comment 1")

**Do you remember lying about your impartiality interest?** ("Comment 2")

*Now I say that very, very cautiously because I have defamation claims out there and I already have somebody that has made admission and offered to make amends for what they have done to me, so I am very, very careful about making allegations, **but do you remember lying about your impartiality interest in terms of the MCCC** ("Comment 3") and do you remember the comments that you made when you said the MCCC are screwed?*

*Do you remember all of that?*

*Cr Separovich: Point of order.*

*Mayor: Yes. Deputy Mayor Smith*

*Deputy Mayor: Do you remember all of that? I will just leave it at that. This is about me."*

20. Note that the Comment numbers have been inserted by the Panel. The bolded Comments are referred to together in this finding as "**the Statements**".
21. The Complainant makes the following arguments and comments regarding the Statements:
  - a. the Statements were issued falsely;
  - b. the Statements may have unduly influenced the course of the meeting, securing an advantage for Deputy Mayor Smith and a disadvantage to Cr Sands;
  - c. Comment 1 was made to cause detriment and impede Cr Sand's credibility by implying she is a liar and under investigation;
  - d. the Statements also cast doubt on the validity of evidence she had presented in support of the motion, thereby securing an advantage for Deputy Mayor Smith;
  - e. Cr Sands confirmed with the Chief Executive Officer of the City ("**the CEO**") and the Department that no complaint had ever been received and no investigation was underway (confirmation email also supplied);
  - f. the allegations and comments by Deputy Mayor Smith were also published by the local media including the front page of the Cockburn Gazette on 28 August 2018;
  - g. Comment 2 and Comment 3 were simply untrue and offensive;
  - h. Cr Sands does not believe that she has any interest in the matters pertaining to the Melville Cockburn Chamber of Commerce ("**MCCC**"). She sought advice on this specific matter from the Governance Officer of the City and from the WA Local Government Association ("**WALGA**") who confirmed she did not have an interest in the matter;



- i. Deputy Mayor Smith made use of her position as an elected member and Deputy Mayor of the City to unduly influence other elected members in attendance at the Special Meeting to make false accusations to secure a personal advantage for herself and to cause significant detriment to Cr Sand's character and loss of credibility with her fellow elected members, the City's staff and members of the public.
22. In the Complaint, the Complainant also provided:
- a. copy of an article entitled "*Close call for Smith*" by Jon Bassett published 28 August on the front cover of the Cockburn Gazette;
  - b. extracts from Facebook Posts by the Cockburn Gazette referring to the above article; and
  - c. transcript relating to Agenda Item 10 at the Special Meeting; and
  - d. messages from Cr Sands to Cockburn Gazette requesting a retraction of comments alleging she was the subject of any complaint or investigation.

### **Respondent's Response**

23. By two emails dated 7 December 2018 Deputy Mayor Smith provided a response to the Complaint.
24. Deputy Mayor Smith denies that she has committed any minor breach and asserts that not all of the information is correct.
25. Deputy Mayor Smith makes the following comments and arguments in respect to the allegations of Minor Breach:
- a. she believes the following comments to be true:
    - i. "*Lying about your impartiality interest*"; and
    - ii. "*Lying about your impartiality interest in terms of the MCCC*";
  - b. there was previously a website link to the MCCC showing Cr Sands was on the Board. This has changed and now and she is no longer on the Board;
  - c. there is bad blood between Cr Sands and the MCCC and she recently put in a motion at Council to deny them a City grant;
  - d. Cr Sands only sought advice as to the conflict after Deputy Mayor Smith questioned her impartiality after the relevant meeting in May 2018 and Cr Sand's assertion that she sought advice is untrue;
  - e. the Director of Governance supplied an email to Deputy Mayor Smith with the following text:

*"Councillor Sands did speak to me the day after the Council Meeting following receipt of your email and informed me that she did not think she had a Conflict of Interest in the Matter because the formalities of the new Chamber had not been completed. I advised her that it would have been prudent for her to raise the matter prior to the Meeting and I could have suggested she declare and Impartiality Interest at that time, which would not have prevented her from taking part in debate and voting on the item."*
  - f. the assertion that the organisation had not been established yet was not true as per the following email:

*"Hi Chontelle*



*The incorporation number is A1023019R and it has been incorporated since 17/11/2017.*

*The organisation holds a .org.au website which cannot be registered if it is not an incorporated association.*

*I suggest you update Don with the correct details.”*

- g. regarding Comment 1, Deputy Mayor Smith was mid-way through submitting complaints at the time these claims were made and was under intense pressure;
  - h. a motion of no confidence with so many alleged allegations publicly humiliating her with no opportunity to defend herself, other than ask questions, made it difficult to think straight;
  - i. the following day she emailed the Department to notify them she was submitting two complaints (email attached);
  - j. unfortunately, due to the intense pressure she has been diagnosed with various mental health issues and is taking medication;
  - k. she will absolutely still be submitting complaints however, given her current state she is a little slow at getting through administration issues relating to this event that still gives her traumatic flashbacks;
  - l. she feels she has already been punished enough over these allegations and hopes that the Panel takes this into consideration when deliberating a finding; and
  - m. many of the comments by Cr Sands on the night were untrue and gave elected members no time to make an informed decision. She used her position to influence a decision and Deputy Mayor Smith was given no opportunity to defend herself.
26. Deputy Mayor Smith also provided the following additional documentation:
- a. Email dated 10 May 2018 from Deputy Mayor Smith to Cr Sands regarding declaration of an impartiality interest;
  - b. Email chain including the following:
    - i. Email dated 10 May 2018 from Deputy Mayor Smith to Director of Governance regarding a possible impartiality issue;
    - ii. Email dated 11 May 2018 from Director of Governance to Deputy Mayor Smith regarding the impartiality interest issue;
  - c. Email dated 11 May 2018 from Deputy Mayor Smith to Director of Governance attaching an extract from the Beeliar Regional Chamber of Commerce;
  - d. Email chain including the following:
    - i. Email dated 23 August 2018 from Deputy Mayor Smith to Strategy and Research Officer of the Department noting that Deputy Mayor Smith wished to make two complaints;
    - ii. Email dated 24 August 2018 from Strategy and Research Officer of the Department to Deputy Mayor Smith noting that complaints were required to be made in the designated form;
    - iii. Email dated 24 August 2018 from Deputy Mayor Smith to Director of Governance noting she would subsequently lodge complaints;



- iv. Email dated 24 August 2018 from Director of Governance to Deputy Mayor Smith noting that any complaint must be lodged with the CEO as Complaint Officer.

### **Elements of a Minor Breach**

27. To make a finding of a minor breach of regulation 7(1)(a) of the Regulations the Panel must be satisfied that:
  - a. Deputy Mayor Smith was a councillor at the time of the alleged breach and the time of the determination; and
  - b. Deputy Mayor Smith made use of her office as Council member of the City;
  - c. when viewed objectively, such use was an improper use of Deputy Mayor Smith'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<sup>9</sup>; and
    - ii. was so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty<sup>10</sup>;
  - d. Deputy Mayor Smith engaged in the conduct in the belief that an advantage would be gained directly or indirectly for herself (or any other person); and
  - e. the conduct in question does not fall under section 5.93 of the Act or *The Criminal Code* section 83.
28. 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. Deputy Mayor Smith was an elected member at the time of the alleged breach and the time of the determination; and
  - b. Deputy Mayor Smith made use of her office as Council member of the City;
  - c. when viewed objectively, such use was an improper use of Deputy Mayor Smith'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. Deputy Mayor Smith engaged in the conduct in the belief that detriment would be suffered by another person; and
  - e. the conduct in question does not fall under section 5.93 of the Act or *The Criminal Code* section 83.

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<sup>9</sup> *Treby and Local Government Standards Panel* [2010] WASAT 81 at [26] – [34]

<sup>10</sup> *Hipkins and Local Government Standards Panel* [2014] WASAT 48 at [9]





## Panel's Consideration

### **Allegation 1**

#### Deputy Mayor Smith was a Councillor at the relevant times

29. Deputy Mayor Smith was an elected member at the time of the alleged breach and at the date the Panel considered the Complaint.

#### Deputy Mayor Smith made use of her office as Council member of the City

30. The Statements were made by Deputy Mayor Smith at the Special Meeting and it was clear she was speaking in her capacity as Deputy Mayor and regarding a matter before Council.
31. The Panel finds, to the required standard, that Deputy Mayor Smith was acting in her role as councillor and therefore making use of her office as a council member.
32. This element is met.

#### Deputy Mayor Smith's use was improper

33. Deciding if conduct is an improper use of office requires something more than simply a demonstration of poor judgment or a lack of wisdom<sup>11</sup>.
34. Impropriety consists in a breach of the standards of conduct that would be expected of a person in the position of a councillor by reasonable persons with knowledge of the duties, powers and authority of that person's position as a councillor and the circumstances of the case<sup>12</sup>.
35. It requires unsuitable or inappropriate behaviour that a councillor knew (or ought to have known) was not authorised.
36. 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<sup>13</sup>.
37. In addition, any decision as to what is "improper" cannot be made in isolation but must be considered in the relevant context. Such context will include the specifics of the relevant event as well as councillor's formal role and responsibilities including the councillor's fiduciary duties and any relevant code of conduct.

38. The City has an Elected Members Code of Conduct adopted by the Council in 2018 (**"the Code of Conduct"**) which prescribes guidelines for dealing with including the following relevant provisions:

#### **"3. CONDUCT**

##### *3.1 Elected Members shall act and be seen to act;*

- *properly and in accordance with the requirements of the law and the terms of this Code;*

.....

- *to make no allegations which are improper or derogatory and refrain from any form of conduct, in the performance of their official or professional*

<sup>11</sup> Complaint of Minor Breach No. SP 3 of 2013

<sup>12</sup> *Yates and Local Government Standards Panel* [2012] WASAT 59

<sup>13</sup> *Chew v R* [1992] HCA 18



*duties, which may cause any reasonable person unwarranted offence or embarrassment.*

*3.2 Elected Members shall observe the highest standards of honesty and integrity and avoid conduct which might suggest any departure from these standards and be frank and honest in their official dealing with staff."*

39. The Panel finds that in making Comment 1 it is more likely than not that Deputy Mayor Smith breached:
- clause 3.1 of the Code of Conduct as she made allegations that were improper and derogatory and without basis in a format she knew would cause Cr Sands unwarranted offence and embarrassment; and
  - clause 3.2 of the Code of Conduct as such conduct could not be seen to be an observation of the highest standards of honesty and integrity.
40. In this particular case, Comment 1 was made in the context that Deputy Mayor Smith knew that:
- no minor complaint had been made against Cr Sands;
  - Cr Sands was not being investigated by the Department; and
  - Comment 1 was therefore false in all respects.
41. In that context, a reasonable person could only categorise Statement 1 as recklessly false with no reasonable basis. As such, the Panel finds to the required standard that this was the case.
42. Deputy Mayor Smith's argument that she always intended to make complaints herself are not compelling. At the time of the Special Meeting she had not made such complaints and at the date the Panel considered this matter, still had not made any complaint regarding Cr Sands.
43. In addition, the Panel considers the actions of Deputy Mayor Smith following the Special Meeting in respect to sending emails regarding making a future complaint indicate that Deputy Mayor Smith was fully aware that her comments were false and wrongful.
44. The Panel appreciates that the Special Meeting would have been stressful for Deputy Mayor Smith, however, this cannot excuse such a blatant disregard for the truth and accuracy.
45. The Panel finds to the required standard that by making Comment 1 Deputy Mayor Smith acted improperly as such conduct:
- breached clause 3.1 and clause 3.2 of the Code;
  - involved a breach of the standards of conduct that would be expected of a person in the position of councillor by reasonable persons; and
  - was so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty.
46. This element is met.

Regulation 7(1)(a) - Deputy Mayor Smith intended an advantage to be gained directly or indirectly

47. The definitions of the noun 'advantage' in the Shorter Oxford English Dictionary (6<sup>th</sup> ed) include: a favouring circumstance; something which gives one a better position, benefit; increased well-being or convenience or pecuniary profit.



48. The Panel considers the term 'advantage' in regulation 7(1)(a) is to be construed widely, and includes a financial or a non-financial benefit, gain or profit, or any state, circumstance, opportunity or means specially favourable.<sup>14</sup>
49. The Complainant does not specifically argue what kind of advantage Deputy Mayor Smith was attempting to secure for herself.
50. The Panel has considered that any likely advantage would be to move the focus of the Special Meeting away from Deputy Mayor Smith.
51. However, it is difficult to discern how this could be considered:
  - a. to give any meaningful advantage to Deputy Mayor Smith; or
  - b. to be the type of advantage intended to be administered by the Act and Regulations.
52. The Panel considers that, although "advantage" is to be construed widely, comments by a party made to deflect attention is not the kind of "advantage" contemplated to be controlled by regulation 7(1)(a) of the Regulations.
53. The Panel finds that it is more likely than Deputy Mayor Smith's comments were not intended to cause an advantage to herself or any other party in the manner that the word "advantage" is intended to be understood in the Regulations and that the purpose of the relevant comments were to disadvantage Cr Sands as set out below.
54. This element is not met.

Regulation 7(1)(b) – Deputy Mayor Smith intended detriment to be suffered by another person

55. "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.
56. It is not necessary to find whether any detriment was actually suffered<sup>15</sup>, but an intent to cause such detriment must be established.
57. Deputy Mayor Smith's argument that she was under intense pressure and that it was difficult to think straight are not particularly convincing. It is acknowledged that she would have been under pressure at the time Comment 1 was made, however, the evidence does not support any argument that the same was made innocently or merely to inform the public or other elected members.
58. In the context of:
  - a. the Special Meeting being held regarding a vote of no confidence against Deputy Mayor Smith;
  - b. the role that Cr Sands was taking in the discussion; and
  - c. the fact that Deputy Mayor Smith knew Comment 1 was false,the Panel finds to the required standard that the only reasonable explanation for making Comment 1 was to cause Cr Sands embarrassment and humiliation and to attempt to disadvantage the position that Cr Sands was taking against Deputy Mayor Smith.

<sup>14</sup> Complaint SP 12 and 13 of 2011

<sup>15</sup> *Yates and Local Government Standards Panel* [2012] WASAT 59 at [72]



59. The Panel finds that it is more likely than not that Deputy Mayor Smith intended Cr Sands to suffer a detriment by making Comment 1.

60. This element is met.

Other Conduct under the Act or Criminal Code

61. The conduct in question does not fall under section 5.93 of the Act or *The Criminal Code* section 83.

62. This element is met.

Conclusion

63. Given the above, the Panel finds that:

- a. the elements required to find a breach of regulation 7(1)(a) of the Regulations have not been met and Deputy Mayor Smith did not commit a minor breach; and
- b. The elements required to find a breach of regulation 7(1)(b) of the Regulations have been met and Deputy Mayor Smith did commit a minor breach.

**Allegation 2**

Deputy Mayor Smith was a Councillor at the relevant times

64. Deputy Mayor Smith was an elected member at the time of the alleged breach and at the date the Panel considered the Complaint.

Deputy Mayor Smith made use of her office as Council member of the City

65. The Statements were made by Deputy Mayor Smith at the Special Meeting and it was clear she was speaking in her capacity as Deputy Mayor and regarding a matter before council.

66. The Panel finds, to the required standard, that Deputy Mayor Smith was acting in her role as councillor and therefore making use of her office as a council member.

67. This element is met.

Deputy Mayor Smith's use was improper

68. Deciding if conduct is an improper use of office requires something more than simply a demonstration of poor judgment or a lack of wisdom<sup>16</sup>.

69. Impropriety consists in a breach of the standards of conduct that would be expected of a person in the position of a councillor by reasonable persons with knowledge of the duties, powers and authority of that person's position as a councillor and the circumstances of the case<sup>17</sup>.

70. It requires unsuitable or inappropriate behaviour that a councillor knew (or ought to have known) was not authorised.

71. 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<sup>18</sup>.

<sup>16</sup> Complaint of Minor Breach No. SP 3 of 2013

<sup>17</sup> *Yates and Local Government Standards Panel* [2012] WASAT 59

<sup>18</sup> *Chew v R* [1992] HCA 18



72. In addition, any decision as to what is “improper” cannot be made in isolation but must be considered in the relevant context. Such context will include the specifics of the relevant event as well as councillor’s formal role and responsibilities including the councillor’s fiduciary duties and any relevant code of conduct.
  73. In this particular case, the Complainant argues that Comments 2 and 3 were based on her true belief that Cr Sands did not properly declare an impartiality interest.
  74. Various emails supplied by the Respondent do indicate that Deputy Mayor Smith held a long standing belief that Cr Sands had not declared an impartiality interest.
  75. Despite this, the emails also show that Deputy Mayor Smith was:
    - a. aware of such conduct as early as 10 May 2018 (being over 3 months earlier than the Special Meeting); and
    - b. had been advised by the Director of Governance that:
      - i. it was possible that the same was simply an oversight; and
      - ii. it was likely Cr Sands could have voted in any event regarding the relevant matter.
  76. Further, Cr Sands denies that there was any failure to declare an interest and that she checked her obligations as to the same.
  77. Given the above, the Panel finds to the required standard this it is more likely than not that Deputy Mayor Smith knew that Cr Sands did not consider that she had a impartiality interest to declare and, although Deputy Mayor Smith disagreed with this stance, the use of the word “lying” was a gross exaggeration in the circumstances.
  78. The provisions of the Code of Conduct specified in paragraph 38 are also relevant with respect to this Allegation.
  79. In any event, whether or not Cr Sands should have declared any interest (which the Panel cannot conclude on the available evidence) the Panel finds it is more likely than not that Comment 2 and Comment 3 accusing Cr Sands of lying was:
    - a. not the appropriate manner or forum in which to raise Deputy Mayor Smith’s concerns; and
    - b. was highly likely to cause unwarranted embarrassment to Cr Sands in breach of clause 3.1 of the Code of Conduct .
  80. The Panel finds to the required standard that by making Comment 2 and Comment 3 Deputy Mayor Smith acted improperly as such conduct:
    - a. breached clause 3.1 of the Code;
    - b. involved a breach of the standards of conduct that would be expected of a person in the position of councillor by reasonable persons; and
    - c. was so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty.
  81. This element is met.
- Regulation 7(1)(a) - Deputy Mayor Smith intended an advantage to be gained directly or indirectly
82. For the same reasons as set out in paragraphs 47 to 52 inclusive, the Panel finds that it is more likely than Deputy Mayor Smith’s comments were not intended to cause an advantage to herself or any other party in the manner that the word “advantage” is



intended to be understood in the Regulations and that the purpose of the relevant comments were to disadvantage Cr Sands as set out below.

83. This element is not met.

Regulation 7(1)(b) – Deputy Mayor Smith intended detriment to be suffered by another person

84. “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.

85. It is not necessary to find whether any detriment was actually suffered<sup>19</sup>, but an intent to cause such detriment must be established.

86. The Panel finds to the required standard that due to:

- a. the context of the subject matter of the Special Meeting; and
- b. the particular use of the language “lying”,

the only reasonable motivation for Making Comments 2 and Comment 3 was to cause Cr Sands embarrassment and humiliation and to attempt to disadvantage the position that Cr Sands was taking against Deputy Mayor Smith.

87. In particular the repeated use of the word “lying” would appear to have been used with the intention to mislead the public that Cr Sands had done something particularly wrongful.

88. The Panel finds that it is more likely than not that Deputy Mayor Smith intended Cr Sands to suffer a detriment by making Comment 2 and Comment 3.

89. This element is met.

Other Conduct under the Act or Criminal Code

90. The conduct in question does not fall under section 5.93 of the Act or *The Criminal Code* section 83.

91. This element is met.

Conclusion

92. Given the above, the Panel finds that:

- a. the elements required to find a breach of regulation 7(1)(a) of the Regulations have not been met and Deputy Mayor Smith did not commit a minor breach; and
- b. The elements required to find a breach of regulation 7(1)(b) of the Regulations have been met and Deputy Mayor Smith did commit a minor breach.

## Panel’s Findings

93. In respect to Allegation 1:

- a. Deputy Mayor Smith did not breach Regulation 7(1)(a) of the Regulations and therefore did not commit a minor breach; and

<sup>19</sup> *Yates and Local Government Standards Panel* [2012] WASAT 59 at [72]



- b. Deputy Mayor Smith did breach Regulation 7(1)(b) of the Regulations and therefore did commit a minor breach.
94. In respect to Allegation 2:
- c. Deputy Mayor Smith did not breach Regulation 7(1)(a) of the Regulations and therefore did not commit a minor breach; and
- d. Deputy Mayor Smith did breach Regulation 7(1)(b) of the Regulations and therefore did commit a minor breach.

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Presiding Member

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Paul Kelly (Member)

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Sarah Rizk (Member)



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## Local Government Standards Panel

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Complaint Number	SP 2018-107
Legislation	<i>Local Government Act 1995 (WA)</i>
<b>Complainant</b>	<b>Councillor Chontelle Sands</b>
<b>Respondent</b>	<b>Deputy Mayor Lee-Anne Smith</b>
Local Government	<b>City of Cockburn</b>
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 Paul Kelly (Member) Mrs Emma Power (Member)
Heard	9 April 2019 Determined on the documents
Penalty Considered	5 June 2019
Outcome	Public Censure and Public Apology

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### DECISION AND REASONS FOR DECISION

Delivered 18 June 2019

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#### 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 5 June 2019, the Panel found that Deputy Mayor Lee-Anne Smith, the Deputy Mayor for the City of Cockburn (“**the City**”), committed 2 minor breaches of Regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (WA) (“**the Regulations**”) when at the Special Meeting of Council held 22 August 2018 she:
  - a. falsely stated that Cr Chontelle Sands was the subject of two minor breach complaints and an investigation by the Department of Local Government, Sport and Cultural Industries (“**the Department**”); and
  - b. she stated that Cr Chontelle Sands had lied about an having an impartiality interest in respect to a matter previously considered by the Council,  
(together “**the Minor Breaches**”).

## Jurisdiction

2. The Panel convened on 5 June 2019 to consider how it should deal with the Minor Breach.
3. The Panel accepted the advice of the Department that on this date there was no available information to indicate that Deputy Mayor Smith had ceased to be, or was disqualified from being, a councillor.

## Possible Sanctions

4. 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) *dismissing the complaint;*
  - (b) *ordering that —*
    - (i) *the person against whom the complaint was made be publicly censured as specified in the order;*
    - (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).*

## Councillor Smith’s Submissions

5. 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).<sup>1</sup>
6. By a letter dated 3 May 2019, Deputy Mayor Smith was:
  - a. notified of the Panel’s finding of the Minor Breaches;
  - b. provided with a copy of the Panel’s Finding and Reasons for Finding; and

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<sup>1</sup> *Local Government Act 1995* (WA), s 5.110(5).



- 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.
7. By an email dated 27 May 2019, the Department received a response from Deputy Mayor Smith with the following comments and arguments:
  - a. Deputy Mayor Smith submits that she would like to attend further training. She recently attended training for the first time and found it highly beneficial;
  - b. Deputy Mayor Smith is so committed to her personal growth and learning this that she will enrol in the full Diploma of Local Government;
  - c. she also asks the Panel to please consider the degree of public admonition a public sanction brings; and
  - d. she has already suffered a huge degree of public humiliation.

### **Panel's Consideration**

8. 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.
9. The Panel notes that Deputy Mayor Smith accepts that she has breached the Regulations.
10. The standards of behaviour expected of councillors are of a generally higher standard than a member of the public due to their public position.
11. An elected member is not free to choose when the obligations and expected standards of conduct attached to such an office will apply to them and is not excused compliance due to ill health or any other similar factor.
12. The Panel considers the Minor Breaches to be of a very serious nature and deliberate in nature.
13. Although in the context Deputy Mayor Smith may have been under pressure, she made comments that she knew were false and were likely to cause damage to the reputation of Cr Sands.
14. Due to the nature and seriousness of the Minor Breaches, the Panel does not feel that training is a suitable penalty.
15. In these circumstances, the Panel considers that the appropriate penalty is that Deputy Mayor Smith be publicly censured and make a public apology.
16. 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 Deputy Mayor Smith's conduct was unacceptable and deserving of a serious penalty.
17. 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 individuals<sup>2</sup>; and/or

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<sup>2</sup> *Treby and Local Government Standards Panel* [2010] WASAT 81 [127] (Pritchard J).



- b. does not meet the standards other councillors seek to uphold.

**Panel's decision**

18. 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 two Minor Breaches of regulation 7(1)(b) of the Regulations, Deputy Mayor Smith:
- a. make a public apology in terms of the attached Order; and
  - b. be publicly censured in terms of the attached Order.

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Mick Connolly (Presiding Member)

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Paul Kelly (Member)

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Emma Power (Member)



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## ORDER

Delivered 18 June 2019

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### THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Deputy Mayor Lee-Anne Smith, the Deputy Mayor for the City of Cockburn **publicly apologise**, as specified in paragraphs 3 and 4 below.
2. Deputy Mayor Lee-Anne Smith, the Deputy Mayor for the City of Cockburn, 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 her, Deputy Mayor Lee-Anne Smith 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)* on 24 August when, at the Special Meeting of Council held 22 August 2018, I:
  - a. falsely stated that Councillor Chontelle Sands was the subject of two minor breach complaints and an investigation by the Department of Local Government, Sport and Cultural Industries; and
  - b. stated that Councillor Chontelle Sands had lied about an having an impartiality interest in respect to a matter previously considered by the Council.
- ii. The Panel found that I twice breached the City of Cockburn's Code of



Conduct and regulation 7(1)(b) of the said Regulations by making comments that were knowingly false and likely to cause damage to the reputation to Councillor Sands.

- iii. I accept that I should not have made the false comments regarding Councillor Sands.
- iv. I now apologise to Councillor Sands, the public and my fellow Councillors.”

4. If Deputy Mayor Smith fails to, or is unable to, comply with the requirements of paragraph 3 above she 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 “Cockburn Gazette” newspaper and the “Cockburn City Herald” newspaper:

#### **PUBLIC APOLOGY BY DEPUTY MAYOR LEE-ANNE SMITH**

A formal 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)* on 24 August when on 24 August when at the Special Meeting of Council held 22 August 2018 I:

- a. falsely stated that Councillor Chontelle Sands was the subject of two minor breach complaints and an investigation by the Department of Local Government, Sport and Cultural Industries; and
- b. stated that Councillor Chontelle Sands had lied about an having an impartiality interest in respect to a matter previously considered by the Council.

The Panel found that I had twice breached the City of Cockburn’s Code of Conduct and regulation 7(1)(b) of the Regulations by making comments that were knowingly false and likely to cause damage to Councillor Sand’s reputation.

I accept that I should not have made the negative comments regarding Councillor Sands.

I now apologise to Councillor Sands, the public and my fellow Councillors.

#### **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 Smith, the Chief Executive Officer of the City of Cockburn shall arrange for the following Notice of Public Censure to be published, in no less than 10 point print:
  - a. as a one-column or a two-column display advertisement in the first 15 pages of “The West Australian” newspaper;



- b. as a one-column or a two-column display advertisement in the first 10 pages of the “Cockburn Gazette” Newspaper; and
- c. as a one-column or a two-column display advertisement in the first 10 pages of the “Cockburn City Herald” Newspaper.



### **NOTICE OF PUBLIC CENSURE**

The Local Government Standards Panel has found that Deputy Mayor Lee-Anne Smith, a Councillor of the City of Cockburn, twice breached regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007 (WA)* when on 24 August when at the Special Meeting of Council held 22 August 2018 she:

- a. falsely stated that Councillor Chontelle Sands was the subject of two minor breach complaints and an investigation by the Department of Local Government, Sport and Cultural Industries; and
- b. stated that Councillor Chontelle Sands had lied about an having an impartiality interest in respect to a matter previously considered by the Council.

In engaging in this conduct, Deputy Mayor Lee-Anne Smith made improper use of her office as a council member with the intent to cause detriment to Councillor Sands.

The Panel censures Councillor Smith for the two breaches of 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."