

Hi Les

Please see below, with the amended date.

We confirm that we are happy for you to produce this document at the Council meeting tomorrow.

Kind regards

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**Annabelle Ritchie**  
Lawyer



**From:** Annabelle Ritchie  
**Sent:** Tuesday 17 March 2020 09:42 AM  
**To:** 'Les Larke'  
**Cc:** Peter Bartlett, Joshua Kaye  
**Subject:** Advice re media policies

Dear Les,

Thank you for your instructions to review the Bass Coast Shire Council's (**BCSC**) Media Engagement and Social Media Policies.

We understand that you are a Councillor with BCSC, and that you are seeking advice as to whether the above policies might infringe upon human rights. Specifically, you have asked us to advise on whether the policies unreasonably restrict Councillors' right to freedom of speech. You have instructed that these policies are to be tabled, debated and voted on at the BCSC's next ordinary meeting this **Wednesday 18 March 2020**.

#### Summary of advice

In our view, the terms of the policies are generally uncontentious. While it may appear that the Social Media Policy also attempts to unreasonably restrict Councillors' personal use of social media platforms, by restricting not only public posting, but also private messaging, such as Facebook Messenger, Whatsapp and other online messaging services, a review of the policies of similar councils indicates that such policies do typically define social media in broad terms, encompassing instant messaging. The Victorian Charter of Human Rights and Responsibilities is not strictly binding, as its rights may be limited by 'reasonable' measures. In our view, the policies are likely to be seen as 'reasonable' in this sense.

However, we believe that you have a basis for arguing that certain aspects of the policies are problematic. Namely:

- The **Media Engagement Policy** purports to prevent councillors from 'contradicting' official Council decisions or from 'causing a detriment or undermining' the Council
- The **Social Media Policy** seeks to prevent councillors from 'disparag[ing] Council activities' or 'damag[ing] the reputation of the Council'

A potential issue is that these terms are inherently subjective, and it is unclear what kinds of statements, for instance, might be seen to 'undermine' the Council. For instance, could these clauses prevent a

Councillor from explaining why they voted against a Council motion? Accordingly, we suggest that the terms within these potentially problematic clauses be clearly, and narrowly defined, in order to prevent any unreasonable restrictions on freedom of expression.

Additionally, these policies ought not restrict Councillors' in their use of social media where it is made clear that they are posting in a personal, rather than professional capacity. In our view, the BCSC policies could be improved by reiterating that Councillors have the right to share their personal opinions via social media. While the Media Engagement Policy contains a statement to this effect, the Social Media Policy is less explicit on this front.

#### Other Councils' policies

We have reviewed these policies against those of other Victorian councils, and have prepared the below table as a point of reference:

Council	Clause	
Whitehorse City Council	<ul style="list-style-type: none"> <li>Defines social media widely to include 'instant messaging' (r 4).</li> <li>Requires councillors to 'represent Council adopted strategies and positions' (r 5.1) but <b>does allow employees to voice personal opinions if they are labelled as such</b> (r 5.5)</li> </ul>	<a href="https://www.whitehorse.vic.gov.au/sites/whitehorse.vic.gov.au/files/assets/documents/Social-Media-Policy-Employees-and-Volunteers.pdf">https://www.whitehorse.vic.gov.au/sites/whitehorse.vic.gov.au/files/assets/documents/Social-Media-Policy-Employees-and-Volunteers.pdf</a>
Surf Coast Shire Council	<ul style="list-style-type: none"> <li>Defines social media widely to include 'instant messaging' (Appendix).</li> <li>Requires councillors to 'respect' Council decisions, but <b>allows them to express their own viewpoint if it does not undermine the Council</b> (r 3.3.2)</li> </ul>	<a href="https://www.surfcoast.vic.gov.au/files/assets/public/01-about-us/council/policies-and-procedures/policies/d19-44708-final-version-councillor-media-policy-scs-041-for-council-meeting-23-april-2019.pdf">https://www.surfcoast.vic.gov.au/files/assets/public/01-about-us/council/policies-and-procedures/policies/d19-44708-final-version-councillor-media-policy-scs-041-for-council-meeting-23-april-2019.pdf</a>
Warrnambool City Council	<ul style="list-style-type: none"> <li>Defines social media widely (r 1.3)</li> <li>Requires councillors to refrain from 'unreasonable criticism' of or undermining public confidence in the Council, but <b>allows them to express their personal opinion</b> (r 2.3.7)</li> </ul>	<a href="https://www.warrnambool.vic.gov.au/sites/warrnambool.vic.gov.au/files/documents/council/policies/Final%20News%20media%20and%20social%20media%20policy%202017.pdf">https://www.warrnambool.vic.gov.au/sites/warrnambool.vic.gov.au/files/documents/council/policies/Final%20News%20media%20and%20social%20media%20policy%202017.pdf</a>
Corangamite Shire Council	<ul style="list-style-type: none"> <li>Defines social media widely to include 'instant messaging' (pg 2).</li> <li>Prevents councillors from publishing material that would 'bring the Council into disrepute' but <b>allows for personal comment and opinion</b> (pg 4)</li> </ul>	<a href="https://www.corangamite.vic.gov.au/files/assets/public/hprim/policy-council-policy-adopted-policies-governance/community-relations/policy-council-community-relations-social-media-adopted-26-april-2017.pdf">https://www.corangamite.vic.gov.au/files/assets/public/hprim/policy-council-policy-adopted-policies-governance/community-relations/policy-council-community-relations-social-media-adopted-26-april-2017.pdf</a>

#### Human Rights

The Victorian Charter of Human Rights and Responsibilities contains the following rights:

- S.14 – Freedom of thought, conscience, religion and belief**  
 (1) Every person has the **right to freedom of thought**, conscience, religion and belief, including—

- (a) the freedom to have or to adopt a religion or belief of his or her choice; and
  - (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.
- (2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

- **S.15 – Freedom of expression**

- (1) Every person has the **right to hold an opinion** without interference.
- (2) Every person has the **right to freedom of expression** which includes the freedom to seek, receive and **impart information and ideas of all kinds**, whether within or outside Victoria and whether—
  - (a) orally; or
  - (b) **in writing**; or
  - (c) in print; or
  - (d) by way of art; or
  - (e) **in another medium chosen by him or her**.
- (3) Special duties and responsibilities are attached to the right of freedom of expression and the **right may be subject to lawful restrictions reasonably necessary—**
  - (a) to **respect the rights and reputation of other persons**; or
  - (b) for the protection of national security, public order, public health or public morality.

As you know, the Charter is not binding. Second, per s 15(3)(a) and s 7, the rights within it may be limited by reasonable measures. The BCSC's draft policies appear to be reasonable.

#### Case law

Furthermore, a number of recent cases (most notably Comcare v Banerji [2019] HCA 23) have held that policies preventing employees from criticising their employers on social media are valid.

In Banerji, the High Court affirmed that employees do not have a personal right to free speech and that restrictions on social media usage will rarely infringe upon the implied freedom of political communication.

For further information, see:

- <https://www.mondaq.com/australia/Employment-and-HR/846198/High-Court-rules-on-social-media-and-free-speech>
- <https://rlc.org.au/article/freedom-speech-right>

Please let us know if you would like to discuss any aspect of the above advice.

Kind regards

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**Annabelle Ritchie**  
Lawyer

