



Local Government Standards Panel

Complaint Number	SP 2020-143
Legislation	<i>Local Government Act 1995</i>
Complainant	Mrs Casey Mihovilovich
Respondent	Councillor Mervyn Darcy
Local Government	City of Mandurah
Regulation	Regulation 10 of the <i>Local Government (Rules of Conduct)</i> <i>Regulations 2007</i>
Panel Members	Mr Michael Connolly (Presiding Member) Cr Deb Hopper (Member) Mrs Emma Power (Member)
Heard	8 April 2021 (Special Meeting) Determined on the documents
Finding	1 x breach Regulation 10(3)

FINDING AND REASONS FOR FINDING

Delivered 17 June 2021

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 April 2021, the Panel found that Councillor Darcy, a councillor of the City of Mandurah ("**the City**") did commit a minor breach pursuant to the *Local Government Act 1995 (WA)* ("**the Act**") and regulation 10 of the *Local Government (Rules of Conduct) Regulations 2007* ("**the Regulations**") when at the Ordinary Council Meeting held on 27 October 2020 he made a comment allegedly criticising officers of the City as described in paragraph 15 below.

The Panel's Role

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

¹ Section 5.105 of the Act

² Section 5.106 of the Act

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

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

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

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



Jurisdiction and Procedural Fairness

11. On 6 November 2020 the Panel received an email from Mr Mark R Newman acting as complaints officer of the City ("**the Complaints Officer**"). The same enclosed a Complaint of Minor Breach Form dated 3 November 2020.
12. In the complaint form the Complainant alleges that Cr Darcy has breached regulation 10 of the Regulations when at the Ordinary Council Meeting held on 27 October 2020 he made a comment allegedly criticising officers of the City as described in paragraph 15 below ("**the Complaint**").
13. The Panel convened on 8 April 2021 to consider the Complaint.
14. 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 Darcy was:
 - i. at the time the Panel met, 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 8 April 2021;
 - b. was satisfied the Complaint was made within six months after the alleged breach occurred⁷;
 - 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 breach⁸;
 - d. was satisfied the Department had provided procedural fairness to Cr Darcy; and
 - e. found it had jurisdiction to consider the Complaint.

The Specifics of the Complaint

15. The Complainant provided the following comments in respect to the Complaint:
 - a. At the Ordinary Council Meeting held on 27 October 2020 ("**the OCM**") during debate of an item regarding the Bench Advertising, Councillor Merv Darcy said in the Council Chamber, whilst speaking against the Officer Recommendation "*that the relevant officer should be shot*".
 - b. This is in breach of regulation 10(3) of the Regulations that a party should not:
 - i. make a statement that a local government employee is incompetent or dishonest; or
 - ii. use offensive or objectionable expressions in reference to a local government employee.

⁷ Section 5.107(4) and 5.109(2) of the Act

⁸ Section 5.107 and 5.109 of the Act



- c. It is noted that immediately after Cr Merv Darcy said the statement he did say sorry.

Respondent's Response

16. By an email dated 24 November 2020, Cr Darcy provided a response to the Complaint.
17. Cr Darcy denies that he has committed any minor breach.
18. Cr Darcy also makes the following comments with respect to the Complaint:
 - a. At the OCM during the Bench Advertising item debate Cr Darcy spoke against the Officers Recommendation in relation to the matter.
 - b. Cr Darcy did say that those involved with this report *"should be shot"*.
 - c. Cr Darcy unequivocally did not say that the *"relevant officer should be shot"*, he did not direct this common saying at anyone, nor was it his intention to do so.
 - d. Cr Darcy used this colloquial term/saying, as a figure of speech, but did not do so for anyone to take it literally.
 - e. Cr Darcy did withdraw what he said immediately after saying it, and without been asked and or told to do so by the Presiding Member.
 - f. The definition of *"should be shot"* is:

"informal - said when you think that someone's actions are extremely unreasonable: They should be shot for selling drinks at that price!"
 - g. Cr Darcy believes his statements above also answer this question, and he reiterates that he did not use the words *"relevant officer"* at all.
 - h. When Cr Darcy found out the following day that the two City Officers who were involved in the writing of the report to Council were upset Cr Darcy immediately tried calling them both personally by telephone to let them know that Cr Darcy did not and was not singling either of them out, nor that his use of this commonly used phrase was meant to hurt anyone.
 - i. Neither answered his calls at that time.
 - j. Cr Darcy then immediately emailed both the City Officers to apologise to them both for any hurt that they may have felt.
 - k. Soon after Cr Darcy was contacted by both City Officers and Cr Darcy reiterated what he had said in his email and apologised again.
 - l. Cr Darcy has always had, and continues to have, a good working relationship with both Officers.
 - m. Cr Darcy withdrew his words immediately without been asked to do so simply because this was a contentious issue, debate was rigorous and he thought that even though he used a commonly used phrase he did not intend anyone to take it literally, nor did he intend to cause any angst.
 - n. There is no doubt that Cr Darcy will be far more careful and aware of using colloquial terms/common sayings in future.



19. Cr Darcy also supplied an email dated 29 October 2020 from Cr Darcy to the relevant City Officers apologising for his conduct.

Regulation 10

20. Regulation 10 regulates councillors' interactions with local government employees:

“10. Relations with local government employees

- (1) *A person who is a council member must not —*
- (a) *direct or attempt to direct a person who is a local government employee to do or not to do anything in the person's capacity as a local government employee; or*
 - (b) *attempt to influence, by means of a threat or the promise of a reward, the conduct of a person who is a local government employee in the person's capacity as a local government employee.*
- (2) *Subregulation (1) does not apply to anything that a council member does as part of the deliberations at a council or committee meeting.*
- (3) *If a person, in his or her capacity as a council member, is attending a council meeting, committee meeting or other organised event and members of the public are present, the person must not, either orally, in writing or by any other means —*
- (a) *make a statement that a local government employee is incompetent or dishonest; or*
 - (b) *use offensive or objectionable expressions in reference to a local government employee.*
- (4) *Subregulation (3)(a) does not apply to conduct that is unlawful under The Criminal Code Chapter XXXV.”*

21. In this complaint it is alleged that the Respondent breached Regulation 10(3)(a) and Regulation 10(3)(b).

Panel's Consideration

22. To make a finding of a minor breach of regulation 10(3)(a) and/or 10(3)(b) of the Regulations the Panel must be satisfied that is more likely than not:
- a. Cr Darcy was a councillor and was acting in his capacity as a councillor at the time of the alleged conduct;
 - b. Cr Darcy was attending a council meeting, committee meeting or other organised event at the time of the alleged conduct;
 - c. members of the public were present when the alleged conduct occurred;



- d. Cr Darcy:
- i. in respect to clause **regulation 10(3)(a)** made comments that state or imply that the government employee was incompetent or dishonest; and
 - ii. in respect to clause **regulation 10(3)(b)** used an expression that:
 - A. was offensive or objectionable; and
 - B. was in reference to an identified employee of the Councillor's local government.

Cr Darcy was a councillor and was acting in his capacity as a councillor at the time of the alleged conduct

23. Cr Darcy was a councillor at the time of the alleged breach and at the time the Panel considered the Complaint.
24. This element is met.

Cr Darcy was attending a council meeting, committee meeting or other organised event at the time of the alleged conduct and member of the Public were present

25. The relevant conduct occurred at the Ordinary Council Meeting held on 27 October 2020 where members of the public were present.
26. This element is met.

Regulation 10(3)(a) - The comments made state or imply that the government employee was incompetent or dishonest

27. The Panel has considered the conduct and Cr Darcy's response to the Complaint.
28. Although Cr Darcy did not name in any particular City Officer, due to the fact the agenda (and attachments) and minutes of the OCM it was easily identifiable that the relevant officers were members of the Business Services team of the City.
29. The term "*Should be Shot*" is a common idiom as noted by the Complainant. In this context it is, of course, not a saying meant to be taken literally.
30. In this case, the Panel considers that, despite the above, a reasonable person would believe that the saying creates an impression that the persons being referred to have not done a satisfactory job and therefore such comment cast aspersions on their competence and credibility.
31. Therefore, the Panel finds it is more likely than not that Cr Darcy's comment implied that the City Officers which completed the relevant report were incompetent in breach of regulation 10(3)(a).
32. This element is met.
33. It is noted, however, that the comment was made in the heat of robust debate, Cr Darcy immediately withdrew the assertion and, in addition, made sure he personally apologised to the relevant City Officers.



The comment made was offensive or objectionable and was in reference to an identified employee of the Councillor's local government.

34. In respect to whether any of the expressions used by Cr Darcy were "*offensive or objectionable*" the Panel may consider both what is offensive to particular individuals but also must contemplate what is considered to be objectively offensive to a reasonable person⁹.
35. In this case, the assertions by Cr Darcy would certainly have been taken to be personally insulting to the relevant Officers.
36. However, the Panel finds to the required standard that, due to the colloquial nature of the saying, it is more likely than not that such phrase would not amount to being objectively considered "*offensive or objectionable*".
37. This element is not met.

Conclusion

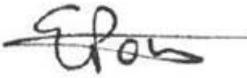
38. The elements required to find a breach of regulation 10(3)(a) of the Regulations have been met.
39. The elements required to find a breach of regulation 10(3)(b) of the Regulations have not been met.

Panel's Findings

40. Cr Darcy did commit a breach of Regulation 10(3)(a) of the Regulations and therefore did commit a minor breach.



Michael Connolly (Presiding Member)



Emma Power (Legal Member)



Deborah Hopper (Deputy Member)

⁹ Hodsdon and Local Government Standards Panel [2019] WASAT 49



Local Government Standards Panel

Complaint Number	SP 2020-143
Legislation	<i>Local Government Act 1995 (WA)</i>
Complainant	Casey Mihovilovich
Respondent	Councillor Mervyn Darcy
Local Government	City Mandurah
Regulation	Regulation 10 of the <i>Local Government (Rules of Conduct) Regulations 2007 (WA)</i>
Panel Members for Penalty Consideration	Mr Tim Fraser (Presiding Member) Mrs Emma Power (Member) Cr Deb Hopper (Member)
Heard	8 April 2021 Determined on the documents
Penalty Considered	19 August 2021
Outcome	No Sanction

DECISION AND REASONS FOR DECISION

Delivered 17 September 2021

DEFAMATION CAUTION

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Introduction

1. At its meeting on 8 April 2021, the Panel found that Councillor Mervyn Darcy, councillor for the City of Mandurah (“**the City**”), committed one minor breach under the *Local Government Act 1995 (WA)* (“**the Act**”) and regulation 10 of the *Local Government (Rules of Conduct) Regulations 2007 (WA)* (“**the Regulations**”) when he made a comment criticizing officers of the City (“**the Minor Breach**”).

Jurisdiction and Law

2. The Panel convened on 19 August 2021 to consider how it should deal with the Minor Breach.
3. 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 Darcy had ceased to be, or was disqualified from being, a councillor.
4. 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
5. By a letter dated 14 July 2021, Cr Darcy 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
 - 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*.

Councillor Darcy’s Submissions

6. By an email dated 5 August 2021, the Department received a response from Cr Darcy.
7. Cr Darcy provided the following comments and arguments as to penalty, as summarised by the Panel:
 - a. Cr Darcy understands the decision of the Panel, and regretful that the incident occurred and have learned from this experience.
 - b. After making this statement Cr Darcy immediately retracted the statement in chambers, tried to reach out to the officers via phone, and email and apologised.
 - c. Further Cr Darcy has spoken personally with both officers who have accepted his apology.
 - d. Vitally the working relationship between Cr Darcy and the officers concerned is respectful, collegiate and without any incidents since the complaint.

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



- e. The comment was an accidental use of colloquial language which Cr Darcy wouldn't have used in hindsight. The incident has not damaged his relationship with the officers which remain strong and has not disrupted the functioning of Council collectively.
- f. Cr Darcy has the most respect for, and faith in, the competency and credibility of the staff at the City of Mandurah, and never meant to imply they were incompetent or dishonest.
- g. Cr Darcy would request that no sanction be imposed, as he has learnt from this mistake.

Possible Sanctions

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

Panel's Consideration

9. Section 5.110(6) is about penalty. The Panel does not have the power to review any finding of a breach.
10. The Panel may order under section 5.110(6)(a), that no sanction be imposed with respect to the Complaint, not to reverse the Panel's finding of a breach, but to indicate that in all the circumstances the relevant councillor should not be penalised further.
11. Guidance as to the factors which the Panel may consider in determining the appropriate penalty to impose include, but are not limited to, the following:
- a. the nature and seriousness of the breaches;
 - b. the councillor's motivation for the contravention;



- c. whether or not the councillor has shown any insight and remorse into his/her conduct;
 - d. whether the councillor has breached the Act knowingly or carelessly;
 - e. the councillor's disciplinary history;
 - f. likelihood or not of the councillor committing further breaches of the Act;
 - g. personal circumstances at the time of conduct, and of imposing the sanction;
 - h. need to protect the public through general deterrence and maintain public confidence in local government; and
 - i. any other matters which may be regarded as aggravating conduct or mitigating its seriousness².
12. The Panel notes that in this case Cr Darcy undertook all correct actions including withdrawing the remark and apologising to the officers involved.
13. Due to his actions and acknowledgment of wrongdoing, the Panel considers that Cr Darcy is fully aware of his obligations under the Act and Regulations and that there is a negligible risk of him reoffending.
14. As such, the Panel considers it appropriate that no further sanction is imposed.

Panel's decision

15. The Panel orders pursuant to section 5.110(6)(a) of the Act that, in relation to the Minor Breach of regulation 10 of the Regulations that no sanction be imposed upon Cr Darcy as set out in the attached Order.

Signing

Tim Fraser (Presiding Member)

Emma Power (Member)

Deborah Hopper (Member)

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



ORDER

Delivered 17 September 2021

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THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

No further sanction be imposed on Councillor Mervyn Darcy.



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."*