

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held at Town House, Broad Street, Aberdeen, AB10 1AQ, on 7 June 2022.

Panel Members: Mr Michael McCormick, Chair of the Hearing Panel
Mr Paul Walker
Ms Suzanne Vestri

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/3600, 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 Councillor Michael Hutchison (the Respondent).

The Respondent was represented by Mr Scott Martin, Solicitor.

Referral

Following an investigation into a complaint received about the conduct of the Respondent, the Acting ESC referred a report to the Standards Commission for Scotland on 15 March 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 (being the version in place at the time of the events in question) and, in particular, that he had contravened paragraphs 3.3, 3.5 and paragraph 20 of Annex C, which were as follows:

Relationship with Council Employees (including those employed by contractors providing services to the Council)

3.3 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.

3.5 You must follow the Protocol for Relations between Councillors and Employees attached at Annex C. A breach of the Protocol will be considered as a breach of this Code.

Annex C – Public Comment

20 Councillors should not raise matters relating to the conduct or capability of employees in public. Employees must accord to councillors the respect and courtesy due to them in their various roles. There are provisions in the Code of Conduct for Employees about speaking in public and employees should observe them.

Evidence Presented at the Hearing

Submissions made by the Acting ESC

The Acting ESC explained the complaint about the Respondent related to an article published on 15 August 2021 in the Press & Journal, entitled "Provost Skene's House: Council accused of 'disregarding city's heritage'" (the article). The Acting ESC advised that there was no dispute that the Respondent provided the quotes that appeared in the article and, in addition, that he appeared in a short video piece that accompanied it on the Press & Journal's website.

The Acting ESC advised that the article reported that the Council's administration had been accused, by the Respondent, of disregarding the city's heritage in its renovation of Provost Skene's House (being a historic building in Aberdeen). The Acting ESC noted that the article stated that the Respondent had claimed that some of the building's historic brickwork has been covered over with mortar, and that he had accused the

Council's administration of showing "complete disregard" to the city's historic buildings. The Respondent had further stated that "the attempt at a restoration" was "frankly embarrassing".

The Acting ESC advised that, in the accompanying video clip, the Respondent stated that the detail, the character and much of the history of the building had been covered over by lime mortar cement. The Respondent alleged that, over the last few years the city's heritage had been treated with disregard and near contempt, by the Council's administration.

The Acting ESC advised that, following the publication of the article, an urgent motion was passed, by a majority vote, at the Council's Growth and Resources Committee on 25 August 2021. The motion instructed the Council's Chief Executive to refer the Respondent's conduct to the ESC on the basis that his comments "attacking the work of council employees" were "unfounded". Additionally, the motion noted that the Unite trade union had written to the Chief Executive and the Council Leader requesting a public apology from the Respondent.

The Acting ESC advised that the councillor who moved the motion to refer the complaint noted that she had spoken to council staff who worked on the restoration, and that they had expressed their distress and anger at the terms of the article.

The Acting ESC advised that there was no dispute that the Respondent had made the remarks attributed to him in the article and accompanying video.

The Acting ESC further advised that there was no dispute that the Respondent was acting in his capacity as a councillor when making his comments and that the article referred to him as such. The Acting ESC contended, therefore, that the Code applied to the Respondent at the time of the events in question.

The Acting ESC noted that at no point in the article had the Respondent identified a team or individual within the council who was involved in the restoration, and advised that the Respondent had confirmed that his criticism was aimed at the administration, not the workforce. The Acting ESC accepted that it was wholly appropriate for a council's administration to be held to account. The Acting ESC contended, however, that it was not possible in this case to separate the criticisms of the political administration from the workforce who carried out the restoration. The Acting ESC advised that this was because the terms of the Respondent's criticisms were sufficiently broad so as to extend to the workforce. The Acting ESC contended that anyone reading the article or viewing the video would not conclude that members of the political administration had been engaged in the physical restoration work. The Acting ESC argued that, instead, members of the public would assume employees and contractors would have carried out the work and, therefore, that the Respondent's criticisms extended to them.

The Acting ESC advised that, in response to the complaint, the Respondent had advised his office that he was of the opinion that the work carried out was not compatible with the approved planning application. The Acting ESC argued that this added weight to his conclusion that the Respondent's remarks could reasonably be taken as being aimed at the employees who had made operational decisions in respect of the work to be undertaken and those who had carried out the work, rather than being directed solely at the Council's administration.

The Acting ESC acknowledged that no council employees or contractors involved in the restoration had been directly identified by the Respondent in the article or video. The Acting ESC considered, however, that individuals did not have to be named in order to be readily identifiable to others. He noted that as the work involved was of a relatively specialist nature, the employees involved in it would have been readily identifiable by themselves, by their family and friends, and by other employees and councillors. The Acting ESC noted that it was likely the contractors involved in the restoration work would have erected signage and

suggested that doing so would have made it easier for members of the public to identify the employees involved.

The Acting ESC noted that in Facebook posts and public discussion following the article, no distinction was drawn between the administration and the workforce. The Acting ESC concluded, therefore, that, on the face of it, the Respondent had breached the provisions in the Code that required councillors to behave with courtesy and respect and to refrain from making public criticisms of the conduct or capability of council employees.

The Acting ESC advised, nevertheless, that, as the Respondent was commenting on a matter of public concern, namely the restoration of a historic building, he would be entitled to the enhanced protection of freedom of expression afforded to politicians under Article 10 of the European Convention on Human Rights (ECHR).

The Acting ESC acknowledged that freedom of expression is a qualified right and can be subject to restrictions for the protection of reputation and rights of others (which would include employees). The Acting ESC considered, however, that it would be difficult to justify placing a restriction on the Respondent's right to freedom of expression given that his comments concerned a matter of public concern and were not offensive or abusive in nature.

As such, the Acting ESC concluded that although, on the face of it, a breach of the Code had occurred, an overall finding of a breach of the Code and the consequent imposition of a sanction could not be justified.

In response to questioning from the Panel, the Acting ESC accepted that it was clear from the Respondent's remarks that he had suggested the responsibility for the finish of the building lay with the Council. The Acting ESC advised, however, that in his response to the ESC's office, the Respondent had stated that the work carried out was not compatible with the approved planning application. It was for that reason that the Acting ESC had concluded that the Respondent appeared to consider that those who carried out the work may have been to blame. The Acting ESC nevertheless accepted that the Respondent's assertion that the restoration work was not carried out in accordance with the approved planning application was made privately to the ESC's office in response to the investigation and, therefore, did not form part of the complaint that he had publicly criticised employees.

The Acting ESC accepted that councillors are entitled to challenge or criticise their political opponents. He noted, however, that such criticism could amount to a breach of the Code if, by extension, it could be reasonably perceived as also being directed at employees.

While the Acting ESC considered that it was significant that Unite had written to the council's Chief Executive and the council leader, he accepted this was the only evidence before him that demonstrated the Respondent's comments had been taken as criticism of council employees. The Acting ESC confirmed that, despite asking the Council's legal department, he had not been provided with any further direct evidence of employee concern.

The Acting ESC accepted that the article appeared to suggest the Respondent had raised concerns about the standard of the restoration work and in particular, the repointing. He clarified, however, that this was a journalistic interpretation of the Respondent's comments and that the article itself did not contain any specific criticism of the execution of the work in question. The Acting ESC further accepted that the responsibility for the finish of the building lay with the Council overall, and not with any individual employee or employees.

In response to a question about how councillors could criticise or challenge the administration without also being perceived as being critical of employees undertaking work as directed and in accordance with decisions made by the administration, the Acting ESC advised that a careful distinction would need to be drawn.

Submissions made by the Respondent's representative

The Respondent's representative advised that the Respondent's comments were directed solely at the council's administration. He further stated that one of the most important duties of the Respondent, as an opposition councillor, was to scrutinise the administration.

The Respondent's representative contended that, in his remarks, the Respondent had set out his concerns articulately and that he was, by holding the administration to account, merely doing what he was elected to do and what was demanded of him by democracy. The Respondent's motivation, as an opposition councillor, was to criticise the administration and its decision-making, rather than being directed at any employees implementing those decisions. The Respondent's representative asserted that the Respondent's comments had been made in good faith, and with the best interests of Aberdeen's built heritage in mind.

The Respondent's representative contended that as there were six separate references in the article and its accompanying video to the administration, most people would interpret the Respondent's remarks as being critical of it. The Respondent's representative further noted that, no council department, employees or contractors were named or referred to by title or position.

The Respondent's representative noted that the term 'administration' refers to the elected councillors who are members of the governing group of a council and argued that it followed that references to the administration within the article could not be taken as being references to any officer or employee of the council, or to any employee of a contractor. The Respondent's representative contended that the word 'administration' should be given its ordinary meaning, especially in the context of the Respondent being an opposition councillor, and being expected as such to criticise his political opponents. As such, the Respondent's representative refuted the Acting ESC's assertion that the criticism of the administration contained in the remarks could reasonably be taken as criticism of the conduct or capability of any employees.

The Respondent's representative noted that the Respondent did not say that those engaged in the restoration work had carried it out in an unsatisfactory manner. Instead, the Respondent had merely criticised the method chosen.

In response to questioning from the Panel, the Respondent's representative noted that the Respondent had a right to express his views, even if these were or were not widely shared. Notwithstanding this, the Respondent's representative drew the Panel's attention to documentary evidence showing that the Respondent had spoken with local historians and building experts before he raised his concerns about the method of restoration.

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, Councillor Hutchison.
2. The Respondent had not breached paragraphs 3.3, 3.5 or paragraph 20 of Annex C of the Code.

Reasons for Decision

The Panel noted that paragraph 3.3 of the Code required councillors to respect council employees and to treat them with courtesy at all times, and that paragraph 3.5 obliged councillors to follow the Protocol for Relations between Councillors and Employees contained at Annex C of the Code. Paragraph 20 of Annex C stated that councillors should not raise matters relating to the conduct or capability of employees in public.

The Panel noted it was not in dispute that the Code applied to the Respondent at the time of the events in question, and also that it was not in dispute that the Respondent had made the comments attributed to him.

Having considered carefully the submissions given by the Acting ESC and the Respondent's representative, the Panel was satisfied that the Respondent had not raised any matters relating to the conduct or capability of any identifiable employee or employees in public. The Panel rejected the Acting ESC's assertion that the fact the identities of the employees who had undertaken the work were known to themselves, their family and friends, other employees, councillors, or were potentially named in signage meant that they were reasonably publicly identifiable. The Panel considered that, in order for council employees to be objectively considered as identifiable, ordinary members of the public in the local area would need to be able to readily understand who they were. The Panel did not consider, in this case, that it was reasonable to conclude that members of the public in Aberdeen would have been able to readily or easily identify any employees involved in the restoration project.

The Panel was satisfied that the Respondent was referring to the methods used in the restoration, rather than the performance, conduct or capability of the employees undertaking the work. The Panel was satisfied that the Respondent's comments concerned the decisions taken by the administration in respect of how the city's historical buildings should be restored.

The Panel accepted that, when considered in isolation, some of the Respondent's comments could be perceived as being disparaging about the quality of the restoration work itself and, by extension, potentially critical of the employees who carried out the work. In the circumstances, however, the Panel considered it to be evident from the context, and particularly the numerous references within the article and the accompanying video to the administration, the council leadership, and the restoration methods used, that the Respondent's criticisms were directed against the administration for its choices in that regard; rather than being about the conduct or capability of any of the employees involved in executing the work.

The Panel noted that the Respondent's remarks resulted in a complaint from Unite, but noted that there was no other documentary evidence to demonstrate that any other individual employee or employees had felt that they were being criticised. The Panel considered that it could not be inferred, from the Unite complaint alone, that any other employees had considered the Respondent's remarks to be critical of their conduct or capability.

The Panel disagreed with the Acting ESC and considered it was entirely possible to distinguish any criticisms of decisions made by the political administration from criticisms of the employees who had undertaken the restoration work in accordance with those decisions. The Panel noted that, given council employees carry out all work instructed by a Council's administration, any criticism of the administration could, by extension, be interpreted as criticism of council employees. The Panel agreed that such an interpretation could prevent opposition councillors from criticising the administration altogether, which would prevent them from being able to undertake the important scrutiny role required by an effective democracy.

For the reasons outlined above, the Panel was satisfied that the Respondent's conduct in making the comments contained in the article and its accompanying video, did not amount to a breach of the Code.

The Panel emphasised that the requirements for councillors to behave in a respectful and courteous manner towards council employees, and to refrain from criticising their conduct or capability in public, are fundamental requirements of the Code. Councillors must adhere to these provisions as they help ensure public confidence in council employees and the council itself is not undermined. It also allows employees to perform their tasks freely without undue interference.

The Panel noted, however that while the Code sought to protect employees from unfounded public accusations, it did not, in any way, seek to restrict a councillor's ability to properly scrutinise the council's performance or decisions made by its administration. The Panel noted that a councillor's right and ability to do so is a fundamental democratic requirement. The Panel noted that it was important to draw a distinction between a councillor scrutinising the decisions of an administration and a councillor embarking on public criticism of the capability of individual and identifiable council employees.

Date: 13 June 2022



**Mr Michael McCormick
Chair of the Hearing Panel**