

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held at Angus House, Orchardbank Business House, Forfar, on 15 June 2022.

Panel Members: Mr Paul Walker, Chair of the Hearing Panel
Ms Ashleigh Dunn
Mrs Tricia Stewart

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/AN/3561, 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 Derek Wann (the Respondent).

Referral

Following an investigation into eight complaints received about the conduct of the Respondent, the Acting ESC referred a report (the report) to the Standards Commission for Scotland on 16 March 2022, in accordance with section 14(2) of the Ethical Standards in Public Life etc. (Scotland) Act 2000 (the 2000 Act).

The substance of the referral was that the Respondent had failed to comply with the provisions of the 2018 version of the Code and, in particular, that he had contravened paragraphs 3.2, 3.6 and 3.18 of the Code, 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.

Bullying and Harassment

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

Use of Council Facilities

3.18 The Council will normally provide facilities to assist councillors in carrying out their duties as councillors or as holders of a particular office within the Council. This may involve access to secretarial assistance, stationery and equipment such as telephones, fax machines and computers. Such facilities must only be used in carrying out Council duties in accordance with your relevant Council's information technology, communications and member support policies, or for incidental personal use as authorised by your Council and not related in any way to party political or campaigning activities. Where the Council recognises party political groups, assistance to such groups is appropriate in relation to Council matters but must not extend to political parties more generally and you should be aware of and ensure the Council complies with the statutory rules governing local authority publicity.

Standards Commission S16 Decision

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

Having considered the terms of the Acting ESC's report, the Standards Commission determined:

- to hold a Hearing in relation to the alleged breach of paragraph 3.2 of the Code; and
- to do neither (i.e. take no action) in relation to the alleged breaches of paragraphs 3.6 and 3.18 of the Code.

In making its decision about whether to hold a Hearing in relation to the alleged breaches of paragraphs 3.6 and 3.18 of the Code, the Standards Commission took into account both public interest and proportionality considerations, in accordance with its policy on Section 16 of the 2000 Act. A copy of the policy can be found at: <https://www.standardscommissionscotland.org.uk/cases>.

The Standards Commission noted that the Acting ESC, in his investigation report, concluded that the Respondent's conduct could not be categorised as bullying and harassment. This was because there was no repeated disrespectful behaviour against any specific individual or account, the Respondent did not always 'tag' the individual to whom he was referring in his tweets, and it was unlikely that the content would have caused anything greater than minor offence.

The Standards Commission noted that the Acting ESC, in his investigation report, advised that the Council confirmed that while the Respondent was provided with a laptop for his work, he was not provided with a mobile telephone or iPad. The Acting ESC found, first, evidence that most of the content on the account had been posted via the Twitter for iPad app and, second, that the Respondent denied using a Council-issued device to access account. As such, the Acting ESC was unable to conclude, on balance, that the Respondent used Council facilities to send the tweets, in contravention of paragraph 3.18 of the Code.

The Standards Commission noted that the holding of a Hearing (with the associated publicity) could promote the provisions of the Code. There could, therefore, be some limited public interest in also considering paragraphs 3.6 and 3.18 at the Hearing. The Standards Commission noted, however, that it was also required to consider whether it would be proportionate to do so. In this case, the Standards Commission saw no reason to depart from the Acting ESC's conclusions in respect of paragraphs 3.6 and 3.18. The Standards Commission did not consider, on the face of it, that the Respondent's conduct would amount to bullying and harassment, and as it did not consider there was evidence to support any contention that the Respondent had used council-issued equipment to post on the account. As such, the Standards Commission determined it was not proportionate to consider, at the Hearing, whether there had been any breach of paragraphs 3.6 or 3.18.

Evidence Presented at the Hearing

Joint Statement of Facts

The Acting ESC's representative advised that a joint statement of facts had been agreed with the Respondent. The joint statement of facts narrated that the details of the complaints and the Acting ESC's factual findings were agreed.

Submissions made by the Acting ESC's representative

The Acting ESC's representative explained that the eight complaints received all concerned an anonymous Twitter account operated by the Respondent. The Twitter account was entitled '(Lady Whistledown) AngusFreeofSNP'. It was not in dispute that the Respondent had operated the Twitter account and posted the comments attributed to him within the Acting ESC's report.

The Panel heard that the Twitter account had operated on an anonymous basis since being set up in December 2020. The Acting ESC's representative advised that the Respondent had first been linked to the account in an article in a local newspaper dated 23 June 2021. The article reported that a tweet had been sent from the account referring to "my comments" and linked to a press release from the Council that contained a statement from Respondent. The article noted that the Respondent shared the press release from his Facebook account shortly before the tweet was posted. The article reported that while the Respondent denied being connected to the Twitter account, comments made on it were very similar both in content and timing to ones the Respondent had posted on other named accounts. The article stated that the last two digits of the mobile phone number connected to the Twitter account matched those of the Respondent's own phone number.

The Acting ESC's representative noted that a further article on the matter appeared in the local newspaper the following day (24 June 2021), which confirmed that the Respondent had admitted he operated the anonymous Twitter account. That article stated that the account had been deleted after it had been linked to the Respondent's phone number. The second article stated that the account "had been used to dish out targeted abuse at local politicians" and that content on it had been described by opposition councillors as "misogynistic and transphobic". The Acting ESC's representative noted that the Respondent was quoted apologising for his conduct and noting that his actions had been "unacceptable".

The Acting ESC's representative advised that the Complainers alleged that the Respondent used the Twitter account to post derogatory comments about others, including other councillors and politicians. A number of the Complainers also stated that the comments were misogynistic and / or transphobic in nature. The Acting ESC's representative noted, however, that despite being asked to do so, none of the Complainers had been able to provide screenshots or evidence to support these claims, over and above the newspaper articles on the matter.

The Acting ESC's representative advised that, as the Twitter account had been deleted, the Investigating Officer had only been able to recover a portion of the content from an internet archive. The Acting ESC's representative noted that screenshots of the recovered tweets and a transcript of their contents had been provided to the Panel.

The Acting ESC's representative noted that paragraph 3.1 of the Code stated that the rules of good conduct contained within it must be observed in all situations where an elected member was acting as a councillor or could be perceived as acting as a councillor; and that this included when they were using social media. The Acting ESC's representative accepted that, as the Twitter account was anonymous, it would not have been automatically connected to the Respondent. The Acting ESC's representative contended, however, that as the Respondent posted at least one tweet from the account linking to his comments in a council press release, it would have been reasonable for members of the public to perceive he was acting as a councillor when operating it. In support of this assertion, the Acting ESC's representative noted that the Standards Commission's Guidance on the Code in place at the time stated that councillors needed to be mindful that their perception of when they were acting privately may be different that of members of the public. The Guidance recognised that members of the public might reasonably consider a councillor was acting in that capacity when posting on social media if they were engaged in political activity, or making comments on political matters.

The Acting ESC's representative noted that, in this case, there was no suggestion that the Twitter account was private. While it was only being followed by 115 accounts, it followed some 145 accounts and interacted with others connected to the Council and the Scottish Parliament. For comparison purposes, the Acting ESC's representative noted a decision by the Standards and Ethics Committee of Rotherham Metropolitan Borough Council¹, in which it was found that posts published by a councillor under a pseudonym on a social media blog site had been made in his official capacity as an elected member. The Acting ESC's representative argued, in any event, that the subsequent identification of the Respondent as a councillor in the press, and his admission that he operated the account, meant that members of the public could reasonably perceive that he was acting as a councillor at the time he posted content on it.

The Acting ESC's representative contended that, when all of the circumstances were considered, the Respondent could reasonably be perceived as acting as a councillor when operating the account and, as such, the Code applied. As an aside, the Acting ESC's representative noted that if the Code was not found to apply,

¹ <https://modern.gov.rotherham.gov.uk/documents/s130213/App%201%20-%20Decision%20Notice%20-%2018th%20January%202021%20-%20Cllr%20Ireland.pdf>

councillors would, in effect, be able to operate anonymous Twitter accounts and use to post disrespectful or discourteous messages, without any fear of sanction.

The Acting ESC's representative noted that the Respondent had acknowledged, in his response to the investigation, that some of the content on the Twitter account may have caused minor offence. The Acting ESC's representative contended, however, that some of tweets went further than this and, on balance, should be categorised as being discourteous and disrespectful, in breach of paragraph 3.2 of the Code.

In particular, the Acting ESC's representative drew the Panel's attention to three tweets. The first of these was one dated 7 May 2021 in which the Respondent stated "does this show that there is a bigger drug issue in [Dundee City West Constituency] than we thought?", in reference to the re-election of a MSP. The Acting ESC's representative contended that this was disrespectful to members of the public who had voted for the MSP in question.

The second was a tweet of 11 May 2021, which stated "[t]his is ridiculous – what does Emma expect – money in advance? Tell me are there many jobs that pay you before you do a day's graft?" about an MSP. The Acting ESC's representative noted the tweet had been sent in response to one from another user that stated "new SNP MSP already wondering where her cash is. A right charmer." The Acting ESC's representative contended that the Respondent's tweet was disrespectful as it does not give due regard to the MSP financial concerns, labelled them 'ridiculous', and posed a rhetorical question that implied she had not done a day's work before having made an enquiry about MSP salaries.

The third was a tweet dated 7 June 2021 that featured a photoshopped image of the First Minister, showing her face on the body of a toddler going to the toilet, and crayon scribbles all over the walls and body, with a caption that read "Westmonster did it". The Acting ESC's representative argued that this was disrespectful as it could be shocking to see the juxtaposition of the First Minister's face on such an image and that this amounted to a gratuitous personal attack on her.

The Acting ESC's representative proceeded to consider the application of Article 10 of the European Convention on Human Rights (ECHR). The Acting ESC's representative contended that the three tweets she had highlighted related to matters of public concern; namely drug deaths in Dundee, MSP salaries and the ongoing relationship between the Scottish Government and the UK Government. As such, the Acting ESC's representative contended that the Respondent would benefit from enhanced protection to his right to freedom of expression.

Having noted that the enhanced protection afforded by Article 10 was wide, and that it extended to matters which might be felt by some to be inappropriate or offensive, the Acting ESC's representative argued that a restriction on the Respondent's right to freedom of expression resulting from a finding of breach and imposition of a sanction could not be justified. The Acting ESC's representative noted that this was because despite the tweets in question containing, to varying extents, a degree of immoderate, offensive and shocking content or (in the case of the third tweet) imagery, all concerned matters that were the subject of public comment. The Acting ESC's representative considered that all were statements or images that could be categorised as falling within with the 'cut and thrust' of political debate on matters of public interest. In the case of the third tweet, the Acting ESC's representative noted that there was no suggestion that the Respondent himself had created the image and suggested it was more akin to the work of a political cartoonist, such as a political parody, satire or caricature. The Acting ESC's representative argued that it was not reasonable to suggest that it was necessary to restrict such political parody, satire or caricature.

The Acting ESC's representative's responses to Panel questions

In response to questions from the Panel, the Acting ESC's representative had confirmed that the Investigating Officer had retrieved a large sample of the tweets from the deleted account and had not found any that could be categorised as misogynistic or transphobic.

The Acting ESC's representative noted that, in a tweet of 25 May 2021, the Respondent tagged another councillor and questioned who a third councillor thought he was. The Respondent referenced a Standards Commission decision to censure the third councillor and proceeded to question whether he was fit for office. While the Acting ESC's representative noted that the information about the Standards Commission's decision in respect of the third councillor was in the public domain, she accepted that it could also be potentially disrespectful for an elected member to question, behind a screen of anonymity, a colleague's fitness for office.

The Acting ESC's representative noted that, in a tweet of 4 May 2021, the Respondent shared a photograph of campaigners for the Scottish independence movement and commented that he had "never kissed a Yes supporter – could you blame me?". The Acting ESC's representative noted that it appeared the photograph was a composite image. The Acting ESC's representative accepted, however, that the campaigners' faces were shown and, as such, they were potentially identifiable. The Acting ESC's representative further accepted that the tweet could be construed as being potentially disrespectful towards the individuals shown in the image.

The Acting ESC's representative noted that, on 8 May 2022, the Respondent commented "gutted absolutely gutted" in response to a remark by an anonymous Twitter user about the re-election of an MSP, who had previously been open about her autism diagnosis, in which the Twitter user called the MSP a "nutcase". The Acting ESC's representative accepted that, while the Respondent had not made the remark, the Respondent could nevertheless be perceived as endorsing a disparaging remark about an individual's neurodiversity, by providing a comment that appeared to be supportive of that remark. The Acting ESC's representative again accepted that this could potentially be categorised as disrespectful.

The Acting ESC's representative was asked whether it was only at the stage when the Respondent posted the tweet with a link to his comments in a Council press release that he could reasonably be perceived as acting as a councillor. In response, the Acting ESC's representative noted that she considered it was possible for members of the public to have drawn that conclusion throughout the period when the Twitter account was in operation. This is because the name Lady Whistledown was a reference to a character in the well-known Netflix series, 'Bridgerton'. The character in the series was an 'insider' spreading information, gossip and rumours about the elite social group of which she was a member. By analogy and implication, it was reasonable to assume the operator of the Twitter account was also an 'insider' of the Council. The Acting ESC's representative advised that this supposition was supported by the fact that some of the content shared on the account displayed a level of knowledge about the inner workings of the Council.

Submissions made by the Respondent

The Respondent advised that he had no additional comments to make other than those he had submitted in response to the ESC's investigation, to the effect that he accepted responsibility for the Twitter account and apologised sincerely for how he had handled the matter. The Panel noted that while the Respondent acknowledged that his actions were unacceptable, his position was that it was unfair to categorise any of his tweets as 'misogynistic' or 'transphobic'. The Respondent asked the Panel to note that the majority of the posts were simply retweets and that while he may have shared some memes, he had not created any.

The Respondent's responses to Panel questions

In response to a question about why the account was anonymous, the Respondent advised that he had established it at a "low point" in his life and had viewed it as an opportunity to make points and comments, without facing the usual criticism and "barrage of abuse" to which councillors were frequently subjected. The Respondent advised that he had deleted the account because the benefit he got from the anonymity no longer applied.

The Respondent advised that he did not consider he had been disrespectful towards colleagues or members of the public, although he accepted that the content of the postings may have caused minor offence.

The Respondent argued, in respect of the tweet of 11 May 2021 regarding the MSP's pay, that he had simply been making the point that an individual should not expect to be paid for work in advance. The Respondent reiterated that he had not tweeted that the other MSP was a "nutcase" and, instead, had merely posted a comment in response. In respect of the tweet of 25 May 2021 questioning whether a councillor colleague was fit for office, the Respondent contended that he was merely commenting about another elected member's behaviour. The Respondent accepted that as the other councillor had been censured by the Standards Commission for his conduct online, his own comment about the other councillor's behaviour could potentially be perceived as being hypocritical.

The Respondent confirmed that, at the time he had been operating the Twitter account, he had been serving as the Council's Children and Learning Committee Convener. The Respondent confirmed that this had involved campaigning against online bullying as part of a 'think before you type' initiative. The Respondent accepted that his own actions, in operating the account, were not compatible with the aims of this initiative.

The Respondent advised that his initial denial of responsibility for the Twitter account was an instinctive reaction to being telephoned out of the blue by a reporter from the local newspaper. The Respondent advised that he admitted to his political party that he was behind the account before the second newspaper article was published on 24 June 2021.

The Respondent advised that he endorsed the Acting ESC's representative's position in respect of the applicability of Article 10 of the ECHR. The Respondent advised that he considered that much of the content he had posted on the account fell within the definition of normal political discourse or "banter", much of which was already in the public domain.

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

Reasons for Decision

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

- 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 Hearing Panel would proceed to consider whether the restriction involved by the finding was justified by Article 10(2), which allows restrictions that are necessary in a democratic society (and, in particular, in this case, for the protection of the reputation or rights of others).

Stage 1: Whether the Respondent's conduct amounted, on the face of it, to a breach of paragraph 3.1 of the Code

The Panel noted that paragraph 3.2 of the version of the Councillors' Code of Conduct in place at the time required councillors to treat colleagues and members of the public with courtesy and respect at all times.

The Panel noted that, in his response to the investigation, the Respondent had disputed the Acting ESC's conclusion that he was acting or could reasonably be perceived to be as acting as a councillor when posting from the Twitter account. While the Panel accepted that the Respondent had not identified himself or referred to his position as a councillor in the Twitter handle or the biography section of the page, it noted that there was no evidence to suggest the account was private or only concerned personal matters. The Panel further noted that, in one tweet, the Respondent posted a link to comments he had made, as an elected member, in a council press statement. The Panel was of the view, therefore, that the Respondent had identified himself as a councillor. The Panel considered that as he had done so, and as the majority of the tweets before it were political in nature, it would be reasonable for members of the public to conclude the Respondent was acting as a councillor when posting from the account. The Panel additionally accepted the Acting ESC's representative argument that such a conclusion would have been reinforced by the inclusion of the name 'Lady Whistledown'. The Panel agreed with the Acting ESC's representative that it would be reasonable for anyone viewing the account to conclude, in light of this name and the content posted, that its operator was very likely to be an 'insider' of the Council.

In any event, the Panel agreed that the subsequent identification of the Respondent as a councillor in the press and his admission that he operated the account, meant that members of the public would be reasonably entitled to perceive he was acting as a councillor at the time he posted content on it. The Panel determined, therefore, that the Code applied to the Respondent at the time of the events in question.

The Panel noted that, despite being asked to do so, none of the Complainers had provided evidence to support the allegation that any of the content of the Twitter account was transphobic in nature. The Panel noted that as the Twitter account had been deleted, the Acting ESC's office had only been able to recover a portion of the tweets, "a large sample", despite their best efforts. Screenshots of the recovered tweets and a transcript of their contents had been provided to, and considered by, the Panel. While the Panel accepted that it did not have all the tweets that had been posted on the account, it was satisfied that none of those before it were transphobic.

Turning to the content that had been recovered from the account, the Panel was not convinced, on balance, that the tweet of 11 May 2021, as highlighted by the Acting ESC's representative, about whether the MSP was expecting to be paid in advance was disrespectful or discourteous. The Panel was of the view that the Respondent, as an opposition politician, was seeking to make a point about whether MSPs should expect to be paid in advance and that such a comment could not be categorised as falling outwith the normal and acceptable bounds of everyday politics.

The Panel further concluded, on balance, that the Respondent's actions in sharing, on 7 June 2021, the photoshopped image of the First Minister was not necessarily disrespectful or discourteous. This was because the Panel considered that it was evident the image was a caricature and noted that there was no evidence or suggestion that the Respondent himself had created it. The Panel was of the view that the Respondent was attempting to make a political point about the relationship between the First Minister's party and the UK Government and that, again, as an opposition politician he was entitled to do so. While the Panel accepted that many would consider it puerile to share such a caricature, it was of the view that it would nevertheless be reasonable for it to be viewed as an attempt at political satire and not an offensive personal attack.

The Panel nevertheless found that the tweet of 4 May 2021, in which the Respondent shared a photograph of "Yes" campaigners and commented that he had "never kissed a Yes supporter – could you blame me?", was disrespectful and discourteous. This was because the Panel was of the view that it was evident from the comment that the Respondent was seeking to make an adverse observation about the appearance of the individuals in the photograph, regardless of whether it was a composite or photoshopped image. The Panel

considered it to be disrespectful and discourteous for such a comment to have been made about the appearance of potentially identifiable members of the public.

The Panel noted that, in his tweet of 7 May 2021 the Respondent stated that it made no sense an SNP MSP had held his seat with 62% of the vote when he had previously resigned as a minister over rising deaths from drugs. The Respondent questioned whether the MSP's increased share of the vote showed "that there is a bigger drug issue in this city than we thought". The Panel was of the view there was a clear inference from the tweet that a proportion of the electorate of the constituency had been under the influence of drugs when voting. The Panel was of the view that there was no basis for this comment, that it was demeaning and, as such, was disrespectful to members of the public forming that electorate.

The Panel noted that, on 8 May 2022, the Respondent commented "gutted absolutely gutted" in response to a remark by an anonymous Twitter user about the re-election of an MSP in which the user called the MSP a "nutcase". While the Panel accepted that the Respondent had not made the initial remark about the MSP's neurodiversity, it considered that, by posting a supportive comment, the Respondent could reasonably be perceived as endorsing it. The Panel was of the view that endorsing such a personal and offensive comment about an individual was disrespectful.

The Panel noted that in his tweet of 25 May 2021, the Respondent questioned who a fellow elected member of Angus Council thought he was. The Respondent proceeded to question whether the other councillor was fit for office. The Panel considered that it was disrespectful and discourteous for an elected member to direct a disparaging remark towards a colleague anonymously.

The Panel noted that the Respondent had operated the Twitter account anonymously. It concluded that the only reasonable explanation for the Respondent to have done so was so that he could indulge in commentary and conduct that he would otherwise have been prevented from engaging in, as an elected politician subject to a Code of Conduct (who was obliged to act in accordance with the key principles of public life). The Panel noted the Respondent advised that he had not intended to be, and did not consider he had been, disrespectful. The Panel was of the view, however, that the fact that the Respondent had initially denied being behind the account, and that he had subsequently deleted it, suggested otherwise.

While the Panel noted the Respondent's position was that he had created the account at a low point in his life and to avoid the abuse that he was normally subject to as a councillor, it was of the view that the establishment of such an account would only serve to contribute to such a hostile environment.

The Panel was satisfied, on balance, the Respondent's conduct in posting some of the tweets amounted, on the face of it, to a contravention of the requirement under paragraph 3.2 of the Code to behave with courtesy and respect towards colleagues and members of the public.

The Panel noted, however, that before coming to a final decision, it was required to consider the Respondent's right to freedom of expression under Article 10 of the European Convention on Human Rights.

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

The Panel noted that enhanced protection of freedom of expression under Article 10 applies to all levels of politics, including local 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 concern². In this case, the Panel was satisfied that the Respondent's tweets it had found to be disrespectful or discourteous were political in nature and, as such, related to matters of public concern. In

² *Thorgeirson v Iceland (1992) 14 EHRR 843*

the circumstances, the Panel considered that the Respondent would attract the enhanced protection of freedom of expression afforded to politicians, including local politicians, under Article 10.

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

The Panel noted, nevertheless, that the right to freedom of expression is not, however, absolute. Article 10(2) states that restrictions can be imposed to ensure that the conduct of public life at the local government level, including public debate, does not fall below a minimum level. It also allows restrictions for the protection of the reputation or rights of others. The Panel noted, however, that Article 10(2) states that any such restriction must be necessary in order to achieve its aim. The Panel proceeded to consider whether the restriction involved by the finding that the Code had been breached was therefore justified, in terms of Article 10(2), to ensure standards of public debate did not fall below a minimum level and / or to protect the reputation or rights of others.

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

The Panel accepted that the Courts have held that the less egregious the conduct in question, the harder it would be for a Panel, when undertaking its balancing exercise, to justifiably conclude that a restriction on an individual's right to freedom of expression is required³.

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 tolerated⁴.

The Panel considered that the tweets could have an impact on the rights and reputation of the individuals in the campaign photo and the electorate in Dundee. The Panel noted, however, that the individuals were not readily identifiable. The Panel further noted that the Twitter account had only a limited number of followers. The Panel considered, therefore, that it was likely that any impact would be negligible. The Panel noted that the tweet about the other Angus councillor's fitness for office could also have an impact on his reputation. The Panel noted, however, that the Standards Commission's decision about the other councillor was already in the public domain. As such, the Panel agreed that any impact would be limited.

The Panel noted that the Respondent's apparent endorsement of the tweet about the MSP's neurodiversity had the potential to lower the standards of public debate. The Panel noted, however, that the comment about the MSP had been made by another user. The Panel did not consider, in the circumstances, that the Respondent's conduct could be said to have brought the standards of public debate below a minimum level, as to render any restriction on his freedom of expression necessary.

After full consideration of the matter, and some debate, the Panel considered that the Respondent's comments were not sufficiently shocking, offensive and gratuitous as to justify a restriction on his right to freedom of expression. This was because the Panel was ultimately satisfied that the Respondent was attempting make political points, albeit he did so in an inappropriate manner. As such, the Panel concluded that a breach of the Code could not be found.

³ *Calver, R (On the Application Of) v The Adjudication Panel for Wales (Rev 2) [2012] EWHC 1172 (Admin)*

⁴ *Heesom v Public Services Ombudsman for Wales [2014] EWHC 1504 (Admin)*

The Panel would nevertheless emphasise that the requirement for councillors to behave in a respectful and courteous manner towards colleagues and members of the public is a fundamental requirement of the Code, as it ensures public confidence in the role of an elected member and the council itself is not undermined. The Panel confirmed that the requirement for councillors to behave respectfully and courteously applies equally on social media as it does in person. Councillors should not make comments online that they would not otherwise make in person, face to face. The Panel was clear that using an anonymous account was disrespectful and discourteous and served only to contribute to poor standards of public debate.

Date: 20 June 2022



**Mr Paul Walker
Chair of the Hearing Panel**