

**IN AN INTERNAL ARBITRATION PROCESS
FOR MORNINGTON PENINSULA SHIRE COUNCIL
UNDER SECTION 143 OF THE *LOCAL GOVERNMENT ACT 2020***

LGA IAP REF: IAP 2023-19 and IAP 2023-25
APPLICANTS: Crs Steve Holland (representative), Debra Mar,
Despi O'Connor, Sarah Race
RESPONDENT: Cr Susan Bissinger
BEFORE: Arbiter J Silver
HEARING DATE: 20 December 2023 at Rosebud
DATE OF LIABILITY REASONS: 12 February 2024
DATE OF SANCTION REASONS: 23 February 2024

ORDERS MADE:

Liability

1. Allegations 6, 7, 8, 11, 13, 14 and 18 are proven.
2. Allegations 1, 2, 3, 4, 5, 9, 10, 12, 15, 16, 17 and 19 are dismissed.
3. Under sub-section 147(1) of the *Local Government Act 2020*, I find that Cr Susan Bissinger has engaged in misconduct.

Sanction

4. Under sub-s 147(2) of the Act, I suspend Cr Bissinger from the office of Councillor for a period of one month (31 calendar days) commencing at 12.00am the day following these reasons.

Other Observations

5. Despite previous orders, Cr Bissinger refused to file a draft form of apology as directed in my orders made on 12 February 2024. This prevents me making an order under-sub 147(2)(a) of the *Local Government Act 2020*.

APPEARENCES

The parties appeared in-person.

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STATEMENT OF REASONS (LIABILITY)

Introduction

1. On 25 October 2023, the applicants (represented by Cr Steve Holland) lodged an application under section 143 of the *Local Government Act 2020* ('the LG Act'), with the Principal Councillor Conduct Registrar.
2. On 6 November 2023, the Principal Councillor Conduct Registrar appointed me to hear the application, numbered IAP 2023-19.
3. I held a directions hearing on 29 November 2023. The applicants told me that another application against Cr Bissinger had been lodged with the Principal Councillor Conduct Registrar, and the parties agreed that if-and-when I received a further appointment, I could hear the applications together.
4. On 23 November 2023, the applicants lodged a further application under section 143 of the LG Act, with the Principal Councillor Conduct Registrar.
5. On 8 December 2023, the Principal Councillor Conduct Registrar appointed me to hear that application, numbered IAP 2023-25, and I made directions to hear and determine the applications concurrently.
6. The LG Act defines "misconduct" as a breach by a Councillor of the "standards of conduct" referred to in section 139(3)(a), being those prescribed in the regulations, in this case, in schedule 1 of the *Local Government (Governance and Integrity) Regulations 2020* (hereafter "**Standards of Conduct**").
7. Between them, the applications contained 19 allegations of misconduct, but two were withdrawn at the hearing. Of the remaining 17, 14 concerned Cr Bissinger's conduct after 22 September 2023, on which date two things happened:
 - first, Cr Bissinger participated in a meeting facilitated by a specialist local government lawyer, which was referred to as an 'external mediation'. Cr Holland

was the other party, and the CEO (Mr Baker) also participated. Beforehand, Cr Bissinger was sent nineteen (19) documents to consider, being emails she had sent, and social media posts she had made, which were said to breach the Mornington Peninsula Shire Councillor Code of Conduct. The external mediation led to Crs Holland and Bissinger signing a self-described 'Mediation Agreement' (although it was technically a Settlement Agreement).¹ It contained a confidentiality clause that applied to both the mediation and the agreement,² although it does not bind me. The agreement stated that the agenda of the mediation had been to discuss:

- (1) *Outlined areas of general concern, including demonstrating poor patterns of behaviour with specific reference to the use of emails, social media and staff interactions;*
- (2) *Concerns arising from an email sent by Councillor Bissinger dated 2 September 2023 to all Councillors and a Director regarding the flying of the Rainbow flag at Council's municipal offices; and*
- (3) *Councillor Bissinger's interactions with Council staff generally.*

The evident purpose of the external mediation was to avoid a disciplinary process against Cr Bissinger, such as an internal arbitration or a Councillor Conduct Panel.

- second, and separately from the mediation, the CEO gave Cr Bissinger a copy of a statutory protocol ('**Protocol**') he had issued under sub-section 46(3)(c) of the LG Act (dated 20 September 2023). The Protocol instructed Cr Bissinger '*not to make any further contact with*' Council staff other than the CEO, his executive officer, the Team Leader of Councillor Support, and Council's executive team (who are called 'directors' in other Councils). The Protocol identified the reason for its enactment as Cr Bissinger's '*current behaviour towards the Shire staff,*' but did not go into particular examples.

¹ In the sense it was an agreement reached at the mediation, as opposed to an agreement governing the conduct of the mediation (as far as I can tell, there was no such instrument).

² With respect to all concerned, confidentiality is usually agreed prior to the mediation, not following the mediation.

8. Of the 17 active allegations, I have found 7 proven, all involving Cr Bissinger's untrue public statements that the CEO imposed the Protocol because Cr Bissinger opposed flying the Intersex Pride Flag at Council premises.
9. On the material before me, I am satisfied that Cr Bissinger understood why the CEO had limited her to dealing with senior Council staff,³ and that it was due (as identified in the Mediation Agreement) to concerns about her '*poor patterns of behaviour*'.
10. The fact that Cr Bissinger did not accept others' concerns about her did not mean she did not understand them. Even if she did not, she never put what (in the hearing) she called her "belief" to the CEO (or anyone else) before the steps she took next. Instead, she went public with an unfounded conspiracy theory, with the effect (if not the design) of suggesting that she was being unjustly punished by the CEO for her unpopular view.
11. I propose to sanction Cr Bissinger under section 147 of the LG Act, which is why I have made an order for her to provide a draft apology. I have made those orders as, if I am to order an apology (and I have not decided that I will), it must be in Cr Bissinger's own words, rather than repeating a statement I suggest.
12. If Cr Bissinger can show genuine remorse and contrition for her misconduct, which is an adequate response to the damage done to the CEO and others, an apology may be all that I order. I will need to see what she comes up with.

³ It is established practice in local government that Councillors first port-of-call is the CEO, together with the senior staff (who are called managers or directors), as they have ultimate responsibility for all other Council staff. This avoids Councillors stepping outside their role into the practical business of Council.

The hearing

A. The lead-up

13. Before the hearing, I made several sets of orders, and answered written queries (through the medium of the Councillor Conduct Officer), to give the parties further direction and guidance in preparing for the day.
14. This included having the applicants prepare what I called a "Summary of Argument", so the allegations were in concise format, which identified the Standard of Conduct in the *Local Government (Governance and Integrity) Regulations 2020* ('**Regulations**') relied on.
15. This was so that both Cr Bissinger and I understood the allegations, and I also ordered her to provide a similar document. Both parties also provided considerable supporting materials, and I thank them for ensuring it was presented appropriately.
16. I also thank them for their good behaviour and demeanour in the hearing itself.
17. Both parties also had permission to bring a support person to the hearing.

B. Limits of the application and relevance of the CEO's statement

18. The applicants' materials mentioned some matters that were not part of the allegations before me, but dealt with concerns about Cr Bissinger more broadly, some of which arose more than 3 months before the applications were filed.
19. I have not considered those matters, because:
 - (a) my jurisdiction is defined by the allegations, which must have occurred within that 3-month period;
 - (b) in general, I cannot make findings about matters at an earlier date, even if what is sought is something short of a misconduct finding (for example, an applicant

submits that, if I am satisfied that an event occurred 4 months ago, it makes it more likely that an event 2 months ago also happened); and

- (c) I note that Cr Bissinger has never been a party to any previous internal arbitration process, or of a Councillor Conduct Panel. If such a process had previously occurred, and reasons had been delivered about Cr Bissinger, I could note those previous findings, at least if they had arguable relevance to the present applications, or informed me on the appropriate form of sanction.
20. In short, it is inappropriate for an arbiter to consider any suggestion that misconduct or serious misconduct has occurred in the past, where it has not been the subject of either of the formal processes provided for under the LG Act.
21. In making those observations, I have been mindful that although the Protocol was a central theme in these applications, the allegations before me were distinct from the matters which led the CEO to impose the Protocol.
22. Although these applications required me to consider if the CEO gave Cr Bissinger reasons for imposing the Protocol, and I am satisfied that he did, I do no more than note those reasons. That is, I do not accept or dispute their merits, and have given the CEO's views no weight in considering any allegation proven or not. I merely accept that the CEO used his powers under sub-section 46(3)(c) of the LG Act to enact the Protocol, and that he gave Cr Bissinger reasons for doing so.
23. If Cr Bissinger wished to set aside the Protocol, her option was to apply for judicial review in the Supreme Court of Victoria. As she did not, it is not for me to question its basis in law, although I will note some of its shortcoming where I am satisfied that its application was not as clear as it could have been.
24. Having said that, because Cr Bissinger has not challenged the Protocol (through a judicial review proceeding), its validity was not in question.
25. Why do I need to make these observations?

26. When the significance of the Protocol became clear to me as I prepared for the hearing, I made orders inviting the CEO to:
- (a) provide a written statement explaining why the Protocol was imposed; and
 - (b) inviting him to attend the arbitration and give evidence.
- In response, a written statement was provided, but the CEO did not attend the hearing.
27. These orders were appropriate where Cr Bissinger contended publicly and before me that she was never told what was, in the Protocol's words, her '*current behaviour towards the Shire staff*' which prompted her being restricted, such that it was not unreasonable for her to link the Protocol to her Intersex Pride Flag views.
28. I also found the practical scope of the Protocol somewhat unclear: did '*not to make any further contact with*' most Council staff prohibit Cr Bissinger simply being in a room with Council staff (for example, if presenting to a community group)? Or, could she attend, but not talk to them? Could they talk to her of their own volition? Somewhat fortunately, no aspect of these reasons requires me to decide the true meaning of the Protocol (or how the CEO explained it to Cr Bissinger), or if Cr Bissinger stepped over the boundaries. If required, I would not have issues doing so.
29. In a best practice scenario, a document such as the Protocol would include something akin to a statement of reasons, for example, in a preamble that notes the events which prompted it. But as I mentioned, all that the Protocol mentioned was that it was needed because of Cr Bissinger's '*current behaviour towards the Shire staff.*'
30. The effect of the CEO's written statement was that he and others engaged in some effort, through 'informal mediation' to address Cr Bissinger's behaviour (before the 'external mediation' in September 2023), due to inappropriate interactions with staff, and in particular, Cr Bissinger going beyond the legal limits of her role as a Councillor.
31. While at the hearing, Cr Bissinger highlighted that most examples listed were from 2021 (and made the point quite strongly that she denied one incident had occurred), more recent examples were mentioned. It is also apparent that in referring to these older examples, the CEO was making the point that he believed that Cr Bissinger had been behaving in a certain manner throughout her term, without improving.

32. I am accordingly satisfied that a reasonable person in Cr Bissinger's position would have understood the gist of the CEO's concerns (at the very least), although the phrase '*current behaviour*' appears less apposite than '*ongoing behaviour*.' This means that I am satisfied that Cr Bissinger did understand, or should have understood, the CEO's concerns, even if she did not agree with them.
33. I am comfortable making that finding, even without hearing from the CEO himself, because of:
- (a) the contents of 19 documents that were sent to Cr Bissinger before the external mediation; and
 - (b) the matters outlined in the CEO's letter to me, which Cr Bissinger was evidently familiar with.
34. I also note that when I asked Cr Bissinger the direct question, "*did you... talk to the CEO about the reasons for the protocol?*" – which I repeated in the slightly different form of "*did you speak to the CEO about the protocol following its implementation?*" – her answer was "*No*", and she confirmed that "*Nobody said that [she was being punished for her Intersex Pride Flag view] to me directly.*"
35. Accordingly, although the CEO did not attend the hearing, Cr Bissinger's concession means that it is unlikely he would have added much evidential value.

C. Hearing day and summary of Cr O'Connor's evidence

36. The hearing took place at Council premises at Rosebud on 20 December 2023. Cr Holland was accompanied by Cr Mar, and Cr Bissinger by Cr Marsh.
37. I swore in Cr Holland and Cr Bissinger, together with the applicants' sole witness, Cr O'Connor.⁴ After hearing first from Cr O'Connor, the hearing proceeded through the

⁴ Under sub-section 12(1)(a)(iii) of the *Oaths and Affirmations Act 2018*, a 'person acting judicially' (defined in section 3 to include 'any person or body having by law or by consent of parties authority to hear and receive and examine evidence') may administer an oath or affirmation to 'any other person required to take an oath or make an affirmation in a proceeding... or before the... person acting judicially'. Under this definition, members of the Arbiter Panel List can take sworn evidence in an internal arbitration.

allegations in numerical order, in which I identified relevant document, before each party made their submissions, together with more general argument.

38. Cr O'Connor's brief evidence concerned Allegations 1, 2, 3 and 5 (none of which were proven to my satisfaction), being:

- Cr Bissinger's correspondence about the Australian Local Government Women's Association ('ALGWA'), as Cr O'Connor is a board member;
- Cr Bissinger's use of the word "woke" in relation to the Intersex Pride Flag, as Cr O'Connor considers herself to be an "ally" (Cr O'Connor's description);
- Cr Bissinger's response to Cr O'Connor's proposed motion concerning the Voice to Parliament referendum; and
- an email argument between the pair after Cr O'Connor invited Councillors to a local information evening in relation to the Voice run by the Southern Women's Action Network ('SWAN').

As will be apparent, Cr O'Connor's evidence had little utility, as she did not attest to anything not already in writing.

39. Cr O'Connor's evidence did not identify a trait or personal characteristic that I should be aware of (which, for example, it was said Cr Bissinger was targeting), or the specific impact on Cr O'Connor of Cr Bissinger's actions. Instead, the thrust of Cr O'Connor's evidence was that she took issue with things written by Cr Bissinger: that much was obvious from Cr O'Connor being a named applicant.

40. And while the applicants also argued that Cr Bissinger made some of the statements she did only to provoke specific Councillors (for example, Cr O'Connor as an ALGWA board member), there was no evidence of that. As such, the most that I can say of Cr O'Connor's evidence is that it was appropriately brief.

41. Misconduct inevitably impacts on different persons differently. But in interpreting the Standards of Conduct (in particular, Standard 1), it is not to the point that an applicant subjectively considers (for example) that they were not respected. If that were the case, my findings would always be determined by that applicant's subjective point of view, rather than an objective assessment of the evidence against the Standards.

The Allegations

Allegation 1

42. On 16 August 2023, the Councillor Support Team Leader emailed all Councillors to say that Council was renewing ALGWA memberships, and asked Councillors if they would like their membership renewed.
43. In response, Cr Bissinger sent a "reply all" email asking that she not be included in ALGWA. She proceeded to write that ALGWA was 'entirely sexist', that she would not support a "Local Govt Men's association", and that ALGWA was a 'good money spinner for the founders'. She then identified that the majority of Mornington Councillors (7 of 11) were women.
44. The applicants argued this email breached Standards 1 and 3. In particular, the applicants relied on the Councillor and Staff Interactions Policy, paragraphs 1.1 and 4.2,⁵ and is thus a policy that Councillors must follow under sub-standard 3(a): those sections of the policy are similar to Standard 1.
45. The statements Cr Bissinger made are not misconduct, even if disagreeable. The email did not direct personal criticism towards anyone in particular, nor did Cr Bissinger attack those who disagreed with her. To the extent she disputed the efficacy of ALGWA membership, that falls within robust debate.
46. I am not satisfied that Allegation 1 involved misconduct.

Allegation 2

47. On Saturday, 2 September 2023 at 1.06pm, Cr Bissinger sent a lengthy email to all Councillors, the CEO, and a staff member (who the applicants submit was known by Cr Bissinger to identify as LGBTQIA+), following a Council announcement that additional flagpoles had been installed at Shire offices to display the Intersex Pride Flag.

⁵ This policy was enacted by the CEO on 20 November 2019 under the-then sub-section 94A(3A) of the-then *Local Government Act* 1989 (now sub-section 46(3)(c) of the 2020 Act).

48. It appropriate to partly reproduce that email, with formatting and the eye-roll emoji which appears at its conclusion:

Hello everyone,

It seems somewhat ironic that after what I thought was a frank and open discussion about why this council's image is so poor and possible solutions that involved directional change, I am seeing that rainbow flags are becoming a permanent fixture at council offices. There are only three flags endorsed by the Australian Government, and that is what should be displayed. Could you please advise if ***all other councils in Victoria*** are flying the rainbow flag or even if it is just ***all the other WOKE councils***, is this legislated by state government? Regardless of the personal beliefs of councillors, officers etc, this opens up an unnecessary and divisive conversation within our community, and the question has already been raised "will other minority group flags be added as they are just as valid?".

Our community in general is accepting and inclusive, and doesn't need to have a flag in their face on their council building to prove it. Is the aim of this council to identify obvious differences, build resentment where there was none, and elevate one minority group above others? The fact that this comes under the heading "community strengthening" is not lost on me, when it could actually have the opposite effect. Is there any chance that in the future we can keep within our lane? Reference to the Council and Wellbeing plan is a stretch at best.

...

Please note that the term WOKE is used in this email is the widely accepted socialist left position with all that now encompasses, and is based on my observations, including that which is legislated. Pause for a moment and remember the MPSC masturbation campaign strongly supported by officers and some councillors, I think it was tagged "pleasuring yourself on the Mornington Peninsula" 🙄

49. The CEO responded the next Monday, including all Councillors, the Mayor, and the Executive Team email address, commencing with the words that the CEO '*[y]et again [found himself] having to send you an email in response to a set of statements from you*

that are both personally and professionally offensive,' before refuting the factual basis of Cr Bissinger's comments, including the suggestion the Council staff had not followed direction from the Councillor group (ie. Cr Bissinger's suggestion that her view was the majority view was wrong).

50. The email concluded by informing Cr Bissinger that the CEO had asked the Mayor to set-up a meeting with an agreed facilitator to discuss the email, and he urged her not to send further *'follow-up emails.'*

51. But the response was not enough for Councillor Bissinger, who responded that afternoon (again, the emoji is from Councillor Bissinger):

I am surprised and sorry you find my email offensive, a lot of residents may find that flying the rainbow flag permanently at council offices is more offensive – honestly I am hoping that most may not even care which is a far cry from support, and an indication they have given up on this council. This council has consciously decided to make it an “in your face” issue – if a council action has the potential to be divisive why do it, why not err on the side of caution and just let it be? That you find my observation that the outcome of some council actions (unintentionally) “identify obvious differences, build resentment where there was none, and elevate one minority group above others” is not correct is puzzling, perhaps I should have worded it better 🙄.

I honestly thought this council was going to be genuinely looking at ways to mend the fracture that must have begun earlier but started showing up in 2019 figures especially with direction of council, and then I see we are proceeding along exactly the same path. Are we ever going to discuss the elephant/s in the room and how we can try and compromise to fix it and start being more insync with our residents? Are we going to consider what the survey looks like without the Briars ward to prop it up? I obviously expected too much.

I understand where you and some other councillors stand on this and other similar WOKE matters, however we all should be open to the opinions of others and take them into consideration without being offended, and perhaps show little empathy

toward our tolerant ratepayers and residents. Please note, I am yet to break any of the core values.

52. As in Allegation 1, the applicants relied on Standards 1 and 3, Councillor and Staff Interactions Policy of 20 November 2019, paragraphs 1.1 and 4.2, on the basis that Cr Bissinger's emails were disrespectful and her continued argument with the CEO was unreasonable conduct.

53. Although the Standards of Conduct comprise five sections, there are technically only four Standards: the fifth, titled '*Standards do not limit robust political debate*', states:

Nothing in these standards is intended to limit, restrict or detract from robust public debate in a democracy.

I considered the scope of 'robust debate' (a term I use in place of either 'political debate' or 'public debate in a democracy') and its interaction with the other Standards in *Newton & Laurence (IAP 2022-5 and IAP 2022-6)* (Darebin, tabled 14 November 2022), at paragraphs 21 to 32, with reference to the reasons of the Councillor Conduct Panel in *Application 2021-3 (Hely & Lew)* (15 July 2022).

54. This included the following observations:

28. *The allowance for 'robust debate' means that a Councillor does not breach the standards merely because, by criticising a Council decision (based on a policy decision which they consider wrong or contrary to the bests of their municipality), that criticism might be said to bring discredit upon Council, or to have discredited Council.*

29. *But there are limits...*

31. *The Panel[s] view [in Hely & Lew] ensures that standard 1 has some work to do: if any disrespectful or uncivil behaviour by Councillors were considered robust debate, there would be little space in which standard 1 would have operation.*

55. I made those observations in the context of numerous allegations against the then-respondent, some robust debate, some not. I need not repeat those observations here, other than to say that the notion of 'robust debate' should not be construed in a manner that starves the other Standards of Conduct of utility.
56. At the same time, it should not be thought that all bad or poor behaviour is misconduct,⁶ although the definition 'serious misconduct' (which includes 'bullying') in the LG Act does not contain an exemption for 'robust debate'.
57. The thrust of the applicants' complaint was that it was inherently disrespectful for Cr Bissinger to call Mornington Peninsula Shire a "woke Council" (or suggest that is how it was seen), such that using the term "woke" is always misconduct, alternatively, that the context in which it was used made it misconduct.⁷
58. After some consideration and careful analysis of the emails, I have concluded that while the emails were rude and unprofessional, and should not have been sent, they did not involve misconduct as defined in the LG Act (albeit just).
59. As used in Australian public life today, the term "woke" is usually used in a disapproving manner. It has replaced an older term "virtue signalling", the difference being that as "woke" is a four-letter word, it is readily perceived as pejorative or an insult, even though "virtue signalling" has always involved a connotation of disingenuity, and an implication that it involves no tangible benefit.
60. Unlike "virtue signalling", which can be levelled towards a decision, statement, or view of any political background, "right" or "left" (although the "left" was the usual target), "woke" is almost exclusively used to describe decisions, statements, or views of a "progressive" or "left" character. In this way, and although it appears to originate from overseas, "woke" is but the latest in a tradition of lazy Australian political sledges, succeeding older sledges such as "communist" or "socialist."

⁶ For example, see *Allen & Ors v Buckley (IAP 2022-13)* (East Gippsland, tabled 13 December 2022)

⁷ This is how I understand the argument, not how the applicants phrased it themselves.

61. While sledging is unhelpful in local government, serving only to create tension among Councillors (although the same can be said, too, for formal argument), the exemption for robust debate often removes it from the scope of Standards 1-5.
62. There is no doubt that Cr Bissinger's emails contained inflammatory language, and perhaps were intended to be inflammatory. But they were also sent to a limited internal audience (ie. Councillors and some Council staff), not the public at-large, and when read as a whole, the emails were directed towards Council decisions, not the CEO or other Councillors personally (although they were mentioned).⁸ Nor was it suggested that any of the CEO or the other Councillors acted improperly.
63. While I understand why the applicants and the CEO have taken issue with Cr Bissinger's language – in particular, her statement that she understood where the CEO *'and some other councillors stand on this and other similar WOKE matters'* – I am satisfied that Allegation 2 involved robust debate, which removes Cr Bissinger's bad behaviour from the scope the scope of Standards 1 and 3.
64. This is not to suggest that Cr Bissinger's behaviour conduct is to be endorsed: if such emails were sent to the CEO and her colleagues repeatedly, that arguably would involve bullying, which the LG Act defines as 'serious misconduct.' But as mentioned, not all bad behaviour is necessarily misconduct, bad as it might be.
65. I am not satisfied that Allegation 2 involved misconduct.

Allegation 3

66. On 8 September 2023, at 12.50pm, Cr O'Connor emailed other Councillors stating she intended to propose a motion concerning the Voice to Parliament referendum, which would come to Council on 3 October 2023.

⁸ Consider paragraphs 47 to 53 of my reasons in *Newton & Laurence (IAP 2022-5 and IAP 2022-6)* (Darebin, tabled 14 November 2022) for a similar example.

67. At 1.09pm, Cr Bissinger responded, stating she thought the CEO had *'made the position of council clear at Tuesday's meeting and I also thought we should and would try to keep personal agendas out of this. We are already seen as a WOKE council completely out of touch with the majority of residents, do we need to divide them more... or should we be smart and keep council out of this personal decision completely?'*
68. At the hearing, Cr Bissinger provided a relevant email that Cr Holland (as Mayor) sent to Cr O'Connor, stating that while he appreciated the *'heads up'*, he did not believe that Cr O'Connor's proposal was *'respectful of what councillors had previously discussed. I believe a majority of councillors had expressed a view that they did not want the Shire... to take a formal position on the referendum.'* I omit the balance of the email, in which the Mayor sought to persuade Cr O'Connor not to move the motion.
69. The applicants submitted that privately calling the Council "woke" and "out of touch" was disrespectful and breached Standard 1, together with the suggestion that Cr O'Connor was acting on her "personal agenda."
70. I do not agree. Cr O'Connor was re-agitating a debate that had been resolved, and Cr Bissinger was stating why she did not agree.
71. While the applicants might not like the language Cr Bissinger used (which was rude), it focused on the issues, not the person, and was robust debate. It does not concern me that the phrase *'personal agenda'* was used, which was used alternatively with the phrase *'personal decision'*: Cr Bissinger was merely stating that Cr O'Connor was informed by her own view of the matter, rather than what Cr Bissinger considered to be the "community view".⁹
72. I am not satisfied that Allegation 3 involved misconduct.

Allegation 4

⁹ The Australian Electoral Commission results show that voters in the Divisions of Dunkley and Flinders (which take in the Mornington Shire) recorded "No" votes of 55.82% and 57.35% respectively. Whether that means a majority of voters would oppose the Shire taking a position is another matter.

73. On 9 September 2023, Cr Bissinger emailed all Councillors, the CEO, and Council's Director of Planning and Infrastructure, the following email:

I have had this sent to me a few times after council meetings by different residents

🤔🤔🤔.

It was not how I was hoping to be perceived, but it never gets old and makes me smile – enjoy!

Cr Bissinger included a Youtube link to 1997 single "Tubthumping" by British anarchist pub band "Chumbawamba."

74. The lyrics to "Tubthumping" begins as follows:

(Chorus: We'll be singing, when we're winning, we'll be singing"

I get knocked down, but I get up again

You are never gonna keep me down

I am informed by Google that the word "Tubthumping" means to "express opinions in a loud or aggressive manner."

75. As the lyrics mention the protagonist consuming a number of alcoholic drinks, and singing songs to remind him of the 'good times' and the 'better times', "Tubthumping" is about someone who had a bad day, is drowning their sorrows, and telling everyone about it within earshot.

76. The applicants submitted that Cr Bissinger was "*implying her views are unfairly disregarded... [and] that Cr Bissinger's colleagues are not accurately reflecting the will of the electorate in their decision-making.*"

77. I think that submission is a bit imaginative.

78. While I cannot be certain why Cr Bissinger found it particularly funny, all I can find is that she sent a stupid email without much thought. The applicants should not have raised

this allegation, which had no proper basis, and was not a good use of my time or the Shire's resources.

79. I am not satisfied that Allegation 4 involved misconduct.

Allegation 5

80. On 18 September 2023 at 6.09pm, Cr O'Connor emailed all Councillors saying that the organisers of community organisation SWAN *'have asked if anyone is heading to the forum tomorrow night. If you are can you let me know [as] they would like to acknowledge that you are in the hall.'*

81. At 6.16pm, Cr Bissinger responded:

Have you thought this through, is it appropriate to announce that councillors are showing support in a Yes meeting, why else would they be there? I've already seen comments on the socials where the council has been identified as supporting it. I don't care what anyone chooses to do, but just thought we all should be mindful.

82. This sort of response, given the matters in Allegation 3, would not have come as a surprise to Cr O'Connor. But she took the bait, and responded as follows at 6.32pm:

It's information Susan from people who understand it. There is no yes campaigning. There are two lawyers, one progressive the other liberal in the room and a First Nations elder. It will be a great session. They are discussing the law as it stands and the impacts of constitutional change. I'm looking forward to hearing what they have to say. I consider this informing myself. Which is what we all should do and I can, like you inform myself the way I choose. I choose to be informed by those who work with the legislation and the people. I am going there to learn.

As for support from council, SWAN obviously met the requirements of the funding package we passed in council.

83. At 6.55pm, Cr Bissinger responded: "Omg. You should do your research."

84. The applicants submitted that Cr Bissinger had '*questioned the legitimacy of a Shire-sponsored event, unfairly disparaged Cr O'Connor for attending and disrespectfully asserts that Cr O'Connor should do her "research", insinuating ill intent and dismissing the opinion of her colleague,*' submitted she was being discourteous and was in breach of Standard 1.
85. I am not concerned by the first two emails in the chain.
86. Although I am more certain what Cr O'Connor meant when she said "*It's information Susan from people who understand it*" (ie. she appears to be telling Cr Bissinger she is ignorant), I am not quite sure what Cr Bissinger meant by "Omg. You should do your research." It is likely Cr Bissinger was telling Cr O'Connor she needed to do "research" into community views.
87. As Cr O'Connor was a party to the application, I am comfortable observing that both Councillors were rude, but I am not satisfied that Cr Bissinger engaged in misconduct, as the two were engaged in robust debate.
88. I am not satisfied that Allegation 5 involved misconduct.

Allegation 6

89. Allegation 6 concerned an email the CEO received on 13 October 2023 from a community member, who expressed her concern on being told by Cr Bissinger that the CEO had '*advised council officers not to have contact with her.*'
90. The email requested '*more clarification on this situation*' and stated concern that '*whatever is going on will result in a lack of representation and therefore further inequities towards our end of the Peninsula.*'
91. The email which prompted this email was sent the previous day by Cr Bissinger to participants in an email chain concerning traffic management in Sorrento. This email was produced on the day of the hearing, and I include the relevant paragraphs:

Unfortunately I will not be able to be part of this meeting as [the CEO] has advised all officers except 4 directors that they are not to have any contact with me, and they have all been directly advised not to attend any meetings I may be present at.

Please be assured I have not been made aware of anything tangible or serious that I have done to warrant this (I am not mean or have bullied anyone), there are no written complaints from officers or councillors, only vague mention of non specific complaints by the CEO and Mayor... The nature of any complaints has not been mentioned anywhere and “over the phone” issues that were touched on were from less than a handful of officers and were solicited by the Mayor with approval from the CEO. I will use what options are available to me to ensure this area is not disadvantaged as a result throughout this process.

92. As I indicated earlier, I do not accept that Cr Bissinger did not understand the ‘nature’ of the complaints against her, or why the CEO had implemented the Protocol. If she was truly in doubt, the commonsense thing was to ask, not throw about accusations.
93. The applicants (without the benefit of the email produced in the hearing) suggested that Cr Bissinger had contravened Standard 4, namely, to ensure (1) her behaviour did not bring discredit upon the Council, but also (2) that she must not deliberately mislead the public about any matter related to the performance of her public duties.
94. The applicants also referred to Standard 1, saying that Cr Bissinger failed in her email to treat the CEO and the Mayor with dignity.
95. As mentioned, I am not satisfied that Cr Bissinger did not understand the CEO's rationale for imposing the Protocol: she may not have agreed, but that is a very different matter from not understanding it. While I am not satisfied that her email misled the public about a matter concerning her public duty, I am satisfied that she brought discredit on Council, and also failed to treat the CEO and Mayor with dignity.
96. Allegation 6 is proven.

Allegations 7, 8, and 17

97. I address these three allegations together, beginning with an email to the Shire from a News Limited journalist on 16 October 2023, and two follow up stories in the Leader (published online on the website of the Herald Sun) on 18 and 25 October 2023.
98. On 16 October 2023, a Shire email account received an email from the journalist, which referred to the external mediation between Cr Bissinger and Cr Holland on 22 September 2023, and sought comment on a number of issues, including the '*order that [Cr Bissinger] undergo personal development training as a result of her recent behaviour*', what examples of Cr Bissinger's behaviour had been the basis of the mediation, and asked why the CEO and another member of Council staff had been present at the mediation.
99. In the article on 18 October 2023, the journalist reported that Cr Bissinger was 'ordered' to undergo training (even though she had agreed to it).
100. The applicants drew my attention to Clause 1 of the Mediation Agreement, which stated that '*the conduct of the mediation and the terms of this Agreement shall remain confidential.*' This is a standard clause in most mediation agreements.
101. There is no doubt that Cr Bissinger broke this clause: whether or not she had direct contact with the journalist, they had come to know matters only she and 4 others knew, and it was not suggested any of them had a motive to break confidentiality.
102. Despite the obvious meaning of Clause 1, Cr Bissinger's response was that "*I was told at the beginning of both mediation sessions... that the confidentiality was good will only practice and not legally binding.*" She said this was made "*extremely clear to me*" in a prior mediation by the same lawyer who conducted the mediation.
103. Although I found Cr Bissinger's suggestion improbable, to give her the benefit of the doubt, and with the parties' acquiescence, I requested the Councillor Conduct Officer to send the lawyer concerned an email, asking if they told the parties that "*the confidentiality of the mediation was "in good faith", but stated that agreement (including confidentiality) was not otherwise legally binding.*"

104. The lawyer responded, advising that their usual practice was to explain the need to conduct the mediation in good faith, and the need to maintain confidentiality to ensure an open discussion, they had no recollection of discussing the legal status of the agreement, or whether the confidentiality clause was legally binding.
105. Having received that indication, I do not consider that Cr Bissinger's recollection was accurate. I think it is more likely that she was unconcerned with the terms of the Mediation Agreement, and was telling me an excuse. Likewise, while in the media interviews the subject of Allegations 13 and 18, Cr Bissinger characterised the Mediation Agreement as something she was forced to sign for no reason, the truth is that it gave her the chance to avoid a disciplinary process under the LG Act, such as this internal arbitration process or a Councillor Conduct Panel hearing.
106. While 'confidential information' (as defined in the LG Act) does not extend to information that is confidential only by agreement (meaning Cr Bissinger did not engage in serious misconduct), I accept that breaking a confidentiality clause contravened Standard 1, in that it involved a failure to respect the other party.
107. That is the first issue arising from the journalist's email.
108. The second issue is that it was suggested that the emails I addressed in Allegation 2 had been provided to the journalist, and my attention was drawn to the line in the 18 October 2023, which appeared to quote Cr Bissinger's statement that flying the Intersex Pride Flag would be 'divisive'.
109. The article also noted the email had been 'referenced' in the mediation, being further confirmation that Cr Bissinger had broken the confidentiality clause (that also being an instance of misconduct, in breach of Standard 1).
110. While correspondence between Councillors (such as emails) is not 'confidential information' under the LG Act, releasing private emails without consent is clearly at odds with Standard 1. It is disrespectful.

111. However, as there is no evidence that Cr Bissinger released any emails other than those that she personally sent (that is, it is not in evidence that she also released any replies that she received), this issue adds nothing to the allegations.
112. The third issue arose from the next question the journalist asked, and how it was reported: "Why was Cr Bissinger directed not to interact with council staff? Was the order related to the pride flag email?"
113. It does not appear the Shire provided the journalist with a response to this issue (where confidentiality did not apply): if they did, it was not reported.
114. This was the focus of the 18 October 2023 article, which began with the words that Cr Bissinger was '*in hot water after questioning a move to permanently fly the Pride flag at Council offices*', and stated (inaccurately) that she was 'ordered' to undergo personal development training, which a further paragraph stated had been organised following '*an online exchange between [Cr] Bissinger, councillors and council staff*' concerning the Intersex Pride Flag.
115. Cr Bissinger was also quoted making the statement that '*the nature of the complaints haven't been explained,*' which as I have noted, is untrue.
116. The article stated by imputation, if not explicitly, that the Protocol had been imposed because Cr Bissinger questioned the decision to fly the Intersex Pride Flag. It is inherently unlikely that, if she had not made that suggestion to someone, or at least agreed with it, that it would have been published: her suggestion that the complaints against her had not been explained leaves no other conclusion.
117. Given that, Cr Bissinger's evident participation in the 18 October 2023 article contravened Standards 1 and 4, in that she failed to respect CEO, and discredited Council.
118. Allegations 7 and 8 are proven.

119. Allegation 17 concerned a follow-up article on 25 October 2023, quoting former Premier of Victoria Jeff Kennett, amongst others. It does not seem to have any new content from Cr Bissinger, so I do not need to consider it further.

120. I am not satisfied that Allegation 17 involved misconduct.

Allegations 9, 10, 11 and 12

121. I address these four allegations together, concerning:

- a Facebook post by Cr Bissinger on 19 October 2023, to her Councillor page addressing the 18 October 2023 article (Allegation 9, not including a link to the article);
- two "shares" of that same post to two Facebook groups (Allegations 10 and 11) the same day; and
- a follow-up post by Cr Bissinger on 20 October 2023.

122. The Allegation 9 post by Cr Bissinger, which was shared to two groups (Allegations 10 and 11) identified that Mornington Peninsula Shire supports the LGBTIQ+ community, that the Herald Sun online survey showed participants were against flying the Intersex Pride Flag at Council buildings, and that in her view, flying the flag would undermine Council's reputation. No mention was of the Protocol, or Cr Bissinger's untrue allegation that it was imposed to punish her.

123. As the posts did not link to the Herald Sun article (which is behind a paywall), or copy and paste its contents, the posts did not convey Cr Bissinger's statements concerning the Protocol, which I addressed in Allegations 7 and 8. That is reflected in the comments section on each post, which refer almost exclusively to Cr Bissinger's position concerning the Intersex Pride Flag (but not the Protocol).

124. While I accept the posts drew attention to the "discrediting Herald Sun article" (as the applicants called it), the posts did not re-publish the problematic statements concerning the Protocol: because those statements were behind a paywall, and I do not accept that the posts alone involved misconduct in and of themselves.

125. But that is not all Allegations 9, 10 and 11 involved: Cr Bissinger also made additional statements in the comments, which I have considered, although I am not concerned with any statements in the comments for Allegations 9 and 10.
126. In the Allegation 11 comments, Cr Bissinger responded to one participant's comment with the statement that it was '*tedious that I have to defend myself over nothing,*' which was clearly a reference to Cr Bissinger's argument that she was being unjustly punished by the CEO for her position by the enactment of the Protocol.
127. That further comment, in which Cr Bissinger made a direct connection between the Protocol and the Intersex Pride Flag issue, brought discredit onto Council and failed to show respect to the CEO, contravening Standards 1 and 4.
128. As such, while I am not satisfied that Allegations 9 and 10 involved misconduct, but Cr Bissinger's further publications in the comments, Allegation 11 did.
129. Cr Bissinger's post on 20 October 2023 (Allegation 12) was somewhat different to the 19 October posts, and I reproduce it:

A HEART FELT THANK YOU

I would like to thank everyone who reached out with kind messages of support after the Herald Sun article. It has been a difficult time (at times, a little overwhelming) and I really appreciate it.

With amazing council Directors to assist me with all council matters, I am confident I can weather the storm, I am thick skinned after all 😊. Please be assured that I will do everything I can to not let anyone down either in my Ward or in the Shire.

130. The applicants' primary complaint was that Cr Bissinger drew attention to the article, and failed to acknowledge that the 'storm' was of her own making.
131. Although I accept that Cr Bissinger was encouraging the perception that she was being unjustly punished by the CEO, I again note that the post did not express criticism of

Council, Council staff, or other Councillors, and viewed independently, I am not satisfied that it involved any misconduct in and of itself.

132. While that is only part of Allegation 12, as Cr Bissinger was active in the comments, I am not concerned by any of them in particular, which stuck to the issue (even if the language was disagreeable to the applicants).

133. I am not satisfied that Allegation 12 involved misconduct.

Allegation 13

134. On 20 October 2023, Cr Bissinger was a guest on Tom Elliot's programme on 3AW. In his introduction, Mr Elliot mentioned having discussed previously "*why local councils make such dumb decisions,*" and introduced Cr Bissinger as appearing to be '*the victim of a rather strange council decision.*'

135. When Mr Elliot asked Cr Bissinger what she had done which led to the imposition of the Protocol, she explained as follows:

Well, there was an email that was circulated. I had to go to mediation about this, so there was an email... that I circulated myself. An internal email, questioning whether after a two-and-a-half-hour workshop on ways that we can improve our public perception with the community, that I got another email that said they were going to start flying the unisex pride flag permanently at all council offices. And so I asked the question, really, is this the right thing to do at this time? We've just had this big meeting. Our people are very inclusive, very inclusive of diversity and the LGBTQIA+ community, do we need to whack a flag in their face? That's what, that was my sort of question. And it's just sort of gone crazy...

136. The meaning of this paragraph was clear, as Mr Elliot's follow-up question showed: '*Sorry that is such a dangerous approach that you can't now speak to employees?*' At the conclusion of the interview, Mr Elliot confirmed his assessment that the two events appeared were linked, being the clear effect of Cr Bissinger's contribution.

137. Cr Bissinger also mentioned the agreed training, which she joked made her feel '*more proficient already*' although when Mr Elliot asked what the training involved, stated "*Who knows. It's just I'm having some evaluation and training... so I'm just... doing it. I'm copping it on the chin.*" This was disrespectful, and tends to show bad faith by Cr Bissinger in signing the Mediation Agreement.

138. As the interview concerns the same matters that I considered in Allegations 7 and 8, I am comfortable adopting my earlier reasons, such that I am satisfied that Allegation 13 involved misconduct.

Allegation 14

139. On 24 October 2023, the online publication "*Mornington News*" published a story titled "*Councillor to undergo 'development training'.*"

140. The reporter wrote that '*[w]hile Bissinger claims not to know the reasons for her training, she says it is linked to her questioning the shire's decision to fly the Progress Pride flag at three council offices,*' and that Cr Bissinger told them that '*she is being censured because she asked if other councils were also flying the Pride flag and "mentioned our community is inclusive and there is no need for a flag".*'

141. While Cr Bissinger initially denied speaking to the reporter, she accepted the words were hers, before conceding that she had spoken with them over the phone.

142. Again, as Cr Bissinger's comments in the article were similar to those I addressed in respect of Allegations 7 and 8, I am comfortable adopting my earlier reasoning, and am satisfied that Allegation 14 involved misconduct.

Allegations 15 and 16

143. The applicants withdrew these allegations at the hearing.

Allegation 18

144. Also on 20 October 2023, Cr Bissinger participated in a segment on *Sky News* presented by journalist Andrew Bolt.
145. As in the 3AW interview, Cr Bissinger joked about the agreed training (which Mr Bolt described as a ‘re-education course’), which she called ‘*just a big chat... to see if they can find what’s wrong with me and how I can be fixed*’ – and linked her views on the Intersex Pride Flag to the imposition of the Protocol, based on her suggestion that she had asked why the Protocol was imposed, but not been told why.
146. Given Cr Bissinger's concession that she had not asked the CEO about the reasons behind the Protocol, she told Mr Bolt and his viewers a falsehood.
147. Again, as Cr Bissinger's comments to Mr Bolt involved similar matters to those I addressed in Allegations 7 and 8, I am comfortable adopting my earlier reasoning, and am satisfied that Allegation 18 involved misconduct.

Allegation 19

148. Allegation 19 arose from an email that Council received from a stakeholder in a planning application. The stakeholder said that when they asked Cr Bissinger about a notice of decision to grant a planning permit, she told them there had been ‘*a back door deal*’ between the relevant planning officer and the applicant.
149. As I must afford the parties to an internal arbitration process procedural fairness (also called natural justice),¹⁰ I took the view that Cr Bissinger was entitled to cross-examine the stakeholder, and to contradict their allegations.
150. Because the stakeholder did not attend as a witness, any consideration of Allegation 19 risked a denial of natural justice, so I am not prepared to consider it further, to make any findings, or give it weight in any respect.

¹⁰ *Local Government Act 2020* sub-s 141(2)(e)

Other Observations

151. As the reasons above highlight, I have found that Cr Bissinger engaged in misconduct by her public suggestions that she was being unjustly punished by the CEO for holding an unpopular opinion on the Intersex Pride Flag. In doing so, Cr Bissinger wrongly undermined the reputation of Council and the CEO.
152. Although she was professional in the hearing, Cr Bissinger made few concessions, and I formed the impression that she does not accept that she did anything wrong, including that she could not be blamed if unrelated facts were put together (which I have found was exactly the link she wanted).
153. I also accept that Cr Bissinger holds what she calls 'belief' (which she told the hearing that she continues to hold) that that the Protocol was a punishment for her views on the Intersex Pride Flag. But that belief has no foundation, and nothing Cr Bissinger took me to suggest that has any basis to hold it, or continuing to hold it.
154. Given that, I struggle to understand how Cr Bissinger decided that it was consistent with the Standards of Conduct (which she agreed to follow when she signed the Mornington Peninsula Shire's Councillor Code of Conduct) to express her 'belief'. I suspect she did so because she was not concerned with those obligations, or of others' reputations.
155. As I have explained, a reasonable person in Cr Bissinger's position could not have formed the belief she did, not just because nobody had told her that, and that she did not ask anyone the question, but because of the documents she received ahead of the external mediation showing her unprofessional dealings with Councillors and Council staff, and members of the public on social media.
156. In any workplace, that behaviour would warrant a written warning.
157. Cr Bissinger told the hearing that she "*couldn't find fault within*" in the documents that she was sent before the external mediation. Having read them myself, and to avoid any suggestion that I am not explaining myself, the emails showed that, at the very least, Cr Bissinger has a propensity to belittle others she disagrees with.

158. This is not to say that I do not accept that Cr Bissinger does genuinely believe there is nothing wrong with how she conducts herself, in relation to the allegations, or more generally. I accept that, but that is exactly the problem.

159. Cr Bissinger's misconduct has had serious consequences, through the repetition of her views throughout Victoria. While I suspect many who accepted her narrative were from outside the Mornington Peninsula Shire (and probably with an existing cynical view towards the local government sector), her behaviour would have been incredibly unpleasant for Council staff and other Councillors.

160. Pending submissions from the parties, I am strongly inclined for Cr Bissinger to apologise genuinely and in her own words.

161. Without an apology, I am concerned she will simply brush off my findings, without learning from them. An apology may show an acceptance of her misconduct, and will go some way to assuring me that Cr Bissinger has learned from this process.

162. But that remains to be seen.

J A SILVER

ARBITER

STATEMENT OF REASONS (SANCTION)

1. On 12 February 2024, I issued my reasons concerning liability to the parties care of the Councillor Conduct Officer, in which I found that Cr Bissinger had engaged in misconduct.
2. Under sub-s 147(2) of the LG Act, five forms of sanction are available to an arbiter if a Councillor has engaged in misconduct.
3. This includes suspending a Councillor from office for a period not exceeding one month under sub-s 147(2)(b), and/or directing the Councillor to ‘*make an apology in a form or manner specified by the arbiter*’ under sub-s 147(2)(a).
4. A direction under sub-s 147(2)(a) must comprise two elements:
 - (a) the ‘apology’ (being its content); and
 - (b) the ‘form or manner’ in which that apology is to occur (for example, the form of apology is to be a public statement to Council, or in an email of no more than 300 words sent to the applicants).

In this way, an arbiter may not only direct a respondent when, where, and how they are to apologise, but also what they are to say or write. The power does not require the arbiter to obtain the respondent's agreement to apologise.

5. Although the LG Act does not otherwise define the term ‘apology’, commonsense suggests it is limited to written or spoken words, rather than actions, such that I could not direct Councillors to present one another with flowers.
6. An arbiter directing an apology has some discretion in defining its contents, which may be more or less detailed, for example:
 - an apology within general parameters or expressing minimum content might be specified, as I did in *Newton & Laurence (IAP 2022-5 and IAP 2022-6)* (Darebin, tabled 14 November 2022);
 - spelling out the proposed apology word-for-word, without any input from the parties at all; or

- directing the parties to prepare a draft form of wording, so that the words are either the respondent's own, or those sought by the applicants.
7. If a particular form of wording is to be delivered, an arbiter should define those words before concluding the arbitration. Only directing an apology to be given, for example, '*to the satisfaction of the applicant*' would seem to me to be an incomplete exercise of sub-s 147(2)(a), as the direction leaves the apology itself undefined.
 8. Ordering an apology can serve an important role in rehabilitating a Councillor who has engaged in misconduct, and is consistent more broadly with the purpose of the LG Act to provide for the peace, order, and good government of every Council, as identified in section 1, as follows:
 - (a) where a public apology is directed, the Councillor must show their acceptance of an internal arbitration, thus incentivising the Councillor to make public efforts to improve their behaviour, and to hold themselves to account going forward;
 - (b) if the Councillor is directed to provide a form of wording for an apology, they are forced to reflect on both their misconduct and the arbiter's reasons, and to give some thought to improving their behaviour;
 - (c) it can improve relations between the respondent Councillor, and the applicants, without which the wounds caused by the misconduct are quite likely to fester.
 9. These reasons concerning sanction, which are somewhat lengthier than I would have liked, identify how sub-s 147(2)(a) can be frustrated where a respondent refuses to follow an arbiter's direction to prepare a draft apology.
 10. As identified in paragraphs 163 to 165 of my reasons concerning liability, my preferred sanction was for Cr Bissinger to apologise in her own words. This was so that I could satisfy myself that Cr Bissinger would use the internal arbitration as an opportunity for reflection, and to improve her behaviour moving forward.

11. To facilitate that occurring, I made the following directions ahead of my considering the issue of sanction:

4. *Within 7 days of receiving these reasons concerning liability, I direct Cr Bissinger to prepare a draft apology, to be provided to the arbiter only (care of the Councillor Conduct Officer). The apology must be in Cr Bissinger's own words, and at a minimum, address the following matters:*
 - (a) *she must accept that she misled the public about why the CEO imposed the Protocol, that she understands that it was based on concerns around her unprofessional interactions, and that she accepts she had no basis to suggest the Protocol was connected to her views on the Intersex Pride Flag;*
 - (b) *she must sincerely apologise to the CEO and her Council colleagues for causing damage to their reputation;*
 - (c) *she must apologise to Cr Holland for failing to abide by the terms of the Mediation Agreement, including the confidentiality clause, and for alleging that she was ordered to undertake training, when she had agreed to it;*
 - (d) *she must accept that her conduct in October 2023 fell short of the standards expected of a Councillor, and that she will work to improve her interactions with her colleagues and Council staff in the coming months.*
5. *On receipt of the draft apology, I will consider what (if any) sanction I impose on Cr Bissinger.*
6. *Within 7 days of receiving these reasons concerning liability, the parties may (not must) file and serve a short written submission limited to the issue of sanction (maximum of 2 A4 pages, 12-point font with 1.5 spacing).*

Other Matters

7. *A failure to provide a draft apology, as I have ordered, could be considered 'serious misconduct' under the Local Government Act 2020, which includes a failure to comply with Council's internal arbitration process.*

In using the particular words that I did, I took some care to ensure that Cr Bissinger understood that her compliance with these directions was not optional.

12. The applicants complied with my orders within time. Cr Bissinger requested an extension, and I approved 2 further business days.
13. On 21 February 2024, Cr Bissinger filed two documents in the form of submissions, but despite my orders, neither contained a draft form of apology, and both were marked "without prejudice" (although not in circumstances that attract the legal privilege to which term that refers, meaning I am not prevented from referring to them).
14. I do not propose to recite the contents of either document in detail – much of which re-agitates matters addressed in my reasons, or raises possible appeal points – other than summarising their effect at a very high level:
 - in a document titled "**Addressing Sanctions**", Cr Bissinger argued that *“sanctions are not appropriate without tangible, verifiable and irrefutable proof as a base of admission of guilt,”* before questioning rhetorically if I had *“followed the correct procedures, pursued natural justice and procedural fairness in this matter”*. She then makes various complaints concerning my reasons, including an allegation of actual bias and favouritism towards the applicants.
 - in a document titled "**Addressing Apology Request**" (an inaccurate description of the effect of my orders), Cr Bissinger wrote that she would not comply with my direction, on the basis that she *“cannot be expected to apologise for something I did not do,”* before proceeding to outline in some detail why Cr Bissinger neither understands nor agrees with my reasons.

It is apparent that Cr Bissinger has not yet come to accept that the arbitration was decided against her. In addition, her refusal to provide a draft apology, despite my orders in the nature of directions, seems to indicate that she does not believe that she is required to follow them.

15. Although that is not right, I have no power to respond.
16. While a failure to comply with an internal arbitration process can amount to serious misconduct, that can only be dealt with by a Councillor Conduct Panel, and I have no power to refer Cr Bissinger. While others might initiate that process, and although in most cases there are practical disincentives to non-compliance (for example, a party who does not give evidence risks competing evidence being accepted), the fact is that the LG Act does not give an arbiter the power or ability to respond to parties who act in open defiance or contempt of an internal arbitration process.
17. In this case, Cr Bissinger has prevented me from concluding this arbitration in the manner I consider most appropriate and in the best interests of all stakeholders. While I could direct an alternate form of apology without her cooperation, I anticipate that Cr Bissinger will also refuse with that direction, which in any event, would not fulfil the objectives I wish to achieve.
18. That leads to my remaining options.
19. On the material before me, I am not satisfied there is any sanction that I can impose on Cr Bissinger that will lead to an improvement in her behaviour.
20. That being the case, her misconduct warrants appropriate denunciation and penalty. The most I can do to achieve that is through suspending Cr Bissinger from the office of Councillor for the maximum period I can, of one month (or 31 days).
21. In determining the period of suspension, I have not considered Cr Bissinger's failure to comply with my directions orders (in other words, she has not been suspended for a longer period because she failed to comply). Rather, I am not satisfied that she has the

intention or ability to improve her behaviour; the contents of a draft apology may possibility have convinced me otherwise.

22. It was within Cr Bissinger's power to end this arbitration on a positive note. Instead, her recent actions only confirm the complaints about her. This means that whatever reputational damage Cr Bissinger suffers from this process, the prime cause was Cr Bissinger, and Cr Bissinger alone.

J A SILVER

ARBITER