



Local Government Standards Panel

Complaint Number	SP 2018-092
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)</i> <i>Regulations 2007 (WA)</i>
Panel Members	Mrs S Siekierka (Presiding Member) Ms E Rowe (Deputy Member) Ms R Aubrey (Deputy Member)
Heard	22 March 2019 Determined on the documents
Outcome	Public censure Public apology

DECISION AND REASONS FOR DECISION

Published: 4 April 2019

DEFAMATION CAUTION

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Introduction

1. At its meeting on 7 December 2018, the Panel found that Councillor Benjamin Bell ("Cr Bell"), a council member of the Shire of Toodyay ("the Shire") committed one breach of regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (WA) ("the Regulations") when he published a Facebook post on 30 September 2018 relating to the allegation of Mr Stan Scott, the Chief Executive Officer of the Shire ("CEO"), commencing legal actions on behalf of the Shire.

2. On 25 January 2019 the Panel published its Finding and Reasons for Finding ("Findings") that Cr Bell had breached regulation 7(1)(b). The Panel reviewed all the evidence presented to it and said:

"42. The Post itself clearly implies that:

- a. a complaint to the Department regarding Cr Bell is a "legal action";
- b. that such actions/complaints are unnecessary, frivolous and will fail; and
- c. that the CEO has spent \$800,000 on similar failed legal action.

43. Following the Post there are substantial community comments as well as several additional comments by Cr Bell. Of interest are the following comments by Cr Bell:

- a. **Comment 1** – *"Make that 6 . . . the CEO just started the sixth action against me this week."*
- b. **Comment 2** – *"...it's is indeed a rare event that a CEO commences action against a councillor. I understand that our current CEO did do a similar thing to another councillor when he was the CEO of other Shire."*
- c. **Comment 3** – *"I am not sure if the CEO is using shire funds for this, as Council only gave him about \$35,000 to use in legal fees for the entire year. There are a number of other legal actions underway by the Shire at present so I suspect this amount of \$35k may be burned through in quick time."*
- d. **Comment 4** – *"Actually, the CEO is unable to move funds between items. The Council approves a budget and the CEO can only spend money in strict accordance with this budget. Any overspend by more than \$5,000 (or 10% of the approved budgeted amount) needs to come to council for approval BEFORE the CEO can spend it. To the best of my knowledge, Council has not been asked to approve a legal costs in excess of that contained in the original budget";*
- e. **Comment 5** – *"[REDACTED] - I was a little surprised (disappointed) that things are heading down this path. The CEO is also the Shire's official Complaint's Officer - that means if the CEO has an issue, he sends his complaint to himself. (I trust that he gives himself a good hearing). I honestly don't think that the other Councillors were aware that the CEO has commenced action against me"*



44. The Post is misleading in relation to complaints made pursuant to the Regulations being classified a “legal action” undertaken by the Shire. A complaint is not a legal action as that term is commonly understood. Further, it is not the Shire undertaking the complaint.
45. A complaint may be made by *any* person. Upon receipt of a complaint the complaints officer (in this case the CEO) must deal with the same pursuant to the provisions of the Act. The CEO is entitled to make a complaint against Cr Bell for referral to the Panel in the same manner as any person.
46. The cost of any consideration of a Complaint by the Panel is dealt with in accordance with the terms of the Act and not at the discretion of any local authority.
47. Cr Bell is encouraged to familiarise himself with the terms of the Act and the Regulations in this regard.
48. It is also noted, as clarified by members of the public following the Post and eventually conceded by Cr Bell, 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, the Post is also misleading in its implication that the CEO is responsible for choosing to spend such monies.
49. Further, in Comment 3, Cr Bell confirms he is actually unsure as to whether Shire funds are in fact used in relation to complaints to the Standards Panel.
50. Given this context, a reasonable person would assume that Cr Bell knew, or ought to have known in his position as an elected official, that the implications that the CEO was:
 - a. undertaking “legal actions” against him; or
 - b. using Shire funds in an unauthorised manner,were false, or at least very misleading, and that Cr Bell was trying to impute that the CEO had an adverse motive for making this Complaint and prior complaints.
51. Comment 5 is also derogatory in tone and misrepresents the function of the complaints officer of a local authority.
52. It is hard to see that there is any reasonable argument that Cr Bell was simply attempting to provide information to the community and had the interests of rate payers as his primary concern when such information was incorrect and misleading.
53. The Panel finds that the Post and several of the subsequent Comments were made in order for Cr Bell to vent his frustration over being the subject of so many complaints, not to provide the community with information. In doing so Cr Bell was in breach of the Code by criticising the CEO and casting aspersions on the CEO’s honesty, competence and credibility.
54. Although in Comments 3 and 4 Cr Bell does somewhat modify his initial position, he does not go so far as to remove or amend the offending Post.
55. The Panel considers that the Post is improper as it was knowingly misleading, implies that the CEO is incompetent or acting wrongfully and does not confirm to the standards of behaviour expected of an Elected Member.

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60. Given the fact that much of the Post was misleading or incorrect in nature, it is likely that the same was made for the purpose of retaliating against the CEO for making various complaints against Cr Bell.

Jurisdiction

3. The Panel convened on 22 March 2019 to consider how it should deal with the Minor Breach. The Panel accepted the advice of the Department of Local Government, Sport and Cultural Industries 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.

Possible Sanctions

4. Section 5.110(6) of the *Local Government Act 1995* (WA) ("the Act") provides that the Panel is to deal with a minor breach by:
- (a) *dismissing the complaint;*
 - (b) *ordering that —*
 - (i) *the person against whom the complaint was made be publicly censured as specified in the order;*
 - (ii) *the person against whom the complaint was made apologise publicly as specified in the order; or*
 - (iii) *the person against whom the complaint was made undertake training as specified in the order;*
 - or*
 - (c) *ordering 2 or more of the sanctions described in paragraph (b).*
5. Section 5.110(6) is about penalty. The Panel does not have the power to review any finding of a breach. The Panel may dismiss a complaint under section 5.110(6)(a), not to reverse the Panel's finding of a breach but to indicate that in all the circumstances the councillor should not be penalised and the breach should not be recorded against the councillor's name.

Councillor Bell's Submissions

6. 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
7. In a letter dated 29 January 2019, the Department notified Cr Bell of the Panel's findings, providing him with a copy of its Findings published on 25 January 2019 and inviting him to make submissions on how the Panel should deal with the breach under section 5.110(6).
8. In a letter dated 14 February 2019 the Panel received submissions from Squire Patton Boggs law firm on behalf of Cr Bell asking that the Complaint be dismissed:

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



- a. The breach of regulation 7(1)(b) is minor in substance as well as definition, in that it will not cause any significant or lasting detriment to the Complainant.
- b. Facebook posts are by their nature, informal and subjective. Although it is acknowledged that they have some immediate impact, the majority of people would regard them as Cr Bell "*letting off steam*". They do not carry the legitimacy of, for example, a published statement or other media release.
- c. The Facebook posts were written several months ago and have now been deleted. An apology, censure or other sanction imposed now would be counterproductive, by drawing fresh attention to the Facebook posts when they are already long forgotten.
- d. Cr Bell at all times acted in what he genuinely felt were the best interests of the community he serves, although he acknowledges that his considerable frustrations with the Complainant may have influenced his judgement in respect of the Facebook posts.
- e. Cr Bell continues to hold his responsibility and role as an elected Councillor very seriously. He has learnt a significant amount from the process and is committed to refraining from any such actions that may be seen as improper in the future.

Panel's consideration

9. The Panel found that Cr Bell committed one breach of regulation 7(1)(b) that related to his conduct when he published a Facebook post on 30 September 2018 relating to the allegation of Mr Stan Scott, the Chief Executive Officer of the Shire ("CEO"), commencing legal actions on behalf of the Shire. Cr Bell also made a series of follow up comments on Facebook.
10. The Panel has considered Cr Bell's reply as to how the Complaint should be dealt with however the Panel does not find Cr Bell's submissions persuasive. While Cr Bell states that he has learnt a lot from this process, he trivialises the seriousness of the allegation and the significant and lasting detriment to the Complainant.
11. It is not appropriate for the Panel to order that the minor breach be dismissed, as this would indicate that Cr Bell's conduct was so minor that no penalty is warranted.
12. Cr Bell has not apologised for his misconduct or shown any genuine contrition and instead seeks to further justify his actions by explaining that his judgement was influenced by his considerable frustrations with the Complainant. The Panel therefore also does not consider that training would be of use in the circumstances or is an appropriate or adequate sanction.
13. A public apology is a significant sanction and is appropriate where a council member's offending conduct amounts to a personal attack on another person, particularly where the other person is an employee of the council member's local government.



14. A breach of regulation 7 involves an intention to cause detriment to another person and is a very serious matter. The Panel found that Cr Bell's Facebook post publicly criticised the CEO and cast aspersions on his honesty, competence and credibility. The Panel found the intention of the Post was to denigrate and humiliate the CEO, and Cr Bell's conduct deserves the sanction of a public apology to the CEO who was subjected to Cr Bell's retaliatory comments.
15. In addition to a public apology, the Panel also considers an order for censure is appropriate.
16. A censure is a public statement of disapprobation of a councillor's conduct and the Panel considers this will send a message to the community and other councillors that Cr Bell's conduct was unacceptable and deserving of a serious penalty.
17. While the Panel notes that when an order that a Notice of Public Censure be published, that Notice is published by the local government's CEO, at the expense of the local government, and such expense is significant where the Notice is to be published in a newspaper or newspapers, the Panel also finds that it is appropriate that Cr Bell be publicly censured for the breach of regulation 7(1)(b).
18. Cr Bell's Facebook post was misleading in relation to complaints made pursuant to the Regulations and the Act and also with regard to how Shire monies are allocated to "legal actions" and who is responsible for such monies. The Post and comments contained serious accusations that were made without any proper or valid basis.
19. The sanction imposed by the Panel must send a message to councillors, local government employees, ratepayers, residents and the wider public that councillors must maintain appropriate standards of conduct. The penalties of a public censure and a public apology are commensurate with the seriousness of the breach.

Panel's decision

20. The Panel orders that in relation to the breach of regulation 7(1)(b), pursuant to section 5.110(6)(c) of the Act and in terms of the attached Order:
 - i. that under section 5.110(6)(b)(i) of the Act, Cr Bell be publicly censured (PART A); and
 - ii. that under section 5.110(6)(b)(ii) of the Act, Cr Bell publicly apologise to the Shire's CEO (PART B).

Sheryl Siekierka (Presiding Member)

Elanor Rowe (Deputy Member)

Rebecca Aubrey (Deputy Member)



Attachment

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Panel Members	Mrs S Siekierka (Presiding Member) Ms E Rowe (Deputy Member) Ms R Aubrey (Deputy Member)
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ORDER

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THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

PART A - ORDER FOR PUBLIC CENSURE

1. Councillor Benjamin Bell, a Councillor for the Shire of Toodyay, be censured as specified in paragraphs 2 and 3 below.
2. 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 arrange for the following Notice of Public Censure to be published, in no less than 10 point print:
 - (a) as a one-column or a two-column display advertisement in the first 15 pages of "The West Australian" newspaper; and
 - (b) as a one-column or a two-column display advertisement in the first 15 pages of the "Toodyay Herald" newspaper.
3. The Notice of Public Censure is to be published on a date other than the Notices of Public Censure ordered in SP54 of 2018, SP65 of 2018 and SP 2018-083.



NOTICE OF PUBLIC CENSURE

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

- (a) regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007 (WA)* by publishing a Facebook post on 30 September 2018 relating to the allegation of Mr Stan Scott, the Chief Executive Officer of the Shire, commencing legal actions on behalf of the Shire.

In engaging in this conduct, Councillor Bell made improper use of his office as a council member.

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

**LOCAL GOVERNMENT
STANDARDS PANEL**



PART B - ORDER FOR PUBLIC APOLOGY

4. Councillor Benjamin Bell, a Councillor for the Shire of Toodyay (Shire), publicly apologise to Mr Stan Scott, the Shire's Chief Executive Officer ("CEO").
5. At the Shire's first ordinary council meeting Cr Bell attends after the expiration of 28 days from the date of service of this Order on him Cr Bell shall:
 - (a) ask the presiding person for his or her permission to address the meeting to make a public apology to the Shire's CEO;
 - (b) 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;
 - (c) address the Council 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 regulation 7(1)(b) of the Local Government (Rules of Conduct) Regulations 2007 when I published a Facebook post on 30 September 2018 relating to the allegation of Mr Stan Scott, the Chief Executive Officer of the Shire, commencing legal actions on behalf of the Shire.
- ii. The Panel found that by behaving in this manner I made improper use of my office as Councillor with the intention of damaging the CEO thereby committing one breach of regulation 7(1)(b) of the Local Government (Rules of Conduct) Regulation 2007.
- iii. I accept that I should not have acted in such a manner towards the CEO and I apologise to the party concerned for having done so."

6. If Cr Bell fails or is unable to comply with the requirements of paragraph 5 above he shall cause the following notice of public apology to be published in no less than 10 point print, as a one-column or two-column display advertisement in the first 10 pages of the Toodyay Herald newspaper.

PUBLIC APOLOGY BY CR BENJAMIN BELL

A formal complaint was made to the Local Government Standards Panel alleging that I contravened a provision of the *Local Government (Rules of Conduct) Regulations 2007* when I published a Facebook Post on 30 September 2018 relating to the allegation of



Mr Stan Scott, the Chief Executive Officer of the Shire, commencing legal actions on behalf of the Shire.

The Panel found:

(1) I committed one breach of regulation of 7(1)(b) of the Rules of Conduct Regulations when I published a Facebook Post on 30 September 2018 relating to the allegation of the CEO commencing legal actions on behalf of the Shire.

(2) By behaving in this way to the CEO, I failed to meet the standards of conduct expected of a councillor

I apologise to the party concerned for acting in such a manner.

Sheryl Siekierka (Presiding Member)

Elanor Rowe (Deputy Member)

Rebecca Aubrey (Deputy Member)



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."