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## Local Government Standards Panel

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Complaint Number	SP 2020-092
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Councillor Jennifer Catalano</b>
<b>Respondent</b>	<b>Mayor Kevin Bailey</b>
Local Government	<b>City of Swan</b>
Regulation	Regulation 7 of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Mrs Emma Power (Presiding Member) Cr Peter Rogers (Member) Mr Gordon MacMile (Member)
Heard	7 October 2020 Determined on the documents
Finding	1 x Breach of Regulation 7(1)(b)

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### FINDING AND REASONS FOR FINDING

**Delivered 9 November 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. On 7 October 2020, the Panel found that Mayor Kevin Bailey, the Mayor of City of Swan (**"the City"**):
  - a. did not commit a minor breach pursuant to the *Local Government Act 1995 (WA)* (**"the Act"**) and Regulation 7(1)(a) of the *Local Government (Rules of Conduct) Regulations 2007* (**"the Regulations"**); and
  - b. did commit a minor breach pursuant to the Act and Regulation 7(1)(b) of the Regulations,when he allegedly made disparaging comments about certain councillors of the City to the Chief Executive Officer of the Midland Information Debt and Legal Advocacy Service 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.

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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)



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.

### **Jurisdiction and Procedural Fairness**

11. On 11 August 2020 the Panel received a complaint from Mr Michael Foley acting as complaints officer of the City ("**the Complaints Officer**"). The same enclosed a Complaint of Minor Breach Form dated 7 August 2020.
12. In the complaint form, the Complainant alleges that Mayor Bailey has breached regulation 7 of the Regulations when on 15 April 2020 he met with the Chief Executive Officer of the Midland Information Debt and Legal Advocacy Service ("**MIDLAS**") and:
  - a. made comments praising certain councillors of the City thereby gaining for them an advantage in breach of regulation 7(1)(a) of the Regulations; and
  - b. made disparaging comments about certain councillors of the City thereby disadvantaging them in breach of Regulation 7(1)(b) of the Regulations,as set out in paragraph 15 ("**the Complaint**").
13. The Panel convened on 7 October 2020 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, Mayor Bailey was:
    - i. elected to the Council of the City in October 2017 for a term expiring in October 2021;
    - ii. a Councillor at the time of the alleged breach; and
    - iii. a Councillor when the Panel met on 7 October 2020;
  - 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 Mayor Bailey; and

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

<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



- e. found it had jurisdiction to consider the Complaint.

### **The Specifics of the Complaint**

- 15. The Complainant provided the following comments and arguments in respect to the Complaint:
  - a. Mayor Bailey met with the Chief Executive Officer (“**the CEO**”) of MIDLAS (a not for profit organisation) at the MIDLAS premises in Midland on 15 April 2020.
  - b. The Complainant was employed as a solicitor at MIDLAS.
  - c. Mayor Bailey acted improperly by attending the MIDLAS office in his capacity as Mayor and making disparaging statements about fellow City of Swan Councillors to their detriment while praising other fellow City Councillors thereby gaining for them an advantage.
  - d. These statements were made to the CEO in MIDLAS' reception area and were overheard by MIDLAS staff and clients.
  - e. Mayor Bailey would have or ought to have known that:
    - i. the disparaging statements made about his fellow City of Swan Councillors including Councillors who represent the Midland Ward would disadvantage them by causing detriment to their reputation;
    - ii. the disparaging statements made to the MIDLAS CEO about Cr Catalano (an employee of MIDLAS) would disadvantage her by causing detriment to her reputation and to her relationship with her employer; and
    - iii. his improper conduct would bring detriment to the Office of Mayor of the City of Swan and thereby to the reputation of the City of Swan.
  - f. On 15 April 2020 the Complainant heard Mayor Bailey speaking loudly in the reception area. The door to the Complainant's room was open and there were a number of MIDLAS staff working in her room and also in the reception area.
  - g. The Complainant heard Cr Bailey relating to the MIDLAS CEO the events of the recent Council meetings.
  - h. The Complainant was surprised to hear the Mayor begin to make disparaging statements about other City of Swan Councillors.
  - i. The Complainant heard Mayor Bailey complain to the MIDLAS CEO about fellow Councillors asking questions and challenging him about issues and meeting procedures. Mayor Bailey boasted that he had to use his gavel a number of times to subdue fellow Councillors. He also complained about how it annoyed him when a Councillor moved a motion without notice at the Council meeting on 8 April 2020.
  - j. Mayor Bailey then described each Councillor to the CEO to provide a comparison between those Councillors about whom he approved and those about whom he disapproved. Of those he approved, he named each Councillor in



turn and told the CEO how much he admired each of them for their role on Council even though they were in business and semi retired or working full time.

- k. Mayor Bailey then named and described each of the Councillors about whom he disapproved because they were only housewives, worked for the Labor Party or had personality issues including mental health problems. The Complainant heard the CEO counter Cr Bailey's description of Cr Andrew Kiely by saying she had worked well with him in the past.
- l. The CEO later told the Complainant that Cr Bailey had also described to her that Cr Johnson had a mental illness, that Cr Kiely was a "psycho" and that the Complaint was "batshit crazy". The CEO told the Complainant that Mayor Bailey had said to her that if he had his way he would like to run the City of Swan as a dictatorship.
- m. Later on the evening of 15 April 2020, before a Council Meeting, the Complainant asked Mayor Bailey if she could have a few words with him in private. In a separate room she said that she had overheard him make disparaging remarks about other Councillors and herself at her workplace to her CEO. Mayor Bailey immediately turned away from her and said "*do what you like about it*" and did not offer an explanation or an apology as he walked away.
- n. The Complainant has not brought this to the attention of the Standards Panel earlier as she did not want to create an issue for Mayor Bailey. However the ongoing conduct of Mayor Bailey in his role as Mayor since that time has led her to now having to make this complaint known as she believes Cr Bailey is not a fit person for office of Mayor of the City of Swan.

### **The Respondent's Response**

16. By an email dated 21 September 2020, Mayor Bailey provided a response to the Complaint.
17. Mayor Bailey denies that he has committed any minor breach.
18. Mayor Bailey provided the following comments and arguments regarding the Complaint:
  - a. During the month of April at the height of the COVID crisis in WA, Mayor Bailey had a number of conversations with the CEO of MIDLAS around supply logistics for food deliveries, volunteers for deliveries and product picking and the provision of donations.
  - b. Mayor Bailey gave whatever assistance he could personally and whatever the City of Swan could provide during this extraordinary time. At no time did Mayor Bailey see Cr Catalano present during any of his visits to MIDLAS nor did she make her presence known to him.
  - c. The CEO of MIDLAS is also a Councillor with another local Government and invariably councillors talk about council and issues when we get together. Mayor Bailey has no recollection of the precise conversations that he may or may not have had with a councillor from another local government.



- d. Either way they would have been private conversations and he doesn't recall anyone being present.
- e. Mayor Bailey does recall Cr Catalano approaching me for a word a few minutes before he was about to open a Council Meeting, however, he does not recall the date and he had no time to talk to her at that time as the meeting was about start.
- f. Cr Catalano has not raised any issues with Mayor Bailey directly or with the CEO or the Deputy Mayor nor has she attempted to make time for a further discussion in regard to this alleged conversation.
- g. If Cr Catalano were so offended Mayor Bailey would expect her to raise the issue sooner rather than wait five months.
- h. Further Mayor Bailey would be interested to know if Cr Catalano has shared these alleged comments with others as he has had no comments from any other councillors, Mayor Bailey would have expected something from those councillors that he is alleged to have offended.
- i. Mayor Bailey has no recollection of the context of the conversation that Cr Catalano refers to given that it apparently took place five months ago during what was a very busy period.
- j. Mayor Bailey received no personal advantage nor can he see any disadvantage to others from any conversations he may have had with the CEO of MIDLAS, an organisation he still supports.
- k. Mayor Bailey calls into question the timing of this complaint given his receipt of other complaints around the same timeframe, all from known associates of Cr Catalano.

### **Panel's Consideration**

#### **Regulation 7**

19. 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.*



20. To make a finding of a minor breach of regulation 7(1)(b) of the Regulations the Panel must be satisfied that it is more likely than not that:
- a. Mayor Bailey was an elected member at the time of the alleged breach and the time of the determination;
  - b. Mayor Bailey made use of his office as Council member of the City;
  - c. when viewed objectively, such use was an improper use of Mayor Bailey'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. Either:
    - i. for Regulation 7(1)(a) - Mayor Bailey engaged in the conduct with the intention to gain directly or indirectly an advantage for any person; OR
    - ii. for Regulation 7(1)(b) - Mayor Bailey engaged in the conduct in the belief that detriment would be suffered by another person.

### **Regulation 7**

#### Mayor Bailey was an Elected Member at the relevant times

21. Mayor Bailey was an elected member at the time of the alleged breach and at the date the Panel considered the Complaint.
22. This element is met.

#### Mayor Bailey made use of his office as Council Member of the City

23. The Complainant asserts that Mayor Bailey was acting in his role as Mayor when he met with the CEO of MIDLAS.
24. Mayor Bailey asserts that he was having a private conversation with a person who is also another councillor, and that it is usual for councillors to discuss Council matters with each other.
25. In this particular instance, the Panel finds that it is more likely than not that Mayor Bailey had attended MIDLAS in his capacity as Mayor of the City to discuss matters that were related to the City.
26. Irrespective of whether the CEO was also a local councillor, Mayor Bailey had attended that meeting in his capacity as a spokesman of the Council and the City.
27. Further, the relevant discussion the subject of the Complaint related specifically to Council matters and councillors of the City.
28. It is not a simple matter for an elected member to simply "switch" between roles during a course of the meeting or conversation.



29. The standards of behaviour expected of councillors are of a generally higher standard than a member of the public due to their public position. Once a person is elevated to a public position, and is recognised as occupying that public position, is a difficult undertaking to separate that person's actions undertaken in their official capacity from that person's actions in their capacity as an individual.
30. As the official spokesperson of the City, the Mayor has an even greater obligation to reflect upon when he may be seen to be acting in his capacity as an elected member.
31. The Panel finds, to the required standard, Mayor Bailey was acting in his capacity as an elected member made use of his office as a council member when he was meeting with the CEO of MIDLAS.
32. This element is met.

Mayor Bailey's use was improper

33. Deciding if conduct is an improper use of office requires something more than simply a demonstration of poor judgment or 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.
34. 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>.
35. 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.
36. The City has 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 to be read in conjunctions 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:-*

*....*

*4. Avoid damage to the reputation of the local government; and*

*....*

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

*....."*

b. Mayor

*" The Mayor is elected from amongst Councillors and by Councillors at the first special Council meeting after the City biennial elections in October. The Mayor has a general leadership role with the City. The Mayor is in a position*

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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



*to facilitate good relationships between Councillors, between Councillors and the administration, and between the Mayor and the CEO.*

*The Mayor facilitates good decision making through skilful chairing of the Council meeting.*

*The Mayor has an important role as a facilitator. Concepts such as participation, communication, involvement, consensus, mutual respect and listening are important. The Mayor's facilitation skills play a key role in ensuring the Council operates successfully.*

*The Mayor can also support good governance by modelling good behaviour and ethics in fulfilling Council and community leadership role.*

*As specified in the Act, responsibilities include:*

- Providing leadership and guidance to the community in the district*
- Presiding at Council meetings*
- Carrying out civic and ceremonial duties on behalf of the City*
- Speaking on behalf of the City*
- Liaising with the CEO about City affairs and the performance of its functions*

*The Mayor also assists Councillors to balance their accountability to their constituents and their accountability to the City as a whole.”*

c. 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;.....”*

37. The Code provides a framework for consideration of the expected standards of behaviour of elected members and as to whether certain conduct can be viewed as “improper”.
38. The Complainant asserts that Mayor Bailey acted improperly by making disparaging remarks regarding certain councillors.
39. Mayor Bailey does not expressly admit or deny that the relevant conversation took place.
40. Given the commentary provided by both the Complainant and Mayor Bailey the Panel finds that it is more likely than not that the relevant conversation did occur, and that Cr Catalano overheard a portion of such conversation.
41. Further, the Panel believes that, as she was the subject of certain negative comments, Cr Catalano has retained a more accurate recollection of the conversation.
42. Although it is not specified exactly what wording was overheard, the Panel is satisfied to the required standard that Mayor Bailey referred to the various councillors of the City in either a positive light or in a negative, disparaging manner.



43. However, the Panel will not take into account the comments that the CEO later passed on to Cr Catalano. This is hearsay only and not sufficient for the Panel to rely on.
44. Mayor Bailey asserts a variety of excuses for his conduct including that:
  - a. he did not see Cr Catalano there;
  - b. no other person was present at the meeting; and
  - c. he would have been simply disusing Council issues with another elected member.
45. With due respect to Mayor Bailey, none of these factors would prevent the relevant conduct from being improper. More accurately they indicate an attitude of carelessness and disregard for standards of appropriate behaviour.
46. In addition, the facts that Cr Catalano made no further attempt to speak to Mayor Bailey regarding the matter, the timing of making the Complaint or the expectation that other councillors may have commented, are purely speculative as to motive largely unconnected to the consideration of whether the Complaint is genuine.
47. In respect to the fact other complaints had been made, such complaints relate to a variety of circumstances and the Panel would encourage Mayor Bailey to reflect on the conduct that gave rise to the complaints, rather than focusing on the identity of the complainants.
48. The particular comments asserted to be made by Mayor Bailey these include two particular topics being:
  - a. comments in relation to the conduct of Council meeting; and
  - b. comments that related particularly to the personal attributes of various councillors.
49. In respect to the comments relating to the conduct of the City's Council Meetings, the Panel finds that to generally express discontentment or annoyance where Council meetings were difficult is not improper and, in certain circumstances, to be expected. Being the Presiding Member of Council Meetings is at times a challenging role.
50. In this case, the Panel finds that although the general comments as to Council Meetings reported to be made indicated that Mayor Bailey was not exercising leadership role with impartiality, such comments are not provided with enough context to be able to make a finding of improper conduct.
51. However, in relation to the disparaging remarks regarding certain councillors, clearly this is a more serious matter.
52. Commenting negatively about the personality or capabilities of other councillors would constitute a breach of Code of the City in that such remarks:
  - a. do not show respect for such councillors;
  - b. result in general damage to the reputation of the local government by publicly indicating such disrespect;



- c. do not facilitate good relationships between Councillors; and
  - d. do not encourage good governance by modelling good behaviour and ethics in fulfilling Council and community leadership role.
53. The fact that the disparaging comments were made in a context where Mayor Bailey was in a meeting in his capacity as spokesman of the City and in a situation where persons could overhear his comments make the conduct more serious.
54. Further, the fact that one of the Councillors was an employee of MIDLAS, and therefore in a position to discover such comments, indicates at best a remarkable lack of awareness or, at worst, reckless indifference by Mayor Bailey as to the possible effect of his comments.
55. As the spokesperson of the City, the Mayor has an even greater responsibility to ensure that his obligation to model good behaviour and provide leadership are met.
56. Given the above the Panel finds that in making disparaging and negative remarks about Councillors of the City, Mayor Bailey did act improperly.
57. Despite this finding, the Panel finds that it is more likely than not any comments praising other councillors were not improper for the purposes of Regulation 7, but only serve as a contrast to indicate how Mayor Bailey viewed different factions of elected members.
58. The Panel finds it is more likely than not that it was improper when Mayor Bailey made negative and disparaging remarks in respect of certain councillors as such conduct:
- a. was in breach of the Code;
  - b. 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. is deserving of a penalty.
59. This element is met.

In respect to Regulation 7(1)(a) Mayor Bailey intended to gain directly or indirectly an advantage

60. The definitions of the noun 'advantage' in the Shorter Oxford English Dictionary (6<sup>th</sup> ed) include: a favouring circumstance; something which gives one a better position, benefit; increased well-being or convenience or pecuniary profit.
61. The Panel considers the term 'advantage' in regulation 7(1)(a) is to be construed widely, and includes a financial or a non-financial benefit, gain or profit, or any state, circumstance, opportunity or means specially favourable.<sup>11</sup>

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<sup>11</sup> Complaint SP 12 and 13 of 2011



62. It is not necessary to find whether any advantage was actually gained<sup>12</sup>, but an intent to gain such advantage must be established.
63. The Complainant asserts that by praising certain Councillors of the City Mayor Bailey gained them an advantage.
64. Although “advantage” is to be construed widely, the Panel does not consider that the asserted “advantage” to councillor of flattery or increasing constructive notoriety is the type of “advantage” contemplated to be controlled by regulation 7(1)(a) of the Regulations.
65. In any event, as the Panel has found above that such comments were not improper a finding of breach of Regulation 7(1)(a) cannot be made.
66. This element is not met

In respect to Regulation 7(1)(b) Mayor Bailey intended detriment to be suffered by another person

67. “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.
68. 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.
69. The Complainant argues that Mayor Bailey knew, or ought to have known, that:
  - a. the disparaging statements would disadvantage the relevant councillors by causing detriment to their reputation;
  - b. the disparaging statements disadvantage the Complainant by causing detriment to her reputation and to her relationship with her employer; and
  - c. his improper conduct would bring detriment to the Office of Mayor of the City of Swan and thereby to the reputation of the City of Swan.
70. Mayor Bailey argues that he cannot see any disadvantage to others from any conversations he may have had with the CEO of MIDLAS.
71. With due respect to Mayor Bailey, it is not required that a disadvantage occurs, only that the party intended the disadvantage when undertaking the relevant conduct.
72. In the context that Mayor Bailey was generally complaining about Council, and was making comparisons between various councillors, the Panel finds that it is more likely than not that Mayor Bailey intended to disparage, and possibly embarrass, certain councillors to the CEO.
73. In particular, as the Complainant was an employee of MIDLAS, it appears more likely than not that Mayor Bailey’s intention of making remarks about Cr Catalano was to make her employer think less of her.

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<sup>12</sup> *Yates and Local Government Standards Panel* [2012] WASAT 59 at [72]

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



74. The Panel finds, to the required standard that Mayor Bailey intended to disparage and therefore cause a detriment to:
- the Complainant and those other councillors he negatively spoke about; and
  - the Council as a whole for making it difficult for him to preside over Council meetings.
75. Although, as noted above, the conduct was also likely to result in general damage to the reputation of the local government, the Panel finds that it was more likely than not that Mayor Bailey did not intend to damage the reputation of the City as a whole, however, was recklessly indifferent to such possible outcome.
76. This element is met.

#### Conclusion

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

#### Panel's Findings

78. Mayor Bailey did not commit a breach of Regulation 7(1)(a) of the Regulations and therefore did not commit a minor breach.
79. Mayor Bailey did commit a breach of Regulation 7(1)(b) of the Regulations and therefore did commit a minor breach.

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Emma Power (Presiding Member)

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Peter Rogers (Member)

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Gordon MacMile (Deputy Member)



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## Local Government Standards Panel

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Complaint Number	SP 2020-092
Legislation	<i>Local Government Act 1995 (WA)</i>
<b>Complainant</b>	<b>Councillor Jennifer Catalano</b>
<b>Respondent</b>	<b>Mayor Kevin Bailey</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 Michael Connolly (Presiding Member) Councillor Peter Rogers (Member) Ms Elanor Rowe (Deputy Member)
Heard	7 October 2020 Determined on the documents
Penalty Considered	14 December 2020
Outcome	Public Apology Training

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### DECISION AND REASONS FOR DECISION

Delivered 25 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



## Introduction

1. At its meeting on 7 October 2020, the Panel found that Mayor Kevin Bailey (“Mayor Bailey”), an elected member 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 made disparaging comments about certain Councillors of the City to the Chief Executive Officer of the Midland Information Debt and Legal Advocacy Service (“Minor Breach”).
2. On 9 November 2020, the Panel published its Finding and Reasons for Finding (“Findings”) that Mayor Bailey had breached Regulation 7(1)(b). The Panel reviewed all the evidence presented to it and made the following observations:
  - “52. *Commenting negatively about the personality or capabilities of other councillors would constitute a breach of Code of the City in that such remarks:*
    - a. *do not show respect for such councillors;*
    - b. *result in general damage to the reputation of the local government by publicly indicating such disrespect;*
    - c. *do not facilitate good relationships between Councillors; and*
    - d. *do not encourage good governance by modelling good behaviour and ethics in fulfilling Council and community leadership role.*
  53. *The fact that the disparaging comments were made in a context where Mayor Bailey was in a meeting in his capacity as spokesman of the City and in a situation where persons could overhear his comments make the conduct more serious.*

.....
  55. *As the spokesperson of the City, the Mayor has an even greater responsibility to ensure that his obligation to model good behaviour and provide leadership are met.*

.....
  72. *In the context that Mayor Bailey was generally complaining about Council, and was making comparisons between various councillors, the Panel finds that it is more likely than not that Mayor Bailey intended to disparage, and possibly embarrass, certain councillors to the CEO.”*

## Jurisdiction and Law

3. The Panel convened on 14 December 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 Mayor Bailey 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.
6. Sub-section 5.110(6)(b)(iv) (in respect to a monetary sanction) was introduced in 2019 to allow the Panel to require a councillor to personally bear the cost of dealing with a complaint, which in other circumstances, would be paid by the local government concerned. This ensures the cost of a breach is borne by the councillor individually, and not simply passed onto the local government and therefore, ultimately, rate payers.

### **Mayor Bailey's Submissions**

7. 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>
8. By a letter dated 9 November 2020, Mayor Bailey was:
  - i. notified of the Panel's Finding of the Minor Breach;
  - 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.

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



9. The Department did not receive a submission from Mayor Bailey within the fourteen-day timeframe provided to him.

### **Panel's Consideration**

10. The purpose of the imposition of a sanction under the Act is generally for the protection of the public and the maintenance of standards of council members. Furthermore, it reflects the disapproval of a contravention of the Regulations, dissuades councillors from other local governments from engaging in similar conduct and facilitates the maintenance of appropriate standards of behaviour by councillors. 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 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.
11. Mayor Bailey had not previously been found to have had committed any minor breaches.
12. The Panel found that Mayor Bailey breached Regulation 7(1)(b) when he made disparaging comments about certain Councillors of the City to the Chief Executive Officer of the Midland Information Debt and Legal Advocacy Service. In doing so, he intended to cause detriment to those parties and the Council.
13. The Panel does not consider it appropriate to impose no sanction in relation to the Minor Breach, as this would indicate that it was so minor that no penalty is warranted.
14. However, the Panel also does not consider it is appropriate to make an order for censure for Mayor Bailey'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 Chief Executive Officer, 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 Mayor Bailey pay to the City a sum of money is warranted on this occasion.

15. The options left for the Panel to consider are to order Mayor Bailey to undertake training or make a public apology (or both).
16. The standards of behaviour expected of elected members are of a generally higher standard than that of a member of the public, due to their prominent positions in the community. Making a public apology is a significant sanction, being a personal admission by the individual of wrongdoing. It is a suitable and appropriate penalty when an elected member's conduct:
  - a. adversely affects a particular individual; and / or
  - b. does not meet the standards other councillors seek to uphold.
17. The Panel finds it fair and reasonable that Mayor Bailey, as leader of the City, makes a public apology to the parties that he was found to have intended to cause detriment to, by his conduct. An apology will go some way to make amends for the potential damage caused by his conduct.
18. In addition, the Panel deems it prudent that Mayor Bailey undertake specified training. Training will serve to refresh his understanding of leadership concepts and the behaviours required of Elected Members. The sanction of an order to undertake training also aligns with the intent of the Act and the purpose of the civil penalties under it to ensure future compliance with the statutory obligations imposed on councillors for the better protection of the public.



## Panel's Decision

19. 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:

- a. pursuant to subsection (b)(ii) of that section, Mayor Bailey is ordered to make a public apology; and
- b. pursuant to subsection (b)(iii) of that section, Mayor Bailey is ordered to undertake training,

in terms as set out in the attached Order.

\_\_\_\_\_  
Mick Connolly (Presiding Member)

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Elanor Rowe (Deputy Member)

\_\_\_\_\_  
Peter Rogers (Member)



## ORDER

Delivered 25 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:

1. Mayor Kevin Bailey, an elected member for the City of Swan, publicly apologise, as specified in paragraph 3, or failing compliance with paragraph 3, then paragraph 4 below.
2. Mayor Kevin Bailey, an elected member for the City of Swan, undertake training as specified in paragraph 5 below.

### Public Apology

3. At the ordinary council meeting first occurring after the expiration of 28 days from the date of service of this Order on him, Mayor Kevin Bailey ("Mayor Bailey") 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 (WA) when I made disparaging comments about certain Councillors of the City to the Chief Executive Officer of the Midland Information Debt and Legal Advocacy Service.
- ii. The Panel found that by behaving in this manner I committed one breach of Regulation 7(1)(b) of the said Regulations as my conduct was wrongful, inappropriate and deserving of a penalty and, further, my actions were likely to cause detriment to the parties involved.
- iii. I accept that I should not have acted in such a manner and I apologise to Councillor Andrew Kiely, Councillor Ian Johnson, Councillor Jennifer Catalano and the Council for having done so.”

4. If Mayor Bailey fails or is unable to comply with the requirements of paragraph 3 above in the required timeframe, then, within the next 28 days following the ordinary council meeting referred to in paragraph 3 above:
  - a. Mayor Bailey shall cause the following notice of public apology to be published in no less than 10-point print, as a one-column or two-column display advertisement in the first 10 pages of the “*Echo*” newspaper; and
  - b. the Chief Executive Officer of the City of Swan shall arrange for the following notice of public apology to be published:
    - i. on the Facebook page of the City of Swan in no less than 10-point font size; and
    - ii. in an appropriate place on the website of the City of Swan in no less than 10-point font size; and
    - iii. 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 MAYOR KEVIN BAILEY**

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 (WA) when I made disparaging comments about certain Councillors of the City to the Chief Executive Officer of the Midland Information Debt and Legal Advocacy Service.

The Panel found that by behaving in this manner I committed one breach of Regulation 7(1)(b) of the said Regulations as my conduct was wrongful, inappropriate and deserving of a penalty and, further, my actions were likely to cause detriment to the parties involved.

I accept that I should not have acted in such a manner and I apologise to Councillor Andrew Kiely, Councillor Ian Johnson, Councillor Jennifer Catalano and the Council for having done so.

**Training**

5. Within four (4) months of the Date of this Order, Mayor Kevin Bailey, an elected member for the City of Swan, shall undertake:
  - a. the training course for Elected Members "*Effective Community Leadership*" provided by the WA Local Government Association for a period of seven and a half (7.5) hours; or
  - b. a training course with substantially similar learning outcomes provided by an alternative registered training organisation for a similar duration, but for a period of at least six (6) hours.

Date of Order: 25 January 2021



## 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."