

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held at Angus House, Forfar on 1 November 2022.

Panel Members: Ms Suzanne Vestri, Chair of the Hearing Panel
Ms Ashleigh Dunn
Mr Michael McCormick

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/3546, concerning an alleged contravention of the Councillors' Code of Conduct (the Code) by Angus Councillor Bill Duff (the Respondent).

Referral

Following an investigation into a complaint received about the conduct of the Respondent, the Acting ESC referred a report to the Standards Commission for Scotland on 20 April 2022, in accordance with the Ethical Standards in Public Life etc. (Scotland) Act 2000 (the 2000 Act). The Standards Commission directed the Acting ESC to undertake further investigation and, in particular, to determine whether any of the meetings that were the subject of the complaint were quasi-judicial or regulatory in nature. The Acting ESC referred the supplementary report outlining the findings of his further investigation on 3 August 2022.

The complaint concerned the Respondent's conduct at three meetings, which were held on 19 October 2020, 18 May 2021 and 16 December 2021. The Acting ESC advised that he had considered whether the Respondent had failed to comply with the 2018 version of the Code, in respect of the first two meetings, and also whether he had failed to comply with the 2021 version of the Code, in place at the time of the third meeting.

The Hearing Panel noted that the applicable paragraphs of the Codes were as follows:

2018 Code

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.

Conduct at Meetings

3.7: You must respect the Chair, your colleagues, Council employees and any members of the public present during meetings of the Council, its Committees or Sub-Committees or of any Public Bodies where you have been appointed by, and represent the Council. You must comply with rulings from the chair in the conduct of the business of these meetings.

Quasi-judicial and Regulatory Applications: Fairness and Impartiality

7.3 In such cases, it is your duty to ensure that decisions are properly taken and that parties involved in the process are dealt with fairly. Where you have a responsibility for making a formal decision, you must not only act fairly but also be seen as acting fairly. Furthermore, you must not prejudge, or demonstrate bias in respect of, or be seen to be prejudging or demonstrating bias in respect of, any such decision before the appropriate Council meeting. In making any decision, you should only take into account relevant and material considerations and you should discount any irrelevant or immaterial considerations.

2021 Code

Respect and Courtesy

3.1 I will treat everyone with courtesy and respect. This includes in person, in writing, at meetings, when I am online and when I am using social media.

3.11 I will respect and comply with rulings from the chair or convener during meetings of: a) the Council, its committees or sub-committees; and b) any outside organisations that I have been appointed or nominated to by the Council or that I represent my council on.

Preliminary Matters

The Respondent's representative noted that the Acting ESC had concluded that the Respondent had not breached either version of the Code. The Respondent's representative noted that the Standards Commission had decided it was nevertheless both proportionate and in the public interest to hold a Hearing. The Standards Commission had explained that this was because it considered that holding a Hearing (and the associated publicity) could promote the provisions of the Codes of Conduct and the ethical standards framework. It further considered that the alleged breach was not insignificant or of a technical, minor nature.

The Respondent's representative noted that the Standards Commission had sent the Respondent a list of the matters that the Panel intended to explore and indicated that he considered that it would be unfair to consider any further issues beyond those identified, at the Hearing. The Panel confirmed that it had no intention of doing so.

Evidence Considered at the Hearing

The Panel viewed recordings of the relevant parts of the three meetings in question. It noted that the following facts were not in dispute, being that:

- During a discussion of a motion regarding a leisure centre in Forfar at a Special Meeting of Angus Council held on 19 October 2020, the Complainer made a deputation and, when doing so, referred to correspondence he had sent to the Council. The Respondent asked the Complainer about this correspondence, and had queried how many letters and emails he had sent to senior council officers and elected members over the previous 18 months. When the Complainer reported that he was unable to confirm an exact number and that he considered the relevant issue to be their content and whether council officers were prepared to answer the questions posted, the Respondent stated that he thought the Complainer would have been able to identify the number and suggested that providing an estimate of the number "just to the nearest 50 or so would do". The Respondent stated that he had "printed off two huge bundles of correspondence" and "would guess there was probably 50 or 100 items in that and that was not the complete total". The Respondent noted that the Complainer's response was an "interesting response" given that that the country was "going through a global pandemic the worst in a hundred years".
- At a meeting of Angus Council's Development Standards Committee on 18 May 2021, the Complainer made a deputation objecting to an application by the Council for permission to demolish a sheltered housing complex and build affordable homes, during which he referred to a survey he had carried out to establish the public's view on the Council's plans. The Respondent asked the Complainer to clarify whether he was representing his "commercial business operation" or 'Working with you in Angus', being his "so-called charity", and questioned whether the survey had been undertaken "by a professional polling company" or the Complainer's own staff.

In response, the Complainer confirmed that 'Working with you in Angus' was not a charity and explained how the survey had been conducted. The Respondent then stated "I mean I could carry out a survey of residents in an area in Montrose or the High Street and I could skew that any time I like, I could interview people coming out of public houses and ask them if they agree with the views of the licensing committee and I suspect I would get a negative response, so I think your survey I suspect is completely invalid in my view unless it was carried out by a professionally competent company who's a member of the appropriate national organisation."

Another councillor had then intervened to state that he was "bit concerned" by the Respondent's comments as he thought they showed "a genuine lack of respect for people". The other councillor

argued that the survey questions were clear and noted that he was “quite surprised” that the Respondent had “mentioned you could skew a poll like that”. The other councillor stated that he thought the Respondent had “showed a little bit of disrespect” to the individuals who had responded to the survey and to the Complainer.

- At a Council Meeting on 16 December 2021 the Respondent made comments in support of a proposal to demolish a leisure centre. The Respondent stated that the future of the leisure centre had been a “saga” and “a long-running movie”. The Respondent stated that “certain actors in this story have prolonged things for their own motives and made matters worse. We have Audit Scotland in the house at present doing the best value audit of Angus Council”. The Respondent noted that he was sure that Audit Scotland would want to look at the issues with the leisure centre and another development which he stated were “two cause célèbres taken up by” the Complainer, whom he named. The Respondent then stated that there was also “a linked issue also involving [name of the Complainer] and his companies that also needs independent investigation, that is the long-running dispute between [name of Complainer] companies and Angus Council where [name of Complainer] has had significant success in challenging developer contributions claimed by Angus Council. To date, this has cost Angus Council over £1,000,000”.

The Chair had interrupted and asked the Respondent to “stick to the Forfar Leisure Centre, please”. In response, the Respondent stated: “If you just let me finish, Provost, the elected members and the public have been kept in the dark on these important issues, and that’s disgraceful given the amount of money involved.” The Respondent referred to another named councillor’s “coalition of chaos” as having been “at the helm throughout this fiasco” and argued that it was “high time for an independent investigation to determine what went wrong and what we must do to prevent a recurrence”.

The Panel further noted that it was not in dispute that the Respondent attended the three meetings in his capacity as a councillor and, as such, the Code applied to him at the time of the events in question.

Submissions made by the Acting ESC

By way of background, the Acting ESC advised that the Complainer was a director of two housebuilding companies and that he had also set up the company ‘Working with you in Angus’ to make sure that local people were at the heart of decision-making in the area. The Acting ESC advised that the Complainer had been successful in an appeal to the Inner House of the Court of Session in respect of a Petition for Judicial Review to challenge a decision the Council made in early 2019 to demolish the leisure centre. The Acting ESC advised that the Complainer had subsequently made complaints to the Council alleging maladministration, which had been copied to all elected members and that he had been involved in a number of council meetings since October 2020.

The Acting ESC noted that the Complainer alleged that, in asking irrelevant questions about the number of letters and emails he had sent, the Respondent had been disrespectful to him at the Special Meeting of Angus Council on 19 October 2020. The Acting ESC noted, however, that the Complainer had been the one who had initially raised the matter of his correspondence. The Acting ESC argued, therefore, that the Respondent’s questions on the subject were relevant and not inherently disrespectful. The Acting ESC suggested that the Respondent had been merely trying to highlight that having to deal with the Complainer’s correspondence would have been distracting and time consuming for officers at a time when they were dealing with issues arising from the coronavirus pandemic.

In response to questions from the Panel, the Acting ESC accepted that the Respondent’s reference to the Complainer being able to provide an estimate of the number of letters or emails “just to the nearest 50 or so” could be perceived as being facetious, especially given he then went on to suggest that there had not been more than 100. The Acting ESC argued, however, that the Respondent was simply expressing his view

on the volume of the correspondence. The Acting ESC accepted that there could be a perception that the Respondent was trying to make the point that the Complainer had wasted officers' time and that he was publicly criticising him for doing so during the pandemic. The Acting ESC contended, however, that the comments on the nature and volume of the correspondence were germane and directly relevant to the matter under discussion, being the motion regarding the future of the leisure centre, as that was the subject of the correspondence.

Turning to the Development Standards Committee meeting on 18 May 2021, the Acting ESC confirmed that the matter being discussed was quasi-judicial in nature and, as such, Section 7 of the Code, which outlined how councillors should make decisions on quasi-judicial and regulatory matters, applied. The Acting ESC accepted that paragraph 7.3 of the 2018 version of the Code required councillors to not only act fairly and avoid demonstrating bias, but to ensure they were seen as acting fairly and not prejudging or demonstrating bias, and that in making any decisions on planning matter, they should only take into account relevant and material considerations. The Acting ESC noted that the Complainer had made reference to the survey in his deputation and argued, therefore, that any comments and questions the Respondent had made on this were material and relevant to the planning matter that was being considered.

In response to questions from the Panel, the Acting ESC accepted that the Respondent's questions and comments suggested that the survey undertaken by the Complainer was not valid, and even potentially implied the results had been falsified, but contended that the Respondent was entitled make points or express views of that nature, as part of his scrutiny of the merits of the application. The Acting ESC stated that he was of the view that there was no way the Respondent could have framed his questions and comments on the survey without them being taken personally by the Complainer. The Acting ESC rejected the suggestion that the Respondent's reference to a "professionally competent company" could be taken as an implication that the Complainer's company was incompetent, and argued that it was clear from the context that the Respondent has just been making the point that the survey had not been undertaken by a professional polling company.

The Acting ESC accepted that it was evident from his intervention that another councillor attending the meeting had considered the Respondent's questions and comments were not respectful and, as such, this was not solely the Complainer's perception. The Acting ESC argued, however, that given the Respondent was entitled to scrutinise the merits of the application and any objections, it was not reasonable to perceive that he had either been disrespectful, or had acted unfairly or with bias. The ESC confirmed this remained his view, even when the potential cumulative effect of:

- the comments made at the Council held on 19 October 2020 to the effect that the Complainer had wasted officers' time;
- the inference at the meeting on 18 May 2021 that the Complainer may have been incorrectly or falsely suggesting 'Working with you in Angus' was a charity, by referring to it as "your so-called charity";
- the inference at the meeting on 18 May 2021 that the survey undertaken by the Complainer was not valid and the potential implication that its results had been falsified; and
- the other councillor's view, as expressed at the meeting on 18 May 2021, that the Respondent's comments questions and comments were not respectful towards the Complainer

were all considered.

The Acting ESC noted that the Complainer had not been present at the Council meeting on 16 December 2021. The Acting ESC advised that he considered that the Complainer had misconstrued the Respondent's comments about the need for an independent investigation to be about him and his companies, whereas it was evident from the context in which the comments were made that the Respondent was suggesting that an investigation about the conduct of the Council itself needed to be undertaken. The Acting ESC advised that his view that the Respondent could not reasonably be perceived as being critical of the Complainer at the meeting was supported by the fact that the Respondent had referred to another, named councillor's

“coalition of chaos” as being responsible for the events that he had described as a “saga” and a “long-running movie”. As such, the Acting ESC advised that he did not consider that the Respondent had behaved discourteously or with disrespect towards the Complainer at the December 2021 meeting.

The Acting ESC noted that while the meeting Chair had intervened and asked the Respondent to only comment on matters relating to the leisure centre, the Respondent had nevertheless proceeded with his comments about the other development, who was to blame for the cost to the Council and the need for an independent investigation. The Acting ESC advised that, as such, he had considered whether the Respondent had failed to behave respectfully towards the Chair or had failed to comply with any ruling he had made, in breach of paragraph 3.11 of the 2021 version of the Code. The Acting ESC advised that he had concluded that there had been no such breach as the Chair had not raised any objection or seem bothered when the Respondent had proceeded to finish his point. The Acting ESC noted that it was not unusual for councillors to continue to make a point even after an intervention from a Chair.

In response to questions from the Panel, the Acting ESC accepted that the Respondent’s references to the Complainer by name four times in the sentences immediately following his comment that “certain actors” had prolonged matters and made them worse, could be taken reasonably as an implication that the Complainer was at least one of the parties who were at fault. The Acting ESC further accepted that the Respondent could have explained why he considered an investigation was necessary without publicly singling out the Complainer, a member of the public, particularly when that individual was not present at the meeting and had no right of reply. The Acting ESC contended, however, that the comments should be viewed in the context of the Respondent attempting to encourage other councillors present to support his proposal that Audit Scotland undertake an investigation into how the Council had conducted itself in respect of decisions made regarding the leisure centre and the other development. The Acting ESC accepted that the Respondent had referred to the costs the Council had incurred directly after naming the Complainer. The Acting ESC suggested, however, that it was evident from his comments proposing such an investigation that the Respondent was not seeking to blame the Complainer for this and was not trying to imply his actions had caused the expenditure.

The Acting ESC advised that he considered the Respondent had been able to explain why he asked the questions and made the comments he had at the three meetings under consideration. The Acting ESC reiterated that he considered the Respondent was entitled to ask the questions and raise the issues he had, in order to undertake his scrutiny role. The Acting ESC accepted that even if behaviour is unintentional, it can still amount to either bullying or harassment as it is the impact of the conduct, not the intent that is the key. The Acting ESC indicated that he had no reason to doubt the Complainer’s contention that he felt he had been bullied or harassed by the Respondent, but argued that any finding of a breach of the Code in this regard must still be subject to some form of objective consideration. The Acting ESC advised that he did not consider, for the reasons outlined above, that the Respondent had behaved discourteously or disrespectfully towards the Complainer and, as such, did not consider that the Respondent’s conduct, either when considered as individual incidents or when viewed cumulatively, amounted to either bullying or harassment.

In response to questions from the Panel, the Acting ESC advised that he considered that the Respondent would benefit from enhanced protection in respect of his right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The Acting ESC advised that this was because he did not consider that the Respondent had been making any personal criticism of the Complainer and, instead, was of the view that he was asking questions and making comments about matters of public concern (namely the actions of the Council and the decisions on the leisure centre and other developments). The Acting ESC advised that his view was that while the Respondent undoubtedly could have expressed himself in a different way, his comments were relevant to the matters being considered and he had not said anything that was directly rude or derogatory about the Complainer. The Acting ESC contended, therefore, that even if the Panel was to find, on the face of it, a breach of the Code, the Respondent’s conduct was not so egregious or

gratuitous as to justify a restriction on his enhanced right to freedom of expression, that a formal finding of a breach of the Code and imposition of a sanction would entail.

Submissions made by the Respondent's representative

The Respondent's representative advised that he wished to adopt all the arguments made by the Acting ESC.

The Respondent's representative argued that even if the Respondent's comments and questions were perceived as being public criticism of the Complainer, as a member of the public, this did not automatically mean they were discourteous or disrespectful. The Respondent's representative noted that the Code did not prevent councillors from publicly questioning or commenting on the behaviour of, or submissions made by, a member of the public, as part of their overall scrutiny role. Similarly, the Respondent's representative argued that it was far from unusual for councillors to make asides or throwaway comments at meetings and the fact that these may not be relevant to the specific matter under consideration again did not make them inherently disrespectful. The Respondent's representative argued that, as elected representatives, councillors held a mandate to raise matters of public interest at meetings that they considered appropriate and that there was nothing to prevent them from doing so, provided they complied with rulings of the Chair and were not disrespectful.

The Respondent's representative accepted that the questions the Respondent put to the Complainer at the meeting of Angus Council on 19 October 2020 were designed to highlight that the volume of correspondence the Complainer had sent would have had an adverse impact on council officers who were trying to deal with issues arising from the pandemic. The Respondent's representative noted that while the Complainer had been successful in the appeal to the Inner House of the Court of Session, the Court's finding against the Council had been based on a narrow point only. The Respondent's representative accepted that the Respondent could have phrased his questions about the volume of correspondence in a more respectful manner, but contended that the Respondent was justifiably frustrated by the Complainer's apparent lack of understanding of the impact of his own conduct and was trying to elicit some contrition.

In response to questions from the Panel, the Respondent's representative accepted that the question of whether someone had been respectful and courteous did not just depend on the words chosen, but also the tone and manner in which they were delivered. The Respondent's representative accepted that the Respondent's references to counting the letters "just to the nearest 50 or so" and to the Complainer's response as being "interesting" could be perceived as being sarcastic but argued that the Respondent had simply been trying to examine further the Complainer's response. The Respondent's representative noted that while it was possible the questions could have been framed in a more careful manner, it was arguable that the Complainer had opened himself up to robust scrutiny by attending and contributing to the meeting. The Respondent's representative further noted that the question of whether the Code had been contravened did not depend on consideration of whether, with hindsight, it was possible to agree that questions and comments could have been framed in a more respectful manner as such an approach did not take into account the fact that they were made on the spot in the context of an ongoing discussion.

In respect of the Development Standards Committee meeting on 18 May 2021, the Respondent's representative advised that the Respondent's questions and comments were intended to highlight the fact that the survey had been undertaken by a commercial business, rather than an independent polling company. The councillors present would therefore need to consider that when determining how much weight to give to the survey's responses. The Respondent's representative confirmed that the Respondent had not intended to be disrespectful either to the Complainer or to the other members of the public who had completed the survey.

In response to questions from the Panel, the Respondent's representative advised that the Respondent had not necessarily been suggesting that the Complainer was misrepresenting the nature of 'Working with you

in Angus' and suggested that he was only questioning whether it was a charity as its name suggested it could be. The Respondent's representative advised that, in comparing the survey to a hypothetical one he himself could have undertaken and manipulated, the Respondent had been expressing a view on the quality of the survey before the committee and had been seeking an assurance that his initial impression on its likely bias was wrong.

The Respondent's representative contended that the Respondent's comments and questions made either at, or before, the meeting on 18 May 2021 were not unfair or biased and should not be perceived as such. The Respondent had simply been testing the evidence before him, in the knowledge that the matters being considered at the meeting were part of an overall consultation process before a final decision would be taken on the planning application. The Respondent's representative argued that both the Respondent's tone and choice of words were fair and should be perceived as fair as it was evident from them that he was focused on the overall merits of the decision.

Turning to the Council Meeting on 16 December 2021, the Respondent's representative disputed the suggestion that the Respondent had been suggesting that the Complainer was responsible for drawing out matters relating to the leisure centre and other developments, or for the costs incurred by the Council. The Respondent's representative drew the Panel's attention to the recording of the meeting and an intervention by another councillor who had also named the councillor the Respondent had identified as the leader or instigator of the "coalition of chaos" to which he had referred. The Respondent's representative contended that this demonstrated that at least one other meeting attendee had understood the Respondent's references to the "actors" who had prolonged matters to be a reference to the other named councillor, rather than to the Complainer.

The Respondent's representative accepted that, during his comments, the Respondent named the Complainer on four occasions. The Respondent's representative advised, however, that the Respondent had been drawing attention to the issues raised by the Complainer and suggesting that they should be the subject of an independent investigation by Audit Scotland to establish what had gone wrong in terms of the Council's processes and decision-making and in respect of how it could prevent similar mistakes in future.

The Respondent's representative reiterated that while the Chair had politely asked the Respondent to "stick to" the matter of the future of the leisure centre, he had not felt obliged to intervene again when the Respondent had indicated he intended to finish making his point. The Respondent's representative noted that the Chair had not repeated his request and argued that such an intervention, in the circumstances, could not be described as a ruling in respect of which the Respondent had failed to comply.

In response to questions from the Panel, the Respondent's representative accepted that the use of the plural term 'actors' in the context of who was responsible for the delay and costs, could mean it was likely that anyone in attendance at, or watching, the meeting may have reasonably concluded that the Respondent was not simply referring to the named councillor and could have also been referring to the Complainer. The Respondent's representative argued, however, that the Respondent should be given the benefit of the doubt if there was any ambiguity in this regard.

The Respondent's representative accepted that it may not have been necessary for the Respondent to have identified the Complainer by name but reiterated that he had simply been outlining the issues he considered should be the subject of an independent investigation by Audit Scotland, and further noted that naming a member of the public could not, in itself, amount to a breach of the Code.

The Respondent's representative argued that, in any event, the Respondent would enjoy the enhanced protection to freedom of expression afforded to politicians when discussing matters of public concern.

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 Duff.
2. The Respondent had contravened paragraph 7.3 of the July 2018 version of the Code

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.

Stage 1: Whether the Respondent's conduct amounted, on the face of it, to a breach of paragraphs 3.2, 3.7 and 3.18 of the Code

While the Panel accepted that it was the Complainer who had raised the issue of the correspondence he had sent at the Special Meeting of Angus Council on 19 October 2020, it noted that the volume and timing of the correspondence was not relevant to the matter at hand (namely the future of the leisure centre). The Panel was of the view that the Respondent's questions, and the manner in which they were posed, could only reasonably be perceived as criticism of the Complainer's conduct. This was because the Panel considered that the clear inference from the questions was that the Complainer's correspondence was manifestly excessive and inappropriate (particularly given it was sent during the pandemic).

The Panel accepted the Respondent's representative's point that the question of whether the Code had been contravened did not depend on consideration of whether, with hindsight, it was possible to agree that questions and comments could have been framed in a more respectful manner. The Panel agreed, however, that in this case it would have been reasonable for those in attendance or watching the meeting to conclude, from the nature and manner in which the Respondent's questions and comments were made, that his intention was to criticise and demean the Complainer.

The Panel noted that the Respondent's representative had confirmed that the Respondent's intention was to elicit contrition from the Complainer about his own conduct, rather than to highlight issues that were directly relevant to the matter under consideration. The Panel agreed that, in criticising a member of the public's conduct, in a public forum, in circumstances where that individual's conduct was not directly relevant to the matter being considered, the Respondent failed to act with courtesy and respect towards the Complainer. The Panel considered that this was particularly the case given the Complainer had no automatic right of response and was only entitled to contribute during the meeting when asked a direct question.

As such, the Panel was satisfied that, on the face of it, the Respondent's conduct at the October meeting amounted to a breach of paragraphs 3.2 and 3.7 of the July 2018 version of Code, in place at the time.

The Panel noted that it was not in dispute that, at a meeting of Angus Council's Development Standards Committee on 18 May 2021, the Complainer made a deputation in respect of an agenda item regarding a planning application by Angus Council, during which he referred to the survey he had carried out to establish the public's view on the Council's plans. The Panel found that the Respondent posed questions to the Complainer, firstly querying who the Complainer was representing at the meeting, and secondly querying the nature of the Complainer's survey. While the Panel accepted that the Respondent, as an elected member, had a duty to scrutinise and explore the merits of any application before him, which would include identifying the parties and how many objections had been collated, it considered that the manner and content of the questions posed by the Respondent were disrespectful and discourteous. In particular, the Panel noted that the Respondent referred to the Complainer's company 'Working with You in Angus' as a "so-called charity". The Panel was of the view that this wording was clearly intended to infer that the Complainer's company was purporting to be a charity. This Panel considered this was disrespectful as there was no evidence or suggestion that the Complainer had, in any way, attempted to mislead anyone about the company's status. The Panel noted that, if he had been unclear about the status of 'Working for You in Angus' or thought anyone else in attendance was in doubt, the Respondent could have simply asked for clarification.

The Panel found that the Respondent also implied that the Complainer's survey was skewed and stated that he thought it was "completely invalid". Having considered the matter objectively, the Panel was of the view that it would be reasonable for those in attendance to have concluded that the Respondent was inferring that the Complainer had somehow falsified the results of the survey for his own purposes. The Panel considered that, in doing so, the Respondent failed to treat the Complainer with courtesy and respect. The Panel noted that this view was supported by the fact that another councillor had interjected to say that he thought the Respondent's comments showed "a genuine lack of respect for people" and that he was "questioning the amount of respect involved here". The Panel accepted that the quality or merits of a survey outlining views of local residents were undoubtedly relevant to the planning application. The Panel was of the view, however, that the Respondent could easily have asked questions or made comments about its potential limitations in manner that was not disparaging or demeaning.

As such, the Panel was satisfied that, on the face of it, the Respondent's conduct at the May meeting also amounted to a breach of paragraphs 3.2 and 3.7 of the July 2018 version of Code, in place at the time.

The Panel found that the Respondent took part in the discussion of a motion regarding the future of Lochside Leisure Centre at a meeting of Angus Council on 16 December 2021, during which he made reference to the decision on the future of the centre as a "saga" and a "long-running movie". The Panel found that the Respondent then stated that "certain actors in this story have prolonged matters for their own motives and made matters worse" and that it was one of two "cause celebres" taken up by the Complainer, whom he proceeded to name. The Panel found that the Chair of the meeting had intervened when the Respondent was speaking and asked him to keep to the issue of the future of the leisure centre.

Having considered matters objectively, the Panel was of the view that a reasonable interpretation of the Respondent having made four explicit references to the Complainer and his companies was that he was including them in his assessment of who was responsible for unduly prolonging matters and necessitating unnecessary expenditure.

The Panel accepted that the Respondent was trying to establish that he considered an independent investigation by Audit Scotland was required to determine what had gone wrong in terms of the Council's processes and decision-making. The Panel was nevertheless of the view that there was a clear implication that he was criticising the Complainer's conduct given that the Respondent had identified the Complainer, being immediately after his accusation that some people had unnecessarily prolonged matters for their own motives. The Panel considered that if the Respondent's motive, as alleged, was to identify another councillor as being mainly responsible for matters, with a view to persuading his colleagues to seek an independent

investigation, there would have been no need to identify the Complainer or his companies. The Panel was of the view that it would be reasonable for an objective observer to conclude that the Respondent's intent, in identifying the Complainer in the circumstances in which he did so, was to criticise and demean him. The Panel was further of the view that, regardless of whether the Respondent's views of the Complainer's alleged conduct had any merit or not, they were not relevant to the matter under discussion.

The Panel found that by publicly engaging in irrelevant personal criticism of a member of the public when that individual was not there and could not respond, the Respondent failed, on the face of it, to treat the individual in question with courtesy and respect and, therefore, contravened paragraph 3.1 of the December 2021 version of the Code.

While the Panel noted that the Chair's position seemed to be that he had intervened to ensure that the Respondent focused on the matters in question, rather than because the Respondent had said anything inherently disrespectful, it nevertheless noted that the Respondent continued with what he had been saying. The Panel accepted, however, that the Chair did not make any further interventions or issue any direction or subsequent reprimand. As such, the Panel was not persuaded, on balance, that the Respondent acted disrespectfully towards the Chair or failed to comply with any ruling he had made. The Panel did not consider, therefore, that there had been a breach of paragraph 3.11 of the December 2021 Code.

The Panel noted that as the item under discussion at the May Meeting was a planning application, it was quasi-judicial and as such, Section 7 of the Code would apply. For the reasons outlined above, the Panel found that the Respondent had been dismissive and disrespectful to the Complainer, as one of the parties to the planning application under discussion. The Panel found that, in doing so, the Respondent failed to comply with the requirement in the Code to act fairly and be seen to be acting fairly, and to refrain from demonstrating bias or doing anything that could be reasonably perceived as demonstrating bias when making decisions on quasi-judicial matters. The Panel considered that it would be reasonable for a member of the public watching the meeting to conclude that the Respondent's view on the Complainer may have inhibited his ability to approach the matter with an open mind. This would particularly have been the case if the member of the public had also viewed the October meeting.

The Panel found, therefore, that the Respondent had failed to comply with the requirements of paragraph 7.3 of the July 2018 version of the Code, in place at the time.

While the Panel noted that the behaviour had taken place over three meetings and may well have left the Complainer feeling that his reputation was being questioned, having considered the matter objectively, the Panel was not satisfied that the Respondent's conduct, considered either individually or cumulatively, was sufficiently offensive and intimidating as to amount to bullying. The Panel was therefore unable to conclude, on balance, that there had been a breach of the bullying and harassment provisions of the Code.

As such, the Panel was satisfied that, on the face of it, the Respondent's conduct amounted a breach of paragraphs 3.2, 3.7 and 7.3 of the 2018 version of the Code and 3.1 of the 2021 version 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

The Panel noted that enhanced protection of freedom of expression under Article 10 of the ECHR can apply to all levels of politics, including at a local government level. 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 concern. In this case, the Panel was satisfied that the Respondent was discussing matters of public concern, namely planning matters in the local area, and a statutory consultation over the demolition of a local leisure centre. In the circumstances, the Panel considered that the Respondent

would attract the enhanced protection of freedom of expression afforded to politicians, including local politicians, under Article 10.

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

The Panel noted, nevertheless, that the right to freedom of expression is not absolute. Article 10(2) allows restrictions to be imposed for certain reasons, including to protect the rights and reputations of others, to allow good administration, and to ensure public confidence in local government is not undermined. This is provided that any restriction is for relevant and sufficient reasons, and is proportionate to the legitimate aim being pursued.

The Panel considered that the need to ensure that a council's quasi-judicial decisions are not only fair, but are also seen to be fair, could be a relevant and sufficient reason to interfere with a councillor's right to freedom of expression. The Panel noted that failing to ensure fairness and failing to avoid a perception of unfairness, in a quasi-judicial setting could expose a council to a legal challenge that may otherwise have been avoidable and, further, could erode the public's confidence in a council's ability to make quasi-judicial decisions competently and fairly.

In this case, the Panel considered that a restriction on the Respondent's conduct during the May meeting was proportionate to the legitimate aim being pursued, which was to provide for, and secure, the high standards expected of councillors when considering quasi-judicial and regulatory matters, as set out in the Code. The Panel noted that adherence to the requirements of the Code helps to both protect the rights and reputations of others and allows the council's administration to function properly.

The Panel further considered that the interference with the Respondent's freedom of expression, that a finding of a breach of the Code and the subsequent imposition of a sanction would entail, was necessary. This was because of the pressing need to ensure that councils meet their obligations to make quasi-judicial decisions fairly, without bias and on the merits alone. The Panel was of the view that such an interference was the least restrictive measure available to it, given that adherence to the Code would not have prevented the Respondent from taking part in the discussion and decision-making process at the May meeting and from scrutinising the merits of the planning application and any objections to it. The Code merely required the Respondent to do so in a manner that was respectful, fair and that would also be perceived as fair.

The Panel concluded, therefore, that it was satisfied that a finding of breach of paragraph 7.3, in terms of the Respondent's conduct at the May meeting and the subsequent application of a sanction, would not contravene Article 10 as it was lawful, legitimate and necessary. The Panel concluded, therefore, that the Respondent had breached paragraph 7.3 of the 2018 version of the Code in respect of the Development Standards Committee meeting of 18 May 2021.

While the Panel had found, on the face of it, that the Respondent had been disrespectful and discourteous towards the complainer at the meetings, it did not consider that his questions and remarks were sufficiently offensive and gratuitous as to justify a restriction on his right to freedom of expression. This was because the Panel was satisfied that the Respondent, in so questioning the Complainer, was expressing value judgements that he considered had some basis in fact. The Panel noted that the Courts had held previously that the requirement to prove the truth of a value judgement was impossible, and also that the distinction between statements of fact and value judgements was of less significance where those value judgements are made in the course of lively political debate at a local level. As such, given the circumstances outlined, the Panel was not able to conclude that a restriction of the Respondent's freedom of expression was justified and consequently a breach of the courtesy and respect provisions in the Code could not be found.

Mitigation

The Respondent's representative advised that the Respondent had been an elected member since 2012, and that he was currently the Joint Deputy Leader of Angus Council, as well as its Finance Convenor. The Respondent's representative advised that, in addition, the Respondent was a member of the Council's Communities, Development Standards, Policy & Resources and Development Management Review committees, the latter of which he was Convener.

The Respondent representative further noted that the Respondent further contributed to public life through his involvement with a number of other local organisations, including Montrose YMCA, Montrose Golf Links, the Tay Cities Region Joint Committee and Tennis Tayside.

The Respondent's representative highlighted to the Panel that it had found a single breach of the Code, being the breach of paragraph 7.3 of the Code in relation to the meeting on 18 May 2021 only. The Respondent's representative advised that the planning application under consideration at that meeting was one made by the Council, which ultimately had been granted unanimously. The Respondent's representative contended, therefore, that the Respondent's conduct had not had any impact on the final decision.

The Respondent's representative further noted that the Respondent had not been previously the subject of an investigation by the ESC.

The Respondent's representative suggested, in the circumstances, that a sanction of censure, being a formal record of the Standards Commission's severe and public disapproval of the Respondent, would be a fair disposal.

SANCTION

The decision of the Hearing Panel was to suspend for a period of one month, with effect from 7 November 2022, the Respondent, Councillor Duff, from all meetings of Angus Council's Development Standards Committee.

The sanction was made under section 19(1)(b)(ii) terms of the 2000 Act.

Reasons for Sanction

In determining the appropriate sanction, the Standards Commission considered:

- first, whether the interference (i.e. the proposed sanction) was the minimum necessary, or whether less restrictive means could be employed; and then
- secondly, whether the benefit of that least necessary measure outweighs its adverse impact on the Respondent's right to freedom of expression. For example, whether any benefit in applying a sanction in respect of protecting the rights and reputations of others, and to ensure good administration which enables local government to function effectively, would outweigh any impact on the Respondent.

In reaching its decision on sanction, the Hearing Panel noted that the Respondent had co-operated fully with the investigative and Hearing processes, and further noted his contribution to public life and to his community. The Panel accepted that the Respondent had been trying to carry out his scrutiny role, albeit in a manner that the Panel had found to amount to a breach of the Code.

Though the Panel had accepted that the overall decision on the planning application may not necessarily have been affected by the Respondent's conduct, it nonetheless considered there would have been an impact on the Complainer, given it would have been reasonable for him to perceive that he was not being treated fairly.

The Panel reviewed the impact statement provided by the Complainer, which it considered in line with the Standards Commission's Sanction Policy, noting that the statement had not been given under oath or tested at the Hearing. The Panel noted that the impact statement recorded the Complainer's view that he had been treated unfairly and that this had an adverse effect on him.

The Panel noted that it had only been able to conclude that there had been a breach of a provision in the Code regarding how councillors should conduct themselves when making quasi-judicial or regulatory decisions. The Panel further noted, however, that the Respondent's conduct at the Special Meeting of Angus Council on 19 October 2020 had contributed to its decision that he had failed to avoid any appearance of unfairness or bias, in breach of the Code.

The Panel emphasised that the requirement for councillors to act fairly and without bias and also to be seen to be acting fairly and without bias when determining planning applications is a fundamental requirement of the Code. The Panel considered that a failure to comply with that provision can erode public confidence in elected members and damage the reputation of a council itself, potentially leaving it open to legal action. The Panel was concerned that the Respondent had not demonstrated any insight in this regard. As such, the Panel considered that disposal of the case by way of censure would not be sufficient. The Panel considered that suspending the Respondent from attending the Council's Development Standards Committee (being a committee that made quasi-judicial and regulatory decisions) for one month was the minimum necessary to preserve confidence in local government decision-making. The Panel agreed that a longer suspension would have an unnecessarily adverse impact on the Respondent's right to freedom of expression.

The Panel further agreed that the Respondent's conduct did not warrant a more serious sanction, such as a suspension from all Council business. This was because there was no evidence of serious aggravating factors on the part of the Respondent, such as dishonesty, personal benefit or repeated behaviour over a long period of time. The Panel also noted that the Respondent had never previously been the subject of an investigation by the ESC.

Right of Appeal

The Respondent has a right of appeal in respect of this decision, as outlined in Section 22 of the 2000 Act.

Date: 7 November 2022



**Ms Suzanne Vestri
Chair of the Hearing Panel**