



Special Council Meeting

# Agenda

29 November 2023



## *Our Vision*

Where environment, lifestyle and opportunity meet

## *Community Aspirations*



### KEY THEME 1 **Environment**

An environment that is valued, conserved and enjoyed by current and future generations.



### KEY THEME 2 **Lifestyle**

A place that is relaxed, safe and friendly, with services and facilities that support positive lifestyles and wellbeing.



### KEY THEME 3 **Opportunity**

A vibrant City with diverse opportunities and a prosperous economy.



### KEY THEME 4 **Leadership**

A Council that connects with the community and is accountable in its decision making.

**NOTICE OF MEETING**

**TO: THE MAYOR AND COUNCILLORS**

**NOTICE** is given that a meeting of the Council will be held in the Council Chambers, Administration Building, Southern Drive, Busselton on Wednesday 29 November 2023, commencing at 4:30pm.

Your attendance is respectfully requested.

**DISCLAIMER**

Statements or decisions made at Council meetings or briefings should not be relied on (or acted upon) by an applicant or any other person or entity until subsequent written notification has been given by or received from the City of Busselton. Without derogating from the generality of the above, approval of planning applications and building permits and acceptance of tenders and quotations will only become effective once written notice to that effect has been given to relevant parties. The City of Busselton expressly disclaims any liability for any loss arising from any person or body relying on any statement or decision made during a Council meeting or briefing.



**TONY NOTTLE**

**CHIEF EXECUTIVE OFFICER**

22 November 2023

## BEHAVIOUR PROTOCOLS

The City of Busselton values are:

- Listening
- Considered Decision Making
- Appreciation
- Respect
- Teamwork

In accordance with these values, the following outlines the behaviour expectations while attending a Council meeting, Committee meeting, Community Access Session, or Public Agenda Presentation:

- Listen respectfully through the meeting or presentation
- Respect the Council process and comply with directions from the Presiding Member
- Use respectful language when addressing Council, staff, and other members of the public
- Behave in a manner that is respectful and non-confrontational
- Do not use offensive language or derogatory language towards others

The City values the diverse input of the community and seeks to ensure that all members of the community can attend a meeting and have their say.

Elected Members, Committee members and Candidates are bound by the City's Code of Conduct and agree to uphold the values of the City of Busselton and principles of good behaviour, maintaining and contributing to a harmonious, safe, and productive environment.

Anyone who does not behave in accordance with the above values and behaviours may be asked by the Presiding Member to leave the gallery.

**CITY OF BUSSELTON**

Agenda for the Council Meeting to be held on Wednesday 29 November 2023

**TABLE OF CONTENTS**

<b>1. OFFICIAL OPENING.....</b>	<b>6</b>
<b>2. PURPOSE OF MEETING.....</b>	<b>6</b>
<b>3. ATTENDANCE.....</b>	<b>6</b>
<b>4. DISCLOSURES OF INTEREST .....</b>	<b>6</b>
<b>5. PUBLIC QUESTION TIME.....</b>	<b>7</b>
<b>6. PRESENTATIONS BY PARTIES WITH AN INTEREST .....</b>	<b>8</b>
<b>7. CORPORATE STRATEGY AND PERFORMANCE REPORTS .....</b>	<b>8</b>
7.1. COMMITTEE APPOINTMENTS.....	8
<b>8. CONFIDENTIAL MATTERS .....</b>	<b>16</b>
<b>9. CLOSURE.....</b>	<b>16</b>

## 1. OFFICIAL OPENING

The City of Busselton welcomes Elected Members, staff, guests and members of the public to the Special Council Meeting of 29 November 2023.

The City of Busselton acknowledges the Wadandi and Bibbulmun people as the traditional custodians of this region and pay respects to Elders past and present.

This meeting will be audio recorded for minute taking purposes.

## 2. PURPOSE OF MEETING

The purpose of the meeting is for the consideration of committee appointments.

## 3. ATTENDANCE

### APOLOGIES

Nil at time of publishing	
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### LEAVE OF ABSENCE

Cr Cherise Woodhams	C2311/184
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### APPLICATION FOR LEAVE OF ABSENCE

## 4. DISCLOSURES OF INTEREST

### DISCLOSURES OF FINANCIAL INTEREST

A declaration under section 5.65 of the Local Government Act 1995 requires that the nature of the interest must be disclosed. An elected member or employee who has made a declaration must not preside, participate in, or be present during any discussion or decision-making procedure relating to the matter on which the subject of the declaration without the approval of the Council in accordance with the Act.

### DISCLOSURES OF IMPARTIALITY INTEREST

Elected members and employees are required, in addition to declaring any financial interest, to declare an interest that might cause or perceive to cause a conflict. If the elected member or employee declares that their impartiality will not be affected then they may participate in the decision-making process.

## 5. PUBLIC QUESTION TIME

### 5.1. QUESTION TIME FOR PUBLIC

#### Public question time procedures and guidance

- The City will allocate a minimum of 15 minutes and a maximum of 30 minutes per Council meeting for public question time.
- Members of the public should register their intent to ask a question at a Council meeting by completing and submitting the [Public Question Time form](#) before 4pm the day prior to the relevant meeting.
- Members of the public will be invited to ask their question in order of registration.
- Questions will be limited to three per person. Additional questions may be permitted by the Presiding Member where time permits.
- Where a person is not present to ask their submitted question it will be responded to administratively as general correspondence.
- Questions may be taken on notice, to be responded to at a later time by the CEO in accordance with clause 6.7 of the Standing Orders.
- Public question time is for the tabling of questions, not for members of the community to make statements. For context, the Presiding Member may allow a short preamble.
- Questions containing defamatory remarks or offensive language, or that question the competency or personal affairs of Elected Members or employees may be ruled inappropriate by the Presiding Member subject to the Presiding Member taking reasonable steps to assist the member of the public to rephrase the question.
- There will be no debate or discussion on the response provided.

For further information, please see the [Meetings, Information Sessions and Decision Making Processes Policy](#).

## 6. PRESENTATIONS BY PARTIES WITH AN INTEREST

## 7. CORPORATE STRATEGY AND PERFORMANCE REPORTS

### 7.1. Committee Appointments

<b>Strategic Theme:</b>	Key Theme 4: Leadership 4.2 Deliver governance systems that facilitate open, ethical and transparent decision making.
<b>Directorate:</b>	Corporate Strategy and Performance
<b>Reporting Officer:</b>	Manager Legal and Governance - Ben Whitehill
<b>Authorised By:</b>	Director of Corporate Strategy and Performance - Sarah Pierson
<b>Nature of Decision:</b>	Executive: Substantial direction setting, including adopting budgets, strategies, plans and policies (excluding local planning policies); funding, donations and sponsorships; reviewing committee recommendations.
<b>Voting Requirements:</b>	Absolute Majority
<b>Disclosures of Interest:</b>	No officers preparing this item have an interest to declare.
<b>Attachments:</b>	1. CONFIDENTIAL - Legal Advice: Appointment of Council members to committees [7.1.1 - 11 pages]

### OFFICER RECOMMENDATION

That the Council:

1. In addition to the elected members appointed at the Special Council Meeting on 25 October 2023, appoint Cr Ryan to the Audit and Risk Committee and the following nominating elected members:

*Enter names*

2. Remove all appointed members from the Behaviour Complaints Committee pending a further review of the Behaviour Complaints Committee.

### EXECUTIVE SUMMARY

The purpose of this report is to consider matters associated with committee appointments that officers believe have not been sufficiently resolved; specifically the appointment of Councillor (Cr) Anne Ryan to a committee of Council specified in section 5.9(2)(a) or (b) of the *Local Government Act 1995* (the Act) and the appointment / resignation of Crs Macnish and Ryan from the Behaviour Complaints Committee.

The report recommends the Council considers the appointment of Cr Ryan to the Audit and Risk Committee, plus (through the re-opening of nominations) any additional nominating elected members it considers appropriate. The report also recommends that the Council formally resolve matters in relation to appointments to the Behaviour Complaints Committee.

## STRATEGIC CONTEXT

The finalisation of appointment of members to committees supports the good governance of the district.

## BACKGROUND

At a Special Council Meeting on 25 October 2023 the Council appointed elected members to its established committees, after having considered nominations from elected members and undertaking a process of allocating members to committees, including conducting a secret ballot where there were more nominations than committee positions.

The endorsed Audit and Risk Committee Terms of Reference (endorsed by the council in July 2023) states that the Council will appoint four elected members to the committee.

The endorsed Behaviour Complaints Committee Terms of Reference (endorsed by the council in October 2023) states that the Council will appoint all elected members to the committee.

Councillors Macnish, Ryan and Woodhams only nominated to be on the Audit and Risk Committee (out of all the s 5.9(2)(a) and (b) committees – discussed further below), with Cr Macnish and Cr Woodhams appointed as members to the Committee (along with Mayor Cronin and Cr Riccelli) following a secret ballot. Cr Ryan was not appointed as a member but was appointed as second deputy, with Cr Love as first deputy member.

No councillors were required to formally nominate for the Behaviour Complaints Committee (given the Council's Terms of Reference for that Committee) and Cr Macnish and Cr Ryan expressed concerns about being appointed to a committee they had not nominated for, and in Cr Ryan's case, concerns about not being appointed to the Audit and Risk Committee.

The Council resolved 7-2 (with Councillors Macnish and Cr Ryan voting against) to make the committee appointments, which included the Audit and Risk Committee appointments outlined above as well as appointing all elected members to the Behaviour Complaints Committee, as per its Terms of Reference.

Since the 25 October 2023 Special Council Meeting, Cr Ryan has sought to resign from the Behaviour Complaints Committee, giving notice to the CEO on Friday 3 November 2023. Cr Macnish has also sought to resign from the Behaviour Complaints Committee, giving notice to the CEO on 6 November 2023.

Assuming Cr Ryan's resignation from the Behaviour Complaints Committee is valid (or if her appointment to the Behavioural Complaints Committee was invalid – see legal opinion attached and discussed in officer comment below) she is no longer a member of a committee comprised of council members only or council members and employees.

Cr Ryan is seeking that she be appointed to the Audit and Risk Committee in accordance with an entitlement under s 5.10(2) of the Act.

Section 5.10(2) of the Act states:

*At any given time each council member is entitled to be a member of at least one committee referred to in section 5.9(2)(a) or (b) and if a council member nominates himself or herself to be a member of such a committee or committees, the local government is to include that council member in the persons appointed under subsection (1)(a) to at least one of those committees as the local government decides.*

The types of committees in s 5.9(2)(a) or (b) of the Act are those that comprise council members only or those that comprise council members and employees. Both the Audit and Risk Committee and Behaviour Complaints Committee are currently committees that comprise council members only.

Officers presented a report to Council at its November Ordinary Council Meeting recommending the following:

*That the Council:*

- 1. In addition to the elected members appointed at the special meeting on 25 October 2023 appoint the following additional elected members to the Audit and Risk Committee:  
enter names*
- 2. Appoint one independent position to the Audit and Risk Committee and request the CEO to undertake an expression of interest for a suitably qualified and experienced independent member and recommend an appointment to the Council.*
- 3. Request the CEO to provide a further report on the relevance of the Behaviour Complaints Committee.*

The Council considered two alternative motions, the first of which lost 3 / 4 (for / against) and the second of which was put and voted on 4 / 3 (for / against). That motion was in three parts as outlined below:

*That the council:*

- 1. Note the sought legal opinion and in particular its 'Narrow' view of the application of LGA s5.10(2).*
- 2. Accordingly, and noting Cr Ryan's previous and still current nomination to the Audit and Risk Committee (ARC), appoint Cr Ryan to the ARC.*
- 3. Request the CEO to provide a further report on recommendations to the Council with the following elements;*
  - i) the relevance of retaining/replacing the BCC;*
  - ii) the implications of and brief for the attracting and appointment of an independent person to be an additional member of the ARC;*
  - iii) the relevance and implications for the ARC's Terms of Reference to be recast based on the Local Government Department's Audit Guidelines\* and its appended model terms of reference; <https://www.dlgsc.wa.gov.au/docs/default->*

[source/local-government/operational-guidelines/operational-guideline-9-the-appointment-function-and-responsibilities-of-audit-committeess.pdf?sfvrsn=77bf5a06\\_1:](#)

- iv) *what model options are available to the ARC to assess Risk in the local government governance context;*
- v) *the Terms of Reference number of positions of the ARC pursuant to the above.*

Parts one and three of the motion required a simple majority – which was achieved. Part two of the motion required an absolute majority – which was not achieved. Part two was therefore put to the Council separately and was again voted 4/3 (for/against), thereby not achieving the absolute majority requirement.

#### **OFFICER COMMENT**

The outcomes of the 25 October 2023 Special Council Meeting and the 15 November 2023 Ordinary Council Meeting have given rise to several complex matters concerning committee appointments.

#### ***Interpretation of s 5.10 of the Local Government Act 1995***

The City has sought external legal advice on the proper interpretation of section 5.10 of the Act as it relates to committee appointments. In particular the City has sought advice on, if an elected member nominates to be on such a committee or committees, and the elected member specifies only one particular committee, is the local government required to appoint the elected member to the particular committee. That advice is attached confidentially at Attachment 1.

At issue is what is meant by the Council's obligation to 'appoint a council member to at least one of those committees as the [Council] decides'.

In particular, is the reference to 'one of those committees' intended to mean:

1. a 'committee referred to in section 5.9(2)(a) or (b)' as referred to in the first limb of section 5.10(2) (**Wider Interpretation**); or
2. 'a committee or committees' to which the Council member nominates himself or herself to be a member (as referred to in the second limb of section 5.10(2)) (**Narrower Interpretation**)?

The external legal advice acknowledges that the terms of s 5.10(2) of the Act are ambiguous and open to both interpretations. However, the advice concludes that the more prudent approach may be to adopt the Narrow Interpretation.

It is somewhat unclear from the Council's decision at its November 2023 Ordinary Council Meeting which interpretation of the advice Council has accepted. The decision, and specifically not appointing Cr Ryan to the Audit and Risk Committee (through non-achievement of the absolute majority requirement), aligns with the Wider Interpretation, although Council has noted the legal advice and its 'Narrow' view at part one of the decision. At part three of the decision Council has also resolved to request the CEO to provide a further report to the Council including on the relevance of retaining / replacing the Behaviour Complaints Committee. It is not clear however whether Council is of the view that the previous appointments to the Behaviour Complaints Committee are valid, and if so, Cr Ryan and Cr Macnish's resignations must be considered.

The officer report to the November 2023 Ordinary Council Meeting leaned, for pragmatic reasons, to adoption of the Narrow Interpretation, and therefore recommended the appointment of Cr Ryan to the Audit and Risk Committee. In leaning to the Narrow Interpretation, officers also took the view that the previous appointments to the Behaviour Complaints Committee were potentially invalid, and therefore did not specifically deal with the matter of Cr Macnish and Cr Ryan's resignations. If Council were to take the Wider Interpretation, that is, that the Council can appoint a member to any one of the committees specified at 5.9(2) (a) or (b), it would also need to consider (as per the legal advice) Cr Macnish and Cr Ryan's request to be removed from the Behaviour Complaints Committee.

As noted above, while acknowledging both interpretations remain open, officers believe there remains uncertainty around the validity of Cr Macnish and Cr Ryan's appointment to the Behaviour Complaints Committee, and whether Cr Ryan is currently appointed to a committee. To resolve the uncertainty, and in the interests of good governance, officers recommend that the Council appoint Cr Ryan to the Audit and Risk Committee.

As it is the Council's role to determine the composition of its committees, officers also recommend that nominations are reopened for the Audit and Risk Committee, and that the Council determine which Council members, beyond Cr Ryan and those Council members already appointed, are to be appointed to the Audit and Risk Committee. Officers believe it is appropriate to offer all Councillors the opportunity to renominate for Audit and Risk Committee, noting it was a committee subject to a ballot. With knowledge of the Narrow Interpretation of the legal advice, other Councillors who were unsuccessful in the ballot process may also have sought to nominate for only the Audit and Risk Committee.

#### ***Inclusion of an independent member to the Audit and Risk Committee***

Officers recommended in the November 2023 Ordinary Council Meeting report that the Council include an independent member position on the committee. The inclusion of an independent member on the Audit and Risk Committee is consistent with:

1. The Department of Local Government, Sport and Cultural Industries guidelines which recommend that one or more persons, with requisite knowledge and skills, other than elected members be appointed to the audit committee (see pp 5-6 of Local Government Operational Guideline Number 09: Audit in Local Government The appointment, function and responsibilities of Audit Committees);
2. The Western Australian Public Sector Audit Committees – Better Practice Guide which states that for local governments (see pp 11-12):

*“having at least 1 appropriately skilled audit committee member who is completely independent of the board or council can bring fresh insight or bridge gaps in the experience needed by the audit committee to perform their duties”*

3. The adopted practice of other Western Australian local governments.
4. The State Government's local government reform agenda which originally proposed that audit committees comprise a majority of independent members and an independent chair. Although the State Government's original proposal is unlikely to be implemented it is highly likely there will be requirements introduced for independent representation on audit committees.

The Council has requested the CEO to provide a further report on the implications of, and brief for the attracting and appointment of an independent member. It remains however open to the Council to determine to appoint an independent member position now to the Audit and Risk Committee Terms of Reference. This is provided as an option in the options section of this report, noting that it would result in the Audit and Risk Committee no longer being a committee of a type referred to in 5.9(2) (a) or (b), which does have other consequences in terms of the right afforded to Cr Ryan in the Narrow Interpretation.

### ***The Behaviour Complaints Committee***

As outlined above, if the Narrow Interpretation of s 5.10(2) is favoured, supported by s 52 of the *Interpretation Act 1984* (as set out in the external legal advice) then the Council may not have the power to appoint a Council member to be a member of a committee unless the Council member had nominated himself or herself, or accepted a nomination, to be a member of that committee.

Given that no Council member formally nominated to be on the Behaviour Complaints Committee it is possible that the appointment of all Council members to the Behaviour Complaints Committee made at the 25 October 2023 Special Council Meeting was invalid.

To provide some clarity with respect to this, officers recommend that the Council, in noting the possibility that the appointments made at the 25 October 2023 Special Council Meeting are invalid, resolve to remove all members from the committee. In the interim, if a behaviour complaint is received, officers will necessarily bring the complaint to the Council to determine.

### **Statutory Environment**

Part 5 Division 2 Sub-division 2 of the *Local Government Act 1995* (WA) deals with committees and their meetings.

Section 5.8 deals with establishment of committees:

*A local government may establish\* committees of 3 or more persons to assist the council and to exercise the powers and discharge the duties of the local government that can be delegated to committees.*

\* by absolute majority

Section 5.9 deals with the types of committees:

- (1) *In this section — other person means a person who is not a council member or an employee.*
- (2) *A committee is to comprise —*
  - (a) *council members only; or*
  - (b) *council members and employees; or*
  - (c) *council members, employees and other persons; or*
  - (d) *council members and other persons; or*
  - (e) *employees and other persons; or*
  - (f) *other persons only.*

Section 5.10 of the Act deals with the appointment of committee members.

- (1) *A committee is to have as its members —*
- (a) *persons appointed\* by the local government to be members of the committee (other than those referred to in paragraph (b)); and*
  - (b) *persons who are appointed to be members of the committee under subsection (4) or (5).*

*\* by absolute majority*

- (2) *At any given time each council member is entitled to be a member of at least one committee referred to in section 5.9(2)(a) or (b) and if a council member nominates himself or herself to be a member of such a committee or committees, the local government is to include that council member in the persons appointed under subsection (1)(a) to at least one of those committees as the local government decides.*

### **Relevant Plans and Policies**

The officer recommendation aligns to the following adopted plan or policy:

Plan:

Not applicable.

Policy:

[Meetings, Information Sessions and Decision Making Processes](#)

### **Financial Implications**

Not Applicable

### **External Stakeholder Consultation**

Not Applicable

### **Risk Assessment**

An assessment of the potential implications of implementing the officer recommendation has been undertaken using the City's risk management framework, with risks assessed taking into account any controls already in place. No risks of a medium or greater level have been identified.

### **Options**

As an alternative to the proposed recommendation the Council could choose to:

1. formally resolve to take the Wider Interpretation and appoint Cr Ryan to one of the committees referenced as 5.9(2)(a) and (b) or consider her to be appointed to the Behaviour Complaints Committee. Further, consider Cr Ryan and Cr Macnish's resignations from the Behaviour Complaints Committee and determine whether to remove them from that committee; noting that in doing so Cr Ryan will need to be appointed to another committee.

2. appoint an independent member position to the Audit and Risk Committee Terms of Reference, with that committee then becoming a committee referenced at 5.9(2)(d), not 5.9(2)(a) or (b). As a consequence, the Audit and Risk Committee would become a committee to which s 5.10(2) of the Act would no longer apply (s 5.10(2) only applies to committees that comprise council members only or those that comprise council members and employees). This means that the entitlement provided to Cr Ryan under the Narrow Interpretation would cease to exist for the Audit and Risk Committee. If Councillors were of a mind to choose this alternative, officers would recommend that the Council also separately resolve on the make-up of the Behaviour Complaints Committee by either removing all members or by removing at their request Cr Ryan and Cr Macnish.

## CONCLUSION

The officer recommendation is consistent with the external legal advice received and will ensure the good governance of the district.

## TIMELINE FOR IMPLEMENTATION OF OFFICER RECOMMENDATION

The officer recommendation will be implemented in full, or in stages as per the following table:

Milestone	Completion Date
Appointment of new Council members to Audit and Risk Committee	30 November 2023
Report on the Behaviour Complaints Committee	28 February 2024

## **8. CONFIDENTIAL MATTERS**

Nil

## **9. CLOSURE**