



INTEGRITY IN PUBLIC LIFE

**FREEDOM OF EXPRESSION -
ADVICE NOTE ON THE
APPLICATION OF
ARTICLE 10 OF THE ECHR
AND
THE MODEL CODE OF CONDUCT**

EXECUTIVE SUMMARY

1. This Advice Note outlines the approach the Standards Commissions' Hearing Panels will take when issues that concern the application of Article 10 of the European Convention on Human Rights (ECHR) and the right to freedom of expression arise. It also suggests issues members of devolved public bodies should consider in order for them to ensure compliance with the provisions in their Codes of Conduct.
2. Article 10 is a qualified right and, as such, the right to freedom of expression may be limited by a restriction such as the imposition of a sanction for a breach of a Code of Conduct. However, any restriction on freedom of expression needs to respond to a pressing social need, to be for relevant and sufficient reasons, and to be proportionate to the legitimate aim being pursued.
3. Enhanced protection of freedom of expression applies to all levels of politics including local. There is little scope under Article 10(2) for restrictions on political speech or on debate on questions of public interest. In a political context, a degree of the immoderate, offensive, shocking, disturbing, exaggerated, provocative, polemical, colourful, emotive, non-rational and aggressive, that would not be acceptable outside that context, is tolerated.
4. Public servants are subject to wider levels of acceptable criticism than other members of the public when matters of public concern are being discussed. However, the limits were not as wide as they are for elected politicians. It may be necessary, for example, to protect officers from offensive and abusive verbal attacks as it is in the public interest that officers are not subjected to unwarranted comments that prevent them from performing their duties.
5. In determining at Hearings whether there has been a contravention of a Code of Conduct, the Standards Commission will take a three stage approach and consider:
 - Whether the facts found lead it to conclude, on the balance of probabilities, that the Respondent has failed to comply with the applicable Code of Conduct.
 - If so, whether such a finding in itself is *prima facie* a breach of the right to freedom of expression under Article 10.
 - If so, whether the restriction involved by the finding was justified by Article 10(2), which allows restrictions that are necessary in a democratic society.
6. Members of devolved public bodies should consider, therefore, both what they are expressing and the way they are expressing it. They should be able to undertake a scrutiny role, represent the public and any stakeholders, or make a political point in a respectful, courteous and appropriate manner without resorting to personal attacks, being offensive, abusive and / or unduly disruptive.
7. If a member of a devolved public body is making a gratuitous personal comment and / or simply indulging in offensive abuse, it is unlikely they will attract the enhanced protection of freedom of expression afforded under Article 10.

ADVICE NOTE FOR MEMBERS OF DEVOLVED PUBLIC BODIES ON THE APPLICATION OF ARTICLE 10 OF THE ECHR

1. Introduction

- 1.1 This Advice Note, issued by the Standards Commission for Scotland (Standards Commission), aims to outline the approach its Hearing Panels will take when issues that concern the application of Article 10 of the European Convention on Human Rights (ECHR) arise.
- 1.2 The Advice Note also suggests issues members of devolved public bodies should consider in order for them to ensure compliance with the provisions concerning courtesy, respect and confidentiality in their Codes of Conduct, which are based on the Model Code of Conduct for Members of Devolved Public Bodies.
- 1.3 Members of devolved public bodies have a personal responsibility to observe the rules in their Codes of Conduct. This advice is intended to assist them in interpreting the provisions in the Codes of Conduct in order to do so. This Advice Note should, therefore, be read in conjunction with the Devolved Public Body's Code of Conduct.

2. Background

- 2.1 The Standards Commission's functions are provided for by the Ethical Standards in Public Life etc. (Scotland) Act 2000 (the 2000 Act) as amended by the Scottish Parliamentary Commissions and Commissioners etc. Act 2010. The 2000 Act created an ethical standards framework whereby councillors and members of devolved public bodies are required to comply with Codes of Conduct, approved by Scottish Ministers, together with Guidance issued by the Standards Commission.
- 2.2 The role of the Standards Commission is to:
 - Encourage high ethical standards in public life; including the promotion and enforcement of the Codes of Conduct and to issue guidance to councils and devolved public bodies.
 - Adjudicate on alleged breaches of the Codes of Conduct, and where a breach is found, to apply a sanction.
- 2.3 Article 10 of the ECHR (as incorporated in the Human Rights Act 1998) concerns freedom of expression. It states:
 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of

information received in confidence, or for maintaining the authority and impartiality of the judiciary.

- 2.4 Therefore, Article 10 is a qualified right and as such the right to freedom of expression may be limited by imposition of sanctions in respect of provisions prescribed by law, such as ones contained in the Model Code of Conduct, provided the restrictions are necessary and proportionate and are in pursuance of a legitimate aim. The approach the Standards Commission will take in conducting such an analysis is outlined under Section 5 below.

3. Relevant Provisions in the Model Code of Conduct

- 3.1 The Model Code of Conduct for Members of Devolved Public Bodies contains provisions relating to respect that impact on a members' right to freedom of expression. Specific applicable paragraphs in the Model Code of Conduct include:

Conduct at Meetings

3.2 *You must respect the chair, your colleagues and employees of the public body in meetings. You must comply with rulings from the chair in the conduct of the business in these meetings.*

Relationship with Board Members and Employees of the Public Body (including those employed by contractors providing services).

3.3 *You must treat your fellow board members and any staff employed by the body with courtesy and respect. It is expected that fellow board members and employees will show you the same consideration in return. It is good practice for employers to provide examples of what is unacceptable behaviour in their organisation. Public bodies should promote a safe healthy and fair working environment for all. As a board member you should be familiar with the policies of the public body in relation to bullying and harassment in the workplace and also lead by exemplar behaviour.*

4. How Article 10 has been interpreted by the Courts

- 4.1 There have been a number of cases on the application of restrictions under Article 10(2) on freedom of expression. Summaries of some relevant cases are outlined at Annex A.
- 4.2 The points below summarise some of the principles established by the Courts, in the cases outlined in the annex, in respect of the application of Article 10.

Enhanced protection of freedom of expression applies to all levels of politics including local.

There is little scope under Article 10(2) for restrictions on political speech or on debate on questions of public interest.

Political expression is a broad concept. There is little distinction between political discussion and discussion of matters of public concern.

In a political context, a degree of the immoderate, offensive, shocking, disturbing, exaggerated, provocative, controversial, colourful, emotive, non-rational and aggressive, that would not be acceptable outside that context, is tolerated.

The right to freedom of expression is not, however, absolute. Restrictions may be imposed to ensure that the conduct of public life at the local government level, including public debate, does not fall below a minimum level so as to endanger public confidence in democracy.

It may be necessary, for example, to protect officers from offensive and abusive verbal attacks. It is in the public interest that officers are not subjected to unwarranted comments that prevent them from performing their duties in conditions free from disturbance.

Public servants are subject to wider levels of acceptable criticism than other members of the public when matters of public concern are being discussed. However, the limits were not as wide as they are for elected politicians.

Public interest in particular information can sometimes be as strong as to override even a legally imposed duty of confidence. In determining whether a restriction is legitimate, however, consideration should be given to whether or not there were sufficient other opportunities for the individual imparting the information to achieve his or her objective.

Any restriction on freedom of expression needs, however, to respond to a pressing social need, to be for relevant and sufficient reasons, and to be proportionate to the legitimate aim being pursued (i.e. is there any other way of achieving the restriction's objective).

The less bad or shocking the conduct, the more difficult it is to justify any restriction on freedom of expression.

Communications protected by Article 10 are not limited to speech. They include communications of any kind such as spoken or written words (including social media); pictures, dress, graffiti, acts of protest, even wearing a beard. They include opinion or speculation even if not objectively true. They must, however, be made in a public way.

Hate speech is not protected. This includes any expressions of hatred toward someone on account of that person's colour, race, disability, nationality (including citizenship), ethnic or national origin, religion, or sexual orientation.

5. The Standards Commission's Approach

- 5.1 The Standards Commission recognises that a finding of a contravention of one or more of the provisions in the Code of Conduct, and the subsequent application of a sanction at one of its Hearings, may impact on the member's right to freedom of expression.
- 5.2 In determining at Hearings whether there has been a contravention of the Code of Conduct, the Standards Commission, through its Hearing Panel, will take the following approach. Firstly, it will

consider whether the facts found lead it to conclude, on the balance of probabilities, that the Respondent has failed to comply with the Code of Conduct.

- 5.3 Secondly, if so, the Standards Commission will then consider whether such a finding in itself was *prima facie* a breach of the right to freedom of expression under Article 10.
- 5.4 Thirdly, if so, the Standards Commission will proceed to consider whether the restriction involved by the finding was justified by Article 10(2), which allows restrictions that are necessary in a democratic society.
- 5.5 **Stage 1:** The Hearing Panel will determine whether the facts as established and / or as admitted lead it to conclude, on the balance of probabilities, that there has on the face of it been a contravention of any of the provisions in the Code of Conduct, as alleged. If not, the Hearing Panel will announce its decision and the reasons behind the finding and will proceed to conclude the Hearing on that basis.

If the Hearing Panel concludes, on the balance of probabilities, that there has on the face of it been a contravention of any of the provisions in the Code of Conduct, it will, consider the provisions of Article 10, as set out in Stage 2 and 3 below, before coming to a finding on the matter.

- 5.6 **Stage 2:** If the Hearing Panel has concluded that there has, on the face of it, been a contravention of the Code of Conduct, it will proceed to determine whether such a finding would interfere with the Respondent's right to freedom of expression under Article 10. In doing so, the Hearing Panel will consider whether the comments were made and/ or the behaviour took place in a political context or in respect of a debate on questions of public interest, in order to determine whether the enhanced protection applies.

The Standards Commission notes that enhanced protection of freedom of expression applies to all levels of politics including local. Therefore, if the conduct being considered concerns comments and / or behaviour by a member in a political forum or context or in respect of matters of public concern, it is likely that the Hearing Panel will conclude that the enhanced protection applies. However, a Hearing Panel will consider the context on a case by case basis, depending on the specific facts and circumstances of each matter.

- 5.7 **Stage 3:** The Hearing Panel will then consider whether any interference to freedom of expression it is considering making, in determining a breach of the Code of Conduct has occurred and in applying a sanction, is justified with reference to Article 10(2). The Hearing Panel in making such an evaluative judgement, must consider:

a) **Is the restriction prescribed by law?** The answer to this will be yes as the Code of Conduct and the Standards Commission's remit to adjudicate on alleged contraventions of them are prescribed by the Ethical Standards in Public Life etc. (Scotland) Act 2000 and the Scottish Parliamentary Commissions and Commissioners etc. Act 2010.

b) **Is the restriction necessary in a democratic society?** The Standards Commission considers that one of the objectives of the Model Code and the provisions within it as outlined under Section 3 above, and the imposition of any sanction if a breach is found, is to maintain standards and ensure the conduct of public life, including public debate, does not fall below a minimum level. A further aim is to protect the reputation and rights of others; for example, from offensive, abusive and defamatory remarks. The Standards Commission considers that the intention is also to ensure that officers of devolved public bodies are free from undue disturbance so they can perform their duties, with the aim of protecting the mutual bond of trust and confidence between members and officers, to enable devolved public bodies to function effectively. Other aims are to prevent the disclosure of information received in confidence; to ensure the devolved public body or role of a member is not brought into disrepute; to allow good administration and ensure public confidence in the devolved public body itself is not undermined.

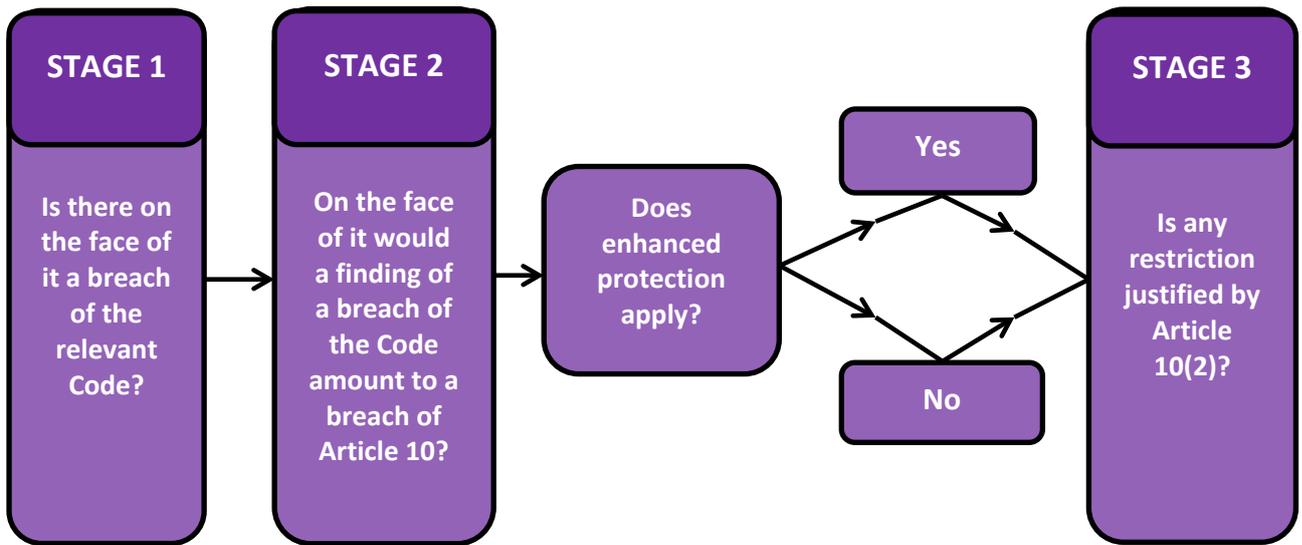
It may be, therefore, that the answer to this question of whether the intended restriction is in pursuance of a legitimate aim will be yes. However, the Standards Commission recognises that Hearing Panels, in determining whether such a restriction is necessary must also consider whether there are relevant and sufficient reasons to justify the interference to the Respondent's right to freedom of expression and whether the restriction is proportionate.

In considering proportionality, the Hearing Panel will reflect on whether the objective of the finding of a breach and the imposition of a sanction can be achieved by means which are less interfering of the Respondent's rights. The Hearing Panel will also take into account the question of whether any restriction would have a disproportionate effect; for example on a member's ability to make a political point or to undertake their scrutiny role in an open and transparent manner. In cases of an alleged breach of confidentiality, the Hearing Panel will consider whether or not there were other opportunities for the member imparting the information to have achieved his or her objective.

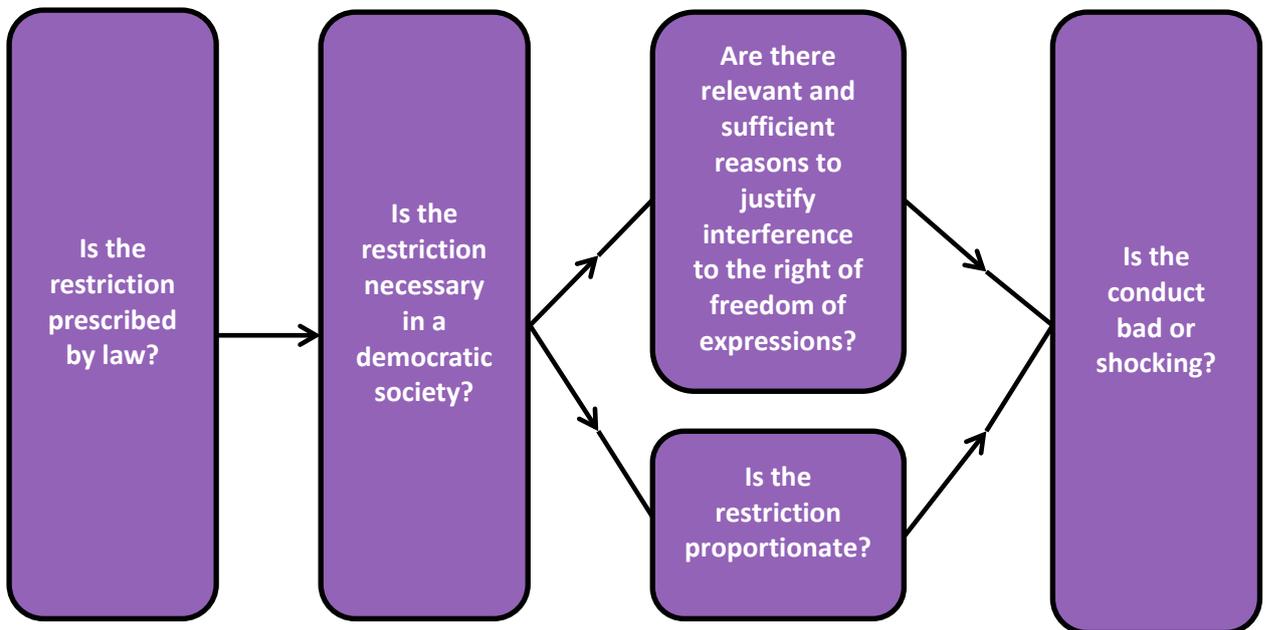
c) **Is the conduct in question bad or shocking?** If the conduct in question is less bad or shocking, it is more difficult to justify any restriction, particularly if the Respondent enjoys enhanced protection.

- 5.8 The Standards Commission recognises that Hearing Panels will be required to make evaluative judgements and will, therefore, need to weigh all factors outlined above together. In doing so, Hearing Panels will be undertaking a balancing exercise and their decisions at each stage will depend on the facts and circumstances of the particular case under consideration.
- 5.9 The Standards Commission further recognises that undertaking such a balancing exercise will be particularly challenging in some cases. It notes, therefore, that previous Hearing decisions may be useful in terms of outlining the Hearing Panel's approach but should not be relied on as precedent cases in respect of findings of fact.
- 5.10 The Standards Commission will follow the process outlined above in any cases where it appears to the Hearing Panel that Article 10 considerations may apply, regardless of whether the parties to the case make any submissions, refer to case law or lead evidence to that effect.
- 5.11 In its written decisions of Hearings, the Standards Commission will announce the Hearing Panel's findings on each distinct stage.

Standards Commission's Approach



Standards Commission's Approach at Stage 3



6. Advice for Members

- 6.1 The approach outlined above concerns how the Standards Commission will apply Article 10 considerations when adjudicating on complaints referred to it. The Scottish public is entitled to have a high expectation of those in public life and, therefore, members should ensure their conduct is beyond reproach so that complaints do not arise.
- 6.2 Members of devolved public bodies must act in the public interest and have a duty to undertake a scrutiny role to ensure their devolved public body uses its resources properly and in accordance with law. Members may operate in a political environment and must be free to make political points and discuss matters of public concern without undue interference. However, as outlined under Section 4 above, the right to freedom of expression is not absolute. It is important that members understand that restrictions can be imposed to protect the rights and reputations of others and to ensure officers can undertake their tasks without undue disturbance.
- 6.3 Members should consider, therefore, both what they are expressing and the way they are expressing it. They should also consider how their conduct could be perceived. They should be able to undertake a scrutiny role, represent the public and any constituents or stakeholders, or make a political point in a respectful, courteous and appropriate manner without resorting to personal attacks, being offensive, abusive and / or unduly disruptive.
- 6.4 Members may wish to consider:
- Whether they are making a gratuitous¹ personal comment and / or simply indulging in offensive abuse? If so, it is unlikely they will attract the enhanced protection of freedom of expression afforded under Article 10.
 - Are they being dishonest or engaging in misleading conduct towards officers, other members of the devolved public body or members of the public?
 - Is their communication factual, made in good faith and does it have a reasonable basis?
 - Could their behaviour bring the devolved public body or role of a member into disrepute?
 - Could their conduct undermine good administration?
 - Have they taken advice about what they intend to do or say?
 - Have they been warned about similar conduct or behaviour in the past? Should they be heeding such advice and warnings?
 - Is there a way of expressing their point that does not involve disclosing confidential information?
 - Could their conduct be perceived as raising negative issues about performance, conduct or capability of specific and identifiable officers in public? Have they considered what the appropriate channels for raising such concerns are?
 - Could there be an impact on the mutual bond of trust between members and officers?
- 6.5 Members may also wish to consider that demonstrating insight and remorse by issuing a genuine and sincere apology if they realise they have behaved in an offensive way in the heat of a moment. Doing so may well put an end to the matter.
- 6.6 Members should note that the fact that their conduct may not amount to a breach of the Code of Conduct does not mean there may not be other consequences, for example, they may be the subject of a defamation action.

¹ Done without good reason, unjustified.

7. Further Sources of Information

- 7.1 The Standards Commission has published guidance on how to interpret, and act in accordance with, the provisions in the Model Code of Conduct, including those relating to courtesy and respect. This guidance can be found on the Standards Commission's website at www.standardscommissionscotland.org.uk/guidance/guidance-notes.
- 7.2 The Standards Commission also publishes written decisions of Hearings held on its website, which can be found at www.standardscommissionscotland.org.uk/cases/case-list.
- 7.3 If members have any queries or concerns about how to interpret or act in accordance with the provisions in their Devolved Public Body's Code of Conduct, they should seek assistance from their respective Standards Officer. Further information can also be obtained from the Standards Commission using the contact details outlined below.

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ANNEX A: CASE LAW ON ARTICLE 10

1. *Heesom v Public Services Ombudsman for Wales* [2014] EWHC 1504 (Admin): The High Court recognised that politicians have an enhanced protection in respect of political expression, which applies to all levels of politics, including local, and that political expression in itself is a broad concept. The Court further held that public servants are subject to wider levels of acceptable criticism than other members of the public when matters of public concern are being discussed. However, the limits were not as wide as they were for elected politicians. The need to protect officers when imposing a restriction, in terms of Article 10(2), on freedom of expression must be weighed up against a politician's right to enhanced protection. The Court noted that the right to freedom of expression was not absolute but that any restriction was required to respond to a 'pressing social need', to be for relevant and sufficient reasons, and to be proportionate to the legitimate aim being pursued. However, that margin must be construed narrowly in this context as there was little scope under Article 10(2) for restrictions on political speech or on debate on questions of public interest. The Court had further recognised that it was in the public interest that officers were not subjected to unwarranted comments that prevented them from performing their duties in conditions free from perturbation² as this could undermine public confidence in the administration. The Court recognised that local government could not 'sensibly function' without such a mutual bond of trust and confidence.
2. *R (Calver) v Adjudication Panel for Wales* (2012) EWHC 1172: This case outlined the order a Tribunal would require to adopt when considering Article 10, which was firstly whether there had been a breach of the Code; secondly, if so, whether the finding of a breach and the imposition of a sanction was a limitation of the right to freedom of expression afforded by Article 10; and thirdly, if so, whether the restriction involved was one that was justified by Article 10(2). The High Court noted that if the conduct in question is less egregious³, it is more difficult to justify any restriction. The Court further noted that 'political expression' had to be interpreted widely and it included open discussion on political issues including public administration and public concern, including comments about the adequacy or inadequacy of the performance of public duties by others. It had been held that there was no distinction between political discussion and discussion of matters of public concern. In making observations about the general purpose of a Code that proscribed conduct, the High Court noted that a Code could seek to maintain standards and to ensure that the conduct of public life at the local government level, including political debate, does not fall below a minimum level so as to maintain public confidence in local democracy.
3. *Guja v Moldova* (2011) 53 EHRR 16: The European Court of Human Rights (EHRR) found that the signalling or disclosure of wrongdoing by an officer should be made in the first place to the individual's superior or other competent authority or body and that the question of whether there was any other effective means of remedying the wrongdoing should be considered before information was disclosed in public. The EHRR further found that the public interest in particular information could sometimes be as strong as to override even a legally imposed duty of confidence.
4. *Lombardo v Malta* (2009) 48 EHRR 23: The EHRR stated that a very narrow margin of appreciation must be afforded to competent national authorities to restrict discussions on matters of public interest. Comments in the political context, which amount to value judgements, are tolerated even if untrue, as long as they have some or any factual basis. Even a statement of fact will be tolerated if what was expressed was said in good faith and there is some reasonable (even if incorrect) factual basis for saying it. The Court noted it did not matter whether the restriction was

² Disturbance or upset caused by some event.

³ Extremely bad in a way that is noticeable or shocking.

imposed by civil or criminal proceedings when determining whether interference with the freedom of expression was proportionate to the aim pursued and was necessary in a democratic society.

5. *Mamere v France (2009) 49 EHRR 39*: The EHRR noted that individuals taking part in public debates on matters of general concern must not overstep certain limits, particularly with regard to respect of the reputation and rights of others, a degree of exaggeration or even provocation is permitted. The requirement to protect civil servants had to be weighed against the interests of freedom of the press or of open discussion on matters of public concern. In a political context, a degree of the immoderate, offensive, shocking, disturbing, exaggerated, provocative, polemical⁴, colourful, emotive, non-rational and aggressive, that would not be acceptable outside that context, is tolerated. The Court noted that Article 10 protects all modes of expression but that the means of disseminating information can be of significance in determining whether measures taken by a competent authority to restrict freedom of expression were proportionate to the legitimate aim being pursued.
6. *Busuioc v Moldova (2006) 42 EHRR 14*: Even if comments are made as part of a debate on an issue of public interest, there are limits to the right to freedom of expression where an individual's reputation is at stake.
7. *Livingstone v Adjudication Panel for England (2006) EWHC 2533*: The High Court notes that restraints imposed by a code of conduct designed to uphold proper standards in public life are in principle likely to fall within Article 10(2) ECHR but such restraints should not extend beyond what is necessary to maintain those standards. The Court noted that interference with the right of free speech which impedes political debate must be subjected to particularly close scrutiny but that simply indulging in offensive behaviour was not to be regarded as expressing a political opinion, which attracts the enhanced level of protection.
8. *Pederson v Denmark (2004) 42 EHRR 24*: The EHRR recognised that there can be a conflict between the right to impart information and the protection of the rights and reputation of others. In determining whether a restriction on freedom of expression was legitimate, consideration should be given to whether or not there were sufficient other opportunities for person imparting the information to achieve his or her objective.
9. *Janowski v Poland (1999) 29 EHRR 705*: The EHRR considered rights of public servants and their entitlement to protection but noted they are subject to the wider limits of acceptable criticism, meaning such criticism could be harsh or expressed in strong form. Public servants can expect criticism at higher level than the public but not quite the same level as politicians. They did not knowingly lay themselves open to close scrutiny of their every word and deed to the extent to which politicians do and should not, therefore, be treated on an equal footing with the latter when it comes to criticism of their actions. The Court noted that civil servants can expect protection if there is a pressing social need. Any such protection must also be proportionate to the legitimate aim being pursued and be relevant and sufficient. Civil Servants must enjoy public confidence in conditions free from undue perturbation if they are to be successful in performing their tasks and it may therefore prove necessary to protect them from offensive and abusive verbal attacks.
10. *Thorgeirson v Iceland (1992) 14 EHRR 843*: The EHRR noted that freedom of expression was not just applicable to information and ideas that were favourably received or regarded as inoffensive or as a matter of indifference, but also to those which shock, offend or disturb. The Court observed that there was no distinction between political discussion and discussion on matters of public concern.

⁴ A piece of writing or a speech in which a person strongly attacks or defends a particular opinion, person, idea, or set of beliefs.