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## Local Government Standards Panel

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Complaint Number	SP 2021-050B
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Mr Jason Gibbs</b>
<b>Respondent</b>	<b>Councillor Julie McFall</b>
Local Government	<b>Shire of West Arthur</b>
Regulation	Regulation 20 of the <i>Local Government (Model Code of Conduct) Regulations 2021</i>
Panel Members	Mr Tim Fraser (Presiding Member) Mrs Emma Power (Member) Cr Peter Rogers (Member)
Heard	5 August 2021 Determined on the documents
Finding	1 x Breach Regulation 20

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### FINDING AND REASONS FOR FINDING

Delivered 18 August 2021

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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 5 August 2021, the Panel found that Councillor Julie McFall, a councillor of the Shire of West Arthur (**"the Shire"**) did commit a minor breach pursuant to the *Local Government Act 1995 (WA)* (**"the Act"**) and regulation 20 of Division 4 of the *Local Government (Model Code of Conduct) Regulations 2021* (**"the Regulations"**) when she went to the residence of a Shire employee as further set out in paragraph 17 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 and the *Local Government (Administration) Regulations 1996* provide for the circumstances in which a council member commits a minor breach.
4. Section 5.105(1) of the Act provides that a council or committee member commits a minor breach if the council or committee member contravenes a rule of conduct. Division 4 of the Regulations sets out the rules of conduct for council members and candidates.
5. Regulation 34D of the *Local Government (Administration) Regulations 1996* also provides that the contravention of a "*local law as to conduct*" is a minor breach pursuant to the Act.
6. 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>1</sup>
7. 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.
8. 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>2</sup>; and
  - b. the seriousness of any allegation made, as well as the gravity of the consequences flowing from a particular finding<sup>3</sup>.
9. The Panel does not possess investigative or supervisory powers.<sup>4</sup> The Panel makes decisions about complaints regarding minor breaches solely upon the evidence presented to it and, where appropriate, materials in the public domain or published by the relevant local authority's website.

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<sup>1</sup> Section 5.106 of the Act

<sup>2</sup> *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1

<sup>3</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336

<sup>4</sup> *Re and Local Government Standards Panel* [2015] WASC 51 (at paragraph 24)



10. 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.
11. The Panel also must have regard to the general interests of local government in Western Australia<sup>5</sup>.
12. 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**

13. On 4 May 2021 the Panel received a complaint from Ms Nicole Wasmann acting as complaints officer of the Shire (**“the Complaints Officer”**). The same enclosed a Complaint of Minor Breach Form dated 6 May 2021.
14. The Complaint of Minor Breach Form contained two allegations of a minor breach that occurred:
  - a. on 17 December 2020 when the *Local Government (Rules of Conduct) Regulations 2007* were in force; and
  - b. on 12 February 2021 following the Regulations being replaced with the *Local Government (Model Code of Conduct) Regulations 2021*.
15. As such the Panel has addressed each allegation in a separate decision being SP 2021-050A and SP 2021-050B respectively.
16. In the complaint form and further response, the Complainant alleges that Cr McFall has breached Regulation 20 of the Regulations when she allegedly attended the residence of a Shire employee as set out in paragraph 17 (**“the Complaint”**).
17. The Panel convened on 5 August 2021 to consider the Complaint.
18. The Panel:
  - a. accepted the advice of the Department of Local Government, Sport and Cultural Industries (**“the Department”**) that, based on information published on the Western Australian Electoral Commission’s website, Cr McFall was:
    - i. elected to the Council of the Shire 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 5 August 2021;
  - b. was satisfied the Complaint was made within six months after the alleged breach occurred<sup>6</sup>;

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<sup>5</sup> Section 8(6) of Schedule 5.1 of the Act

<sup>6</sup> Section 5.107(4) and 5.109(2) of the Act



- c. was satisfied that the Shire'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>7</sup>;
- d. was satisfied the Department had provided procedural fairness to Cr McFall; and
- e. found it had jurisdiction to consider the Complaint.

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

19. The Complainant provided the following comments and arguments in respect to the Complaint:
- a. The Complainant's wife (KG) is a staff member at the Shire in the role of Manager of Community Services.
  - b. In December, Cr McFall had made a complaint as to alleged conduct of the Complainant's wife, specifically in respect to what KG had allegedly told the Complainant.
  - c. On 12 February 2021 Cr McFall entered the Complainant's property, drove up his driveway and parked at his house.
  - d. Cr McFall has never before visited the Complainant's property and he was surprised at her presence.
  - e. A person's house is their castle and place of sanctuary and in this current situation KG's only safe place away from the current work conflict.
  - f. The Complainant finds for a councillor to visit for the first time unannounced, extremely provocative and a gross violation of the Councillor Code of Conduct considering the context of the request of disciplinary action against KG and the Complainant's vocal interaction at the Electors meeting three days prior,.
  - g. KG does not work on Friday's which Cr McFall would be aware of and could reasonably expect that KG would be home at this time.
  - h. The purpose of McFall's visit was to discuss Council matters and her actions as a councillor.
  - i. When Cr McFall approached the Complainant at the front of his house she said she would like to have a 'little chat', the Complainant replied that he was not interested in having a chat with her.
  - j. Cr McFall did not take this as a cue to leave and in the brief conversation that followed she refuted some of the Complainant's claims and claimed she had done nothing wrong.
  - k. The Complainant told Cr McFall to leave his property and never return.
  - l. Given the heightened and tense situation at that time and being present at the Electors meeting where the Complainant showed his full support for the CEO and staff at the Shire and concerns with the current councillor behaviour, the

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<sup>7</sup> Section 5.107 and 5.109 of the Act



Complainant finds it a gross misjudgement or a deliberately provocative move to visit his and KG's home.

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

20. By an email dated 26 May 2021, Cr McFall provided a response to the Complaint.
21. Cr McFall denies that she has committed any minor breach.
22. Cr McFall provided the following comments and arguments regarding the Complaint:
  - a. At the recent Electors Meeting the Complainant, along with many other statements called Cr McFall a liar; and said that he tried to call Cr McFall.
  - b. Cr McFall never received his call. After rechecking her phone and checking my phone number on the website I realised he had been using an old number.
  - c. The Complainant's stepfather also spoke against Cr McFall at the Elector's Meeting.
  - d. As Cr McFall doesn't have the Complainant's number Cr McFall thought she could have a chat and try to get to the bottom of his and KG's concerns.
  - e. Cr McFall was met with a very angry Jason Gibbs. She tried to find out which number he had been using to contact her. He told her "*get of my property you lying fucking c###!*" and she left.
  - f. Cr McFall did not and still does not know the days when KG or any other staff member work, it is not her role as a councillor to know such things.
  - g. To this day Cr McFall has not been told how or why she have been targeted for such slanderous accusations.
  - h. Cr McFall asks questions and will keep asking questions in Council. Cr McFall has been to WALGA and seek help on several occasions regarding this issue and followed advice from them.
  - i. Cr McFall has requested WALGA assistance in training on governance for all council members as she feels the information Jason Gibbs was receiving indicated a confidentiality breach, up until this time we had no general audience at council meetings. So this information could only come from the CEO, other council member or her staff.
  - j. Cr McFall is business owner in a very small community, these endless accusations and rumours are taking a toll on her financial, physical and mental health, as she sees it also destroying her once beautiful community.



## Regulation 20

23. Regulation 20 regulates councillors' interactions with local government employees:

### **“ 20. Relationship with local government employees**

(1) *In this clause —*

**local government employee** means a person —

(a) *employed by a local government under section 5.36(1) of the Act;*  
*or*

(b) *engaged by a local government under a contract for services.*

(2) *A council member or candidate must not —*

(a) *direct or attempt to direct a local government employee to do or not to do anything in their capacity as a local government employee; or*

(b) *attempt to influence, by means of a threat or the promise of a reward, the conduct of a local government employee in their capacity as a local government employee; or*

(c) *act in an abusive or threatening manner towards a local government employee.*

(3) *Subclause (2)(a) does not apply to anything that a council member does as part of the deliberations at a council or committee meeting.*

(4) *If a council member or candidate, in their capacity as a council member or candidate, is attending a council or committee meeting or other organised event (for example, a briefing or workshop), the council member or candidate must not orally, in writing or by any other means —*

(a) *make a statement that a local government employee is incompetent or dishonest; or*

(b) *use an offensive or objectionable expression when referring to a local government employee.*

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

24. In this case the Panel considers that the alleged minor breach is of regulation 20(2)(c) of the Regulations.

25. To make a finding of a minor breach of regulation 20(2)(c) of the Regulations the Panel must be satisfied that it is more likely than not that:

a. Cr McFall was a councillor at the time of the alleged breach;

b. Cr McFall acted in an abusive or threatening manner; and

c. the conduct was towards a local government employee as defined in regulation 20(1) of the Regulations.



## **Panel's Consideration**

### **Capacity of Cr McFall as Councillor**

26. Cr McFall was a councillor at the time of the conduct and at the time the Panel considered the matter.
27. This element is met.

### **Cr McFall acted in an abusive or threatening manner**

28. In this case it is conceded that the relevant conduct undertaken by Cr McFall was her visiting the Complainant's house, which is the residence of a Shire employee ("**KG**").
29. In respect to whether the conduct was "*abusive or threatening*" the definitions of "abusive" and "threatening" are respectively as follows:

#### ***"Abusive:***

1. *a. using harsh, insulting language*  
*b: harsh and insulting*  
*c: using or involving physical violence or emotional cruelty*
2. *characterized by wrong or improper use or action<sup>8</sup>*

#### ***"Threatening***

1. *expressing or suggesting a threat of harm, danger, etc.*
  2. *indicating or suggesting the approach of possible trouble or danger<sup>9</sup>*
30. In this case the Panel has not been provided any evidence that would characterise the conduct as abusive, however, the following aspects of the incident categorise the same as "threatening":
    - a. the fact that Cr McFall had recently alleged that KG had engaged in inappropriate conduct and had spoken to the Shire President and Chief Executive Officer regarding the same; and
    - b. the fact that Cr McFall was aware that KG did not wish to speak to Cr McFall personally regarding the issue;
    - c. the relevant place was KG's private residence, where she should be able to feel safe and retain her privacy and Cr McFall should have been reasonably aware that to visit unannounced would be considered an invasion of such privacy and to indicate possible trouble; and

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<sup>8</sup> "Abusive." Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/abusive>. Accessed 7 May. 2021.

<sup>9</sup> "Threatening." Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/threatening>. Accessed 7 May. 2021.



- d. due to the recent conflict between the Complainant and Cr McFall, and the allegation mentioned in paragraph 30.a, it was highly likely that any discussion between the parties would be confrontational.
31. The Panel therefore finds that it is more likely than not that Cr McFall acted in a threatening manner.
32. The Panel further comments that it is entirely inappropriate for an Elected Member to seek out either a Shire employee or a member of the public at their private place of residence in order to discuss a conflict or grievance that relates to local government matters.
33. This element is met.

#### The conduct was towards a local government employee

34. KG is employed as at the Shire and the Panel finds to the required standard that she is a local government Employee as defined in regulations 20(1) of the Regulations.
35. In this case, the relevant Shire employee was not at home when the conduct occurred.
36. Despite this, Cr McFall was aware that KG resided at the place she visited and therefore it was entirely possible, if not likely, that she would be home at the time of the visit.
37. The Panel is also aware that the Complainant and Cr McFall were also in conflict over certain issues. However, due to the prior interactions between the three parties the Panel finds that the conflicts were substantially interrelated and it was more likely than not that Cr McFall intended to confront both the Complainant and KG.
38. As such, the Panel characterises the conduct as being intended to be towards both the Complainant and KG.
39. This element is met.

#### Conclusion

40. The elements required to find a breach of regulation 20(2)(c) of the Regulations have been met.



### **Panel's Findings**

41. Cr McFall did commit a breach of Regulation 20(2)(c) of the Regulations and therefore did commit a minor breach.

### **Signing**

A handwritten signature in black ink, appearing to be 'T Fraser'.

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Tim Fraser (Presiding Member)

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

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Emma Power (Member)

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

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Peter Rogers (Member)



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## Local Government Standards Panel

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Complaint Number	SP 2021-050B
Legislation	<i>Local Government Act 1995 (WA)</i>
<b>Complainant</b>	<b>Mr Jason Gibbs</b>
<b>Respondent</b>	<b>Former Councillor Julie McFall</b>
Local Government	<b>Shire of West Arthur</b>
Regulation	Regulation 20 of the <i>Local Government (Model Code of Conduct) Regulations 2021</i>
Panel Members for Penalty Consideration	Mr Tim Fraser (Presiding Member) Councillor Peter Rogers (Member) Ms Elanor Rowe (Deputy Member)
Heard	5 August 2021 Determined on the documents
Penalty Considered	11 November 2021
Outcome	No Sanction

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### DECISION AND REASONS FOR DECISION

Delivered 11 January 2022

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#### DEFAMATION CAUTION

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## Introduction

1. At its meeting on 5 August 2021, the Panel found that Councillor Julie McFall (“Cr McFall”), a councillor for the Shire of West Arthur (“the Shire”), committed one minor breach under the Local Government Act 1995 (WA) (“the Act”) and Regulation 20(2)(c) of the *Local Government (Model Code of Conduct) Regulations 2021* (“the Regulations”) when she went to the residence of a Shire employee (“Minor Breach”).
2. On 18 August 2021, the Panel published its Finding and Reasons for Finding (“Findings”) stating that Cr McFall had breached Regulation 20(2)(c). The Panel reviewed all the evidence presented to it and made the following observations:
  - “30. *In this case, the Panel has not been provided with any evidence that would characterise the conduct as abusive, however, the following aspects of the incident categorise the same as “threatening”:*
    - a. *the fact that Cr McFall had recently alleged that KG had engaged in inappropriate conduct and had spoken to the Shire President and Chief Executive Officer regarding the same; and*
    - b. *the fact that Cr McFall was aware that KG did not wish to speak to Cr McFall personally regarding the issue;*
    - c. *the relevant place was KG’s private residence, where she should be able to feel safe and retain her privacy and Cr McFall should have been reasonably aware that to visit unannounced would be considered an invasion of such privacy and to indicate possible trouble; and*
    - d. *due to the recent conflict between the Complainant and Cr McFall, and the allegation mentioned in paragraph 30.a, it was highly likely that any discussion between the parties would be confrontational.*
- .....
32. *The Panel further comments that it is entirely inappropriate for an Elected Member to seek out either a Shire employee or a member of the public at their private place of residence in order to discuss a conflict or grievance that relates to local government matters.”*

## Jurisdiction and Law

3. Cr McFall was a councillor at the time of the alleged breach and was still a councillor when the Panel met on 5 August 2021 to consider whether the alleged breach in the Complaint occurred.
4. However, at the time the Panel convened, on 11 November 2021, to consider how it should deal with the Minor Breach, Cr McFall was no longer an elected member of the Shire.
5. Under the Act, if a Panel finds that a council member has committed a breach, it is required to determine how the breach should be dealt with<sup>1</sup>. Therefore, the Panel proceeded to consider how it should deal with the Minor Breach at the meeting on 11 November 2021.

<sup>1</sup> *Local Government Act 1995 (WA)*, s 5.110(6).



## Possible Sanctions

6. 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).*
7. 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 however indicate that in all the circumstances the relevant councillor should not be penalised further.
8. Sub-section 5.110(6)(b)(iv) (in respect of 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.

## Cr McFall's Submissions

9. 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>2</sup>
10. In a letter dated 27 August 2021, Cr McFall was:
- i. notified of the Panel's Finding of the Minor Breach;
  - ii. provided with a copy of the Panel's Findings; and

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<sup>2</sup> *Local Government Act 1995 (WA)*, s 5.110(5).



- 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.

11. On 20 September 2021, the Department received a response from Cr McFall, in which she submitted:

- a. the matter had taken a toll on her;
- b. she had not intended to act in a threatening manner;
- c. a different approach could have been taken in order to resolve the matter;
- d. she became a councillor because she had a passion for supporting local people. However, she now feels disillusioned in local government; and
- e. she has now stood down as a councillor.

### **Panel's Consideration**

12. 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.

13. In this case, the Panel found that Cr McFall breached Regulation 20(2)(c) when she went to the residence of a Shire employee. The subject of the Minor Breach Findings,



was viewed by the Panel as, and considered, a serious matter. On that basis, the Panel considered it reasonable that a penalty may have been warranted.

14. However, as stated above, at the time when the Panel convened to decide how the breach was to be dealt with, Cr McFall had ceased to be an elected member. Therefore, in the circumstances, the Panel finds that the imposition of a penalty would be futile.

### **Panel's Decision**

15. 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)(a) of the Act, is that no sanction is to be imposed against Cr McFall.

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Tim Fraser (Presiding Member)

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Peter Rogers (Member)

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Elanor Rowe (Deputy Member)



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## 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-makers 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."*