

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held at City Chambers, 14 City Square, Dundee, DD1 3BY, on 1 June 2022.

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/D/3580, concerning an alleged contravention of the Councillors' Code of Conduct (the Code) dated July 2018, being the version in place at the time of the events in question by former Councillor Gregor Murray (the Respondent).

The Respondent was not in attendance.

The Respondent identifies as non-binary, so the pronouns they/them are used below when reference is made to them.

Referral

Following an investigation into a complaint received about the conduct of the Respondent, the ESC referred a report to the Standards Commission for Scotland on 21 February 2022, in accordance with section 14(2) of the Ethical Standards in Public Life etc. (Scotland) Act 2000 (the 2000 Act), as amended.

The substance of the referral was that the Respondent had failed to comply with the provisions of the 2018 version of the Code and, in particular, that they had contravened paragraphs 3.2 and 3.6, which are 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.

Bullying and Harassment

3.6 Bullying or harassment is completely unacceptable and will be considered to be a breach of this Code.

Preliminary Matters

The Panel noted that the Respondent had advised the Standards Commission that they did not intend to attend the Hearing. The Panel was satisfied that the Respondent had been given proper notice of the Hearing, in accordance with Section 20 of the 2000 Act and, as such, was content to proceed in their absence.

No other preliminary matters were raised.

Submissions made by the Acting ESC

The Acting ESC advised that, at the time of the events in question, the Respondent was the only openly trans councillor in Scotland, and that they had a history of campaigning on trans rights and other issues. The Complainer is a prominent lawyer, who as well as having his own column in a local newspaper, has his own Wikipedia entry. Additionally, the Complainer was formerly a board member of a devolved public body listed in Schedule 3 of the 2000 Act. The Acting ESC noted that it was apparent from the material he had investigated that the Complainer campaigns on the issue of women's rights.

The Acting ESC noted that the Gender Recognition (Scotland) Bill was in the early stages of passing through the Scottish Parliament's legislative process, and had caused significant and heated debate in Scotland. The Acting ESC noted that the aim of that Bill was to reform the grounds and procedure for obtaining gender recognition in order to make it easier for trans people to self-identify. The Acting ESC highlighted that some people have concerns about the Bill's contents, and in particular contend that it does not take adequately the rights of women and girls into account.

The Acting ESC noted that the Scottish Government's proposals for reform had generated much debate in the media, and especially so on social media. He noted that views on either side of the debate are often highly polarised, and that the debate itself has been regularly characterised as "toxic". The Acting ESC noted that in terms of the debate, the Complainer and the Respondent have opposing views, and in particular highlighted that the Respondent considered the Complainer to hold gender-critical beliefs, a contention that the Acting ESC considered to be confirmed by the contents of the Complainer's complaint form. The Acting ESC made it clear that he did not intend to offer any views on the validity of either side of the debate.

The Acting ESC explained that the first issue of complaint concerned an email the Respondent sent to the Complainer's employer, a well-known charity law centre, on 7 June 2021, in which they alleged that, based on two tweets the Complainer had posted, that the Complainer was a bigot and transphobic, and that he had bullied and intimidated trans people.

The Acting ESC described the two tweets by the Complainer that the Respondent had highlighted in their complaint email to the law centre. In the first of those tweets, the Complainer responded to a tweet by Shelter, a housing charity. Shelter's tweet had referred to the Stonewall uprising, and noted the part played by "black cis and trans women". The Complainer, in his responding tweet, noted that he found it "troubling to describe women as 'cis'". The Acting ESC noted that the term "cis" was defined in the Collins English Dictionary as a term for someone who has a gender identity which fully corresponds to the sex assigned to them at birth. The Acting ESC noted that cis could be stated to be an antonym of trans.

The second of the Complainer's tweets highlighted by the Respondent was a response to a tweet by a member of the public in which the Complainer contended he had been falsely accused of being transphobic because he did not agree with the need to refer to a woman as a 'cis' woman. In that tweet, the Complainer noted he would pass the matter to his lawyers.

The Acting ESC noted that it was not in dispute that, after receiving an email response from the law centre, the Respondent then shared their initial email and the response in a Twitter post on 9 June 2021, the sharing of that exchange forming the basis of the second issue of complaint. The Acting ESC noted that the Respondent had advised that they had shared the email due to the "horrendous actions" of the Complainer, and, further, that the Respondent had described the Complainer's behaviour as "atrocious" and the law centre's response as "abhorrent in the extreme". It was noted that the Respondent had stated that the law centre was "horrendously transphobic", and that they feared for the rights of trans people using their service. The Respondent had further stated that the law centre used public money to defend transphobia.

The Acting ESC advised that the Respondent also acknowledged, in their Twitter thread, that the law centre did "a lot of good for people" and that they did not want to endanger its good work. The Respondent said that campaigning to cut the law centre's funds would harm the poorest in society and asked if it was worth contacting the law centre's funders to ask them "to do better" and "to be less bigoted".

The Acting ESC advised that there was no dispute as to the facts outlined above.

The Acting ESC noted the terms of paragraph 3.1 of the 2018 Code, which stated:

3.1 The rules of good conduct in this section must be observed in all situations where you act as a councillor or are perceived as acting as a councillor, including representing the Council on official business and when using social media.

The Acting ESC noted that the Respondent disputed that they were acting as councillor at the time of the conduct in question. The Acting ESC noted that the biography of the Respondent's Twitter account stated they were "totally not a politician", and noted that this might support the Respondent's contention that it was a personal account. However, the Acting ESC considered that as the Respondent had signed off the email as "councillor", and had received a response from the law centre addressing them as such, he was satisfied that, in relation to both issues of complaint, the Respondent was acting in the capacity of a councillor and could be perceived to be acting in that capacity as the time of the events in question.

The Acting ESC noted that in their complaint email to the law centre, the Respondent queried whether the law centre had any inclusion / diversity policies. The Respondent highlighted the two tweets made by the Complainer and stated that their email should be treated as a formal complaint about the Complainer.

The Acting ESC referred to the Standards Commission's Guidance on the Code, which stated that councillors should treat everyone with respect, even if they disagreed with their views. The Acting ESC acknowledged the accusation of bigotry and transphobia, and noted that in using those terms, the Respondent could be objectively perceived as being disrespectful.

In acknowledging the Respondent's accusation that the law centre's response to their complaint was "abhorrent in the extreme", the Acting ESC accepted that Respondent's position that their response was due to them being surprised and disappointed with the law centre's response to their complaint. While the Acting ESC noted that the Respondent could have responded in a different way, he did not think the response was disrespectful and, rather, that the response was a value judgement made in good faith.

Turning to paragraph 3.6 of the Code, the Acting ESC noted that in sharing the email interaction on Twitter, the Respondent had highlighted the difficult circumstances surrounding that course of action. The Acting ESC noted that he accepted the Respondent's assertion that they were merely sharing their experience of a service, having felt that the law centre had "brushed the complaint aside". The Acting ESC noted that the Respondent had not threatened to have the law centre closed, or called for any of its staff to lose their jobs. Instead, the Acting ESC noted that the Respondent highlighted the good work that the law centre did, and that they wanted the law centre to "do better" and "to be less bigoted".

The Acting ESC referred to the Guidance and Advice Notes produced by the Standards Commission relating to bullying and harassment, and noted that it was the impact of any behaviour that mattered, rather than the intent. Having considered the content of the posts, the Acting ESC advised he was of the view that nothing within them could be perceived to be bullying or harassing in nature. The Acting ESC advised that, as such, he had concluded that the conduct complained of in respect of the second issue of complaint could not be said to amount to a breach of paragraph 3.6 of the Code.

The Acting ESC proceeded to consider the application of Article 10 of the European Convention on Human Rights (ECHR). The Acting ESC noted that enhanced protection to freedom of expression is afforded to politicians when commenting on matters of political expression and public interest, which terms have been defined very widely within the relevant case law. The Acting ESC noted that this enhanced protection applies to all level of politics, including local.

The Acting ESC noted that the freedom of expression afforded by Article 10 was not absolute, and that in terms of Article 10(2), it may be subject to restrictions. Notably, the Acting ESC stated, in relation to matters under consideration, restrictions may be applied for the protection of the reputation and rights of others. The Acting ESC noted, however, that there was little scope for any such restrictions on matters of public

interest, and that any such restrictions would have to be in response to a pressing social need, to be relevant, and to be proportionate.

The Acting ESC argued that as the Respondent was enquiring about the policies of the law centre, a charity, in the context of the wider debate in Scotland surrounding the issues of trans rights, the conduct in question could be said to relate to matters of political and public interest. As such, the Acting ESC considered that the Respondent would benefit from enhanced protection to their right to freedom of expression.

Having noted that the enhanced protection afforded by Article 10 was wide, and that it extended to matters which might be felt by some to be inappropriate or offensive, the Acting ESC considered that a restriction on the Respondent's right to freedom of expression could not be justified. The Acting ESC further contended he considered the Respondent had reasonable grounds for holding their views and considered they had been expressed in good faith.

In response to questions from the Panel, the Acting ESC accepted that, in his two tweets, the Complainer had questioned the appropriateness of the use of the descriptor 'cis' and had not expressly stated he held gender critical beliefs. The Acting ESC argued, however, that he had not conflated the two issues as the commentary about the descriptor characterised that side of the debate and was representative of such a view. The Acting ESC further advised that he considered that the Complainer had inferred, in his complaint form, that he held gender critical beliefs.

The Acting ESC advised that his view was that the Respondent's conduct, in sending a complaint about the Complainer's personal Twitter account to his employer, did not amount to bullying and harassment. The Acting ESC explained that this was because the Complainer was the public face of a law centre which, as a charity, should be open to public scrutiny.

The Acting ESC accepted that there was no suggestion that the Respondent had received any service from the law centre, but noted that their position was that they had a right to advise members of the trans community of their concerns, as others could potentially seek legal advice from it in the future. The Acting ESC accepted that while his view was that the Respondent had raised issues about the law centre's funding as part of their attempt to encourage it "to do better", an alternative interpretation could be that the issue of funding was potentially raised as a warning and, as such, could be interpreted as intimidatory.

The Acting ESC further accepted that there was no evidence or suggestion that the Respondent's claim that the law centre was using public money to defend transphobia had any basis in fact, other than the fact that its response to the Respondent's complaint stated that the Complainer's comments were not transphobic. The Acting ESC acknowledged that the Respondent had presented his allegation that the law centre was using public money to defend transphobia as a fact.

The Acting ESC did not accept that accusing the Complainer of being transphobic or bigoted could be perceived as being particularly egregious, given that he was a solicitor and was, therefore, obliged to comply with professional standards of conduct. The Acting ESC noted that as the Complainer was a well-known charity lawyer, who wrote a weekly column in a local newspaper and who had chosen to engage publicly in the debate on trans rights and gender critical beliefs, he had potentially invited greater scrutiny and criticism.

The Acting ESC advised that his understanding was that the basis for the Respondent's statement that the Complainer had "bullied and intimidated trans people" was that the Complainer had threatened legal action against members of the trans community for calling him transphobic in both his second tweet and in subsequent posts. The Acting ESC accepted, however, that the Respondent could not have been referring to later tweets posted by the Complainer at the time he made the comment, which was presented as a fact, in their complaint to the law centre.

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 Respondent, former Councillor Murray.
2. There had, on the face of it, been a breach of paragraphs 3.2 and 3.6 of the Councillors' Code of Conduct by the Respondent. However, when the Respondent's right to freedom of expression under Article 10 of the ECHR was taken into account, a finding of breach, and the consequent imposition of a sanction, was not justified.

Reasons for Decision

In reaching its decision as to whether there had been a breach of the Code, the Panel took the following three-stage approach, as outlined in the Standards Commission's Advice Note on the Application of Article 10 of the ECHR:

- Firstly, it would consider whether the facts found led it to conclude, on the balance of probabilities, that the Respondent 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 Respondent's 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, in this case, for the protection of the reputation or rights of others).

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

The Panel noted that the Respondent had used a personal email address when sending their complaint email to the law centre. The Panel further noted that the Respondent's Twitter account appeared to be a personal one, in that no mention was made of their then status as a councillor in the 'biography' section. The Panel noted, nevertheless, that the Respondent had signed off their complaint email as 'councillor' (using the accepted abbreviation 'Cllr') and that the law centre, in its response, had addressed them as such. The Panel noted that before sharing the email exchange on Twitter, the Respondent would have had the opportunity to redact the email to remove the 'councillor' sign-off, but they had chosen not to do so.

The Panel agreed with the Acting ESC that by signing off their initial complaint email as 'councillor', the Respondent could be perceived to have been using their position as an elected member in order to add weight, or prestige, to their complaint.

The Panel noted that the Respondent had included the phrase "totally not a politician" as part of their Twitter biography. The Panel further noted, however, that the Respondent was a politician at the time, and that their account was not private. The Panel considered that the Respondent's use of the sign-off 'councillor', while commenting on matters of public concern, meant that it would be reasonable for anyone viewing the posts in question to consider they were acting as such, regardless of any attempt to appear to note that any comments were being posted in a personal capacity only.

The Panel determined that given the circumstances outlined above, it would be reasonable for any members of the public, viewing the email and the response shared by the Respondent, to have considered them to be acting in their capacity as an elected politician (which in this case was as a councillor). The Panel was satisfied, therefore, that the Code applied to the Respondent at the time of the events in question.

The Panel noted that paragraph 3.2 of the 2018 Code required councillors to respect their colleagues and members of the public and to treat them with courtesy and respect at all times when acting as a councillor. Paragraph 3.6 of the 2018 Code stated that bullying and harassment was completely unacceptable and would be considered to be a breach of the Code.

The Panel noted that the Acting ESC had stated, in the 'Executive Summary' section in his report, that he had "found that, on the face of it, the Respondent's reference to the Complainer as bigoted and transphobic could amount to disrespect", but that he had concluded a restriction was not justified under Article 10. The Panel noted that the Acting ESC indicated, at the Hearing, that his position was that the Respondent's conduct did not, on the face of it, amount to discourtesy or disrespect.

The Panel noted that, in response to the complaint, the Respondent had advised the Acting ESC's office that they considered that, on issues of trans inclusion, and especially in relation to the treatment of trans women, the Complainer had presented his opinions in "a bigoted, and transphobic manner", which was why the Respondent had submitted the complaint to the law centre. The Respondent had advised that they had been surprised and disappointed by the law centre's response to their complaint, and considered it be "abhorrent in the extreme", particularly given the nature of the law centre's "professional standards, their stated aims and general humanity". The Respondent's position was, therefore, that they were justified in expressing these views. The Respondent further argued that they were entitled to the protection afforded by Article 10 of the ECHR, in respect of freedom of expression.

The Panel acknowledged that the Acting ESC accepted the Respondent's position that they were merely sharing their experience of a service (being the complaint response from the law centre) and that this was supported by the fact that the Respondent had stated that they simply wanted the law centre "to do better". The Panel further acknowledged that the Respondent was determined to stand up for the trans community.

The Panel noted that, in the two tweets that had led to the Respondent's initial complaint email to the law centre, the Complainer had indicated he found it troubling and did not agree with the view that women should be described as "cis women" as they were "just women" ('cis' being used as a descriptor of a person whose gender identity and sex assigned at birth are the same).

The Panel accepted that the Respondent was entitled to disagree with the Complainer's view on how women should be described. The Panel noted that it was a matter of law that holding a gender critical belief (namely that biological sex should not be conflated with gender identity) was lawful and protected under Section 6 of the Equality Act 2010 and Article 10 of the ECHR. The Panel noted, nevertheless, that the Respondent was entitled to consider that anyone who held such a belief to be transphobic and that they may well have found the Complainer's tweets to be offensive on that basis.

The Panel accepted that the ongoing debate on trans rights and gender critical beliefs was highly polarised and could be characterised as being discourteous and disrespectful on both sides. The Panel was cognisant of this context but noted that its role was not to make any judgements on the acceptability or otherwise of any views on either side of the debate. Instead, the Panel's role was only to determine whether the Respondent had complied with the Code.

The Panel noted that the Respondent was fully entitled to hold a different view to the Complainer and to challenge the Complainer's view, and that there was nothing in the Code that prevented them from doing so in a respectful manner. This did not mean, however, that the Respondent was entitled to make serious accusations of bullying and intimidation and misuse of public money.

While the Panel noted that the Acting ESC argued that, as a solicitor, the Complainer would not have felt bullied and harassed by the Respondent. The Panel considered, however, that the fact that the Complainer had submitted a complaint to that effect was evidence to the contrary.

The Panel noted that, on the evidence before it, the allegation that the Complainer had bullied and intimidated trans people appeared to be based on the fact that the Complainer had indicated in one of the two tweets in question that they may take legal action against a member of the public for accusing them of transphobia. The Panel was of the view that the Complainer was entitled to refer to their right to take legal action if they considered that they had been defamed. The Panel considered that a reference to this right would not, in itself, amount to bullying and intimidation. The Panel considered that at the time the Respondent, as a councillor, was in a position of responsibility and authority and, as such, should have been reasonably aware that it would be a serious matter for them to make an accusation that a member of the public had engaged in bullying and intimidation. The Panel was of the view that the Respondent would, or should, have known that the making of such an accusation had the potential to have a serious impact on the Complainer, particularly as he was a well-known charity solicitor, whose work and livelihood would be linked intrinsically to his reputation. In the circumstances, the Panel considered that the making of such an accusation, without any reasonable foundation, was disrespectful.

The Panel noted that the sole basis for the Respondent's accusation that the law centre had misused public money to defend transphobia was its very brief response to the unsolicited initial complaint and, in particular, the short statement that the Complainer's comments were not transphobic. The Panel considered that the Respondent's characterisation of this response was entirely disproportionate. The Panel was of the view that an allegation of such a serious nature should not have been made without any reasonable basis. The Panel noted that it had not been presented with any evidence, over and above the Respondent's unhappiness with the law centre's response to their complaint, that there was any reasonable basis for the making of such an accusation. In the circumstances, the Panel concluded that the Respondent's conduct in making a public accusation to the effect that the law centre had misused public money was discourteous and disrespectful.

As such, the Panel was satisfied, on balance, that the Respondent's conduct amounted, on the face of it, to a contravention of the requirement under paragraph 3.2 of the Code for councillors to treat members of the public with courtesy and respect.

The Panel noted that bullying and harassment can be a one-off or a course of conduct and is inappropriate or unwelcome behaviour that makes an individual or a group feel undermined or insulted. It usually arises as a result of someone misusing their power, which is derived from their status or a position of strength. The Panel noted that it is the impact of the behaviour, rather than the intent, that is the key. In this case, the Panel again noted that the Respondent's status, at the time, as a councillor meant that they were in a position of power. The Panel was of the view that the Respondent's conduct in making serious accusations about both the conduct of the Complainer and the integrity of the law centre, that lacked any reasonable basis, was entirely inappropriate and would have been both unwelcome and insulting. The Panel concluded, therefore, that it amounted to bullying and harassment.

As such, the Panel was satisfied, on balance, that the Respondent's conduct also amounted, on the face of it, to a contravention of the requirement under paragraph 3.6 of the Code for councillors to refrain from bullying and harassment.

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

The Panel noted that enhanced protection of freedom of expression under Article 10 applies to all levels of politics, including local. The Panel further noted that the Courts have held that political expression is a broad concept and that there is little distinction between political discussion and discussion of matters of public

concern¹. In this case, the Panel was satisfied that the Respondent was commenting on matters of public concern, namely the conduct of a well-known charity law centre and its principal solicitor. In the circumstances, the Panel considered that the Respondent 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 Respondent's 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 Panel noted that Article 10(2) provides that since an individual's right to freedom of expression carries with it duties and responsibilities, a restriction on it may be necessary, in a democratic society, for the protection of the reputation or rights of others. The Panel then proceeded to consider whether the restriction involved by the finding that the Code had been breached was therefore justified, in terms of Article 10(2).

The Panel noted that it was required to undertake a balancing exercise, weighing the enhanced protection to freedom of expression enjoyed by the Respondent against any restriction imposed by the application of the Code and the imposition of any sanction. In this case, as the issues being discussed by the Respondent concerned matters of public interest or concern, the Panel noted there was limited scope under Article 10(2) for a restriction on the Respondent's right to freedom of expression.

The Panel accepted 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 is required².

The Panel was of the view that the accusations that the Complainer had bullied and intimidated trans people, and that the law centre had used public funds to defend transphobia, were offensive. The Panel nevertheless accepted that the Courts have held that, in a political context, a degree of the immoderate, offensive, shocking, disturbing, exaggerated, provocative, emotive, non-rational and aggressive, that would not be acceptable outside that context, is tolerated³.

The Panel was concerned that the Respondent's accusations could have had an impact on the reputation of both the Complainer and the law centre. The Panel noted, however, that the Complainer had chosen to engage publicly in the ongoing debate on trans rights and gender critical beliefs, in the knowledge that the debate was highly polarised. The Panel considered it was reasonable to assume the Complainer would have known that his own Tweets may have provoked a reaction. The Panel further considered that as an experienced solicitor, the Complainer was capable of standing up for his rights and reputation and that of his practice.

After full consideration of the matter, and some debate, the Panel considered that the Respondent's comments were not sufficiently offensive and gratuitous as to justify a restriction on their right to freedom of expression. This was because the Panel was ultimately satisfied that the Respondent was attempting to express their opinion about the Complainer's views and position in a polarised debate, albeit they had done so in a particularly inappropriate manner. As such, the Panel concluded that a breach of the Code could not be found.

The Panel would nevertheless emphasise that the requirement for councillors to lead by example and behave in a respectful and courteous manner towards members of the public, regardless of the polarity of the views under debate, is a fundamental requirement of the Code, as it ensures a minimum standard of public debate.

¹ *Thorgeirson v Iceland (1992) 14 EHRR 843*

² *Calver, R (On the Application Of) v The Adjudication Panel for Wales (Rev 2) [2012] EWHC 1172 (Admin)*

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

Date: 7 June 2022



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