



Local Government Standards Panel

Complaint Number	SP 2019-010
Legislation	<i>Local Government Act 1995</i>
Complainant	Mr Stanley Scott
Respondent	Councillor Benjamin Bell
Local Government	Shire of Toodyay
Regulation	Regulation 7 of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Mr Michael Connolly (Presiding Member) Cr Peter Rogers (Member) Mrs Emma Power (Member)
Heard	2 September 2020 Determined on the documents
Finding	3 x Breaches of Regulation 7(1)(b)

FINDING AND REASONS FOR FINDING

Delivered 8 October 2020

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Summary of the Panel's decision

1. On 2 September 2020, the Panel found that Councillor Benjamin Bell, a councillor of the Shire of Toodyay ("**the Shire**"):
 - a. did commit a minor breach pursuant to the *Local Government Act 1995 (WA)* ("**the Act**") regulation 7 of the *Local Government (Rules of Conduct) Regulations 2007* ("**the Regulations**") when he:
 - i. made a Facebook Post on 10 February 2019 in respect to minor breach findings against him;
 - ii. made a Facebook Post on 10 February 2019 in respect to use of legal representation by the Shire; and
 - iii. made a Facebook Post on 10 February 2019 in respect to Cr Therese Chitty; and
 - b. did not commit a minor breach pursuant to the Act and regulation 7 of the Regulations with respect to a Facebook Post made 10 February 2019 relating to the characterisation of minor breach complaints,
as set out in paragraph 18 below.

The Panel's Role

2. Under section 5.110(2) of the Act the Panel is required to consider a minor breach complaint and make a finding as to whether the alleged minor breach occurred.
3. The Act provides for the circumstances in which a council member commits a minor breach.¹
4. The Panel may make a finding that a councillor has committed a minor breach of the Act and Regulations based on evidence from which it may be concluded that it is more likely that the alleged breach occurred than it did not occur.²
5. In order to find a breach, it must be established that each element of the relevant Regulation is more likely than not to have been breached or met.
6. In considering whether a minor breach is established the Panel must consider:
 - a. all evidence provided and, where there are conflicting circumstances, inferences or evidence, must come to a reasonable conclusion that any circumstance, inference or evidence relied upon is more likely than not to have occurred or be accurate³; and
 - b. the seriousness of any allegation made, as well as the gravity of the consequences flowing from a particular finding⁴.
7. The Panel does not possess investigative or supervisory powers.⁵ The Panel makes decisions about complaints regarding minor breaches solely upon the evidence

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)



presented to it and, where appropriate, materials published by the relevant local authority's website.

8. It is the responsibility of both complainants and respondents to provide the Panel with all information they wish the Panel to consider when making its determination.
9. The Panel also must have regard to the general interests of local government in Western Australia⁶.
10. The Panel is obliged to give notice of the reasons for any finding it makes under section 5.110(2) of the Act.

Jurisdiction and Procedural Fairness

11. On 19 February 2019 the Panel received a complaint from Mr Stan Scott acting as complaints officer of the Shire (**"the Complaints Officer"**). The same enclosed a Complaint of Minor Breach Form dated 19 February 2019.
12. Due to the fact that at that time Cr Bell had been found to have committed six prior minor breaches, at its meeting of 26 April 2019, the Panel made the decision:
 - a. that if the alleged minor breach was found to have been committed, the same may be a recurrent breach; and
 - b. to send the complaint to the Departmental Chief Executive Officer (**"Department CEO"**) under section 5.111 of the Act, to determine whether the Department CEO would make an allegation to the State Administrative Tribunal (**"SAT"**) under section 5.112(2) of the Act.
13. The complaint was duly referred to the Department CEO on 9 May 2019.
14. On 30 July 2020 the Director General referred complaint SP 2019-009 back to the Panel pursuant to section 5.112(4) of the Act on the basis that, if the allegation was made out, SAT would not consider any further penalties for Cr Bell than those already available to the Panel.
15. In the complaint form, the Complainant alleges that, on 10 February 2019 Cr Bell breached regulation 7 of the Regulations when he wrote various Facebook Posts:
 - a. in respect to minor breach findings against him being Post 1 set out in paragraph 18.c below (**"Allegation 1"**);
 - b. relating to use of legal representation by the Shire being Post 2 set out in paragraph 18.f below (**"Allegation 2"**); and
 - c. in respect to the characterisation of minor breach complaints being Post 3 set out in paragraph 18.f below (**"Allegation 3"**); and
 - d. relating to Cr Therese Chitty being Post 4 set out in paragraph 18.f below (**"Allegation 4"**).(together **"the Complaint"**).
16. The Panel convened on 2 September 2020 to re-consider the Complaint.

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



17. The Panel:

- a. accepted the advice of the Department that, based on information published on the Western Australian Electoral Commission's website, Cr Bell was:
 - i. elected to the Council of the Shire in October 2017 for a term expiring in October 2019 and re-elected for a term commencing October 2019 and expiring October 2023;
 - ii. a Councillor at the time of the alleged breach; and
 - iii. a Councillor when the Panel met on 2 September 2020;
- b. was satisfied the Complaint was made within two years after the alleged breach occurred⁷;
- c. was satisfied that the Shire's Complaints Officer had dealt with the Complaint in accordance with the administrative requirements in the Act for dealing with complaints of a minor breach⁸;
- d. was satisfied the Department had provided procedural fairness to Cr Bell; and
- e. found it had jurisdiction to consider the Complaint.

The Specifics of the Complaint

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

- a. Cr Benjamin Bell has recently changed his Facebook Page removing reference to his position as a Councillor for the Shire of Toodyay and including the following disclaimer:

" All statements made by me on this Facebook page are done in my capacity as a resident and ratepayer of the Shire of Toodyay.

At no time should any statement made on this, my private Facebook page, be taken as anything but my own personal views."
- b. Despite this disclaimer, Cr Bell continues to discuss Council matters and continues to denigrate the Chief Executive Officer ("**the CEO**"), the Shire, fellow Councillors and the Local Government Standards Panel, including grossly misrepresenting the outcomes of previous considerations by the Panel.
- c. On 10 February 2019 the following post appeared on Cr Bell's Facebook page:

" Facts:

18 separate breaches submitted against me by CEO

12 were dismissed because the CEO failed make a case against me 6 were found that I have apparently embarrassed the CEO

0 of my public statements which the CEO tried to breach me on were found to be incorrect by the Department

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

⁸ Section 5.107 and 5.109 of the Act



In separate correspondence , the Department stated that the CEO has a propensity to misinterpret policies and procedure and the law

So I get a wrap on the knuckles for pointing out the numerous errors made by the CEO because he felt embarrassed that they were pointed out.

My job as a councillor is to represent the interests of the community on Council, and to hold the CEO to account.

I will continue to do my job as councillor as best I can.

And yes, sometimes I may say something that may embarrass the CEO and I will accept the consequences of that.

But I am not the person being investigated by the State Government for potential gross misconduct. Can the CEO say the same?

(“Post 1”)

- d. The Panel has in previous determinations admonished Cr Bell for representing minor breach complaints as legal action. There were in fact 6 complaints, all upheld, though he was not found to have breached other regulations, only Regulation 7.
- e. Post 1 generated significant interest and numerous negative responses about the CEO.
- f. Cr Bell went on to make further posts on the same conversation including the posts below:

“ Like everyone else in the community that the CEO has undertaken legal action against over the last few years (of which there are many), I have to use my own money to defend myself against these actions, whereas the CEO can use rate payers funds.

Is this really how people want to see your rates and the Shire's resources used?

Perhaps, any consolation may be if the CEO is getting a family discount on the legal fees by using his son's legal firm - Civic Legal.

(Yes - Civic legal is the same legal firm that the Shire used in the Merrick case that cost Toodyay rate payers more than \$550,000 in legal fees over the past few years)”

(“Post 2”)

“ Therese Chitty - if you are being accused of breaking the law (and the Act is law), then guess what? That's a legal action

And rather than deal with any complaints via the Council as was the case with the CEO breaching of the code of conduct and the President's breach of the code of conduct, the CEO took it direct to the Department.

(“Post 3”)



“ Oh, and by the way Therese, you actually breached the Code of conduct in your post when you incorrectly) implied that I used a lawyer because of the severity of the CEO's allegations against me.

But unlike the CEO (and Cr Greenway who also submitted a breach against me recently for god knows what reason), I see no value at all initiating action against a fellow councillor.

Because my focus is the Toodyay rate payers and ensuring that I use my voice to highlight their concerns and wishes.

Anything else (such as frivolous legal action) only acts to detract from that purpose.”

(“Post 4”)

- g. The last time council used Civic Legal was before Cr Bell was elected in October 2017. There has been no legal advice involved in any of the complaints to the Standards Panel from Civic Legal or anyone else.
 - h. Therese Chitty is the Deputy Shire President.
 - i. Cr Bell also denigrated fellow Cr Greenway for lodging a separate complaint against him.
 - j. 7 previous complaints have been lodged against Councillor Bell in relation to prior Facebook posts, and a further complaint in relation to comments in a newspaper column.
 - k. Six of these complaints were determined by the Standards Panel and its findings were distributed on 25 January 2019.
 - l. These Posts were made with full knowledge of the Standards Panel findings.
 - m. Cr Bell has once again set out to denigrate the Complainant as CEO.
 - n. Cr Bell has misrepresented the Standards Panel as a court, and the upheld complaints as frivolous.
 - o. Cr Bell, meets the requirements for a breach that:
 - i. he was a Council Member at the time;
 - ii. he made the post as a Councillor;
 - iii. the office of a Council Member was used improperly;
 - iv. he used his office improperly to disadvantage the Local Government and the Complainant as CEO.
 - p. These breaches also have a direct and serious impact on all Shire staff.
19. The Complainant also provided a copy of the various Posts and related comments by other third parties.

Respondent's Response

20. By an email dated 10 April 2019, Cr Bell's legal representative, Squire Patton Boggs, provided a response to the Complaint.



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

"To denigrate me as CEO both in the performance of my duties and misrepresent the Standards Panel as a court, and it's the upheld complaints as frivolous (sic)"
 - i. Cr Bell considers Mr Scott's allegation to relate to Regulation 7(1)(b), however, the submissions apply equally to Regulation 7(1)(a) as the comments in the Facebook Post and Comments were not intended to cause advantage to Cr Bell.
 - j. Regulation 7(1) states that a councillor must not make "improper" use of their office to gain an advantage or to cause detriment.
 - k. Whether or not the CEO or the Shire may have suffered detriment as a result of the Facebook Post and Comments is debatable, but is irrelevant in these circumstances.



- I. Cr Bell's actions cannot have breached Regulation 7(1) unless they were an "improper" use of his position as a council member.
- m. Regulation 3(1) contains a list of principles to guide the proper exercise of a councillor's powers. Although the principles outlined in Regulation (3)(1) are for guidance purposes only and are not a specific rule of conduct, these principles have bearing on whether Cr Bell's conduct was "improper".
- n. In publishing the Facebook Post and Comment, Cr Bell considers that he has:
 - i. relied upon information that he honestly believed to be accurate and of importance to the community, therefore complying with Regulation 3(1)(b);
 - ii. openly and accountably aired Cr Bell's concerns in a public forum via a public social media platform and under his own name, therefore complying with Regulation 3(1)(e); and
 - iii. not done anything that would be counter to, or in breach of, Regulation 3(1)(a), (c), (d), (f), (g) or (h).
- o. The Complaint alleges that Cr Bell's statements were incorrect or misleading and therefore implies that they breached Regulation 3(1)(a), (b) and (f) as it infers that Cr Bell did not act diligently, with integrity or on the basis of factually correct information.
- p. In respect to allegations that my statements were incorrect in respect to Cr Bell's characterisation of prior minor breach Complaints as 18 separate complaints and as "legal action":
 - i. Cr Bell maintains that while the Complaints were lodged as six separate complaints concerning six separate incidents, those Complaints contained 18 allegations of misconduct on three distinct grounds.
 - ii. As the Panel found in the Complaints, the allegations that Cr Bell's conduct breached Regulations 9 and 10 were unfounded it is reasonable that those allegations are considered separate from the allegations that the Panel ultimately upheld.
 - iii. Additionally, while the Panel is not a court of law, it does involve allegations of breach of legislation and is inherently legal.
 - iv. The arguments that the Complaints were six complaints as opposed to 18, or that the complaints are not 'legal actions', are semantic arguments without basis and Cr Bell's position taken in the Facebook Post and Comments is a legitimate interpretation of the Complaints.
 - v. Accordingly, Cr Bell does not consider that his comments regarding the Complaints were factually incorrect or misleading and therefore that Cr Bell has complied with the standards of "proper" conduct set out in Regulation 3.
- q. Cr Bell submits that the comments contained in the Facebook Posts and comments were published in what he genuinely considered to be the best interests of the community he serves and the Shire itself.



- r. As outlined above, Cr Bell's comments complied with, and were in the spirit of, the principles contained in Regulation 3(1). Therefore, his actions were not "improper" and were not in breach of Regulation 7(1).
- s. Additionally, Regulation 7(1) provides that a councillor must not make improper use of "the person's office as a council member". As set out in Mr Scott's complaint, Cr Bell's personal Facebook page carries the disclaimer that:

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

Regulation 7

23. 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.*

PANEL'S CONSIDERATION

Elements of Regulation 7(1)(b)

24. To make a finding of a minor breach of regulation 7(1)(b) of the Regulations the Panel must be satisfied to the required standard that:
- a. Cr Bell was an elected member at the time of the alleged breach and the time of the determination;
 - b. Cr Bell made use of his office as Council member of the Shire;
 - c. when viewed objectively, such use was an improper use of Cr Bell's office in that it:



- i. involved a breach of the standards of conduct that would be expected of a person in the position of councillor by reasonable persons; and
 - ii. was so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty; and
- d. Cr Bell engaged in the conduct in the belief that detriment would be suffered by another person.

General Comments

25. Firstly the Panel affirms that it does not find the Complaint to be frivolous or vexatious in nature.
26. To be deemed frivolous or vexatious requires that the Complaint could have no reasonable apprehension of success.
27. Due to Cr Bell's prior findings of minor breach, and the nature of Cr Bell's conduct that led to such minor breach findings, it was reasonable for the Complainant to make the Complaint.
28. The Complainant has not made any allegation that there was any intention to provide an advantage to any particular party, so the Panel has only considered regulation 7(1)(b) of the Regulations in this decision.
29. The Panel also makes the general note that although the Posts also attempt to minimise Cr Bell's culpability for the prior minor breaches in what appears to be an attempt to make himself look better or blameless, this is generally not the kind of "advantage" that the Panel would consider applies to an alleged breach of Regulation 7(1)(a). As such, this regulation is not discussed in any detail below.
30. Deciding if conduct is an improper use of office requires something more than simply a demonstration of poor judgment or a lack of wisdom⁹. It requires an abuse of power or the use of the councillor's position in a manner that such councillor knew (or ought to have known) was not authorised.
31. Impropriety does not depend on a councillor's consciousness of impropriety. It is to be judged objectively and does not involve an element of intent¹⁰.
32. 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.
33. In addition to the guiding principles set out in Regulation 3 of the Regulations breaches of any code of conduct adopted by a local authority may indicate that certain conduct by a councillor is improper.
34. The Shire has a Code of Conduct adopted 18 October 2007 ("**the Code**") which prescribes guidelines for dealing with others including the following specific provisions:

- a. **HANDLING BREACHES**

⁹ Complaint of Minor Breach No. SP 3 of 2013

¹⁰ *Chew v R* [1992] HCA 18



When we believe that an actual or perceived breach of this Code has occurred we will act promptly to deal with it. In the first instance, if we feel competent to handle the situation, we will discuss the matter with the person involved and seek to resolve the matter informally and directly. If this is unsuccessful, we will report our concerns.

In dealing with breaches we will avoid undue concern to others by presenting factual information, not rumour or suspicion, and will not make unsubstantiated allegations. Nothing in these provisions prevents us from reporting matters directly to the police or appropriate outside authority. In this situation, we will advise the Shire President and/or Chief Executive Officer.

.....

- **Reporting Rules of Conduct Breaches**

A breach of a Rule of Conduct (shown in a boxed section of this Code) may be reported to the Shire’s Complaints Officer. If so, it will be dealt with under Part 5, Division 9 of the Local Government Act 1995 and the Local Government (Rules of Conduct) Regulations 2007.”

b. **“1.2 Act Honestly and with Integrity**

We will observe the highest standards of honesty, probity and integrity, and avoid any conduct that might suggest a departure from these standards. We will be loyal and act in good faith (i.e. honestly, for the proper purpose, and without exceeding our powers) in the interests of the Shire. We will not tolerate dishonesty.

c. **“1.3 Exercise Fairness and Impartiality**

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

d. **“3.1 Our Shire Relationships**

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

.....

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

.....



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

e. “3.4 Communication and Public Relations

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

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

....”

f. “3.5 Avoid Derogatory Statements

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

35. “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.
36. It is not necessary to find whether any detriment was actually suffered¹¹, but an intent to cause such detriment must be established.

Allegation 1 – Regulation 7(1)(b)

Cr Bell was an Elected Member at the relevant times

37. Cr Bell was an elected member at the time of the alleged breach and at the date the Panel considered the Complaint.

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



38. This element is met.

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

39. Cr Bell asserts that Post 1 was made in his capacity as a private individual and that the disclaimer shown on his personal Facebook Page indicates he was not acting in his capacity as councillor.
40. Various elements may indicate whether a Councillor is acting in their capacity as a councillor when making public comment such as:
- the name or title attributed to the Councillor in the communication;
 - the subject matter or contents of the communication and the degree to which the same are related to the Council or City or local community;
 - the public or private nature of the communication; and
 - the audience with which the communication is shared.
41. In Post 1 Cr Bell:
- is discussing matters specific to the Shire and the CEO of the Shire;
 - is referring to his actions in his capacity as an elected member;
 - was commenting in a forum where, based on the supplied responses, there was clearly a substantial public audience; and
 - is not discussing what would be usually considered to be solely “personal” matters.
42. The above indicate that Cr Bell was acting in his capacity as a councillor and made use of this office.
43. The use of a disclaimer is not enough to remove the responsibility a councillor has from their obligations under the Regulations. It is not reasonable to expect that:
- every person visiting his Facebook Page, or reading a comment by Cr Bell, would read such disclaimer; or
 - where Cr Bell is commenting on the Shire, the CEO or the Council, and refers to himself as a councillor, that persons reading his comments would reasonably consider such comments to be made separately from Cr Bell’s role as an elected member.
44. Further, the argument that a councillor is not using their office when they express personal opinions or statements is flawed and disingenuous where those comments relate directly to their role as a councillor.
45. Cr Bell’s assertion that his comments were published in what he genuinely considered to be the best interests of the community he serves and the Shire itself also indicate that Cr Bell believed himself to be acting in his role as an elected member and wished to communicate with his electors.
46. The standards of behaviour expected of councillors are of a generally higher standard than a member of the public due to their public position. Councillors must always remain aware of situations where it is likely they may be considered to be acting in their capacity as an elected member.



47. The Panel finds that it is more likely than not that Cr Bell made use of this office as an elected member when making the Post.

48. This element is met.

Cr Bell's use was improper

49. The Complainant asserts that Cr Bell has acted improperly by grossly misrepresenting the outcomes of previous considerations by the Panel and denigrating the CEO.

50. Cr Bell asserts that he at all times acted in accordance with the guiding principles set out in Regulation 3 of the Regulations.

51. In his response Cr Bell also only addresses the issue of the mischaracterisation of the prior Panel's findings, but does not address the other contents of Post 1.

52. In considering Post 1, the Panel notes that Cr Bell introduces the comments "Facts". This places an obligation on Cr Bell to ensure that what is said below is, in fact factual.

53. The Panel makes the following particular observations and comments regarding the contents of Post 1:

a. *"18 separate breaches submitted against me by CEO".*

i. This assertion is inaccurate. Six complaints were lodged with the Department in respect to the conduct of Cr Bell. Each complaint related to one particular instance (or grouped instances) of conduct by Cr Bell.

ii. To lodge a complaint in this manner (i.e. one instance of behaviour covering several regulations) is quite common and does not necessarily result in additional sitting dates for the Panel or increased Departmental costs.

iii. In each complaint it was alleged that Cr Bell breached regulation 7, regulation 9 and regulation 10 by such conduct.

iv. Although, technically, this may have resulted in 3 distinct "breach" findings on each complaint, it is untrue to assert that "separate" breaches were "submitted" by the CEO.

v. Further, of the 6 complaints, 5 were made by the CEO and 1 was made by another councillor.

b. *12 were dismissed because the CEO failed to make a case against me 6 were found that I have apparently embarrassed the CEO*

0 of my public statements which the CEO tried to breach me on were found to be incorrect by the Department.

i. These assertions are wholly incorrect.

ii. 12 allegations were not "dismissed". This implies that there was no substance to the same. Rather, the conduct by Cr Bell in each case supported a finding of a breach under regulation 7, but did not meet the requirements to be found in breach of regulation 9 or regulation 10.



- iii. The fact that no breach was found for regulation 9 or 10 in no way endorses or condones the conduct of Cr Bell. In fact, in all cases, Cr Bell's conduct was expressly found to be "improper".
 - iv. The Panel also did not make findings as to the "correctness" of comments by Cr Bell. This is entirely misleading. In each case the Panel found that:
 - A. certain of Cr Bell's comments were improper to the extent that the same were deserving of a penalty and, in many cases, found to be unfounded or incorrect;
 - B. Cr Bell's conduct on several occasions was in breach of the Code of Conduct of the Shire; and
 - C. Cr Bell's comments were intended to denigrate and therefore cause a detriment to one or more parties (including the CEO).
 - c. *"So I get a wrap (sic) on the knuckles for pointing out the numerous errors made by the CEO because he felt embarrassed that they were pointed out."*
 - i. Cr Bell may consider being found to have committed 6 minor breaches a "rap on the knuckles", however, it is most unusual for a councillor to be found in breach of the Regulations so many times.
 - ii. The findings were not based on any perceived embarrassment to the CEO. They were based on the fact that it is a breach of section 1.3 and 3.5 of the Shire's Code of Conduct to make improper or derogatory statements which *"may cause any reasonable person unwarranted offence or embarrassment"*. Therefore, Cr Bell's comments, in many instances were found to be unwarranted.
 - d. *"But I am not the person being investigated by the State Government for potential gross misconduct. Can the CEO say the same?"*
 - i. At the time Post 1 was made, the Departmental Inquiry into the Shire had been recently announced. At this stage, there was simply no reasonable basis for the comment that the CEO was being *"investigated for potential gross misconduct"*. Further, the Inquiry was into the Shire as a whole. As a member of the Council, Cr Bell's conduct was also equally a focus of the Inquiry. As such, this comment is patently false and misleading as to the nature of the proposed Inquiry.
 - ii. Post 1 strongly implies that the CEO has engaged in gross misconduct. It is a serious accusation to make that a person is guilty of gross misconduct and the same should not be asserted with no reasonable basis.
54. The above comments appear to be purposefully misleading to give the impression that:
- a. The CEO had wrongfully brought several complaints against Cr Bell. In fact, each complaint was justified and resulted in the finding of a minor breach in respect to the complaint of conduct;
 - b. Cr Bell himself was not guilty of any wrongdoing;



- c. the CEO was being actively “investigated” by the Department for “gross misconduct”; and
 - d. Cr Bell was not involved in the Inquiry despite being a part of the serving Council.
55. The Panel finds that it is more likely than not that Post 1 is in breach of the Code of Conduct as follows:
- a. Post 1 is not respectful or courteous in breach of clause 1.3 of the Code;
 - b. Post 1 is in breach of clause 3.3 as it publicly criticises Shire staff in a way that casts aspersions on their professional competence and credibility; and
 - c. Post 1 makes an allegation against the CEO that is derogatory or improper in breach of clause 3.5 of the Code.
56. The Panel has also considered Post 1 in the light that:
- a. the prior findings of minor breach were made on the basis of similar Facebook Posts by Cr Bell; and
 - b. at the time Post 1 was made, Cr Bell had had an opportunity to peruse and review those decisions and his behaviour; and
 - c. Cr Bell’s “interpretation” of the outcome of the Panel decisions is unobservant at best, and purposefully misleading at worst.
57. Due to this, the Panel also considers that Cr Bell has acted recklessly and breached the guiding principle set out in Regulation 3(1)(a) to act with reasonable care and diligence.
58. Given the above, the Panel finds that it is more likely than not that Post 1 by Cr Bell was improper as:
- a. the contents of Post 1 were in breach of the Code and the guiding principles set out in Regulation 3; and
 - 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.
59. This element is met.

Cr Bell intended to cause a disadvantage

60. The Complainant asserts that Post 1 was written to cause detriment to the CEO.
61. Cr Bell asserts that Post 1 was published in what Cr Bell genuinely considers to be the best interests of the community he serves and the Shire itself.
62. The Panel does not find Cr Bell’s argument compelling.
63. The Panel finds that it is more likely than not that Cr Bell intended Post 1 to:



- a. reflect poorly on the actions of the CEO in making complaints against Cr Bell by falsely insinuating that there was no basis for the Complaints and that such breaches only resulted in a “rap on the knuckles”;
 - b. denigrate the performance of the CEO by implying that he was being individually investigated for, and was guilty of, “gross misconduct”
64. The Panel further finds that Post 1 cannot be reasonably seen to be in the best interests of the community and the Shire. This is simply a self justification by Cr Bell of his actions in circumstances where such actions were found by an independent panel to be improper and deserving of penalty.
65. As expressed in prior decisions relating to Cr Bell, it is possible to provide information to community members in a manner which does not outrightly criticise the Shire or Shire employees, is not inflammatory and not in breach of the Code.
66. In this case, the Panel finds it is more likely than not that Cr Bell made Post 1 with the intention to denigrate the actions of the CEO so as to detriment the CEO.
67. This element is met.

Conclusion

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

Allegation 2 – Regulation 7(1)(b)

Cr Bell was an Elected Member at the relevant times

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

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

71. See comments in paragraphs 39 to 47 inclusive above which also apply in respect to Post 2.
72. This element is met.

Cr Bell’s use was improper

73. The Complainant asserts that Cr Bell has acted improperly by making false and misleading statements and denigrating the CEO.
74. Cr Bell asserts that he at all times acted in accordance with the guiding principles set out in Regulation 3 of the Regulations.
75. Cr Bell does not address the contents of Post 2 in his response.
76. Post 2 makes several allegations that can be disputed including:
- a. that the CEO had wrongfully used Tax Payer funds to fund legal actions;



- b. that the CEO improperly used Civic Legal to act on behalf of the Shire.
77. Further, Post 2 strongly implies that:
- a. the “legal action” spoken about applied to the complaints of minor breach made against Cr Bell;
 - b. the prior complaints made by the CEO were baseless;
 - c. the CEO was personally responsible for incurring the legal fees and had acted wrongly and without Council approval; and
 - d. that the CEO had a conflict of interest in appointing Civic Legal due to his son being employed by that firm.
78. The Panel comments that the allegations and implications made in the Post are misleading in respect to prior Standard Panel complaints on the following basis:
- a. there is no cost in actually bringing/lodging a complaint under the Regulations, irrespective of who the complainant is;
 - b. the consideration of a complaint against a councillor incurs some cost to the Department, and this cost is then recouped from the local government concerned, irrespective of whether a breach is found or not;
 - c. a minor breach complaint is not a “legal action” as that term is commonly understood. A complaint is a legislative process that is “quasi-judicial” and does not have the characteristics of a traditional legal action;
 - d. the CEO did not use Civic Legal, or any other legal firm or assistance to make the allegations of minor breach against Cr Bell; and
 - e. the prior complaints were, in fact, wholly justified as, in every case, Cr Bell was found to have breached the Regulations and acted improperly.
79. Due to the contents of decision SP 2018-092, Cr Bell should have reasonably been aware of several of the above matters.
80. The Panel further considered that it is a contradiction to argue that it is the complainant that has caused the expense to the local government when a complaint of minor breach is made under the Regulations. More accurately, it is the conduct of an individual councillor that has caused such complaint to be made. In essence, this indicates that the inappropriate conduct of such councillor has resulted in the rate payers bearing that cost.
81. In relation to the expenditure of legal fees in respect to the City, Complaint SP 2018-092 against Cr Bell explicitly addressed Cr Bell making assertions in respect to the CEO and the funding of Shire actions.
82. Cr Bell was aware at the time Post 2 was made, that the CEO does not have the power to arbitrarily allocate Shire monies to “legal actions” without the Councillors voting for the same in the budget. As such, Post 2 Post is also misleading in its implication that the CEO is solely responsible for choosing to spend such monies.
83. In relation to the use of Civic Legal, it appears on the evidence provided that Civic Legal had not been used by the Shire as legal representation for a number of years at the time of the Post.



84. As such, Cr Bell would have been aware that the implication that the CEO had a current conflict in this regard was unjustified.
85. Further, the “Merrick Case” mentioned was an action brought by the Shire, as to a matter of contract dispute, not a matter personally related to the CEO.
86. It is the nature of legal disputes that the same may be protracted and expensive. It is unreasonable for Cr Bell to impliedly blame the CEO for the whole cost of the Shire defending its legal rights. In addition, if Cr Bell genuinely believed there to be an irregularity regarding the expenditure of legal fees by the Shire, then a public Facebook forum is not the place to assert such irregularities.
87. In addition, the Panel notes that Cr Bell does not correct the incorrect assumptions of other persons commenting in relation to the matters raised in Post 2.
88. Due to the above, the Panel finds that it is more likely than not that Post 2:
 - a. makes allegations that are derogatory or improper against the CEO in breach of clause 3.5 of the Code; and
 - b. publicly criticising staff in a way that casts aspersions on their professional competence and credibility in breach of clause 3.1(c) of the Code;
 - c. is in breach of the guiding principle set out in Regulation 3(1)(a) to act with reasonable care and diligence as the Post repeats substantially the same behaviours as were the subject of a minor breach finding in SP 2018-092.
89. Given the above, the Panel finds that it is more likely than not that Post 2 by Cr Bell was improper as:
 - a. the contents of Post 2 were in breach of the Code and the guiding principles set out in Regulation 3; and
 - 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.
90. This element is met.

Cr Bell intended to cause a disadvantage

91. The Complainant asserts that Post 2 was written to cause detriment to the CEO.
92. Cr Bell asserts that Post 2 was published in what Cr Bell genuinely considers to be the best interests of the community he serves and the Shire itself.
93. The Panel finds, to the required standard, that the Post cannot be reasonably seen to be motivated by the best interests of the community and the Shire.
94. Post 2 is patently misleading and written in a manner that Cr Bell would have reasonably known would have incensed readers and caused them to think less of the CEO.
95. In this case, the Panel finds it is more likely than not that Cr Bell made Post 2 with the intention to denigrate, and thereby detriment, the CEO
96. This element is met.



Conclusion

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

Allegation 3 – Regulation 7(1)(b)

Cr Bell was an Elected Member at the relevant times

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

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

100. See comments in paragraphs 39 to 47 inclusive above which also apply in respect to Post 3.
101. This element is met.

Cr Bell's use was improper

102. In reviewing Post 3, the Panel considers that there are a few misconceptions in Cr Bell's comments.
103. Firstly, as noted above, a minor breach complaint is not a legal action as discussed above. A minor breach allegation is not an accusation of breaking the law, it is an allegation that a Councillor has breached the rules of conduct as set out in the Regulations.
104. In addition, it is the correct procedure to make a minor breach complaint to the Department. This relevant legislation requires that this occurs.
105. Despite this, and the robust tone of Post 3, the Panel finds that it is more likely than not that Post 3, while perhaps inaccurate, does not amount to being improper in content.
106. Given the above, the Panel finds that it is more likely than not that Post 3 by Cr Bell was not improper as:
- a. the conduct was not 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
 - b. the conduct is not deserving of a penalty.
107. This element is not met.

Cr Bell intended to cause a disadvantage

108. As the above element is not met, the Panel has not further considered this element.

Conclusion



109. Given the above, the elements required to find a breach of regulation 7(1)(b) of the Regulations have not been met.

Allegation 4 – Regulation 7(1)(b)

Cr Bell was an Elected Member at the relevant times

110. Cr Bell was an elected member at the time of the alleged breach and at the date the Panel considered the Complaint.

111. This element is met.

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

112. See comments in paragraphs 39 to 47 inclusive above which also apply in respect to Post 4.

113. This element is met.

Cr Bell's use was improper

114. The Complainant asserts that Cr Bell has acted improperly by:

- a. denigrating Cr Greenaway; and
- b. denigrating the CEO.

115. Cr Bell:

- a. asserts that he at all times acted in accordance with the guiding principles set out in Regulation 3 of the Regulations;
- b. argues that his characterisation of a breach complaint as a “legal action” is accurate; and
- c. does not otherwise address the contents of Post 4.

116. The initial comment by Cr Chitty and Post 4 (made in response) are as follows:

***Therese Chitty:** I would like to point out that a complaint to the Standards Panel does not cost the rate payers of Toodyay anything, it is not Legal action, it is a breach of the rules that Councillors swear that they will abide by when they become a Councillor. This is part of the Local Government Act and our Code of Conduct, like it or not we as Councillors have to abide by these rules. Councillors do not have to employ a Lawyer to answer these breaches, if they feel that the allegations against them are so serious that they need to have a lawyer answer them then that's up to the individual Councillor. I have a breach against me at the Standards Panel at the moment and I wrote the reply to the allegations myself.*

I just thought I would clear up the misconception that the CEO has taken legal action out on a Councillor.

Also Civic Legal is not the CEOs families business, as far as I am aware the CEOs son became an employee of that firm in recent times.



Ben Bell: *Oh, and by the way Therese, you actually breached the Code of conduct in your post when you incorrectly) implied that I used a lawyer because of the severity of the CEO's allegations against me.*

But unlike the CEO (and Cr Greenway who also submitted a breach against me recently for god knows what reason), I see no value at all initiating action against a fellow councillor.

Because my focus is the Toodyay rate payers and ensuring that I use my voice to highlight their concerns and wishes.

Anything else (such as frivolous legal action) only acts to detract from that purpose.”

117. There are a number of elements of Post 4 which the Panel has considered.
118. Firstly Cr Bell accuses Cr Chitty of breaching the Code of Conduct by implying he used a lawyer due to the severity of the CEO's allegations against him.
119. The Panel considers this assertion a gross overreaction to the comment made by Cr Chitty and to be substantially unfounded.
120. The Panel cannot see that Cr Chitty's comment implies anything negative regarding Cr Bell's actions. Cr Bell did in fact use legal representation when providing a response to the allegations of minor breach. This is relatively rare, but certainly within the rights of Cr Bell. There is no negative or positive implication to be drawn from the same.
121. Cr Bell does not explain how Cr Chitty's comment could possibly be construed to be a breach of the Code of Conduct. It is a reasonable assumption that a person will not go to the trouble and expense of seeking legal representation unless reasonably warranted.
122. It is a significant matter to make an unfounded accusation against a councillor of a breach of the Code of Conduct and the Panel considers that Cr Bell was attempting to threaten Cr Chitty in order to make her to cease making comments that were contradictory to his series of Posts.
123. The Panel finds to the required standard that this implied threat and assertion of wrongdoing is in breach of clause 3.4 and 3.5 of the Code of Conduct.
124. Secondly, Cr Bell's other comments in Post 4 appear to be intended to create the impression that:
 - a. Cr Bell had no idea why the various prior minor breach complaints were made; and
 - b. the recent minor breach complaints against him were frivolous and unjustified.
125. The Panel considers that Cr Bell knew these asserted implications were completely false. At the time Post 4 was made, Cr Bell had received six written decisions from the Panel which clearly set out:
 - a. that Cr Bell's conduct in each case was improper and why the Panel had made that finding; and



- b. that the relevant complaint resulted in a minor breach of the Regulations by Cr Bell.
126. As such, it is very difficult for Cr Bell to convincingly assert that he did not know why the complaints were made, or that they were frivolous in nature.
127. The Panel further refers to the introductory part of the Code of Conduct which clearly states that allegations of a minor breach of the Regulations may be reported to the Shire's Complaints Officer and then dealt with under the Act.
128. It is the proper and correct thing to make a complaint to the Department where a councillor's conduct justifies such complaint.
129. Given the above the Panel finds that it is more likely than not that Post 4:
- was dishonest in breach of clause 1.2 of the Code of Conduct;
 - makes an allegation that is derogatory or improper against Cr Chitty in breach of clause 3.5 of the Code; and
 - breached the guiding principle set out in Regulation 3(1)(a) to act with reasonable care and diligence by being purposefully misleading.
130. Given the above, the Panel finds that it is more likely than not that Post 4 by Cr Bell was improper as:
- the contents of Post 4 were a breach of the Code and the guiding principles set out in Regulation 3; and
 - the conduct was of such a nature that a reasonable individual would consider the same to be inappropriate or not in keeping with the conduct that would be expected of a councillor; and
 - the conduct is deserving of a penalty.
131. This element is met.
- Cr Bell intended to cause a disadvantage
132. The Complainant asserts that Post 4 was written to cause detriment to the CEO and Cr Greenaway.
133. Cr Bell asserts that the Post 4 was published in what Cr Bell genuinely considered to be the best interests of the community he serves and the Shire itself.
134. The Panel considers that Post 4 cannot be reasonably seen to be in the best interests of the community and the Shire.
135. Post 4 is clearly an attempt to defect blame onto the CEO and Cr Greenaway in a situation where Cr Bell himself had been found to be in breach of the Regulations.
136. Further, as found above, Cr Bell must have reasonably known at the time he made Post 4, that its contents were substantially untrue. It cannot be argued that this is in the public interest.
137. Further, the implication that to make a complaint in accordance with the published Code of Conduct of the Shire is wrongful or frivolous is not in the public interest and



appears to be designed to bring the Shire's processes and staff into disrepute for following correct procedure.

138. The Panel further finds to the required standard that Cr Bell intended to denigrate Cr Chitty, by asserting, without a reasonable basis, in a public forum that she was in breach of the Code of Conduct.

139. In this case, the Panel finds it is more likely than not that Cr Bell made Post 4 with the intention to denigrate:

- a. the CEO and Cr Greenaway for making complaints against him; and
- b. Cr Chitty for attempting to clarify Cr Bell's inaccurate comments, and therefore cause a detriment to each of those parties.

140. This element is met.

Conclusion

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

Panel's Findings

142. In respect to Allegation 1 - Cr Bell did commit a breach of Regulation 7(1)(b) of the Regulations and therefore did commit a minor breach.

143. In respect to Allegation 2 - Cr Bell did commit a breach of Regulation 7(1)(b) of the Regulations and therefore did commit a minor breach.

144. In respect to Allegation 3 - Cr Bell did not commit a breach of Regulation 7(1)(b) of the Regulations and therefore did not commit a minor breach.

145. In respect to Allegation 4 - Cr Bell did commit a breach of Regulation 7(1)(b) of the Regulations and therefore did commit a minor breach.

Mick Connolly (Presiding Member)

Emma Power (Member)

Peter Rogers (Member)

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Local Government Standards Panel

Complaint Number	SP 2019-010
Legislation	<i>Local Government Act 1995 (WA)</i>
Complainant	Mr Stan Scott
Respondent	Councillor Benjamin Bell
Local Government	Shire of Toodyay
Regulation	Regulation 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007 (WA)</i>
Panel Members for Penalty Consideration	Mr Michael Connolly (Presiding Member) Cr Peter Rogers (Member) Mrs Emma Power (Member)
Heard	2 September 2020 Determined on the documents
Penalty Considered	10 November 2020
Outcome	Public Censure, Public Apology and Training

DECISION AND REASONS FOR DECISION

Delivered 12 January 2021

DEFAMATION CAUTION

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



Introduction

1. At its meeting on 2 September 2020, the Panel found that Councillor Benjamin Bell, a councillor for the Shire of Toodyay ("**the Shire**"), committed three minor breaches under the Local Government Act 1995 (WA) ("**the Act**") and regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (WA) ("**the Regulations**") when he:
 - a. made a Facebook Post on 10 February 2019 in respect to minor breach findings against him;
 - b. made a Facebook Post on 10 February 2019 in respect to use of legal representation by the Shire; and
 - c. made a Facebook Post on 10 February 2019 in respect to Cr Therese Chitty,(together "**the Minor Breaches**").

Jurisdiction and Law

2. Due to the fact that Cr Bell had been found to have committed six prior minor breaches, at its first consideration of this Complaint on 26 April 2019, the Panel made the decision:
 - a. that if the alleged minor breach was found to have been committed, the same may be a recurrent breach; and
 - b. to send the complaint to the Departmental Chief Executive Officer ("**Department CEO**") under section 5.111 of the Act, to determine whether the Department CEO would make an allegation to the State Administrative Tribunal ("**SAT**") under section 5.112(2) of the Act.
3. The complaint was duly referred to the Department CEO on 9 May 2019.
4. On 30 July 2020 the Director General referred complaint SP 2019-010 back to the Panel pursuant to section 5.112(4) of the Act on the basis that, if the allegation was made out, SAT would not consider any further penalties for Cr Bell than those already available to the Panel.
5. On 2 September 2020 the Panel reconsidered the Complaint and found Cr Bell committed three minor breaches pursuant to section 7(1)(b) of the regulations.
6. The Panel then convened on 10 November 2020 to consider how it should deal with the sanction for the Minor Breaches.
7. The Panel accepted the advice of the Department of Local Government, Sport and Cultural Industries ("**the Department**") that on this date there was no available information to indicate that Cr Bell had ceased to be, or was disqualified from being, a councillor.
8. If the Panel finds that a councillor has committed a minor breach, it must give the councillor an opportunity to make submissions to the Panel about how it should deal with the breach under section 5.110(6).¹
9. By a letter dated 8 October 2020, Cr Bell was:
 - a. notified of the Panel's finding of the Minor Breaches;

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



- 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 Breaches should be dealt with under section 5.110(6) of the *Act*.
10. Cr Bell did not make any submissions regarding how the Minor Breaches should be dealt with.

Possible Sanctions

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

Panel's Consideration

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



- e. the councillor's disciplinary history;
 - f. likelihood or not of the councillor committing further breaches of the Act;
 - g. personal circumstances at the time of conduct, and of imposing the sanction;
 - h. need to protect the public through general deterrence and maintain public confidence in local government; and
 - i. any other matters which may be regarded as aggravating conduct or mitigating its seriousness².
15. In this case the conduct of Cr Bell was deemed to be significant as the Facebook Posts:
- a. were made in a public forum;
 - b. publicly criticised the CEO of the Shire and other Councillors in a derogatory manner;
 - c. were generally inaccurate and materially misleading in some instances; and
 - d. indicated a lack of insight and accountability as to the prior minor breaches Cr Bell was found to have made.
16. Although the Panel appreciates that it has been some time since the Complaint was first made, the relevant delay was caused due to the referral of the matter to the Department CEO due to repeated findings of minor breach against Cr Bell.
17. In the relevant Facebook Posts Cr Bell directly referred to the prior minor breaches and attempted to re-frame the relevant Panel decisions as exonerating Cr Bell's conduct in response to the prior minor breaches. This indicates to the Panel that Cr Bell is dismissive of the improper nature of his conduct.
18. In these circumstances, the Panel considers that the appropriate sanctions are that Cr Bell be publicly censured, to make a public apology and to receive training.
19. A censure is a public statement of disapprobation of a councillor's conduct. The Panel considers this to be an appropriate penalty as it will send a message to the community and other councillors that Cr Bell's conduct was unacceptable and deserving of a serious penalty.
20. Making a public apology is also a significant sanction, being a personal admission by the individual of wrongdoing. It is a suitable and appropriate penalty when a councillor's conduct:
- a. adversely affects particular individuals³; and/or
 - b. does not meet the standards other councillors seek to uphold.
21. In respect to the relevant training, due to the nature of Cr Bell's repeated breaches, it is clear that he is not able to effectively respond to and communicate with people who he is in conflict with in a manner which reflects the standards of conduct expected of local councillors. The Panel feels that the ordered training will assist Cr Bell's skills in this regard.

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

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



22. The sanction of an order to undertake training also aligns with the intent of the Act and the purpose of the civil penalties under the Act to ensure future compliance with the statutory obligations imposed on councillors for the better protection of the public.
23. The Panel confirms that at the time the Complaint was made, Schedule 5.1 clause 9 was not in effect and consequently the Panel does not order that Cr Bell recoup to the Shire the costs of the Department incurred in respect to the Complaint.

Panel's decision

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

Mick Connolly (Presiding Member)

Emma Power (Member)

Peter Rogers (Member)



ORDER

Delivered 12 January 2021

DEFAMATION CAUTION

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THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Councillor Benjamin Bell, a councillor for the Shire of Toodyay **publicly apologise**, as specified in paragraph 4, or failing compliance with paragraph 4, then paragraph 5 below shall apply.
2. Councillor Benjamin Bell, a councillor for the Shire of Toodyay, be **censured** as specified in paragraph 6 below.
3. Councillor Benjamin Bell, a councillor for the Shire of Toodyay, undertake **training** as specified in paragraph 7 below.

Public Apology

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

"I advise this meeting that:

- i. A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened *the Local Government (Rules of Conduct) Regulations 2007 (WA)* when I made several false, misleading and derogatory Facebook Posts on 10 February 2019.
- i. The Panel found that I breached regulation 7(1)(b) of the said Regulations three times as my conduct was in breach of the Shire's Code of Conduct and deserving of a penalty and, further, my comments were false or misleading and likely to cause detriment to Mr Stan Scott and Cr Therese Chitty.



- ii. I accept that I should not have made the relevant comments.
- iii. I now apologise to Mr Stan Scott, Cr Therese Chitty my fellow Councillors and the public.”

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

PUBLIC APOLOGY BY COUNCILLOR BENJAMIN BELL

A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened the Local Government (Rules of Conduct) Regulations 2007 (WA) when I made several false, misleading and derogatory Facebook Posts on 10 February 2019.

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

I accept that I should not have made the relevant comments.

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

Public Censure

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



NOTICE OF PUBLIC CENSURE

The Local Government Standards Panel has found that Councillor Benjamin Bell, a Councillor of the Shire of Toodyay, breached



regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007 (WA)* three times when he made several false, misleading and derogatory Facebook Posts on 10 February 2019.

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

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

**LOCAL GOVERNMENT
STANDARDS PANEL**

Training

7. Within 4 months of the date of this Order, Councillor Benjamin Bell, a Councillor for the Shire of Toodyay, shall undertake:
 - a. the training course for Elected Members "Dealing with Conflict" provided by WA Local Government Association (WALGA) for a period of no less than 7.5 hours, attending either in person or via e-learning; or
 - b. a training course with substantially similar learning outcomes provided by an alternative registered training organisation for a period of not less than 7.5 hours.



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."*