



Local Government Standards Panel

Complaint Number	20230230
Legislation	<i>Local Government Act 1995</i>
Complainant	Mr Peter Walker
Respondent	Councillor Brett Treby
Local Government	City of Wanneroo
Regulation	Regulation 18 <i>Local Government (Model Code of Conduct) Regulations 2021</i>
Panel Members	Mrs Emma Power (Presiding Member) Ms Suleila Felton (Member) Cr Peter Rogers (Member)
Heard	15 June 2023 Determined on the documents
Finding	Breach x 1 - Regulation 18(1)(b)

FINDING AND REASONS FOR FINDING

Delivered 12 July 2023

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 15 June 2023, the Panel found that Councillor Brett Treby, a councillor of the City of Wanneroo (**"the City"**) did commit a minor breach pursuant to the *Local Government Act 1995 (WA)* (**"the Act"**) and Division 4 and Regulation 18 of the *Local Government (Model Code of Conduct) Regulations 2021* (**"the Regulations"**) made a comment on Facebook regarding another councillor as further set out in paragraph 17 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 and the *Local Government (Administration) Regulations 1996* provide for the circumstances in which a council member commits a minor breach.
4. Section 5.105(1) of the Act provides that a council or committee member commits a minor breach if the council or committee member contravenes a rule of conduct. Division 4 of the Regulations sets out the rules of conduct for council members and candidates.
5. Regulation 34D of the *Local Government (Administration) Regulations 1996* also provides that the contravention of a "*local law as to conduct*" is a minor breach pursuant to the Act.
6. 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.¹
7. 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.
8. 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 accurate²; and
 - b. the seriousness of any allegation made, as well as the gravity of the consequences flowing from a particular finding³.
9. The Panel does not possess investigative or supervisory powers.⁴ The Panel makes decisions about complaints regarding minor breaches solely upon the evidence

¹ Section 5.106 of the Act

² *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1

³ *Briginshaw v Briginshaw* (1938) 60 CLR 336

⁴ *Re and Local Government Standards Panel* [2015] WASC 51 (at paragraph 24)



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

10. 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.
11. The Panel also must have regard to the general interests of local government in Western Australia⁵.
12. The Panel is obliged to give notice of the reasons for any finding it makes under section 5.110(2) of the Act.

Jurisdiction and Procedural Fairness

13. On 11 April 2023 the Panel received a complaint from Ms Noelene Jennings acting as complaints officer of the City ("**the Complaints Officer**"). The same enclosed a Complaint of Minor Breach Form dated 3 April 2023.
14. In the Complaint of Minor Breach Form the Complainant has alleged Cr Treby has breached Regulation 18 of the Regulations when made a Facebook Post that allegedly was intend to disadvantage another councillor of the City as further set out in paragraph 17 ("**the Complaint**").
15. The Panel convened on 15 June 2023 to consider the Complaint.
16. The Panel:
 - a. 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 Treby was:
 - i. elected to the Council of the City in October 2019 for a term expiring in October 2023;
 - ii. a Councillor at the time of the alleged breach; and
 - iii. a Councillor when the Panel met on 15 June 2023;
 - b. was satisfied the Complaint was made within six months after the alleged breach occurred⁶;
 - c. was satisfied that the City's Complaints Officer had dealt with the Complaint in accordance with the administrative requirements in the Act for dealing with complaints of a minor breach⁷;
 - d. was satisfied the Department had provided procedural fairness to Cr Treby; and
 - e. found it had jurisdiction to consider the Complaint.

⁵ Section 8(6) of Schedule 5.1 of the Act

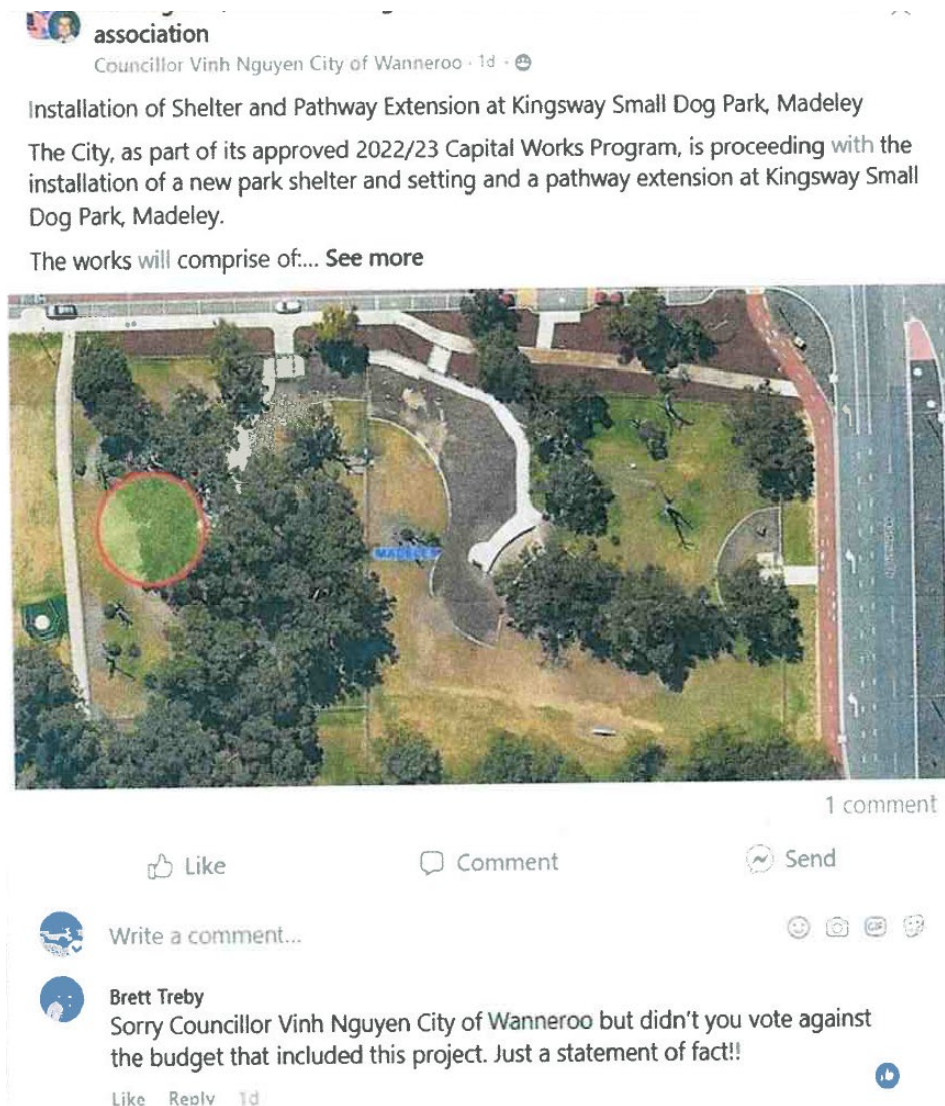
⁶ Section 5.107(4) and 5.109(2) of the Act

⁷ Section 5.107 and 5.109 of the Act

The Specifics of the Complaint

17. The Complainants provided the following comments and arguments in respect to the Complaint as summarised by the Panel:

- a. On the second of April 2023, Councillor Vinh Ngyen made a Facebook post in the Marangaroo, Alexander Heights, Darch, Landsdale residents association Facebook group (**“the Post”**).
- b. Cr Brett Treby made a comment on this Post shown as follows:



“the Comment”).

- c. The Comment by Cr Treby caused a detriment to Cr Ngyen.



- d. Properly read, the Comment seeks to cast Cr Ngyen as dishonest, a hypocrite and a councillor who did not support the particular infrastructure he announced to the community. It seeks to diminish his reputation within the ward he represents and harm his standing in the community by belittling his efforts to represent ratepayers.
 - e. Impugning the honesty of Cr Ngyen is particularly egregious given Cr Ngyen's standing within the Vietnamese community who rely on him, as well as his professional reputation as a solicitor.
 - f. Cr Treby would know that the criticism would likely diminish Cr Ngyen's reputation and/or create a tendency for others to think less favourably of him.
 - g. It is plain and obvious that any councillor voting against the adoption of a council budget can do so for many reasons, including for the overall budget amount.
 - h. However, the Comment implies that Cr Ngyen voted against, and objected to, a particular piece of equipment and beneficial infrastructure works for the community - the equipment and works referred to in the Post.
 - i. Cr Treby states that he was simply stating facts however that is both disingenuous and deceitful. The words used were intended to contradict Cr Ngyen and paint him in a bad light.
 - j. Other than to cause detriment, there was absolutely no purpose to the Comment. It was directed at Cr Ngyen and not at the community. It was clear his intention was to cause a detriment to Cr Ngyen.
 - k. It is important to note that in his Post, Cr Ngyen did not seek to take any credit for the works being undertaken, he merely passed on information to inform his community, as he is supposed to do.
 - l. Cr Treby is well known as the Deputy Mayor of the City and a long-term councillor. It doesn't matter that he used his personal Facebook account to make the Comment as he uses his councillor Facebook account interchangeably by making personal posts and any reader of a local Facebook group is highly likely to know who Cr Treby is and his role.
 - m. Cr Treby made a public post, not a side comment directly to Cr Ngyen as the intended audience was the public.
 - n. The circumstances of this most recent Comment by Cr Treby are aggravated by the fact that Cr Treby has previously been found to have caused a detriment to a fellow councillor related to the fellow councillor opposing the adoption of a budget, identical to this incident (*Treby and Local Government Standards Panel [2010] WASAT 81 (11 June 2010)*). As such, Cr Treby's intentions were clear and were not benign.
18. The Complainant also provided a full copy of the Post.

The Respondent's Response



19. By an email dated 17 May 2023, Cr Treby provided a response to the Complaint.
20. Cr Treby denies that he has committed any minor breach.
21. Cr Treby makes the following comments in respect to the Complaint as summarised by the Panel:
 - a. The allegations made by the Complainant have neither met his legal nor evidential burden to sustain his confected allegations and are without either basis of fact or merit in law.
 - b. The evidence provided by the Complainant cannot be considered as reliable evidence, as it is a heavily redacted and edited version of the factual Facebook page.
 - c. The Complaint and associated allegations have been based on an altered and edited version of the Facebook Post.
 - d. It is also to be noted that the Complainant's response comments to the Comment have been removed from the original Post provided.
 - e. The allegations made by the Complainant are constructed on matters unrelated to the Post based upon his personal, enmity and bias towards Cr Treby.
 - f. Cr Treby:
 - i. completely refutes that the Comment caused detriment to Cr Nguyen;
 - ii. completely rejects that the Comment either did, or sought to, cast Cr Nguyen as either dishonest or a hypocrite; and
 - iii. completely rejects the assertion that the Comment sought to either diminish or harm Cr Nguyen's standing.
 - g. The Complainant's assertions and allegations that Cr Nguyen's standing and reputation are completely confected as Cr Treby neither referred to the councillor's ethnicity, nor his profession.
 - h. At no stage in the Comment did Cr Treby criticise the councillor.
 - i. City of Wanneroo held Special Council meeting on 28 June 2022 for the purposes of adopting the 2022/23 Annual Budget.
 - j. As shown in the transcript of the City of Wanneroo special council meeting Cr Nguyen entered debate on item SCS01-06/22 Adoption of the 2022/23 - 2025/26 Corporate Business Plan, 2022/23 Annual Budget and 2022/23 Fees and Charges Schedule.
 - k. At the point of voting on SCS01-06/22 Adoption of the 2022/23 - 2025/26 Corporate Business Plan, 2022/23 Annual Budget and 2022/23 Fees and Charges Schedule,
 - l. Cr Nguyen did not request to separate voting on the 12 individual points within the recommendation.



- m. Therefore, the vote by Cr Nguyen was registered against each of the 12 individual items in recommendation meeting (Attachment 4), and the budget in its entirety.
 - n. Cr Treby categorically refutes and reject the Complainant's allegations as it is not and was not his intention at any time to cause detriment as alleged.
 - o. As noted in *Briginshaw Vs Briginshaw (1938) 60 CLR 336*, Sir Owen Dixon J held:

“when the law requires the proof of any fact, the tribunal must feel an actual persuasion [emphasis added] of its occurrence or existence ... It cannot be found as a result of a mere mechanical comparison of probabilities”.
 - p. Further, in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd [1992] HCA 66; (1992) 110 ALR 449 at 450*:

“the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove”.
 - q. It should be clear that the Complainant's allegations of the circumstances and of motive cannot be sustained by the tainted evidence provided.
 - r. The Post upon which the allegations are made has been significantly altered or amended or deleted altogether.
 - s. There is a history of animosity and enmity demonstrated by the Complainant against Cr Treby.
 - t. The seriousness of the possible outcomes must be weighed against the strength of the evidence provided.
 - u. Cr Treby respectfully contends that the tainted manner of the edited and altered Facebook post base evidence, and the confected embellishments extrapolated from this base evidence places serious concerns upon its veracity.
 - v. The Complaint is vexatious in nature, an abuse of process and should not be accepted by the Panel.
22. Cr Treby also provided the following supporting documentation:
- a. A copy of Councillor Nguyen' speech transcript at the City of Wanneroo Special Council meeting of 28 June 2022;
 - b. Extract of the City of Wanneroo Special Council Meeting of 28 June 2022 Minutes;
 - c. Page capture of the original Post; and
 - d. Page capture of the Comment and further interactions between the Complainant and Cr Treby.



PANEL'S CONSIDERATION

Regulation 18

23. Regulation 18 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:

“18. Securing personal advantage or disadvantaging others

(1) A council member must not make improper use of their office —

(a) to gain, directly or indirectly, an advantage for the council member or any other person; or

(b) to cause detriment to the local government or any other person.

(2) Subclause (1) does not apply to conduct that contravenes section 5.93 of the Act or The Criminal Code section 83.”

24. To make a finding of a minor breach of regulation 18(1)(b) of the Regulations the Panel must be satisfied to the required standard that:
- a. Cr Treby was an elected member or a candidate at the time of the alleged breach and the time of the determination;
 - b. Cr Treby made use of his office as Council member or candidate of the City;
 - c. when viewed objectively, such use was an improper use of Cr Treby'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 Treby engaged in the conduct with the intention of gaining an advantage for himself or another party.
25. There is no allegation that Cr Treby intended to gain any advantage, so the Panel has only considered regulation 18(1)(b) in this case.

Code of Conduct

26. The City has a *Code of Conduct Elected Members, Committee Members and Candidates* adopted by 20 April 2021 (“**the Code**”).
27. The relevant provisions of the Code are as follows:

“ 4. Personal integrity

(1) A council member, committee member or candidate should —

(a) act with reasonable care and diligence; and



(b) *act with honesty and integrity; and*

.....

(e) *avoid damage to the reputation of the local government.”*

“ 5. Relationship with others

(1) *A council member, committee member or candidate should —*

(a) *treat others with respect, courtesy and fairness; and*

(b) *respect and value diversity in the community.*

(2) *A council member or committee member should maintain and contribute to a harmonious, safe and productive work environment.”*

“ 6. Accountability

A council member or committee member should —

.....

(d) *be open and accountable to, and represent, the community in the district.”*

“ 8. Personal integrity

(1) *A council member, committee member or candidate -*

(a) *must ensure that their use of social media and other forms of communication complies with this code; and*

(b) *must only publish material that is factually correct.*

....”

“ 9. Relationship with others

A council member, committee member or candidate —

(a) *must not bully or harass another person in any way; and*

.....

(d) *must not disparage the character of another council member, committee member or candidate or a local government employee in connection with the performance of their official duties; and*

(e) *must not impute dishonest or unethical motives to another council member, committee member or candidate or a local government employee in connection with the performance of their official duties.”*

Regulation 18

Cr Treby was an Elected Member or a candidate at the relevant times



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

29. This element is met.

Cr Treby made use of his office as Council Member or candidate of the City

30. The Panel notes in this case that Cr Treby made the Comment using his personal Facebook account (shown as “*Brett Treby*”) and that Cr Treby also holds and uses a Facebook account specifically noting his role as a local councillor.

31. In the recent State Administrative Tribunal appeal of *Cain and Local Government Standards Panel [2022] CC 167 SAT Member V. Haigh* stated during the hearing as follows:

“... I observe that the fact that a Facebook post is sent or made from a private account is not decisive of whether the email or post constitutes a use of a councillor’s office and the relevant context must be considered.”

32. The Panel notes that the Brett Treby account is not a private account (i.e. it is open to any member of the public to view).

33. Due to the facts that:

- a. the Comment was posted on the Facebook Page in respect to another elected member’s post;
- b. the nature of Cr Treby’s Facebook account used readily would allow a member of the public to confirm his identity as a local councillor with very little effort;
- c. as Deputy Mayor of the City, Cr Treby’s identity would be well known in respect to local government matters;
- d. the Comment concerned a matter related to the City and Cr Nguyen’s actions as a councillor; and
- e. Cr Treby was purporting to communicate with and guide the community in the local municipality,

the Panel finds that it is more likely than not that Cr Treby was acting in his capacity as an elected member and made use of his office as a council member when undertaking the conduct.

34. This element is met.

Cr Treby’s use was improper

35. Deciding if conduct is an improper use of office requires something more than simply a demonstration of poor judgment or lack of wisdom. 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.

36. 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.



37. 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.
38. In the case of impropriety arising from an abuse of power, a councillor’s alleged knowledge or means of knowledge of the circumstances in which the power is exercised and his purpose or intention in exercising the power will be important factors in determining whether the power has been abused⁸.
39. The Panel first comments on the arguments that allegation does not meet the necessary legal or evidential burden.
40. The Complaint provided a screenshot of the comment made by Cr Treby. Cr Treby does not deny he made the Comment.
41. Further, it is patently clear that the initial Post has not been altered or amended as claimed by Cr Treby. The version provided by the Complainant is:
 - a. is clearly made up of multiple screenshots which are only limited due to both the size of the Complaint’s device and Facebook limiting the visibility of the Post; and
 - b. is exactly the same in content as the copy provided by Cr Treby.
42. Therefore, to argue the Post was “significantly altered or amended” is simply disingenuous and an attempt to misdirect the Panel.
43. Further, the fact that the Complainant engaged with Cr Treby on Facebook *after the Comment was made* is irrelevant to the fact Cr Treby initially engaged in the asserted conduct.
44. With due respect to Cr Treby, It is hard to see what argument Cr Treby is attempting to put forward that the evidence provided does not meet the standard set out in the Briginshaw case, when the contents of the Post and the Comment are undisputed.
45. The Complainant has alleged that the Comment was improper as it was both disingenuous and deceitful and deliberately intended to contradict Cr Nguyen and paint him in a bad light.
46. Cr Treby argues that the Comment was true and accurate and supplied evidence to support the fact that Cr Nguyen voted against the budget as stated.
47. The Post by Cr Nguyen was clearly being made to communicate with his local constituents regarding the existence of the new infrastructure and did not, even by implication, make any statement that Cr Nguyen was responsible for the same. The Panel characterises the Post as Cr Nguyen properly undertaking his role to facilitate communication between the community and the council in accordance with his statutory role under section 2.10(c) of the Act.

⁸ Treby and Local Government Standards Panel [2010] WASAT 81 (at 31); *Chew v The Queen* (1992) 173 CLR 626 (at 640 - 641 [Dawson J]); *R v Byrnes* (1995) 183 CLR 501 – (at 514 - 515 [Brennan, Deane, Toohey and Gaudron JJ] and at 521 [McHugh J]).



48. In this case, it is accurate that Cr Nguyen voted against the relevant budget as a whole, however, the Comment cannot reasonably be seen as a clarifying remark (i.e. where Cr Nguyen had incorrectly asserted he was responsible for voting for or particularly supporting a matter) but rather was a wholesale attempt to make a negative remark regarding Cr Nguyen's past conduct in largely unrelated circumstances.
49. The Comment has the tone of a "gotcha" moment as if there has been some uncovering of some kind of inappropriate conduct or statement by Cr Nguyen.
50. There is no reasonable interpretation of the Comment that could be anything but an attempt to disparage and embarrass Cr Nguyen for conduct (which took place a considerable time ago) which Cr Treby was not happy with.
51. Further, the use of a private Facebook account to attempt (as least ostensibly) to disguise the fact that Cr Treby was also a sitting councillor also indicates that Cr Treby knew that the Comment was inappropriate, or at least, should not be made openly as an elected member.
52. The Panel considers the Comment to be in breach of the Code as follows:
 - a. *Clause 4(b) – act with honesty and integrity.*
 - i. It was not acting with integrity to use a post by Cr Nguyen to bring up past conduct that Cr Treby was disappointed with in order to attempt to show Cr Nguyen in a negative light.
 - ii. It was not acting with honesty or integrity to use a personal Facebook Account in an attempt to distance the Comment from Cr Treby in his elected member role.
 - b. *Clause 5(1)(a) - treat others with respect, courtesy and fairness:*
 - i. The Comment was not respectful nor courteous.
 - ii. It was unfair for Cr Treby to attach the Comment ad Cr Nguyen's past conduct to an unrelated post.
 - c. *Clause - 6(d) - be open and accountable to, and represent, the community in the district:*
 - i. It was not open and accountable to the public to use a personal Facebook Account to criticise another elected member for their legitimate actions as part of Council.
 - ii. The use of the personal Facebook Account was a disingenuous action to attempt to appear as a member of the public rather than another elected member.
 - d. *Clause 8(1)(a) - ensure that their use of social media and other forms of communication complies with this code:*
 - i. Due to the other breaches of the Code, Cr Treby's use of social media was not in compliance with the Code.



- e. *Clause 8(1)(b) - only publish material that is factually correct.*
 - i. Although it was correct the Cr Nguyen has voted against the budget as a whole, the strong implication in the Comment that he had not supported this particular project was not accurate.
 - f. *Clause 9(a) - must not bully or harass another person in any way:*
 - i. The Panel considers the Comment to be bullying and harassing in nature by bringing up past conduct in an inappropriate manner and context.
 - g. *Clause 9(d) - must not disparage the character of another council member....in connection with the performance of their official duties:*
 - i. The Comment disparages the character of Cr Nguyen by implying he is a hypocrite and not acting properly in his role as an elected member.
53. Although Cr Treby may, understandably, be annoyed with an elected member who voted against the budget as a whole, rather than dealing with certain elements to attempt to reduce costs individually, this type of passive-aggressive comment, made some 9 months later, is not the way to deal with such frustration.
54. As Council member, Cr Nguyen is permitted to support or not support any budget as he feels is appropriate. If Cr Treby disagrees with the manner in which Cr Nguyen approached the budget vote, then debate in the chamber is the way to raise this, so long as it is done in an accurate and respectful manner.
55. Given the above the Panel finds, to the required standard, that the conduct of Cr Treby was improper in that the conduct:
- a. was in breach of the Code;
 - b. was of such a nature that a reasonable individual, with an understanding of the nature and background of the issue, 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.
56. This element is met.

Regulation 18(1)(b) - Cr Treby intended to cause a disadvantage

57. "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.
58. It is not necessary to find whether any detriment was actually suffered⁹, but an intent to cause such detriment must be established.
59. The Complaint has alleged that:
- a. the Comment intended to impugn the honesty of Cr Nguyen;

⁹ *Yates and Local Government Standards Panel* [2012] WASAT 59 at [72]



- b. the criticism would likely diminish Cr Nguyen's reputation and/or create a tendency for others to think less favourably of him; and
 - c. Cr Treby's intention to cause a detriment was clear due to Cr Treby previously having been found to have caused a similar detriment to a fellow councillor.
60. Cr Treby argues that it was not his intention at any time to cause detriment as alleged.
61. Firstly, the Panel comments that a past breach of the Regulations that occurred over 10 years ago, despite any similarity, does not establish any intention to cause a detriment in this case.
62. As discussed above, the Panel has found that the Comment was substantially related to Cr Treby's feelings as to Cr Nguyen's past conduct in voting on the budget, rather than having any particular relevance to the subject matter of the Post.
63. Although Cr Treby argues he did not intend to cause any detriment, given the context and circumstances, it is hard to contemplate what possible other reason there would be for making the Comment other than to:
 - a. make the public incorrectly assume that Cr Nguyen had specifically not supported the relevant infrastructure referred to in the Post;
 - b. make the public think Cr Nguyen was not undertaking his role as a councillor properly;
 - c. make the public think less of Cr Nguyen due to the above points; and
 - d. attempt to embarrass Cr Nguyen in front of the intended audience of the Post.
64. The fact that the Comment was made using Cr Treby's personal Facebook account, rather than his official councillor account, also indicates a more deceptive intent and that the Comment was in the nature of a personal attack.
65. If Cr Treby did not wish to make or imply any negative connotation, the Comment simply should not have been made.
66. Given the above, the Panel finds it is more likely than not that in making the Comment Cr Treby did intend to cause a detriment to the Complainant.
67. This element is met.

Conclusion

68. Given the above the elements required to a breach of regulation 18(1)(b) of the Regulations have been met.



PANEL'S FINDINGS

69. Cr Treby did commit a breach of Regulation 18(1)(b) of the Regulations and therefore did commit a minor breach.

Signing

A handwritten signature in black ink, appearing to read 'E Power', written over a horizontal line.

Emma Power (Presiding Member)

A handwritten signature in black ink, appearing to read 'P Rogers', written over a horizontal line.

Peter Rogers (Member)

A handwritten signature in black ink, appearing to read 'S Felton', written over a horizontal line.

Suleila Felton (Deputy Member)



Local Government Standards Panel

Complaint Number	20230230
Legislation	<i>Local Government Act 1995 (WA)</i>
Complainant	Mr. Peter Walker
Respondent	Councillor Brett Treby
Local Government	City of Wanneroo
Regulation	<i>Regulation 18 of the Local Government (Model Code of Conduct) Regulations 2021</i>
Panel Members for Penalty Consideration	Ms Emma Power (Presiding Member) Ms Suleila Felton (Member) Cr Renee McLennan (Member)
Heard	15 June 2023 Determined on the documents
Penalty Considered	29 August 2023
Outcome	Public Apology

DECISION AND REASONS FOR DECISION

29 September 2023

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 15 June 2023, the Panel found that Councillor Brett Treby, a councillor for the City of Wanneroo (**“the City”**), committed a minor breach under the *Local Government Act 1995 (WA)* (**“the Act”**) and regulation 18 of Division 4 of the *Local Government (Model Code of Conduct) Regulations 2021* (**“the Regulations”**) when he made a comment on Facebook regarding another councillor’s voting history (**“the Minor Breach”**).

Jurisdiction and Law

2. The Panel convened on 29 August 2023 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 Treby 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).¹
5. By a letter dated 12 July 2023, Cr Treby 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*

¹ *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 Treby's Submissions

7. By emails dated 22 August 2023 and 23 August 2023, the Department received a response from Cr Treby.
8. The Panel confirms that it cannot reverse or make an alternative decision in respect to any matter at this stage of proceedings. Only issues as to penalty can be considered.
9. Cr Treby provided the following comments and arguments, as summarised by the Panel:
 - a. Based on the available information, such a finding was not reasonably open to the Panel.
 - b. The Post was incapable of causing detriment to Councillor Ngyen. It amounted to no more than repeating the same truthful, innocuous, and well-known facts that Cr Nguyen had himself industriously circulated in a successful effort to promote and enhance his reputation in the community.
 - c. The weight of evidence also shows that Cr Treby's comments were more likely to assist Cr Nguyen in advancing his reputation in the community than give rise to any detriment.
 - d. The decision of the Panel lacks procedural fairness. The evidence rule and bias rule have been ignored.
 - e. The Panel arrived at the Findings by substituting speculation for available evidence and failing to consider conflicting circumstances.
 - f. The Panel did not appropriately consider other plausible alternatives. For example, that Cr Treby found the circumstances ironic and (or) that Cr Treby was pointing out to Cr Nguyen (and all concerned) that, on balance, the City's budget was well-founded and in the public interest. Neither interpretation meets the threshold required to substantiate a breach of the Regulations.
 - g. The Panel also breached the bias rule as the Findings appear to focus on the preconceptions of those concerned instead of the available evidence.
 - h. The Panel has attempted to justify and sanitise Cr Nguyen's position, seemingly massaging the facts to conform with a preferred goal.
 - i. The Findings display a "weapons grade" hostility towards Cr Treby. For example, the Findings variably describe Cr Treby's response to the Complaint as "dishonest", "deceitful", and "deceptive". Such commentary is unnecessary and misplaced in the Findings and unbecoming of the Panel. It can only serve as a thinly veiled attempt to harass and intimidate and make Cr Treby's conduct appear more egregious than the circumstances of the Complaint support.
 - j. The Findings contain several examples of clear bias against Cr Treby.
 - k. The Panel shows no interest in considering evidence inconsistent with the allegations against Cr Treby, but it went so far as to bolster the case against



Cr Treby, including engaging in ad hominem attacks that, if committed by an elected member, would have resulted in an adverse finding.

- I. The Findings failed to consider any relevant circumstance inconsistent with the Complaint. Has the Panel fulfilled its obligations by exercising the required standard and care and attention it could not have reasonably arrived at its Findings.
- m. Further, the Findings exemplify apprehended bias and hostility. To that end, the Findings are no more than the prosecution of a preconceived decision in search of evidence.
- n. In the event that the Panel upholds its Finding, Cr Treby will most certainly be exercising his rights of judicial appeal.

Panel's Consideration

10. Section 5.110(6) is solely about penalty. The Panel does not have the power to review any finding of a breach.
11. 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.
12. Guidance as to the factors which the Panel may consider in determining the appropriate penalty to impose include, but are not limited to, the following:
 - a. the nature and seriousness of the breaches;
 - b. the councillor's motivation for the contravention;
 - c. whether or not the councillor has shown any insight and remorse into his/her conduct;
 - d. whether the councillor has breached the Act knowingly or carelessly;
 - e. the councillor's disciplinary history;
 - f. likelihood or not of the councillor committing further breaches of the Act;
 - g. personal circumstances at the time of conduct, and of imposing the sanction;
 - h. need to protect the public through general deterrence and maintain public confidence in local government; and
 - i. any other matters which may be regarded as aggravating conduct or mitigating its seriousness².
13. The Panel has carefully considered the response from Cr Treby.
14. The Panel comments that Cr Treby's response is unnecessarily antagonistic.
15. Cr Treby has misread certain contents of the decision. Where Cr Treby is referring to "weapon's grade hostility" he fails to differentiate the parts of the decision which

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



simply replicate the Complaint by the Complainant and those portions reflecting the Panel's findings.

16. Further, a mere finding of a minor breach by the Panel is not representative of any hostility or bias. The Panel has no existing relationship with Cr Treby, or even any history of findings against Cr Treby, that support this contention.
17. Although the breach is on the lower end of seriousness, Cr Treby has shown no insight as to the conduct undertaken by him and the manner in which his comments can be reasonably interpreted by the public.
18. The Panel further considers that due to Cr Treby's lack of reflection on his conduct there is a likelihood of reoffending in a similar manner.
19. The Panel considers that, as the Post was public and expressly named Cr Nguyen, a public apology is the appropriate sanction.
20. Making a public apology is a significant sanction, being a personal admission by the individual of wrongdoing³. It is a suitable and appropriate penalty when a councillor's conduct:
 - a. adversely affects particular individuals⁴; and/or
 - b. does not meet the standards other councillors seek to uphold.
21. In the relevant circumstances, the Panel considers that making a public apology is an adequate sanction and that it is not necessary to make an order in accordance with Schedule 5.1 clause 9 of the Act that Cr Treby recoup to the City the costs of the Department incurred with respect to the Complaint.

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

⁴ *Treby and Local Government Standards Panel* [2010] WASAT 81 [127] (Pritchard J).



Panel's decision

22. The Panel orders pursuant to section 5.110(6)(b)(ii) of the Act that, in relation to the one Minor Breach of regulation 18 of the Regulations, Cr Treby make a public apology in terms of the attached Order.

Signing

A handwritten signature in black ink, appearing to read 'E Power'.

Emma Power (Presiding Member)

A handwritten signature in black ink, appearing to read 'S Felton'.

Suleila Felton (Deputy Member)

A handwritten signature in black ink, appearing to read 'R McClennan'.

Renee McClennan (Deputy Member)



ORDER

29 September 2023

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

THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Councillor Brett Treby, a councillor for the City of Wanneroo **publicly apologise** as specified in paragraph 3; OR
2. Failing compliance with paragraph 3 within the specified timeframe, then paragraph 4 shall apply.

Public Apology

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

"I advise this meeting that:

- i. A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened Regulation 18 of Division 4 of the *Local Government (Model Code of Conduct) Regulations 2021* when I made a comment on Facebook in respect to the voting history of Cr Nguyen.
- ii. The Panel found that I breached Regulation 18 by my conduct in that I acted improperly and sought to harass and disparage Cr Nguyen.
- iii. I acknowledge that I should have not made the comment and I now apologise to Cr Nguyen and my fellow councillors."



4. If Cr Treby fails to, or is unable to, comply with the requirements of paragraph 3 above in the required time frame THEN, within the next **28 days** following the ordinary council meeting referred to in paragraph 3 above the Chief Executive Officer of the City of Wanneroo shall arrange for the notice of public apology to be published:
 - a. on the Facebook Page of the City of Wanneroo shall in no less than 10 point font size; and
 - b. in an appropriate place on the website of the City of Wanneroo shall in no less than 10 point font size; and
 - c. in the next occurring issue of any City of Wanneroo shall public newsletter (if any) whether in electronic or print copy) in no less than 10 point font size.

PUBLIC APOLOGY BY COUNCILLOR TREBY

A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened Regulation 18 of Division 4 of the *Local Government (Model Code of Conduct) Regulations 2021* when I made a comment on Facebook in respect to the voting history of Cr Nugyen.

The Panel found that I breached Regulation 18 by my conduct in that I acted improperly and sought to harass and disparage Cr Nugyen.

I acknowledge that I should have not made the comment and I now apologise to Cr Nguyen and my fellow councillors

Appeal

5. In the event that, prior to the date for compliance with the above Orders, Cr Treby:
 - a. commences an appeal the decision of the Standards Panel to the State Administrative Tribunal in accordance with section 5.125 of the Local Government Act 1995; and
 - b. notifies the Complaints Officer of the City of Wanneroo of such appeal in writing,
THEN:
 - c. compliance with the above Orders may be delayed until the State Administrative Tribunal has made a finding in respect to the decision; and
 - d. such Orders may be amended by an order of the State Administrative Tribunal.



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."