



Local Government Standards Panel

Complaint Number	SPs 11, 12, 14, 15 of 2017 [DLGSC 20170013, 20170014, 20170016, 20170017]
Legislation	<i>Local Government Act 1995</i>
Complainants	Ms Belinda Rowland Mr Roger Seeney Ms Barbara Marshall Mr John Sampson
Respondent	Councillor Yasmin Bartlett
Local Government	Shire of Denmark
Regulation	Regulation 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Ms M Strauss (Presiding Member) Ms S Siekierka (Deputy Member) Councillor Rebecca Aubrey (Deputy Member)
Heard	27 July 2017 Determined on the documents
Outcome	One breach of regulation 7(1)(b)

FINDING AND REASONS FOR FINDING

Published 29 August 2017

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Summary of the Panel's decision

1. The Panel found that Councillor Yasmin Bartlett (Cr Bartlett), a councillor for the Shire of Denmark (the Shire), committed one minor breach under the *Local Government Act 1995* (WA) (the Act) and regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (the Regulations) on 20 January 2017 when making statements in a Facebook post about the previous Shire Chief Executive Officer's performance in relation to business planning and managing the Shire's assets.

Jurisdiction

2. The Act provides for the circumstances in which a council member commits a minor breach.¹
3. On 10 February 2017 the Panel received four Complaint of Minor Breach Forms. Each complainant provided a copy of Cr Bartlett's Facebook post made on 20 January 2017 (the Post) and the other documents referred to in the paragraph below. The four complainants allege Cr Bartlett breached regulation 7(1)(b) on 20 January 2017 by making statements in the Post.

Complaint 1 (SP 11 of 2017) made by Ms Belinda Rowland by Complaint Form dated 6 February 2017, submitted with a copy of a letter she wrote to Mr Bill Parker, the Shire's current Chief Executive Officer (the CEO) dated 21 January 2017.

Complaint 2 (SP 12 of 2017) made by Mr Roger Seeney by Complaint Form dated 2 February 2017, which included his written statement, attaching a copy of his email to a Shire Councillor, Cr David Morrell, and the CEO dated 20 January 2017.

Complaint 3 (SP 14 of 2017) made by Ms Barbara Marshall by Complaint Form dated 2 February 2017, submitted with a copy of her letter to the CEO dated 22 January 2017 and a copy of her email to the CEO dated 23 January 2017.

Complaint 4 (SP 15 of 2017) made by Mr John Sampson by Complaint Form dated 3 February 2017, submitted with a copy of his letter to the CEO dated 20 January 2017.
5. Prior to 1 July 2017 the Government department assisting the relevant Minister to administer the Act was the Department of Local Government and Communities (the former Department). On 1 July 2017 the Department of Local Government, Sport and Cultural Industries became the Department responsible for administering the Act (the Department).
6. In a letter dated 10 May 2017 sent by email on that date the former Department advised Cr Bartlett of the four complaints and invited her to respond. The former Department sent Cr Bartlett a copy of all the supporting documents provided by the complainants and referred to above.

¹ Section 5.105 of the Act.



7. Under the Act the Panel is required to consider a complaint of a minor breach and make a finding as to whether the alleged breach occurred.² On 27 July 2017 the Panel convened to consider the complaints.
8. The Panel accepted the Department's advice, based on information from the Western Australian Electoral Commission, that Cr Bartlett was a councillor at the time of the alleged breach, having been elected on 17 October 2015, and when the Panel met on 27 July 2017.
9. The Panel was satisfied the complaints had been made within two years after the alleged breach is said to have occurred³, that they had been dealt with in accordance with the administrative requirements in the Act for dealing with complaints of minor breaches⁴ and that the former Department and the Department had provided procedural fairness to Cr Bartlett.
10. If a councillor has previously committed two or more minor breaches, the Panel may send the complaint to the Chief Executive Officer of the department assisting the relevant Minister at the time instead of considering the Complaint itself.⁵ As Cr Bartlett had not previously committed a minor breach the Panel did not consider sending the Complaint to the Chief Executive Officer of the Department.
11. Based on the information referred to in paragraphs 2 to 10 above the Panel found it had jurisdiction to determine whether Cr Bartlett had breached regulation 7(1)(b).

Panel's role

12. The Panel is not an investigative body. It determines complaints of minor breaches solely upon the evidence presented to it.
13. Any finding that a councillor has committed a minor breach must be based on evidence from which it may be concluded that it is more likely than not that the breach occurred than that it did not occur (the required standard of proof).⁶
14. Where direct proof of an alleged fact, proposition or conduct is not available, in order to find the allegation, proposition or conduct has been established, the Panel must be satisfied on the evidence that it is more probable than not that the alleged fact, proposition or conduct occurred. The Panel cannot make a finding that the alleged fact, proposition or conduct occurred if the evidence merely supports two or more conflicting but equally possible inferences.⁷
15. For a finding that a councillor has breached a particular regulation the Panel must be satisfied that every element of the particular regulation has been established to the required standard of proof.

² Section 5.110(2)(a) of the Act.

³ Section 5.107(4) of the Act

⁴ Sections 5.107, 5.108, 5.109 of the Act.

⁵ Sections 5.110(2)(b), 5.111(1) of the Act.

⁶ Section 5.106 of the Act.

⁷ *Bradshaw v McEwens Pty Ltd* (1951) 217 ALR 1, paragraph 5.

Regulation 7(1)(b)

16. Regulation 7(1)(b) 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 —

*...
(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.”

17. The Panel decided that the alleged conduct is not conduct that could contravene section 5.93 of the Act or section 83 of *The Criminal Code*.

Substance of the four complaints

18. None of the complainants describes the context of the Post. Early in the Post Cr Bartlett refers to a letter from the Shire’s previous Chief Executive Officer (the previous CEO) seeking funding (the purpose of the funding is not evident) and says, “Council has simply made a request for more time to look in detail at the options as should have been done prior to the funding being sought”.
19. It is not in dispute that Cr Bartlett added the Post at 8.39am on 20 January 2016. The complainants refer to the Post but do not identify which particular comments form the basis of the alleged breach.
20. Although only one of the complainants identifies herself as a former Shire Councillor the Western Australian Electoral Commission website shows that all four complainants are former Shire Councillors.

Ms Rowland

21. In her letter to the CEO dated 21 January 2017 Cr Rowland makes allegations about two Denmark Councillors generally: “The constant criticism of Shire of Denmark operational staff and former councillors is offensive, defamatory, lacks integrity, is undermining suggesting functions of governance were not performed, the statements made are factually incorrect ... The Act and Rules clearly state to ‘Refrain from publicly criticising staff in a way that casts aspersions on their professional competence and credibility’.”

Mr Seeney

22. Mr Seeney alleges the Post defames the previous CEO and questions his integrity and that of former Councillors.⁸ Mr Seeney alleges Cr Bartlett breached paragraph 4.1 of the Shire’s Code of Conduct, which provides:

⁸ Mr Seeney’s email to the CEO and other councillors dated 20 January 2017.



“4.1 Personal Behaviour

(a) Council Members, Committee Members and staff will:

- (i) act, and be seen to act, properly and in accordance with the requirements of the law and the terms of this Code;
- (ii) perform their duties impartially and in the best interests of the Local Government uninfluenced by fear or favour;
- (iii) act in good faith (i.e. honestly, for the proper purpose, and without exceeding their powers) in the interests of the Local Government and the community;
- (iv) make no allegations which are improper or derogatory (unless true and in the public interest) and refrain from any form of conduct, in the performance of their official or professional duties, which may cause any reasonable person unwarranted offence or embarrassment; and
- (v) always act in accordance with their obligation of fidelity to the Local Government.”

23. Mr Seeney alleges Cr Bartlett also breached the Shire’s Social Media Policy, which provides:

“Prohibited or offensive activities

Employees and elected members must not post or respond to material that is offensive, obscene, defamatory, threatening, harassing, bullying, discriminatory, hateful, racist, sexist or infringes copyright.

...

Responsibilities/Delegations

...

Elected members should seek advice from the CEO and be sure not to speak on behalf of the Council excepting for the Shire President.”

24. Mr Seeney makes other adverse comments about Cr Bartlett’s character that are not relevant to the issues to be decided by the Panel.
25. The email that Mr Seeney sent on 20 January 2017 to the Shire President and CEO making a formal complaint was copied to six other persons; two of whom, Mr Sampson and Ms Rowland, also lodged complaints.

Ms Marshall

26. In her letter to the CEO dated 22 January 2017 Ms Marshall says she is appalled by Cr Bartlett’s behaviour in criticising former staff and Councillors in the public arena through Facebook; that Cr Bartlett’s statements in the Post are “childish, tasteless, disrespectful and most unbecoming of a person elected to such an important role; she “lacks the dignity and professionalism of someone who should be above playground behaviour”; and Cr Bartlett is not a new Councillor so is not excused for her behaviour.
27. Ms Marshall makes other adverse comments about Cr Bartlett that are not relevant to the issues to be decided by the Panel.



Mr Sampson

28. In his letter to the CEO dated 20 January 2017 Mr Sampson alleges:

- In the Post Cr Bartlett attacked the previous CEO who is highly regarded in the industry and the recipient of a number of awards;
- Cr Bartlett's comments were false and defamatory;
- her comments damaged the reputation of Shire staff and undermined the community's confidence in local government;
- Cr Bartlett breached the Shire's Officer and Elected Member Code of Conduct and Social Media Policy;
- although Cr Bartlett removed the Post she had put it in on a widely viewed site with over 1,000 members in Denmark; and
- her conduct in making the Post was unconscionable.

29. Ms Marshall makes other adverse comments about Cr Bartlett that are not relevant to the issues to be decided by the Panel.

Cr Bartlett's Response

30. Cr Bartlett does not deny the Post was initially accessible to a large number of community members. However, she said this was only because the person to whom she was responding posted his question in a public forum. She had intended to send her Post to him alone. She removed the Post a few minutes later, as soon as she received a reply from Mr Sampson which alerted her to the wider than expected audience.
31. Cr Bartlett provided copies of three letters to the Denmark Bulletin local newspaper, including one from Mr Seeney, which are not relevant to the questions to be decided by the Panel.
32. In relation to Ms Rowland's complaint Cr Bartlett quotes from a video message Ms Rowland sent her. The message is personal and extremely unpleasant but not relevant to the issues to be decided by the Panel.
33. In relation to Mr Seeney's complaint Cr Bartlett alleges Mr Seeney had behaved badly towards her, including by making false accusations about her, but this does not address Mr Seeney's complaint that she breached the Shire's Code of Conduct and Social Media Policy.
34. In relation to Ms Marshall's complaint Cr Bartlett refers to previous conduct by Ms Marshall, including making a false allegation against her and undermining her. This is not relevant to the issues to be decided by the Panel. Cr Bartlett claims that Ms Marshall did not see the Post.

35. In relation to Mr Sampson's complaint Cr Bartlett alleges Mr Sampson had previously verbally attacked her in public but this is not relevant to the matters to be decided by the Panel. Cr Bartlett provided the Panel with a copy of Mr Sampson's Facebook post responding to her Post. In his post Mr Sampson makes the same allegations he makes in his complaint to the Panel, and his wording could be seen as offensive, but Mr Sampson's post does not provide any evidence that is relevant to the Panel's decision.
36. The complainants include negative personal comments about Cr Bartlett that do not relate to her statements in the Facebook post about former Shire Councillors (who she does not name), the former Council and the previous CEO, who she names. It is not surprising that Cr Bartlett seeks to defend her integrity and actions in her response to the complaints, challenging the complainants' integrity, their previous conduct and their motives for making these complaints to the Panel. However, the Panel must confine itself to considering whether making any of the comments in the Post amounts to a breach of regulation 7(1)(b).
37. Cr Bartlett does not make any submissions about her references to the former Council and previous CEO in the Post.

Elements of regulation 7(1)(b)

38. In order to find that Cr Bartlett breached regulation 7(1)(b) the Panel must be satisfied to the required standard of proof that:
- Cr Bartlett was a councillor when she made the Post;
 - she used her office as a councillor when making the Post;
 - she used her office improperly when making the Post; and
 - she used her office improperly to cause detriment to the local government or any other person.

Panel's consideration

39. The Panel accepts, based on the material provided to it (referred to above) that the person Cr Bartlett named in the Post (other than the person to whom she was replying) was the previous Shire CEO.

Was Cr Bartlett acting in her capacity as a councillor?

40. Cr Bartlett does not deny she was a councillor or acting in her capacity as a councillor when she added the Post. The Panel finds that on reading the Post it is clear that Cr Bartlett was acting as a councillor at the time.
41. The first and second elements of regulation 7(1)(b) are established.

Did Cr Bartlett make improper use of her position as a councillor when adding the Post?

42. The Macquarie 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 The Shorter Oxford dictionary definition is “irregular, wrong; unsuitable, inappropriate; unbecoming, unseemly.”¹⁰
43. 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 “For behaviour to be improper it must be such that a right-thinking person would regard the conduct as so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty.”¹²
44. Under the Act Panel members must have regard to the general interests of local government in Western Australia.¹³ It is in the interests of local government that councillors are, and are seen to be, professional and respectful in their dealings with fellow councillors, local government employees and members of the public.
45. 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.¹⁴ Regulation 3 provides, among other things, that councillors should act with reasonable care, diligence and integrity and treat others with respect and fairness.
46. The meaning of “improper” must be considered in the context of relevant legislation, such as the Act and the Regulations, and 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.¹⁵ All these provisions form part of the backdrop to the Regulations and give context to a complaint but the alleged conduct must also be judged in the particular circumstances.
47. 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
48. Cr Bartlett does not mention any former Councillors by name. The complainants do not identify which precise statements in the Post justify a finding that Cr Bartlett acted improperly in relation to either former Councillors, the former Council or the previous CEO.

⁹ Macquarie Dictionary, Revised Third Edition.

¹⁰ Shorter Oxford English Dictionary, Sixth Edition.

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

¹² *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 9, referring to *Robbins v Harness Racing Board* [1984] VR 641.

¹³ Section 5.122(3) of the Act, Schedule 5.1 of the Act, clause 8(6).

¹⁴ Regulation 13.

¹⁵ *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 10, referring to *Treby and Local Government Standards Panel* [2010] WASAT 81 (*Treby* 2010).

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



49. Ms Rowlands does not identify herself as a former Councillor or allege that she or any other particular person has been damaged.
50. Mr Seeney alleges the Post questions the integrity of the previous CEO and former Councillors. He does not identify himself as a former Councillor or name the former Councillors he alleges have been damaged.
51. Ms Marshall identifies herself as a former Councillor but her complaint is general. In her email to the CEO she complains about “the ongoing behaviour of Councillors in ... casting aspersions on former staff and councillors via Facebook”. Her comments in her letter to the CEO are again general: she alleges Cr Bartlett “continues to criticise former staff and Councillors” and refers to “recent posts”.
52. Mr Sampson does not identify himself as a former Councillor. He is not specific about the parts of the Post that amount to a “series of what (he believes) are false and defamatory allegations”. However, Mr Sampson names the previous CEO as the person damaged by the Post.
53. The Panel is left to unpick the complaints to identify and assess any allegations that Cr Bartlett has acted improperly in relation to any former Councillors and the former Council. The Panel is not satisfied to the required standard of proof that Cr Bartlett acted improperly when referring to the former Council in the Post. It is therefore not necessary to consider the fourth element in relation to the former Council or former Councillors.
54. Applying the tests for impropriety referred to above the Panel finds that Cr Bartlett acted improperly when making the following comments about the previous CEO:
- “... the funding obtained by a letter from (the previous CEO) stating the council has in place appropriate asset management systems ... is not TRUE.”
 - “(The previous CEO) did not ensure the shire met its governmental legislative requirements in many ways.”
 - “Apart from not having an asset management plan which has resulted in lack of maintenance the buildings contributing to the need to demolish buildings ... (the previous CEO) and the previous council failed to ensure the shire produced a Corporate Business plan.”
 - “The site near Amaroo was also meant to be decontaminated under the delegation of the (previous CEO) who also failed to meet this performance (criterion).”
55. The Panel finds that Cr Bartlett also acted improperly when making the following statements in the Post, because when read in the context of the statements in which she names the previous CEO, the only reasonable inference is that Cr Bartlett was referring to the previous CEO:
- “During the previous leadership the (Shire’s) sewerage ponds were not maintained or improved ...”
 - “It is this council focus to catch up on all the process, systems and maintenance that has not been done over the last 10 years.”



56. This Panel makes this finding because it is satisfied to the required standard of proof that a reasonable person would consider that Cr Bartlett did not meet the standards of conduct expected of a councillor when publishing the statements about the previous CEO to a wide audience, including many members of the community. Cr Bartlett did not act professionally or with respect towards a former Shire employee by making these accusations in public. It is not relevant whether her claims about the previous CEO are true.
57. Even if Cr Bartlett intended the comments for a limited audience, and the Post was only on Facebook for a matter of minutes, Cr Bartlett is not excused. Her actions would have been improper even if her post was accessible by a smaller audience, or by only the person to whom she responded. If Cr Bartlett had grievances about the previous CEO's performance she should have raised them in a confidential setting with other current Councillors and/or the current CEO.
58. This element is established in relation to her statements in the Post about the previous CEO.

Did Cr Bartlett post the statements about the previous CEO to cause detriment to the local government or any other person?

59. "Detriment" means loss, damage or injury.¹⁷ It includes financial and non-financial loss and adverse treatment, such as humiliation, denigration, intimidation, harassment, discrimination and disadvantage. A person can suffer detriment through others thinking less favourably of them.¹⁸
60. 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.¹⁹ 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 it is more likely than not that the councillor believed that his or her actions would cause detriment and intended to cause detriment.²⁰
61. "To cause detriment" has been interpreted as meaning "in order to" or "for the purpose of" causing detriment, or "with the will to" cause detriment.²¹ 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.²²
62. Cr Bartlett took time to write such a long post. A prudent councillor would have read over the words and considered the implications of what she was about to post. Cr Bartlett referred to the previous CEO by name four times. It would have been easy for her to use her post to promote the current Shire's and Council's plans and projects without denigrating the previous CEO.

¹⁷ Macquarie Dictionary Revised Third Edition, 2001.

¹⁸ *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraphs 31, 32.

¹⁹ *Treby* 2010, paragraph 96, referring to *Chew v The Queen* 1992 CLR 626 (*Chew* 2010).

²⁰ *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.

²¹ *Chew* 2010.

²² *Treby* 2010.



63. The only reasonable inference in all the circumstances is that Cr Bartlett intended to tell others that the previous CEO was to blame for what she saw as deficiencies in the local government's corporate planning and asset management while he was the CEO. Any reasonable person would expect that publishing these comments in these circumstances would have offended the previous CEO and damaged his reputation.
64. The Panel is satisfied to the required standard of proof that Cr Bartlett intended to cause detriment to the previous CEO by publishing the statements referred to in paragraphs 54 and 55 above.

Panel's finding

65. The Panel finds that Cr Bartlett committed one breach of regulation 7(1)(b) when making the statements in the Post referred to in paragraph 54 and 55 above.

Sheryl Siekierka (Deputy Member)

Rebecca Aubrey (Deputy Member)

Merranie Strauss (Member)

Date of Reasons – 28 August 2017