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## Local Government Standards Panel

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Complaint Number	20230319
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Councillor Suzanne Thompson</b>
<b>Respondent</b>	<b>Mayor Albert Jacob</b>
<b>Local Government</b>	<b>City of Joondalup</b>
Regulation	Regulation 18(1)(b) of the <i>Local Government (Model Code of Conduct) Regulations 2021</i> Regulation 34D of the <i>Local Government (Administration) Regulations 1996</i>
Panel Members	Mr Tim Fraser (Presiding Member) Ms Elanor Rowe (Deputy Member) Councillor Peter Rogers (Member)
Heard	20 December 2023 Determined on the documents
Outcome	One breach of Regulation 34D No breach of Regulation 18(1)(b)

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### FINDING AND REASONS FOR FINDING

19 January 2024

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#### DEFAMATION CAUTION

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## Summary of the Panel's decision

1. The Local Government Standards Panel ("the Panel") found that Mayor Albert Jacob ("Mayor"), an elected member for the City of Joondalup ("the City") committed one breach under the under the *Local Government Act 1995* (WA) ("the Act") and Regulation 34D of the *Local Government (Administration) Regulations 1996* ("the Administration Regulations") when he used an offensive and objectionable expression towards some of his fellow councillors at a Committee Meeting held on 9 October 2023.
2. The Panel found that Mayor Jacob did not commit a breach of Regulation 18(1)(b) of the *Local Government (Model Code of Conduct) Regulations 2021* in relation to the same conduct.

## Jurisdiction and procedural fairness

3. The Act makes provision for the circumstances in which a council member commits a minor breach.<sup>1</sup>
4. On 3 November 2023, the Department of Local Government, Sport and Cultural Industries ("the Department") received a Complaint of Minor Breach Form ("Complaint"). The Complaint was signed by Councillor Suzanne Thompson, ("the Complainant") and contained one allegation of a breach of Regulation 34D and one allegation of a breach of Regulation 18(1)(b) by Mayor Jacob as summarised at paragraph 1 above.
5. On 7 November 2023, the Department advised Mayor Jacob of the Complaint and invited him to respond. The Department sent Mayor Jacob copies of the original Complaint and all the supporting documents provided by the Complainant.
6. Under the Act the Panel is required to consider a complaint of a minor breach and make a finding as to whether the alleged breach occurred.<sup>2</sup> On 20 December 2023, the Panel convened to consider the Complaint.
7. The Panel:
  - (a) accepted the Department's advice, based on information from the Western Australian Electoral Commission, that Mayor Jacob was a councillor at the time of the alleged breaches, and was still a Councillor when the Panel met on 20 December 2023;
  - (b) was satisfied the Complaint had been made within six months after the alleged breaches are said to have occurred.
  - (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>3</sup>; and

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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> Sections 5.107, 5.108, 5.109 of the Act.



- (d) was satisfied that the Department had provided procedural fairness to Mayor Jacob.
8. 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>4</sup> Mayor Jacob had not previously been found to have committed any breaches of the Regulations. Therefore, the Panel decided to not send the Complaint to the Chief Executive Officer of the Department.
9. Based on the information referred to in paragraphs 2 to 8 above, the Panel found it had jurisdiction to determine whether Mayor Jacob had breached the Regulations in connection with the Complaint.

### **Panel's role**

10. The Panel is not an investigative body. It determines complaints of minor breaches solely upon the evidence presented to it.
11. 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>5</sup>
12. 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>6</sup>
13. 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 34D**

13. Regulation 34D provides:

*“(1) In this regulation –*

*“local law as to conduct” means a local law relating to conduct of people at council or committee meetings.*

*(2) The contravention of a local law as to conduct is a minor breach for the purposes of section 5.105(1)(b) of the Act.”*

14. Section 5.105(1)(b) of the Act states as follows:

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<sup>4</sup> Sections 5.110(2)(b), 5.111(1) of the Act.

<sup>5</sup> Section 5.106 of the Act.

<sup>6</sup> *Bradshaw v McEwens Pty Ltd* (1951) 217 ALR 1, paragraph 5.



*“A council member commits a minor breach if he or she contravenes...*

- (b) a local law under this Act, contravention of which the regulations specify to be a minor breach.”*

### **Regulation 18(1)(b)**

15. Regulation 18(1)(b) provides:

#### ***“18. Securing personal advantage or disadvantaging others***

- (1) A council member must not make improper use of their office –*

*....*

- (b) to cause detriment to the local government or any other person.*

- (2) Subclause (1) does not apply to conduct that contravenes section 5.93 of the Act or The Criminal Code section 83.”*

- a. The Panel decided that the alleged conduct was not conduct that contravened section 5.93 of the Act or section 83 of *The Criminal Code*.

### Elements of Regulation 18(1)(b)

16. In order to find a breach of Regulation 18(1)(b), 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”*

17. 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>7</sup> The Shorter Oxford dictionary definition is “*irregular, wrong; unsuitable, inappropriate; unbecoming, unseemly.*”<sup>8</sup>
18. 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>9</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>10</sup>
19. Under the Act Panel members must have regard to the general interests of local government in Western Australia.<sup>11</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.
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 circumstances and context of the case.<sup>12</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 judgement 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>13</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>14</sup> It includes financial and non-financial loss and adverse treatment, such as humiliation, denigration, intimidation,

<sup>7</sup> Macquarie Dictionary, Revised Third Edition.

<sup>8</sup> Shorter Oxford English Dictionary, Sixth Edition.

<sup>9</sup> *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraph 27, referring to *R v Byrnes* (1995) 183 CLR 501.

<sup>10</sup> *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 9, referring to *Robbins v Harness Racing Board* [1984] VR 641.

<sup>11</sup> Section 5.122(3) of the Act, Schedule 5.1 of the Act, clause 8(6).

<sup>12</sup> *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 10.

<sup>13</sup> *Yates and Local Government Standards Panel* [2012] WASAT 59, paragraph 64, referring to *Treby* 2010.

<sup>14</sup> Macquarie Dictionary Revised Third Edition, 2001.



harassment, discrimination and disadvantage. A person can suffer detriment through others thinking less favourably of them.<sup>15</sup>

23. For Regulation 18(1)(b) to be satisfied it is not necessary to show that the local government or the person concerned actually suffered detriment.<sup>16</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>17</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>18</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.<sup>19</sup>

### **Substance of the Complaint**

25. By way of background, the Complainant explained that on 29 May 2023, a committee (“Committee”) meeting (“May Committee Meeting”) was held to discuss the “*Chief Executive Officer Recruitment and Performance Review*”.
26. At the May Committee Meeting, the Committee received a confidential report outlining the timeline for the Performance Review of the City’s Chief Executive Officer (“CEO”).
27. The recommendation in the report was that the CEO’s Performance Review commence on 29 August 2023. It was clearly outlined and understood that:

#### ***“Annual Salary Review***

*The Contract provides that the annual Salary Review is to be done after the completion of the annual Performance Review. This has usually been done at the same meeting as, and following consideration of, the Concluded Annual Performance Review Report. A separate report is presented to the Committee in relation to this. The intention for the review in 2023 is to continue to follow this process.”*

28. At the May Committee Meeting, the direction to be taken was set out and at no point was any decision made by the Committee to deviate from the approach with regards to the timing of the Salary Review.
29. Following the May Committee Meeting, Council Member feedback was sought and collected by an independent consultant as part of the review process and put into a report (“Report”). However, the Report had not contained all the written comments (“Comments”), but instead was a heavily redacted, edited version of the feedback provided.
30. A further Committee meeting was held on 28 August 2023 (“August Committee Meeting”). At the August Committee meeting, concerns had been raised by some

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<sup>15</sup> *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraphs 31, 32.

<sup>16</sup> *Treby* 2010, paragraph 96, referring to *Chew v The Queen* 1992 CLR 626 (*Chew* 2010).

<sup>17</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>18</sup> *Chew* 2010.

<sup>19</sup> *Treby* 2010.



members of the Committee that the CEO's employment contract was not being followed as prescribed. Some debate ensued and a compromise was sought and agreed to.

31. In addition, it was determined that written Comments from elected members could be provided, but as a compromise the feedback Council Members had previously submitted would be referred back to them. That meant that they could choose to allow their Comments to be shared, with the redaction of information which might be considered to be of a personal or identifying nature.
32. A Committee meeting was then held on 13 September 2023 ("September Committee Meeting"). At the September Committee Meeting, some members of the Committee (including the Complainant) tried and failed to have the "raw" unedited Comments included in the formal Report. An amendment ("Amendment") to formally receive written Elected Member feedback was put forward.
33. Mayor Jacob spoke strongly against the motion. He "*counselled*" the Committee to vote down the Amendment, offering his own amendment (Mayor Jacob's Amendment") to take out the Elected Members' written Comments. Mayor Jacob's Amendment was tied 3/3. As Presiding Member, he used his casting vote "*to prevent the Elected Members written responses from being entered into the record*".
34. The Complainant believed that along with a "*lack of transparency and chain of custody*", keeping the Comments out of the Report prevented the Committee carrying out their role effectively and from completing a full and frank review of the CEO.
35. In spite of the timeline set out and agreed to at the May Committee Meeting, and without consultation or agreement, a Special Meeting of the Committee was then called and held on 9 October 2023 ("October Committee Meeting"). At the time of the October Committee Meeting, two of the Committee Members were on leave. Therefore, their Deputies attended in their place.

### October Committee Meeting

36. At the October Committee Meeting, Mayor Jacob moved the following motion ("Motion"):

CITY OF JOONDALUP - SPECIAL CHIEF EXECUTIVE OFFICER RECRUITMENT  
AND PERFORMANCE REVIEW COMMITTEE MINUTES - 09.10.2023

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OFFICER'S RECOMMENDATION MOVED Mayor Jacob, SECONDED Cr McLean that  
Council BY AN ABSOLUTE MAJORITY:

- 1 ENDORSES the Chief Executive Officer Recruitment and Performance Review Committee's Confidential Concluded Annual Performance Review Report as detailed in Attachment 1 to this Report and the overall rating of "met the performance requirements set by Council for the period ending 30 June 2023";
- 2 ADOPTS the Key Performance Indicators for the 2023-24 review period as detailed in Attachment 2 to this Report.

It was requested that each part of the Motion be voted upon separately.

37. The scope of the October Committee Meeting only allowed Council to conclude the Annual Performance Review, with the Motion simply stating that the CEO had met his performance requirement. Concerns were raised by both Committee Members



and Deputies that the current Committee had not been given the opportunity to complete the Performance Review, and in particular, the Salary Review component. Also, despite the original agreement and timeline, the Committee had not been provided with the agreed upon further report that would enable it to complete the Salary Review.

38. During the October Committee Meeting, concerns raised included:

- The Committee that started the process, was bound to complete it.
- A newly formed Committee, post-election, would not be the same Committee as the current one.
- Since the full comments by Elected Members had not been formally received by the current Committee, the new Committee would not be in possession of the complete material information that should form the basis of the Salary Review.

39. It was suggested that the reason that the Salary Review should not be completed at that time was due to the upcoming Local Government Elections held on 21 October 2023, and it was against the Elections Caretaker Policy for a decision to be made during that period:

#### 4.1. Scheduling Major Policy Decisions

- (1) During a Caretaker Period, unless Extraordinary Circumstances apply, the Chief Executive Officer will reasonably ensure that:
  - (a) a Council Agenda, Committee Agenda or Briefing Session Agenda, does not include reports that constitute Major Policy Decisions
  - (b) Elected Member forums, workshops or Strategy Sessions, do not list for discussion matters that relate to Major Policy Decisions.
- (2) The Chief Executive Officer shall reasonably ensure that, unless Extraordinary Circumstances apply, Major Policy Decisions are either:
  - (a) considered by Council prior to the Caretaker Period
  - or
  - (b) scheduled for determination by the incoming Council.
- (3) The Chief Executive Officer shall reasonably ensure that, unless Extraordinary Circumstances apply, delegated authority from Council to the Chief Executive Officer or a Committee is not exercised where the exercise of that delegated authority relates to a Major Policy Decision or an election campaign issue.

#### 4.3. Chief Executive Officer employment

This policy prohibits Major Policy Decisions relating to the employment, remuneration or termination of the Chief Executive Officer during a Caretaker Period.

Council is however required to fulfil its obligations as the Chief Executive Officer's employer regardless of a Caretaker Period. Therefore, during a Caretaker Period Council may consider and determine:

- (a) Chief Executive Officer's leave applications
- (b) appoint an Acting Chief Executive Officer, where necessary
- (c) suspend the current Chief Executive Officer, where appropriate and in accordance with the terms of their contract.

40. However:

- it was known at the outset of the Performance Review that this would be the case;
- the signing off on Performance and KPIs (as set out in the Motion) should also have been considered Major Policy Decisions, yet those matters had been tabled for a vote nevertheless; and





- previous Committees had set the precedent of completing the Performance and Salary Review during the Caretaker period.

41. When it became clear that the Motion might not be carried, Mayor Jacob became *“enraged and threatening”* towards the Committee.
42. He *“intoned”* that the first part of the Motion *“had better not be voted down”* and that doing so *“would be just the sort of thing that got Local Governments into trouble and Councils stood down”*. Mayor Jacob *“fallaciously framed”* the action of voting down the Motion as meaning that the Committee had failed to do the right thing. He had placed the Committee members in a very difficult position, and he had implied that they had no choice but to vote through the Motion.
43. That was not the case. The Committee was well within its rights to vote no for a motion they did not agree with. At best, Mayor Jacob had offered the Committee poor advice. The Complainant hoped that in voting the *“flawed motion down”*, the Committee could have revisited it and completed the review process as per the agreement. The Complainant believed that *they “were handing over an incomplete record to a future Committee”*.
44. The First Part of the Motion was lost 4/3:

**OFFICER'S RECOMMENDATION MOVED Mayor Jacob, SECONDED Cr McLean that Council BY AN ABSOLUTE MAJORITY:**

- 1 ENDORSES the Chief Executive Officer Recruitment and Performance Review Committee's Confidential Concluded Annual Performance Review Report as detailed in Attachment 1 to this Report and the overall rating of "met the performance requirements set by Council for the period ending 30 June 2023";

**The Motion was Put and LOST (3/4)**

**In favour of the Motion:** Mayor Jacob, Cr Chester and Cr McLean.  
**Against the Motion:** Cr Kingston, Cr Poliwka, Cr Raftis and Cr Thompson.

45. Upon counting the vote for Part One of the Motion, and finding out the result, Mayor Jacob exclaimed:

*“You are all fucked.”*

46. The Complainant believed that Mayor Jacob had called those members who had voted against the Motion, *“stupid”* for not voting as he wished. She found his language objectionable and offensive.
47. He then threw his pen down in anger and aggressively hit the table. There was a slight pause and he said he would put Part Two of the Motion.
48. Subsequently the second vote was put and not carried 5/2:

**OFFICER'S RECOMMENDATION MOVED Mayor Jacob, SECONDED Cr McLean that Council BY AN ABSOLUTE MAJORITY:**

- 2 ADOPTS the Key Performance Indicators for the 2023-24 review period as detailed in Attachment 2 to this Report.

**The Motion was Put and LOST (2/5)**

**In favour of the Motion:** Mayor Jacob and Cr McLean.  
**Against the Motion:** Cr Chester, Cr Kingston, Cr Poliwka, Cr Raftis and Cr Thompson.



49. Mayor Jacob then engaged in a conversation with Director, Governance and Strategy, Mr Jamie Parry (“Director”) and Councillor Russ Fishwick (“Cr Fishwick”), neither of whom were Committee Members.
50. Cr Fishwick expressed a view that failing to complete the Salary Review would be a breach of the CEO’s employment contract.
51. Councillor Daniel Kingston (“Cr Kingston”) attempted to offer his view and enter the discussion. He pointed out that no decision had been made; all that had happened was that the Motion had been lost and at that point, it was not possible to put forward an alternate motion. However, a further Special Committee Meeting could have been called prior to the Local Government Election to address the Performance Review and Annual Salary Review in accordance with the contract, so that the matter could be brought to an orderly close.
52. However, Mayor Jacob interrupted Cr Kingston’s suggestion and closed the meeting without resolving the issue or offering a way forward.

First Allegation: alleged breach of Regulation 34D

53. Standing Order 7.14 (“SO 7.14”) of the City’s *Meeting Procedures Local Law 2013* (“Standing Orders”) provides as follows:

**7.14 Adverse reflection and offensive language**

- (1) A member must not reflect adversely on a decision of the Council or a committee except on a motion that the decision be revoked or changed (see Part 13).
- (2) A member must not -
- (a) reflect adversely on the character or actions of another member or employee;
  - (b) impute any motive to a member or employee; or
  - (c) use an expression that is offensive or objectionable in reference to any other member, employee or other person.

54. The Committee had not voted as Mayor Jacob “*insisted they must*”. By way of response, he had breached SO 7.14 when he:
- a. shouted “*You are all fucked*” to a room of Committee Members;
  - b. threw a pen; and
  - c. slammed a desk.

55. There was no excuse for his behaviour. It was particularly concerning given his role as Presiding Member and Mayor. It set a poor and intimidating example and there was a risk that it might cause Councillors to “*go along with poor decisions for fear of being on the receiving end of such unpleasant behaviour*”.

Second Allegation: alleged breach of Regulation 18(1)(b)

56. Mayor Jacob had misused his office as Mayor and Presiding Member of the Committee and had disadvantaged other members of the Committee. He had prevented them from completing their work in an orderly fashion. He had



unilaterally decided that he would act against the procedure set out and agreed to by the Committee at the May Committee Meeting. Instead, the Performance Review and Salary Review had been separated with the intent to have a new Committee complete the Salary Review.

57. Mayor Jacob had no intention of allowing the current Committee to complete their task. Furthermore, when complaints had been made that the Committee had not been given the opportunity to complete the process, he insisted that he was of the view that the Committee should not carry out the Salary Review during the Caretaker period, even though this had been agreed to back at the May Committee Meeting.
58. Some Committee members had been unwilling to put aside the Salary Review and expressed their wish to complete their work by voting against the Motion. Moreover, the necessary timeline to complete the work could still have been met. However, Mayor Jacob had misrepresented that proposition as being “*disorderly and bringing disrepute to the Council*”. He had put Committee Members at risk of breaching the CEO’s employment contract.
59. Mayor Jacob’s actions resulted in the Committee being prevented from completing their role. Also, the new Committee and Council, would be ill equipped to provide an effective and comprehensive Performance Review.

### **Mayor Jacob’s Response**

55. Mayor Jacob had not accepted the information detailed in the Complaint, nor that he had committed the alleged misconduct. In particular, he submitted that he had not used the words attributed to him. The direct quote conveyed an entirely different meaning to both the intention and the substance of the comments which he expressed to the Committee members.
56. The City’s Officers’ advice and the formal legal advice received by the City aligned with the actions he had taken and the comments which he put forward to his colleagues. At all times he sought and acted upon the advice of the City’s Officers, and consultants as to the correct way to proceed in a manner that was as fair as possible. He had sought to apply that advice as impartially as possible.
57. The Complainant held strong views as to how the process should have run. However, they were not always shared by her colleagues. Six Councillors had withdrawn their “*verbatim comments*” which clearly demonstrated a divergence of opinion amongst Councillors.

### **First Allegation – alleged breach of Regulation 34D**

58. The Complainant alleged that Mayor Jacob had breached regulation 34D in two parts. The first related to the comments which he had made when closing the debate at the October Committee Meeting. The second related to comments made after the vote was taken.

### ***Comments made when closing the debate***

59. The legal advice provided a clear summary of the implications of Clause 18 of the *CEO Recruitment, Performance and Termination Council Policy* (“Policy”). As per



the Policy, it was not open to the Committee to vote down Part One of the Motion. This advice was given to the Committee verbally at the October Committee Meeting by the Director. Mayor Jacob had drawn the Committee's attention to the advice and to the clear wording of the Policy in his closing comments.

60. There was nothing fallacious in the comments he made to that effect. The subsequent legal advice entirely agreed with the position he had put to the Committee. In fact, the Complainant had been "*implacably*" resistant to any advice that she had not wanted to hear.

61. When he made his closing comments, it had become apparent that a majority of the Committee were considering voting the Motion down in direct contravention of Clause 18 of the Policy. Mayor Jacob submitted:

*"I would have been derelict in my duty if I did not point these facts out to the Committee in an attempt to dissuade the majority from making an unlawful decision by voting down the motion".*

*Mayor Jacob's statement after the vote was taken*

62. It was correct that he had made some general comments to the Committee after the vote had been taken that the vote had now placed them all in a very difficult position. Those comments had not been made during the debate.

63. He had not used the form of words which had been directly attributed to him. However, it was correct that he stated that he believed that the decision of the majority of the Committee was "*ill-considered and should not have occurred*". He had been firm and forthright in expressing this view as he believed that the actions taken by the four members who had voted down the Motion had no discernible reason or basis and were contrary to all advice. In some respects, those members had been "*derelict in their duty of care as employers of the CEO*".

64. When a matter was as sensitive as the performance review of the CEO, the responsible course of action was to obtain advice before moving any such Motion. That is what occurred. The Director advised the Committee after the vote that the situation created by the Motion being voted down was highly unusual and risky and that he would need clear legal advice before being able to provide any recommendation.

65. Voting down the Motion:

- was a breach of the Policy;
- exposed the City to entirely unnecessary reputational risk; and
- was an act of bad faith towards the CEO, in circumstances where the clear majority of the Council as a whole had empirically agreed that he had met the KPIs which the Council had set.

66. Some of the members who had voted the Motion down had stated during debate that they understood that the Committee had an obligation to agree that the CEO had met the Council's expectations based upon the qualitative feedback of the



Council. Unfortunately, a trend had developed over the past year or more where these four Councillors essentially voted as a block, which they did in this case.

67. Furthermore, Mayor Jacob submitted:

- a. The prohibition in SO7.14(1) was not absolute and that the rule allowed for adverse reflection to occur in a private or confidential setting amongst Councillors. The rule was clearly directed to public adverse reflections.
- b. The provision permitted adverse reflection if “*on a motion that the decision be revoked or changed*”.
- c. In the alternative, in voting down the Motion at the October Committee Meeting, it was not a decision that was open to the Committee to make and therefore it was a nullity. Therefore, SO7.14(1) was not enlivened because there was no decision to have been adversely reflected upon.
- d. As a matter of practicality, SO13.4 required that any motion to rescind be signed by at least five members of the Council.

#### Second Allegation – alleged breach of Regulation 18(1)(b)

68. Mere disagreement did not amount to detriment.

69. The actions of the Complainant and the other members who had voted against the Motion, had placed the Council in an “*invidious*” position.

70. As both Mayor and the Chair of the Performance Review Committee, he had a statutory responsibility to provide leadership. On occasion, that necessarily involved clearly advising his colleagues that their actions were not appropriate. Some elected members responded better than others to such advice.

71. He had simply attempted to enlist the support of colleagues to correct a serious breach of good faith by the Committee, as was the case here.

72. The key question was whether a Mayor had the freedom (and the duty) in a confidential and private setting to clearly communicate to their colleagues when they had fallen into error. It had been his responsibility to do that.

#### **Panel’s Consideration**

##### First Allegation – alleged breach of Regulation 34D

73. Based on the evidence before it, the Panel is satisfied that Mayor Jacob breached Regulation 34D at the October Committee Meeting:

##### *The conduct occurred at a council or committee meeting*

- a. The alleged conduct occurred at the October Committee Meeting, at which the CEO’s Performance Review was discussed. This element is satisfied.

##### *A local law relating to conduct applied at the meeting*



- b. Under the Act a local government can make “*local laws*”, including laws that are necessary or convenient to enable the local government to perform its functions. Under the Act and Regulation 34D of the *Local Government (Administration) Regulations 1996*, a council member who contravenes a “*local law as to conduct*” commits a minor breach. A “*local law as to conduct*” includes a local law about the conduct of councillors at meetings.
- c. The City’s Standing Orders is a local law that applied at the October Committee Meeting.

*There was a contravention of a local law*

- d. SO7.14(1) states:

*“A member must not reflect adversely on a decision of the Council or a committee except on a motion that the decision be revoked or changed.”*

- e. SO7.14(2) states:

*“A member must not....use an expression that is offensive or objectionable in reference to any other member, employee or other person.”*

- f. The Complainant alleged that Mayor Jacob had breached SO7.14 specifically when he had:
  - i. shouted “*You are all fucked*” to the room of Committee Members;
  - ii. threw a pen; and
  - iii. slammed a desk.
- g. Mayor Jacob denied that he had used the words attributed to him. However, in support of the Complaint, the Complainant included a written statement by Cr Poliwka that corroborated her version of events. An extract from Cr Poliwka’s statement is below:

I was in attendance at that meeting at the time of the incident, in my role as Deputy Committee Member, as the Minutes [reflect](#).

I write specifically to report the Contravention of Regulation 34D by Mayor Albert Jacob. The clear breach of the City’s Gazetted [Meeting Procedures Local Law 7.14](#) occurred when a vote did not go the Mayor’s way. At that point he threw his pen down, slammed the table and exclaimed: “You are all fucked!”

- h. In this case, and based on the evidence before it, the Panel finds it more likely than not that Mayor Jacob had acted as alleged (and set out at paragraph 73(f) above).
- i. With regard to SO7.14(1), a decision had just been made by the Committee in relation to Part One of the Motion when Mayor Jacob had his outburst. By saying “*You are all fucked*” he clearly showed his lack of approval for how certain members had voted and expressed his opinion that the decision was entirely wrong. He did so through both his words and physical actions.



- j. With regard to SO7.14(2), Mayor Jacob's conduct was undoubtedly both offensive and objectionable. He had not only used foul language towards his fellow councillors and swore at them, but he had also stated that there would be seriously negative consequences for those members who had voted against the First Part of the Motion. His conduct was aggressive, rude and highly disrespectful.

## **Findings**

74. Accordingly, for the above reasons, the Panel finds that Mayor Jacob did breach Regulation 34D in relation to the Complaint.

### Second Allegation – alleged breach of Regulation 18(1)(b)

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

#### *Whether Mayor Jacob acted improperly (fourth element)*

76. The Panel is satisfied that Mayor Jacob acted improperly at the October Committee Meeting:

- a. The Panel has already found that Mayor Jacob breached Regulation 34D and SO7.14. It repeats its Findings at paragraphs 73(f) – (j) above.
- b. In addition, the CEO performance management process was clearly a serious one and there had been disagreement on a number of matters. However, the ability to communicate and debate while actively participating in meetings is one of the core duties of elected members. They also need to be able to develop and maintain effective working relationships.
- c. Mayor Jacob, as both Mayor and the Chair of the Performance Review Committee, held a pivotal role throughout the process and at the October Committee Meeting itself. He showed a total lack of respect for his fellow councillors when he shouted at them and told them they were “*all fucked*” following the vote on Part One of the Motion.
- d. Moreover, Council and committee members have the right to access and request information on matters that are relevant to their functions. Members of the Committee had been appointed and were authorised to carry out the CEO's Performance Review. Some of the members sought further information which they believed was required to be able to complete the task, and that is why they had voted against the Motion. That was their prerogative and even if Mayor Jacob vehemently disagreed, he was still under a duty to act in an appropriate manner and show due restraint.
- e. This element is satisfied.

#### *Whether Mayor Jacob intended to cause a detriment to any party (fifth element)*

77. The Panel is not satisfied that Mayor Jacob intended to cause a detriment to any party at the October Committee Meeting:



- a. As already stated, the CEO performance management process was a sensitive matter and various members of the Committee held strong opinions on what the correct course of action was.
- b. Although Mayor Jacob's actions were wrongful, the Panel is not persuaded that he intended to cause the other Committee members a detriment when he acted as he had. The evidence provided supported Mayor Jacob's submission that he had acted on the advice of the City's Officers and consultants as to the correct way to proceed.
- c. It was clear that he believed the Motion needed to be passed and that he genuinely believed it was his duty to dissuade the Committee from making what he deemed "*an unlawful decision*". Finally, the Panel finds it more likely than not that his intention was to be "*as fair as possible*" to the CEO and follow what he believed was the proper process which was in everyone's best interests.
- d. This element is not satisfied.

### **Findings**

78. 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.

79. Accordingly, for the above reasons, the Panel finds that Mayor Jacob had not breached Regulation 18(1)(b) in relation to the Complaint.

### **Signing**

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Tim Fraser (Presiding Member)

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Elanor Rowe (Deputy Member)

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Peter Rogers (Deputy Member)





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## Local Government Standards Panel

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Complaint Number	20230319
Legislation	<i>Local Government Act 1995 (WA)</i>
<b>Complainant</b>	<b>Ms Suzanne Thompson</b>
<b>Respondent</b>	<b>Mayor Albert Jacob</b>
Local Government	<b>City of Joondalup</b>
Regulation	Regulation 34D of the <i>Local Government (Administration) Regulations 1996</i>
Panel Members for Penalty Consideration	Tim Fraser (Presiding Member) Ms Emma Power (Member) Mr Peter Rogers (Member)
Heard	20 December 2023 Determined on the documents
Penalty Considered	23 February 2023
Outcome	Public Apology

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### DECISION AND REASONS FOR DECISION

27 February 2024

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#### DEFAMATION CAUTION

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## Introduction

1. At its meeting on 20 December 2023, the Panel found that Mayor Albert Jacob, the Mayor of the City of Joondalup (**“the City”**), committed a minor breach under the *Local Government Act 1995 (WA)* (**“the Act”**) and regulation 34D of the *Local Government (Administration) Regulations 1996* (**“the Administration Regulations”**) when he used an offensive and objectionable expression towards some of his fellow councillors at a Committee Meeting held 9 October 2023 (**“the Minor Breach”**).

## Jurisdiction and Law

2. The Panel convened on 23 January 2024 to consider how it should deal with the Minor Breaches.
3. The Panel accepted the advice of the Department of Local Government, Sport and Cultural Industries (**“the Department”**) that on this date there was no available information to indicate that Mayor Jacob had ceased to be, or was disqualified from being a councillor.
4. If the Panel finds that a councillor has committed a minor breach, it must give the councillor an opportunity to make submissions to the Panel about how it should deal with the breach under section 5.110(6).<sup>1</sup>
5. By a letter dated 19 January 2024, Mayor Jacob was:
  - a. notified of the Panel’s finding of the Minor Breaches.
  - b. provided with a copy of the Panel’s Finding and Reasons for Finding; and
  - c. offered an opportunity to make submissions as to how the Minor Breaches should be dealt with under section 5.110(6) of the *Act*.

## Possible Sanctions

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

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



(iv) *the person against whom the complaint was made pay to the local government specified in the order an amount equal to the amount of remuneration and allowances payable by the local government in relation to the complaint under Schedule 5.1 clause 9;*

*or*

(c) *ordering 2 or more of the sanctions described in paragraph (b).*

### **Mayor Jacob's Submissions**

7. By an email dated 16 February 2024 the Department received a response from Mayor Jacob.
8. Mayor Jacob provided the following comments and arguments, as summarised by the Panel:
  - a. Mayor Jacob deeply regrets his verbal outburst. His outburst was out of character and falls below the standard of conduct that he expects of myself.
  - b. Although it is no excuse, the Mayor Jacob was navigating significant personal/family difficulty that week.
  - c. Mayor Jacob has booked himself in for counselling sessions via the City's Employee Assistance Program to better equip him to handle the pressures of public office, especially in times when these pressures are compounded by outside challenges. These sessions will continue irrespective of the outcome of this Complaint.
  - d. Mayor Jacob submits that an apology is an appropriate sanction for his actions for the following reasons:
    - i. As per the Panel's findings there was no intent to cause detriment to Mayor Jacob's committee colleagues, his motivation was to ensure a fair and proper process for the Council's employee, the CEO.
    - ii. As inappropriate as Mayor Jacob's actions were, the absence of intent to cause detriment supports an apology the most appropriate sanction in this matter.
    - iii. the CEO's experience and recollection of the meeting at indicate that he believed the Committee's actions were not a fair treatment of him as an employee are reinforced by the Panel's findings.
    - iv. The minor breach would better fit under Division 3 of the rules of conduct, due to the similar operation of Regulation 34D. Mayor Jacob therefore submits that the sanctions appropriate to a breach of Division 3 would be appropriate.
    - v. There remains a divergence of recollection as to what occurred. However, Mayor Jacob believes that fairness to himself requires an acceptance that there is a divergence of recollection as to what my actions were and that there are reasonable doubts as to several of the claims made by the Complainant. In accepting that his actions were nonetheless wrongful, Mayor Jacob again submits that an apology is the most appropriate sanction.



9. As the Panel is not able to reconsider its decision as to a breach at this stage of proceedings, the Panel has not included Mayor Jacob's comments as to the initial finding here.

### **Panel's Discretion**

10. The Panel further notes that the Complainant has raised the issue of this matter not being referred to the Department CEO as a recurrent breach under section 5.111 of the Act.
11. It is noted that Mayor Jacob did have two prior minor breach findings for conduct occurring in 2021 under the prior Regulations.
12. It is solely within the discretion of the Panel as to whether a matter is to be referred to the Departmental CEO. The Panel exercises this discretion rarely.
13. There are several factors that the Panel considers in the referral of a matter including, but not limited to, the number of prior breaches, the length of time between the breaches as well as the nature and seriousness of the alleged breaches.
14. In this case, the Panel did not consider that the Complaint was of a nature that was appropriate to be referred to the Departmental CEO.

### **Panel's Consideration**

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



- i. any other matters which may be regarded as aggravating conduct or mitigating its seriousness<sup>2</sup>.
18. In this case the Panel notes that Mayor Jacob has shown insight and remorse as to his conduct.
19. Further the Panel accepts that Mayor was under considerable personal pressure at the time of the outburst and that there was no intention to determine any of his colleagues.
20. Despite this, the Panel comments that certain of Mayor Jacob's arguments are misconceived.
21. Any similarity between a minor breach under regulation 34D of the Administration Regulations and a Division 3 code of conduct breach are irrelevant. The same comprises two separate types of possible breaches that are dealt with in different ways, and with different possible penalties, under the Act.
22. Further, the Panel has already found that it was "more likely than not" that the conduct occurred as alleged. In any event, it is undisputed that there was an inappropriate outburst by Mayor Jacob, using profanity, and mere disagreement as to the exact wording used is not a matter that is of particular relevance to sanction.
23. In this case, the Panel considers that a public apology is an appropriate sanction.
24. Making a public apology is a significant sanction, being a personal admission by the individual of wrongdoing<sup>3</sup>. It is a suitable and appropriate penalty when a councillor's conduct:
  - a. adversely affects particular individuals<sup>4</sup>; and/or
  - b. does not meet the standards other councillors seek to uphold.
25. In the relevant circumstances, the Panel considers that making a public apology is an adequate sanction and that it is not necessary to make an order in accordance with Schedule 5.1 clause 9 of the Act that Mayor Jacob recoup to the City the costs of the Department incurred with respect to the Complaint.

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

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

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



### Panel's decision

26. The Panel orders pursuant to section 5.110(6)(b)(ii) of the Act that, in relation to the one Minor Breach of regulation 34D of the Administration Regulations, Mayor Jacob make a public apology in terms of the attached Order.

### 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 (Deputy Member)



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## ORDER

27 February 2024

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### THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Mayor Albert Jacob, a councillor for the City of Joondalup **publicly apologises** as specified in paragraph 3; OR
2. Failing compliance with paragraph 3 within the specified timeframe, then paragraph 4 shall apply.

### Public Apology

3. On the ordinary council meeting of the City of Joondalup first occurring after the expiration of **28 days** from the date of service of this Order on him, Mayor Jacob shall:
  - i. attend the relevant ordinary council meeting;
  - ii. ask the presiding person, or acting presiding person, for his or her permission to address the meeting to make a public apology to the public;
  - iii. 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
  - iv. 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 Regulation 34D of the *Local Government (Administration) Regulations 1996*, when, during a Committee Meeting of 9 October 2023, I used an offensive and objectionable expression.
- ii. The Panel found that I breached Regulation 34D by my conduct.
- iii. I acknowledge that I should have not made the comment and I now apologise to my fellow councillors."



4. If Mayor Jacob fails to, or is unable to, comply with the requirements of paragraph 3 above in the required time frame THEN, within the next **28 days** following the ordinary council meeting referred to in paragraph 3 above the Chief Executive Officer of the City of Joondalup shall arrange for the notice of public apology to be published:
  - a. on the Facebook Page of the City of Joondalup shall be in no less than 10-point font size; and
  - b. in an appropriate place on the website of the City of Joondalup shall in no less than 10 point font size; and
  - c. in the next occurring issue of any City of Joondalup shall public newsletter (if any) whether in electronic or print copy) in no less than 10-point font size.

**PUBLIC APOLOGY BY MAYOR ALBERT JACOB**

A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened Regulation 34D of the Local Government (Administration) Regulations 1996, when, during a Committee Meeting of 9 October 2023, I used an offensive and objectionable expression.

The Panel found that I breached Regulation 34D by my conduct.

I acknowledge that I should have not made the comment and I now apologise to my fellow councillors.

**Appeal**

5. In the event that, prior to the date for compliance with the above Orders, Mayor Jacob:
  - a. commences an appeal the decision of the Standards Panel to the State Administrative Tribunal in accordance with section 5.125 of the Local Government Act 1995; and
  - b. notifies the Complaints Officer of such appeal in writing,THEN:
  - c. compliance with the above Orders may be delayed until the State Administrative Tribunal has made a finding in respect to the decision; and
  - d. such Orders may be amended by an order of the State Administrative Tribunal.





## 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.”*