



Local Government Standards Panel

Complaint Number	SP 12 of 2018 [DLGSC 20180246]
Legislation	<i>Local Government Act 1995</i>
Complainant	Mayor Gary Brennan
Respondent	Councillor Brendan Kelly
Local Government	City of Bunbury
Regulation	Regulation 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Ms M Strauss (Presiding Member) Mr M Beecroft (Member) Councillor P Kelly (Member)
Heard	2 July 2018 Determined on the documents
Finding	Breach of regulation 7(1)(b)

FINDING AND REASONS FOR FINDING

Published 17 July 2018

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Summary of the Panel's decision

1. Under the provisions of the *Local Government Act 1995* (WA) (the Act) the Panel found that Councillor Brendan Kelly, a Councillor for the City of Bunbury (the City), breached regulation 7(1)(b) of the Act and the *Local Government (Rules of Conduct) Regulations 2007* (the Regulations) by publishing comments in two Facebook posts on an uncertain date in January or February 2018 and on 6 February 2018 concerning a Council decision on 23 January 2018 to add a representative of the Bunbury Geographe Chamber of Commerce and Industry (BGCCI) to the membership of the Council's Policy Review and Development Committee (the Policy Committee).

Jurisdiction and procedural fairness

2. The Act provides for the circumstances in which a council member commits a minor breach.¹

3. On 20 February 2018 the Panel received a Complaint of Minor Breach Form dated 15 February 2018, with several attachments, signed by Councillor Gary Brennan, the City Mayor, alleging Cr Kelly breached regulation 7 of the Regulations by publishing several comments on Facebook criticising Council decisions and making inappropriate comments about the Mayor (the Complaint).

4. By email on 16 March 2018 the Department of Local Government, Sport and Cultural Industries (the Department) sent Cr Kelly a copy of the Complaint Form and the documents the Mayor provided with his Complaint Form, inviting him to respond to the Complaint.

5. 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 breach occurred.

6. The Panel convened on 2 July 2018 to consider the Complaint. The Panel:

- accepted the advice of the Department that, based on information published on the Western Australian Electoral Commission's website, Cr Kelly was last elected as a City Councillor on 17 October 2015, was a councillor at the time of the alleged breach and a councillor when the Panel met on 2 July 2018;
 - was satisfied the Complaint was made within two years after the alleged breach occurred²;
 - noted that Cr Kelly responded to the Complaint by email on 28 March 2018, attaching several documents (the Response);
 - was satisfied the Department had provided procedural fairness to Cr Kelly;
- and
- found it had jurisdiction to consider the Complaint.

¹ Section 5.105 of the Act.

² Section 5.107(4) of the Act



The Panel's role

7. The Panel is not an investigative body.³ It makes decisions about complaints of minor breaches solely upon the evidence presented to it and, when relevant, information published on a local government's website, such as council meeting agendas and minutes, policies and codes of conduct. For the Panel to find that a councillor committed a minor breach it must be satisfied on the evidence before it that it is more likely than not that the alleged breach occurred.⁴ This is commonly referred to as "the required standard" or "the required standard of proof".

8. The Panel cannot rely on an alleged fact unless it is satisfied that it is more likely than not that the alleged fact is true.⁵ The Panel cannot merely choose between two or more conflicting but equally possible versions of events.⁶ To accept one of the competing versions of events it must be satisfied that one is more likely to be the correct version.

9. For a finding that a councillor has breached a particular regulation the Panel must be satisfied to the required standard that every element of that regulation has been established.

10. Where the complainant submits the Panel should come to a particular conclusion, such as that the evidence establishes an element of the regulation, the Panel must be satisfied, after weighing up all the evidence and applying the relevant legal principles, that its conclusion is the one best supported by the evidence.⁷

Regulation 7

11. Regulation 7 provides:

"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 5.9 of the Act or The Criminal Code section 83."

12. The Mayor does not specify whether he alleges a breach of regulation 7(1)(a) or 7(1)(b). Based on the assertions in the Complaint Form the Panel treated the Complaint as an allegation of a breach of regulation 7(1)(b).

13. In this case regulation 7(2) does not exclude the operation of regulation 7(1)(b) because the alleged conduct is not conduct that could contravene the parts of the Act and *The Criminal Code* referred to in regulation 7(2).

³ *Re and Local Government Standards Panel* [2015] WASAC 51, paragraph 24.

⁴ Section 5.106 of the Act.

⁵ The effect of section 5.106 of the Act.

⁶ *Bradshaw v McEwens Pty Ltd* (1951) 217 ALR 1, paragraph 5.

⁷ The effect of section 5.106 of the Act.

14. Regulation 7(1)(b) has four elements:

First element – whether the respondent was a councillor when he/she is alleged to have committed the breach.

Second element - whether the councillor used his/her office as a councillor when engaging in the alleged conduct.

Third element – whether the councillor made improper use of his/her office as a councillor by engaging in the alleged conduct.

Fourth element – whether the councillor engaging in the alleged conduct to cause detriment to the local government or any other person.

The Complaint

15. The Mayor asserts in his Complaint Form, in summary:

- Cr Kelly used his personal and councillor Facebook pages “on a number of occasions” to criticise Council decisions. This is damaging the City’s reputation, as evidenced by the public’s Facebook responses to Cr Kelly’s criticism.
- Cr Kelly is using information which is causing a detriment to the City through public criticism of Council’s decisions which is a breach of his obligation to be loyal to Council and Council Decisions.
- Cr Kelly has made inappropriate comments about him on Cr Kelly’s personal and councillor Facebook pages.
- Having observed Cr Kelly’s series of negative posts he wrote to Cr Kelly on 2 February 2018 in his capacity as Mayor, expressing his concerns about Cr Kelly’s use of social media to criticise Council decisions.

16. The Mayor provided copies of the following documents with his Complaint Form:

- Facebook posts – a series of Facebook posts made between 23 January 2018 and 7 February 2018 (some undated) on various topics made in the names of “Brendan Kelly for Bunbury” and “Brendan Kelly”, interspersed with posts by numerous other Facebook users.
- A letter from the Mayor to Cr Kelly dated 2 February 2018, titled “Without prejudice” about Cr Kelly’s use of social media.
- Fifteen emails dating between 12 November 2017 and 9 February 2018 about various topics.

17. The Mayor submits the numerous “examples of Facebook posts” provided support his claim that Cr Kelly has breached regulation 7. The Panel expresses concern that the Mayor has not identified which Facebook posts criticise Council decisions, the particular decisions criticised and which posts make inappropriate comments about him. Neither has the Mayor identified which of the 15 emails support his assertions.

18. The Panel has considered all the material submitted by the Mayor. Many Facebook posts are irrelevant to the issues to be considered. Some emails concern issues that are not mentioned in any Facebook posts, such as issues relating to the City's "friendship city" Nha Trang and the Bunbury Mail newspaper's invitation to Councillors to contribute "opinion pieces". Several emails concern voting requirements being specified in agendas.

19. On the face of the Complaint Form and material submitted by the Mayor, the Panel finds that only four of the Facebook posts made by "Brendan Kelly" or "Brendan Kelly for Bunbury" could possibly lead to a finding of a breach of regulation 7(1)(b).

20. In relation to the other Facebook posts, the material submitted could not possibly establish that Cr Kelly made improper use of his office (the third element), according to the legal tests for this element outlined below.

21. The only four Facebook posts worthy of the Panel's consideration in detail are:

Post 1 - South's Furniture Building - dated 30 January 2018

"Brendan Kelly for Bunbury

It's no secret that the City of Bunbury is negotiating to buy the old South's Furniture Building, I might add for a fairly tidy sum. Whereas it is undoubtedly a strategic long term investment, only today I was asked: "What about today's needs?" Good question, given that this week I also had to lodge a motion on notice to get an allocation for an urgently needed footpath in Glen Iris. What is more important? Fixing things that need to be fixed now, building community infrastructure, such as shade sails, bike paths, park play equipment, etc. or buying something hoping that it might pay off in ten or twenty years. There is a balance I suspect, however a bit more community 'yack' about the matter might help Councillors in their decision making."

Post 2 - Destination Park skate park - dated "???? 2018"

"Brendan Kelly – Bunbury Needs a New Skate Park

"Sorry crew, no new skate park... yet. Unfortunately my move in the Bunbury City Council to secure a way forward for the new skate facility fell in a heap. It's a long story, but essentially knowing that the numbers were hostile, I tried to modify the motion to suit the mood. The Mayor refused to consider it. I'll provide the details to Dicko later and we'll work on Plan B. Meanwhile, looks like those trips you all make to Busselton to skate will continue for a while. Hopefully not too long..."

Post 3 - Council committees and the BGCCI - dated "???? 2018"

"The decision (7/6) by the Bunbury City Council to give the Bunbury Geographe Chamber of Commerce & Industry a vote on the Council's Policy Committee fails the pub-test. It was a curious decision, given the compelling argument 'against' and no convincing argument 'for'.



It was claimed that including the Chamber onto the Policy Committee was no different than what occurs on other Council committees, such as the Community Access Committee, the International Relations Committee or the Heritage Advisory Committee. This is simply not true. Those committees are set up with specific terms of reference, to take carriage on one subject, with community members who have a particular interest or expertise in the field. The Policy Committee on the other hand exists to create policy for a wide range of issues across the City of Bunbury and for all ratepayers. That is the job of elected members.

It was argued that if the Policy Committee is to have outside voting rights then it must be open to all interests, not just the self-interest of the Chamber. The pub-test calls out the decision as an elitist piece of work, which relegates any other community group to the bottom of the pile. It is worth thinking about the consequences that such a decision will have upon the independence of Council decision making."

Post 4 - The BGCCI issue - dated 6 February 2018

"Now here's a defence of the Bunbury Geographe Chamber of Commerce and Industry that still doesn't pass the pub test. By the two "leaders" themselves. It's nice to be accused of being "precious". Demonstrates clearly the level of debate that occurred in bestowing the BGCCI their own vote on a Council Committee. Elitist it is..."

Cr Kelly's Response

22. Cr Kelly submitted an Elected Member's Response Form denying he breached regulation 7. He attached a 20 page document containing general and specific submissions about the Facebook posts and emails submitted by the Mayor (his Response).

23. Cr Kelly advises the Panel that he has been a City Councillor since October 2007.

24. The Panel agrees with Cr Kelly that several posts could not possibly lead to a finding of breach.

25. The Panel expresses concern that the general nature of the Complaint and the volume of material submitted by the Mayor has caused Cr Kelly to spend an unreasonable amount of time preparing his Response. This has no doubt caused Cr Kelly significant inconvenience.

26. Cr Kelly submits the Panel should refuse to deal with the Complaint on the grounds that it is frivolous, trivial and misconceived.⁸ The Panel considers Posts 1 to 4 are worthy of consideration so decides to deal with the Complaint.

⁸ Section 5.1110(3A) allows the Panel to refuse to deal with a complaint if it is satisfied the complaint is frivolous, trivial, vexatious, misconceived or without substance.

Principles for assessing third element, “must not make improper use of ... office”

27. The dictionary definition of “improper” is “not in accordance with propriety of behaviour, manners, etc.; unsuitable or inappropriate for the purpose or occasion; abnormal or irregular.”⁹

28. The meaning of “improper” must be considered in the context of relevant legislation, such as the Act and the Regulations, other rules and standards that apply to a councillor’s role and conduct, such as the local government’s Code of Conduct, and the circumstances and context of the case.¹⁰

29. Whether there is impropriety is to be assessed objectively: would a reasonable person with knowledge of the duties, powers and authority of a councillor, and all the circumstances of the particular case, form the view that the councillor had breached the standards of conduct expected of a councillor?¹¹

30. Under the Act Panel members must have regard to the general interests of local government in Western Australia.¹² It is in the interests of local government that councillors avoid damage to the reputation of the local government, employees and councillors and treat others with respect and fairness.¹³ Councillors must respect, and be seen to respect, the processes and authorised decisions of Council. Councillors have a duty to be faithful to their Council.¹⁴

31. Regulation 3 of the Regulations sets out general principles to guide councillors’ behaviour, although contravention of any of any of these does not amount to a minor breach.¹⁵ Regulation 3 provides, among other things, that councillors should act with reasonable care, diligence, honesty and integrity; avoid damage to the reputation of the local government; and treat others with respect and fairness.

32. Conduct can be improper even though the councillor’s judgment is that it isn’t improper. A councillor’s use of his or her office can be improper even though the councillor is intending to benefit the local government, the council or the ratepayers and residents.¹⁶

Code of Conduct

33. The version of the City’s Code of Conduct currently published on its website applied at the time of the alleged breach.¹⁷ It provides:¹⁸

⁹ Macquarie Dictionary, Revised Third Edition.

¹⁰ *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 10, referring to *Treby and Local Government Standards Panel* [2010] WASAT 81 (*Treby* 2010).

¹¹ *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraph 27, referring to *R v Byrnes* (1995) 183 CLR 501.

¹² Section 5.122(3) of the Act, Schedule 5.1 of the Act, clause 8(6).

¹³ Regulations 3(1)(d) and (g) of the Regulations.

¹⁴ *Yates and Local Government Standards Panel* [2012] WASAT 59 paragraph 64(5), *Treby and Local Government Standards Panel* [2009] WASAT 224 paragraph 19.

¹⁵ Regulation 13.

¹⁶ *Yates and Local Government Standards Panel* [2012] WASAT 59, paragraph 64(4), referring to *Treby* 2010.

¹⁷ The Code was amended by Council resolution on 19 September 2017.

¹⁸ Pages 15 and 16.



“Dealing with the Media – Making Public Comment

Unless otherwise authorised to do so, Elected Members, Committee Members or Employees making public statements, express them as opinions only, which do not necessarily represent the City's position. Elected Members, Committee Members and Employees who speak publicly against any Council resolution without authorisation to do so may be using the information, or be seen to use the information improperly and run the risk of causing detriment to the City.

...

All contact Elected Members, Committee Members and Employees have with the public outside the City, media or otherwise, should be positive, informative and appropriate.”

Principles for assessing fourth element “to cause detriment to the local government or any other person”

34. “Detriment” means loss, damage or injury.¹⁹ It includes financial and non-financial loss and adverse treatment, such as humiliation, denigration, intimidation, harassment, discrimination and disadvantage. A person or organisation can suffer detriment through others thinking less favourably of them or of it.²⁰

35. For regulation 7(1)(b) to be satisfied it is not necessary to show that the local government or the person concerned actually suffered detriment.²¹ And it is not enough to show that the local government or the person concerned suffered detriment, or could have suffered detriment. The Panel must find that the councillor believed that his or her actions would cause detriment and took the action to cause detriment.²²

36. “To cause detriment” means “in order to” or “for the purpose of” causing detriment, or “with the will to” cause detriment.²³ There can be a finding of intent if, after considering all the evidence, the only reasonable inference is that the councillor intended to cause detriment.²⁴

Consideration of Post 1

First element

37. There can be no doubt that Cr Kelly was a City Councillor at the time. This element is established.

Second element

38. Cr Kelly posted his comments as “Brendan Kelly for Bunbury”. Cr Kelly admits he posted in his capacity as a Councillor.²⁵ This element is established.

¹⁹ Macquarie Dictionary Revised Third Edition, 2001.

²⁰ *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraphs 31, 32.

²¹ *Treby* 2010, paragraph 96, referring to *Chew v The Queen* 1992 CLR 626 (*Chew* 2010).

²² *Re and Local Government Standards Panel* [2014] WASAT 111, paragraph 51, referring to *Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd* [2013] FCA 1342.

²³ *Chew* 2010.

²⁴ *Treby* 2010.

²⁵ Third page of the Response.



Third element

39. The principles to be applied when considering this element are outlined in paragraphs 27 to 32 above.

40. The Mayor has not indicated when Council made any decision to negotiate and none of the emails he has provided refer to a Council decision or any negotiations about this building.

41. In the Post Cr Kelly states, *"It's no secret that the City of Bunbury is negotiating to buy the old South's Furniture Building"* and goes on to express some concern about that: *"What about today's needs? ... I also had to lodge a motion on notice to get an allocation for an urgently needed footpath ..."* Cr Kelly then implies it would be better to fix things than buy property that may or may not benefit the City.

42. However, Cr Kelly shows some moderation in this Post, acknowledging there may be factors to be weighed up (referring to "balance") and suggested more community discussion would assist all Councillors.

43. Cr Kelly submits that the Post makes practical and reasonable use of social media to elicit community comment on an important Council issue.²⁶

44. The Code of Conduct does not prohibit Councillors from speaking about Council decisions in public. It alerts them to pitfalls and encourages positive and informative communication.

45. The Panel is not satisfied to the required standard that a reasonable reader of this Post who knows a councillor has a duty to be faithful to a Council decision, but who also knows the role of a councillor includes informing and consulting the community, would consider Cr Kelly breached the standards of conduct expected of him.

46. This element is not established

Fourth element

47. As the third element is not established it is not necessary for the Panel to consider the fourth element.

No breach

48. Cr Kelly did not breach regulation 7(1)(b) by publishing Post 1.

Consideration of Post 2

49. The Mayor provided copies of the following emails:

²⁶ Third page of the Response.



- An email from Cr Kelly to Mr Malcolm Osborne, the City's Chief Executive Officer (CEO) on 11 November 2017 about a potential new skate park, "Destination Park".
- The CEOs' email response to Cr Kelly on 12 November 2017 titled "Destination Park".

First element

50. There can be no doubt that Cr Kelly was a City Councillor at the time. This element is established.

Second element

51. Cr Kelly posted his comments as "Brendan Kelly". Cr Kelly says he posted this message to the "Bunbury Needs a New Skatepark" Facebook page.²⁷ In this Post Cr Kelly presents himself as a Councillor who supports the idea of a new skate park, saying, "Sorry ... no new skate park". He refers to his attempt to modify a motion in Council. Cr Kelly does not deny he was using his office as a Councillor when he posted this message.²⁸

52. This element is established.

Third element

53. Cr Kelly submits the Post was "truthful, by way of information only, to a key stakeholder group of constituents and a real-world way of disseminating significant information".²⁹

54. Although the Post implies Council had recently made a decision relevant to a proposed skate park, the Mayor has not given any particulars of the Council decision Cr Kelly is said to have criticised. Council may have made an interim decision, such as to defer consideration to obtain more information. It is difficult to assess the "no skate park" statement without more information.

55. The two emails referred to in paragraph 49 above discuss processes relevant to a potential skate park project being put before Council. They do not provide any evidence to support the Mayor's assertion that Cr Kelly improperly criticised a Council decision in the public domain.

56. Post 2 is more of an update than a criticism. Cr Kelly indicates that at least for the time being a skate park has not been approved. The communication shows some positivity ("hopefully not too long") and is informative.

57. The Panel is not satisfied to the required standard that a reasonable reader of this Post who knows a councillor has a duty to be faithful to a Council decision, but who also knows the role of a councillor includes informing and consulting the community, would consider Cr Kelly breached the standards of conduct expected of him.

58. This element is not established

²⁷ Fourth page of Cr Kelly's Response.

²⁸ Fourth page of Response.

²⁹ Fourth page of Response.



Fourth element

59. As the third element is not established it is not necessary for the Panel to consider the fourth element.

No breach

60. Cr Kelly did not breach regulation 7(1)(b) by publishing Post 2.

Background to Posts 3 and 4

61. The background to these Posts³⁰ is that at an ordinary council meeting on 23 January 2018 (the OCM) Council decided, on a recommendation from the Policy Committee, to amend the Policy Committee's terms of reference to provide that it include a BGCCI representative.

62. Both Posts comment on the decision to include BGCCI on the Policy Committee (the Decision).

63. The Mayor provided copies of the following:

- Three emails passing between Cr Kelly and Mr GG, the City's Governance Officer on 25 January 2018 titled "A Governance Matter" discussing membership of council committees generally and the Decision.
- An email on 11 February 2018 from Cr Kelly to Mr RS, General Manager of BGCCI titled "BGCCI" discussing the Decision.
- An email on 12 February 2018 from Mr RS of BGCCI to Cr Kelly advising BGCCI was still discussing the matter of membership of the Policy Committee.

Consideration of Post 3

64. Although Cr Kelly did not give the date of the Decision in Post 3, a reasonable reader of this Facebook page would understand that Cr Kelly was referring to a recent formal Council decision.

65. Post 3 is quite different from Posts 1 and 2. It provides some particulars of the Decision – a 7/6 decision to give BGCCI membership of the Policy Committee. Cr Kelly goes beyond informing readers of the Decision and why he voted against it. He comments on the merits of the Decision, saying in effect that it was a bad decision.

66. In Post 3 Cr Kelly criticises the Decision by saying:

- There was a compelling argument against the Decision and no convincing argument supporting it.
- The claim that the inclusion of BGCCI was similar to membership arrangements for other committees was not true.

³⁰ Provided by Cr Kelly, ninth page of his Response.

- It was not appropriate to include BGCCI to the exclusion of other interested parties because BGCCI only had a “self-interest”.
- The ordinary person (in a “pub-test”) would consider the Decision to be elitist.
- The Decision relegates other community groups to the bottom of the pile.
- The Decision will have an adverse effect on the independence of Council.

First element

67. There can be no doubt that Cr Kelly was a City Councillor when he published the Post. This element is established.

Second element

68. Cr Kelly submits he added Post 3 to his personal Facebook page, “Brendan Kelly”. It is more likely than not that a number of readers of the “Brendan Kelly” page who read Post 3 will know that Brendan Kelly is a Councillor. Cr Kelly does not deny he was using his office as a Councillor when he added Post 3.³¹ This element is established.

Third element

69. Cr Kelly submits³²:

- “... (Post 3) makes authentic use of social media, using common vernacular; to provide information and have the community question the democratic process, in order to stimulate public discussion on an issue of civic interest.”
- The issue of giving the BGCCI a vote on the Policy Committee had been extensively reported in social and mainstream media.

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

- (a) It is more likely than not that a reasonable reader of Post 3 would form the view that Cr Kelly was, in his capacity as a Councillor, criticising a recent Council decision to appoint a member of the BGCCI to the Policy Committee.
- (b) The Panel has no reason to doubt the accuracy of the minutes of the OCM published on the City’s website. These minutes record that Cr Kelly and the other dissenting Councillors requested that their votes “against” be recorded.³³ Cr Kelly does not submit he was denied an opportunity to express his opposition to the Recommendation before Council voted. Councillors can present their views on a matter before Council votes. Once Council had made the Decision Cr Kelly had a duty to respect and be faithful to it, unless and until Council revisits the matter. It was not appropriate for him to continue the debate in social media after the Decision had been made.

³¹ Fourth page of Response.

³² Fourth page of Response.

³³ Page 55 of the published minutes.

- (c) Although a councillor can advise the public after a council meeting why they voted against a proposal they must be careful to word their comments in a way that indicates respect for the views of all other councillors and a commitment to their council's decision.
- (d) It is likely that the Councillors who voted in favour of the Recommendation would be offended by Cr Kelly's comment that there were no compelling arguments to support the Recommendation. This implies they did not give proper consideration to the matter. It is unprofessional to make such comments in the public domain and shows disrespect for the views of the several Councillors who voted in favour of the Recommendation.
- (e) It is also likely that Councillors who voted in favour of the Recommendation would be offended by Cr Kelly's comment that the Decision would be seen as elitist and the BGCCI seen as self-interested. It is reasonable to interpret these comments as implying that Councillors who supported the Recommendation were giving favourable treatment to a body which would use the Policy Committee for its own benefit rather than for the benefit of the community.
- (f) It is more likely than not that a reasonable reader of Post 3 would consider Cr Kelly to be accusing Councillors who voted in favour of the Recommendation of threatening its independence and allowing an outsider to take on Councillors' responsibilities.
- (g) It is not in the interests of the City or the Council for members of the public to see one Councillor criticising how other Councillors voted.
- (h) The Code of Conduct warns Councillors about the risk of damaging the City when they speak publicly. It says Councillors need to be positive, informative and appropriate when speaking in public. Cr Kelly did not take sufficient care to ensure his comments met the standards espoused in the Code of Conduct.
- (i) The Panel is satisfied to the required standard that any reasonable person who read Post 3, knowing about the Decision and the rules that govern the conduct of councillors, would come to the view that Cr Kelly did not meet the standards of professionalism and respect for the Decision, and for his fellow Councillors, that he is expected to uphold.

71. This element is established.

Fourth element

72. The copy of Post 3 provided by the Mayor does not indicate the date of posting. However, there is no apparent reason why Cr Kelly would not have had time to reflect on his comments before posting them. The Post is not brief. There is no reason to think he was under time pressures or was writing impulsively.

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



74. Cr Kelly submits his comments were merely to “stimulate public discussion” on the issue.³⁴ The Panel does not accept this. He could have stimulated further discussion by simply advising the public that the Decision had been made and that the close vote indicated Council was divided. He could have told the public that he would wait to see how the new membership of the Policy Committee worked.

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

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

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

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

79. In his letter to Mr RS, the General Manager of BGCCI, Cr Kelly again makes adverse comments about the Decision, saying it was inappropriate, had caused “genuine alarm” and was divisive. This letter further demonstrates that Cr Kelly was intent on telling people that some Councillors had made a bad decision. He in effect told Mr RS that the Decision was so bad that BGCCI should decline to join the Policy Committee.

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

81. This element is established.

Breach

82. Cr Kelly breached regulation 7(1)(b) when publishing Post 3 intending to cause detriment to the seven Councillors who voted in support of the Recommendation to include a BGCCI representative on the Policy Committee.

Consideration of Post 4

First element

83. There can be no doubt that Cr Kelly was a City Councillor when he published the Post. This element is established.

³⁴ Fourth page of Response.



Second element

84. Cr Kelly posted his comments as “Brendan Kelly for Bunbury”. Cr Kelly admits he posted in his capacity as a Councillor.³⁵ This element is established.

Third element

85. The Panel notes that this Post was published on the “Brendan Kelly for Bunbury” page, whereas Post 3 was on “Brendan Kelly”.

86. Cr Kelly reinforces his strong opposition to the Decision and makes an adverse comment about the level of debate that occurred “in bestowing” the BGCCI with a place on the Committee.

87. Cr Kelly submits:³⁶

- The Mayor provoked him by publishing in the Bunbury Herald, “It’s really important for some elected members not to be too precious”. It was this comment from the Mayor, not Councillors’ behaviour generally, that prompted him to refer to the low level of debate.
- This Post “makes appropriate use of social media to promote and nurture a vigorous, full-bodied and healthy civic debate”.

88. This Post must be considered in the context of the 6 February 2018 Bunbury Herald article posted with the message. According to Cr Kelly³⁷ the title is “Leaders defend committee decision”.

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

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

- (a) It is more likely than not that a significant number of people who followed Cr Kelly on the “Brendan Kelly for Bunbury” Facebook page would also have followed him on the “Brendan Kelly” page.
- (b) Post 4 must be considered in the context of Post 3 because it is more likely than not that a significant number of people who read Post 4 would have read or been aware of Post 3, realising they were linked.
- (c) In Post 4 Cr Kelly criticised the Decision, saying it still didn’t meet the pub-test and was elitist. He implied that Council debate was inadequate or inappropriate.

³⁵ Fifth page of the Response.

³⁶ Fifth page of Response.

³⁷ Fifth page of Response.

- (d) Although a councillor may advise the public after a council meeting why they voted against a proposal they must be careful to word their comments in a way that indicates respect for the views of all other councillors and a commitment to their council's decision.
- (e) It is likely than the Councillors who voted in favour of the Recommendation would be offended by Cr Kelly's comments in Post 4 referring to the "pub-test", "elitist" and the level of debate.
- (f) It is more likely than not that a reasonable person who read Post 4, and who was aware of Post 3, would consider Cr Kelly to be reiterating his criticism of the Decision and his view that Councillors who voted in favour of the Recommendation did not meet their responsibility to make well-considered decisions.
- (g) The Code of Conduct warns Councillors who wish to speak publicly about the risk of damaging the City and the need to be positive, informative and appropriate. Cr Kelly did not take sufficient care to ensure his comments met the standards espoused in the Code of Conduct.
- (h) The Panel is satisfied to the required standard that any reasonable person who read Post 4, knowing about Post 3, the Decision and the rules that govern the conduct of councillors, would come to the view that Cr Kelly did not meet the standards of professionalism and respect for the Decision, and for his fellow Councillors, that he is expected to uphold.

91. This element is established.

Fourth element

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

93. Cr Kelly submits his comments were merely to promote vigorous debate. The Panel does not accept this. He could have done that by simply advising the public that the vote had been as close as 7/6 in favour of the Recommendation. He could have told the public that he would monitor how the new Committee composition worked.

94. Cr Kelly's claim that he wanted debate to continue supports an inference that he wanted to keep his negative views about the Decision in the public domain. Cr Kelly posted Post 4 and wrote to Mr RS despite having received the Mayor's 2 February 2018 letter.

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

96. This element is established.



Breach

97. Cr Kelly breached regulation 7(1)(b) when publishing Post 4, intending to cause detriment to the seven Councillors who voted in support of the Recommendation to include a BGCCI representative on the Policy Committee.

Panel's finding

98. The Panel finds that Cr Kelly breached regulation 7(1)(b) when he published Facebook Post 3 and Post 4. Cr Kelly therefore committed a minor breach.

Merranie Strauss (Member)

Paul Kelly (Member)

Mark Beecroft (Deputy Member)

Date of Reasons for Decision 17 July 2018