

Decision-maker's Title: LOCAL GOVERNMENT STANDARDS PANEL
Jurisdiction: Complaints of minor breach by local government council members
Act: *Local Government Act 1995*
File No/s: SP 3 of 2014 (DLG 20140069)
Heard: Determined on the documents
Determined: 14 August 2014
Coram: Mr B. Jolly (Presiding Member) Councillor P. Kelly (Member) Mr G. Cridland (Member)

Complaint: SP 3 of 2014
Complainant: Dr Shayne Silcox
Council member complained about: Councillor Nicholas
Pazolli Local Government: City of Melville
Regulations alleged breached: Regulation 7(1)(b) and 10(3)(a) of the *Local Government (Rules of Conduct) Regulations 2007*

FINDING AND REASONS FOR FINDING

DEFAMATION CAUTION

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SUMMARY OF FINDING

The Panel found that Councillor Pazolli has committed a breach of regulation 7(1)(b) and has not committed a breach of regulation 10(3)(a).

FINDING AND WRITTEN REASONS FOR FINDING

Preliminary

Clause 8 of Schedule 5.1 of the Act requires the Panel's members to have regard to the general interests of local government in Western Australia (which might reasonably include the setting of proper standards of conduct by decisions of the Panel).

In the body of these Reasons unless otherwise indicated:

- (a) a reference to a regulation is a reference to the corresponding regulation of the *Local Government (Rules of Conduct) Regulations 2007* ("the Regulations"), and a reference to a section is a reference to the corresponding section of the *Local Government Act 1995* ('the Act'); and

- (b) the term 'viewed objectively' means "as viewed by a reasonable person" (the reference to a reasonable person being a reference to a hypothetical person with an ordinary degree of reason, prudence, care, self-control, foresight and intelligence, who knows the relevant facts).

Complaint

1. On or about 23 May 2014 the Presiding Member of the Local Government Standards Panel ('the Panel') received from the Complaints Officer of the City of Melville ('the City') a Complaint of Minor Breach ('the complaint') dated 20 May 2014 made by Dr Shayne Silcox, the City's Chief Executive Officer ('the CEO').
2. The CEO alleges that Councillor Nicholas Pazolli has committed a breach of each of regulations 7(1)(b) and 10(3)(a) by his conduct at a Special Council Meeting held on 9 December 2013 ('the Council meeting'). These are the two allegations made by the CEO.
3. The CEO also implicitly alleges that Councillor Pazolli, by committing such conduct, committed a breach of each of clauses 2.1 and 8.1 of the City's Code of Conduct adopted by Council on 13 October 2009 ('the City's Code of Conduct'). While a breach of the City's Code of Conduct is not a minor breach, the CEO has instead rolled such alleged breaches into the regulation 7 allegation by referring to this as "the impropriety".
4. The Regulations provide general principles to guide the behaviour of council members in regulation 3(1). A failure to follow these principles may support the conclusion that in committing the relevant conduct a councillor engaged in an improper use of his or her office as a council member.
5. Regulation 3(1) of the Regulations reads:

"General principles to guide the behaviour of council members include that a person in his or her capacity as a council member should —

 - (a) act with reasonable care and diligence; and*
 - (b) act with honesty and integrity; and*
 - (c) act lawfully; and*
 - (d) avoid damage to the reputation of the local government; and*
 - (e) be open and accountable to the public; and*
 - (f) base decisions on relevant and factually correct information; and*
 - (g) treat others with respect and fairness; and*
 - (h) not be impaired by mind affecting substances."*
6. Clauses 2.1 and 8.1 of the City's Code of Conduct read:

"2.1 PERSONAL BEHAVIOUR
Elected Members, Committee Members and Officers will:

 - (a) act, and be seen to act, properly and in accordance with the requirements of the law and the terms of this Code;*
 - (b) perform their duties impartially and in the best interests of the Local Government uninfluenced by fear or favour;*

- (c) *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;*
- (d) *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*
- (e) *always act in accordance with their obligation of fidelity to the Local Government.”*

“8.1 Reporting breaches of the code of conduct

An Elected Member or Officer has an obligation to report suspected breaches of the code of conduct to the Chief Executive Officer or to the Mayor. If a suspected breach of the code of conduct is reported to the Mayor, the Mayor has an obligation to refer this to the Chief Executive Officer for investigation. Elected Members should refrain from making allegations at open council meetings.”

7. The specific allegations are:

- (1) **(Allegation 1)** That Councillor Pazolli attended the Council meeting and in the presence of members of the public and immediately before he commenced his speech in regard to then proposed “Final Adoption of the Melville City Centre Structure Plan”:
 - (a) he said to the presiding person words to the effect that he had received certain information late in the afternoon;
 - (b) he then said to the presiding person words to the effect that such information was that a group of Elected Members had met outside of a Council forum to discuss an issue and then colluded to vote in a particular manner ahead of the Council meeting at which that issue is to be decided; and
 - (c) he then asked the presiding person how he should deal with such information and what action should he take;

and that, in or by committing such conduct, he contravened regulation 7(1)(b) in that he made improper use of his office as a Council member to cause detriment to the City and to the Councillors at the subject Council meeting who later voted for the final adoption of the structure plan in accord with the officer recommendation, with such impropriety including that he was in breach of clauses 2.1 and 8.1 of the City’s Code of Conduct.

- (2) **(Allegation 2)** That during his speech at the Council meeting, in the presence of members of the public, Councillor Pazolli stated words to the effect that:

(a) the Probity Oversight Committee who were meant to oversight the process has not done its job, and he hoped that the process would be done differently next time; and

(b) the Probity Oversight Committee had failed to ensure that the concerns of the Southern Frame Group residents were properly heard and considered in the structure plan prepared by the AMP and its consultants;

and that, in or by committing such conduct, he contravened regulation 10(3)(a) in that he orally made a statement implying that a local government employee is incompetent or dishonest.

Jurisdiction

8. The complaint is in the form approved by the Minister for Local Government and was made within two years after the 'minor breach' alleged in it occurred.
9. Councillor Pazolli was elected as a member of the City's Council ('Council') on 15 October 2011 for a term expiring on 17 October 2015. He was on 9 December 2013 and is at the time of the finding an elected member.
10. The allegations of 'minor breach' made in the complaint concern an alleged contravention of each of regulation 7(1) and 10(3).
11. Regulations 4, 7 and 10 are rules of conduct under section 5.104(1) of the Act, and accordingly a breach of any or all of those regulation is a 'minor breach' as defined in section 5.105(1)(a) of the Act if a complaint is made.
12. In the circumstances, the Panel has jurisdiction to consider the two allegations in the complaint, and to deal with the alleged breaches of regulations 7(1)(b) and 10(3)(a) made in it.
13. The matter was dealt with on the papers.

Applicable Legislation

14. The applicable legislation is:

Regulation 4.

(1) *In this regulation—*

"local law as to conduct" means a local law relating to conduct of people at council or committee meetings.

(2) *The contravention of a local law as to conduct is a minor breach for the purposes of section 5.105(1)(b) of the Act.*

Regulation 7

- (1) *A person who is a council member must not make improper use of the person's office as a council member—*

(a) ...

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

Regulation 10

(3) If a person, in his or her capacity as a council member, is attending a council meeting, committee meeting or other organised event and members of the public are present, the person must not, either orally, in writing or by any other means -

(a) make a statement that a local government employee is incompetent or dishonest, or ...”

(underlining added by way of emphasis)

Procedural fairness and Response by Councillor Pazolli

15. The Panel is required to afford procedural fairness to the council member complained about in a complaint before it, according to the circumstances of the matter. The importance of procedural fairness has been explained as follows:

“It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. ‘When something is obvious’, they may say, ‘why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.’ Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.”¹

16. By letter dated 10 June 2014 the Department of Local Government (“the Department”) extended procedural fairness to Councillor Pazolli by advising him of the complaint.
17. A summarised version of the complaint was also provided to Councillor Pazolli and he was provided with the opportunity to comment and provide the Panel any relevant information he wished relating to the complaint.
18. Councillor Pazolli responded to the Department’s correspondence and provided his response dated 14 July 2014 along with its attachments (‘Councillor Pazolli’s response’ or ‘his response’).
19. In Councillor Pazolli’s response he denies having committed a breach.

¹ *John v Rees* [1970] Ch 345 per Megarry J at 402

20. The Panels considers that Councillor Pazolli's response indicates that he admits making the comments in the first allegation. Councillor Pazolli suggests that the comments were proper questions for an elected member to put through the presiding member.
21. Councillor Pazolli also contends in his response that, in respect of the first allegation, he did not name or identify an elected member or the source of the information. He instead suggests that his words indicated that some elected members may have met outside of a Council meeting and discussed how they would vote without first having heard or participated in the debate on the item. Councillor Pazolli says that he used the qualifying word 'may' and did not use the word 'collude' in his comment at the meeting (which latter terms he admits using in his private email to the CEO on 11 December).
22. In respect of the second allegation, Councillor Pazolli says that he did not state that the Probity Oversight Committee has not done its job and he did not name that committee. He suggests that he was referring to a different group when he was referring to committee. Councillor Pazolli contends that it is relevant that the Probity Oversight Committee was named the Probity Advisory Group in an official document one week before the Council meeting.
23. Further Councillor Pazolli says that he did not name any of the local government officers involved in preparing the structure plan and that these people were not publicly known.
24. Councillor Pazolli also suggests that the CEO was prone to making misinterpretations adverse to Councillor Pazolli.

Available information

25. The information before the Panel in relation to this matter ("the available information") which was taken into account by the Panel was:
 - (a) the CEO's complaint, and
 - (b) Councillor Pazolli's response.

Panel's role - duty to make finding - required standard of proof

26. The Panel notes that:
 - (1) The Panel is a statutory decision-maker that is required to adjudicate on complaints made in writing that give certain details including the details of the contravention that is alleged to have resulted in the breach.
 - (2) The Panel has no power to compel any information to be provided to it.
 - (3) Clause 8 of Schedule 5.1 of the Act requires the Panel's members to have regard to the general interests of local government in Western Australia.

- (4) The Panel is required to make a finding as to whether the breach alleged in the complaint occurred [section 5.110(2)]. In order for the Panel to make any finding that any minor breach has been committed by a council member, the finding is to be based on evidence from which it may be concluded that it is more likely that the breach occurred than that it did not occur [section 5.106].

This level or standard of proof is the same as in ordinary civil legal proceedings where it is referred to as being a preponderance of probabilities (or, the balance of probabilities).

- (5) The Panel is aware that when it makes a finding of a minor breach, the finding is a serious matter as it may affect individuals personally and professionally.

Accordingly, in determining whether on the evidence the standard of proof - on the balance of probabilities - has been satisfied, the Panel recognises that *“the seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the [determining body]”*².

Each of these 'considerations' applies in complaint proceedings against a council member. These 'considerations' are referred to in these Reasons as 'the Briginshaw principles'.

- (6) As the High Court of Australia has expressed the position, the significance of *Briginshaw*³ is that the seriousness of the matter and of its consequences does not affect the standard of proof but goes to the strength of the evidence necessary to establish a fact required to meet that standard. So much reflects a conventional perception that (relevantly) local government council members do not ordinarily engage in improper conduct generally and in circumstances where to do so is likely to render them liable to a punitive sanction.⁴

- (7) The following passage (without the authorities) from the High Court's decision in *Bradshaw v McEwans Pty Ltd*⁵ is relevant in complaint proceedings against a council member:

“The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while in the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to

² *Briginshaw v Briginshaw* (1938) 60 CLR 336 per Dixon J in at 362

³ *ibid*

⁴ *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170

⁵ (1951) 217 ALR 1 at 5

conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture. But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise." [Underlining added]

Matters for Determination

27. The issues (or elements of the breach) before the Panel for determination of whether or not Councillor Pazolli breached regulation 7(1)(b) and 10(3)(a) are underlined below:

Regulation 7

- (1) A person who is a council member must not make improper use of the person's office as a council member—
- (a) ...
- (b) to cause detriment to the local government or any other person.

Regulation 10

- (3) If a person, in his or her capacity as a council member, is attending a council meeting, committee meeting or other organised event and members of the public are present, the person must not, either orally, in writing or by any other means -
- (a) make a statement that a local government employee is incompetent or dishonest, or ..."

(underlining added by way of emphasis)

28. The essential elements of a breach of regulation 7(1)(b) are that it is more likely than not that:
- (a) a person who is currently a council member committed the alleged conduct;
- (b) the member's conduct complained about occurred;
- (c) the conduct was a use of the member's office as a council member;
- (d) viewed objectively, the member's conduct complained about was an improper use of the member's office as a council member; and
- (e) the member committed the conduct complained about with the intention to cause detriment to the local government or any other person.

29. The essential elements of a breach of regulation 10(3)(a) are that it is more likely than not that:
- (a) a person in their capacity as a council member attends a council meeting;
 - (b) makes a statement; and
 - (c) the statement is that 'a' local government employee is incompetent or dishonest.

Findings – Regulation 7 complaint

30. On consideration of the complaint and Councillor Pazolli's response, being the available information, the Panel is satisfied (i.e. satisfied to the degree required by the *Briginshaw*⁶ principles) and accordingly finds as follows.

Council member

31. The Panel finds that Councillor Pazolli is a council member.

Conduct Occurred

32. The Panel finds that Councillor Pazolli engaged in conduct by saying the words to the effect as alleged by the CEO and set out in paragraph 7(1) of these reasons.

Use of office by the Complained of Conduct

33. A Council meeting occurred on 9 December 2013.
34. Councillor Pazolli was speaking in that Council meeting as an elected member and accordingly such conduct constituted a use of office.

Intent to cause detriment

35. The comments made by Councillor Pazolli would have resulted in members of the public having an adverse view of the local government and its elected members as a result of the statement by him that he had information that elected members may have or had met outside of Council to predetermine their voting on a matter before having heard or engaged in relevant debate on the matter.
36. The Panel has previously considered loss of reputation to be a detriment and remains of that view.
37. The Panel accepts that Councillor Pazolli made a generalised reference to elected members rather than identified individual named elected members. The Panel considers that this distinction made by Councillor Pazolli impacts upon the width of the group of the persons to suffer a detriment but provides no basis for not finding that there was no intent to cause detriment.

38. If Councillor Pazolli identified specific elected members then the detriment would have been likely to be suffered by them. In the circumstances where Councillor Pazolli spoke generally about elected members of the Council then the detriment was likely to be suffered by the group of elected members as a whole and the local government.
39. The Panel considers that Councillor Pazolli had other means of raising the issue before the Council meeting which would not have necessarily involved the matter being placed immediately on the public record, such as discussing the issue with the CEO or asking for the matter to be dealt with as a confidential item behind closed doors. The Code of Conduct provides relevant guidance in this respect.
40. The asking of a question in an open Council meeting by an elected member which has as its basis an assumption of significant impropriety by others is not changed from being an allegation of impropriety which will naturally and necessarily cause harm to another simply because it is preceded by, or forms part of, a question asked by the elected member.
41. Accordingly the Panel find that Councillor Pazolli intended to raise the matter publicly and the inference most open on the evidence is that he intended the natural consequences of that public raising of the issue, being the detriment referred to above, that would flow from that publicity.
42. The Panel finds that Councillor Pazolli intended the detriment.

Improper use of office

43. For a breach of regulation 7(1)(b) to be made out, the conduct which was intended to cause detriment and a use of office must also have been an *improper* use of office.
44. Councillors must act with great care. They must intelligently and carefully exercise their judgment in what they do and say including in Council meetings. It is reasonable that the standard required of elected members be much higher where the elected member has time to reflect and consider their actions as opposed to responsive comments made in the heat of debate on matters that were not known in advance of the meeting.
45. The Panel has taken into account regulation 3 and clauses 2.1 and 8.1 of the City's Code of Conduct.
46. In circumstances where the City's Code of Conduct was applicable and directly relevant, and Councillor Pazolli had ample opportunity to consider his options and could have chosen to raise the matter confidentially in a closed meeting or prior to the Council meeting instead of raising it in the open public meeting, and the public raising of the matter would naturally cause detriment to the elected members and the local government, the Panel finds that it was improper for Councillor Pazolli to use his office to engage in the conduct.

Panel finding on the subject regulation 7 allegation

47. On the available information, for the above reasons, the Panel finds that Councillor Pazolli did commit a breach of regulation 7(1)(b).

Findings – Regulation 10 complaint

48. On a consideration of the complaint and the response, being the available information, the Panel is satisfied (i.e. satisfied to the degree required by the *Briginshaw*⁷ principles) and accordingly finds as follows:

Council member attending Council Meeting in that Capacity

49. Councillor Pazolli is and was a council member and attended the Council meeting in his capacity as a council member.

Statement Made

50. Councillor Pazolli made various statements at the Council meeting.

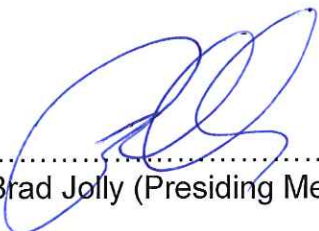
Requisite Allegation against 'a' Local Government Employee

51. The Panel carefully considered the text of the regulation.
52. This element of the regulation requires that the statement include an allegation of incompetence or dishonesty AND that the allegation be made against 'a' local government employee.
53. A sub-element of the breach specified in this regulation is that the requisite allegation be made against 'a' local government employee. The Panel dealt with this part of the element first.
54. Regulation 7 is a separate minor breach regulation which deals with allegations made with intent to cause detriment including against groups of people whose individual members are unspecified such as, for example, all the local government employees in the planning and environment directorate(s) of a particular local government.
55. In this context the Panel considers that the best interpretation of regulation 10 is that it deals with a different subject matter to regulation 7 and the mischief it is aimed at is destructive criticisms directed at identified local government employees. This interpretation is consistent with the use of the word 'a' before local government employee in the regulation.
56. Accordingly, in the Panel's view, for the allegation of a regulation 10(3)(a) breach to be made out there must be identification, on the balance of probabilities, of at least one particular local government employee.
57. Councillor Pazolli denies identifying any particular local government employee and goes further to say that he was referring to a different committee or group to that identified by the CEO in the complaint.


- 58. On one view, Councillor Pazolli may have been referring to persons who are not employed by the local government - such as employees of AMP.
- 59. Had there been audio recording of the Council meeting and then it might have been possible for the Panel to ascertain whether or not Councillor Pazolli had identified a particular local government employee for prohibited criticism.
- 60. In these circumstances the Panel is unable to find that Councillor Pazolli directed his statement at 'a' local government employee and accordingly the element is not made out.

Panel finding on the subject regulation 10 allegation

- 61. **On the available information, for the above reasons, the Panel finds that Councillor Pazolli did not commit a breach of regulation 10(3)(a) .**



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Brad Jolly (Presiding Member)



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Paul Kelly (Member)



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Glenn Cridland (Member)