

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held online, on 5 October 2021.

Panel Members: Mrs Tricia Stewart, Chair of the Hearing Panel
Mr Michael McCormick
Ms Ashleigh Dunn

The Hearing arose in respect of a Report referred by Mr Ian Bruce, the Acting Ethical Standards Commissioner (the Acting ESC), further to complaint reference LA/AC/3495, concerning an alleged contravention of the Councillors' Code of Conduct (the Code) by Councillors Steve Delaney and Ian Yuill (the Respondents).

The Acting ESC was represented by Dr Kirsty Hood, QC. The Respondents were represented by Ms Linda Beedie, solicitor.

Referral

Following an investigation into a complaint received about the conduct of the Respondents, the Acting ESC referred a report to the Standards Commission for Scotland on 20 July 2021, in accordance with section 14(2) of the Ethical Standards in Public Life etc. (Scotland) Act 2000 (the 2000 Act).

The substance of the referral was that the Respondents had failed to comply with the provisions of the Code and, in particular, that they had contravened paragraph 3.2, which is as follows:

Relationship with other councillors and members of the public

3.2 You must respect your colleagues and members of the public and treat them with courtesy at all times when acting as a councillor.

Evidence Presented before and at the Hearing

Joint Statement of Facts

The Panel noted that a joint statement had been agreed between the parties and that the following facts were not in dispute:

- At a Council budget meeting on 10 March 2021 Councillor Yuill put forward a budget proposal. The complainer, Councillor Donnelly, had been the first to raise his hand to second the motion and had proceeded to do so.
- In response to the seconding of the motion, Councillor Delaney referred to the complainer as the "resident sex offender" and suggested that "maybe it is time [the complainer] realises what everyone else is saying and goes now".
- At the same budget meeting, Councillor Yuill referred to the complainer as a "convicted sex offender" and further stated that "[the complainer's] seconding, like [the complainer's] presence is unwelcome".
- The budget meeting had been the subject of a publicly available webcast.

The Panel noted that following the making of the remarks by the Respondents, it was accepted that the Lord Provost had intervened and reminded all members that the Code required them to treat one another with respect.

The Panel noted that it was not in dispute that the complainer had been convicted of sexual assault, contrary to section 3 of the Sexual Offences (Scotland) Act 2009, at Aberdeen Sheriff Court on 13 December 2019. The Panel further noted that, at a Sentencing Hearing on 31 January 2020, the Respondent had been ordered to pay compensation of £800, had been made the subject of an eight-month supervision period and placed on the Sex Offenders' Register.

The Panel noted that, by the meeting in question on 10 March 2021, the eight-month supervision period imposed on the complainer at the Sentencing Hearing had ended and he had been removed from the Sex Offenders' Register. An overall suspension period of one year imposed on the complainer by the Standards Commission at a Hearing on 20 November 2020 (by way of an interim suspension followed by a full suspension) had also expired.

Witness Evidence

No witnesses were led. The Panel noted, however, that the complainer had submitted a written statement in which he had indicated that he considered the exchange to be deeply disrespectful and abusive and that it had made him feel ridiculed and belittled. The complainer's position was that the Respondents' remarks had a knock-on effect, as members of the public, having seen elected members being abusive towards him had felt they could behave in a similar manner. The complainer stated that since the incident in question, he has received abusive e-mails, telephone calls and comments and has been subjected to threats of violence that he has reported to the Police.

Submissions made on behalf of the ESC

The ESC's representative noted that the Panel was not required to consider or resolve any broader questions and debate about whether councillors (such as the complainer) should be permitted to remain in office after a conviction and / or the suitability of the sanctions available to the Standards Commission. The Panel was also not required to consider the motivation behind the complainer's seconding of Councillor Yuill's budget proposal (being the act that precipitated the Respondents' comments). The ESC's representative contended that this was because the Panel's role should be restricted to considering whether the Respondents had treated the complainer with courtesy and respect, as required by the Code.

The ESC's representative noted that Councillor Delaney had been expecting to second the motion on the budget proposal being moved by Councillor Yuill and that it was unusual for the seconder of a budget proposal to be from a different party or political grouping (as was the case with the complainer). As such, the ESC's representative accepted that the complainer's intervention was unexpected and that the Respondents may well have wished to distance themselves from it for political reasons, if nothing else. The ESC's representative noted, however, that the complainer's position was that he supported the budget proposal and was not trying to provoke the Respondents or to engage in any kind of political "stunt". While the ESC's representative accepted that the Respondents were suspicious of the complainer's motivation, there was no apparent outward sign, from the complainer's demeanour or the contents of his seconding speech, of any mischievous intent.

The ESC's representative observed that the Respondents had reacted and made their subsequent remarks in the context of a public meeting. The ESC's representative noted that the complainer had made a short speech explaining why he supported the budget proposal and it was not until that had concluded that Councillor Delaney had made his remarks. The ESC's representative further noted that Councillor Yuill's comments had been made at least one hour later. The ESC's representative argued, therefore, the Respondents had had plenty of time to consider their responses and to have framed them in a way that demonstrated courtesy and respect to the complainer, even if they had wished to make it clear that his intervention was unwelcome.

The ESC's representative noted that the complainer was no longer on the Sex Offenders' Register at the time of the meeting in question and that his conviction had no bearing on the meeting or the subject under discussion (being a debate on the Council's budget). The ESC's representative contended that Councillor Delaney's reference to the complainer as the "resident" sex offender, along with the Respondents' comments to the effect that his presence at the meeting was unwelcome, were evidence that the remarks were personal in nature (as opposed to being general statements about the suitability of convicted sex offenders to be councillors). The ESC's representative noted that the argument that the comments amounted to a personal

attack on the complainer was supported by the fact that the Lord Provost had felt the need to intervene and remind all councillors in attendance of the provisions of the Code and the need to be respectful towards each other.

The ESC's representative noted that, by the time of the meeting, the complainer had served the period of suspension imposed on him by the Standards Commission and that he was, therefore, entitled to attend the meeting and participate in the discussion. The ESC's representative contended that the comments had no relevance or bearing on the subject matter being discussed at the meeting and, therefore, could be simply characterised as gratuitous asides. The ESC's representative further argued that the fact that the Respondents' comments may have had a factual basis did not diminish the disrespectful intent or nature of the remarks.

The ESC's representative noted that the comments had been made in the context of the Respondents being irritated by the complainer's seconding of Councillor Yuill's budget proposal and having felt it necessary to distance themselves from the complainer's support. The ESC's representative contended, however, that the Respondents could have done so without making gratuitous references to the complainer's conviction or comments as to whether he was welcome. The ESC's representative argued that as the meeting was being broadcast as a live event, and could be viewed by the public, it was important for participants to act in accordance with the standards required by the Code, in order to avoid diminishing the public's trust and confidence in elected members or the Council as an entity.

The ESC's representative acknowledged the Respondents' right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The ESC's representative noted, however, that the Standards Commission's Advice Note for Councillors on the Application of Article 10 of the ECHR stated that councillors should be able to undertake a scrutiny role and make political points in a respectful, courteous and appropriate manner without resorting to personal attacks or being offensive and abusive. The ESC's representative noted that the Advice Note further stated that if a councillor was making a gratuitous personal comment and / or simply indulging in offensive abuse, it was unlikely that they would attract the enhanced protection of freedom of expression afforded to politicians.

The ESC's representative submitted that the comments made by the Respondents amounted to gratuitous personal attacks which had caused offence, and which had been unnecessary to any political points the Respondents may have been seeking to make. As such, the ESC's representative contended that the Respondents had been disrespectful towards the complainer and, therefore, had breached paragraph 3.2 of the Code. The ESC's representative further contended that, in the circumstances, any restriction on the Respondents' right to freedom of expression that a finding of a breach of paragraph 3.2 of the Code and the imposition of a sanction would represent would be justified.

In response to questions from the Panel, the ESC's representative accepted that it was not unusual for politicians to call on each other to resign, but argued the Respondents' remarks to that effect, combined with the references to the complainer's conviction, were entirely gratuitous as they had no relevance whatsoever to matters being discussed at the meeting. The ESC's representative noted that remarks can be disrespectful and discourteous even if they have a factual basis (such as comments about a person's appearance).

Submissions made by the Respondents' Representative

The Respondents' representative accepted that, when Councillor Yuill proposed his motion at the meeting on 10 March 2021, he had invited all elected members present to support it. The Respondents' representative noted, however, that non-housing budgets were always contentious and, as such, any motion proposing a budget amendment on any non-housing matters would never be seconded by a councillor from another political group. The Respondents' representative advised, therefore, that the complainer's

seconding of the Councillor Yuill's motion was entirely unexpected. It was also unnecessary, as Councillor Delaney had been expecting to second the motion. The Respondents' representative explained that the Respondents had, therefore, been taken by surprise by the complainer's intervention. The Respondents' representative further explained that the Respondents were suspicious of the complainer's motives and considered that as he was well aware that they would not wish to be associated with him, his support had been designed to cause embarrassment to their party. The Respondents' representative contended that, as such, the Respondents had made their remarks in the context of them reacting to an unexpected intervention by the complainer and trying to distance themselves from him and any perception that his support for their proposal was welcome.

The Respondents' representative noted that the comments to the effect that the complainer was a sex offender were factually accurate, regardless of whether his conviction was 'spent' in terms of the Rehabilitation of Offenders Act 1974, whether he was no longer on the Sex Offenders' Register, or whether any suspension imposed by the Standards Commission had expired. The Respondents' representative further noted that Aberdeen City Council's Urgent Business Committee had agreed unanimously on 19 December 2019 to call upon the complainer to resign as a councillor of Aberdeen City Council and to instruct the Chief Executive to inform the complainer that was the decision of the Council. The Respondents' representative argued, therefore, that the Respondents' comments to the effect that the complainer was unwelcome were simply a reflection of both their own views and those of their fellow elected members.

The Respondents' representative noted that the complainer had stated, in a press release, that he did not accept his conviction and that it had "destroyed his life". The Respondents' representative argued, therefore, that any adverse impact on the complainer and hostility directed towards him resulted directly from his own conduct and the subsequent criminal proceedings, rather than stemming from the comments made by the Respondents.

The Respondents' representative argued that, in interpreting the Code and determining whether the Respondents had failed to treat the complainer with courtesy and respect, as required by paragraph 3.2 of the Code, the Panel should consider all the relevant circumstances and context in which their remarks were made, as outlined above. The Respondents' representative contended that paragraph 3.2 should be interpreted as requiring respect "wherever possible", and that a literal interpretation, particularly in the given circumstances, was not appropriate. The Respondents' representative submitted that, having had regard to all the relevant circumstances, the Respondents' conduct had not been disrespectful and did not amount to a breach of the Code.

The Respondents' representative contended that, in any event, the Respondents were entitled to the protection to freedom of expression under Article 10 of the ECHR and, in particular, to the enhanced protection afforded to politicians when discussing matters of public interest. The Respondents' representative noted that, in interpreting Article 10, the Courts had found that enhanced protection of freedom of expression applies to all levels of politics, including local and that there was little scope under Article 10(2) for restrictions on political speech or on debate on questions of public interest. The Respondents' representative drew the Panel's attention to case law that stated that, in a political context, a degree of the immoderate, offensive, shocking, disturbing and polemical conduct, that would not be acceptable outside that context, should be tolerated.

The Respondents' representative noted that the Respondents' comments about the complainer being a sex offender were factual and made in a political context. The Respondents' representative further noted that the Respondents had been acting to strengthen the public's trust and confidence in the integrity of the Council and its elected members in conducting public business by highlighting that they, and others, did not believe the complainer's continued membership of the Council or presence at the meeting was welcome. As such, the Respondents' representative contended the remarks did not reach the threshold of being so

offensive, shocking and polemical as to warrant a restriction on the Respondents' enhanced right to freedom of expression that a finding of breach and sanction would impose.

In response to questions from the Panel, the Respondents' representative advised that Councillor Delaney had intended to refer to the complainer as a "registered" sex offender and that this reference to him being the "resident" sex offender was simply a slip of the tongue. The Respondents' representative accepted that the Respondents could have distanced themselves from the complainer without referring to his conviction, but noted that a failure to do so did not in itself mean that there had been a contravention of the Code.

DECISION

The Hearing Panel considered the submissions made both in writing and orally at the Hearing. It concluded that:

1. The Councillors' Code of Conduct applied to the Respondents, Councillors Delaney and Yuill.
2. The Respondents had not breached paragraph 3.2 of the Code.

Reasons for Decision

In reaching its decision, the Hearing Panel took the following approach, as outlined in the Standards Commission's Advice Note on the Application of Article 10 of the European Convention on Human Rights. Firstly, it would consider whether the facts found led it to conclude, on the balance of probabilities, that the Respondents had failed to comply with the Code. Secondly, if so, it would then consider whether such a finding in itself was, on the face of it, a breach of the Respondents' right to freedom of expression under Article 10. Thirdly, if so, the Hearing Panel would 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 (and in particular, for this case, for the protection of the reputation or rights of others).

Stage 1: Whether the Respondents' conduct amounted, on the face of it, to a breach of the Code

The Panel noted that the complainer had not been automatically disqualified under Section 31 of the Local Government (Scotland) Act 1973 (which provides that a councillor is automatically disqualified if they are convicted of a crime and receive a custodial sentence of three months or more). The complainer had also not been disqualified by the Standards Commission when it considered his conduct at a Hearing on 20 November 2020. As such, the complainer was entitled to be at the meeting on 10 March 2021 and to take part in the discussion. The Panel noted, however, that the Respondents had not prevented the complainer's attendance or participation at the meeting. Instead, they had made remarks about his conviction and whether his presence was welcome.

While the Panel accepted that the Respondents' comments were made in response to an unexpected intervention by the complainer, it noted that they had not been made immediately after the complainer had indicated his support for the motion. The Panel noted, therefore, that the Respondents had time to frame their remarks and to ensure they conducted themselves in a courteous and respectful manner. The Panel noted that despite the Lord Provost having intervened to remind elected members of the requirements of the Code and the importance of treating each other with respect, the Respondents had not retracted or apologised for their comments.

The Panel noted that its role was not to consider the complainer's own conduct, as that had already been the subject of both a criminal trial and the Standards Commission's own Hearing proceedings. The Panel accepted that the complainer had been convicted of a sexual offence and considered, therefore, that the Respondents' references to him being a "convicted sex offender" or a "sex offender" were factually accurate. The Panel was of the view, nevertheless, that the Respondents' references to the complainer's conviction

and remarks to the effect that he was unwelcome at the meeting, or as a councillor, would have made him feel uncomfortable at work and offended. This was particularly the case given that the comments were made during a meeting that was not focused on the conduct of the complainer.

The Panel further considered that the Respondents would have known, or ought reasonably to have known, that the references would have made the complainer feel humiliated and belittled. The Panel also did not accept the Respondents' representative's argument that paragraph 3.2 should be interpreted as requiring respect "wherever possible" and considered that, instead, it applied at all times when an individual was acting as a councillor or when they would be reasonably regarded as acting as such. As such, the Panel was satisfied that the Respondents' conduct amounted, on the face of it, to a contravention of the requirement under paragraph 3.2 of the Code for councillors to treat each other with respect. However, before concluding its finding on the matter, the Hearing Panel noted that it would have to consider the provisions of Article 10 of the ECHR, which it proceeded to do, as set out in Stages 2 and 3 below.

Stage 2: Whether a finding of a contravention of the Code would be a breach of the Respondents' right to freedom of expression under Article 10 of the ECHR

The question which then arose was whether the finding that the Respondents had failed to comply with the provisions of the Code would, on the face of it, be a breach of the Respondents' right to freedom of expression under Article 10 of the ECHR. In coming to a view, the Hearing Panel considered whether the Respondents were expressing views on matters of public concern and were, therefore, entitled to the enhanced protection to freedom of expression afforded to politicians, which includes local government councillors.

The Panel noted that the Respondents' remarks had been made in the context of whether the complainer's seconding of their party's motion on a budget amendment was welcome. While the Panel recognised that the complainer's conviction was not the subject of the meeting, it nevertheless noted that his suitability (and that of others convicted of sexual offences) to be a councillor was a matter of public debate and interest. The Panel noted that the Courts, in considering Article 10, had found there was no distinction between political discussion and discussions on matters of public concern.¹

In this case, the Panel was of the view that the Respondents' remarks concerned matters of public interest, namely whether the contribution of a councillor who had been convicted of a sexual offence was welcome and whether that councillor should resign. In the circumstances, the Panel considered that both Respondents would attract the enhanced protection of freedom of expression afforded to politicians, including local politicians, under Article 10.

Stage 3: Whether any restriction on the Respondents' right to freedom of expression involved by a finding of a contravention of the Code would be justified by Article 10(2) of the ECHR

The Hearing Panel then proceeded to consider whether the restriction involved by the finding that the Code had been breached was justified by Article 10(2), which allows restrictions that are necessary in a democratic society for the protection of the reputation or rights of others.

The Panel noted that this required it to undertake a balancing exercise, weighing the enhanced protection to freedom of expression enjoyed by the Respondents against any restriction imposed by the application of the Code and imposition of any sanction. In this case, for the reasons outlined above, the Hearing Panel determined the Respondents' remarks concerned matters of public interest. As such, the Hearing Panel

¹ *R (Calver) v Adjudication Panel for Wales (2012) EWHC 1172*

considered there was limited scope under article 10(2) for a restriction of the Respondents' freedom of expression.

In reaching an evaluative judgment, the Panel noted that, while the Respondents' references to the complainer as being a sex offender had a factual basis, they were accompanied by comments to the effect that the complainer was "unwelcome" and, as stated by Councillor Delaney, that he was the "resident" sex offender. The Panel considered that while these additional comments supported the ESC's position that the remarks were of a personal rather than political nature, it nevertheless noted that it was not uncommon for politicians to refer to the actions and misconduct of colleagues and to call on them to resign.

The Panel noted that a distinction could be drawn between factual statements, such as the Respondents' remarks about the complainer being a sex offender, and opinions or value judgments, such as the comments as to whether he was welcome and should resign. This was because while the existence of facts can be demonstrated, the truth (or otherwise) of value judgments is not susceptible to proof. The Panel noted, however, that the Courts have held any distinction between statements of fact and value judgments is of less significance where the comments in question are made during political debate at any level. The Panel noted that the Courts have held that comments made in a political context, which amount to value judgments, are tolerated even if untrue, if what was expressed was said in good faith and there is some reasonable (even if incorrect) factual basis for making such comments.²

In this case, the Panel determined that the Respondents were expressing value judgements when making comments to the effect that the complainer, as someone who had been convicted of a sexual offence was not welcome / should resign. The Panel was satisfied that there was evidence that these value judgements had a factual basis, given the decision made by the Council's Urgent Business Committee on 19 December 2019 to call upon the complainer to resign as a councillor.

The Panel noted that the Courts have held that politicians are subject to wider levels of acceptable criticism than officers or members of the public when matters of public concern were being discussed.³

The Panel further noted that the Courts have held that the less egregious the conduct in question, the harder it would be for a Panel, when undertaking its balancing exercise, to justifiably conclude that a restriction on an individual's right to freedom of expression was required.⁴

The Panel determined that, in the context of the remarks having been made about another politician and being either factual in nature or being value judgments that had a factual basis, the Respondents' remarks were not sufficiently offensive, polemical and gratuitous as to justify a restriction on their right to freedom of expression. As such, the Panel concluded that a breach of the Code could not be found.

The Panel nevertheless emphasised that the requirement for councillors to behave in a respectful manner towards each other is a fundamental requirement of the Code, as it ensures a minimum standard of debate. The Panel noted that a failure to reach this standard has the potential to undermine the reputation of a Council and, in addition, the public's confidence in elected members. The Panel welcomed the fact that the Lord Provost had made this point during the meeting on 10 March 2021 after the Respondents' remarks had been made.

² *Lombardo v Malta* (2009) 48 EHRR 23

³ *Heesom v Public Services Ombudsman for Wales* [2014] EWHC 1504

⁴ *R (Calver) v Adjudication Panel for Wales* (2012) EWHC 1172

Date: 8 October 2021



**Mrs Tricia Stewart
Chair of the Hearing Panel**