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## Local Government Standards Panel

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Complaint Number	SP 2021-030
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Councillor Ian Johnson</b>
<b>Respondent</b>	<b>Councillor Cate McCullough</b>
Local Government	<b>City of Swan</b>
Regulation	Regulation 7 of the <i>Local Government (Rules of Conduct)</i> <i>Regulations 2007</i>
Panel Members	Mrs Emma Power (Presiding Member) Cr Peter Rogers (Member) Mr Gordon MacMile (Member)
Heard	8 April 2021 Determined on the documents
Finding	One (1) breach of Regulation 7(1)(b)

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### FINDING AND REASONS FOR FINDING

Delivered 26 July 2021

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#### DEFAMATION CAUTION

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## Summary of the Panel's decision

1. On 8 April 2021, the Panel found that Councillor Cate McCullough, a councillor of the City of Swan (**"the City"**) did commit a minor breach pursuant to the *Local Government Act 1995 (WA)* (**"the Act"**) regulation 7 of the *Local Government (Rules of Conduct) Regulations 2007* (**"the Regulations"**) when she asked certain questions of the Complainant which implied he was racist as set out in paragraph 15 below.

## The Panel's Role

2. Under section 5.110(2) of the Act the Panel is required to consider a minor breach complaint and make a finding as to whether the alleged minor breach occurred.
3. The Act provides for the circumstances in which a council member commits a minor breach.<sup>1</sup>
4. The Panel may make a finding that a councillor has committed a minor breach of the Act and Regulations based on evidence from which it may be concluded that it is more likely that the alleged breach occurred than it did not occur.<sup>2</sup>
5. In order to find a breach, it must be established that each element of the relevant Regulation is more likely than not to have been breached or met.
6. In considering whether a minor breach is established the Panel must consider:
  - a. all evidence provided and, where there are conflicting circumstances, inferences or evidence, must come to a reasonable conclusion that any circumstance, inference or evidence relied upon is more likely than not to have occurred or be accurate<sup>3</sup>; and
  - b. the seriousness of any allegation made, as well as the gravity of the consequences flowing from a particular finding<sup>4</sup>.
7. The Panel does not possess investigative or supervisory powers.<sup>5</sup> The Panel makes decisions about complaints regarding minor breaches solely upon the evidence presented to it and, where appropriate, materials published by the relevant local authority's website.
8. It is the responsibility of both complainants and respondents to provide the Panel with all information they wish the Panel to consider when making its determination.
9. The Panel also must have regard to the general interests of local government in Western Australia<sup>6</sup>.
10. The Panel is obliged to give notice of the reasons for any finding it makes under section 5.110(2) of the Act.

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

<sup>2</sup> Section 5.106 of the Act

<sup>3</sup> *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1

<sup>4</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336

<sup>5</sup> *Re and Local Government Standards Panel* [2015] WASC 51 (at paragraph 24)

<sup>6</sup> Section 8(6) of Schedule 5.1 of the Act



### Jurisdiction and Procedural Fairness

11. On 4 March 2021 the Panel received a complaint from Mr Jeremy Edwards acting as complaints officer of the City (**"the Complaints Officer"**). The same enclosed a Complaint of Minor Breach Form dated 1 March 2021.
12. In the complaint form, the Complainant alleges that, at the Ordinary Council Meeting of 20 January 2021 (**"the OCM"**) Cr McCullough breached regulation 7 of the Regulations when she when she asked certain questions of the Complainant which implied he was racist as set out in paragraph 15 below (**"the Complaint"**).
13. The Panel convened on 8 April 2021 to consider the Complaint.
14. The Panel:
  - a. accepted the advice of the Department that, based on information published on the Western Australian Electoral Commission's website, Cr McCullough was:
    - i. elected to the Council of the City in October 2019 for a term expiring in October 2023;
    - ii. a Councillor at the time of the alleged breach; and
    - iii. a Councillor when the Panel met on 8 April 2021;
  - b. was satisfied the Complaint was made within six months after the alleged breach occurred<sup>7</sup>;
  - c. was satisfied that the City's Complaints Officer had dealt with the Complaint in accordance with the administrative requirements in the Act for dealing with complaints of a minor breach<sup>8</sup>;
  - d. was satisfied the Department had provided procedural fairness to Cr McCullough; and
  - e. found it had jurisdiction to consider the Complaint.

### The Specifics of the Complaint

15. The Complainant provided the following arguments and comments in respect to the Complaint:
  - a. At the Ordinary Council meeting of 20 January 2021 in agenda section 10.3 "Councillor Questions" Cr McCullough asked a number of leading questions directed at the Complainant that implied he was racist.
  - b. This is a detriment under regulation 7(1)b.
  - c. The relevant content of the Minutes is as follows:  
*" Questions for Cr Johnson:*

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<sup>7</sup> Section 5.107(4) and 5.109(2) of the Act

<sup>8</sup> Section 5.107 and 5.109 of the Act



**Q1 Is it your view that as a Councillor of the City of Swan that a Councillor owes it to each and every resident and ratepayer of the City of Swan to treat people fairly and be polite to them?**

*A1 Cr Johnson advised he was polite to everybody.*

**Q2 Is it your view that each and every resident ratepayer has a right to be treated respectfully, fairly and in a professional manner when dealing with Councillors or City staff regardless of skin colour, ethnicity or background?**

*Cr Johnson stated that he considered a defamatory slur was being made against him and asked for a retraction.*

**Q3 Have you seen the email that a ratepayer emailed to all Councillors on 17 January, regarding his dismay at how he was treated by you during a short conversation near Noonan Park?**

*In the email the ratepayer states that you had attended on a woman who had not attended last week's Agenda Forum to make a deputation. When the ratepayer asked you a question as to why she had not attended, you responded to him "Because of people like you".*

*Would you care to explain why you would say that to a resident of our City and upon what proof was your comment based?*

*Were you implying this resident had been threatening other residents?*

*Were you implying this resident's ethnicity had something to do with the issue?*

*Cr Johnson stated the questions were defamatory and inappropriate.*

*Cr Johnson advised that he considered the Mayor had a conflict of interest in determining the appropriateness of the questions, as Cr McCullough was his wife.*

*The Mayor advised that there was no conflict*

*\*A Cr Johnson advised that on Sunday, after reading a letter from an affected resident, he went to door knock in the community to find out what people thought. He spent some time sitting in the car.*

*Nobody was playing basketball. He looked around the park, walked around it and then decided to doorknock. He started with the houses nearby. One resident opened the door and invited him inside. The resident conveyed to him an apprehension of significant concern. They did not wish to participate in any public forum requesting the removal of the basketball court. They are severely impacted by the noise and were in some considerable fear. The apprehension was that it was somebody known. He then left as he thought he had enough information and proceeded to his car. At that point Mr D'Costa approached him and requested to speak to him. Cr Johnson advised that he was leaving (to view other basketball courts nearby) and that*



*he had already heard from Mr D'Costa at the Agenda Forum. Mr D'Costa was extremely insistent and demanded Cr Johnson speak to him. Cr Johnson apprehended a significant fear of what was going to happen next. He did not recall the exact words used, possibly "Yes, people are afraid". He was not making any racial slur toward anybody.*

*Cr Johnson reiterated he considered the questions were defamatory and again requested they be withdrawn and an apology made."*

- d. Cr McCullough's questions are a defamatory detriment and a minor breach under section 7(1)(b) of the Regulations.
- e. Cr McCullough was not present when the Complainant visited Noonan Park on Sunday 17 January. She does not have first hand knowledge of the events, and is instead relying on an email sent to all Councillors and the CEO (**"the Email"**).
- f. Cr McCullough was using her office as a Councillor during the meeting. She certainly caused a detriment by asking questions of a defamatory nature.
- g. Asking one individual Councillor Q1 is an innuendo that incorrectly suggests that the Complainant is not treating people equally regardless of skin colour, ethnicity or background.
- h. The question is not a proper use of the office of Councillor because it is defamatory.
- i. It is defamatory because it is a false statement, framed as an innuendo, calculated to damage the Complainant's reputation by incorrectly implying that he is a racist. Cr McCullough's questions were published via the City's live streaming to a wide audience.
- j. This also damages the Midland Guildford ward and the City of Swan as a whole. It is also damaging to the Complainant in his workplace.
- k. It was done deliberately with intent to cause a detriment.
- l. Cr McCullough had previously read the Email giving one side of the story. She had not bothered to wait for the debate of the subject, nor to the best of the Complainant's knowledge has she visited the affected residents whose lives are being made unbearable by the noise from the basketball court. She was not present at the events on Sunday 17 Jan.
- m. The Complainant doesn't agree that the Email is a good representation of events.
- n. Councillor McCullough could have chosen to first ask questions to get the facts, rather than jump straight into innuendo. By failing to ask for the facts first, she created a detriment.
- o. The facts that Cr McCullough would have learned were that there were people living near the basketball court who were being intimidated by some of the people playing basketball. The intimidation of vulnerable members of the community amounted to bullying. This is not something that can be discussed in an open Council meeting without making matters worse. When this was debated, the Complainant asked to give his speech behind closed

doors. Cr McCullough voted against this - she's not interested in getting the facts about the impact on residents who were afraid to attend the meeting. Her objective is damaging the reputation of Councillors and Council. This is not a proper use of the office of Councillor.

- p. Cr McCullough has previously had to apologise for a breach of Regulation 7(1)(b) so this appears to be a repeating problem.
16. The Complainant also attached:
- a. Extract from the Minutes from the OCM; and
  - b. A copy of the Email dated 17 January 2021 from Mr Keith D'Costa to all councillors.
17. The Panel was also supplied with a recording of the relevant OCM.

### Respondent's Response

18. By an email dated 31 March 2021, Cr McCullough provided a response to the Complaint.
19. Cr McCullough denies that she has committed any minor breach.
20. Cr McCullough makes the following comments in respect to the Complaint:
- a. Cr McCullough does not accept the information detailed in the complaint.
  - b. Cr McCullough was asking on behalf of an aggrieved ratepayer for Cr Johnson to explain himself in regard to the comments that he made to him on 17 January 2021.
  - c. The questions to Cr Johnson did not imply anything, nor were they defamatory or inappropriate. Cr Johnson was simply asked to comment and explain his actions on that day.
  - d. At no point in Cr McCullough's questions was there an implication that Cr Johnson was a racist.
  - e. Cr McCullough finds it interesting that in the meeting recording Cr Johnson states:  
  

*"...no Cr McCullough I was not making any racial slur to anybody and you will need to take that back as that was defamatory... I think you'll find that my skin is darker than Mr D'Costa's".*
  - f. Cr Johnson is making a racial slur and Cr McCullough is not entirely sure why he made the comment about skin colour either.
  - g. Cr Johnson implied in his response that the Mayor had a conflict of interest as Cr McCullough is the Mayor's wife. Cr Johnson has on numerous occasions during live streamed Council Meetings, referred to me as 'the Mayor's wife'. This in itself is a derogatory comment. Cr McCullough is an Elected Member of this Council in her own right and is insulted that Cr Johnson cannot separate the two.



- h. Cr Johnson has stated that Cr McCullough is only responding according to one person's viewpoint. Cr McCullough was very aware of the Item before Council and had a thorough knowledge of the report and the facts.
- i. Irrespective Cr McCullough's questions had nothing to do with the item on the agenda but everything to do with how we respond fairly to people.
- j. Cr McCullough finds that Cr Johnson's recollection of events in his statement inconsistent.
- k. Cr McCullough attached the Email from Mr D'Costa that was sent to Councillors on the afternoon of the incident. Cr McCullough also received a phone call from Mr D'Costa shortly after his exchange with Cr Johnson and he was in a distressed state.
- l. Mr D'Costa raised his concerns in an email to all Councillors. He did not feel comfortable to ask questions of Cr Johnson in a public forum. Cr McCullough acted on behalf of this constituent by asking Cr Johnson to clarify his intent and perspective, giving him an opportunity to explain.
- m. Mr D'Costa believed that he had been treated unfairly and without respect. Cr Johnson's words and behaviour at the basketball court had upset him greatly that day.
- n. Mr D'Costa was upset that Cr Johnson brushed him off and would not give him any time.
- o. He was particularly upset at Cr Johnson's comment... *"because of people like me"* as set out in the Email.
- p. The way that Cr Johnson treated Mr D'Costa, a hardworking leader in the local community who has committed so much time to mentoring and advocating for young people, was unfair and inappropriate.
- q. Cr McCullough believes that Cr Johnson's actions were in fact detrimental to Council's reputation.
- r. Cr McCullough's questions were not defamatory and did not damage The City's, or Cr Johnson's reputation. Cr McCullough believes that Cr Johnson should give greater thought to treating ratepayers equally and respectfully.
- s. Cr Johnson has stated in his complaint that *'questions about an agenda item are asked just before the debate'*. Cr McCullough's questions had nothing to do with the agenda item and were part of Section 10.2 Members' Questions where she was raising the concerns of a resident.
- t. Cr Johnson's statement in regard to the Mayor implies some kind of collusion.
- u. Cr Johnson states: *"I was doing my job as a Councillor"*. So was Cr McCullough. As a Councillor who had been personally contacted by a distressed member of our community, Cr McCullough was simply asking for answers to questions that had been raised by a community member.
- v. Cr McCullough do not believe that her questions created a detriment of any kind to the City or any other person.





- w. If a detriment was caused it was to Mr D'Costa, a hardworking and respected member and leader in the community.

### **Regulation 7**

21. Regulation 7 prohibits councillors engaging in conduct to either gain an advantage for themselves (or another party) or cause detriment to another party and specifically provides as follows:

***“7. Securing personal advantage or disadvantaging others***

- (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.*
22. The Complainant has not made any allegation that there was any intention to provide an advantage to any particular party, so the Panel has only considered regulation 7(1)(b) of the Regulations in this decision.

### **Panel's Consideration**

#### **Regulation 7(1)(b)**

23. To make a finding of a minor breach of regulation 7(1)(b) of the Regulations the Panel must be satisfied to the required standard that:
- a. Cr McCullough was an elected member at the time of the alleged breach and the time of the determination;
  - b. Cr McCullough made use of her office as Council member of the City;
  - c. when viewed objectively, such use was an improper use of Cr McCullough's office in that it:
    - i. involved a breach of the standards of conduct that would be expected of a person in the position of councillor by reasonable persons; and
    - ii. was so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty; and
  - d. Cr McCullough engaged in the conduct in the belief that detriment would be suffered by another person.

#### **Cr McCullough was an Elected Member at the relevant times**

24. Cr McCullough was an elected member at the time of the alleged breach and at the date the Panel considered the Complaint.
25. This element is met.





Cr McCullough made use of her office as Council Member of the City

26. In this case Cr McCullough was:

- a. attending an Ordinary Council Meeting of the City in her capacity as a councillor;
- b. asking questions in the portion of the OCM reserved for “*Members’ Questions*”; and
- c. was speaking in respect to a matter that had been brought to her attention in her capacity as a councillor.

27. Given the above the Panel finds to the required standard that Cr McCullough acted in her capacity as an elected member and therefore made use of her office as a council member of the City.

28. This element is met.

Cr McCullough’s use was improper

29. Deciding if conduct is an improper use of office requires something more than simply a demonstration of poor judgment or a lack of wisdom<sup>9</sup>. It requires an abuse of power or the use of the councillor’s position in a manner that such councillor knew (or ought to have known) was not authorised.

30. Impropriety does not depend on a councillor’s consciousness of impropriety. It is to be judged objectively and does not involve an element of intent<sup>10</sup>.

31. Any decision as to what is “improper” cannot be made in isolation but must be considered in the relevant context including the specifics of the relevant event as well as councillor’s formal role and responsibilities.

32. At the time the conduct occurred the City had a “*Code of Conduct for Councillors and Committee Members*” published September 2015 (“**the Code**”) which sets out certain expectations in respect to the conduct of Councillors. The same is to be read in conjunction with the Regulations. The relevant sections of the Code are as below:

a. High Ethical Standard

*“Councillors and Committee Members of the City of Swan should aspire to high ethical standards including those in Regulation 3(1) of the Local Government (Rules of Conduct) Regulations 2007. The standards in Regulation 3(1) prescribe the following conduct:-*

*....*

*7. Treat others with respect and fairness; and*

*.....”*

b. Personal Behaviour

*“(a) Councillors and Committee Members will:*

- (i) act, and be seen to act, properly and in accordance with the requirements of the law and the terms of this Code;.....*

*.....*

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<sup>9</sup> Complaint of Minor Breach No. SP 3 of 2013

<sup>10</sup> *Chew v R* [1992] HCA 18

- (iii) *act in good faith (i.e. honestly, for the proper purpose, and without exceeding their powers) in the interests of the City and the community as a whole;*
  - (iv) *make no allegations which are improper or derogatory (unless true and in the public interest) and refrain from any form of conduct, in the performance of their official duties, which may cause any reasonable person unwarranted offence or embarrassment....."*
- 33. A breach of the Code may indicate that the conduct of a councillor is "improper" as contemplated by the Regulations.
- 34. In addition the following provisions of the *City of Swan, Meeting Procedures Local Law 2019* ("**the Meeting Procedures**") are relevant:

**"2.8 Members' questions**

- (1) *A member may raise questions at a meeting relating to the business of the Council with an employee.*
- (2) *Whenever possible, questions are to be submitted in writing to the CEO at least 10 business days prior to the meeting.*
- (3) *The question and the answer, so far as is practicable, are to be included in the agenda of the meeting, or otherwise tabled at that meeting.*
- (4) *Where possible the employee shall endeavour to answer the question at the meeting, however, questions may be taken on notice and an answer placed in the agenda for the following meeting.*
- (5) *Every question and answer is to be submitted as briefly and concisely as possible and no discussion is to be allowed without the consent of the Presiding Member."*

**"4.11 Adverse reflection**

*Unless the meeting resolves, without debate, that the matter before the meeting cannot otherwise be adequately considered-*

- (1) *A member must not reflect adversely on a decision of the Council or a committee except on a motion that the decision be revoked or changed.*
  - (2) *A member must not, in a meeting open to the public-*
    - (a) *reflect adversely on the character or actions of another member or employee; or*
    - (b) *impute any improper motive to a member or employee."*
- 35. Insofar as the same deals with conduct, a breach of a provision of the Meeting Procedures may also indicate that a councillor has acted improperly.
  - 36. The Complainant asserts that Cr McCullough acted improperly as the questions she asked during Member's Question Time ("**the Questions**") falsely implied that he was racist and were defamatory.
  - 37. Cr McCullough asserts that she did not act improperly as she was:



- a. not making any implication, simply asking the Complainant to comment and explain his actions on that day; and
  - b. raising concerns of a constituent who felt he had been he had been treated unfairly and without respect.
38. The Panel acknowledges that the subject matter of the Questions arose from the concerns raised by Mr D'Costa in his Email.
39. The Panel does not dispute that where there is a complaint or issue as to the conduct of an elected member raised by a member of the public, that it is proper for the same to be raised with the City. However, there is an appropriate manner in which to do this.
40. The Panel first refers to section 2.8 of the Meeting Procedures. It is clear from subclause 2.8(a) that the intended subject matter of Members' Questions is "*the business of the Council*" and to be asked of an "*employee*".
41. Members' Questions is not intended to be a forum to:
  - a. ask other elected members questions; or
  - b. ask questions which do not relate to the business being undertaken by Council; or
  - c. bring up grievances or complaints (either personal or on behalf of a rate payer).
42. Further, although the Panel appreciates that the Mr D'Costa's email was received on 17 January 2021 only a few days prior to the OCM on 20 January 2021, the Questions were raised without any prior notice.
43. Section 2.8(2) clearly states that "*whenever possible, questions are to be submitted in writing to the CEO at least 10 business days prior to the meeting*". Although 10 days' notice was not possible before the OCM, Cr McCullough would have been aware that the Questions would likely be controversial and confrontational, and that the nature of the allegation was not so serious that the same could not have been delayed to allow for:
  - a. the matter to be investigated by the City; or
  - b. Cr Johnson to be asked his version of events.
44. The recording of the OCM indicates that Cr McCullough was satisfied to leave those questions "on notice" during the OCM. This indicates she did not consider Cr Johnson's answers to be urgent.
45. As such, the Panel finds that it was improper for Cr McCullough to bring up such subject matter when:
  - a. she was aware the same was not related to any item on the Agenda for discussion and was not "business of the Council";
  - b. she knew, or should have known, that it was inappropriate subject matter for Members' Questions; and
  - c. she could have delayed the Questions to allow the City to commence a complaints process or allow Cr Johnson to properly contemplate his answers.

46. The argument that Cr McCullough was not implying anything, but only asking the Complainant to explain himself is not compelling. The particular words used by Cr McCullough are as follows:
- “Q2 Is it your view that each and every resident ratepayer has a right to be treated respectfully, fairly and in a professional manner when dealing with Councillors or City staff regardless of skin colour, ethnicity or background?” (underline added)*
47. This is clearly a leading question with an insulting undertone. The fact that it is couched as a question does not limit the comment’s ability to be seen as an implied criticism.
48. To ask the question which included the above underlined portion was *“to involve or indicate by inference, association, or necessary consequence rather than by direct statement”*<sup>11</sup>.
49. If Cr McCullough did not wish to make an implication that the Complainant had treated a ratepayer disrespectfully, unfairly or unprofessionally due to that ratepayer’s skin colour, ethnicity or background then those particular words would not have reasonably been included in the question.
50. Further, the questions then following also indicate Cr McCullough’s desire to link Cr Johnson with improper behaviour for similar reasons. An extract of the questions are as follows:
- “ When the ratepayer asked you a question as to why she had not attended, you responded to him “Because of people like you”.  
Would you care to explain why you would say that to a resident of our City and upon what proof was your comment based?  
Were you implying this resident had been threatening other residents?  
Were you implying this resident’s ethnicity had something to do with the issue?”*
51. Cr Johnson is accused of making the statement *“because of people like you”* and Cr McCullough again uses leading questions including inflammatory language to imply that Cr Johnson’s comment did imply that Mr D’Costa had threatened others or his actions were due to ethnicity.
52. The Questions were also asked against the background where each other councillor had recently received the Email and would be aware of what Mr D’Costa had asserted. As such, it was certainly clear to those councillors that Cr McCullough was not asking Cr Johnson what occurred, but implying that he had acted improperly in the situation.
53. In asking the Questions Cr McCullough also makes no assertion nor gives any indication that she was approached by Mr D’Costa to act on his behalf. Clearly Mr D’Costa had no issue with bringing this matter to the City’s attention as he proactively emailed all councillors and the CEO.

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<sup>11</sup> Definition “Imply.” Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/imply>. Accessed 9 May. 2021.



54. Further, the Email contained the following statement:
- “I trust this communication will be kept “in confidence” to all the people in this email and not forwarded to anyone outside of the City of Swan.”*
55. If Cr McCullough had genuinely wished for the matter to be investigated and addressed, then the City has a complaints procedure to be undertaken. It is not correct procedure, nor considered fair or respectful, to publicly announce an *alleged* racially motivated comment in public at a Council meeting.
56. The Panel is of the view that, instead, Cr McCullough improperly raised the matter to gain political mileage and to take advantage of the adage that *“mud sticks”*.
57. In addition, the Panel considers that Cr McCullough has breached provision 4.11(2)(a) of the Meeting Procedures as her comments reflected adversely on the character and actions of Cr Johnson.
58. 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<sup>12</sup>.
59. In this case, the Panel finds that the implications in Cr McCullough’s Questions clearly implied that Cr Johnson had acted on the basis of the skin colour, ethnicity or background of Mr D’Costa and that such implication had the intended consequence of those listening to think less of Cr Johnson.
60. Due to the above, the Panel finds to the required standard that the manner in which Cr McCullough approached the matter was:
- a. in breach of the Code as:
    - i. her conduct did not treat Cr Johnson with respect and fairness by raising the complaint matter before the same had been investigated;
    - ii. the Questions made allegations that were derogatory towards Cr McCullough and were likely to cause him offence or embarrassment. As these comments were made prior to any complaint process being initiated, Cr McCullough could not have reasonably known whether the allegations were, in fact, true or the offence or embarrassment was unwarranted; and
    - iii. the Questions were not asked in good faith as Cr McCullough should have been aware that the same contained inappropriate in subject matter for Members’ Questions in breach of section 2.8 of the Meeting Procedures; and
  - b. in breach of provision 4.11(2)(a) of the Meeting Procedures as the Questions reflected adversely on the character and actions of the Complainant.
61. The above indicate that the conduct by Cr McCullough was improper.
62. The Panel feels it necessary to note that they are not condoning any conduct by Cr Johnson. The conduct may or may not have occurred as asserted by Mr D’Costa

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<sup>12</sup> Local Government Standards Panel SP 30 of 2008

and Cr Johnson may well have unnecessarily offended this ratepayer due to a careless choice of language. However, irrespective of this, it was simply not appropriate for Cr McCullough to:

- a. raise the matter during Members' Questions; and
  - b. use language which clearly implied Cr Johnson had acted improperly and in a racially motivated manner before any complaint or investigation process had occurred.
63. For the reasons given above, the Panel finds that it is more likely than not that the Questions asked by Cr McCullough at the OCM during Members' Questions were improper as:
- a. the conduct was in breach of the Code and the Meeting Procedures; and
  - b. the conduct was of such a nature that a reasonable individual would consider the same to be inappropriate or not in keeping with the conduct that would be expected of a councillor; and
  - c. the conduct is deserving of a penalty.
64. This element is met.

Cr McCullough intended to cause a disadvantage

65. "Detriment" means loss, damage or injury. It is construed widely and includes financial and non-financial loss and adverse treatment, such as humiliation, denigration, intimidation, harassment, discrimination and disadvantage.
66. It is not necessary to find whether any detriment was actually suffered<sup>13</sup>, but an intent to cause such detriment must be established.
67. Cr McCullough asserts that:
- a. the Questions were not were not defamatory and did not damage the City's, or Cr Johnson's reputation; and
  - b. Cr Johnson's actions were in fact detrimental to Council's reputation.
68. The Complainant argues that:
- a. Cr McCullough's actions were calculated to damage the Complainant's reputation by incorrectly implying that he is a racist; and
  - b. the Questions were deliberately published via the City's live streaming to a wide audience.
69. The Panel reiterates that it is not necessary that any actual damage occurs, it is the intention of the party making the comment, or undertaking the conduct, that the Panel must consider.
70. The facts that:

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<sup>13</sup> *Yates and Local Government Standards Panel* [2012] WASAT 59 at [72]



- a. Cr McCullough knew, or should have known that the Questions were inappropriate to raise during Members' Questions;
  - b. Cr McCullough expressly acknowledges that that the Questions did not relate to any matter to be discussed at the OCM that evening;
  - c. Cr McCullough knew no investigation had taken place regarding Cr Johnson's alleged actions;
  - d. Cr McCullough did not give Cr Johnson an opportunity to clarify his actions prior to raising the Questions in a public forum, despite the non-urgent nature of the incident; and
  - e. in the Email, Mr D'Costa had requested the same be considered confidential, all indicate that the predominant purpose of the Questions was to take Cr Johnson by surprise and embarrass him by making derogatory implications as to his character.
71. In the event that Cr McCullough truly wished to advocate for the relevant ratepayer, the appropriate course of action was to push for the commencement of a complaint process by the City.
72. Despite the fact that councillors engaging in this type of behaviour has the potential to damage the reputation of the local government, the Panel does not consider that Cr McCullough had any intention to cause a detriment to the City. Rather, Cr McCullough likely saw her actions as protecting the City from being tainted by the impression that elected members may be racist or biased.
73. The Panel reiterates that it is vitally important that Councillors are held to account for conduct that is not in keeping with their role. However, it is not appropriate for another councillor to ignore due process and announce a derogatory accusation of improper behaviour in a public forum on the basis of hearsay evidence from one party.
74. The Panel finds to the required standard that in asking the Questions during Members' Questions during the OCM Cr McCullough had an intention to disparage and embarrass, and therefore cause a detriment to Councillor Johnson.
75. This element is met.

### Conclusion

76. Given the above, the elements required to find a breach of regulation 7(1)(b) of the Regulations have been met.





### **Panel's Findings**

77. Cr McCullough did commit a breach of Regulation 7(1)(b) of the Regulations and therefore did commit a minor breach.

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

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Emma Power (Presiding Member)

A handwritten signature in black ink, appearing to read 'P Rogers'.

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Peter Rogers (Member)

A handwritten signature in blue ink, appearing to read 'G MacMile'.

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Gordon MacMile (Deputy Member)



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## Local Government Standards Panel

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Complaint Number	SP 2021-030
Legislation	<i>Local Government Act 1995 (WA)</i>
<b>Complainant</b>	<b>Councillor Ian Johnson</b>
<b>Respondent</b>	<b>Councillor Cate McCullough</b>
Local Government	<b>City of Swan</b>
Regulation	Regulation 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007 (WA)</i>
Panel Members for Penalty Consideration	Mr Tim Fraser (Presiding Member) Mrs Emma Power (Member) Cr Peter Rogers (Member)
Heard	8 April 2021 Determined on the documents
Penalty Considered	9 September 2021
Outcome	Public Apology

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### DECISION AND REASONS FOR DECISION

Delivered 8 November 2021

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#### DEFAMATION CAUTION

The general law of defamation, as modified by the *Defamation Act 2005 (WA)*, applies to the further release or publication of all or part of this document or its contents. Accordingly, appropriate caution should be exercised when considering the further dissemination and the method of retention of this document and its contents

## Introduction

1. At its meeting on 8 April 2021, the Panel found that Councillor Cate McCullough, a councillor for the City of Swan (**"the City"**), committed one minor breach under the *Local Government Act 1995 (WA)* (**"the Act"**) and regulation 7(1)(b) of *Local Government (Rules of Conduct) Regulations 2007* (**"the Regulations"**) when she asked certain questions of the Complainant which implied he was racist (**"the Minor Breach"**).

## Jurisdiction and Law

2. The Panel convened on 9 September 2021 to consider how it should deal with the Minor Breach.
3. The Panel accepted the advice of the Department of Local Government, Sport and Cultural Industries (**"the Department"**) that on this date there was no available information to indicate that Councillor McCullough had ceased to be, or was disqualified from being, a councillor.
4. If the Panel finds that a councillor has committed a minor breach, it must give the councillor an opportunity to make submissions to the Panel about how it should deal with the breach under section 5.110(6).<sup>1</sup>
5. By a letter dated 4 August 2021, Cr McCullough was:
  - a. notified of the Panel's finding of the Minor Breach;
  - b. provided with a copy of the Panel's Finding and Reasons for Finding; and
  - c. offered an opportunity to make submissions as to how the Minor Breach should be dealt with under section 5.110(6) of the *Act*.

## Possible Sanctions

6. Section 5.110(6) of the *Local Government Act 1995 (WA)* (**"the Act"**) provides that the Panel is to deal with a minor breach by:
  - (a) *ordering that no sanction be imposed; or*
  - (b) *ordering that —*
    - (i) *the person against whom the complaint was made be publicly censured as specified in the order;*  
*or*
    - (ii) *the person against whom the complaint was made apologise publicly as specified in the order;*  
*or*
    - (iii) *the person against whom the complaint was made undertake training as specified in the order;*  
*or*

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<sup>1</sup> *Local Government Act 1995 (WA)*, s 5.110(5).

- (iv) *the person against whom the complaint was made pay to the local government specified in the order an amount equal to the amount of remuneration and allowances payable by the local government in relation to the complaint under Schedule 5.1 clause 9;*
- or*
- (c) *ordering 2 or more of the sanctions described in paragraph (b).*

### **Cr McCullough's Submissions**

7. By an email dated 18 August 2021, the Department received a response from Cr McCullough.
8. Cr McCullough provided the following comments and arguments as to penalty:
  - a. Cr McCullough acknowledges that it would have been more appropriate to have supported Mr D'Costa to follow the complaints process.
  - b. Cr McCullough had not realised that she couldn't ask another Councillor questions during members question time and she needs to be aware of that in the future.
  - c. Cr McCullough would be willing to undertake training to enhance her understanding of the procedures and will ensure that she further personally familiarises herself with them.

### **Panel's Consideration**

9. Section 5.110(6) is about penalty. The Panel does not have the power to review any finding of a breach.
10. The Panel may order under section 5.110(6)(a), that no sanction be imposed, not to reverse the Panel's finding of a breach, but to indicate that in all the circumstances the relevant councillor should not be penalised further.
11. Guidance as to the factors which the Panel may consider in determining the appropriate penalty to impose include, but are not limited to, the following:
  - a. the nature and seriousness of the breaches;
  - b. the councillor's motivation for the contravention;
  - c. whether or not the councillor has shown any insight and remorse into his/her conduct;
  - d. whether the councillor has breached the Act knowingly or carelessly;
  - e. the councillor's disciplinary history;
  - f. likelihood or not of the councillor committing further breaches of the Act;
  - g. personal circumstances at the time of conduct, and of imposing the sanction;
  - h. need to protect the public through general deterrence and maintain public confidence in local government; and



- i. any other matters which may be regarded as aggravating conduct or mitigating its seriousness<sup>2</sup>.
12. The Panel appreciates that Cr McCullough is remorseful and acknowledges that Cr McCullough is unlikely to commit a similar breach in the future.
13. However, as the particular remarks were made in a public forum and specifically referred to the character of another elected member the Panel considers that the appropriate sanction is that Cr McCullough make a public apology.
14. Making a public apology is a significant sanction, being a personal admission by the individual of wrongdoing<sup>3</sup>. It is a suitable and appropriate penalty when a councillor's conduct:
  - a. adversely affects particular individuals<sup>4</sup>; and/or
  - b. does not meet the standards other councillors seek to uphold.
15. In the relevant circumstances, the Panel considers that making a public apology is an adequate sanction and that it is not necessary to make an order in accordance with Schedule 5.1 clause 9 of the Act that Cr McCullough recoup to the City the costs of the Department incurred with respect to the Complaint.

### Panel's decision

16. The Panel orders pursuant to section 5.110(6)(b)(ii) of the Act that, in relation to the two Minor Breaches of regulation 4 of the Regulations, Cr McCullough make a public apology in terms of the attached Order.

### Signing

Tim Fraser (Presiding Member)

Emma Power (Member)

Peter Rogers (Member)

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

<sup>3</sup> Treby and Local Government Standards Panel [2010] WASAT 81 (Pritchard J).

<sup>4</sup> Treby and Local Government Standards Panel [2010] WASAT 81 [127] (Pritchard J).



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## ORDER

Delivered 8 November 2021

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### THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Councillor McCullough, a councillor for the City of Swan **publicly apologise**, as specified in paragraph 2 OR failing compliance with paragraph 2 within the specified timeframe, then paragraph 3 shall apply.

#### Public Apology

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

"I advise this meeting that:

- i. A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened the *Local Government (Rules of Conduct) Regulations 2007* when I asked Cr Ian Johnson various questions in respect to his conduct towards a member of the public.
- ii. The Panel found that I breached regulation 7(1)(b) of the said Regulations.
- iii. I accept that I should not have asked the relevant questions in a manner which implied he had acted improperly.
- iv. I now apologise to Cr Ian Johnson, my fellow Councillors and the public."

3. If Cr McCullough fails to, or is unable to, comply with the requirements of paragraph 2 above in the required time frame THEN, within the next **28 days** following the ordinary



council meeting referred to in paragraph 2 above the Chief Executive Officer of the City of Swan shall arrange for the notice of public apology to be published:

- a. on the Facebook Page of the City of Swan in no less than 10 point font size; and
- b. in an appropriate place on the website of the City of Swan in no less than 10 point font size; and
- c. in the next occurring issue of any City of Swan public newsletter (if any) whether in electronic or print copy) in no less than 10 point font size.

#### **PUBLIC APOLOGY BY COUNCILLOR CATE MCCULLOUGH**

A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened the *Local Government (Rules of Conduct) Regulations 2007* when I asked Cr Ian Johnson various questions in respect to his conduct towards a member of the public.

The Panel found that I breached regulation 7(1)(b) of the said Regulations.

I accept that I should not have asked the relevant questions in a manner which implied he had acted improperly.

I now apologise to Cr Ian Johnson, my fellow Councillors and the public.





## NOTICE TO THE PARTIES TO THE COMPLAINT

### RIGHT TO HAVE PANEL DECISION REVIEWED BY THE STATE ADMINISTRATIVE TRIBUNAL

The Local Government Standards Panel (the Panel) advises:

- (1) Under section 5.125 of the *Local Government Act 1995* the person making a complaint and the person complained about each have the right to apply to the State Administrative Tribunal (the SAT) for a review of the Panel's decision in this matter. In this context, the term "decision" means a decision to dismiss the complaint or to make an order.
- (2) By rule 9(a) of the *State Administrative Tribunal Rules 2004*, subject to those rules an application to the SAT under its review jurisdiction must be made within 28 days of the day on which the Panel (as the decision-maker) gives a notice [see the Note below] under the *State Administrative Tribunal Act 2004* (SAT Act), section 20(1).
- (3) The Panel's *Breach Findings and these Findings and Reasons for Finding – Sanctions*, constitute the Panel's notice (i.e. the decision-maker's notice) given under the SAT Act, section 20(1).

**Note:**

- (1) This document may be given to a person in any of the ways provided for by sections 75 and 76 of the *Interpretation Act 1984*. [see s. 9.50 of the *Local Government Act 1995*]
- (2) Subsections 75(1) and (2) of the *Interpretation Act 1984* read:
  - "(1) Where a written law authorises or requires a document to be served by post, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, **service shall be deemed** to be effected by properly addressing and posting (by pre-paid post) the document as a letter to the last known address of the person to be served, and, **unless the contrary is proved, to have been effected at the time when the letter would have been delivered in the ordinary course of post.** [Bold emphases added]
  - (2) Where a written law authorises or requires a document to be served by registered post, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, then, if the document is eligible and acceptable for transmission as certified mail, the service of the document may be effected either by registered post or by certified mail."
- (3) Section 76 of the *Interpretation Act 1984* reads:

"Where a written law authorises or requires a document to be served, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, without directing it to be served in a particular manner, service of that document may be effected on the person to be served —

  - (a) by delivering the document to him personally; or
  - (b) by post in accordance with section 75(1); or
  - (c) by leaving it for him at his usual or last known place of abode, or if he is a principal of a business, at his usual or last known place of business; or
  - (d) in the case of a corporation or of an association of persons (whether incorporated or not), by delivering or leaving the document or posting it as a letter, addressed in each case to the corporation or association, at its principal place of business or principal office in the State."