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## Local Government Standards Panel

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| Complaint Number   | SP 2019-092  |
| Legislation        | <i>Local Government Act 1995</i>   |
| <b>Complainant</b> | <b>Ms Toni Collins</b>   |
| <b>Respondent</b>  | <b>Councillor William McGrath</b>  |
| Local Government   | <b>Shire of Boddington</b>   |
| Regulation         | Regulation 7<br>of the <i>Local Government (Rules of Conduct)</i><br><i>Regulations 2007</i> |
| Panel Members      | Mr Michael Connolly (Presiding Member)<br>Cr Paul Kelly (Member)<br>Mrs Emma Power (Member)  |
| Heard              | 22 January 2020<br>Determined on the documents   |
| Finding            | One breach of Regulation 7(1)(b)   |

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### FINDING AND REASONS FOR FINDING

Delivered 10 February 2020

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#### DEFAMATION CAUTION

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



## Summary of the Panel's decision

1. On 22 January 2020, the Panel found that Councillor William McGrath, a Councillor of the Shire of Boddington (**"the Shire"**), did commit a minor breach pursuant to the Local Government Act 1995 (WA) (**"the Act"**) and regulation 7 of the Local Government (Rules of Conduct) Regulations 2007 (**"the Regulations"**) when he made derogatory comments regarding various councillors and members of the public on 19 October 2019 at the local polling station as set out in paragraph 19 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.<sup>1</sup>
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.<sup>2</sup>
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 accurate<sup>3</sup>; and
  - b. the seriousness of any allegation made, as well as the gravity of the consequences flowing from a particular finding<sup>4</sup>.
7. The Panel does not possess investigative or supervisory powers.<sup>5</sup> The Panel makes decisions about complaints regarding minor breaches solely upon the evidence presented to it and, where appropriate, materials published by the relevant local authority's website.
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 Australia<sup>6</sup>.
10. The Panel is obliged to give notice of the reasons for any finding it makes under section 5.110(2) of the Act.

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<sup>1</sup> Section 5.105 of the Act

<sup>2</sup> Section 5.106 of the Act

<sup>3</sup> Bradshaw v McEwans Pty Ltd (1951) 217 ALR 1

<sup>4</sup> Briginshaw v Briginshaw (1938) 60 CLR 336

<sup>5</sup> Re and Local Government Standards Panel [2015] WASC 51 (at paragraph 24)

<sup>6</sup> Section 8(6) of Schedule 5.1 of the Act



## Regulation 7

11. 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.*
12. The Complainant has not made any allegation that there was any intention to gain an advantage for Cr McGrath or any other party, so the Panel has only considered regulation 7(1)(b) of the Regulations in this decision.

## Jurisdiction and Procedural Fairness

13. On 22 October 2019 the Panel received a Complaint of Minor Breach Form dated 22 October 2019 from Mr Chris Littlemore acting as complaints officer of the Shire (**“the Complaints Officer”**).
14. The Panel also received an additional complaint in respect to the same incident being Complaint SP 2019-091.
15. In the complaint form the Complainant alleges that Cr McGrath has breached regulation 7 of the Regulations by using derogatory language towards various councillors and members of the public as specified in paragraph 19 below (**“the Complaint”**).
16. The Panel convened on 22 January 2020 to consider the Complaint.
17. The Panel:
- accepted the advice of the Department of Local Government, Sport and Cultural Industries (**“the Department”**) that, based on information published on the Western Australian Electoral Commission’s website, Cr McGrath was:
    - last elected to the Council of the Shire in October 2017 for a term expiring in October 2021;
    - a Councillor at the time of the alleged breach; and
    - a Councillor when the Panel met on 22 January 2020;
  - was satisfied the Complaint was made within six months after the alleged breach occurred<sup>7</sup>;
  - 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 breach<sup>8</sup>;

<sup>7</sup> Section 5.107(4) and 5.109(2) of the Act

<sup>8</sup> Section 5.107 and 5.109 of the Act

- d. was satisfied the Department had provided procedural fairness to Cr McGrath and
- e. found it had jurisdiction to consider the Complaint.

### **The Specifics of the Complaint**

- 18. The Complaint arises from a comment made by Cr McGrath on 19 October 2019 at a government election polling station in the Shire.
- 19. The Complainant describes the relevant incident as follows:
  - a. on the relevant date Cr McGrath walked into the election count approximately 7.00 pm;
  - b. Cr McGrath looked over to the corner where the Complainant and various other parties were sitting (including the Shire President and another councillor and their wives) watching the election count;
  - c. Cr McGrath said very loudly:  
*“ Look at that group in the corner - Where there are flies there are maggots”*
  - d. Cr McGrath also continued to mumble under his breath, but what he said was not heard by the Complainant;
  - e. there were approximately 20 people in the chambers (names provided but not reproduced in this decision) and most heard the abhorrent remarks;
  - f. this behaviour from a Councillor in Council Chambers in front of ratepayers is deplorable and not acceptable;
  - g. the Complainant felt embarrassed, shocked, hurt and upset and felt the remarks:
    - i. were unbecoming of a Councillor; and
    - ii. may lessen people's views of the Complainant and others around her.

### **Respondent's Response**

- 20. By an email dated 10 November 2019, Cr McGrath provided a response to the Complaint.
- 21. Cr McGrath admits that he engaged in the relevant behaviour as set out in the Complaint.
- 22. Cr McGrath also makes the following comments with respect to the Complaint:
  - a. the comments were made in conversation with another party, however he spoke too loudly;
  - b. Cr McGrath has spoken to several people who were present at the meeting and offered his apologies and also published an apology in the Boddington Community Newsletter;
  - c. all of the people Cr McGrath spoke to either said there was no need for the apology and or that they did not hear what had been said, and were further surprised by his public apology;
  - d. Cr McGrath wonders how people closer to him did not hear the comment yet the people who did complain who were furthest away;
  - e. both Complainants have no liking for Cr McGrath; and

- f. Cr McGrath is sorry to have the issue arise.
23. By an email dated 4 November 2019, the Complaints Officer provided a copy of the public apology by Cr McGrath that was published in the Boddington Community Newsletter of 29 October 2019 (**“the Apology”**).
24. The text of the published Apology is as follows:

**“ A PUBLIC APOLOGY**

*From Councillor William McGrath*

*After a long day of bowls on Saturday the 19th of October at which I was soundly beaten by Milton and his team I attended the polling place at the shire to observe how the count was progressing and give support to David Smart.*

*While in a conversation with David I managed to cause offence to some people over a comment I made to David I learned later from Gabe and Cathy that what I had said was not nice and could be heard by others in the room.*

*As a CR and business owner/operator in town I should be held to a higher standard, so having said this I unreservedly apologise to Gabe, Cathy and anyone who heard my comment to David and took offence.*

*Yours Sincerely W McGrath”*

**Panel’s Consideration**

25. 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 McGrath was an elected member at the time of the alleged breach and the time of the determination;
  - b. Cr McGrath made use of his office as Council member of the Shire;
  - c. when viewed objectively, such use was an improper use of Cr McGrath’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 McGrath engaged in the conduct in the belief that detriment would be suffered by another person.

**Cr McGrath was an Elected Member at the relevant times**

26. Cr McGrath was an elected member at the time of the alleged breach and at the date the Panel considered the Complaint.
27. This element is met.

**Cr McGrath made use of his office as Council Member of the Shire**

28. The Panel considers that it is more likely than not that Cr McGrath was acting in his capacity as a Councillor of the Shire when he made the comments due as:
- a. he was attending a polling place in the Council Chamber;
  - b. the conduct took place on the day of the Local Council Elections; and

- c. in a small Shire such as the Shire of Boddington Cr McGrath would be easily recognisable in his capacity as a Councillor when attending the Council Chambers.

29. This element is met.

Cr McGrath's use was improper

30. Deciding if conduct is an improper use of office requires something more than simply a demonstration of poor judgment or a lack of wisdom<sup>9</sup>. 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 intent<sup>10</sup>.
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. The Shire has an Elected Members Code of Conduct date 21 November 2017 ("**the Code of Conduct**").
34. The relevant provision of the Code of Conduct relating to behaviour of elected members are as follows:

**"3. CONDUCT**

- ...
- *to make no allegations which are improper or derogatory 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."*

35. The Panel considers that it is more likely than not that the nature of the comments would be considered to be rude and offensive by a reasonable member of the public.
36. The fact that the comments made by Cr McGrath were the subject of the subsequent public Apology indicated that Cr McGrath was aware the relevant conduct was not acceptable to the public.
37. Further, in the Apology Cr McGrath acknowledges that his conduct was not of a standard appropriate to a Councillor.
38. Despite the fact it is asserted the comments were not intended to be overheard, they were carelessly made in a very public place where other persons would have a reasonable chance of overhearing.
39. Given the above, the Panel finds that it is more likely than not that the conduct by Cr McGrath in making the relevant comments was improper as it:
- a. was in breach of the Code of Conduct;
  - b. 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. is deserving of a penalty.
40. This element is met.

<sup>9</sup> Complaint of Minor Breach No. SP 3 of 2013

<sup>10</sup> *Chew v R* [1992] HCA 18



#### Cr McGrath intended detriment to be suffered

41. "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.
42. It is not necessary to find whether any detriment was actually suffered<sup>11</sup>, but an intent to cause such detriment must be established.
43. Despite Cr McGrath's assertion that the comments were only intended to be heard by the particular person he was speaking to, it is clear that the comments were intended to be denigrating of the other parties being referred to.
44. As such, the Panel finds that it is more likely than not that Cr McGrath did intend to cause damage or detriment to the particular parties being referred to.
45. This element is met.

#### Conclusion

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

#### **Panel's Findings**

47. In respect to the Complaint Cr McGrath did commit a breach of Regulation 7(1)(b) of the Regulations and therefore did commit a minor breach.

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Mick Connolly (Presiding Member)

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Paul Kelly (Member)

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Emma Power (Member)

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<sup>11</sup> *Yates and Local Government Standards Panel* [2012] WASAT 59 at [72]



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## Local Government Standards Panel

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| Complaint Number      | SP 2019-092   |
| Legislation           | <i>Local Government Act 1995 (WA)</i>   |
| <b>Complainant</b>    | <b>Ms Toni Collins</b>  |
| <b>Respondent</b>     | <b>Councillor William McGrath</b>   |
| Local Government      | <b>Shire of Boddington</b>  |
| Regulation            | Regulation 7<br>of the <i>Local Government (Rules of Conduct) Regulations 2007 (WA)</i> |
| Panel Members for     | Mr Michael Connolly (Presiding Member)  |
| Penalty Consideration | Ms Rebecca Aubrey (Member)<br>Mrs Emma Power (Member)                                   |
| Heard                 | 22 January 2019<br>Determined on the documents  |
| Penalty Considered    | 12 March 2020   |
| Outcome               | No sanction   |

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## DECISION AND REASONS FOR DECISION

Delivered 21 April 2020

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### 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 22 January 2020, the Panel found that Councillor William McGrath, a councillor for the Shire of Boddington (**“the Shire”**), committed one minor breach under the Local Government Act 1995 (WA) (**“the Act”**) and regulation 7(1)(b) *Local Government (Rules of Conduct) Regulations 2007* (WA) (**“the Regulations”**) when he made derogatory comments regarding various councillors and members of the public on 19 October 2019 at the local polling station (**“the Minor Breach”**).

## Jurisdiction and Law

2. The Panel convened on 12 March 2020 to consider how it should deal with the Minor Breach.
3. The Panel accepted the advice of the Department of Local Government, Sport and Cultural Industries (**“the Department”**) that on this date there was no available information to indicate that Cr McGrath had ceased to be, or was disqualified from being, a councillor.
4. If the Panel finds that a councillor has committed a minor breach, it must give the councillor an opportunity to make submissions to the Panel about how it should deal with the breach under section 5.110(6).<sup>1</sup>
5. By a letter dated 11 February 2020, Cr McGrath was:
  - a. notified of the Panel’s finding of the Minor Breach;
  - b. provided with a copy of the Panel’s Finding and Reasons for Finding; and
  - c. offered an opportunity to make submissions as to how the Minor Breach should be dealt with under section 5.110(6) of the *Act*.

## Possible Sanctions

6. 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*

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<sup>1</sup> *Local Government Act 1995* (WA), s 5.110(5).



*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).*

### **Councillor McGrath's Submissions**

7. By an email dated 25 February 2020, the Department received a response from Cr McGrath with the following comments and arguments as summarised by the Panel:
  - a. At the first opportunity, i.e. the very next publication of the widely circulated Boddington Community Newsletter, Cr McGrath published a sincere public apology expressing his profound regret for his actions and words.
  - b. Cr McGrath's response to the Department in regard to the allegations was not replete with denials, cross allegations or excuses but an acknowledgement of the events and indicated remorse for what had transpired.
  - c. The complaint was made in payback.
  - d. There are inconsistencies in how other complaints and this complaint have been handled with respect to conflicting evidence being provided.
  - e. A genuine public apology has already been made and Cr McGrath submits that the Panel order that no sanction be imposed.
  - f. Should the Panel be of the view that the published public apology is insufficient and that a sanction should be imposed. Cr McGrath submits that he would be willing to make a further public apology at a council meeting.
  - g. Cr McGrath accepts that his actions and words breached Regulation 7(1)(b) and he will abide by any Order that the Panel makes. Cr McGrath is genuinely and profoundly remorseful for allowing his emotions to get the better of him and in doing so may have done damage to the respect which the public have for their elected representatives.

### **Panel's Consideration**

8. Section 5.110(6) is about penalty. The Panel does not have the power to review any finding of a breach.
9. The Panel may order under section 5.110(6)(a), that no sanction be imposed, 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.
10. The Panel notes that Cr McGrath accepts that he has breached the Regulations and is remorseful for his actions and that he took immediate steps to publish a public apology for his words.
11. Making a public apology is 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 individuals<sup>2</sup>; and/or
  - b. does not meet the standards other councillors seek to uphold.
12. In the relevant circumstances, the Panel considers that as Cr McGrath has already made a suitable public apology no further order of a sanction is required.

**Panel's decision**

13. The Panel orders pursuant to section 5.110(6)(a) of the Act that, in relation to the Minor Breach of the Regulation 7(1)(b) of the Regulations no sanction be imposed on Cr McGrath.

Mick Connolly (Presiding Member)

Rebecca Aubrey (Deputy Member)

Emma Power (Member)

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<sup>2</sup> *Treby and Local Government Standards Panel* [2010] WASAT 81 [127] (Pritchard J).



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## ORDER

Delivered 21 April 2020

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### DEFAMATION CAUTION

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### THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

Pursuant to section 5.110(6)(a) of the Local Government Act 1995 (WA), no sanction be imposed on Cr McGrath.



## 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."