

## Decision of the Standards Commission for Scotland

On receipt of a report from the Ethical Standards Commissioner (ESC), the Standards Commission has three options available, in terms of Section 16 of The Ethical Standards in Public Life etc. (Scotland) Act 2000 (the 2000 Act). These are: (a) to direct the ESC to carry out further investigations; (b) hold a hearing; or (c) do neither.

In this case, the Standards Commission determined to do neither.

### Background

The Standards Commission is a statutory body established under the 2000 Act. The 2000 Act created an ethical standards framework, under which councillors and members of devolved public bodies in Scotland are required to comply with Codes of Conduct. It provides that complaints about breaches of these Codes are to be investigated by the ESC and adjudicated upon by the Standards Commission.

### Report to the Standards Commission

Following his investigation into a complaint (reference LA/AB/3573) concerning an alleged contravention of the Councillors' Code of Conduct (the Code) by Councillor [REDACTED] of Argyll and Bute Council (the Respondent), the Acting ESC referred a report to the Standards Commission, on 16 November 2021, in accordance with Section 14(2) of the 2000 Act.

The Acting ESC advised that the complaint concerned the Respondent's conduct in sharing, on Facebook, an Oban Times article of 8 July 2021 entitled "Stop Chinese Whispering online, headteacher tells parents". The complainer alleged that, by sharing the article in question, the Respondent had permitted an "inaccurate malicious representation" of a council employee (being the school's headteacher).

The Acting ESC advised that a third party had made the following two comments on the Respondent's post: "In this date (sic) and age, a Head Teacher who uses this kind of language brings shame on this school, community and his Argyll & Bute Council employers. Time for the school to be inspected by HMIE! For the sake of the pupils, parents, community and staff, this cannot be allowed to 'rumble on' any more"; and "How long is A&B Council going to do nothing about this?"

The Acting ESC noted that the complaint also concerned the Respondent's response to these comments, which was as follows: "Hopefully not for much longer. I have no words!".

The complainer alleged that, in her response, the Respondent had misinterpreted the language used by the headteacher and implied that the headteacher was racist and used racist language.

In his report, the Acting ESC investigated whether the Respondent's conduct would amount to a contravention of paragraph 3.3 of the Code, which states:

### **Relationship with Council Employees**

*You must respect all Council employees and the role they play, and treat them with courtesy at all times. It is expected that employees will show the same consideration in return.*

The Acting ESC advised that:

1. There was no dispute that the Respondent made the comment on Facebook. As the Respondent's Facebook profile referred to her being a councillor, she could reasonably be perceived as acting as such when she shared the article and responded to the comments made. As such, the Code applied.

2. While some of the responses to the article condemned the headteacher for using the term “Chinese Whispers”, on the basis that the term was racist, the Respondent did not appear to have engaged in this criticism.
3. The Respondent’s position was that her response to the comments concerned the school’s uniform policy, rather than being an endorsement of any criticisms of the headteacher’s choice of words. The Respondent explained that, at the time, she was expecting a response to a letter she had sent the Council in this regard. The Acting ESC advised that the Council’s Monitoring Officer had confirmed receipt of that letter.
4. In light of the Respondent’s explanation and a lack of other evidence to support the complainer’s position, the burden of proof had not been discharged. As such, the Acting ESC was of the view that it had not been established that the Respondent’s response or actions in sharing the article lacked respect or courtesy. The Acting ESC further noted that the content of comments and posts from third parties were outwith the control of the Respondent.

### **Reasons for Decision**

Having noted that it was not in dispute that the Respondent had shared the article and posted the response as alleged, the Standards Commission did not consider that it was necessary or appropriate to direct the Acting ESC to undertake any further investigation into the matter.

In making a decision about whether to hold a Hearing, the Standards Commission took into account both public interest and proportionality considerations, in accordance with its policy on Section 16 of the 2000 Act. A copy of the policy can be found at: <https://www.standardscommissionscotland.org.uk/cases>.

In assessing the public interest, the Standards Commission noted that a breach of the respect provision in the Code could have the potential to lower the tone of political discourse and to bring the role of a councillor, and the Council itself, into disrepute. The Standards Commission noted, however, that this would only be the case if, having taken into the account the full circumstances, the sharing of the post and the response were found to be disrespectful by a Hearing Panel.

The Standards Commission noted that holding a Hearing (with the associated publicity) could promote the provisions of the Code, if it was found that the Respondent’s conduct amounted to a breach of the Code. There could, therefore, be some limited public interest in holding a Hearing. Regardless of this, the Standards Commission was, however, also required to consider whether it would be proportionate to do so.

In considering proportionality, the Standards Commission noted that it would be obliged, at a Hearing, to consider the application of Article 10 of the ECHR, which concerns the right to freedom of expression. Article 10 is a qualified right and may be limited by a restriction, such as the imposition of a sanction for a breach of a Code of Conduct, provided such a restriction is:

- responding to a pressing social need;
- for relevant and sufficient reasons; and
- proportionate.

The Standards Commission noted that the Courts have held, however, that enhanced protection of freedom of expression applies to all levels of politics including local. As such, there was 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, colourful and emotive, that would not be acceptable outside that context, is tolerated.

An Advice Note on the approach the Standards Commission takes when issues that concern the application of Article 10 and the right to freedom of expression arise can be found at: <https://www.standardscommissionscotland.org.uk/education-and-resources/professional-briefings>.

The Standards Commission noted that the option to take no action had been included in the 2000 Act to ensure that neither the ethical standards framework, nor the Standards Commission, was brought into disrepute by spending public funds on unnecessary administrative or legal processes in cases that did not, on balance, warrant such action.

In this case, the Standards Commission noted the Acting ESC's position in respect of the likelihood of establishing the complaint. The Standards Commission considered, in any event, that even if the Respondent's conduct was found to be disrespectful or discourteous at a Hearing, it was highly likely that she would enjoy the enhanced protection to freedom of expression afforded by Article 10, given the post and comments in question concerned a matter of public interest (being a newspaper article on matters relating to a local school). The Standards Commission was of the view that it was very unlikely that the conduct in question would be found to be sufficiently offensive, gratuitous or egregious as to justify a restriction on the Respondent's right to freedom of expression.

Having taken into account the nature of the alleged breach, and the likelihood of the Respondent's conduct being protected by her enhanced right to freedom of expression, the Standards Commission concluded that it was neither proportionate, nor in the public interest, for it to hold a Hearing. The Standards Commission determined, therefore, to take no action on the referral.

**It should be noted that this means no decision has been taken or is to be taken on whether the Respondent's conduct amounts to a breach of the Code.**

The Standards Commission would nevertheless remind councillors of the need to comply with the Code when using social media. They should be careful to ensure, when posting comments, that they could not reasonably be perceived to be endorsing the opinions or views of others when they do not intend to do so.

**Date: 18 November 2021**



**Lorna Johnston  
Executive Director**