

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held at Lothian Valuation Joint Board, Edinburgh on Monday 9 October 2023.

Panel Members: Mr Paul Walker, Chair of the Hearing Panel
Ms Ashleigh Dunn
Ms Helen Donaldson

The Hearing arose in respect of a Report referred by Mr Ian Bruce, the Ethical Standards Commissioner (the ESC), further to complaint reference LA/E/3645, concerning an alleged contravention of the Councillors' Code of Conduct (the Code) by former Councillor John McLellan (the Respondent).

The Respondent was represented by Mr Campbell Deane, solicitor.

Referral

Following an investigation into complaints received on 9 November 2021 about the conduct of the Respondent, the ESC referred a report to the Standards Commission on 12 July 2023, in accordance with the Ethical Standards in Public Life etc. (Scotland) Act 2000 (the 2000 Act).

The substance of the referral was that the Respondent had failed to comply with the provisions of the 2018 version of the Code in place at the time and, in particular, that he had contravened paragraphs 3.2, 3.3 and 3.6, which were 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.

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.

Bullying and Harassment

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

Evidence Presented at the Hearing

Joint Statement of Facts

The Panel noted that a joint statement of facts had been agreed between the ESC and the Respondent's representative. This recorded that it was not in dispute that the Respondent attended a session to read a report at the Edinburgh offices of a solicitors' firm in the morning of 21 October 2021. The report had been drafted by an independent Inquiry Team, comprising the solicitors and an advocate, commissioned by the Council to investigate the conduct of a former employee and how allegations made against him had been handled.

The Panel noted that it was agreed that two solicitors from the firm, being solicitors A and B, were present in the room with the Respondent, along with Councillors Joanna Mowat and Neil Ross. A further solicitor from the firm, solicitor C, was present in the next room.

The joint statement of facts recorded that it was agreed that the Respondent understood that mobile phones should not be used to communicate during the session or to record confidential information. It was further

agreed that the Respondent used his mobile phone during the session and, after listening to a voicemail from a journalist, had offered the phone to solicitor A and had said “shall I just pass the phone to you to comment”.

The Panel noted, however, that agreement could not be reached on other key aspects of the matters investigated and found by the ESC, including that the Respondent

- banged both of his fists on the table during the Reading Session; and
- shouted, in reference to a particular paragraph in the report, “this is an absolutely outrageous comment to make” at solicitors A and B while pointing at them.

Witness Evidence

Witnesses called on behalf of the ESC

The ESC’s representative led evidence from three witnesses, being solicitors D, C and B.

Solicitor D: Solicitor D advised that he was the partner from the legal firm who, along with the advocate, was responsible for leading the Inquiry Team’s investigation. Solicitor D advised that two reports on the investigation undertaken by the Inquiry Team were produced, one being the full report and the other being a shorter, redacted version that was to be made public. Solicitor D advised that all elected members of Edinburgh Council were invited to read the full version of the report at private sessions held at the legal firm’s Edinburgh office during the week commencing 18 October 2021. Solicitor D confirmed that, in accordance with his professional standards, he was obliged and expected to tell the truth.

Solicitor D advised that the Respondent attended a reading session on 21 October 2021, along with Councillor Mowat and Councillor Ross. Solicitor D advised that two of his junior colleagues, solicitors A and B, were present in the room to supervise the session and answer any questions the elected members might have. Solicitor D stated that after the reading session concluded, he was advised by his colleague, solicitor C, that the Respondent had become angry when he read a particular paragraph in the report. The paragraph in question indicated it was the Inquiry Team’s hope that the recommendations in the report were not “seized upon by elected members or their political parties and used for political gain”. Solicitor D stated that solicitor C had advised him that the Respondent had banged his fist on the table, and had shouted and pointed his finger at solicitors A and B. Solicitor D further stated that solicitor C had reported that during the reading session the Respondent had listened to a voicemail from a local journalist left on his mobile phone.

Solicitor D explained that, as he considered the Respondent’s conduct to have been unacceptable, he had contacted the Council’s lead solicitor. Solicitor D advised he had also spoken to solicitor B, who had confirmed solicitor C’s account and also stated that the Respondent had shouted and waved his finger at her. Solicitor D advised that he had subsequently written to both the Council’s Chief Executive, and then to its group leaders, on 8 November 2021, to advise them of his concerns about the Respondent’s behaviour. Solicitor D stated that he had done so because he considered the Respondent’s conduct towards his colleagues, being two young female solicitors, to be “wholly inappropriate”. Solicitor D advised that he also wished to convey his contention that if the Respondent had concerns with the content of the report, he should have raised them with more senior individuals from the Inquiry Team.

Solicitor D stated that he had no reason to doubt either solicitor B’s or solicitor C’s versions of events. Solicitor D further stated that neither he, nor his firm, had anything to gain from raising concerns about the Respondent’s conduct. Solicitor D noted, in any event, that the formal complaint to the ESC had been made by the Council’s Chief Executive and that he understood the Respondent had also referred himself to the ESC.

In response to questions in cross-examination, solicitor D confirmed that the initial information he received about the incident had come from solicitor C, who had not been in the room during the reading session. Solicitor D advised that solicitor C had been in an adjacent room and was reporting on what solicitors A and B had recounted to him.

Solicitor D confirmed that while the Respondent had listened, and referred, to a voicemail from a journalist during the reading session, there was no suggestion or evidence that he had disclosed any confidential information about the report or its contents. Solicitor D confirmed that he had referred, in a statement he prepared after the incident, to the Respondent's conduct in doing so as an "outrageous provocation". Solicitor D noted that this statement was later provided to the ESC during the investigation into the complaint about the Respondent's conduct. Solicitor D advised that he considered the Respondent's conduct in respect of the voicemail to be provocative because the subject of the report was extremely serious and it contained graphic descriptions of alleged physical and sexual abuse. Solicitor D explained that, as such, he would have expected any councillors reading the report to have concentrated solely on its contents and not on any voicemail. In addition, solicitor D noted that councillors had been advised that, due to the confidential nature of the report, they were not to take their phones out during the reading sessions. Solicitor D contended, therefore, that in the circumstances it was entirely inappropriate for the Respondent to have suggested to solicitor A, as a junior member of the Inquiry Team, that she should speak to the journalist. Solicitor D noted there was a suggestion that the Respondent was attempting to be humorous when making the comment, but again contended that, even if that was the case, it was inappropriate in the context of reading a report concerning alleged sexual and physical abuse, as it suggested he was not taking its subject or contents seriously. Solicitor D advised that ensuring photographs of the report were not taken was only one of the reasons that councillors had been asked not to use their phones. Solicitor D reiterated that it was also to ensure they gave the report their full attention.

In response to questions from the Panel, solicitor D confirmed that, when he spoke to solicitor B, on the day of the incident, about what had occurred, she had been clear that the Respondent had shouted and waved his finger at her. Solicitor D further advised that solicitor C had reported that he had heard raised voices from the reading session taking place in the adjacent room.

Solicitor C: Solicitor C confirmed that, in accordance with his professional standards, he was obliged and expected to be honest. Solicitor C advised he was a senior associate and was responsible for leading the Inquiry Team on a day-to-day basis. Solicitor C advised that he had attended the firm's Edinburgh office, along with his colleagues, solicitors A and B, to supervise and facilitate the reading sessions, to which all elected members of Edinburgh Council had been invited.

Solicitor C advised that the Inquiry Team's report was extremely lengthy with sections covering, in graphic detail, the former employee's alleged conduct towards several women. It also contained the team's conclusions and recommendations on how the Council could improve its procedures for handling allegations of that nature.

Solicitor C advised that he, solicitor A and solicitor B had operated a rota system during the reading sessions, with two of them present in the room with elected members at any one time, so that they could answer and record any questions or queries raised about the report. Solicitor C confirmed that, during the reading session attended by the Respondent on 21 October 2021, he had been in an adjacent room. Solicitor C stated that he had been working on his laptop when he received messages on the firm's internal messaging system, from solicitor A, advising that the Respondent had become aggravated and was behaving in an aggressive manner towards solicitor B. Solicitor C advised that solicitor A also reported, via the messaging service, that the Respondent was becoming increasingly annoyed at one particular aspect of the report, and was raising his voice towards solicitor B.

Solicitor C advised that he was alarmed by solicitor A's messages and, as such, had replied asking if solicitor B was ok and whether they wanted him to go through and join them. Solicitor C stated that while he could not remember the exact content of the messages, he had decided against going into the room, as solicitor A had then indicated that she felt solicitor B was handling the situation. Solicitor C explained that he had been annoyed and quite distressed to receive the messages about the Respondent's conduct towards solicitors A

and B as both were friends, as well as being members of his team. Solicitor C further explained he eventually decided not to intervene as he was confident that solicitor B would be able to handle the situation in a professional manner and did not want to undermine her.

Solicitor C confirmed that he had heard raised voices in the room, which had struck him as odd as he had not been able to hear anything from the room during any of the earlier reading sessions.

Solicitor C stated that solicitor A then messaged him, later in the session, to advise that the Respondent had taken a phone call from someone she thought was a journalist. Solicitor C said that he was taken aback by this as the firm had put in place strict protocols to prevent the use of mobile phones during the reading sessions, in order to ensure confidential information about the report and its contents were not disclosed.

Solicitor C noted that, after the reading session on 21 October 2021 had concluded, he went into the room to speak to solicitors A and B. Solicitor C advised that he had initially spoken to solicitor B alone, as solicitor A was escorting the remaining councillors present from the firm's offices. Solicitor C advised that when solicitor A returned, he could see she was visibly distressed. Solicitor A reported that the Respondent had been shouting and aggressive and that, when advising her that the phone call had been from a journalist, he had offered her the phone and suggested that she might as well speak to the journalist herself. Solicitor C stated that solicitor B agreed that the Respondent's reaction had been completely inappropriate, 'over the top' and 'out of line'. Solicitor C confirmed that he had then reported the incident to the lead partner, solicitor D.

Solicitor C noted that the Respondent subsequently wrote an opinion piece, published in the *Edinburgh Evening News* on 11 November 2021, in which he was quoted as saying that he agreed the report should not be used for party political advantage. Solicitor C advised that he had been "amazed" by this, given the Respondent appeared to be agreeing with the sentiment expressed in the paragraph in the report, to which he had taken such great exception.

Solicitor C confirmed that neither he, nor his colleagues, had anything to gain by making a complaint about the Respondent's conduct or by giving evidence at the Hearing. Solicitor C advised, however, that he considered it was correct for the firm to have raised concerns with the Council, given it had a responsibility to protect its employees.

In response to cross-examination, solicitor C confirmed that he had not been interviewed by the ESC and that any quotes from him in the ESC's report derived from a contemporaneous statement he prepared in the aftermath of the incident.

Solicitor C accepted that while one reason for banning the use of mobile phones at the reading sessions was to ensure that no one took a photograph of the report's contents, another was to prevent councillors in attendance from taking calls or messaging, either while in the room or when outside on a comfort break. Councillor C stated that his firm had made this clear to all elected members and had explained to them that the reason for this was to ensure the report contents remained confidential.

When questioned about why he had not gone into the room and intervened when advised the Respondent's conduct was aggressive, solicitor C reiterated that he had trust and faith in the ability of his colleagues to deal with the situation appropriately and that he had not wished to undermine them or 'pull rank'. Solicitor C noted that had solicitor B, as the more experienced of the two colleagues in the room, messaged to say she needed help then he would have gone through.

When asked if he had heard any fists being slammed against a table, solicitor C noted he could not be clear about what he had heard, but that he thought it was raised voices. Solicitor C noted that whether he would have been able to hear fists slam on a table would likely depend on how close the Respondent was to the

wall dividing the two rooms. Solicitor C further noted that it was likely the rooms, being ones in a solicitors' office would be sound-proofed to some extent, which is why he considered it unusual that he had heard anything at all.

When questioned about whether solicitor A had reported that the Respondent had taken a phone call or whether, as he contended, she had reported that the Respondent had listened to a voicemail from the journalist, solicitor C advised he was not sure and could not recall.

In response to questions from the Panel, solicitor C advised that while he could not be certain, due to the passage of time, he thought he started receiving messages from solicitor A about the Respondent's conduct at roughly the same time as he heard the raised voices emanating from the room they were in. Solicitor C advised that he had received the message from solicitor A about the Respondent taking a call or listening to a voicemail sometime later in the session, possibly towards the end.

Solicitor C confirmed that a number of other elected members had raised questions about the report during the reading session, but that no other councillor had reacted in a similar manner as the Respondent.

In response to a question about solicitor A's demeanour when he entered the room at the conclusion of the reading session on 21 October 2021, solicitor C advised that he considered she had looked shocked and had been visibly upset and distressed. Solicitor C noted that while solicitor B did not appear distressed, she was also shocked and was certain in her view that the Respondent's conduct had been entirely inappropriate.

Solicitor C advised that all elected members had been sent an email in advance of the reading sessions advising them not to use mobile phones due to the confidential nature of the report. Solicitor C advised that a reminder to this effect had also been provided verbally at the start of each session.

Solicitor B: Solicitor B advised that, at the time of the events in question, she had some four years post qualified experience, and had been a member of the Inquiry Team. Solicitor B confirmed she had been present, along with solicitor A, Councillor Mowat, Councillor Ross and the Respondent at the reading session on 21 October 2021. Solicitor B advised that it had been her turn, in terms of the rota, to lead the session. Solicitor B stated that, at the outset, she had reminded the three councillors present that, due to its confidential and sensitive nature, they should not use their phones and should not take any notes they might make, while reading the report, out of the room.

Solicitor B advised that the session had begun as normal, with the three councillors asking some questions as they proceeded to read the report. Solicitor B stated, however, that the Respondent had taken great offence at the paragraph recommending that elected members should not attempt to use the report for political gain. Solicitor B stated that the Respondent had become "fairly angry" and had pointed his finger at her, while stating that they [the solicitors' firm] could not tell councillors what to do. Solicitor B stated that while doing so, the Respondent raised his voice to a level that exceeded what would normally be deemed acceptable. Solicitor B advised that Councillor Mowat had intervened to explain that the recommendation was like a 'red rag to a bull'. Solicitor B advised that, at the time, she had understood this intervention to be an attempt to alleviate the situation.

Solicitor B advised that, in response to the Respondent's "outburst", she had tried to answer the points he was making. Solicitor B stated that she found the Respondent's conduct, in terms of his manner and the fact that he was shouting at her and solicitor A, to be inappropriate, particularly given it occurred in the context of him reading a report detailing serious allegations about the behaviour of a former council employee towards women.

Solicitor B explained that, at the time, most of her experience had been in criminal law, meaning that she was quite accustomed to aggressive and shocking behaviour. Solicitor B advised that she considered this

experience meant she was confident she could handle the situation and had not been upset, but noted that this did not mean she considered the Respondent's conduct to be ok or appropriate. Solicitor B further indicated that she had been on the Inquiry Team for a year, which had included interviewing witnesses about the alleged aggressive behaviour of the former council employee. Solicitor B indicated she had found it shocking to witness the same behaviour displayed by the Respondent.

Solicitor B advised that, given his reaction on the day, she had also been surprised to read the Respondent's subsequent opinion piece, in the *Edinburgh Evening News*, stating that he agreed the report should not be used for party political advantage.

Solicitor B advised that as they were sitting next to each other, she had not seen solicitor A's reaction to the Respondent's outburst. Solicitor B stated that solicitor A had messaged her, during the session, to check she was ok and that it was evident, at the end, that she was upset and shaken by the Respondent's conduct.

In response to questions in cross-examination, solicitor B confirmed that she had been out of the room on a comfort break when the Respondent had used his mobile phone. Solicitor B confirmed that she accepted there was no evidence that he had done so to leak confidential information about the report or its contents. When asked about whether it was acceptable for the Respondent to direct any concerns about the paragraph in the report to her during the reading session, solicitor B accepted that she was the most senior representative of the firm present. Solicitor B acknowledged that the paragraph in question had a political element to it, but disputed the contention that it was made in a political context, given it appeared in a report about a former employee's conduct.

Solicitor B confirmed that she had not been personally upset by the Respondent's behaviour during the reading session and that she had felt in control of the situation. Solicitor B contended, nevertheless, that this did not mean that she had not found the Respondent's conduct, in shouting and behaving in the manner he had, to be shocking and unacceptable.

When her attention was drawn to the content of the statement she had provided to the ESC, solicitor B accepted saying that she would not have made a formal complaint, had solicitor A not been present in the room and distressed. Solicitor B confirmed, nevertheless, that she would have reported the incident to solicitor D, the team's partner even if solicitor A had not been there.

Solicitor B confirmed that the Respondent had not pointed his finger in her face during the outburst but stated he had directed it towards her in a manner that displayed his annoyance.

In response to questions from the Panel, solicitor B stated that, during his outburst, the Respondent had repeatedly shouted to the effect that the firm were not entitled to include such a recommendation in the report. Solicitor B advised that she could not recall the Respondent banging his fist or fists on the table.

Witnesses called on behalf of the Respondent

The Respondent's representative led evidence from three witnesses, being Councillors Joanne Mowat and Neil Ross, and the Respondent.

Councillor Joanna Mowat: Councillor Mowat confirmed that she was in same political party as the Respondent at the time and that she had been present during the reading session in question. Councillor Mowat advised that she had been annoyed at the paragraph recommending that elected members should not use the report for political gain, as she felt this would likely be perceived as being directed at the then opposition, which was her political party.

Councillor Mowat advised that the Respondent asked the two solicitors present what the recommendation was doing in the report and whether it could be removed. Councillor Mowat noted that it was unclear, at

that stage, whether there would be any opportunity to amend the report before the open version of it was published. Councillor Mowat advised that she did not ask whether it could be removed, but decided to speak to her party's group leader and ask him to make representations to that effect.

Councillor Mowat stated that the Respondent did not shout, albeit she accepted there was "shock and urgency" in his voice. Councillor Mowat advised that her perception was that the Respondent was neither rude nor aggressive and, instead, had just been expressing his deep concern about the inclusion of the recommendation. Councillor Mowat stated that she did not recall the Respondent having pointed at the solicitors or his face turning red with anger. Councillor Mowat further stated that did she not recall the Respondent banging a fist or fists on the table and contended that she would have noticed had he done so. Councillor Mowat explained this was because, other than when questions were being asked or answered, the room was entirely quiet. Councillor Mowat advised that she considered the Respondent may have used a sharper tone than normal to demonstrate his concern, but that he had simply made his point in a firm and robust manner.

Councillor Mowat explained that the Respondent had tried to clarify why he considered the paragraph might be interpreted as being directed at their political party. The Respondent had further attempted to explain that this could be damaging to the Council as a whole, as it had the potential to undermine the cross-party consensus about the need for the inquiry and the importance of the report. Councillor Mowat advised that solicitor B had become somewhat defensive and that there had been a "robust exchange" on both sides.

Councillor Mowat advised that she did not consider that either solicitor A or solicitor B had appeared intimidated, upset, threatened or uncomfortable at any point during the session. Councillor Mowat reiterated that she did not consider the Respondent had behaved inappropriately and noted that if he had done so, she would have intervened and would have reported him to the party whip.

Councillor Mowat confirmed that the Respondent had listened to a voicemail during the session and that, having advised it was from a local journalist, he offered the mobile phone to solicitor A. Councillor Mowat advised that, when doing so, the Respondent said that the journalist wanted to know what was in the report and when it would be made public. The Respondent had then asked whether solicitor A wished to speak to the journalist. Councillor Mowat said that she considered the Respondent had done so in a jocular manner.

In response to cross-examination Councillor Mowat confirmed that the content of the report and its graphic descriptions of alleged sexual and physical abuse made it upsetting to read.

Councillor Mowat confirmed that, at the time, she had a good working relationship with the Respondent and considered him to be a friend. Councillor Mowat advised that it was normal for elected members to raise their voices in order to project across the Council Chambers and make points. Councillor Mowat accepted that she had advised the ESC, during the investigation, that the Respondent had made his arguments to the solicitors in the same way that he would speak during a political debate. Councillor Mowat acknowledged that solicitors were not politicians and that the reading session was an entirely different setting to council meetings or a political debate. Councillor Mowat explained that, in making the comparison, she had simply meant that the Respondent had marshalled his arguments and had spoken in a formal way while expressing his concern, as he would have done in a debate. Councillor Mowat noted that she had also advised the ESC that the paragraph in question had been like a "red rag to a bull". Councillor Mowat explained that she had not meant to imply, by this, that the Respondent had been very angry or inflamed. Instead, she had used the expression to make the point that the inclusion of the recommendation was extremely controversial, given how it could be perceived and, in turn, the possibility that the ongoing consensus that the report should be dealt with by the Council as an entity could be undermined.

In answer to a question about how the solicitors could have benefitted from raising concerns about the Respondent's conduct, if he had not behaved as alleged, Councillor Mowat suggested that their motivation may have been to defend strongly their position and report.

Councillor Mowat stated that it seemed obvious to her that the Respondent's offering of the mobile phone to solicitor A and the suggestion she could speak to the journalist was intended as a joke. While Councillor Mowat accepted that the contents of the report were extremely serious, she suggested that the Respondent was not intending to make light of it and, instead was seeking to break the tension and ease the strain that they were all under having read a report detailing such difficult and sensitive matters.

Cllr Neil Ross: Councillor Ross advised he represented a different party to the Respondent and, as they had not had a great deal of interaction, he did not know him particularly well. Councillor Ross advised that he had been surprised by the paragraph in the report recommending that councillors did not use the report for political gain, as he did not consider that it required to be said.

Councillor Ross confirmed that the Respondent had reacted to the paragraph in question by making remarks about it in a forthright manner to everyone in the room and by questioning the two solicitors present. Councillor Ross advised that the Respondent had raised his voice sufficiently as to be heard at the other end of the room, but did not consider this could be described as 'shouting'. Councillor Ross further advised that he did not recall the Respondent having waved or pointed his fingers aggressively. Councillor Ross stated that while he did not recall the Respondent having banged his fists, he remembered him having put his hands flat on the table.

Councillor Ross advised that he did not consider the Respondent had been rude or aggressive, that he had 'lost the plot' or that his face had turned red. While Councillor Ross accepted the Respondent had expressed his surprise at the inclusion of the paragraph in the report, he did not consider that he had behaved in an inappropriate manner. Councillor Ross stated that he had not noticed either solicitor present appearing uncomfortable, distressed or upset. Councillor Ross indicated he was confident he would have been able to identify such emotions, had that been the case.

In response to questions in cross-examination, Councillor Ross confirmed that the Respondent had raised his voice and had spoken in the same robust, forthright way he would have during a political meeting or debate. While Councillor Ross accepted that the meeting on 21 October 2021 was not such an occasion, he contended that there had been nothing untoward in respect of the Respondent's behaviour. Councillor Ross further accepted that, as solicitors are not politicians, they would not expect to be spoken to in the way a councillor might address a political opponent during a debate. Councillor Ross noted, nevertheless, that solicitors would be experienced at dealing with people. Councillor Ross acknowledged that it was possible he may have missed any finger pointing, if it took place, as he would have been looking down to read the report on the table in front of him. Councillor Ross advised, however, that he considered he would have heard the sound of any fists banging on the table, if that had occurred, and indicated he thought such a noise could only have been masked to an extent if the Respondent had been raising his voice at the same time.

Councillor Ross accepted that it may have been normal for a solicitor to maintain their professionalism and to appear normal, even if they were upset. Councillor Ross further agreed that there would be no reason for the solicitors to have made up their concerns.

In response to a question from the Panel, Councillor Ross indicated that no-one else present in the room had needed to raise their voice to be heard.

The Respondent, former Councillor McLellan: The Respondent advised that he was a journalist and that he had been elected to the council in 2017 but had stood down before the May 2022 local government election.

The Respondent advised that he was aware that he was not to use his phone during the meeting on 21 October 2021 to communicate with anyone about the report, or to take notes or photographs of its contents. The Respondent confirmed that he had not done so. The Respondent advised, however, that he was not aware of any restriction in respect of the use of a phone to read or receive any messages during the reading session and he did not recall any detailed instructions being provided at the start of the meeting to that effect.

The Respondent advised that, while reading the report, he had raised some points with the two solicitors present, being solicitor A and solicitor B, and that there had been some limited conversation. The Respondent noted that the meeting was held in a large boardroom, with considerable space between attendees.

The Respondent advised that he had been very surprised and shocked to see, included in the report, the paragraph recommending that elected members should not seek to use the report for political gain. The Respondent stated that this initial reaction had been to check whether it would appear in both the full and the open versions of the report. The Respondent advised that he had been unhappy about the recommendation, as he could not understand why the Inquiry Team felt it necessary to give elected members instructions on how to conduct their business. The Respondent further advised that he was unhappy that the recommendation would be perceived as being directed at opposition councillors.

The Respondent advised that he raised his concerns with the solicitors present as he thought it might be the only opportunity to persuade them to remove the recommendation from the report before it was made public. The Respondent stated that while his voice was raised above a normal conversational level, he had not shouted or behaved inappropriately. The Respondent advised that he may have made hand gestures, but was certain that he had not jabbed his finger at anyone aggressively or banged his fists on the table. The Respondent further advised that he had not been rude or aggressive.

The Respondent indicated that he could not recall, in any great detail, how the solicitors had responded to his intervention. The Respondent stated that when he explained to solicitor B that he thought it would be in her firm's best interests to remove the recommendation as it suggested a closeness between them and the Council, solicitor B had disagreed but had recorded his points nonetheless. The Respondent advised that he considered the duration of the incident was relatively brief and that solicitor B appeared in control and unfazed. The Respondent noted that he did not think that either solicitor A or solicitor B would have authority to remove the recommendation without consultation with more senior colleagues and, therefore, there would have been no point in him becoming angry with either of them. The Respondent advised that he had simply been seeking to ensure they would relay his points back to the wider Inquiry Team.

The Respondent advised that he was unaware at the time that either solicitor might have had concerns about his conduct and that he had left the room thinking nothing untoward had happened. The Respondent advised that he had not seen anything in the solicitors' demeanours that would have led him to think otherwise. While the Respondent accepted that it was possible that solicitor A may have been hiding how she felt, he advised that he was accustomed to interacting with others in a professional setting and was confident he would be able to ascertain if someone was distressed, uncomfortable or upset.

Turning to the incident with the mobile phone, the Respondent advised that his phone had been in silent mode when a call was received. The Respondent advised that as he was respecting the conditions on the use of mobile phones, he did not answer the call and, instead, had only listened to the voicemail that was left. The Respondent stated that no one in the room had objected to him doing so. The Respondent confirmed that he had then offered to pass the phone to solicitor A, but contended he had done so in a humorous way. The Respondent advised that solicitor A had not responded, but equally had not raised any issue with him at the time and had not appeared shocked or upset. The Respondent advised that it had not been his intention to intimidate solicitor A or to make light of contents of the report or his duties as a councillor. The Respondent

instead indicated his actions were intended as a form of dark humour. The Respondent reiterated that, at no time, had he breached confidentiality by disclosing information about the report.

The Respondent advised that he had held senior positions in his career as a journalist and that despite the stress that this sometimes entailed, he had never previously received complaints about his conduct. The Respondent advised he had been devastated by the complaint and, as a father of a young female professional, he was appalled by the suggestion that he had been abusive towards solicitors A and B, given that they were also young female professionals. The Respondent denied categorically any suggestion that he was asserting dominance over solicitors A and B and that he would have behaved differently if solicitor C, being male and more senior, had been in the room. The Respondent reiterated that he had simply been making a point about the report to the representatives of the Inquiry Team who happened to be present during the reading session.

In response to cross-examination, the Respondent denied the suggestion that he had spoken to solicitors in the same manner he would have employed during a council debate. The Respondent accepted that he had used a firm tone, had raised his voice, and had made his points clearly and robustly, but disputed any suggestion that he had been argumentative. The Respondent accepted that the solicitors were not politicians and he was not in a Council meeting or political setting. The Respondent contended, however, that he was entitled to raise his concerns about the report with the members of the Inquiry Team, responsible for its drafting, who were present.

The Respondent denied losing his temper during the reading session and advised that he had only raised his voice to ensure he was heard by everyone in the room. The Respondent advised that he could not recall exactly what he had said, but agreed it would be reasonable to suggest he stated, in a raised voice, that the inclusion of the paragraph in question in the report was 'outrageous'.

The Respondent noted that he had suggested to the ESC, during the investigation, that the relationship between the legal firm and the Council was very close. The Respondent advised that he had done so as he could not otherwise understand why a complaint about his conduct had been made, given he did not consider anything untoward had occurred at the reading session. The Respondent accepted, nevertheless, that the firm had an existing commercial relationship with the Council outwith the instruction to conduct the inquiry. In any event, it would be reasonable for discussions to be held between the Council and the legal firm on all aspects of the inquiry as part of the instruction, including about any concerns raised.

When questioned about why he reiterated the recommendation in the report in the opinion piece that appeared in the Edinburgh Evening News on 11 November 2021, if he objected to it so much, the Respondent stated that as the recommendation appeared in the publicly available version of the report, he had been entitled to comment on it. The Respondent noted that he would not have published the opinion piece had the recommendation not been included in the report.

The Respondent accepted that solicitor D stated, both in his letter to the group leaders of 8 November 2021, and in correspondence to the Respondent's representative of 9 November 2021, that his firm would consider the matter closed and not make a formal complaint, if the Respondent apologised for his conduct towards its employees. The Respondent noted that he did not take these opportunities as he did not consider he had done anything wrong and had no indication, on the day, that either solicitor A or solicitor B were upset. The Respondent further noted that it would not have been the end of the matter if he had apologised following receipt of the letter to his representative as, by then, the complaint had been escalated.

When asked whether, with hindsight, he would have conducted himself differently during the reading session, the Respondent advised that he would not have listened to the voicemail. The Respondent advised, however, that he had not pressed solicitor A to take the phone and his comment to her about speaking to the journalist was rhetorical. The Respondent advised that, other than this, he would not have conducted

himself differently as he considered that there was nothing untoward about his behaviour and that he had a right to ask questions about what he considered to be an inappropriate recommendation in the report.

In response to questions from the Panel, the Respondent advised that he considered the comments he made, during the reading session, about the recommendation to be both questions and criticisms. The Respondent reiterated that he had been astonished to read the recommendation as the Inquiry Team were aware that the report had been commissioned by the Council as a whole and that no one was, or would be, seeking to make any political gain from its content.

When asked why the solicitors would have raised concerns if there was nothing untoward about his conduct, including the allegation that he had banged his fists on the table, the Respondent advised he did not consider anyone was lying. The Respondent stated that he had not banged his fists on the table and noted that solicitor B had not alleged he had done so. The Respondent advised that he could only conclude that the incident had been exaggerated or overstated.

Turning to questions about why he listened to the voicemail and mentioned it was from a journalist, the Respondent reiterated that he had not been aware of any restrictions on viewing or listening to content on his phone. The Respondent indicated that he wished to ensure everyone present was aware that the media was seeking information about the report and, given his background as a journalist, to be transparent in the event there was any suspicion that he might be the source of any disclosure of confidential information. The Respondent advised that he considered it was obvious that his suggestion to the effect that solicitor A could speak to the journalist was a joke. The Respondent advised that, as he had not considered there was any tension emanating from his earlier intervention about the recommendation in the report, it had not occurred to him that the comment would be interpreted as anything other than a light-hearted attempt at humour.

Submissions made by the ESC's Representative

The ESC's representative noted that while the evidence given by Councillors Mowat and Ross differed from that given by the solicitors, the solicitors' recollections had been recorded almost contemporaneously. The ESC's representative advised that solicitor A, as the assigned note-taker for the reading session, had sent an email to solicitors B and C in which the key queries raised by the councillors present had been recorded, including that the Respondent had stated that the recommendation in question was an "outrageous comment" that would make the inquiry political. The ESC's representative also noted that solicitor A had relayed, via her firm's online messaging system, her concerns about the Respondent's behaviour during the session, and that receipt of those messages had been corroborated by solicitors B and C. The ESC's representative further noted that in the hours immediately following the session, solicitors A and B had also relayed their concerns about the Respondent's conduct to solicitors C and D.

The ESC's representative noted that solicitor C had advised, during his evidence, that he had heard a raised voice from the next room, which was not something he had heard during any other reading sessions. The ESC's representative contended that this was evidence that the Respondent's voice had been raised to a volume akin to shouting.

The ESC's representative advised that when solicitor A was interviewed by the ESC's office, in November 2022, she had confirmed that the Respondent had shouted, pointed and banged his fists during the session. The ESC's representative noted that solicitor A's signed witness statement, which had been submitted in place of her appearing as a witness at the Hearing, confirmed the same. The ESC's representative contended that solicitor A had been consistent in her account as to what had occurred.

The ESC's representative noted that solicitors A and B had also been consistent in their accounts that the Respondent had pointed his finger at them during the incident and that solicitor B had demonstrated this while giving evidence under oath. The ESC's representative queried how solicitor B would be able to demonstrate what the Respondent's pointing had looked like, had he not engaged in such conduct. The ESC's

representative also noted that while the Respondent denied pointing, he accepted that he may have been gesturing with his hands during the incident in question.

The ESC's representative noted that the evidence given under oath by solicitors B, C and D, and by solicitor A in her signed witness statement, was that they had no incentive to make up the allegations about the Respondent's conduct. The ESC's representative also noted that the solicitors were regulated by the Solicitors Regulation Authority (or, in the case of solicitor B, the Law Society for Scotland), and as such they were subject to rules of professional conduct, including that they must not mislead. The ESC's representative advised that there was no evidence or reason to suspect there was any collusion between the legal firm and the Council or its officers in respect of the complaint and reasons why it had been made. The ESC's representative noted, in this regard, that the legal firm had a duty of care towards its staff, and that by raising its concerns it was discharging its responsibility in that regard. The ESC's representative contended that a legal firm was unlikely to make a complaint about a commercial client lightly and, therefore, the solicitors must have been concerned enough to consider it necessary to make a complaint to the Council about the Respondent's conduct.

The ESC's representative noted that both Councillors Mowat and Ross had indicated that the Respondent had conducted himself in a manner similar to that which he would adopt during a council meeting. The ESC's representative noted, however, that both had accepted that behaviour which might be deemed acceptable between councillors during a lively political debate may not necessarily be acceptable in a private meeting with solicitors from an external legal firm.

The ESC's representative also noted that the Respondent had accepted, in representations submitted on his behalf to the ESC as part of the investigatory process, that he had raised his voice and that doing so could be discourteous, and that he would accept a sanction of censure for doing so.

The ESC submitted, therefore, that in light of all the above points, it was more likely than not that the Respondent had shouted, pointed and banged his fists on the table during the reading session.

The ESC's representative noted that it was not in dispute that the Respondent had used and offered his mobile phone to solicitor A during the session. While the ESC's representative noted that the Respondent's actions in this regard could be perceived objectively as being disrespectful, she acknowledged that he had not used his phone to take photographs of the report, or to speak to someone during the session. The ESC's representative noted that the Respondent had indicated he had been trying to make light of a situation and that his actions amounted to a weak attempt at humour. While the ESC's representative accepted this may have been the case, she noted it was for the Panel to decide whether to consider the Respondent's overall conduct at the reading session in determining whether he had breached the Code.

The ESC's representative contended that the Respondent's actions had caused solicitors A and B to feel uncomfortable, and in particular that solicitor A had been made to feel anxious and upset. The ESC's representative noted that in solicitor A's signed witness statement, she stated that the Respondent's behaviour had been "completely unnecessary and inappropriate", and that she was "appalled that he behaved in such a way in a professional setting".

The ESC's representative noted that solicitor B had advised, in evidence, that while she had not been upset by the Respondent's behaviour, she had been shocked. The ESC's representative contended that the fact that solicitor B had conducted herself professionally during the Respondent's outburst and had not felt upset, did not detract from the feeling of shock she had felt and did not in itself mean that the Respondent's conduct had been appropriate.

The ESC's representative submitted that it was inappropriate for the Respondent to have spoken to the solicitors as if they were seasoned politicians used to the normal cut and thrust of political debate. The ESC's

representative noted that solicitors A and B were junior professionals undertaking the duties required by their roles, and contended that they should not have had to experience discourteous and disrespectful behaviour when doing so. The ESC's representative further contended that it was not unreasonable for solicitors A and B to have felt shocked by the Respondent's behaviour, particularly given the context of him being there to read a report, which contained graphic, unsettling and upsetting information. The ESC's representative argued, in the circumstances, that it would not be reasonable to consider that solicitors A and B were being too sensitive. The ESC's representative suggested that it was more likely that the Respondent's conduct had fallen short of the sensitivity required by the occasion.

Given the above, the ESC's representative submitted that the Respondent's conduct in banging his fists, shouting and pointing at the solicitors, amounted, on the face of it, to a breach of the respect provisions under paragraphs 3.2 and 3.3 of the Code.

In considering whether the Respondent's conduct amounted to a breach of provision in the Code that concerned bullying and harassment, the ESC's representative noted that bullying can be a one-off incident, and that it was the impact of such behaviour, rather than the intent, that was the key consideration.

The ESC's representative noted that solicitor A had consistently advised that the Respondent's behaviour had caused her to feel nervous, shocked, upset and distressed, and had caused her to 'jump'. The ESC's representative further noted that solicitor A's account in this regard was supported by the fact that she had contemporaneously contacted solicitor C to inform him of the events and to outline her concerns over the Respondent's behaviour. The ESC's representative further noted that solicitor B had been shocked by the Respondent's behaviour and found it inappropriate. The ESC's representative contended, therefore, that it was apparent from the evidence of solicitors A and B and the fact that the legal firm was sufficiently concerned that it raised the matter with the Council and the group leaders, that the Respondent's conduct was unwelcome and that it had made solicitors A and B uncomfortable in their workplace. The ESC's representative contended, therefore, that the Respondent's conduct amounted to bullying in terms of paragraph 3.6 of the Code.

Following a question from the Panel about why the ESC had concluded that the Respondent had breached paragraph 3.3 of the Code, being the provision that required councillors to behave respectfully towards council employees, the ESC's representative explained that the heading before paragraph 3.3 expressly stated that the term 'council employees' included 'those employed by contractors providing services to the council'. The ESC's representative advised that as the Council had instructed the legal firm to carry out the inquiry, a contract was in place. Solicitors A and B were employed by that legal firm and, as such, the ESC had concluded that they were contractors providing services to the Council.

The ESC's representative accepted that the Respondent, as a politician commenting on a matter of public interest, would be entitled to the enhanced level of protection of freedom of expression afforded to political expression under Article 10 of the European Convention on Human Rights.

The ESC's representative contended, however, that she did not consider that the Respondent's conduct in shouting, banging his fists or pointing would be afforded protection under Article 10. This was because it amounted to disrespect and bullying that had caused shock and distress. The ESC's representative argued that even if it was accepted that the reading session was an opportunity for feedback or criticism of the Inquiry Team, it was not appropriate to raise issues with the junior members of staff present in a disrespectful and bullying manner.

The ESC's representative noted that some of the objectives of the Code were to:

- maintain standards and ensure that the conduct of public life in local government did not fall below a minimum level;
- protect the reputation and rights of others from offensive and abusive behaviour;

- ensure that council officers and contractors are free from undue disturbance so they can perform their duties;
- protect the mutual bond of trust and confidence between councillors and officers to enable local government to function effectively;
- ensure that the council or the office of a councillor is not brought into disrepute; and
- ensure public confidence in the council or democracy itself is not undermined.

The ESC's representative argued that a restriction of the Respondent's right to freedom of expression in this case was justifiable, and proportionate to the legitimate aims as outlined above, because:

- it protected junior officers or contractors (in this case, the junior members of the Inquiry Team) from unwarranted attacks and allowed them to perform their duties without undue disturbance;
- the Respondent could have expressed himself in a respectful, courteous and appropriate manner, without resorting to shouting, pointing or banging his fists;
- the Respondent's unduly disruptive conduct led to a formal complaint being made by the legal firm to the council, and reference to the conduct being made at full meeting of the Council, which had the effect of bringing the council into disrepute;
- a failure to restrict the Respondent's rights would support a view that the Code allows for a councillor to conduct themselves in the way in which the Respondent has, without consequence, which did not appear to be compatible with the intentions and objectives of the Code.

The ESC's representative argued that, as such, the finding of a breach of paragraphs 3.2, 3.3 and 3.6 of the Code would be justified.

Submissions made by the Respondent's Representative

The Respondent's representative contended that the Respondent was both credible and reliable, noting that he had denied from the outset the allegations made against him and had maintained his position. The Respondent's representative suggested that the conduct in question had been nothing more than a robust exchange of views on a passage in the report that had shocked and concerned the Respondent. The Respondent's representative noted that this position was almost entirely corroborated by Councillors Ross and Mowat.

The Respondent's representative suggested that the evidence of Councillor Ross should be regarded as the most compelling as he was the only person who could be said to be truly independent. The Respondent's representative noted this was because all the solicitors were members of the Inquiry Team that had compiled the report being criticised; and Councillor Mowat was from the same political party as the Respondent. As such, if the Panel found Councillor Ross to be credible and reliable, it should accept his evidence.

The Respondent's representative noted that Councillor Ross had stated, on oath, that he did not consider the Respondent had acted inappropriately. Councillor Ross had further noted that the Respondent had been surprised the recommendation and had raised his level of voice to express this and to be heard by everyone present, including those at the opposite end of a room. The Respondent's representative noted that Councillor Ross had stated that it was likely he would have heard the Respondent banging his fists, had this happened. The Respondent's representative noted that Councillor Ross did not consider that the Respondent had shouted, pointed or banged his fists.

The Respondent's representative accepted that Councillor Mowat could not be said to be as independent as Councillor Ross, but submitted that her evidence was both credible and reliable. The Respondent's representative noted that Councillor Mowat stated that the Respondent did not bang his fists and, further, that he could have done so without her noticing. The Respondent's representative argued that this was compelling and was consistent with the evidence of solicitor B, who similarly did not recall the Respondent

having banged his fist or fists. The Respondent's representative noted that of all present at the session, only solicitor A stated that the Respondent banged his fists.

The Respondent's representative noted that Councillor Mowat also testified that the Respondent had not shouted. The Respondent's representative noted that Councillor Mowat had stated the Respondent had employed a sharper tone and made his points firmly and robustly, but that he had not done so in an inappropriate manner. The Respondent's representative contended that the evidence provided by Councillors Mowat and Ross was consistent with that of solicitor C, who had testified he had heard a raised voice but had not described this as 'shouting'. The Respondent's representative contended that in the context in which the reading session took place, being a session arranged, at least in part, to allow feedback on the report to be gathered, there was nothing inherently untoward in the Respondent raising objections with the Inquiry Team in a raised voice in the same manner he might do at a council meeting.

The Respondent's representative noted that Councillor Mowat had stated that if she had realised the Respondent had made anyone else uncomfortable, she would not have sat back and let it happen. The Respondent's representative further noted that Councillor Mowat had stated she did not understand how the Respondent's offering of his phone to solicitor A could have been interpreted as anything other than an attempt at humour.

The Respondent's representative contended that solicitor D's evidence was, at best, second-hand, as he had not been present during the alleged incident. The Respondent's representative also queried why, if it was the case that the Respondent had 'shouted' and 'pointed', solicitor D did not describe the conduct using those terms. The Respondent's representative also suggested that solicitor D's evidence demonstrated how easy it is to 'get the wrong end of the stick', in that the handing of the phone by the Respondent to solicitor A, a humorous incident, had turned into an 'outrage'.

The Respondent's representative noted that while solicitor B said the Respondent's behaviour was inappropriate, and not the best way to behave, she had confirmed that it had not upset her and that she had not messaged solicitor C for assistance because she had felt in control of the situation. The Respondent's representative suggested that it was likely that solicitor B would have been upset had the Respondent been shouting directly at her.

The Respondent's representative further noted that solicitor B had indicated that if solicitor A had not been in the room, she would not have complained about the Respondent's conduct. The Respondent's representative contended that it could be inferred from this that she had been attempting to support solicitor A and had been overly sensitive of her feelings.

The Respondent's representative contended that as solicitor A's written statement and credibility could not be tested, less weight should be attached to her evidence. The Respondent's representative contended that this was particularly the case given that no one else present in the room recalled the Respondent having banged his fist or fists, as solicitor A alleged. The Respondent's representative advised that he was not suggesting that solicitor A was lying. Instead, his contention was that her evidence was exaggerated or overstated.

The Respondent's representative accepted that the Respondent's actions, in offering his phone to solicitor A, may be considered inappropriate if taken out of context, but advised that there had been no intent to cause any anguish. The Respondent's representative noted that there was no question of any breach of confidentiality, which had been the reason for the restriction on phone usage.

The Respondent's representative submitted, therefore, that the Respondent had not been disrespectful and had not breached paragraphs 3.2 and 3.3 of the Code.

The Respondent's representative further submitted that the Respondent's conduct could not be said to amount to bullying. The Respondent's representative noted that at no point during the Hearing, or in the ESC's investigation, did either solicitor A or B allege that the Respondent's behaviour was tantamount to bullying. The Respondent's representative suggested that if either solicitor A or B had considered that to be the case, both, as qualified solicitors, would have been able to identify and articulate that. On the contrary, the Respondent's representative noted that solicitor B had said she had not been upset by the Respondent's behaviour. The Respondent's representative further noted that the Respondent was aware that neither solicitor A nor solicitor B had the power to remove the recommendation from the report and, as such, he had not been trying to pressure them to do so.

In response to a question from the Panel, the Respondent's representative accepted that he had, in his representations on the ESC's draft investigation report, indicated that the Respondent would be willing to accept that his raising of his voice could be seen to be discourteous, and that he would accept censure for doing so. The Respondent's representative advised, however, that this concession was made in an attempt to resolve the matter and was not an admission that the Respondent had been discourteous.

The Respondent's representative argued that the Respondent, as a councillor commenting on matters of public concern, was entitled to enhanced protection to his freedom of expression under Article 10, and that there was limited scope for the restriction of such political speech or debate. The Respondent's representative noted that any such restriction would have to be appropriate and necessary in the public interest.

The Respondent's representative submitted that, if the Panel found the Respondent's actions to amount to the raising of his voice, it would be neither appropriate nor necessary to restrict his right to freedom of expression. The Respondent's representative noted that Article 10 protection can also apply to matters that offend, shock or disturb, and contended that if the Panel found that shock and distress arose as a consequence of the Respondent's behaviour, then a finding of breach would sit beyond the limited scope for restriction, given that protection extends to matters that are offensive, shocking or disturbing.

The Respondent's representative submitted that it was not necessary, in order to uphold proper standards, to restrict the Respondent's right to freedom of expression, and that such a restriction, when closely scrutinised, would be disproportionate. The Respondent's representative suggested that it was clear, when the speech that forms the basis of any misconduct can be classed as political expression (as was the case here), that must weigh in the Respondent's favour. The Respondent's representative submitted that the Panel must conduct a highly fact-sensitive balancing act, and noted that the more egregious the conduct, the easier it would likely be for the Panel to determine that a restriction was justified. The Respondent's representative argued that the Respondent's raising of his voice, even in circumstances where it caused offence, would not amount to egregious behaviour. The Respondent's representative further argued that the Respondent's passing of his phone to solicitor A, an attempt at humour, would not amount to egregious behaviour, even if the attempt at humour was misinterpreted. The Respondent's representative noted that there had been no swearing, no attempts to embarrass or humiliate anyone, and no name-calling. The Respondent's representative submitted, therefore, that the Respondent's overall behaviour was not egregious and accordingly, a restriction on his Article 10 rights would not be justified.

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 McLellan.
2. The Respondent, had on the face of it, breached the courtesy and respect provisions in the Code.

3. A restriction on the Respondent's Article 10 right to freedom of expression could not be justified. As such, a formal finding of a breach of paragraph 3.2 of the Code could not be found.

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:

- First, 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 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 there was no dispute that the Respondent attended the legal firm's Edinburgh office on 21 October 2021 in order to attend a session to read a report prepared by the Inquiry Team into historic complaints regarding the conduct of a former council employee. The Panel further noted that there was no dispute that the Respondent had been invited to the session in his role as a councillor and was satisfied, therefore, that he was acting as such at the time of the events in question. The Panel concluded, therefore, that the Code applied.

The Panel noted that conflicting accounts of the Respondent's conduct at the meeting on 21 October 2021 had been provided from those in attendance, both to the ESC during his investigation and in evidence led at the Hearing. The Panel noted that it was obliged to determine, on the balance of probabilities, whether it was more likely than not the alleged behaviour had occurred.

Having considered the evidence led, and the submissions made orally at the Hearing and in writing, the Panel was satisfied that it was more likely than not that the Respondent had reacted angrily to a particular paragraph in the report and had raised his voice and expressed views about it in a confrontational and challenging manner. This was because it was evident from the Respondent's own testimony that he was deeply unhappy about the recommendation outlined in the paragraph. The Panel noted that the majority of witnesses who had given evidence at the Hearing agreed that the Respondent had raised his voice. While the Panel noted that the Respondent and the other two councillors present considered that the Respondent's voice had only been raised to ensure all those present in the room could hear the points he was making, the Panel noted that there was no evidence or suggestion that the size, layout or acoustics of the room had prevented anyone from hearing any remarks that had been made by anyone present at a normal conversational level. The Panel further accepted the evidence of solicitor C to the effect that he had heard raised voices from where he was sitting in the adjoining room on that one occasion only.

The Panel noted that the Respondent, and Councillors Mowat and Ross, did not consider the Respondent to have used anything more than a robust tone. The Panel noted, however, that as all three were accustomed to heated political debates they may well have assessed the way the Respondent made his points in that context, at the time. As noted above, the Panel considered it was evident that the Respondent was very unhappy about the recommendation and that he had raised his voice. The Panel concluded, therefore, that it was more likely than not that he was angry and, as such, had made his points about it in a confrontational and antagonistic manner. The Panel agreed with the ESC's representative that such a conclusion was supported by the fact that solicitor A notified solicitor C of her concerns about the Respondent's conduct contemporaneously, via the firm's internal messaging service and that both she and solicitor B raised them with senior colleagues later that day. The Panel further agreed with the ESC's representative that it was

apparent that not only did solicitor D believe the accounts of solicitor A and B, but that he had found what they told him sufficiently disturbing as to merit or necessitate his correspondence to the Council's Chief Executive and group leaders. The Panel accepted the ESC's representative's position that, other than potentially discharging a duty of care to its employees, neither solicitor D nor his firm had anything to gain by doing so.

The Panel further accepted the evidence of solicitor B that the Respondent had pointed at her while expressing his views on the recommendation, albeit he had not done so repeatedly. In determining that this was more likely than not to have occurred, the Panel considered that solicitor B had been entirely measured and credible when giving evidence and that she would have no reason to make up the allegation. The Panel further noted that the Respondent accepted that he may have gesticulated while making his views known. While the Panel accepted that neither Councillors Mowat or Ross had noted, or recalled, the Respondent having pointed at solicitor B, it noted that it was possible they may well have missed this, had they been reading the report at the time. The Panel also noted that it may have been natural or normal for the Respondent to have used gestures to emphasise a point he was making. The Panel considered on balance, however, that the Respondent's conduct in pointing at solicitor B, while evidently angry was, and would have felt, confrontational, even if he had not done so in an aggressive manner.

The Panel was not satisfied on the balance of probabilities, however, that the Respondent had banged his fist or fists on the table during his apparent outburst. In reaching this conclusion, the Panel noted that only solicitor A recalled this having happened. The Panel further noted that the Respondent categorically denied having done so. The Panel considered that it was likely that solicitor B and Councillors Mowat and Ross would have heard fists banging on the table, even if they had not been looking at the Respondent at the time. The Panel considered, therefore, that it was possible that, given it was evident that the Respondent was expressing his anger or upset about the inclusion of the recommendation, solicitor A may have misinterpreted or misremembered another gesture he had made. The Panel noted, in support of this, that Councillor Ross recalled the Respondent having put his hands flat on the table while making his comments.

While the Panel accepted the Respondent's position that he was incredulous at the paragraph in question having been included in the report, and accepted he was entitled to challenge this, it was satisfied that he could have done so without raising his voice. The Panel found that by doing so, and by behaving in a confrontational manner, the Respondent failed to show courtesy and respect to the solicitors present, as required by the Code. In reaching this conclusion, the Panel noted that the meeting was a private one, arranged so that councillors could read the full report, and was not, therefore, a political forum. The Panel agreed with the ESC's representative that a tone that might reasonably be adopted and considered acceptable in a political debate between elected members, who had a right of reply, was very different to that which would be expected at a private meeting with employees, external solicitors or general members of the public.

The Panel noted that it was not in dispute that the Respondent had used his mobile phone during the meeting to listen to a voicemail from a journalist. The Panel was satisfied that the Respondent advised the only solicitor present in the room at the time, solicitor A, that the journalist wanted to know what was in the report and when it would be made public, and asked whether the solicitor wished to speak to him. The Panel noted that the Respondent's position was that he had done so as a joke, and in seeking to be transparent. The Panel was satisfied, however, that the Respondent had been warned that the use of mobile phones during the session was not allowed due to the sensitive nature of the report, and the need to ensure it remained confidential. The Panel agreed, in the circumstances and given the contents of the report, that the Respondent's use of the phone and his offering of it to one of the solicitors, in the context of him mentioning contact with a journalist, was entirely inappropriate, facetious and ill-judged. The Panel agreed that it was reasonable to conclude that the Respondent should have known that doing so would have made solicitor A uncomfortable and, therefore, that doing so was disrespectful.

The Panel concluded that the Respondent had, on the face of it, contravened paragraph 3.2 of the July 2018 version of the Code, being the version that was in place at the time of the events in question.

The Panel was not satisfied, however, that the solicitors should be regarded as council officers in terms of paragraph 3.3 of then Code. The Panel accepted that the Code made it clear that the provisions concerning the relationship between councillor and council employees included those employed by contractors providing services to the Council. The Panel agreed, however, that a distinction should be drawn between:

1. individuals who, as contractors, might reasonably be understood to be council employees by an objective observer who might not know the full details of their employment status. This might, for example, include cleaners or security guards employed by an agency contracted to provide services to the council and who work in council buildings and / or solely and entirely on council work; and
2. individuals working on external premises for an independent firm or company which is instructed to provide particular services or undertake a specific task for the council, and which has other clients and unrelated work.

The Panel considered solicitors A and B fell into the second category and, therefore, could not be considered contractors or employees of the Council, for the purpose of the Code. The Panel concluded, therefore, that a breach of paragraph 3.3 could not be found. The Panel acknowledged nevertheless that the extent of the provision concerning 'contractors' remained unclear in the current version of the Code, and agreed that the Standards Commission's Guidance should be updated to reflect the distinction drawn above.

The Panel acknowledged that solicitor A had reported feeling shocked and upset as a result of the Respondent's behaviour. The Panel had sympathy for this and could understand why solicitor A had felt that way, as it considered, given the purpose of the reading session and the contents of the report being shared, that she would not have been expecting, and should not have had to witness disrespectful and discourteous behaviour. The Panel agreed with the ESC's representative that it was the impact of the behaviour, not the intent, that was the key.

Having considered the matter objectively, however, the Panel was not satisfied that the Respondent's conduct met the threshold of amounting to bullying or harassment. The Panel noted that harassment can be any unwelcome behaviour or conduct that makes someone feel offended, humiliated, intimidated, frightened and / or uncomfortable. Harassment can be experienced directly or indirectly (such as being in the room while unacceptable conduct is being displayed and being affected by it), and can occur as an isolated incident or as a course of persistent behaviour. The Panel noted that while bullying tends to be a pattern of behaviour or course of conduct, it can also be a one-off serious incident that becomes objectionable or intimidating. In this case, the Panel noted that it had found that the Respondent had raised his voice and pointed at the solicitors in the room. The Panel did not consider, however, there was any evidence or suggestion that there had been any significant personal element in terms of the comments made, or to whom they were directed. The Panel noted that while solicitor B had stated that the Respondent had pointed his finger at her, she had indicated that he had done so in a way that displayed his annoyance about the recommendation in the report, rather than at her as an individual.

The Panel noted that bullying usually arises as a result of an individual misusing their power (usually derived from status or some other position of strength). The Panel noted that, as an elected member of the Council, the Respondent was effectively a client of the firm, and he was older and more senior than the two solicitors in the room. The Panel therefore accepted the ESC's representative's position that the Respondent was effectively in a position of power over solicitors A and B. The Panel noted, nevertheless, that there was no evidence or suggestion that the Respondent had attempted to force the solicitors to change the report. The Panel considered that, instead, he was venting his feelings about the recommendation (albeit in an inappropriate manner) and ensuring these were recorded. The Panel was satisfied that the solicitors had always intended to record any comments made on the report. The Panel was further satisfied that there was no suggestion that the Respondent had pressured solicitor A into taking the mobile phone or speaking to the

journalist, or that she had even considered doing so. The Panel concluded, therefore, that in the circumstances the Respondent had not bullied or harassed either solicitor, in breach of paragraph 3.6 of the Code.

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

Having found, on the face of it, that the Respondent had breached paragraph 3.2 of the Code, the Panel proceeded to consider the applicability of Article 10.

The Panel noted that enhanced protection of freedom of expression under Article 10 applies to all levels of politics, including local politics. 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 expressing a view on a matter of public concern, namely a recommendation about whether the content of a report, intended for publication, regarding historic allegations of abuse within the council should be used for political gain. The Panel was further satisfied that the Respondent's conduct, in attempting to pass the mobile phone to solicitor A and suggesting she spoke to a journalist, was an expression that concerned the confidentiality or otherwise of the report (irrespective of whether it was intended, or perceived, as an attempt at humour). The Panel agreed that the confidentiality of the report and, how and to what extent, its contents could be disclosed were again a matter of public concern. 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 nevertheless noted that the right to freedom of expression is not absolute. Article 10(2) states that restrictions can be imposed, provided they are necessary in order to achieve a legitimate aim. As noted by the ESC's representative, legitimate aims can include ensuring that the conduct of public life at the local government level, including public debate, does not fall below a minimum level so that public confidence in democracy is not eroded. The Panel noted a restriction can also be imposed to protect the reputation and rights of others (including members of the public) and to ensure or maintain confidence in elected members and the council itself.

The Panel noted, however, that the Courts have found any restriction on freedom of expression must also be proportionate to the legitimate aim being pursued. As such, the Panel 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 proceeded to consider whether the restriction involved by the finding that the Code had been breached was therefore proportionate and justified, in terms of Article 10(2).

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 required.

The Panel noted that the Courts have held that, in a political context, a degree of the immoderate, offensive, shocking, exaggerated, provocative, controversial, colourful and emotive, that would not be acceptable outside that context, is tolerated. The Courts have also held that comments made in a political context, which amount to value judgements, are tolerated even if untrue, as long as they have some or any factual basis.

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

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 Panel agreed with the ESC's representative that the Respondent's conduct could have an impact on the rights of the solicitors present, and their ability to undertake their work without undue disturbance. The Panel noted, however, that the Respondent was entitled to make the points he had about the recommendation in the report, albeit it had found that he did so in a discourteous and disrespectful manner. The Panel agreed, therefore, that the Respondent's conduct had been limited, in terms of any potential disruption. The Panel noted that there was no evidence or suggestion that the Respondent's behaviour had caused the reading session to have been abandoned or even extended unduly.

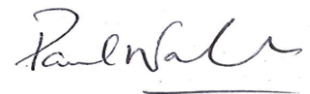
The Panel considered that the Respondent's behaviour was not sufficiently shocking, offensive and gratuitous as to justify a restriction on his right to freedom of expression. The Panel noted, in this regard, that it had not found that the Respondent used profanities, resorted to any personal abuse or insults, and / or engaged in threatening behaviour. The Panel again noted that the Respondent was entitled to express his concerns (being value judgements), about the content of the report, albeit it found he had done so in manner that was inappropriate and disrespectful.

The Panel was further satisfied that, while the Respondent's use of the mobile phone during the session and his offer for the solicitor to speak to the journalist was wholly inappropriate and disrespectful (whether it was intended as a joke or not), there was no suggestion that he had insisted she did so, or any evidence that he had disclosed confidential information about the report.

In the circumstances, the Panel determined the imposition of a restriction on the Respondent's right to freedom of expression would not be relevant, sufficient and proportionate.

As the Panel had found that a restriction on the Respondent's Article 10 right to freedom of expression could not be justified, it concluded that a formal finding of a breach of paragraph 3.2 of the Code could not be found.

Date: 18 October 2023



Paul Walker
Chair of the Hearing Panel