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## Local Government Standards Panel

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Complaint Number	SP 2020-039
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Ms Barbara Freeman</b>
<b>Respondent</b>	<b>Councillor Michael Separovich</b>
<b>Local Government</b>	<b>City of Cockburn</b>
Regulation	Regulation 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Mr Michael Connolly (Presiding Member) Ms Elanor Rowe (Deputy Member) Councillor Deborah Hopper (Deputy Member)
Heard	4 September 2020 Determined on the documents
Outcome	One breach of Regulation 7(1)(b)

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### FINDING AND REASONS FOR FINDING

Published 6 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. The Local Government Standards Panel ("the Panel") found that Councillor Michael Separovich ("Cr Separovich"), a councillor for the City of Cockburn ("the City") committed one breach under the *Local Government Act 1995 (WA)* ("the Act") and regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* ("the Regulations") when he reposted a photo of the British Royal Family along with an inappropriate comment, on the Melville Community Chat page, in or around 26 January 2020.

## Jurisdiction and procedural fairness

2. The Act makes provision for the circumstances in which a council member commits a minor breach.<sup>1</sup>
3. On 29 May 2020, the Department of Local Government, Sport and Cultural Industries ("the Department") received a Complaint of Minor Breach Form dated 28 May 2020 ("Complaint"). The Complaint was signed by Ms Barbara Freeman ("the Complainant") and contained one allegation of a breach of Regulation 7(1)(b) by Cr Separovich when he reposted a photo of the British Royal Family along with an inappropriate comment, on the Melville Community Chat page, in or around 26 January 2020.
4. On 4 June 2020, the Department advised Cr Separovich of the Complaint and invited him to respond. The Department sent Cr Separovich a copy of the original Complaint and all the supporting documents provided by the Complainant.
5. Under the Act the Panel is required to consider a complaint of a minor breach and make a finding as to whether the alleged breach occurred.<sup>2</sup> On 4 September 2020 the Panel convened to consider the Complaint.
6. The Panel:
  - (a) accepted the Department's advice, based on information from the Western Australian Electoral Commission, that Cr Separovich was a councillor at the time of the alleged breach, having been elected on 21 October 2017, and was still a Councillor when the Panel met on 4 September 2020;
  - (b) was satisfied the Complaint had been made within six months after the alleged breach is said to have occurred<sup>3</sup>;
  - (c) was satisfied the Complaint had been dealt with in accordance with the administrative requirements in the Act for dealing with complaints of minor breaches<sup>4</sup>; and
  - (d) was satisfied that the Department had provided procedural fairness to Cr Separovich.

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

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

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

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



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

### **Panel's role**

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

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

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

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

*(1) A person who is a council member must not make improper use of the person's office as a council member –*

*.....*

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

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

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

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

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



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

Elements of Regulation 7(1)(b)

15. In order to find a breach of Regulation 7(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"*

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

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

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

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

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



*as so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty.”<sup>11</sup>*

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

Fifth element - meaning of “to cause detriment to the local government or any other person”

*Detriment*

22. “*Detriment*” means loss, damage or injury.<sup>16</sup> It includes financial and non-financial loss and adverse treatment, such as humiliation, denigration, intimidation, harassment, discrimination and disadvantage. A person can suffer detriment through others thinking less favourably of them.<sup>17</sup>
23. For regulation 7(1)(b) to be satisfied it is not necessary to show that the local government or the person concerned actually suffered detriment.<sup>18</sup> However it is not enough to show that the local government or the person concerned suffered detriment, or could have suffered detriment. The Panel must find that it is more likely than not that the councillor believed that his or her actions would cause detriment and intended to cause detriment.<sup>19</sup>

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

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

<sup>13</sup> Regulation 3.

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

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

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

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

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

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

24. “*To cause detriment*” has been interpreted as meaning “*in order to*” or “*for the purpose of*” causing detriment, or “*with the will to*” cause detriment.<sup>20</sup> There can be a finding of intent if, after considering all the evidence, the only reasonable inference is that the councillor intended to cause detriment.

### Substance of the Complaint

25. In or around 26 January 2020, Cr Separovich published a Facebook post (“Facebook Post”) on the Melville Community Chat Page (“Community Chat Page”) depicting a photograph of some members of the British Royal Family along with the following caption:

*“I HEREBY ACKNOWLEDGE THE TRADITIONAL OWNERS OF THE LAND ON WHICH WE MEET...”*

26. A copy of the Facebook Post is as follows:



27. Cr Separovich introduced the Facebook Post with the following comment:

*“.....heres a spicy one for you while you enjoy the fireworks.”*

28. On 17 February 2020, a meeting of the City’s Reconciliation Action Plan Steering Group (“Steering Group”) was held, and the Facebook Post was discussed amongst its members. In particular, the Facebook Post had offended some aboriginal members of the Steering Group and caused several people to question the commitment of the City towards addressing genuine reconciliation with the indigenous community.
29. While the City continues to celebrate Australia Day, as it did on 26 January 2020, it does so with the support of a significant number of indigenous people, who choose to join the City, in providing a number of events on the day, to exemplify the spirit of tolerance and togetherness.
30. It is also an acknowledgement that there is some level of acceptance amongst the Cockburn community of Australia Day being a celebration for all Australians, including those of indigenous and non-indigenous heritage.

<sup>20</sup> Chew 2010.



31. Unfortunately, the ill-conceived and highly questionable Facebook Post threatened to set back the hard-won progress of the City and others who are seeking to make improvements and take steps towards achieving the idea of reconciliation.
32. This is not the first time that Cr Separovich has caused offence of some sort to indigenous Australians. Clear evidence can be found in the many derogatory and inflammatory comments he made in the past using social media, that are disrespectful and insensitive towards aboriginal people.
33. It is clear, that Cr Separovich published the Facebook Post with the intent to rile the feelings of community members and cause an emotive social media response, without any consideration to the potential distress that his actions would cause. It is important to note that the deeply hurtful statements were not only being felt by members of the aboriginal community, but also City staff who objected to this level of poor and unacceptable public behaviour by a councillor and who had to defend the City's position.
34. In summary, it is disappointing that an elected City official would publicly show such callous and contemptuous disregard for the City's and Council's established strong level of commitment to indigenous relations, as demonstrated through its adoption of the Reconciliation Action Plan ("RAP").

### **Cr Separovich's Response**

35. Cr Separovich submitted that the Facebook page on which he published the Facebook Post is a personal page with private security settings. The page is not used by him in his capacity as a councillor and he does not speak on behalf of the Council on the page. He has gone so far as to not include his occupation on the page, instead listing it as "*professional troll*".
36. He held the page for many years prior to being elected, and he will continue to hold it for many years after leaving office. The people who have complained against him have been angered by what he has said and are attempting to get him fired. However, it has nothing to do with local government.

### **Panel's Consideration**

#### *First and second elements satisfied*

37. The Panel finds that Cr Separovich engaged in the conduct which is the subject of the Complaint and that he was a councillor at all relevant times. The First and second elements of Regulation 7(1)(b) are established in relation to the Facebook Post.

#### *Third element*

38. The third element requires that 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) while engaging in the conduct. Cr Separovich denied that he was acting in his capacity as a councillor when he published the Facebook Post on his personal Facebook page.



39. It is common for Councillors to have official Facebook or other social media pages, in which they are identified as councillors and the pages are predominantly about their work as councillors. Councillors frequently also have personal or family Facebook (or other social media) pages that are used solely or predominantly for private purposes. It appears that Cr Separovich had both such accounts.
40. The Panel finds that in this case, Cr Separovich's online activity using his "*personal*" Facebook page to publish the Facebook Post on the Community Chat Page, could nevertheless be easily identified as his and associated with him, in his role as a councillor and a leader in the community. Members of the community were clearly able to view the Facebook Post and engage in conversation with Cr Separovich (who they would have easily recognised as an elected member). It is inherent to the role of a councillor to communicate with members of the public and Cr Separovich discussed a highly relevant and topical issue publicly online in the Facebook Post. Cr Separovich could not divest himself of his public persona (as a councillor) simply by alternatively using his personal Facebook account to do so.
41. Furthermore, the City's Code of Conduct 2018 ("Code") directly addresses the issue of elected members personal social media accounts and how they are to be regarded. Section 5.2(a) of the Code states:
- "Elected Members are responsible for the content they publish in a personal capacity on any form of social media platform and in this regard must understand their legal obligations.*
- The speed and reach of publishing online means content is available immediately to a wide audience. Anything posted can be difficult to delete and may be replicated, misconstrued and seen by people the author never intended or expected would see it.*
- Elected Members must recognize the potential damage that may be caused to the City through inappropriate use of social media. Accordingly, Elected Members should comply with this guideline to ensure that the risk of such damage is minimized, including potential action against an Elected Member under the Local Government (Rules of Conduct) Regulations 2007.*
- As civic leaders, Elected Members must comply with the requirements of the Local Government Act 1995 and the Local Government (Rules of Conduct) Regulations 2007 and such obligations extend to when Elected Members use social media to communicate with the community."*
42. Therefore, while Cr Separovich submitted that there was a clear distinction between his use of his personal and his council related social media accounts, the Code clearly states that his obligations as an Elected Member extend to whenever he uses social media to communicate with the community.
43. It is unrealistic to believe that when members of the community viewed Cr Separovich's Facebook Post, they would have seen him in any other role than that of a local councillor, or were able to distinguish between whether, he was speaking in an official capacity or a personal one. Therefore, the Panel finds that the third element has been established and that Cr Separovich was likewise acting as a councillor when he published the Facebook Post on his personal Facebook page.

*Whether Cr Separovich acted improperly (fourth element)*

44. Based on the evidence before it, the Panel is satisfied that the fourth element has been established in relation to the Complaint and finds that Cr Separovich did act





improperly. The Panel makes this finding because it is satisfied to the required standard of proof that a reasonable person would consider that Cr Separovich did not meet the standards of conduct expected of a councillor when he published the Facebook Post:

- a. Regulation 3 sets out general principles to guide the behaviour of council members and provides an indication of the standards which can reasonably be expected of councillors. These include: to act with reasonable care and diligence<sup>21</sup>; to act with honesty and integrity<sup>22</sup>; to avoid damage to the reputation of the local government<sup>23</sup>; and to treat others with respect and fairness<sup>24</sup>. The Panel finds that Cr Separovich's conduct fell well below the standard of behaviour expected of elected members when he published the Facebook Post:
- b. In the Facebook Post, Cr Separovich referred to Australia's official national day of celebration held on 26 January every year. The topic is a very controversial one, and there is much criticism of it from those who say that it is a day that causes unfair hurt to indigenous people.
- c. Cr Separovich opened the Facebook Post (which was published just prior to the main fireworks event) with the following menacing and sinister statement:

*"heres a spicy one for you while you enjoy the fireworks."*

- d. The Facebook Post also contained the following sarcastic comment (above a picture of the British Royal Family):

*"I hereby acknowledge the traditional owners of the land on which we meet."*

The above comment was totally disrespectful and rude, and it was highly inappropriate of Cr Separovich to undermine the seriousness of the issue by mocking and making fun of it.

- e. It would have been clear to Cr Separovich that many people would have found the Facebook Post offensive. Yet the tone of his comments suggested that he drew enjoyment from hurting other peoples' feelings. The Complainant attached a copy of a series of emails ("Emails") involving the City's Manager Community Development ("Manager") that were sent subsequently to the publication of the Facebook Post. The Manager had been made aware of the concerns that had been raised at the Steering Group Meeting on 17 February 2020, by various parties, in relation to the Facebook Post, who had found it "*extremely offensive*" and "*were embarrassed and saddened*" by it.
- f. It was wholly reckless of Cr Separovich to joke about such an issue (on or just prior to Australia Day itself) and regardless of the point he was trying to make, the manner that he chose to make it in publicly, as a person holding the position of a Councillor, was indefensible.

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<sup>21</sup> Regulation 3(1)(a)

<sup>22</sup> Regulation 3(1)(b)

<sup>23</sup> Regulation 3(1)(d)

<sup>24</sup> Regulation 3(1)(g)



- g. Cr Separovich also showed total disregard for the feelings and views of the community. As a leader of the community there is no sense in the Facebook Post of Cr Separovich making attempts to heal tension at such a highly charged time or calm any concerns of the community. Rather, it appears that he simply wished to aggravate and ignite any potential issues. The discussion was not conducted in either an appropriate or conducive manner.

### *Summary*

- h. The Panel finds that Cr Separovich displayed a fundamental and clear lack of respect and sensitivity when speaking to the community about a highly controversial and topical issue. Councillors may well wish to initiate interesting and productive conversations with members of the public. However, the Facebook Post was simply degrading and rude. It went far beyond being a tongue-in cheek or satirical commentary and it was not an acceptable way to open-up a dialogue with the community.
- i. The Panel also finds that Cr Separovich breached section 5 of the City's Code that states that when using social media, elected members must:
- be polite and respectful to all people they interact with; and
  - avoid making any comment or post any material that might otherwise cause damage to other persons or bring the City's reputation into question.

By engaging in such disrespectful and inappropriate commentary, Cr Separovich breached the trust placed in him as a councillor. In publishing the Facebook Post, he would inevitably have caused distrust, uncertainty and doubts amongst the community as to the integrity of their elected members.

- j. Cr Separovich's comments also compromised his capacity to perform his duties as an elected member in an independent and unbiased manner. The issue of the Australia Day celebration could well have come to the attention of the Council at a later date. Councillors make a decision when deciding to run for public office. If successful, and in accepting the position, they also choose to take on the obligations that are inherent in being an elected representative. Cr Separovich's online conduct reflected adversely on his role as a councillor and as a leader in his community. He behaved in a way which contradicted and undermined the City's and local government's principles and values, such as meaningful community engagement, social inclusion and ethical behaviour.

45. Based on the evidence before it, the Panel finds that Cr Separovich breached the standards expected of an elected member. His actions were so wrongful, highly offensive and deeply inappropriate that they call for the imposition of a penalty.

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



46. The Panel is satisfied that the fifth element has been established and that Cr Separovich intended to cause detriment to the City, the Council and the community when he published the Facebook Post:

- a. The Facebook Post related to the controversial topic of Australia Day and Cr Separovich published it on (or just before) 26 January 2020, itself. The Facebook Post was disrespectful, rude and sarcastic as well as inflammatory and potentially very harmful. The timing of the publication of the post was particularly pertinent, as it would inevitably have increased the level of damage it would cause. Although it appears that Cr Separovich copied some of the content of the Facebook Post from a third party, he was nevertheless responsible for its republication on the Community Chat Page.
- b. It is clear, that Cr Separovich intended to actively and openly, engage with members of the public when he published the Facebook Post. The Panel also finds it more likely than not that he wished to provoke a negative reaction (which he acknowledged when he stated):

*“heres a spicy one for you while you enjoy the fireworks.”*

It was a deliberately barbed comment and one that would further inflame tension.

- c. It is evident from the City’s website, that the City and the Council has worked to strengthen relationships with Aboriginal and Torres Strait Islander community members who live, work or are actively involved in the City’s community. Cr Separovich would have undoubtedly been aware that the Facebook Post would likely cause damage to the reputation of the City and its work towards reconciliation with the First Peoples of Australia. Therefore, it is unnerving that he still chose to publish it regardless, and the only reasonable conclusion was that he intended to undermine the City’s efforts, as well as to cause hurt and distress to members of the community. Damage was inevitably caused (as evidenced in the Emails), with people in the wider community asking questions as to whether Cr Separovich’s comments were representative of *“the City of Cockburn’s way”*.
  - d. By insulting people and talking about such a serious issue in an extremely insensitive manner, he would inevitably have caused feelings of anger and frustration as well as hurt and distress amongst community members.
47. In the circumstances, and based on the evidence before it, the Panel finds to the required standard of proof, that Cr Separovich intended to cause detriment to the City, the Council and the community when he published the Facebook Post.



## Findings

48. Accordingly, for the above reasons, the Panel finds that Cr Separovich did breach Regulation 7(1)(b)

  
Mick Connolly (Presiding Member)

  
Elanor Rowe (Deputy Member)

  
Deborah Hopper (Deputy Member)



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## Local Government Standards Panel

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Complaint Number	SP 2020-039
Legislation	<i>Local Government Act 1995 (WA)</i>
<b>Complainant</b>	<b>Ms Barbara Freeman</b>
<b>Respondent</b>	<b>Councillor Michael Separovich</b>
Local Government	<b>City of Cockburn</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 Deborah Hopper (Deputy Member) Ms Elanor Rowe (Deputy Member)
Heard	4 September 2020 Determined on the documents
Penalty Considered	16 December 2020
Outcome	Training

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### DECISION AND REASONS FOR DECISION

Delivered 1 February 2021

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#### DEFAMATION CAUTION

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## Introduction

1. At its meeting on 4 September 2020, the Panel found that Councillor Michael Separovich (“Cr Separovich”), a councillor for the City of Cockburn (“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 reposted a photograph of the British Royal Family along with an inappropriate comment, on the Melville Community Chat page, in or around 26 January 2020 (“Minor Breach”).
2. On 6 November 2020, the Panel published its Finding and Reasons for Finding (“Findings”) stating that Cr Separovich had breached Regulation 7(1)(b). The Panel reviewed all the evidence presented to it and made the following observations:

“41 Furthermore, the City’s Code of Conduct 2018 (“Code”) directly addresses the issue of elected members personal social media accounts and how they are to be regarded. Section 5.2(a) of the Code states:

*“Elected Members are responsible for the content they publish in a personal capacity on any form of social media platform and in this regard must understand their legal obligations.”*

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.....

- h. *The Panel finds that Cr Separovich displayed a fundamental and clear lack of respect and sensitivity when speaking to the community about a highly controversial and topical issue. Councillors may well wish to initiate interesting and productive conversations with members of the public. However, the Facebook Post was simply degrading and rude. It went far beyond being a tongue-in-cheek or satirical commentary and it was not an acceptable way to open-up a dialogue with the community.*
- i. *...By engaging in such disrespectful and inappropriate commentary, Cr Separovich breached the trust placed in him as a councillor. In publishing the Facebook Post, he would inevitably have caused distrust, uncertainty and doubts amongst the community as to the integrity of their elected members.*
- j. *Cr Separovich’s comments also compromised his capacity to perform his duties as an elected member in an independent and unbiased manner. The issue of the Australia Day celebration could well have come to the attention of the Council at a later date. Councillors make a decision when deciding to run for public office. If successful, and in accepting the position, they also choose to take on the obligations that are inherent in being an elected representative. Cr Separovich’s online conduct reflected adversely on his role as a councillor and as a leader in his community. He behaved in a way which contradicted and undermined the City’s and local government’s principles and values, such as meaningful community engagement, social inclusion and ethical behaviour.*

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....



- a. *The Facebook Post related to the controversial topic of Australia Day and Cr Separovich published it on (or just before) 26 January 2020, itself. The Facebook Post was disrespectful, rude and sarcastic as well as inflammatory and potentially very harmful. The timing of the publication of the post was particularly pertinent, as it would inevitably have increased the level of damage it would cause. Although it appears that Cr Separovich copied some of the content of the Facebook Post from a third party, he was nevertheless responsible for its republication on the Community Chat Page.*
- b. *It is clear, that Cr Separovich intended to actively and openly, engage with members of the public when he published the Facebook Post. The Panel also finds it more likely than not that he wished to provoke a negative reaction (which he acknowledged when he stated):*

*“heres a spicy one for you while you enjoy the fireworks.”*

*It was a deliberately barbed comment and one that would further inflame tension.*

- c. *It is evident from the City’s website, that the City and the Council has worked to strengthen relationships with Aboriginal and Torres Strait Islander community members who live, work or are actively involved in the City’s community. Cr Separovich would have undoubtedly been aware that the Facebook Post would likely cause damage to the reputation of the City and its work towards reconciliation with the First Peoples of Australia. Therefore, it is unnerving that he still chose to publish it regardless, and the only reasonable conclusion was that he intended to undermine the City’s efforts, as well as to cause hurt and distress to members of the community. Damage was inevitably caused (as evidenced in the Emails), with people in the wider community asking questions as to whether Cr Separovich’s comments were representative of “the City of Cockburn’s way”.*
- d. *By insulting people and talking about such a serious issue in an extremely insensitive manner, he would inevitably have caused feelings of anger and frustration as well as hurt and distress amongst community members.*

### **Jurisdiction and Law**

3. The Panel convened on 16 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 Cr Separovich 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 however indicate that in all the circumstances the relevant councillor should not be penalised further.
6. 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 Separovich'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, Cr Separovich 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.
9. The Department did not receive a submission from Cr Separovich within the 14-day timeframe provided to him.

### **Panel's Consideration**

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





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. In this case, the Panel found that Cr Separovich breached Regulation 7(1)(b) when he reposted a photograph of the British Royal Family along with an inappropriate comment, on the Melville Community Chat page, on or around 26 January 2020. In its Finding, the Panel had emphasised that Cr Separovich:
- a. initiated the conduct by posting the Facebook Post independently;
  - b. was responsible for its publication on a community chat page; and
  - c. chose to speak about a highly controversial and topical subject in a deliberately disrespectful, rude and sarcastic manner.
12. 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.
13. However, the Panel also does not consider it is appropriate to make an order for censure for Cr Separovich'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 Cr Separovich pay to the City a sum of money is warranted.



14. The options left for the Panel to consider are to order Cr Separovich to undertake training or make a Public Apology.
15. Cr Separovich did not take the opportunity to respond to how the Panel should deal with the matter. However, it was clear that Cr Separovich needed to revisit his understanding as to his role and responsibilities as an elected member in leading and supporting the community. Therefore, the Panel finds training will be of use to him and is the appropriate penalty. It will help him differentiate between making appropriate and inappropriate comments as an elected member on social media as well as provide guidance on the proper use of social media in communicating with the community.
16. The sanction of an order to undertake training also aligns with the intent of the Act and the purpose of the civil penalties under the Act to ensure future compliance with the statutory obligations imposed on councillors for the better protection of the public.

### **Panel's Decision**

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

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Michael Connolly (Presiding Member)

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Deborah Hopper (Deputy Member)

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Elanor Rowe (Deputy Member)



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## ORDER

Delivered 1 February 2021

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### DEFAMATION CAUTION

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

### THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

Within four (4) months of the date of this Order, Councillor Michael Separovich, a member of the City of Cockburn, shall undertake:

1. the training course for Elected Members "*Serving on Council*" provided by WA Local Government Association (WALGA) for a period of fifteen (15) hours; or
2. a training course with substantially similar learning outcomes provided by an alternative registered training organisation for a similar duration, but at least twelve (12) hours.

**Date of Order: 1 February 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."