

## LOCAL GOVERNMENT STANDARDS PANEL

Established under section 5.122 of the *Local Government Act 1995* (WA)

Complaint Number	SP 60 of 2015 [DLG 20150297]
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Councillor James Kelly</b>
<b>Subject of complaint</b>	<b>Councillor John Brennan</b>
Local Government	<b>Shire of Victoria Plains</b>
Regulation	Regulation 4 of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Mr B Jolly (Presiding Member) Councillor P Kelly (Member) Ms M Strauss (Member)
Heard	2 August 2016 Determined on the documents
Outcome	Breach established

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### FINDING AND REASONS FOR FINDING

Published October 2016

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#### DEFAMATION CAUTION

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## Summary of the Panel's decision

1. The Local Government Standards Panel (the Panel) found that Councillor John Brennan (Cr Brennan), a councillor for the Shire of Victoria Plains (the Shire), committed a minor breach under the *Local Government Act 1995 (WA)* (the Act) and regulation 4 of the *Local Government (Rules of Conduct) Regulations 2007* (the Regulations) at an Ordinary Council Meeting on 15 July 2015 when he directed offensive, objectionable and disrespectful comments to Councillor James Kelly (Cr Kelly).

## Jurisdiction

2. The Act provides for the circumstances in which a council member commits a minor breach.<sup>1</sup>
3. On 4 December 2015, the Panel received a complaint of a minor breach from the Shire's Complaints Officer (the Complaint). The complainant, Cr Kelly, alleged that during the Shire's Ordinary Council Meeting on 15 July 2015 (the OCM) Cr Brennan said to Cr Kelly, *"If you don't shut your mouth I'll knock your fucking head off"*, thereby committing a minor breach under regulation 4 of the Regulations (regulation 4).
4. Under the Act the Panel is required to consider a complaint of a minor breach and make a finding as to whether the alleged breach occurred<sup>2</sup>. If the alleged conduct may amount to a "recurrent breach", the Panel may instead send the complaint to the Chief Executive Officer of the Department of Local Government and Communities (the Department).<sup>3</sup>
5. Under the Act a local government can make "local laws", including laws that are necessary or convenient to enable the local government to perform its functions.<sup>4</sup>
6. Under the Act and regulation 4 a council member who contravenes a "local law as to conduct" commits a minor breach.<sup>5</sup> A "local law as to conduct" includes a local law about the conduct of councillors at meetings.<sup>6</sup>
7. Regulation 4 provides:

*"4. Contravention of certain local laws*

*(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."*

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

<sup>2</sup> Section 5.110(2)(a) of the Act.

<sup>3</sup> Sections 5.110(2)(b), 5.111(1) of the Act.

<sup>4</sup> Section 3.51 of the Act.

<sup>5</sup> Section 5.105(1)(b), regulation 4 of the Regulations.

<sup>6</sup> Regulation 4(1) of the Regulations.

8. The Shire's local laws include its Standing Orders, which regulate the proceedings and business of the Shire's Council.<sup>7</sup>
9. Order 1.1 of the Standing Orders states the purpose of the Orders and 1.2 defines "meeting";

*"1.1 Standing Orders*

*The proceedings and business of the Council shall be conducted in accordance with (the Local Government Act 1995 (WA)), and where not specifically prescribed, according to this local law which shall be referred to as "the Standing Orders".*

*1.2 Interpretation*

*(1) In these Standing Orders, unless the context requires otherwise –*

*...*

*"meeting" includes any Ordinary or Special meeting of the Council or a Committee held in accordance with (the Local Government Act 1995 (WA))."*

10. Order 10 is titled "Meeting Procedure". Order 10.7(1) (SO 10.7(1)) provides:

*"10.7 Imputations or Offensive Expressions*

*(1) No Member may impute motives or use offensive or objectionable expressions or comment adversely upon the character or actions or be disrespectful in any way to any Member, officer or any other person."*

11. On 2 August 2016 the Panel met to consider the Complaint.
12. The Panel considered the documents listed in Attachment A to these Reasons, including the Statement of Facts in Attachment B to these Reasons. The Panel was satisfied that the Complaint had been dealt with in accordance with the administrative requirements in the Act for dealing with the Complaint.<sup>8</sup>
13. Cr Brennan had not previously been found to have committed a minor breach, so the Panel was not required to consider sending the Complaint to the Chief Executive Officer of the Department.
14. Based on the information referred to in paragraphs 2 to 11 above the Panel found that it had jurisdiction to determine whether Cr Brennan had committed a minor breach under regulation 4.

**Panel's role**

15. The Panel is not an investigative body. It determines complaints of minor breaches solely upon the evidence presented to it.
16. Any finding that a councillor has committed a minor breach must be based on evidence from which it may be concluded that it is more likely than not that the breach occurred.<sup>9</sup>

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<sup>7</sup> The Shire's Local Law Relating to Standing Orders, published in the Government Gazette on 26 August 1997.

<sup>8</sup> Sections 5.107, 5.108, 5.109 of the Act.

<sup>9</sup> Section 5.106 of the Act.

17. Where direct proof is not available, in order to find that a breach occurred, the Panel must be satisfied on the evidence that it is more probable than not that the breach occurred. The Panel cannot conclude there is a breach if the evidence merely points to two or more conflicting but equally possible outcomes.

### **The Complaint**

18. In his Complaint Form dated 15 July 2015 Cr Kelly said:

*“Cr Brennan verbally expressed himself across the council chambers to (me) & said the words ‘If you don’t shut your mouth, I’ll knock your fucking head off’ with a look of outrage and obviously in a threatening manner.*

...

*I do not know what this outburst was about & was also very reluctant to mix with the councillors at anytime on that day in case of physical harm to me.”*

19. In the Complaint Form Cr Kelly provided the names of one Shire staff member and three councillors (including Cr Young), who Cr Kelly said witnessed “the outburst”. Cr Kelly did not however provide any witness statements.

### **Cr Brennan’s response**

20. Cr Brennan’s view was a little unclear. In his Member’s Response Form dated 7 April 2016 Cr Brennan replied “No” to the question whether he accepted the allegations in the Complaint. However, he responded “Yes” to the question whether he accepted he had committed a breach under regulation 4.

21. In his Response Form Cr Brennan wrote:

*“Retired Councillor Young has told me he doubted anyone could have heard this because I said it under my breath.*

*This happened in late business I believe and I also left the meeting straight away – he is being a drama queen. He provoked the incident like he does to all Councillors and Staff.*

*Councillor Kelly is a very manipulative member on Council. Our CEO is having a lot of trouble with him.”*

22. Cr Brennan did not provide any witness statements.

### **The OCM Minutes**

23. The OCM Minutes record that:

- the meeting opened at 2.03pm;
- Councillors Kelly, Brennan and Young attended the OCM;
- the staff member and the other two councillors Cr Brennan named as witnesses attended;
- seven “visitors” attended the meeting;

- the meeting was adjourned at 2.56pm after Item 6 (Petitions/Deputations/Presentations) and all public visitors left the meeting, but the Minutes don't record why the meeting was adjourned;
- the meeting resumed at 3.21pm before Council proceeded to Item 7 (Confirmation of Minutes) without recording whether the public visitors returned;
- during Item 9 proceedings (President and Councillors' Reports) Cr Kelly reported to Council on "the Canberra Conference";
- before Council proceeded with Item 10 (Business Paper) Council agreed to change the order of business to deal with Item 10.5 (Plant and Works) before Item 10.1 (Finance);
- at 4.15 during Item 10.5 proceedings Cr Brennan left the meeting but the Minutes don't record the reason;
- Cr Kelly voted on a motion during Item 10.5 discussions after Cr Brennan had left the meeting;
- Cr Brennan re-joined the meeting at 4.59pm after Item 10.1 discussions had commenced (Council having voted to deal with 10.5 before 10.1); and
- after Cr Brennan re-joined the meeting Cr Kelly moved a motion.

24. For Item 12, Confidential Items, the Minutes record "Nil".

#### **Requirements for a minor breach under regulation 4**

25. The Panel finds that SO 10.7(1) is a local law as to conduct within the meaning of regulation 4(1), and that a contravention of SO 10.7(1) would be a minor breach under the Act and regulation 4(2).
26. Because SO 10.7(1) appears under the heading "10 Meeting Procedure", it must be read as applying to "Imputations or Offensive Expressions" in a Council meeting.
27. In order to find that Cr Brennan committed a breach under regulation 4 the Panel must be satisfied that it is more likely than not that Cr Brennan:
- used an "expression" in which he:
  - imputed motives to Cr Kelly; or
  - used offensive expressions towards Cr Kelly; or
  - used objectionable expressions towards Cr Kelly; or
  - commented adversely on the character or actions of Cr Kelly; or
  - was disrespectful in any way to Cr Kelly;
- and that
- Cr Brennan used the expression in a Council meeting.

### **Meaning of “expression”**

28. An “expression” is defined as “a particular word, phrase, or form of words”.<sup>10</sup>
29. The Panel finds that the words quoted by Cr Kelly in the Complaint are an “expression” within the meaning in SO 10.7(1).

### **Did Cr Brennan make the alleged expression?**

30. Cr Brennan did not deny that he said the words Cr Kelly alleged. Although Cr Brennan responded to the Complaint by saying “no”, meaning he didn’t accept the allegations in the Complaint, he didn’t specify whether he denied all allegations in the Complaint, or only one, or some of them.
31. Cr Brennan didn’t say whether he used different words. He sought to justify his comments by saying Cr Kelly provoked him and was a manipulative councillor. Cr Brennan also said in his response that he said “it” under his breath (underlining added by the Panel), implying he agreed with the statement as alleged by Cr Kelly.
32. The Panel is satisfied that it is more likely than not that Cr Brennan said the words Cr Kelly quoted in the Complaint.

### **Did Cr Brennan direct the expression to Cr Kelly?**

33. Cr Brennan said Cr Kelly wouldn’t have heard the words because he spoke “under (his) breath”. However, the words, which Cr Brennan does not deny saying, were: “If you don’t shut your mouth I’ll knock your fucking head off”. (Underlining added by the Panel.)
34. Because Cr Brennan used “you” and “your”, and Cr Brennan does not deny he used these words, the Panel is satisfied that it is more likely than not that Cr Brennan directed the words to Cr Kelly.

### **Did Cr Brennan make the expression during the Council meeting?**

35. The OCM was clearly a “meeting” as defined in Standing Order 1.2.
36. Under Standing Order “12 Procedural Motions” a Member may move a motion that the Council adjourn (Order 12.1(c)). The effect of this motion, if carried, “will cause the meeting to stand adjourned until it is reopened at which time the meeting continues from the point at which it was adjourned, unless the President or the majority of Members upon vote, determine otherwise. (Order 13.3.)
37. The OCM started at 2.03pm and was adjourned from 2.56pm to 3.21pm. Applying a plain reading of Standing Order 13.3, the meeting ceased at 2.56pm and recommenced at 3.21pm. The Minutes do not indicate that any councillors left the chamber during the adjournment. The Minutes record that all public visitors left the chamber during the adjournment so the more likely inference is that councillors remained in the chamber during the adjournment.
38. The Minutes record that Cr Kelly and Cr Brennan were present at the start of the meeting.

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<sup>10</sup> Macquarie Dictionary Revised Third Edition.

39. It is not necessary for the Panel to decide whether members of the public were present when the words were spoken because the wording of SO 10.7(1) does not make this a requirement for a contravention of SO 10.7(1).
40. Cr Kelly said Cr Brennan made the statement across the Council chamber. Cr Brennan did not deny this.
41. Neither Cr Kelly nor Cr Brennan has said anything in their Complaint and Response, respectively, to indicate that Cr Brennan made the statement during the adjournment. However, for the Panel to find that the statement offended SO 10.7(1) it must be satisfied that Cr Brennan spoke the words while the meeting was in progress and not during the adjournment.
42. There is no reference in the Minutes to Cr Kelly leaving the meeting at any time and Cr Kelly did not say in his Complaint whether he himself did so.
43. Cr Brennan said he “also left the meeting straight away”, implying that he left close to the time he made the statement. The Minutes record that Cr Brennan was absent from the meeting between 4.15pm and 4.59pm.
44. The Panel finds that it is more likely than not that Cr Brennan made the statement close to 4.15pm, which is well after the meeting re-convened at 3.21pm, after the adjournment.
45. Accordingly, the panel is satisfied that Cr Brennan made the statement during the meeting.

#### **Were the words of the type referred to in SO 10.7(1)?**

46. For there to be a breach under regulation 4 it is only necessary for the Panel to find that the words matched one of the characteristics listed in paragraph 27 above, however the Panel finds that the words were offensive as well as objectionable, and disrespectful to Cr Kelly, for the following reasons.

#### Offensive

47. The meaning of “offensive” includes causing offence or displeasure; irritating; highly annoying ... repugnant to the moral sense, good taste or the like ... insulting.<sup>11</sup> The meaning of “offence” includes the feeling of resentful displeasure caused.<sup>12</sup> The meaning of “resentment” includes the feeling of displeasure ... or indignation as something regarded as an injury or insult.<sup>13</sup>
48. The dictionary meaning of “offensive” indicates that words can be offensive to a person to whom they are directed or offensive to another person who hears the words.
49. In his Complaint Cr Kelly perceived a look of outrage and a threatening manner and felt upset and threatened to the extent that he did not mix with councillors after the meeting. The Panel has no reason to doubt Cr Kelly’s feelings about the words and accepts he found the words to be offensive.

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<sup>11</sup> Macquarie Dictionary Revised Third Edition.

<sup>12</sup> As above.

<sup>13</sup> As above.

50. Council meetings are to be conducted with formality and structure. Councillors are expected to be orderly, professional and respectful of the meeting environment and each other. Cr Brennan's communication to Cr Kelly was completely at odds with the expected characteristics and atmosphere of council meetings. The Panel's view is that any reasonable person hearing this statement directed by one councillor to another in a council meeting would find it distasteful and offensive.

### Objectionable

51. Something is "objectionable" if it causes a feeling of disapproval or dislike ... if it unpleasant, offensive.<sup>14</sup>
52. Considering the words objectively, the Panel is of the view that a reasonable person hearing one councillor speak to another in this way would find Cr Brennan's statement extremely unpleasant, and completely at odds with the language reasonably expected in a council meeting, as well as offensive. A reasonable person would strongly disapprove of the words.


### Disrespectful

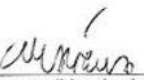
53. The meaning of "disrespectful" includes not honouring; to treat without regard or consideration.<sup>15</sup> A reasonable person would consider the words to be demeaning, inconsiderate and disrespectful of Cr Kelly, and that Cr Kelly should not have been subjected to the words directed at him.
54. The Panel's conclusion is that Cr Brennan used an offensive and objectionable expression directed at Cr Kelly, and that in so doing he was disrespectful towards Cr Kelly.

### **Panel's Finding**

55. The Panel finds that Cr Brennan breached SO 10.7(1) of the Standing Orders and therefore committed a minor breach under regulation 4.

  
Brad Jolly (Presiding Member)

  
Paul Kelly (Member)

  
Merranie Strauss (Member)

Date of Reasons - 27 October 2016

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<sup>14</sup> As above.

<sup>15</sup> As above.



## Attachment A

### The available information

<b>Doc ID</b>	<b>Description</b>	<b>Page #</b>
<b>Attachment B</b>	Statement of Facts	<b>7</b>
<b>01</b>	Copy of complaint from the Shire's Complaints Officer made by Cr Jim Kelly	<b>8</b>
<b>02</b>	Copy of Department's notification letter emailed to Cr Brennan on 23 December 2015	<b>13</b>
<b>03</b>	Copy of Department's letter to Cr Brennan dated 29 March 2016 requesting response to allegations (incl. Complaint Summary and Form A)	<b>14</b>
<b>04</b>	Copy of Cr Brennan's Form A response dated 7 April 2016	<b>18</b>
<b>05</b>	Copy of extract of Minutes of Shire Victoria Plains Ordinary Council Meeting of 15 July 2015	<b>19</b>
<b>06</b>	Copy of Shire of Victoria Plains Local Law Relating to Standing Orders (1997)	<b>22</b>

## **Attachment B**

### Statement of facts

- The complaint was received by the Presiding Member of the Standards Panel on 4 December 2015.
- The Complaint is made in writing in the form approved by the Minister pursuant to section 5.107(2) of the Act and the Complaint was sent to the Complaints Officer within two years of the alleged breaches occurring, in accordance with section 5.107(4) of the Act.
- Under regulation 5, regulation 4 is a rule of conduct for the purposes of section 5.104(1). Accordingly, a contravention of regulation 4 is a minor breach under section 5.105(1)(a).
- The Panel has jurisdiction to determine whether the breach of regulation 4, as alleged in the Complaint, occurred.
- Councillor Brennan has been an elected member of the Shire Council since 2013 and his current term expires in 2017.
- On 23 December 2015 the Department sent an acknowledgement to Cr Brennan.
- On 29 March 2016, the Department wrote to Cr Brennan putting the allegation to him and provided him with a copy of the complaint and associated material, and gave him the opportunity to provide his comments and any information he desires in relation to the allegation.
- On 12 April 2016, the Department received Cr Brennan's Form A response to the allegation.