

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 50 of 2008 (DLG 20090003)
Heard: Determined on the documents
Considered: 5 November 2009
Coram: Mr B. Jolly (Presiding Member)
Councillor C. Adams (Member)
Mr J. Lyon (Member)

SP 50 of 2008

Complainant: (Mr) Jason BUCKLEY

Council member complained about: Councillor Rodney BRADLEY

Local Government: Town of Cambridge

Regulations alleged breached: Regulations 10(3)(a), 10(3)(b), 7(1)(a) & 7(1)(b)

FINDINGS AND REASONS FOR FINDINGS

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 FINDINGS

The Panel found that during the Councillor debate on item 178 at the Town's Ordinary Council Meeting held on 16 December 2008, while members of the public were present, Councillor Bradley:

- breached regulation 10(3)(a);
- did not breach regulation 10(3)(b);
- did not breach regulation 7(1)(a); and
- breached regulation 7(1)(b).

BACKGROUND AND PROCEDURAL MATTERS

The material in **Attachment A** is incorporated here as if set out in full.

AVAILABLE INFORMATION

The information before the Panel in relation to this matter (“the available information”) is the information in the documents described in the table under the heading ‘Available information’ in **Attachment A**. These documents are referred to below, in italics within square brackets, by the relevant Doc ID in the table for the relevant document – e.g. [*Doc B3*] refers to the document that is Doc ID B3 in the table. Pages in a document described in the table are similarly referred to below by the relevant page/s number followed by the relevant Doc ID – e.g. [*pp3-4Doc B3*] refers to pages 3 - 4 of Doc ID B3.

FINDINGS AND REASONS FOR FINDINGS

Allegations of minor breach

1. The 3 allegations of minor breach in this matter, that the Panel has sent notification of to Councillor Bradley, can be expressed as follows:

(1) The first allegation (“allegation (1)”) is:

That Councillor Bradley, in committing the alleged conduct, committed a breach of regulation 10(3)(a) by orally making a statement or statements that Mr Lee Rowley (“Mr Rowley”), a Town employee, is incompetent and or, alternatively, dishonest. Mr Buckley alleges that the said statement/s is/are the statements set out in paragraph 2(7)(c) below.

(2) The second allegation (“allegation (2)”) is:

That Councillor Bradley, in committing the alleged conduct, committed a breach of regulation 10(3)(b) by orally using an offensive or objectionable expression, or offensive or objectionable expressions, in reference to Mr Rowley. Mr Buckley alleges that the said expression/s is/are the expression/s set out in paragraph 2(7)(c) below.

(3) The third allegation (“allegation (3)”) is:

That Councillor Bradley, in committing the alleged conduct, committed a breach of regulation 7(1) by making improper use of his office as a Council member both or either:

- (a) to directly or indirectly gain an advantage for Mr Saliba; and or, alternatively
- (b) to cause detriment to both or either of the Town and / or Mr Rowley.

Mr Buckley alleges that the advantage Councillor Bradley intended to be gained for Mr Saliba, and the detriment Councillor Bradley intended to be caused to the Town, was:

- (i) Undermining the credibility of the evidence provided for the Town in case no. PE34738/08 (“the court case”) before the Perth Magistrates Court in which the Town had prosecuted Mr Saliba for non-compliance with an order of the State Administrative Tribunal (“SAT”) to fix defects on the property at 67 Ruislip Street, West Leederville (“Mr Saliba’s property”).
- (ii) By such undermining, affecting the Town’s ability to enforce the notice resolved by Council at the OCM in relation to item 178, to be given to Mr Saliba in regard to Mr Saliba’s property.
- (iii) By such undermining, affecting the Town’s ability to proceed with the legal processes to resolve, to the Town’s satisfaction, the outstanding issues between the Town and Mr Saliba in regard to Mr Saliba’s property.

Mr Buckley further alleges that the detriment Councillor Bradley intended to be caused to the Town included the lowering of the Town’s reputation by creating doubt in the integrity and ability of the Town’s employees to act professionally and without bias.

Mr Buckley alleges that the detriment Councillor Bradley intended to be caused to Mr Rowley was:

- (i) The lowering of Mr Rowley’s reputation by virtue of him being perceived by others as a person who gave false or misleading evidence to a court while he was on oath.
- (ii) The lowering of Mr Rowley’s reputation by creating doubt in his integrity and ability to act professionally and without bias.

Probable facts

2. On the available information the Panel is satisfied there is evidence from which it may be concluded, and from which the Panel has concluded, that it is more likely than not that:

- (1) In the SAT Matter the witnesses for the Town included Mr Rowley. *[p1DocB2]*
- (2) On 23 July 2008 Mr Rowley appeared as the sole witness for the Town in its prosecution of Mr Saliba in the court case. *[Doc F]*
- (3) On 23 July 2008 Councillor Bradley gave evidence for Mr Saliba in the court case, defending him against the Town’s action. Councillor Bradley’s evidence can be summarised as:
 - (a) his opinion on town planning matters and evidence given by the Town’s staff and its expert witness in a previous SAT proceeding relating to the unfinished house; and

- (b) his opinion that in view of Mr Saliba's background and the circumstances of the matter:
 - (i) Mr Saliba had been and was being unfairly treated by the Town;
 - (ii) it was unfair for the Town to insist on rigid or strict compliance by Mr Saliba with the Town approved plans and specifications in completing the unfinished house; and
 - (iii) Mr Saliba should be given more time to finish the unfinished house.
- (4) In his two letters dated 19 and 20 August 2008 to the CEO [Docs B1 & B2], Councillor Bradley outlined his concerns in relation to the evidence given by Mr Rowley in the SAT Matter and in the court case.
- (5) In response to those two letters from Cr Bradley, in his letter dated 21 August 2008 to Cr Bradley [Doc B3], the CEO:
 - (a) advised and foreshadowed various possible consequences that he thought could or would happen if Councillor Bradley were to publicly air those concerns before the CEO had an opportunity to investigate them; and
 - (b) asked Councillor Bradley not to publicly air those concerns before the CEO had an opportunity to investigate them.
- (6) Pages 77 – 81 of the minutes of the December 2008 OCM [Doc B7] set out the background and events relating to item DV08.178. The "matter", as per the opening paragraph of the Officer Report presented at the December 2008 OCM in relation to item DV08.178, was Council's consideration whether "any further action is necessary to require the completion of the construction of the house at 67 Ruislip Street, West Leederville, in accordance with the respective building licences, associated approved plans and specifications; and to bring the construction of [that house] into compliance with the outstanding Local Government Act Notice, as varied by the [State Administrative Tribunal]".
- (7) During the debate:
 - (a) the meeting "was open to the public and there were many members of the public present (approximately 25 including Mr Saliba) in addition to media representatives (2)"; [p2Doc B]
 - (b) Councillor Bradley referred to a letter from Mr Saliba to the Town, and to accusations made in that letter; [p2Doc B] and
 - (c) Councillor Bradley said:
 - (i) *"But he (Mr Saliba) makes some very serious accusations about providing false evidence to the Magistrates Court. ... You know, if there was a charge of perjury laid, it could be a very, a very serious matter."* [p1Doc B6]

- (ii) *“Now if we are going to go along to the Magistrates Court and give evidence under oath which is untrue and it’s clearly untrue because the plans said it’s untrue, ...” [p2Doc B6]*
- (iii) *“[In a State Administrative Tribunal hearing] ... the Town’s case was that these bricks were not fireproof and yet they are. Where do we stand? You know that was evidence given under oath. And then we talk about the tiles, this was another thing mentioned in the State Administrative Tribunal the tiles are not fixed. Well they are fixed, I’ve been there and seen that the tiles on the roof are fixed.” [p2Doc B6]*
- (iv) *“Now there is a series of serious either serious blunders here or serious determinations to mislead the magistrate in the magistrates court ...” [p2Doc B6]*
- (v) *“... if we get a police investigation asking about crim... and putting a criminal charges on the Town for giving untrue evidence under oath somebody is going to be embarrassed ...” [p3Doc B6]*

(the statements reproduced in this paragraph 2(7)(c) being collectively referred to herein as “the statements complained about”).

Allegation (1)

3. The Panel’s general views in relation to regulation 10(3)(a) and associated matters are set out in **Attachment B**. In the light of those views and the available information the Panel is satisfied there is evidence from which it may be concluded, and from which the Panel has concluded, that it is more likely than not that in relation to allegation (1):

- (1) Councillor Bradley was, on 16 December 2008, attending a Council meeting in his capacity as a Council member. *[Doc B7]*
- (2) Members of the public were present at that meeting. *[p2Doc B]*
- (3) The prerequisites for the operation of the prohibition found in regulation 10(3) are therefore established.
- (4) What Councillor Bradley said during the debate were his representations of fact or opinion. Accordingly, what Councillor Bradley said during the debate, as reproduced in paragraph 2(7)(c) above, were orally made ‘statements’.
- (5) During the debate Councillor Bradley published the statements complained about. *[Doc B6]*
- (6) Councillor Bradley published those statements to persons with knowledge of other facts which would reasonably enable them to identify Mr Rowley as the Town employee that Councillor Bradley was referring to.

- (7) Viewed objectively:
- (a) in their natural and ordinary meanings, or as a true innuendo, the words in Councillor Bradley's statement that: "*Now there is a series of serious either serious blunders here or serious determinations to mislead the magistrate in the magistrates court ...*" have and were understood to have the meaning and imputation in part that Mr Rowley, a Town employee, was incompetent in that he had committed a series of blunders or errors in giving his evidence in the court case; and
 - (b) that imputation was disparaging and defamatory of Mr Rowley as it had a tendency to lower him in the estimation of his fellow persons by making them think less of him.
- (8) Viewed objectively:
- (a) in their natural and ordinary meanings, or as a true innuendo, the words in Councillor Bradley's respective statements reproduced in paragraph 2.2(7)(c)(i) to (v) above (both inclusive) have and were understood to have the meaning and the imputation that Mr Rowley, a Town employee, was dishonest in that he gave untrustworthy evidence or that he lied when giving his evidence in the SAT Matter and in the court case; and
 - (b) that imputation was disparaging and defamatory of Mr Rowley as it had a tendency to lower him in the estimation of his fellow persons by making them think less of him.
- (9) Viewed objectively, the contents of the transcript excerpt [Doc B6] indicate that when Councillor Bradley made the statements complained about his sole or dominant intent (motive or purpose) was not to cause:
- (a) significant financial injury or harm to Mr Rowley or the Town; or
 - (b) significant mental or psychological injury or harm to Mr Rowley that was, or was likely to be, significant and longstanding.
- (10) Accordingly, Councillor Bradley's publishing of the statements complained about during the debate was not conduct that was unlawful under *The Criminal Code* Chapter XXXV.

Panel finding on allegation (1)

4. In view of the contents of paragraph 3 above the Panel finds that Councillor character Bradley breached regulation 10(3)(a) during the debate on Item 178 at the December 2008 OCM by orally making statements, while members of the public were present, imputing or implying that a Town employee, Mr Lee Rowley, was incompetent or dishonest and gave untrustworthy evidence.

Allegation (2)

5. The Panel's general views in relation to regulation 10(3)(b) and associated matters are set out in **Attachment C**. In the light of those views it is the Panel's view in relation to allegation (2) that:

- (a) on the available information, while it can be argued whether the statements complained about were offensive or objectionable inferences or accusations, it is more likely than not that none of those statements constitute the use of an expression; and
- (b) therefore, there is no need to consider whether or not the statements complained about were offensive or objectionable.

Panel finding on allegation (2)

6. In view of the contents of paragraph 5 above the Panel finds that Councillor Bradley did not breach regulation 10(3)(b) during the debate.

Allegation (3)

7. In relation to allegation (3) the Panel notes that:

- (1) In his two letters dated 19 and 20 August 2008 to the CEO, Cr Bradley outlined his concerns in relation to the evidence given by Mr Rowley in the SAT Matter and in the court case.
- (2) The text of the CEO's letter dated 21 August 2008 to Cr Bradley [Doc B3], sent in response to those two letters from Cr Bradley, reads:

"I acknowledge receipt of your two letters dated 19 and 20 August 2008 outlining your concerns in relation to the evidence provided by the Town's Officers in the prosecution of Mr C C Saliba for non-compliance with the Notice dated 16 August 2004 (as amended by the State Administrative Tribunal) concerning the building construction at 67 Ruislip Street, West Leederville.

In your first letter you requested that I obtain information in order to assess your concerns about the evidence provided by the Town's Officers. The following day I received from you a letter making serious allegations about an Officer of the Town in that he lied in giving evidence which constitutes perjury and is a criminal offence. To this end you have advised that you intend to make a Statutory Declaration to this effect and intend to present that declaration to Council and local newspapers.

I recall that in my initial discussion with you on this matter on the evening of Tuesday, 12 August 2008, I advised that if you wished to pursue a complaint it would be necessary for you put your complaint in writing to allow me to conduct an investigation. Your intention at that time was to obtain a transcript of the Court proceedings to assess whether or not the evidence provided by the Officer was inaccurate. You also advised me that you did not personally hear the evidence of the Officer and that the information had been relayed to you by Mr Saliba.

At this time I am not aware of the specific details of the evidence given by the Officer that you allege is inaccurate and will not be in a position to make comment until the facts of the matter have been ascertained. The proper process would be to allow me to investigate the matter to identify the issues you are concerned about.

Your intention to release information publically in relation to your allegations is highly unusual, could potentially pre-empt the outcome, and denies me the opportunity to investigate the matter properly. Depending on the content of your Statutory Declaration, your actions could conflict with the natural justice and procedural fairness of the Officer concerned and violate the Town's employment obligations.

For these reason I urge you to reconsider your intentions and allow the proper investigative processes to be followed by myself as the Town's Chief Executive.

In relation to this matter I am also compelled to bring to your attention your responsibilities and obligations as an Elected Member of the Town. Notwithstanding, the Town has a Code of Conduct which outlines the expected standard of behaviour of Elected Members; several statutory requirements exist relating to Elected Members as detailed in the Local Government (Rules of Conduct) Regulations 2007. Relevant items in relation to this matter are detailed below:

[The provisions of regulations 7(1)(b), 10(1)(b), 10(3) and 10(4) are then reproduced in the letter.]

At this time there has been no determination that the Town's officer is either incompetent or dishonest as the proper investigation into allegations, that have yet to be identified, has not been commenced.

Further, in relation to your responsibilities at a Council meeting, the Standing Orders provide under Clause 13.3(2):

"No Member of the Council or a Committee is to use offensive or objectionable expressions in reference to any Member, employee of the council or any other person."

The Local Government (Rules of Conduct) Regulations 2007 also provides in Regulation 4 that the contravention of a local law as to conduct (ie Standing Orders) is a minor breach.

I would also bring your attention to the possibility of a civil action for defamation that may be brought by the Town's officer.

On the basis of your obligations and requirements as a representative of the Council that I have detailed above, I recommend that you allow due process to be followed in this matter prior to initiating the actions you have proposed.

Due to the serious nature of the matters you have raised, I will be providing the Mayor (in confidence) the details of your concerns so that he may assist you in having the issue resolved.

It is my intention to review the material available to me to determine whether or not there is any basis to proceed with an investigation into concerns raised by in relation to the evidence provided by the Town's officer and will respond to you when I have had a reasonable opportunity to conduct this review.

In the meantime, due to the seriousness of the allegations I request that you do not have any direct contact with staff related to this matter or the compliance issues related to the notice served on Mr Saliba other than in committee or Council meetings where this matter is discussed.”

8. The Panel’s general views in relation to regulation 7 and associated matters are as set out in **Attachment D**. In relation to allegation (3), in the light of those views and on the available information it is the Panel’s view that:

- (1) Councillor Bradley attended the December 2008 OCM in his capacity as a Council member.
- (2) Members of the public were present at that meeting.
- (3) During the debate, when members of the public were present, Councillor Bradley published the statements complained about (“the relevant publishing”).
- (4) The relevant publishing was a use of Councillor Bradley’s office as a Council member.
- (5) Viewed objectively, the relevant publishing constituted making improper use of Councillor Bradley’s office as a council member, in that:
 - (a) the relevant publishing breached regulation 10(3)(a), for the reasons set out in paragraph 3 above; and
 - (b) the relevant publishing was in breach of his obligation to exercise powers conferred on him as a Council member only for the purposes for which they were conferred, by:
 - (i) such breaching of regulation 10(3)(a); and
 - (ii) deliberately making the relevant publishing despite the contents of the letter of 21 August 2008 from the CEO to him.
- (6) Viewed objectively, the relevant publishing was committed by Councillor Bradley for the sole or dominant purpose of causing detriment to Mr Rowley and the Town, in that Councillor Bradley’s intent at the time of publishing was for others to think less favourably of Mr Rowley and the Town.
- (7) The relevant publishing was not conduct that contravened section 5.93 of the Act or *The Criminal Code* section 83.

Panel finding on allegation (3)

10. In view of the contents of paragraph 9 above:

- (a) the Panel finds that Councillor Bradley did not breach regulation 7(1)(a) during the debate on item 178 at the December 2008 OCM; and
- (b) the Panel finds that Councillor Bradley committed a breach of regulation 7(1)(b) during that debate by making improper use of his office to cause detriment to the Town and to a Town employee, Mr Lee Rowley.

.....
Brad Jolly (Presiding Member)

.....
Carol Adams (Member)

.....
John Lyon (Member)

Attachment A

BACKGROUND AND PROCEDURAL MATTERS

References to sections and regulations, and the term “viewed objectively”

1. In these Reasons, unless otherwise indicated:

- (1) A reference to a regulation is a reference to the corresponding regulation of the *Local Government (Rules of Conduct) Regulations 2007* (“the Regulations”), a reference to a section is a reference to the corresponding section of the *Local Government Act 1995* (“the Act”).
- (2) 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).

Details of the complaint

2. The complainant in this matter, Mr Buckley, is the complaints officer (“complaints officer”) and the Chief Executive Officer (“CEO”) of the Town of Cambridge (“Town”). His complaint (“the complaint” or “Complaint SP50”) consists of a 4-page *Complaint of Minor Breach* dated 24 December 2008 [*Doc B*] and the attachments to it [*Docs B1 to B13*].

3. By a letter [*Doc C*] Mr Buckley was requested to clarify his allegations and provide further information in this matter. His response was his 3-page letter of 8 May 2009 [*Doc D*] and the attachments to it [*Docs B1 to B13*].

Alleged conduct

4. In the complaint, as supplemented by Mr Buckley’s response of 8 May 2009, Mr Buckley alleges that Councillor Bradley’s conduct in this matter (“alleged conduct”) is that during debate on Item 178 (“the debate”) at the Town’s Ordinary Council Meeting held on 16 December 2008 (“the December 2008 OCM”), while members of the public were present, Councillor Bradley:

- (a) referred to a letter from Mr Carmelo Charles Saliba (“Mr Saliba”) to the Town, and to accusations made in that letter;
- (b) made the statements, remarks or observations attributed to him in the 3-pages of “Transcript excerpt from the Council meeting held on 16 December 2008 – Comments from Councillor Bradley in relation to Item 178” [*Doc B6*] provided by Mr Buckley to the Panel (“the transcript excerpt”); and
- (c) used the expressions attributed to Councillor Bradley in the transcript excerpt.

Preliminary matters

5. The Panel notes that:

- (1) The complaint is in the form approved by the Minister for Local Government and was made within time.
- (2) Regulations 7 and 10 are rules of conduct under section 5.104(1). A contravention of regulation 7 or 10 is a minor breach under section 5.105(1).
- (3) There are allegations made in the complaint that Councillor Bradley, a Council member at the relevant time, has committed minor breaches as defined under section 5.105(1)(a).

Procedural fairness

6. By a Panel *Notice of Complaint* dated 9 June 2009 [Doc E] Councillor Bradley was notified of the subject 3 allegations of minor breach and invited his response. At the time of signing of these Reasons, the Panel has not received any response from Councillor Bradley in relation to any of those allegations.

Available information

7. The Panel notes that:

- (1) In another complaint made by Mr Buckley about Councillor Bradley (Complaint SP 48 of 2008), Mr Buckley complained about alleged conduct by Councillor Bradley in and when giving evidence for Mr Saliba at the Perth Magistrates Court on 23 July 2008 in PE 34738 of 2008 (*Town of Cambridge v Carmelo Charles Saliba*) (“the court case”), in which the Town was prosecuting Mr Saliba for a failure to comply with a notice under section 401 (and non-compliance with a SAT order) relating to the unfinished house and other defects on Mr Saliba’s property.
- (2) In relation to Complaint SP 48 of 2008:
 - (a) Mr Buckley has provided the Panel with material that includes a copy of all 94 pages of the Transcript of Proceedings at the court case on 23 July 2008 (“the court case transcript”) [Doc F];
 - (b) on 9 June 2009 the Panel’s Presiding Member sent to Councillor Bradley, among other things, a copy of the court case transcript; and
 - (c) Councillor Bradley has not advised the Panel that he disputes any of the contents of the court case transcript.

8. The information before the Panel in relation to this matter (“the available information”) is the information in the documents described in the following table:

Doc ID	Description
A	1-page letter from Mr Buckley, dated 24 December 2008
B	The complaint (4-page Complaint No. SP 50 of 2008, dated 24 December 2008)
B1	Copy of 2-page letter from Councillor Bradley to Mr Buckley, dated 19 August 2008
B2	Copy of 2-page letter from Councillor Bradley to Mr Buckley, dated 20 August 2008
B3	Copy of 3-page letter from Mr Buckley to Councillor Bradley, dated 21 August 2008
B4	Copy of 1-page letter from Mr Buckley to Councillor Bradley, dated 26 August 2008
B5	Copy of 1-page letter from Mr Buckley to Councillor Bradley, dated 23 September 2008
B6	Copy of 3-pages of Transcript excerpt from the Council meeting held on 16 December 2008 – Comments from Councillor Bradley in relation to Item 178
B7	Copy of pages 77 – 81 of the minutes of the Council meeting held on 16 December 2008
<i>[Copy of 11-page Attachment to Item DV08.178 for the Town’s Development Committee Meeting on 9 December 2008 (the Attachment consisting of:)]</i>	
B8	Copy of 1-page attachment cover sheet
B9	Copy of 2-page letter from McLeods, Barristers & Solicitors, to the Town, dated 28 October 2008
B10	Copy of 3-page letter from Mr CC Saliba to the Town, dated 1 September 2008
B11	Copy of 1-page letter from Reed Engineers Pty Ltd to Mr CC Saliba, dated 22 August 2008
B12	Copy of amended plan of the screen wall details at Lot 2 Ruislip Street, West Leederville, prepared by Reed Engineers Pty Ltd, and date-marked 11 September 2008 received by the Town
B13	Copy of pages 72 – 74 of the Minutes of the Ordinary Council Meeting held on 26 August 2008
C	Copy of 4-page letter to Mr Buckley, dated 14 January 2009
D	Copy of 3-page letter from Mr Buckley, dated 8 May 2009
D1	CD copy of recording of Councillor Bradley’s speech on Item 178 at the Council meeting held on 16 December 2008 (from 2 minutes 32 seconds to 11 minutes 30 seconds of the CD’s running time)
D2	Copy of 1-page of Mr Buckley’s diary, dated 18 March 2008
D3	Copy of 1-page of Mr Buckley’s diary, dated 11 August 2008
D4	Colour copy of <i>[Doc B6]</i> , headed “4.(a) Incompetent”
D5	Colour copy of <i>[Doc B6]</i> , headed “4.(b) Dishonest”
D6	Colour copy of <i>[Doc B6]</i> , headed “6. Offensive or objectionable expressions”
E	Copy of <i>Notice of Complaint</i> to Councillor Bradley, dated 9 June 2009
F	Copy of Transcript of Proceedings at Perth Magistrates Court on 23 July 2008 in <i>Town of Cambridge v Carmelo Charles Saliba</i>

Attachment B

PANEL'S GENERAL VIEWS AND MATERIAL IN RELATION TO REGULATION 10(3)(a)

Relevant legislation

1. Regulations 10(3)(a) and (4) read, relevantly:

“(3) If a person, in his or her capacity as a council member, is attending a council meeting ... 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;

(4) Subregulation (3)(a) does not apply to conduct that is unlawful under The Criminal Code Chapter XXXV.”

2. *The Criminal Code Chapter XXXV consists of section 345 (the crime of criminal defamation), which reads, relevantly:*

“(1) A person who, without lawful excuse, publishes matter defamatory of another living person (the “victim”):

(a) knowing the matter to be false or without having regard to whether the matter is true or false; and

(b) intending to cause serious harm to the victim or any other person or without having regard to whether such harm is caused,

is guilty of a crime

(2) In proceedings for an offence under this section the accused person has a lawful excuse for the publication of defamatory matter about the victim if, and only if, subsection (3) applies.

(3) This subsection applies if the accused person would, having regard only to the circumstances happening before or at the time of the publication, have had a defence for the publication if the victim had brought civil proceedings for defamation against the accused person.

...

(7) In this section:

“publish” and “defamatory” have the meanings that those terms have in the law of tort (as modified by the Defamation Act 2005) relating to defamation.”

Elements of breach

3. In view of regulation 10(4) the elements of a breach of regulation 10(3)(a) are that:

- a council member attended a council meeting, committee meeting or other organised event in his or her capacity as a council member
- [and] in the presence of a member or members of the public
- the council member either orally, in writing or by any other means
- made a statement
- that statement (or the imputation from the words used) was that a local government employee was incompetent or dishonest
- the making of that statement was not unlawful under section 345 of *The Criminal Code Chapter XXXV*.

4. What is a 'statement' for the purposes of regulation 10(3)(a)?

- (1) The noun 'statement' is primarily defined in the Shorter Oxford English Dictionary (6th ed) as "the action of or an act of stating, alleging, or enunciating something".
- (2) The term 'statement' is defined under section 79B of the *Evidence Act 1906* (W.A.) as including "any representation of fact or opinion whether made in words or otherwise".
- (3) In *Given v Pryor* (1979) 39 FLR 437 at 439, Franki J said:

"... It seems to me a statement may be in any language, including one made by signs that are understood by those deaf and dumb [sic, mute] people who use them, and one written in shorthand. In the same way I cannot see why pictorial or diagrammatic material should not be included in a statement".
- (4) Accordingly, it is the Panel's view that for the purposes of regulation 10(3)(a), the term 'statement' refers to any representation of fact or opinion.

5. What conduct is unlawful under *The Criminal Code Chapter XXXV*?

- (1) It is the Panel's view that, by virtue of regulation 10(4), if a council member attended a council meeting and - when members of the public were present - orally, in writing or by any other means made a representation of fact or opinion that a local government employee was incompetent or dishonest, the council member's conduct of making the representation of fact or opinion will be unlawful under section 345 of *The Criminal Code* (i.e. *The Criminal Code Chapter XXXV*) where, in a prosecution under that section:
 - (a) there is sufficient evidence for the prosecution to prove beyond a reasonable doubt that:
 - (i) the council member published matter defamatory of the employee; and
 - (ii) at the time of such publication, the council member did so:
 - (A) knowing the matter to be false or without having regard to whether the matter is true or false (i.e. the council member did so with 'malice', in the defamation sense); and
 - (B) with his or her sole or dominant intent (motive or purpose) being to cause serious harm to the employee or the local government concerned or any other person or without having regard to whether such harm is caused; and
 - (b) the council member then fails to prove on the balance of probabilities that, having regard only to the circumstances happening before or at the time of the publication, he or she would have had a defence (which malice does not defeat) for the publication if the employee had brought civil proceedings for defamation against the council member.

6. What is defamation?

The Panel notes that:

- (1) Defamation occurs when defamatory material relating to an individual is published. Material will be defamatory if it could:
 - injure the reputation of the individual by exposing them to hatred, contempt or ridicule;
 - cause people to shun or avoid the individual; or
 - lower the individual's estimation by right thinking members of society.
- (2) In other words, material is defamatory of a person if the material has a tendency to lower the person in the estimation of his or her fellow persons by making them think less of him or her.
- (3) For a defamation action to be successful, three elements must be satisfied:
 - the information was communicated by the defendant to a third person other than the plaintiff (publication);
 - the material identifies the plaintiff (identification); and
 - the information/material contains matter that is defamatory, regardless of whether the material was intentionally published or not (defamatory matter).

1. Publication: Publication means that the material is made known to a third person other than the person being defamed. Publication can be oral, in writing or in pictures. Publishing occurs in each place the material is seen or heard, thus each time defamatory information is repeated to a third person, a separate publication occurs.

2. Identification: The plaintiff must be able to show that the defamatory matter could reasonably be taken to be about him or her. It is a question of whether an ordinary reasonable person having knowledge of the relevant circumstances would read the material as referring to the plaintiff. There is no need for the plaintiff to be expressly named. It is enough that the publication is made to persons with knowledge of other facts which would reasonably enable them to identify the plaintiff.

3. Defamatory matter: Whether a matter is defamatory will depend on the circumstances of each individual case. It is necessary to consider:

- whether the material was capable of conveying the defamatory meaning alleged by the plaintiff to an ordinary person. If this is answered positively, the next issue for determination is:
- whether, in fact, an ordinary person would have taken the publication as conveying the meaning alleged.

In answering these questions the standard to be applied is what the ordinary reader, listener or viewer would understand or infer from the statement. The audience is taken not to have any special prejudices. The actual intention of the person making the statement is irrelevant.

There are three ways that a statement can convey a defamatory meaning (otherwise known as an imputation):

- On the *natural and ordinary meaning* of the words: the meaning coming from a literal reading of the words.
- The court may find that the statement is a *false innuendo*. In other words, there is a secondary meaning which comes from reading between the lines.
- The statement may be a *true innuendo*. This is where the alleged meaning arises from the natural and ordinary meaning of the words being read in light of other facts not mentioned in the publication. The statement must be published to at least one person who knows of other facts.

The defamatory meaning can be directly stated or it can be implied. An implication that arises from another implication is not actionable – e.g. statement that somebody is charged with a crime carries the implication that the person is suspected of committing that crime; to conclude that this means the person did in fact commit the crime requires a second implication, and would not be actionable.

7. What is malice (in the sense that the term is used in the law of defamation)?

At common law a defamatory statement is published with malice (i.e. in the sense that the term is used in the law of defamation) if the person making it: knew at the time of publication that the representation was false; or made the representation recklessly indifferent to whether it was true or false.

At common law, malice includes ill will, spite and improper motive (*Horrocks v Lowe* [1975] AC 135 at 149-151).

8. In view of regulation 10(3)(a) and the context and purposes of section 345 of *The Criminal Code*, what does the term ‘serious harm’ mean?”

- (1) The term ‘serious harm’ is not defined under *The Criminal Code*. However, under section 1 of the Code the term “serious disease” is defined to mean “a disease of such a nature as to: endanger, or be likely to endanger, life; or cause, or be likely to cause, permanent injury to health.”
- (2) In *LM (Guardianship)* [2008] VCAT 2084 (9 October 2008) at [26] – [48], Member J. Grainger discussed the meaning of “serious harm” in section 191 of the *Disability Act 2006* (VIC). In those paragraphs, of relevance here, appear the following statements:

“I have also considered the ordinary meaning of the words. The Shorter Oxford English Dictionary defines “serious” as, amongst other things, “of grave aspect”, “weighty or important” and “giving cause for apprehension; critical” (3rd Edition, Clarendon Press, Oxford, 1980). It also defines “harm” as, amongst other things, “injury, damage or hurt”.

The Macquarie Dictionary defines “serious” as, amongst other things, “dealing with or regarding a matter on its grave side”, “weighty, important, grave” and “attended with danger; giving cause for anxiety” (4th Edition, Macquarie University NSW, 2005). “Harm” is defined as, amongst other things “hurt, injury, damage” and “grief, pain, trouble”.

The *Criminal Code Act (Cth)* 1995 defines "serious harm" as "harm (including the cumulative effect of any harm):

- (a) that endangers, or is likely to endanger, a person's life; or
- (b) that is or is likely to be significant and longstanding."

The Code defines "harm" as "physical harm or harm to a person's mental health, whether temporary or permanent. However, it does not include being subjected to any force or impact that is within the limits of what is acceptable as incidental to social interaction or to life in the community."

The Code also defines "Harm to a person's mental health" as including "significant psychological harm, but does not include mere ordinary emotional reactions such as those of only distress, grief, fear or anger".

The *Criminal Code (ACT)* 2002 also defines "serious harm". "Harm" is defined as "physical harm to a person, including unconsciousness, pain, disfigurement, infection with a disease and any physical contact with the person that a person might reasonably object to in the circumstances (whether or not the person was aware of it at the time)" and "harm to a person's mental health, including psychological harm, but not including mere ordinary emotional reactions (for example, distress, grief, fear or anger) whether temporary or permanent, but does not include being subjected to any force or impact that is within the limits of what is acceptable as incidental to social interaction or to life in the community."

"Serious harm" is defined as "any harm (including the cumulative effect of more than 1 harm) that:

- (a) endangers, or is likely to endanger, human life; or
- (b) is, or is likely to be, significant and longstanding."

"Serious harm" is also defined in section 91R (2) of the *Migration Act (Cth)* 1958 as including:

- A threat to the person's life or liberty.
- Significant physical harassment of the person.
- Significant physical ill-treatment of the person.
- Significant economic hardship that threatens the person's capacity to subsist.
- Denial of access to basic services, where the denial threatens the person's capacity to subsist.
- Denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

Whilst these definitions are in the context of criminal offences and migration law, I consider that the definitions are useful in considering the meaning of "serious harm" for the purpose of the *Disability Act* as each of the acts deal with serious subject matters, being determining whether a criminal offence has been committed, determining whether a person ought to be granted a protection visa on the grounds that the person has a well-founded fear of being persecuted in another country and determining whether a person with a disability ought to be detained."

- (3) In the light of regulations 10(3)(a) and 10(4) and the context and purposes of section 345 of *The Criminal Code*, it is the Panel's view that, when it considers the intent of a council member, the term 'serious harm' in section 345 is a reference to:
- (a) significant financial injury or harm; or
 - (b) significant mental or psychological injury or harm that is, or is likely to be, significant and longstanding, but does not include mere ordinary emotional reactions such as those of only distress, grief, fear or anger.

9. 'incompetent' and 'dishonest'

The Panel notes that the Shorter Oxford English Dictionary (6th ed) defines:

- (a) the word 'incompetent' (as an adjective and noun) as, relevantly, "Chiefly of a person: of inadequate ability or fitness; lacking the requisite capacity or qualification; incapable"; and
- (b) the word 'dishonest' (as an adjective) as, relevantly, "Of a person: lacking in probity or integrity, untrustworthy; (now chiefly) apt to steal, cheat, lie or act fraudulently".

10. What representations of fact or opinion will be a breach of regulation 10(3)(a)?

In the Panel's view the types of representations of fact or opinion that will breach of regulation 10(3)(a) are:

- (a) an express statement that a local government employee is "incompetent" or "dishonest" – e.g. "The CEO is incompetent" or "The Manager, Compliance is dishonest"; or
- (b) a statement imputing or implying that a local government employee is incompetent – i.e. imputing or implying that the employee is of inadequate ability or fitness, or is lacking the requisite capacity or qualification, or is incapable; or
- (c) a statement imputing or implying that a local government employee is dishonest – i.e. imputing or implying that the employee is lacking in probity or integrity, is untrustworthy, or has a tendency to steal, cheat, lie or act fraudulently.

11. What are the available defences if an employee brings civil proceedings for defamation against the council member?

The *Defamation Act 2005 (WA)* ("Defamation Act") governs the law of defamation in WA in relation to defamatory matter published after 1 January 2006.

Part 4 Division 2 of the Defamation Act specifies various defences in civil proceedings for defamation. By virtue of section 24 of the Defamation Act, the scope of defences under general law (i.e. the common law and equity) and other law are not limited to these statutory defences.

Section 24 of the Defamation Act reads:

- “(1) A defence under this Division is additional to any other defence or exclusion of liability available to the defendant apart from this Act (including under the general law) and does not of itself vitiate, limit or abrogate any other defence or exclusion of liability.
- (2) If a defence under this Division to the publication of defamatory matter may be defeated by proof that the publication was actuated by malice, the general law applies in defamation proceedings in which the defence is raised to determine whether a particular publication of matter was actuated by malice.”

Thus, in WA there are 3 possible types of defences available to the defendant: common law defences; a defence or exclusion of liability available to the defendant apart from the Defamation Act; and statutory defences under the Defamation Act.

Common law defences: The 4 main ones of which are: justification; fair comment; absolute privilege; and qualified privilege. Depending on the circumstances, the main common law defences available to a council member are: justification; fair comment; and qualified privilege. The common law defences of fair comment and qualified privilege are defeated where there is proof of malice.

An exclusion of liability available to the defendant apart from the Defamation Act: By virtue of section 9.56 an action in tort does not lie against a council member for anything that he or she has, in good faith, done in the performance or purported performance of a function under the Act or under any other written law. However, if an employee brings civil proceedings for defamation against a council member, for this ‘defence or exclusion of liability’ to apply the requirement of “good faith” means that the council member’s publication of the defamatory material must have been done without “bad faith” or malice – i.e. this defence is defeated where there is proof of malice.

Statutory defences: By their nature the statutory defences under the Defamation Act of absolute privilege (s.27) and innocent dissemination (s.32) are not available to an offending council member. Where there is proof of malice, the statutory defences that may be available to an offending council member appear limited to: justification (s.25); contextual truth (s.26); publication of a public document (s.28); and triviality (s.33).

Implied Freedom of Political Communication: In addition to the statutory defence of qualified privilege, the laws of defamation must also be read subject to an implied freedom of political communication in the *Constitution* in relation to publications concerning government and political matters that affect the Australian people. This means that certain material that is otherwise defamatory may be immune if it is a fair and accurate report of parliamentary or judicial proceedings, or public meetings concerning matters of public interest. The defendant must not believe that the imputation was untrue nor can the publication be actuated by malice.

Attachment C

PANEL'S GENERAL VIEWS AND MATERIAL IN RELATION TO REGULATION 10(3)(b)

1. Relevant legislation

Regulation 10(3)(b) reads, relevantly:

“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:

...

(b) use offensive or objectionable expressions in reference to a local government employee.”

2. Elements of breach

The elements of a breach of regulation 10(3)(b) are that:

- a person, in his or her capacity as a council member
- attended a council meeting, committee meeting or other organised event
- [and] in the presence of a member or members of the public
- either orally, in writing or by any other means
- used an expression
- the expression was an offensive or objectionable expression
- the expression was an offensive or objectionable expression in reference to a local government employee

3. Panel's views

Section 1.3(2) of the *Local Government Act 1995* sets out the intent of that Act as follows:

“This Act is intended to result in —

(a) better decision-making by local governments;

(b) greater community participation in the decisions and affairs of local governments;

(c) greater accountability of local governments to their communities; and

(d) more efficient and effective local government.”

In relation to regulation 10(3)(b), it is the Panel's views that:

1. **[What is an “expression”?] Amongst the meanings of the word “expression” in the Macquarie Dictionary is “a particular word, phrase, or form of words”. The Panel has accepted that for the purposes of regulation 10(3)(b), the term ‘expression’ means a particular word, phrase, or form of words.**

2. In the term 'offensive or objectionable expression' in regulation 10(3)(b), the word 'or' is properly construed to be used in the disjunctive so that separate meanings may be determined for each of the terms 'offensive expression' and 'objectionable expression'.
3. **[What is an "offensive expression"?)** In *Hargreaves and Local Government Standards Panel* [2008] WASAT 300 ("*Hargreaves*"), a matter concerning regulation 10(3)(b), Judge Chaney (as he then was) said in his Reasons for Decision:

At [17] – [18]: "Regulation 10 is headed 'Relations with local government employees'. I accept the submissions of counsel for the Attorney General of Western Australia that reg 10(3) is designed to ensure that councillors do not use their position to publicly criticise employees within their local government. It is predicated on the proposition that concerns about the performance of employees should be dealt with within the local government organisation and through proper channels, rather than aired publicly in a council or committee meeting.

... I was taken to definitions of 'offensive' in the Oxford English Dictionary online, in which it is defined as 'giving, or liable to give, offence; displeasing; annoying; insulting', and the Macquarie Dictionary, where it is defined as 'causing offence or displeasure; irritating ... and insulting'."

At [20]: "..., in my view, to accuse some person of dereliction of duty is likely to cause offence or displeasure and is insulting. It is an offensive expression within the meaning of reg 10(3)."

At [21]: "The proscription in reg 10(3) is against using offensive expression in reference to a local government employee. It is therefore not an answer to an allegation of breach of that regulation to say that the councillor concerned was merely reporting another person's offensive expression. The prohibition applies regardless of the original source of the offensive expression. The statement made by [the Council member] that [another, named, person] claims that the health inspector has been derelict in his duties amounts, in my view, to the use of an expression in reference to the health inspector which was offensive."

4. **[What is an "objectionable expression"?)** The term 'objectionable' has no fixed meaning, but rather takes its "colour" from the context in which it is to be found. It is neither a technical term, nor a term of art. That is not to say that the term 'objectionable' lacks a central core of settled or accepted meaning, or an "essential character". Dictionary meanings may provide assistance in describing, if not defining, the primary characteristics of 'objectionable'.
5. Synonyms of the noun 'offence' (as in "to cause offence") include the nouns 'insult', 'affront', 'umbrage', 'resentment', 'pique' and 'indignation' – terms that indicate a strong emotive response.
6. Synonyms of the noun 'offensive' that indicate a strong emotive response include the nouns 'objectionable' and 'insulting'. However, a synonym of the noun 'offensive' that indicates a mild emotive response is the noun 'unpleasant'.

7. The meanings of the word “objectionable” in the Macquarie Dictionary include “that may be objected to; unpleasant; offensive [as in] *offensive remarks*”. Synonyms of ‘objectionable’ that indicate a strong emotive response include ‘offensive’, ‘obnoxious’, ‘horrible’, ‘intolerable’, ‘abhorrent’ and ‘loathsome’. However, synonyms of ‘objectionable’ that indicate a lesser or a mild emotive response include ‘unpleasant’, ‘distasteful’ and even something that is ‘unacceptable’.
8. The Shorter Oxford English Dictionary defines:
- (a) the noun ‘insult’ as, relevantly, “an act or the action of attacking; (an) attack, (an) assault”;
 - (b) the verb intransitive ‘insult’ as “show arrogance or scorn; boast, exult, esp. insolently or contemptuously; and
 - (c) the verb transitive ‘insult’ as “treat with scornful abuse; subject to indignity; (of a person or thing) offend the modesty or self-respect of”.
9. In *Thurley v Hayes* [1920] HCA 28; (1920) 27 CLR 548 at 550, Knox CJ, Gavan Duffy and Rich JJ said:

'Insulting' is a very large term, and in a statement of this kind is generally understood to be a word not cramped within narrow limits. In the Oxford Dictionary under the word 'insult', we find it means in a transitive sense 'to assail with offensively dishonouring or contemptuous speech or action; to treat with scornful abuse or offensive disrespect; to offer indignity to; to affront, outrage'. We find in the same dictionary: 'Hence "insulted", treated with contemptuous abuse, outraged'.

10. In case law involving disorderly conduct, provocation or the phrase ‘wrongful act or insult’, the term ‘insult’ has been defined to mean:
- “words or conduct that could wound a person's feelings”;
 - “behaviour likely to arouse significant emotional reaction”; and
 - “behaviour that would produce, in the reasonable person, an emotional reaction (such as anger, resentment, disgust or outrage) beyond a reaction that was no more than the consequence of a difference of opinion on a political issue”.
11. *Jones v Scully* [2002] FCA 1080 (2 September 2002) was an appeal in relation to section 18C (1) of the *Racial Discrimination Act (1975)* (Cth), which reads:

“It is unlawful for a person to do an act, otherwise than in private, if:

- (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and*
- (b) the act is done because of the race, colour or national or ethnic origin of the other person or some or all of the people in the group.”*

In that case Hely J said, at [102 - 107]:

“... In the absence of any statutory definition of the words "offend, insult, humiliate or intimidate", it is appropriate that the words be given their ordinary English meanings.

Dictionary definitions of the terms used in s 18C are as follows:

Offend

* "1. To irritate in mind or feelings; cause resentful displeasure in.
2. To affect (the sense, taste, etc) disagreeably."

(Macquarie Dictionary 3rd Ed.)

* In its chief sense "to hurt or wound the feelings or susceptibilities of; to be displeasing or disagreeable to; to vex, annoy, displease, anger; to excite a feeling of personal annoyance, resentment or disgust in (any one)."

(Oxford English Dictionary)

Insult

* "To assail with offensively dishonouring or contemptuous speech or action; to treat with scornful abuse or offensive disrespect; to offer indignity to; to affront, outrage."

(Oxford English Dictionary)

...

The fact, if it be a fact, that assertions made in the leaflets may be wrong or inaccurate does not of itself establish a contravention of s 18C: *Creek* at [6]. A true statement, or one which might be shown in some way to be true, does not mean that the statement is incapable of being offensive: *Patrick v Cobain* [2000] VSCA 140; [1993] 1 VR 290 at 294.

In *Worcester v Smith* [1951] VLR 316, O'Bryan J held that behaviour, to be offensive within the context of "behaves in an offensive manner" in s 25 of the *Police Offences Act 1928* (Vic) must be such as is calculated to wound the feelings or arouse anger, resentment, disgust or outrage in the mind of a reasonable person. His Honour held that the mere expression of political views contrary to those probably held by the majority of the community, even when made in the proximity of the offices of those whose views are attacked, does not amount to such offensive behaviour. A banner bearing the inscription "Stop Yank Intervention in Korea" was regarded by his Honour as an inoffensive statement of political views, even when carried outside the offices of the United States Consul.

For the reasons explained by Wilcox J in *CEPU v Australian Postal Corporation* (1998) 85 FCR 526 at 534-535, criminal cases on offensive behaviour, whilst not determinative of the question which arises in the present case, do provide some general insight into the question of offensiveness. In particular, they support the proposition that the expression or dissemination of views contrary to those held by a section of the community or even by a majority of the community will not necessarily be offensive (although in some circumstances it may), even if the expression of those views is hurtful to those who hold a different opinion. As the outline in the Explanatory Memorandum to the Racial Hatred Bill states (p 1), the RDA: "is not intended to prohibit people from having and expressing ideas". In the context of the summary offence of offensive behaviour, conduct or language to be offensive must be such as is calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person: Watson, Blackmore and Hosking *Criminal Law (NSW)* at [9.7990]. In *CEPU* (supra) at 534 Wilcox J quoted the following observation by Kerr J in *Ball v McIntyre* (1966) 9 FLR 237 at 241:

"Some types of political conduct may offend against accepted views or opinions and may be hurtful to those who hold those accepted views or opinions. But such political conduct, even though not thought to be proper conduct by accepted standards, may not be offensive conduct within the section. Conduct showing a refusal to accept commonly held attitudes of respect to institutions or objects held in high esteem by most may not produce offensive behaviour, although in some cases, of course, it may."

At p 243 in *Ball v McIntyre*, Kerr J said:

"... behaviour to be offensive behaviour must be calculated to produce a stronger emotional reaction in the reasonable man than is involved in indicating difference from or non acceptance of his views or values. The behaviour to be offensive would normally be calculated to wound the feelings, arouse anger, resentment, disgust or outrage in the mind of a reasonable man."

12. In the Panel's view:

- (a) a council member will *reflect adversely upon the character of another member* if the council member makes a remark or observation that relates to the other member's moral or mental characteristics, and the remark or observation would be perceived by a reasonable person as tending to lower a person in the estimation of his or her fellow persons by making them think less of him or her; and
- (b) a council member will *reflect adversely upon the actions of another member* if the council member makes a remark or observation that relates to any thing done by the other member, and the remark or observation would be perceived by a reasonable person as tending to lower a person in the estimation of his or her fellow persons by making them think less of him or her.

13. The Shorter Oxford English Dictionary defines the word 'disparage' as, relevantly, "speak of or treat slightly or critically".

14. It was accepted by Chaney J in *Hargreaves* that:

"...reg 10(3) is designed to ensure that councillors do not use their position to publicly criticise employees within their local government. It is predicated on the proposition that concerns about the performance of employees should be dealt with within the local government organisation and through proper channels, rather than aired publicly..."

15. It appears that the public criticism referred to will include the use of an expression to make an adverse reflection on the character or actions of a local government employee. That expression would appear to be an 'objectionable expression' if, viewed objectively, the expression is a particular word, phrase, or form of words that is distasteful or unacceptable.

16. To an ordinary person, an 'offensive expression' will always be an 'objectionable expression – however, an expression may be an 'objectionable expression' and not also an 'offensive expression' if, viewed objectively, the expression is a particular word, phrase, or form of words that is distasteful or unacceptable.
17. For the purposes of regulation 10(3)(b) the term '*objectionable expression*' means '*a particular word, phrase, or form of words that viewed objectively is distasteful or unacceptable.*'

Attachment D

PANEL'S GENERAL VIEWS IN RELATION TO REGULATION 7 AND ASSOCIATED MATTERS

1. Relevant legislation

(1) Regulation 7 reads:

“(1) A person who is a council member must not make improper use of the person’s office as a council member:

- (a) to gain directly or indirectly an advantage for the person or any other person; or*
- (b) to cause detriment to the local government or any other person.*

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

(2) Section 5.93, headed ‘Improper use of information’, reads:

“A person who is a council member, a committee member or an employee must not make improper use of any information acquired in the performance by the person of any of his or her functions under this Act or any other written law:

- (a) to gain directly or indirectly an advantage for the person or any other person; or*
- (b) to cause detriment to the local government or any other person.*

Penalty: \$10 000 or imprisonment for 2 years.”

[Note: In section 5.93, the term ‘information’ means confidential information.]

(3) By virtue of the definition of “public officer” in *The Criminal Code* section 1, a council member is a public officer.

(4) *The Criminal Code* section 83, headed ‘Corruption’, reads:

“Any public officer who, without lawful authority or a reasonable excuse:

- (a) acts upon any knowledge or information obtained by reason of his office or employment;*
- (b) acts in any matter, in the performance or discharge of the functions of his office or employment, in relation to which he has, directly or indirectly, any pecuniary interest; or*
- (c) acts corruptly in the performance or discharge of the functions of his office or employment,*

so as to gain a benefit, whether pecuniary or otherwise, for any person, or so as to cause a detriment, whether pecuniary or otherwise, to any person, is guilty of a crime and is liable to imprisonment for 7 years.”

2. Elements of regulation 7(1)

It is the Panel's view that the elements of a breach of regulation 7(1) are:

- a council member
- committed the alleged conduct
- the member's conduct was a use of the member's office as a council member
- viewed objectively, the member's conduct constituted making improper use of the member's office as a council member
- viewed objectively, the member's conduct was committed by the member for the sole or dominant purpose (motive or intent) of:
 - gaining directly or indirectly an advantage for the member or any other person; and / or
 - causing detriment to the local government or any other person.

3. Panel's views

In the Panel's view:

1. Conduct has been held to be "improper" where it involves "a breach of the standards of conduct that would be expected of a person or body in the position of the public body by reasonable persons with knowledge of the duties, powers and authority of the position and circumstances of the case.": *R v Byrnes: Re Hopgood* (1995) 183 CLR 501 at 514 – 5.
2. The required standards of conduct of council members are in essence those flowing from the fiduciary obligations owed by a council member to his or her council (or local government) as varied or complemented by the Act (which includes all regulations, including the Regulations, made under it), the common law, any relevant code of conduct, and his or her council's decisions and policies.
3. For regulation 7(1) to be breached, it is not necessary that an advantage has actually been directly or indirectly gained or that a detriment has been actually suffered, as it is sufficient that the council member had the intention of directly or indirectly gaining an advantage or of causing a detriment: *Chew v R* (1992) 173 CLR 626.
4. Moreover, the test for impropriety being objective, it is not a requirement for the existence of impropriety that there be conscious wrongdoing: *Chew*, at 647; *R v Byrnes* at 514 – 5.
5. In considering the meaning of the term "detriment" in regulation 7(1)(b), the Macquarie Dictionary (2nd ed) defines:
 - (a) the noun "detriment" as "loss, damage, or injury" and "a cause of loss or damage";
 - (b) the noun "loss", relevantly, as "detriment or disadvantage from failure to keep, have or get";
 - (c) the noun "damage" as "injury or harm that impairs value or usefulness";
 - (d) the noun "harm" as "injury; damage; hurt" and "moral injury; evil; wrong"; and
 - (e) the noun "disadvantage", relevantly, as "any unfavourable circumstance or condition" and "injury to interest, reputation, credit, profit, etc".

6. The term “detriment” is to be construed widely, and includes a financial or a non-financial loss, damage, or injury, or any state, circumstance, opportunity or means specially unfavourable. Accordingly, “detriment” may include a tendency for others to think less favourably of a person, humiliation, denigration, intimidation, harassment, discrimination, disadvantage, adverse treatment, and dismissal from, or prejudice in, employment.

[Note: In *Ryan and Local Government Standards Panel* [2009] WASAT 154 Mr Justice J A Chaney (President), at [32], agreed with the observations set out in 3, 4, 5 and 6 above.]

7. The Panel may find that a council member intended by his/her conduct to cause a detriment to a person if:
 - (a) the member’s admission/s is/are to that effect; or
 - (b) there is a rational inference arising from the circumstantial evidence that it is more likely than not that:
 - (i) the member intended to cause the detriment; or
 - (ii) the member’s conduct was done with reckless indifference that the detriment was a probable or likely consequence of that conduct, and it is more likely than not that such inference is the only inference open to reasonable persons upon a consideration of all the facts in evidence.
8. In considering the meaning of the term ‘advantage’ in regulation 7(1)(a), the definitions of the noun ‘advantage’ in the Shorter Oxford English Dictionary (6th ed) include: “a favouring circumstance; something which gives one a better position ... benefit; increased well-being or convenience ... pecuniary profit ...”.
9. The term ‘advantage’ in regulation 7(1)(a) is to be construed widely, and includes a financial or a non-financial benefit, gain or profit, or any state, circumstance, opportunity or means specially favourable.
10. Section 83 of the *Criminal Code* [see regulation 7(2)] makes reference to a public officer who “acts in the performance or discharge of the functions of his office”, whereas regulation 7(1) refers only to “use of the person’s office”. Accordingly, improper conduct falling short of being in the performance or discharge of a council member’s office is caught by regulation 7 so long as it involves the use of office.
11. A council member’s right of freedom of expression is a factor in considering what constitutes improper conduct by him or her.
12. The role, responsibilities, empowerment and limitations of a council member include the following:
 - (1) The role of the council of a local government is set out by section 2.7, which reads:
 - “(1) *The council -*
 - (a) *directs and controls the local government's affairs; and*
 - (b) *is responsible for the performance of the local government's functions.*

- (2) *Without limiting subsection (1), the council is to -*
- (a) *oversee the allocation of the local government's finances and resources; and*
 - (b) *determine the local government's policies."*
- (2) Thus, by virtue of section 2.7 and the definition of the term 'function' in section 5 of the *Interpretation Act 1984*, it is the role of the council to direct and control the local government's affairs and to be responsible for the performance of the local government's functions, powers, duties, responsibilities, authorities and jurisdictions.
- (3) Section 2.10 defines the role of a councillor:
- "A councillor -*
- (a) *represents the interests of electors, ratepayers and residents of the district;*
 - (b) *provides leadership and guidance to the community in the district;*
 - (c) *facilitates communication between the community and the council;*
 - (d) *participates in the local government's decision-making processes at council and committee meetings; and*
 - (e) *performs such other functions as are given to a councillor by this Act or any other written law."*
- (4) Elected members constitute a local government's council. They are responsible for observing and implementing section 2.7 and ensuring the needs and concerns of their community are addressed.
- (5) While a councillor has responsibility under the Act to his/her constituents, this responsibility – particularly the responsibilities under section 2.10(a) and (c) – is subject to (i.e. subordinate to) the councillor's duty to abide by the provisions of the Act and its regulations, any applicable code of conduct and the procedures and decisions of his/her local government.
- (6) The Act does not impose upon a councillor any right to conduct himself/herself in a manner whilst representing the interests of the members of the community, or during the facilitation of communication between the community and council, that is contrary to: the relevant provisions of the Act or its regulations; or the standards of conduct expected of a person in that position; or the council's responsibility for the performance of the local government's functions.
- (7) A councillor will carry out his or her role and functions under section 2.10 by observing and implementing section 2.7 and ensuring the needs and concerns of his or her community are addressed.

13. In relation to the fiduciary obligations owed by a council member to his or her council (or local government):

- (1) In considering the meaning of the terms 'obligation' and 'fidelity', it is noted that the Shorter Oxford English Dictionary (6th ed) defines:
 - (a) the noun 'obligation' variously and relevantly as:
 - (i) "the action of constraining oneself by promise or contract to a particular course of action";
 - (ii) (at law) "a binding agreement committing a person to a payment or other action ...; the created or liability incurred by such an agreement";
 - (iii) "moral or legal constraint; the condition of being morally or legally bound; the constraining power of a law, duty, contract, etc";
 - (iv) "an act or course of action to which a person is morally or legally obliged; what one is bound to do; (a) duty; an enforced or burdensome task or responsibility"; and
 - (v) "legal liability"; and
 - (b) the noun 'fidelity' as, relevantly, "loyalty, faithfulness, unswerving allegiance (to a person, spouse, cause, etc.)".
- (2) The term 'fidelity' implies the unflinching fulfilment of one's duties and obligations and strict adherence to vows or promises, and the term 'loyalty' implies a steadfast and devoted attachment that is not easily turned aside.
- (3) The classic statement of the nature of fiduciary relationships is that of the High Court in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, at 96-97 (and see, too, *Chan v Zacharia* (1984) 154 CLR 178):

"The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations (cf. Phipps v Boardman (1967) 2 AC 46, at 127), viz., trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners. The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions 'for', 'on behalf of', and 'in the interests of' signify that the fiduciary acts in a 'representative' character in the exercise of his responsibility ... "

- (4) In Meagher, Gurnmow and Lehane's *Equity: Doctrines and Remedies* (2002), at p158, the learned authors state:

“The distinguishing characteristic of a fiduciary relationship is that its essence, or purpose, is to serve exclusively the interests of a person or group of persons; or, to put it negatively, it is a relationship in which the parties are not each free to pursue their separate interests.”

- (5) In other words, the fiduciary duty is one, having regard to the trust and confidence reposed in a person by virtue of his or her position, not to act unconscionably and thereby abuse that trust and confidence.
- (6) *Keech v Sandford* (1726) 25 ER 223 is a foundational case on the fiduciary duty of loyalty. It concerns the law of trusts and has affected much of the thinking on directors' duties in company law. It is authority for the position that a trustee owes a strict duty of loyalty so that there can never be a possibility of *any* conflict of interest.
- (7) A fiduciary's duties are different to a trustee's duties, although some of the respective duties may be similar or overlap.
- (8) It is settled that during the term of his or her employment an employee is under an implied contractual "duty of fidelity". In a South Australian Industrial Relations Commission case, *Cocks v Adelaide City Council* [2002] SAIRComm 6 (12 February 2002), Commissioner KM Bartel said, omitting authorities and citations:

At [68–69]: *“The duty of fidelity and good faith is a convenient term which covers a range of obligations owed by an employee and which are intended to ensure that honest and faithful service is rendered to the employer. Among the range of obligations, are the implied duties of loyalty, honesty, confidentiality and mutual trust.*

The duty of fidelity and good faith is an implied term in every contract of employment. The scope and content of that duty will vary according to the nature and circumstances of the contract of employment.”

At [75]: *“What is required by good faith and fidelity has to be determined on consideration of the circumstances, including the nature of the employer's business, the position of the employee in it and the actual or potential impact of what the employee does on the employer's interests.”*

- (9) In *Youyang Pty Limited v Minter Ellison Morris Fletcher* [2003] HCA 15, the Court [Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ at [40]] approved the statement of principle of McLachlin J in *Canson Enterprises Limited v Boughton & Co* [1991] 3 SCR 534 at 543 that “The essence of a fiduciary relationship ... is that one party pledges itself to act in the best interest of the other. The fiduciary relationship has trust, not self-interest, at its core, and when breach occurs, the balance favours the person wronged.””

- (10) The Shorter Oxford English Dictionary (6th ed) defines:
- (a) the noun 'college' in its primary sense as "an organised body of people performing certain common functions and sharing special privileges"; and
 - (b) the adjective 'collegiate' in its primary sense as "of the nature of, constituted as, a college".
- (11) The essential features of the fiduciary relationship, and the fiduciary duties, owed by a council member to his or her council as the governing body of the local government may be summarised as:
- (a) a duty to act in good faith – i.e. the council member must in his dealings act bona fide in what he considers to be the best interests of the council;
 - (b) an obligation to exercise powers conferred on the council member only for the purposes for which they were conferred – i.e. for "proper purposes";
 - (c) subject to section 5.21 and regulation 11, the no conflict rule – i.e. subject to section 5.21 and regulation 11, a council member cannot have a personal interest or inconsistent engagement with a third party where there is a real and sensible possibility of conflict; and
 - (d) the no profit rule – i.e. a council member cannot obtain an advantage for himself or others from the property, powers, confidential information or opportunities afforded to the member by virtue of his position.
- (12) Those fiduciary duties are the paramount duties of a councillor by virtue of the fact that councillors are representatives of their community and elected by and from that community, and take precedence notwithstanding that:
- (a) a councillor, when acting in his capacity as a private citizen, has a conditional right of free expression – i.e. that right is subject only to any lawful restrictions on the right of free speech;
 - (b) it may be expected that councillors will support particular views as to what is in the best interests of the community and that often they will have strong personal views as to what ought to occur in the community;
 - (c) councillors may be expected to hold particular views as to how they would wish their community to develop and to discharge their duties as councillors by reference to those views;
 - (d) councillors may be assumed to hold and to express views on a variety of matters relevant to the exercise of the functions of the council;

- (e) a councillor's expression of such views is part of the electoral process;
 - (f) by virtue of the political nature of the processes they are involved in as representatives of their community, as recognised under the Act, councillors can obtain input from numerous sources and bring their own opinion to bear on matters for council decisions; and
 - (g) it is expected councillors will have views about the matters before council and express those views in a way which in a tribunal or court context could or would be considered biased, as this reflects the nature of the decision-making process undertaken by councils.
- (13) By virtue of the section 2.29(1) declaration made by a council member before acting in the office, the member has voluntarily undertaken an obligation of constraining himself or herself by his or her promise to a particular course of action – namely, that he or she takes the office “upon myself and will duly, faithfully, honestly, and with integrity, fulfil the duties of the office for the people in the district according to the best of [his or her] judgment and ability, and will observe the *Local Government (Rules of Conduct) Regulations 2007*”.
- (14) A reference in a local government's code of code, or otherwise, to a council member having an '*obligation of fidelity*' to his or her local government's council as the governing body of that local government:
- (a) is a reference to the council member's duty, having regard to the trust and confidence reposed in a council member by virtue of his or her position, not to act unconscionably and thereby abuse that trust and confidence; and
 - (b) is to use a convenient term which refers to and covers all of the fiduciary duties that such a member has in fact to his or her local government's council as that governing body.
- (15) A local government makes its decisions by its council, its committees to which a local government power or duty has been delegated, and by delegation under section 5.42 or section 5.44.
- (16) Prior to a council making a decision on a matter, a council member may lobby or attempt to persuade any one or more of the other council members or the committee members to vote in a certain way.
- (17) The council of a local government is an organised body of people performing certain common functions and sharing special privileges. Accordingly, the council of a local government is a collegiate decision-maker, with its members voluntarily elected by willing eligible electors from the community for whom they make decisions.

- (18) As a member of council, the member's '*obligation of fidelity*' to council includes a duty or obligation of loyalty (i.e. to be loyal): to council's decisions made lawfully at a regularly held council meeting; and to a relevant committee's decisions made lawfully at a regularly held committee meeting.
- (19) A council member's duty of loyalty to his or her local government's decisions (particularly those made by its council) exists irrespective whether: the member was present when the decision was made; the member voted for or against the decision; the member agreed or not with the decision or the reason or any of the reasons for the decision. However, there are situations when this duty of loyalty does not apply – for example, when a matter before a council meeting or a relevant committee meeting is in relation to a motion or a notice of motion to revoke or change a decision of the council or the committee.

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 50 of 2008 (DLGRD 20090003)
Heard: Determined on the documents
Considered: 5 November 2009 & 25 March 2010
Corams: Mr B. Jolly (Presiding Member)
Councillor C. Adams (Member)
Mr J. Lyon (Member)

SP 50 of 2008

Complainant: (Mr) Jason BUCKLEY

Council member complained about: Councillor Rodney BRADLEY

Local Government: Town of Cambridge

Regulations alleged breached: Regulations 7(1)(a), 7(1)(b), 10(3)(a) and 10(3)(b)

DECISION & REASONS FOR DECISION

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 FINDINGS OF MINOR BREACHES

The Panel has made two findings (the findings) of minor breach in this matter:

- That Councillor Bradley breached regulation 10(3)(a) during the debate on item 178 at the Town of Cambridge's Ordinary Council Meeting held on 16 December 2008 by orally making statements, while members of the public were present, imputing or implying that a Town employee, Mr Lee Rowley, was incompetent or dishonest and gave untrustworthy evidence in a court case (the first breach).
- That during that debate Councillor Bradley made improper use of his office to cause detriment to the Town and to a Town employee, Mr Lee Rowley, and thus committed a breach of regulation 7(1)(b), by breaching his obligation to exercise powers conferred on him as a Council member only for the purposes for which they were conferred, by committing the first breach and by deliberately doing so despite the contents of the letter of 21 August 2008 from the Town's Chief Executive Officer to him (the second breach).

SUMMARY OF DECISION

The Panel's decision on how the first breach and the second breach (together, the present breaches) are dealt with under section 5.110(6) of the *Local Government Act 1995* (the Act) was that, for the following reasons, pursuant to subsection (c) of that section, it ordered two of the sanctions described in paragraph (b) of that section – that Councillor Bradley be publicly censured as specified in the attached Minute of Order, and that he apologise publicly to Mr Rowley as specified in the attached Minute of Order.

DECISION & REASONS FOR DECISION

References to sections and regulations

1. In these Reasons, unless otherwise indicated a reference to a section is a reference to the corresponding section in the Act, and a reference to a regulation is a reference to the corresponding regulation in the *Local Government (Rules of Conduct) Regulations 2007* (the Regulations).

Procedural fairness matters

2. The Panel gave to Councillor Bradley:

- (a) notice of the findings (the notice of the findings);
- (b) a copy of the Panel's Reasons for Findings (the Reasons for Findings); and
- (c) a reasonable opportunity for him to make submissions about how the present breaches should be dealt with under section 5.110(6); and
- (d) a further opportunity for him to make such submissions.

Councillor Bradley's response and submissions

3. Councillor Bradley's response to the notice of the findings and the Reasons for Findings is his letter of 8 March 2010 (Councillor Bradley's response). In the Panel's view:

- (a) Councillor Bradley's response may be summarised, relevantly, as consisting of:
 - (i) irrelevant observations about other persons; and
 - (ii) his suggestion that - in the light of those observations - the Panel reconsider its findings in this matter and in relation to Complaint No. SP 48 of 2008;
- (b) the Panel accorded Councillor Bradley procedural fairness before it made its findings of the present breaches;
- (c) Councillor Bradley's response does not provide any reason to cause the Panel to doubt its findings of the present breaches;
- (d) the term 'submission' refers to a claim, line of reasoning or contention that is intended to persuade the Panel to reach a particular decision on the evidence before it;

- (e) Councillor Bradley's response does not contain any such submission about how the present breaches should be dealt with by the Panel under section 5.110(6); and
- (f) the Panel has accorded Councillor Bradley procedural fairness before it has dealt with the present breaches under section 5.110(6).

4. The Panel also observes in relation to Councillor Bradley's response, that:

- (1) When an individual becomes a member of a council of a local government, he or she undertakes high public duties. Those duties are inseparable from the position: the individual cannot retain the honour and divest him/her of the duties.¹
- (2) Councillor Bradley fails to accept that he has committed any wrongdoing in his conduct that, in the Panel's view, resulted in the present breaches.
- (3) It is noteworthy that Councillor Bradley's response does not disagree with the Panel's general views on regulation 7(1), particularly in relation to the role, responsibilities, empowerment and limitations of a council member, as set out in Annexure D to the present Reasons for Findings, which include the following:
 - (a) while a councillor has responsibility under the Act to his/her constituents, this responsibility – particularly the responsibilities under section 2.10(a) and (c) – is subject to (i.e. subordinate to) the councillor's duty to abide by the provisions of the Act and its regulations, any applicable code of conduct and the procedures and decisions of his/her local government; and
 - (b) the Act does not impose upon a councillor any right to conduct himself/herself in a manner whilst representing the interests of the members of the community, or during the facilitation of communication between the community and council, that is contrary to: the relevant provisions of the Act or its regulations; or the standards of conduct expected of a person in that position; or the council's responsibility for the performance of the local government's functions.

Panel's views

5. In considering an appropriate sanction or sanctions for the present breaches the Panel notes that:

Relevant antecedent

- (1) In relation to Complaint No. SP 47 of 2008:
 - (a) Councillor Bradley was found under Part 5 Division 9 of the Act to have committed a minor breach (the first found breach) – namely, that at the Town of Cambridge's Ordinary Council Meeting held on 16 December 2008

¹ By analogy from *Horne v Barber* ([1920] HCA 33; (1920) 27 CLR 494) per Isaacs J.

Councillor Bradley contravened regulation 11(2) by having and failing to disclose the nature of his “interest” (as defined by regulation 11(1)) in item DV08.178 – that interest being that Councillor Bradley had appeared as a witness for Mr Carmelo Charles Saliba in the Town’s prosecution against him in PE 34738 of 2008 (Town of Cambridge v Carmelo Charles Saliba) (the court case) defending him against the Town’s action; and

- (b) the Panel dealt with the first found breach pursuant to paragraph (b)(i) of section 5.110(6) by ordering that Councillor Bradley be publicly censured as specified in the Panel’s order.

Is a public censure appropriate in this matter?

- (2) A public censure of the kind ordered by the Panel is a significant sanction. It involves a high degree of public admonition of the conduct of the council member concerned.² A breach of regulation 7(1) is a serious matter and will in almost all occasions deserve the sanction of a publicly censure. A breach of regulation 10(3) is a serious matter and will in almost all occasions deserve the sanction of a publicly censure. A council member’s breaches of regulations 7(1) and 10(3), committed deliberately and after appropriate advice from his local government’s Chief Executive Officer not to commit the offending conduct, as is the case of the present breaches, will inevitably be deserving of a publicly censure. Accordingly the Panel considers an order that Councillor Bradley be publicly censured is an appropriate sanction in regard to each of the present breaches.

Is a public apology appropriate in this matter?

- (3) In *Hargreaves and Local Government Standards Panel* [2008] WASAT 300, a matter concerning regulation 10(3)(b), at [17] – [18], Judge Chaney (as he then was) said in his Reasons for Decision:

“Regulation 10 is headed ‘Relations with local government employees’. I accept the submissions of counsel for the Attorney General of Western Australia that reg 10(3) is designed to ensure that councillors do not use their position to publicly criticise employees within their local government. It is predicated on the proposition that concerns about the performance of employees should be dealt with within the local government organisation and through proper channels, rather than aired publicly in a council or committee meeting.”

- (4) Accordingly, a breach of regulation 10(3) is a serious matter and will usually deserve the sanction of a publicly censure and the requirement that the offending councillor publicly apologise to the employee that he/she has publicly criticised.
- (5) In this matter, in the case of the first breach, the employee concerned is Mr Rowley. Accordingly the Panel considers that an order requiring Councillor Bradley to apologise publicly to Mr Rowley is an appropriate sanction in regard to the first breach.

² *Mazza and Local Government Standards Panel* [2009] WASAT 165 per Judge J Pritchard (Deputy President) at [107].

- (6) Where a councillor is found by the Panel to have breached regulation 7(1)(b) by committing an act deliberately done to bring about a result which can be characterised as a detriment to a named or identifiable natural person, the breach will in almost all occasions deserve the sanction of a public apology to that person. In the case of the second breach the natural person concerned is Mr Rowley. Accordingly the Panel considers an order requiring Councillor Bradley to apologise publicly to Mr Rowley is an appropriate sanction in regard to the second breach.

Is training appropriate in this matter?

- (7) It is the Panel's view that what is required of Councillor Bradley is not formal training – rather it is for him:
- (a) to take on board the Panel's general views on regulation 7(1), particularly in relation to the role, responsibilities, empowerment and limitations of a council member, as set out in Annexure D to the present Reasons for Findings;
 - (b) to accept that whenever he is acting in his capacity as a Council member he is required to steadfastly adhere to and actively observe and carry out all of the legal duties and ethical duties that he has as a Council member; and
 - (c) to act accordingly;

and thus the Panel does not consider that an order for Councillor Bradley to undertake training is an appropriate sanction in this matter.

Panel decision

6. Having regard to the Reasons for Findings, the matters mentioned in paragraph 5 above, and the general interests of local government in Western Australia, the Panel's decision on how the present breaches are dealt with under section 5.110(6) is that pursuant to subsection (c) of that section, it orders two of the sanctions described in paragraph (b) of that section, as set out in the attached Minute of Order.

.....
Brad Jolly (Presiding Member)

.....
Carol Adams (Member)

.....
John Lyon (Member)

NOTICE TO THE PARTIES TO THE COMPLAINT/S

RIGHT TO HAVE PANEL DECISION REVIEWED BY THE STATE ADMINISTRATIVE TRIBUNAL

The Local Government Standards Panel (“the Panel”) hereby gives notice that:

- (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 (“SAT”) for a review of the Panel’s decision in this matter. In this context “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 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 under the *State Administrative Tribunal Act 2004* (“SAT Act”) section 20(1).
- (3) The Panel’s *Reasons for Finding* and these *Reasons for Decision* constitute the Panel’s notice (i.e. the decision-maker’s notice) given under the SAT Act section 20(1).