

Decision of the Standards Commission for Scotland

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

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

Background

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

Report to the Standards Commission

Following his investigation into a complaint received on 12 July 2022 (reference LA/H/3778) concerning an alleged contravention of the Councillors' Code of Conduct dated December 2021 (the Code) by an elected member of Highland Council (the Respondent), the ESC referred a report to the Standards Commission on 23 March 2023.

The complaint concerns allegations that the Respondent had breached the respect, bullying and harassment provisions in the Code by suggesting in two social media posts that the Complainer was stalking him, that he was a "*snake in the grass*" and a "*crocodile who comes from Dundee*" and also by suggesting, during a council meeting, that the Complainer was "*not fit for public office*".

In his report, the ESC advised that:

1. As the Respondent's social media account, from which the posts in question were made, indicated that he was a councillor and, further, that as the Respondent was in attendance at the council meeting in question in his capacity as a councillor, there was no dispute that he was acting, or could be perceived to be acting as a councillor in relation to the conduct under investigation. As such, the Code applied.
2. He considered that by referring to the Complainer in the social media posts as "*stalking*" him, as "*a snake in the grass*" and as a "*crocodile who comes from Dundee*", and in suggesting at a public meeting that the Complainer was "*not fit for public office*", the Respondent had, on the face of it, contravened the respect provisions in the Code.
3. He further considered, however, that the Respondent, as a politician commenting both on the character of the Complainer (a political opponent) and on issues of potential concern and relevance to the local community, would be entitled to the enhanced protection to freedom of expression afforded to politicians under Article 10 of the European Convention on Human Rights (ECHR). The ESC advised that he considered that the Respondent was expressing opinions about the Complainer and that his comments, when taken in context, were not entirely gratuitous in nature. As such, the ESC was of the view that they could be considered to be value judgements. The ESC concluded that the comments were not sufficiently bad or shocking as to justify a restriction on the Respondent's right to freedom of expression that a breach finding and imposition of a sanction would entail. As such, the ESC could not recommend that a finding of breach could be made.

Reasons for Decision

Having considered the terms of the ESC's report and comments received from the Complainer, the Standards Commission did not consider that it was necessary or appropriate to direct the ESC to undertake any further investigation into the matter.

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

In considering proportionality, the Standards Commission noted that the ESC, in his report, had reached the conclusion that the Respondent's conduct could amount, on the face of it, to a breach of the provision in the Code that requires councillors to behave with courtesy and respect.

The Standards Commission noted that holding a Hearing (with the associated publicity) could promote the provisions of the Code, if it was found that the Respondent's conduct amounted to a breach of the Code. There could, therefore, be some limited public interest in holding a Hearing. The Standards Commission noted, however, that the option to take no action had been included in the 2000 Act to ensure that neither the ethical standards framework, nor the Standards Commission, was brought into disrepute by spending public funds on administrative or legal processes in cases that did not, on balance, warrant such action.

In this case, the Standards Commission noted that even if the Respondent's conduct was found to be disrespectful or discourteous at a Hearing, it was highly likely that he would enjoy the enhanced protection to freedom of expression afforded by Article 10, given that the comments appeared to have been made in a political context and concerned matters of public interest (being the character of a fellow politician).

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

In this case, the Standards Commission was of the view, having taken into account the context in which they were made and the apparent colloquial nature of the language used, that the comments were not sufficiently gratuitous or offensive as to be likely to justify a restriction on the Respondent's enhanced right to freedom of expression. As such, the Standards Commission concluded that it was unlikely that a finding of breach could be made at a Hearing.

The Standards Commission further noted that the ESC had reached the conclusion that the Respondent's conduct was not sufficiently serious as to amount to bullying and harassment in terms of the Code. Having reviewed the evidence presented in the report, Standards Commission found no reason to depart from that conclusion.

Having taken into account the above factors, and the fact that the Respondent had proffered an apology to the Complainer, the Standards Commission concluded that it was neither proportionate, nor in the public interest, for it to hold a Hearing. The Standards Commission determined, therefore, to take no action on the referral.

The Standards Commission nevertheless emphasises that the requirement for councillors to behave in a respectful and courteous manner towards colleagues 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

Standards Commission reiterates that councillors should be able to make political points in a respectful, courteous and appropriate manner, without resorting to personal attacks and without being offensive, abusive or unduly disruptive.

Date: 5 April 2023



**Lorna Johnston
Executive Director**