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## Local Government Standards Panel

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Complaint Number	SP 2020-082
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Councillor Jennifer Catalano</b>
<b>Respondent</b>	<b>Councillor Mel Congerton</b>
<b>Local Government</b>	<b>City of Swan</b>
Regulation	Regulation 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Mr Michael Connolly (Presiding Member) Ms Elanor Rowe (Deputy Member) Ms Deborah Hopper (Deputy Member)
Heard	21 August 2020 Determined on the documents
Outcome	One breach of Regulation 7(1)(b)

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### FINDING AND REASONS FOR FINDING

Published 18 September 2020

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#### 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 the Panel's decision

1. The Local Government Standards Panel ("the Panel") found that Councillor Mel Congerton ("Cr Congerton"), a councillor for the City of Swan ("the City") committed one breach under the *Local Government Act 1995* (WA) ("the Act") and regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* ("the Regulations") when he allowed a statement relating to the adoption of the City's annual budget, to be published on the Facebook page he shared with another Councillor.

## Jurisdiction and procedural fairness

2. The Act makes provision for the circumstances in which a council member commits a minor breach.<sup>1</sup>
3. On 23 July 2020 the Department of Local Government, Sport and Cultural Industries ("the Department") received a Complaint of Minor Breach Form dated 20 July 2020 ("Complaint"). The Complaint was signed by Councillor Jennifer Catalano ("the Complainant") and contained one allegation of a breach of Regulation 7(1)(b) by Cr Congerton when he allowed a statement, relating to the adoption of the City's annual budget, to be published on the Facebook page he shared with another Councillor.
4. On 3 August 2020, the Department advised Cr Congerton of the Complaint and invited him to respond. The Department sent Cr Congerton a copy of the original Complaint and all the supporting documents provided by the Complainant.
5. Under the Act the Panel is required to consider a complaint of a minor breach and make a finding as to whether the alleged breaches occurred.<sup>2</sup> On 21 August 2020 the Panel convened to consider the Complaint.
6. The Panel:
  - (a) accepted the Department's advice, based on information from the Western Australian Electoral Commission, that Cr Congerton was a councillor at the time of the alleged breach, having been elected on 19 October 2019, and was still a Councillor when the Panel met on 21 August 2020;
  - (b) was satisfied the Complaint had been made within six months after the alleged breach is said to have occurred<sup>3</sup>;
  - (c) was satisfied the Complaint had been dealt with in accordance with the administrative requirements in the Act for dealing with complaints of minor breaches<sup>4</sup>; and
  - (d) was satisfied that the Department had provided procedural fairness to Cr Congerton.

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

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

<sup>3</sup> Section 5.107(4) of the Act

<sup>4</sup> Sections 5.107, 5.108, 5.109 of the Act.



7. If a councillor has previously committed two or more minor breaches, the Panel may send the complaint to the Chief Executive Officer of the department assisting the relevant Minister at the time instead of considering the Complaint itself.<sup>5</sup> Cr Congerton had not previously been found to have had committed any minor breaches and therefore, the Panel decided not to send the Complaint to the Chief Executive Officer of the Department.
8. Based on the information referred to in paragraphs 2 to 7 above, the Panel found it had jurisdiction to determine whether Cr Congerton had breached Regulation 7(1)(b) in connection with the Complaint.

### **Panel's role**

9. The Panel is not an investigative body. It determines complaints of minor breaches solely upon the evidence presented to it.
10. Any finding, that a councillor has committed a minor breach, must be based on evidence from which it may be concluded that it is more likely than not that the breach occurred than that it did not occur (the required standard of proof).<sup>6</sup>
11. In order to find the allegation, proposition or conduct has been established, and where direct proof is not available, the Panel must be satisfied from the evidence that it is more probable than not that it has occurred. The Panel cannot make a finding that the alleged fact, proposition or conduct occurred if the evidence merely supports two or more conflicting but equally possible inferences.<sup>7</sup>
12. For a finding that a councillor has breached a particular regulation, the Panel must be satisfied that every element of the particular regulation has been established to the required standard of proof.

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

13. Regulation 7(1)(b) provides:

***“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 –*

*.....*

*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.”*

14. The Panel decided that the alleged conduct is not conduct that contravenes section 5.93 of the Act or section 83 of *The Criminal Code*.

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<sup>5</sup> Sections 5.110(2)(b), 5.111(1) of the Act.

<sup>6</sup> Section 5.106 of the Act.

<sup>7</sup> *Bradshaw v McEwens Pty Ltd* (1951) 217 ALR 1, paragraph 5.



### Elements of Regulation 7(1)(b)

15. In order to find a breach of Regulation 7, the Panel must be satisfied to the required standard of proof that:

- (a) the person, the subject of the Complaint, engaged in the alleged conduct (first element);
- (b) the person, the subject of the Complaint, was a council member both at the time of the conduct and the time when the Panel makes its determination (second element);
- (c) by engaging in the conduct, the person, the subject of the complaint, made use of his or her office as a council member (in the sense that he or she acted in their capacity as a councillor, rather than in some other capacity) (third element);
- (d) when viewed objectively, such use was an improper use of the person's office as a council member in that it:
  - (i) involved a breach of the standards of conduct that would be expected of a person in the position of a councillor, by reasonable persons with knowledge of the duties, power and authority of the councillor and the circumstances of the case; and
  - (ii) was so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty;(fourth element);
- (e) the person engaged in the conduct in the belief that detriment would be suffered by the local government or any other person (fifth element).

#### *Fourth element - meaning of "to make improper use of...office"*

16. The Macquarie dictionary definition of "*improper*" is "*not in accordance with propriety of behaviour, manners, etc; unsuitable or inappropriate for the purpose or occasion; abnormal or irregular.*"<sup>8</sup> The Shorter Oxford dictionary definition is "*irregular, wrong; unsuitable, inappropriate; unbecoming, unseemly.*"<sup>9</sup>

17. Whether there is impropriety is to be assessed objectively: would a reasonable person with knowledge of the duties, powers and authority of a councillor, and all the circumstances of the particular case, form the view that the councillor had breached the standards of conduct expected of a councillor?<sup>10</sup> "*For behaviour to be improper it must be such that a right-thinking person would regard the conduct as so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty.*"<sup>11</sup>

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<sup>8</sup> Macquarie Dictionary, Revised Third Edition.

<sup>9</sup> Shorter Oxford English Dictionary, Sixth Edition.

<sup>10</sup> *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraph 27, referring to *R v Byrnes* (1995) 183 CLR 501.

<sup>11</sup> *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 9, referring to *Robbins v Harness Racing Board* [1984] VR 641.



18. Under the Act Panel members must have regard to the general interests of local government in Western Australia.<sup>12</sup> It is in the interests of local government that councillors are, and are seen to be, professional and respectful in their dealings with fellow councillors, local government employees and members of the public.
19. Regulation 3 sets out general principles to guide councillors' behaviour, although contravention of any of these does not amount to a minor breach.<sup>13</sup> Regulation 3 provides, among other things, that councillors should act with reasonable care, diligence and integrity and treat others with respect and fairness.
20. The meaning of "*improper*" must be considered in the context of relevant legislation, such as the Act and the Regulations, and other rules and standards that apply to a councillor's role and conduct, such as the local government's Code of Conduct, and the circumstances and context of the case.<sup>14</sup> All these provisions form part of the backdrop to the Regulations and give context to a complaint but the alleged conduct must also be judged in the particular circumstances.
21. Conduct can be improper even though the councillor's judgment is that it isn't improper. A councillor's use of his or her office can be improper even though the councillor is intending to benefit the local government, the council or the ratepayers and residents.<sup>15</sup>

Fifth element - meaning of "*to cause detriment to the local government or any other person*"

*Detriment*

22. "*Detriment*" means loss, damage or injury.<sup>16</sup> It includes financial and non-financial loss and adverse treatment, such as humiliation, denigration, intimidation, harassment, discrimination and disadvantage. A person can suffer detriment through others thinking less favourably of them.<sup>17</sup>
23. For regulation 7(1)(b) to be satisfied it is not necessary to show that the local government or the person concerned actually suffered detriment.<sup>18</sup> However it is not enough to show that the local government or the person concerned suffered detriment, or could have suffered detriment. The Panel must find that it is more likely than not that the councillor believed that his or her actions would cause detriment and intended to cause detriment.<sup>19</sup>
24. "*To cause detriment*" has been interpreted as meaning "*in order to*" or "*for the purpose of*" causing detriment, or "*with the will to*" cause detriment.<sup>20</sup> There can be a finding of intent if, after considering all the evidence, the only reasonable inference is that the councillor intended to cause detriment.

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<sup>12</sup> Section 5.122(3) of the Act, Schedule 5.1 of the Act, clause 8(6).

<sup>13</sup> Regulation 3.

<sup>14</sup> *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 10.

<sup>15</sup> *Yates and Local Government Standards Panel* [2012] WASAT 59, paragraph 64, referring to *Treby* 2010.

<sup>16</sup> Macquarie Dictionary Revised Third Edition, 2001.

<sup>17</sup> *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraphs 31, 32.

<sup>18</sup> *Treby* 2010, paragraph 96, referring to *Chew v The Queen* 1992 CLR 626 (*Chew* 2010).

<sup>19</sup> *Re and Local Government Standards Panel* [2014] WASAT 111, paragraph 51, referring to *Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd* [2013] FCA 1342.

<sup>20</sup> *Chew* 2010.



## Substance of the Complaint

25. Cr Congerton has been a Councillor for many years. He currently shares a Facebook page (“Facebook Page”) with Councillor Bryce Parry: “*Cr Bryce Parry & Cr Mel Congerton for Whiteman Ward – City of Swan*”. The first post on the Facebook Page states: “*Original posts...are authorised by M.Congerton*”.
26. On 3 July 2020, Cr Congerton published a post that related to the passing of the City’s annual budget (“Budget Post”) on the Facebook Page. The Budget Post contained a statement (“Statement”) that was allegedly “*detrimental and disadvantaging*” to the reputation of other City Councillors. The Statement was as follows:
- “Sadly Councillors Predovnik, Kiely and Catalano voted against jobs and growth for our region.”*
27. In the Budget Post, Cr Congerton did not clarify whether or not the Statement was his personal opinion, nor did he provide any evidence to support the accuracy of the Statement. If the Statement was attributable to Cr Parry (with whom he shared the page), Cr Congerton also at no time made any clarification that he did not agree with the Statement.
28. At no time during Council debate about the City’s 2020/21 Budget at the Council Meeting held on 1 July 2020 (“Council Meeting”), or any other time, did the Complainant or any of the other two Councillors that Cr Congerton mentioned in the Statement, indicate or express a view that they were voting against jobs and growth opportunities.
29. Cr Congerton would have known that the Statement would be detrimental to the reputation of the Councillors within the community because the Statement alleged that these Councillors:
- a. did not care about, or harmed, the economic welfare of their constituents; and
  - b. are inept, uncaring, malicious and financially irresponsible.
30. Cr Congerton should retract the Statement and let people know that it was incorrect, as the three councillors that he mentioned had secured an alternative responsible budget that retained economic stimulus.

## Cr Congerton’ Response

31. Cr Congerton submitted that the information contained in the Budget Post is correct. The three councillors identified in the Statement did not vote to approve the City’s 2020/21 Budget which included \$160 million worth of capital works in what is the fastest growing Council in the Perth Metropolitan Area.
32. The three Councillors mentioned in the Statement also voted against additional funding contained in the Budget, and in fact wanted to reduce the capital works funding by another \$10 million. This was in complete contradiction to the stimulus package of \$8.85m proposed at the Special Council Meeting held in April 2020.



33. There had been months of budget preparation, culminating (on the night of the Budget) in a package to:
- deliver a capital works program;
  - free-up rates revenue; and
  - deliver a zero increase on fees and charges in order to stimulate jobs and growth in the Swan region.
34. The Statement caused no detriment to the City or any other Councillor as it told the truth; it was not a fabrication and was simply a statement of fact. If the three Councillors knowingly did not vote for the Budget, they must then have knowingly and deliberately not voted for the additional \$10 million stimulus package or the capital works program (that was provided for the purposes of creating employment in the COVID-19 pandemic year).
35. If a councillor did not vote to pass the Budget, then they did not vote for jobs and growth. Growth follows employment and project creation. Both are terms that are constantly used by both State and Federal government.
36. Twelve of the City's Councillors voted for the Budget (and the additional stimulus package) and three did not. This information, and how specific councillors voted, is available in the Minutes to the Council Meeting. The Budget Post was placed on Facebook to provide the City's ratepayers with an accurate picture of what took place at the Council Meeting and it was done in the interests of "*openness, accountability and transparency*".
37. In the past ten months, countless Facebook postings have been made by Councillors thanking those in support of Council recommendations, and at the same instance, also pointing out those who were not in support.

### **Panel's Consideration**

#### *First, second and third elements*

38. The Panel finds that Cr Congerton engaged in the conduct that is the subject of the Complaint, that he was a councillor at all relevant times and that he was acting as a councillor at all times. The first, second and third elements are established.

#### *Whether Cr Congerton acted improperly (fourth element)*

39. Based on the evidence before it, the Panel is satisfied that the fourth element has been established in relation to the Complaint and finds that Cr Congerton did act improperly. The Panel makes this finding because it is satisfied to the required standard of proof that a reasonable person would consider that Cr Congerton did not meet the standards of conduct expected of a councillor when he made the Statement in the Budget Post and published it on Facebook:
- a. The Budget Post related to the annual budget that had just been passed, two days prior, by the City. The Budget Post generally spoke positively about the adoption of the Budget and provided useful information that



would have been of interest to the City's local residents and ratepayers. This was especially so, as it was the first budget to have been delivered following the Covid19 crisis. The Budget Post initially referred to Council as a group: *"We have had an excellent 8 months, delivering on a large number of our promises...."*. It also named and thanked the councillors who had voted in favour of the budget:

*"Thank you to those Councillors for supporting a balanced budget that ensures our City's long term financial stability and the assurance that planned projects will still proceed driving Jobs and stimulating our local economy"*.

- b. However, the Budget Post then singled out three councillors (including the Complainant) who did not vote in favour of the Budget:

*"Sadly Councillors Predovnik, Kiely and Catalano voted against jobs and growth for our region."*

The clear meaning (which was acknowledged by Cr Congerton in his response), was that the three councillors who voted against the Budget had consequently not voted for *"jobs and growth"*. Jobs and growth are two of the most important issues at a local government level. Therefore, it could reasonably be implied from the Statement that Cr Congerton meant to insinuate that those councillors had, in fact, acted against the interests of the City and its residents.

- c. Setting a budget for a local government is an extremely complex matter, involving numerous issues, even more so given the unique circumstances of it being during the Covid19 crisis period. Unanimity of thinking was not possible amongst councillors when it came to the passing of the City's 2020/21 budget (it was passed with a 12:3 majority), and the eventual decision reflected the majority viewpoint as to what was in the best interests of the City. However, the three councillors who voted against the Budget would have had their own individual reasons for why they voted as they did. Just because they disagreed with the majority, does not mean that their respective views (or votes) should be dismissed in such a damning manner. Councillors are entitled to vote on matters before council, and so long as they do so in good faith and believe they are acting in the best interests of the community, they are fulfilling their duty as elected members.
- d. Cr Congerton may have disagreed with the position taken by the three Councillors who voted against the Budget. However, Councillors need to be able to develop and maintain effective working relationships with other elected members. Therefore, Councillors should demonstrate the ability to disagree with their fellow councillors without being disagreeable. In this case, Cr Congerton referred rather flippantly to the position taken by the three councillors and he showed a complete lack of respect towards them. There was no consideration in the Statement (or the Budget Post) of their respective positions or any meaningful discussion when it came to their different viewpoints; instead, Cr Congerton, rather recklessly, oversimplified the issue and surmised that they had voted *"against jobs and growth."*



- e. People look to their elected representatives to provide leadership and guidance. A further consequence of the role of a councillor is that when council members takes it upon themselves to make public statements, comments or remarks about any acts or omissions of another council member, they have an obligation to ensure that any statement of fact they mention or rely on is substantially true and that their comments or remarks are not made or delivered with malice. The Panel finds that Cr Congerton did not meet the standards of conduct expected of a councillor in this respect, when he made the Statement.
- f. Finally, Councillors should also adopt a collegiate approach to serving the community. A local government's council is a team, and each council member is a member of the team. Councillors are expected, where appropriate and in an appropriate forum, to appropriately criticise the views of their fellow councillors on a matter, until such time as the local government has made its decision on a matter. At the time, the City and Council were trying to rebuild the local economy and provide a strong financial base in order for the City to be able to move forward. In this case, a decision had already been made at the Council Meeting regarding the passing of the Budget, and in the circumstances it was wrongful for Cr Congerton to revisit and reflect on the votes of those three councillors in such a negative manner.

40. The Panel finds that Cr Congerton's actions were wrongful and inappropriate.

*Whether Cr Congerton intended to cause detriment to the local government or any other person.*

41. The Panel is satisfied that the fifth element has been established, and that Cr Congerton intended to cause detriment to the Complainant and their fellow councillors:

- a. The Budget Post reflected very negatively on the three councillors who voted against the Budget. It was published two days after the Council Meeting (at which the budget was passed). Therefore, Cr Congerton had had some time to consider his actions. However, regardless, he chose to publish the Statement publicly on Facebook and directly to the local community. Moreover, the Statement was published on a page that he shared with another of the City's councillors, which would have added weight to the Statement in the minds of anyone reading the post, and consequently, increased its damaging impact on the three Councillors.
- b. Jobs and growth are two of most important issues for local government and Cr Congerton advised the community that those three councillors had voted against both. The Panel finds that it is more likely than not, the Statement was made with the intention of shaming those three councillors publicly and thereby causing them detriment. Cr Congerton submitted that he had published the Statement in the interests of "*openness, accountability and transparency*". However, all three of those objectives could have been achieved, without the Statement going as far as it did.



42. The Panel finds that Cr Congerton intended to cause detriment to the Complainant and his fellow Councillors when he made the Statement on Facebook.

### **Findings**

43. Accordingly, for the above reasons, the Panel finds that Cr Congerton did breach Regulation 7(1)(b) in relation to the Complaint.

A handwritten signature in blue ink, appearing to read 'Mick Connolly', written over a horizontal line.

Mick Connolly (Presiding Member)

A handwritten signature in blue ink, appearing to read 'Elanor Rowe', written over a horizontal line.

Elanor Rowe (Deputy Member)

A handwritten signature in blue ink, appearing to read 'Deborah Hopper', written over a horizontal line.

Deborah Hopper (Deputy Member)



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## Local Government Standards Panel

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Complaint Number	SP 2020-082
Legislation	<i>Local Government Act 1995 (WA)</i>
<b>Complainant</b>	<b>Councillor Jennifer Catalano</b>
<b>Respondent</b>	<b>Councillor Mel Congerton</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 Gordon MacMile (Presiding Member) Councillor Deborah Hopper (Member) Ms Elanor Rowe (Member)
Heard	21 August 2020 Determined on the documents
Penalty Considered	23 October 2020
Outcome	Training

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### DECISION AND REASONS FOR DECISION

Delivered 6 January 2021

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#### DEFAMATION CAUTION

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## Introduction

1. At its meeting on 21 August 2020, the Panel found that Councillor Mel Congerton (“Cr Congerton”), 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 the *Local Government (Rules of Conduct) Regulations 2007* (WA) (“the Regulations”) when he allowed a statement relating to the adoption of the City’s annual budget, to be published on the Facebook page he shared with another Councillor (“Minor Breach”).
2. On 18 September 2020, the Panel published its Finding and Reasons for Finding (“Findings”) that Cr Congerton had breached Regulation 7(1)(b). The Panel reviewed all the evidence presented to it and made the following statements:

“39 .....

*b Therefore, it could reasonably be implied from the Statement that Cr Congerton meant to insinuate that those councillors had, in fact, acted against the interests of the City and its residents.*

.....

*d .....Councillors need to be able to develop and maintain effective working relationships with other elected members. Therefore, Councillors should demonstrate the ability to disagree with their fellow councillors without being disagreeable.*

.....

*f Councillors are expected, where appropriate and in an appropriate forum, to appropriately criticise the views of their fellow councillors on a matter, until such time as the local government has made its decision on the matter. At the time, the City and Council were trying to rebuild the local economy and provide a strong financial base in order for the City to be able to move forward. In this case, a decision had already been made at the Council Meeting regarding the passing of the Budget, and in the circumstances it was wrongful for Cr Congerton to revisit and reflect on the votes of those three councillors in such a negative manner.*

41. ....

*a. The Budget Post reflected very negatively on the three councillors who voted against the Budget. It was published two days after the Council Meeting (at which the budget was passed). Therefore, Cr Congerton had had some time to consider his actions. However, regardless, he chose to publish the Statement publicly on Facebook and directly to the local community...*

*b. ...The Panel finds that it is more likely than not, the Statement was made with the intention of shaming those three councillors publicly and thereby causing them detriment. Cr Congerton submitted that he had published the Statement in the interests of “openness, accountability and transparency”. However, all three of those objectives could have been achieved, without the Statement going as far as it did.”*



### Jurisdiction and Law

3. The Panel convened on 23 October 2020 to consider how it should deal with the Minor Breach. 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 Cr Congerton had ceased to be, or was disqualified from being, a councillor.

### Possible Sanctions

4. Section 5.110(6) of 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*
    - (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).*
5. Section 5.110(6) is about penalty. The Panel does not have the power to review any finding of a breach. Under section 5.110(6)(a), the Panel may order that no sanction be imposed, not to reverse the finding of a breach, but to indicate that in all the circumstances the relevant councillor should not be penalised further.

### Councillor Congerton’s Submissions

6. 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>
7. By a letter dated 22 September 2020, Cr Congerton was:
- i. notified of the Panel’s Findings of the Minor Breach;

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



- ii. provided with a copy of the Panel's Findings; and
  - iii. offered an opportunity to make submissions as to how the Minor Breach should be dealt with under section 5.110(6) of the Act
8. On 6 October 2020, the Department received a response from Cr Congerton in which he submitted that no sanction be imposed. Furthermore, he stated that:
- a. Councillors do not receive mandatory training on the impact of social media. Therefore, it is not surprising that there may be different understandings and views amongst local government councillors, as to what communications are reasonable and appropriate on social media platforms in relation to local government matters.
  - b. The post has since been removed from the Facebook page on which it was published and to his knowledge, it has not been reposted on any other social media page.
  - c. He had been a Councillor for over seventeen years, was highly awarded and was a Freeman of the City. Furthermore, he had not had any other complaints made against him. It was only in the past year that he had been introduced to social media and the impact of it, and in future he would think twice about what to publish.

### **Panel's Consideration**

9. Guidance on the factors which the Panel may consider in determining the appropriate penalty to impose, include, but are not limited to:
- a. the nature and seriousness of the breach or 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. the likelihood or not of the councillor committing further breaches of the Act;
  - g. the councillor's personal circumstances at the time of the conduct, and at the time of imposing the sanction;
  - h. the 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.



10. Cr Congerton had not previously been found to have committed any minor breaches.
11. The Panel found that Cr Congerton breached Regulation 7(1)(b) when he published a Facebook post about the City's budget and sought to cause detriment to three of his fellow councillors in doing so. It was not a trivial matter, and the Panel does not consider it appropriate to not impose a sanction in relation to the Minor Breach as this would indicate that it was so minor that no penalty is warranted.
12. The Panel also does not consider that it is appropriate to make an order for censure for Cr Congerton's actions, as they were not so serious to justify such an order. When the Panel makes an order that a Notice of Public Censure be published, the Notice is published by the local government's CEO, at the expense of the local government; such expense is significant where the Notice is to be published in a newspaper or newspapers. Likewise, the Panel also does not find that an order that Cr Congerton pay to the City a sum of money is warranted.
13. The options left for the Panel to consider are to order Cr Congerton to undertake training or make a Public Apology.
14. The circumstances in which it may be appropriate for the Panel to order that the council member concerned undertake training include cases where members communicate to the Panel:
  - a. their acknowledgement that they have committed the minor breach, and their willingness to undertake training; or
  - b. their acknowledgement that they have committed the minor breach, but that such breach occurred through their lack of knowledge or education on the issue or issues concerned; or
  - c. their remorse or contrition for their offending conduct in committing the minor breach.
15. Cr Congerton took the opportunity to respond to how the Panel should deal with the matter and to reiterate his belief that he had not committed a Minor Breach. However, the response made was reasonable as Cr Congerton was receptive to the Panel's Findings and had taken action to remove the Facebook post. Cr Congerton also stated that he was relatively new to social media and had not received any training in that area; he acknowledged that he had not fully considered its impact when he published the Facebook post and would act with more care in the future. The Panel finds that training, rather than a public apology, will be of use to Cr Congerton and is the appropriate penalty. It will help him differentiate between making appropriate and inappropriate comments as an elected member on social media.
16. The sanction of an order to undertake training also aligns with the intent of the Act and the purpose of the civil penalties under the Act to ensure future compliance with the statutory obligations imposed on councillors for the better protection of the public.



## Panel's Decision

17. Having regard to the Findings, the matters set out herein, and the general interests of local government in Western Australia, the Panel's decision on how the Minor Breach is to be dealt with under s5.110(6) of the Act, is that pursuant to subsection (b)(iii) of that section, Cr Congerton is ordered to undertake training as set out in the attached Order.

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

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Gordon MacMile (Presiding Member)

A handwritten signature in blue ink, appearing to read 'Elanor Rowe'.

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Elanor Rowe (Deputy Member)

A handwritten signature in blue ink, appearing to read 'Deborah Hopper'.

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Deborah Hopper (Deputy Member)



## ORDER

Delivered 6 January 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

### THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

Within four (4) months of the date of this Order, Councillor Mel Congerton, a member of the City of Swan, shall undertake:

1. the training course for Elected Members "Effective Community Leadership" provided by WA Local Government Association (WALGA) for a period of 7.5 hours; or
2. a training course with substantially similar learning outcomes provided by an alternative registered training organisation for a similar duration, but at least 5 hours.

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Gordon MacMile (Presiding Member)

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Elanor Rowe (Deputy Member)

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Deborah Hopper (Deputy Member)



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## Local Government Standards Panel

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### ORDER

Originally Delivered 6 January 2021  
Varied 3 February 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

#### THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

By 30 September 2021, Councillor Mel Congerton, a member of the City of Swan, shall undertake:

1. the training course for Elected Members "Effective Community Leadership" provided by WA Local Government Association (WALGA) for a period of 7.5 hours; or
2. a training course with substantially similar learning outcomes provided by an alternative registered training organisation for a similar duration, but at least 5 hours.

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Gordon MacMile (Presiding Member)

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Elanor Rowe (Deputy Member)

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Deborah Hopper (Deputy Member)



## 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."*