

## **Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held at Dundee City Chambers, 14 City Square, Dundee, on Tuesday 6 June 2023.**

**Panel Members:** Paul Walker, Chair of the Hearing Panel  
Helen Donaldson  
Anne-Marie O’Hara

The Hearing arose in respect of two Reports referred by Ian Bruce, the Ethical Standards Commissioner (the ESC), further to complaint references LA/D/3745 and LA/D/3742, concerning an alleged contravention of the Councillors’ Code of Conduct dated December 2021 (the Code) by former Councillor Gregor Murray (the Respondent)<sup>1</sup>.

### **Referral**

Following investigations into complaints, received on 20 April 2022 and 13 April 2022, about the conduct of the Respondent, the ESC referred two reports to the Standards Commission for Scotland on 10 March 2023 and 26 April 2023, in accordance the Ethical Standards in Public Life etc. (Scotland) Act 2000 (the 2000 Act).

The substance of the referrals was that the Respondent had failed to comply with the provisions of the Code and, in particular, that they had contravened paragraphs 3.1, 3.2, 3.3, 3.10, 3.24 and 3.25, which are as follows:

### **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.*

*3.2: I will not discriminate unlawfully on the basis of race, age, sex, sexual orientation, gender reassignment, disability, religion or belief, marital status or pregnancy/maternity; I will advance equality of opportunity and seek to foster good relations between different people.*

*3.3: I will not engage in any conduct that could amount to bullying or harassment (which includes sexual harassment). I accept that such conduct is completely unacceptable and will be considered to be a breach of this Code.*

*3.10: I will follow the Protocol for Relations between Councillors and Employees at Annex A and note that a breach of the Protocol will be considered a breach of this Code. I will also comply with any internal protocol the Council has on councillor / employee relations.*

*Annex A: Councillors and employees should work in an atmosphere of mutual trust and respect, with neither party seeking to take unfair advantage of their position or influence*

### **Use of Council Resources**

*3.24: I will only use council resources, including employee assistance, facilities, stationery and IT equipment, for carrying out council duties in accordance with all my council’s relevant policies.*

*3.25: I will not use, or in any way enable others to use, council resources: a) imprudently (without thinking about the implications or consequences); b) unlawfully; c) for any party political or campaigning activities or matters relating to these; or d) improperly.*

### **Preliminary Matters**

The Panel noted that the Respondent had advised the Standards Commission that they did not intend to attend the Hearing. The Panel was satisfied that the Respondent had been given proper notice of the Hearing, in accordance with Section 20 of the 2000 Act and, as such, was content to proceed in their absence.

No other preliminary matters were identified.

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<sup>1</sup> The Respondent identifies as non-binary, so the pronouns they/them are used when reference is made to them.

## **Submissions made by the ESC**

### **Established Facts**

The ESC advised that the first complaint concerned a post the Respondent published on Twitter on 11 April 2022, which was directed towards the Complainer, a member of the public. The ESC advised that the factual elements of the complaint, which are as follows, were not in dispute:

That, after a Member of the Scottish Parliament posted a tweet about an upcoming consultation on her Members' Bill to introduce 'buffer zones' around healthcare sites providing abortion services, the Complainer, when responding in the publicly available comments on the post, took exception to use of the word 'people', rather than 'women'. The Respondent subsequently queried "are women not people?" and questioned whether such services would be available "to other people who could get pregnant, including some non-binary people or trans men?". The Complainer responded that women's services are available to "all adult human females Gregor". The Respondent further replied, "with absolutely no respect whatsoever, get to fuck, TERF".

The ESC advised that the factual basis of the second complaint was also not in dispute, being that:

1. On 31 March 2022, in response to a member of the public publishing a post on Twitter stating that, on Mothers' Day, she was missing her mother and mother-in-law, who both knew "what a woman is", the Respondent posted a comment stating "imagine using such a joyous, celebratory day to spread your hate. What. A. Cunt".
2. The Respondent replied on 11, 13 and 14 April 2022 to emails from the Council's Monitoring Officer (the Complainer), advising them of two complaints from members of the public about the post above, stating:
  - "I would suggest you try asking someone who gives a fuck";
  - "Go and tell someone who gives a fuck. For the avoidance of doubt, this does not include myself";
  - "I wish you to cease this conversation. If I ever wanted to hear from more extremely overpaid, over privileged, cishet\* white men in politics, who actively work to exclude marginalised communities, I have absolutely no shortage to chose [sic] from"; and
  - That, if the Complainer contacted them again, they would contact the Police to report the matter as harassment.

The Respondent had signed-off their email of 13 April 2022, "yours in queerness, G xxx".

\*The Panel noted that 'cishet' is a term referring to an individual who identifies with the gender they were assigned at birth, and who is attracted to the opposite sex (being a combination of 'cisgender' and 'heterosexual').

### **Applicability of the Code**

The ESC noted that the Respondent had not referred to themselves, at the time of the Twitter posts, as a councillor in either the Twitter account name or in its biography section. The ESC contended, however, that the Respondent could be considered objectively to be acting as a councillor and / or had identified themselves as such. This was because the biography section referred to them as being a "failed" politician and also because they had referred to themselves as a councillor in other comments posted from the same account in February and March 2022. This included posting a tweet, on 15 February 2022, in which they noted that they had been a councillor for ten years and were the second youngest councillor, and referred to their perceived need for local government to be more representative. On 25 March 2022, the Respondent also shared a screenshot of a front-page newspaper article which contained a photograph of them and referred to them being a councillor.

The ESC noted that there was no dispute that the Respondent was acting in their capacity as a councillor when corresponding with the Council's Monitoring Officer. The Respondent accepted that their emails were

sent from their Council email account using a Council issued device, and that they were responding to an email from a Council employee.

The ESC contended, therefore, that the Code applied to the Respondent in respect of both complaints.

### **Complaint 1**

The ESC considered that the use of the words “with absolutely no respect whatsoever”, was clear evidence that the Respondent was intending to be disrespectful towards the Complainer. The ESC advised that he also considered it was clear that in publicly directing a profanity towards the Complainer, as a member of the public, the Respondent was to intending to cause upset or offence.

The ESC noted that while ‘TERF’ could be perceived as being a derogatory term, the Respondent had argued that it was not a slur and instead was a descriptor. The Respondent contended that they used the term to describe anyone who was transphobic and, as such, it was neither gendered nor misogynistic. The Respondent had further argued that some individuals had sought to reclaim the term by self-identifying as ‘TERFS’. The ESC argued, however, that it was evident from the Respondent’s used of the words “with absolutely no respect whatsoever” and “get to fuck” in the same sentence that the Respondent was using the term with the intention trying to upset or offend the Complainer. The ESC contended, therefore, that the Respondent’s conduct amounted, on the face of it, to a breach of paragraph 3.1 of the Code.

The ESC advised, nevertheless, that he did not consider the Respondent’s conduct would amount to bullying or harassment, when considered in the context of the Respondent’s belief that the Complainer had used “transphobic dog whistles”, and in their stated aim of trying to defend trans rights in the context of the use of abortion clinics. The ESC advised that, in coming to this conclusion, he had noted that the Complainer had referred to ‘adult human females’ in the comment she had directed towards the Respondent. The ESC noted that the term ‘adult human female’ was often associated with those who held gender critical beliefs (including the belief that sex is biological and immutable, that people cannot change their sex and that sex is distinct from gender-identity). The ESC advised that he accepted that, as the Respondent held the opposite view, they would have found this term inflammatory. The ESC further noted that the Respondent had not sought out the Complainer and sent an unsolicited message to her but, instead, had responded to a public tweet made by the Complainer in relation to a topic of public interest.

The ESC accepted that bullying could be a one-off serious incident but advised that he had found no evidence of any prior or later interaction between the Respondent and the Complainer. The ESC further noted that the Respondent had ‘blocked’ the Complainer immediately after posting their comment, and contended that this suggested the Respondent did not want or intend to engage further with the Complainer.

### **Complaint 2**

In respect of the first issue within the second complaint, the ESC noted that the member of the public in question had made in clear on her Twitter biography, and by stating in her tweet that her late mother and mother-in-law knew “what a woman is”, that she held the gender critical belief that biological sex should not be conflated with gender identity. The ESC noted that it was widely accepted that the public debate on the issue was of a toxic nature. The ESC further noted the Respondent’s contention that the member of the public was well-known to them and that they were engaged in an ongoing debate on the topic.

The ESC indicated, however, that he nevertheless considered that it was evident from the use of term “cunt”, being offensive slang and an abusive term, that the Respondent had been intending to offend. This was particularly evident given that the Respondent had been replying to a tweet about the member of the public’s late relatives, being a context that had nothing to do with them. The ESC contended, therefore, that the Respondent had failed to treat the member of the public with courtesy and respect, as required by paragraph 3.1 of the Code.

The ESC noted, nevertheless, that the member of the public in question had not submitted a formal complaint to him and that, after the tweet, there had been no further interaction between her and the Respondent on Twitter. The ESC noted too that the Respondent's position was that they knew the member of the public well. The ESC also noted that the member of the public had not submitted any formal complaint to the Council about the Respondent's tweeted comment and argued that this tended to indicate that she had not felt bullied or harassed by it. While the ESC again accepted that it was possible for a one-off incident to be classified as bullying, he did not consider, in the circumstances, that the comment posted by the Respondent could be classified as such.

Turning to the second issue in the second complaint, the ESC noted that the Complainer's position was that he had emailed the Respondent to advise them that complaints about their conduct had been received and to afford them the opportunity to provide comments on these, in order to establish whether local resolution could be achieved. The ESC accepted that doing so was part of the Complainer's role as the Council's Monitoring Officer, and noted that his emails to the Respondent appeared polite and respectful, both in terms of tone and content. The ESC contended that the Respondent's replies had been entirely inappropriate and disrespectful, especially given the Complainer was a council employee and was simply discharging his duties in that capacity. The ESC noted that even if the Respondent had wished to express their desire no longer to have contact with him, it would have been equally possible for them to have done so in a respectful manner, without resorting to the use of profanities or any references to the assumed characteristics of the Complainer.

The ESC accepted that the Respondent had listed various assumptions about the Complainer's personal characteristics, including his gender, sexuality, colour, pay, privilege and career. The ESC argued, nevertheless, that there was no evidence that the Respondent had discriminated, either directly or indirectly, against the Complainer, or treated him unfairly, based on the characteristics listed. The ESC advised, therefore, that as he was of the view that the Respondent was merely expressing their beliefs or making value judgements about the Complainer's personal characteristics, he had concluded that the Respondent had not breached paragraph 3.2 of the Code.

The ESC acknowledged that threatening a council officer with the police when they are only doing their job (in this case, seeking a response in respect of a complaint) was inappropriate. The ESC noted, however, that the Respondent was entitled to hold the belief that they were being harassed by the Complainer and contended, therefore, that they were entitled to inform the Complainer that they would contact the police should the Complainer continue to contact them. The ESC argued that, as such, the Respondent's conduct in respect of the second issue would not amount to bullying and / or harassment.

The ESC noted that the Respondent's position was that their relationship with the Complainer had broken down, allegedly due to the Complainer having failed to use their correct pronouns and having failed to provide support when previous complaints about them had been made. The ESC argued, however, that as the Respondent had been abusive to the Complainer on more than one occasion during the email exchange, they had demonstrated neither trust in, nor respect for, him. The ESC contended that, as such, the Respondent failed to foster an atmosphere of trust and respect and had failed to follow the Protocol for Relations between Councillors and Employees at Annex A, in breach of paragraph 3.10 of the Code.

The ESC noted, as outlined above, that there was no dispute that the Respondent had used a council-issued device and their council email account to respond to the Complainer. The ESC noted that the Council's IT policy stated clearly that computing facilities could not be used to send emails containing anything that could be construed as offensive. The ESC contended that, in using a council device and email account to send disrespectful emails, which contained profanities, to the Complainer, the Respondent had breached paragraph 3.24 of the Code. The ESC further contended it was evident that that in doing so the Respondent had not acted with good sense or used caution and argued, therefore, that they had also used council resources imprudently, in breach of paragraph 3.25.

### **Article 10**

The ESC advised that, in relation to the first complaint, he considered that the Respondent would benefit from the enhanced protection afforded to politicians in certain circumstances, in respect of their right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). This was because the exchange between the Respondent and Complainer had taken place in the context of them commenting on a public tweet by a MSP about buffer zones around abortion clinics, which was a topic of public interest.

The ESC argued that a restriction on the Respondent's enhanced Article 10 rights would not be justified in respect of their use of the term 'TERF'. The ESC advised that this was because it was not, in or of itself, an abusive term. The ESC advised that he accepted that the Respondent held the sincere belief that the Complainer was a trans-exclusionary radical feminist on the basis of her apparent gender critical beliefs and, therefore, their use of the term 'TERF' was a value judgement that, in the context of a highly polarised public debate on gender recognition, would not amount to a personal attack. The ESC contended that, as such, the use of the term 'TERF', in the circumstances, was not sufficiently egregious as to justify a restriction.

The ESC argued, however, that a restriction of the Respondent's Article 10 rights for telling the Complainer to "get to fuck", would be justified, given that the use of such a phrase was entirely gratuitous, even in circumstances where the Respondent felt that they had been provoked, and where the use did not necessarily amount to a personal attack on the Complainer. The ESC contended that such a restriction was necessary and proportionate to pursue the legitimate aims of:

- ensuring that the conduct of public life at the local government level, including public debate, did not fall below a minimum level, so that public confidence in democracy is not eroded; and
- protecting the rights and reputations of other individuals.

Turning to the second complaint, the ESC advised that he again considered that the Respondent would benefit from enhanced protection in respect of their Article 10 rights. This was because the Respondent's use of the word "cunt" (being the subject of the first issue), was made in response to a public tweet, which again was a matter of public interest.

The ESC argued that the Respondent would also benefit from enhanced protection in respect of their Article 10 rights in relation to the conduct that was the subject of the second issue. The ESC argued that this was because it occurred in a political context, being an email exchange between the Respondent and a council officer. The ESC further argued that as the email exchange had been about complaints made to the Council about the Respondent's interactions with a member of the public on Twitter, the email exchange concerned matters of public interest that were pertinent to council business.

The ESC nevertheless contended that a restriction of the Respondent's Article 10 rights for the use of the word "cunt" towards a member of the public in a public forum, would be justified, given its use was entirely gratuitous and offensive. The ESC again contended that such a restriction was necessary and proportionate to pursue the legitimate aims of ensuring that the conduct of public life did not fall below a minimum level, and to protect the rights and reputations of other individuals.

While the ESC advised that he considered the Respondent's use of profanities in the email exchange, in and of itself, did not amount to a personal attack on the Complainer, it was nevertheless gratuitous and offensive. The ESC contended that a restriction on the Respondent's enhanced Article 10 rights was necessary and proportionate to pursue the legitimate aim of protecting the rights and reputations of others. This would include protecting council officers from offensive and abusive comments that could prevent them from performing their duties without undue disturbance. In reaching this conclusion, the ESC noted that while the Respondent was entitled to choose not to provide comments in relation to the complaints made against them, they could have expressed their choice in a different and respectful manner.



In response to questions from the Panel, referring an to accepted dictionary definition (Shorter Oxford English), the ESC accepted that the term ‘cunt’ was widely accepted as being particularly derogatory towards women. The ESC further accepted that the Respondent would have been aware that the comments that they had directed towards both members of the public could have encouraged other Twitter users to bully and harass the individuals in question. The ESC advised, however, that he had not seen any evidence this had happened.

The ESC accepted that as the Complainer’s emails to the Respondent had been courteous and respectful, and as the Complainer was simply doing his job in seeking comments from the Respondent about the complaints that had been made; the Respondent’s threat to contact the police was entirely disproportionate and disrespectful. The ESC noted that the use of kisses in an email from a councillor to a council officer was inappropriate and unprofessional. The ESC accepted therefore, that the Respondent’s use of kisses (as represented by ‘xxx’ in their email of 13 April 2022), particularly in the context of the rest of the email exchange, was also intended to be disrespectful.

The ESC confirmed that he had not been provided with, or seen, any evidence to support any contention that the Complainer was transphobic or had a personal vendetta against the Respondent and their community; and that the Complainer fully denied all these allegations. The ESC confirmed that he had not seen any evidence or suggestion that the Respondent had raised any grievance about the Complainer, as might have been expected, had this been the case. The ESC further advised that he had not been provided with, or seen, any evidence that the Complainer had misgendered the Respondent, or that he had failed or refused to use the correct pronouns when addressing them.

The ESC accepted that there was normally a power imbalance between councillors, as elected representatives, and council officers. The ESC advised, however, that in this case it had been well-known, at the time of the email exchange between the Complainer and Respondent, that the Respondent had decided not to stand for re-election in the May 2022 local government elections. The ESC contended that, in the circumstances, it was unlikely that the Complainer (being a senior officer who was legally qualified), would have felt bullied or harassed by the Respondent’s emails, including their threat to contact the police.

In response to a question about whether the Respondent would attract enhanced protection in relation to their Article 10 rights, the ESC accepted that the email exchange between the Respondent and Complainer had been private and could be taken as being administrative in nature, given it concerned the Council’s response to the complaints that had been made. The ESC argued, however, that the Respondent’s reference to ‘cishet’ drew it back into the sphere of the debate on gender recognition, being a matter of public concern.

### **Written Submissions from the Respondent**

#### **Applicability of the Code**

The Panel noted that, in written submissions made to the ESC and the Standards Commission, the Respondent had advised that they did not consider the Code applied in respect of the comments posted on Twitter as they had been posted on a personal Twitter account, which had been accessed via a personal device. The Respondent noted that they had made no reference to the Council or their then role as a councillor in the comments in question. The Respondent argued that they were acting as a private citizen, in the knowledge that if they had identified themselves as a councillor then they would have been unable to say what they really felt.

#### **Complaint 1**

The Respondent’s position was that they had posted the comment telling the Complainer to “get to fuck” as they considered “bigots should not be welcome”. The Respondent advised that they considered the complaint to be vexatious, as well as full of lies, bigotry and hate. The Respondent indicated that they accept

the word 'fuck' was profane, but argued that its use was necessary on occasion. The Respondent contended that 'TERF' was not a slur as 'TERFS' often self-identify as such, hold "TERF Awards" and wish one another a "Merry TERFmas". The Respondent advised that they did not accept that 'TERF' was a gendered term and stated that they "use it against any and all genders", so any accusation, by the Complainer, of misogyny in respect of its use was to them "ludicrous".

The Respondent advised that they did not consider the Twitter comment that was the subject of Complaint one to be abusive and rejected any suggestion that it could amount to bullying or harassment. The Respondent advised that they would make the same comment again in a similar situation and would not apologise or make amends for having posted it. The Respondent argued that it was unfair that they were expected to treat the Complainer with respect, while the Complainer was allowed to be disrespectful continuously. The Respondent further argued that they had the right to defend themselves in the face of provocation and should not be penalised for doing so.

### **Complaint 2**

The Respondent explained that the individual they responded to on Twitter was well-known to them and had been nasty previously both to them and to other trans people. As such, their comment was not a random, out of the blue response. The Respondent noted that the complaint to the ESC about the Tweet had been made by the Council's Monitoring Officer, not the individual to which the comment had been directed. The Respondent questioned whether it would have mattered if they had made the comment in a different setting, such as at a pub or in their house, and queried whether they were ever allowed to swear at anyone (and, essentially, whether the Code should apply to their private life).

Turning to the second issue, the Respondent stated that it was their "sincerely held belief" that the Complainer was "an overpaid, over privileged, cishet white man, who actively works to exclude marginalised communities from politics." The Respondent advised that they had been unaware that the Monitoring Officer had any role to play in respect of complaint handling, and considered the Monitoring Officer's emails, informing them that complaints about their conduct had been received, amounted to a personal attack. The Respondent advised that, despite having worked alongside them for some 10 years, the Monitoring Officer had never offered them any support, even when previous complaints about their conduct had been made or when they received death threats or abuse. The Respondent alleged that the Monitoring Officer had failed to use the correct pronouns when addressing them.

The Respondent advised that they had concluded that the Monitoring Officer's emails demonstrated that he had a personal vendetta against both them and their community. The Respondent advised, therefore, that they had requested that the Monitoring Officer stop contacting them and had stated that if he continued to do so, they would contact the police to report any future contact as harassment. The Respondent stated that as they considered the Complainer was harassing them, despite being asked to stop, they believed they had a right to take such action.

### **Article 10**

The Respondent submitted that any restriction on their right to freedom of expression, under Article 10 of the ECHR, was not justified in respect of either complaint. The Respondent contended that they must be allowed the right to express their displeasure towards those who send them "transphobic dog whistles".

### **DECISION**

The Hearing Panel considered the submissions made both in writing and orally at the Hearing. It concluded that:

1. The Councillors' Code of Conduct applied to the Respondent, former Councillor Murray at the time of the events in question.

2. The Respondent had breached paragraphs 3.1, 3.2, 3.10, 3.24 and 3.25 of the Code.

### **Reasons for Decision**

The Panel determined that the Respondent had identified themselves as a councillor and / or could objectively be considered to be acting as a councillor, at the time of the events in question. This was because, while the Respondent had not identified themselves as a councillor in the name of the Twitter account or its biography at the time, they had referred to themselves as a politician and had posted other tweets from the account in February and March 2022 that referred to their role as a councillor. The Panel further accepted that the emails to the Monitoring Officer had been sent from the Respondent's Council email account, using a Council device. As such, the Panel was satisfied that the Code applied to the Respondent in respect of both complaints.

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

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.
- Second, 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.
- Third, 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.

In relation to the first complaint, the Panel accepted that TERF could be a descriptor, but determined that, when considered in the context of being used in the same sentence and immediately following "with absolutely no respect whatsoever, get to fuck", it was clearly intended as a slur and as a personal attack. The Panel agreed with the ESC that it was evident that the Respondent had posted the comment with the intention of trying to upset and / or offend the Complainer. The Panel was satisfied, therefore, that the Respondent's conduct in respect of the first complaint amounted, on the face of it, to a breach of the requirement under paragraph 3.1 of the Code for councillors to treat everyone (including members of the public and council employees) with courtesy and respect.

While the Panel noted that bullying can be a one-off incident and considered that it was arguable that the Respondent's comment could have encouraged other Twitter users to be abusive towards the Complainer, it noted that the ESC had not been presented with any evidence to suggest that the Respondent's remark had brought about such an effect. The Panel further noted that the Complainer had chosen to engage actively with the Respondent. In the circumstances, therefore, the Panel did not consider that the Respondent's conduct, in respect of the first complaint, amounted to a breach of the bullying and harassment provisions in the Code.

Turning to the first issue of the second complaint, the Panel agreed that the use of a profane and derogatory term about a member of the public, by someone who was then in a position of authority and responsibility, was disrespectful and discourteous. The Panel was satisfied, therefore, that the Respondent's conduct in respect of the first issue of the second complaint, on the face of it, amounted to a breach of paragraph 3.1 of the Code.

The Panel noted that the member of the public in question had not submitted any formal complaint to the ESC or the Council about the Respondent's comment. The Panel considered that this did not necessarily



indicate that she had not felt bullied or harassed, given there could have been a number of different, other reasons why she may have felt unable or unwilling to make a complaint.

The Panel was of the view, nonetheless, that the member of the public's reference to her late relatives' knowing what a woman was, in the comment that led to the Respondent's response, and her use of certain 'hashtags', indicated that she might hold gender critical beliefs. The Panel agreed, therefore, that the member of the public had chosen to engage in what was generally accepted to be a highly toxic and polarised public debate about gender recognition and trans rights. While the Panel was of the view that it was entirely unacceptable the Respondent had called the second member of the public a "cunt", it was not satisfied that the making of the comment, when taken in that context, would amount to bullying or harassment.

Turning to the second issue of the second complaint, the Panel considered that advising a councillor a complaint has been made about them, and attempting to ascertain whether any local resolution can be achieved, is part of a Monitoring Officer's role. The Panel agreed that not only did the Monitoring Officer (the Complainer) have every right to contact the Respondent to advise them that the complaints had been received, it was also appropriate, fair and courteous for him to have done so. The Panel rejected entirely the Respondent's claim that the Complainer's emails demonstrated that he was harassing them or had a personal vendetta against both them and their community, or indeed that it was in any way reasonable for the Respondent to have made such an accusation.

The Panel noted that the Complainer's emails were entirely professional and respectful, both in tone and content. The Panel further noted that the Complainer had used the Respondent's correct pronouns in the emails and that no evidence had been found or provided to substantiate the Respondent's claims that the Complainer was transphobic or had misgendered them on a regular or repeated basis.

The Panel found that the Respondent's replies to the Complainer, as a council officer, were entirely inappropriate, particularly given the Respondent's then role as a councillor and their respective power and influence as an elected politician. The Panel agreed that the Respondent's use of profanities and their reference to the Complainer's assumed personal characteristics in the emails were discourteous and disrespectful. The Panel was of the view that the Respondent's use of kisses in a sign-off to one email was both unprofessional and, in the context of the overall exchange, demonstrated disrespect to the Complainer's role as a council officer, as well as to him as an individual. The Panel further agreed that threatening a council officer with the police, for simply doing their job, was also disrespectful. The Panel therefore concluded that, on the face of it, the Respondent had contravened paragraph 3.1 of the Code.

The Panel noted that paragraph 3.2 of the Code states that councillors must not discriminate unlawfully on the basis of various characteristics including race, sex and sexual orientation, and also that councillors should seek to foster good relations between different people. The Panel noted that it was not in dispute that the Respondent referred, in one email, to their assumptions about the Complainer's personal characteristics, including his race, gender identity and sexual orientation. The Panel noted that the list of characteristics followed on immediately from the Respondent's statement to the effect that they no longer wished to hear from the Complainer. The Panel considered that it was not unreasonable, therefore, to conclude that the Respondent's assumptions about the Complainer's personal characteristics played some part in the Respondent's desire to end the communication between them. The Panel was satisfied that the Respondent was indicating that their refusal to engage was based, at least in part, on their assumptions about these characteristics and that doing so was an indication that the Respondent was treating the Complainer less favourably because of these assumed characteristics. The Panel further considered that by making assumptions about the Complainer's assumed characteristics, the Respondent was seeking to draw a distinction between them, and in doing so, was failing to foster good relations between different people. The Panel concluded that there was evidence that the Respondent had, therefore, breached paragraph 3.2 of the Code.

The Panel was of the view that threatening to report a council officer, who was just doing their job, to the police could amount to bullying. The Panel noted, however, that the Complainer had confirmed that he had not submitted the complaint as a result of any impact the Respondent's conduct had on him personally. The Panel considered that it was unlikely that the Complainer would have felt bullied or harassed by the threat of a report to the police, given there was absolutely no evidence of illegal activity on his part. In the particular circumstances of the case, the Panel was not satisfied that the Respondent's conduct towards the Monitoring Officer amounted to bullying or harassment, in breach of the Code.

While the Panel noted that Annex A of the Code does not require a councillor to 'foster' an atmosphere of trust and respect, it states that councillors and council employees should work in such an atmosphere of mutual trust and respect, with neither party seeking to take unfair advantage of their position or influence. The Panel agreed with the ESC that because the Respondent had been rude and offensive to the Complainer in their emails, the Respondent had demonstrated neither trust in, nor respect for the Monitoring Officer. The Panel was satisfied that, as a result, the Respondent's action prevented them, as a councillor, from working with the Monitoring Officer in an atmosphere of mutual trust and respect. The Panel therefore was satisfied that, on the face of it, the Respondent had failed to follow the Protocol for Relations between Councillors and Employees at Annex A and was, therefore, in breach of paragraph 3.10 of the Code.

The Panel noted that while there was no evidence or suggestion that the Respondent had used council-issued IT equipment to post either of the Twitter comments, it was not in dispute that they had used a council email address and device when responding to the Complainer. The Panel was satisfied, therefore, that in sending the Complainer disrespectful emails, that contained profanities and that were offensive, the Respondent had breached the Council's IT policy which, in turn, was a contravention paragraph 3.24 of the Code. The Panel agreed with the ESC that, in doing so, it was evident that the Respondent had not acted with good sense or used caution. As such, the Panel was satisfied that the Respondent had also used council resources imprudently, in breach of paragraph 3.25 of the Code.

**Stage 2: Whether any findings that the Code had been contravened 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<sup>2</sup>. 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.

The Court noted that any interference with the right of free speech, which impedes political debate, must be subjected to particularly close scrutiny but that simply indulging in offensive behaviour was not to be regarded as expressing a political opinion, which attracts the enhanced level of protection<sup>3</sup>.

While the Panel accepted that the Respondent's Twitter comments that were the subject of both complaints one and two were offensive, it considered that the Respondent would nevertheless attract enhanced protection in respect of their right to freedom of expression in relation to the posts. This was because the Panel considered that the first comment was posted in the context of a public conversation about the introduction of buffer zones around abortion clinics, and the second was posted in response to commentary on gender recognition reform, both of which are matters of public interest.

The Panel did not consider, however, that the Respondent would attract enhanced protection in relation to the email exchange that was the subject of the second complaint. This was because the Panel was of the view that the email exchange between the Respondent and the Complainer (the Monitoring Officer) was private

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<sup>2</sup> *Jerusalem v Austria* (2003) 37 EHRR 25

<sup>3</sup> *Livingstone v Adjudication Panel for England* (2006) EWHC 2533

and non-political in nature and concerned how the Respondent may wish to respond to complaints that had been made about the Respondent's conduct, being a matter that was not yet in the public domain or of public concern. The Panel disagreed with the ESC's contention that the Respondent's use of the word 'cishet' drew the exchange into the realms of public interest. That was because it was evident from the context of the email that the Respondent used the word when listing the Complainer's assumed personal characteristics, as opposed to using it as part of a debate about gender identity or other matter of public concern.

**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, such as the imposition of a sanction for a breach of a regulatory code of conduct, to 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. Restrictions are also allowed for the protection of the reputation or rights of others, which can include protecting members of the public from offensive attacks, and to ensure council officers can undertake their tasks without undue disturbance. This is provided that any restriction is for relevant and sufficient reasons, and is proportionate to the legitimate aim being pursued.

The Panel noted that it was required to undertake a balancing exercise, weighing the right to freedom of expression enjoyed by the Respondent (and particularly the enhanced right to which they were entitled in this case in respect of their Twitter comments), against any restriction imposed by the application of the Code and the imposition of any sanction.

The Panel noted that the Courts have held that the less egregious the conduct in question, the harder it would be for a Panel, when undertaking its balancing exercise, to justifiably conclude that a restriction on an individual's right to freedom of expression is required<sup>4</sup>.

The Panel further noted that the Courts have held that, in a political context, a degree of the immoderate, offensive, shocking, exaggerated, provocative, controversial, colourful and emotive, that would not be acceptable outside that context, is tolerated<sup>5</sup>.

The Panel considered that the Respondent's Twitter comments could have an impact on the rights and reputations of the individuals to which they had been directed. The Panel further considered that the Respondent's use of profanities and slurs in posting comments in public, when using an account where they were readily identifiable at the time as being a councillor, brought the standards of public debate below a minimum level, that rendered a restriction on their freedom of expression necessary.

The Panel agreed that there was no requirement for the Respondent to have commented on the posts made by the two members of the public. The Panel further agreed that even if the Respondent had felt compelled to comment on the posts, in an attempt to stand up to what they considered to be transphobia, they could have expressed their views and opinions without resorting to profanities and personal abuse. The Panel considered the tweets to be sufficiently offensive and gratuitous as to justify a restriction on the Respondent's right to freedom of expression.

Turning to the email exchange, the Panel accepted that the Respondent was entitled to advise the Complainer that they no longer wished to have contact with him or to receive information about any complaint made about them. The Panel agreed, however, that the Respondent could have done so in a respectful manner, without referring to the assumed personal characteristics of the Complainer. The Panel again considered the content of the emails to be sufficiently offensive and gratuitous as to justify a restriction on the Respondent's right to freedom of expression.

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<sup>4</sup> *Calver, R (On the Application Of) v The Adjudication Panel for Wales (Rev 2) [2012] EWHC 1172 (Admin)*

<sup>5</sup> *Heesom v Public Services Ombudsman for Wales [2014] EWHC 1504 (Admin)*

The Panel was satisfied, therefore, that the imposition of a restriction on the Respondent's right to freedom of expression in the circumstances was relevant, sufficient and proportionate in respect of both complaints. The Panel concluded, therefore, that it was satisfied that the findings of breach, and the subsequent application of a sanction, would not contravene Article 10.

### **SANCTION**

The decision of the Hearing Panel was to censure the Respondent, former Councillor Murray. The sanction was made under the terms of section 19(1)(a) of the Ethical Standards in Public Life etc. (Scotland) Act 2000.

### **Reasons for Sanction**

In making its decision on sanction, the Panel had regard to the Standards Commission's Policy on the Application of Sanctions. A copy of the policy can be found on the Standards Commission's website.

The Panel began by assessing the nature and seriousness of the breaches of the Code.

The Panel was concerned that the Respondent had subjected members of the public to offensive and demeaning comments that went well beyond what might be considered normal or even acceptable. The Panel was also concerned that the Respondent, as an elected politician at that time, had made the comments in a public forum. It considered that, in doing so, the Respondent brought the standards of public debate well below a minimum level of acceptability.

The Panel was further concerned that the Respondent had been disrespectful and discriminatory towards a council employee, when that employee had only been doing his job. The Panel noted that disrespect, bullying and harassment towards officers is serious, in that it has the potential to disrupt effective working relations and can be a threat to both the reputation of the council and the role of an elected member. The Panel was of the view that Council officers should be able to work in an environment where they are not subjected to unwarranted attacks and personal abuse. The Panel considered that the Respondent's conduct in this regard was completely unacceptable.

Having considered the nature and seriousness of the breach, the Panel considered the aggravating and mitigating factors as set out in the Policy on the Application of Sanctions, beginning with those in mitigation. The Panel noted that mitigating factors are those which may lessen the severity or culpability of the breach.

In terms of mitigation, the Panel accepted that the Respondent considered they had been the subject of abuse and that they were determined to stand up for trans rights and call out what they perceived to be transphobia. The Panel noted that the conduct complained about had occurred over a relatively short period of time, and that there was no evidence or suggestion of any personal gain or benefit to the Respondent.

The Panel then proceeded to consider the aggravating factors; being ones that may increase the severity or culpability of the breach.

The Panel noted that the Respondent had argued that it was unfair that they were expected to treat members of the public with respect, even if members of the public had been disrespectful towards them and their community. The Panel noted, however, that the Respondent had agreed, as part of their acceptance of office as a councillor, that they would abide by the terms of the Code, which clearly included the requirement to behave with courtesy and respect towards council officers and members of the public.

The Panel noted that councillors do not have to engage with members of the public on social media and, further, that if they choose to do so, they should be able to make political points and engage in public debates without resorting to profanities and personal abuse.

The Panel noted that the Respondent had been found, on the face of it, to have breached the respect provisions of the Code at two previous Hearings and that, despite this, had yet again engaged in similar, entirely unacceptable conduct. The Panel concluded, therefore, that the Respondent's behaviour in this case was deliberate, evidencing a lack of concern that their conduct could affect others adversely and could bring the role of a councillor or the Council itself into disrepute (with the associated impact on public confidence).

The Panel further noted that the Respondent had failed to show any remorse, and had failed to demonstrate they had gained any insight from the previous Hearings or had developed any interest in understanding the impact of their conduct on others. In addition, the Respondent had failed to engage with the Hearing process, choosing instead to use profanities and direct insults towards the Standards Commission, its Members and staff in their correspondence with the ESC and Standards Commission.

Having considered and weighed up all the mitigating and aggravating factors, and in particular, noting that the conduct in both complaints had occurred over a relatively short period of time, the Panel concluded that in the circumstances of the case a disqualification was neither warranted nor justifiable, particularly when the Respondent's Article 10 rights were considered.

The Panel concluded, however, that in light of its finding that the Respondent's conduct was in deliberate breach of the Code, and when taken with findings made at the two previous Hearings, the appropriate sanction should be a lengthy suspension.

The Panel could not impose a suspension, however, as the Respondent was no longer a councillor. The Panel therefore could only censure the Respondent.

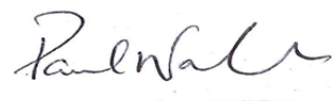
The Panel emphasised that the requirement for councillors to behave in a respectful and courteous manner towards members of the public is a fundamental requirement of the Code, as it ensures public confidence in the role of an elected member and the council itself is not undermined. The Panel was clear that a failure by politicians to adhere to the minimum standard of conduct expected when in public (including when using social media) serves only to reduce the standard of public debate.

The Panel noted that councillors should be aware of the inherent influence their role brings and note that, as elected politicians, they are in a position of power over council employees. The Panel noted that while council officers could submit complaints about an elected member, it can be difficult for them to do so, given that they will be required to continue to work alongside the individual in question. The Panel therefore emphasised the importance of the requirement for councillors to behave respectfully towards council officers, in order for officers to be able to undertake their tasks without unwarranted abuse or interference.

### **RIGHT OF APPEAL**

The Respondent has a right of appeal in respect of this decision, as outlined in Section 22 of the Ethical Standards in Public Life etc. (Scotland) Act 2000, as amended.

**Date:** 12 June 2023



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