Renfrewshire Council

**To:** Council

**On:** 24 June 2021

**Report by:** Head of Corporate Governance as Monitoring Officer

**Heading:** Standards Commission for Scotland: Decision of the Hearing Panel of the Commission

## 1. Summary


1.1 Reports to Council on 17 December 2020 and 4 March 2021 advised of the outcome of a hearing held by the Standards Commission for Scotland into complaints against Cllr Paul Mack and the subsequent appeal to the Sheriff Principal against the findings of the Commission and the sanction imposed on him.

1.2 The appeal was determined in Cllr Mack's favour and the decision of the Sheriff Principal was that the original decision of the Standards Commission to proceed with the hearing in Cllr Mack's absence was quashed and the matter was remitted back to the Standards Commission to hold a new hearing.

1.3 The new hearing was held on Monday 3 May 2021 and the written decision of the Standards Commission was received on 10 May 2021. The decision of that Hearing Panel was to disqualify Councillor Mack for a period of 16 months, from being, or from being nominated for election as, or from being elected, a councillor, with effect from 10 May 2021.

1.4 This sanction is made under the terms of the Ethical Standards in Public Life etc. (Scotland) Act 2000 section 19(1)(d). The written decision of the Hearing Panel has been received and a copy is appended to this report. This sets out the reasons for the decision that a breach of the code had been proven and the factors taken into account in deciding on the sanction imposed.

1.5 In terms of the Ethical Standards in Public Life (Scotland) Act 2000 a council receiving a copy of findings from the Standards Commission requires to consider those findings within three months of receiving them (or within such longer period as the Commission may specify).

1.6 Councillor Mack has submitted an appeal to the Sheriff Principal challenging the sanction imposed. The appeal will be heard in Court although a date has still to be fixed for the hearing. Despite an appeal being lodged, the sanction imposed by the Standards Commission remains in place while the appeal has still to be determined.

1.7 Following consideration of the appeal the Court may:

a) In respect of the sanction imposed by the Commission:
   i) Confirm the sanction
   ii) Quash the sanction and either substitute a lesser sanction or remit the matter back to the Commission

1.8 Members are reminded that training on governance (which includes the Councillors' code of conduct) has been and will continue to be provided to members as part of their training and development programme. Individual members can seek advice from the Head of Corporate Governance on any issues arising from the Code.

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## 2. Recommendation

2.1 That the Council:

a) in accordance with the terms of the Ethical Standards in Public Life etc. (Scotland) Act 2000, note the findings of the Standards Commission on the complaints against Councillor Mack; and

b) note that Councillor Mack has submitted an appeal against the sanction imposed on him by the Commission and that the appeal has still to be determined.

**Implications of the Report**

1. **Financial** - none

2. **HR & Organisational Development** - none

3. **Community Planning –** none

4. **Legal** – in terms of the Ethical Standards in Public Life etc. (Scotland) Act 2000 a council requires to consider the findings of the Standards Commission within 3 months of receipt (or within such longer period as the Commission may specify).

5. **Property/Assets** - none

6. **Information Technology** – none

7. **Equality & Human Rights** - The recommendation contained within this report has been assessed in relation to its impact on equalities and human rights. No negative impacts on equality groups or potential for infringement of individuals' human rights have been identified arising from the recommendations contained in the report. If required following implementation, the actual impact of the recommendations and the mitigating actions will be reviewed and monitored, and the results of the assessment will be published on the Council's website.

8. **Health & Safety** – none

9. **Procurement** – none

10. **Risk** – none.

11. **Privacy Impact** – none

12. **CoSLA Policy Position**– not applicable

13. **Climate Risk** – n/a

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List of Background Papers – none – report on Standards Commission's findings is appended.

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Appendix

STANDARDS COMMISSION FOR SCOTLAND
INTEGRITY IN PUBLIC LIFE

**COUNCILLOR PAUL MACK**
**RENFREWSHIRE COUNCIL**

**Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held online, on Monday, 3 May 2021.**

**Panel Members:** Mr Paul Walker, Chair of the Hearing Panel
Professor Kevin Dunion
Mr Michael McCormick

The Hearing arose in respect of two reports referred by Ms Caroline Anderson, the Commissioner for Ethical Standards in Public Life in Scotland (the ESC), further to complaint references LA/R/2257 and LA/R/3262, which concerned alleged contraventions of the Councillors' Code of Conduct (the Code) by Councillor Paul Mack (the Respondent).

The ESC was represented at the Hearing by Dr Kirsty Hood, QC.

**Referral**

Following an investigation into two complaints received about the conduct of the Respondent, the ESC referred reports to the Standards Commission for Scotland on 27 April 2020 and on 16 July 2020, in accordance with section 14(2) of the Ethical Standards in Public Life etc. (Scotland) Act 2000 (the 2000 Act), as amended.

The substance of the referral on the first complaint, made by Councillor Devine, was that the Respondent had failed to comply with the provisions of the Code and, in particular, that he had contravened paragraphs 3.2, 3.3, 3.5, 3.6, 3.7, and paragraphs 2 and 20 of Annex C. The second referral concerned a complaint by Councillor Mackay and alleged that the Respondent had contravened paragraphs 3.2 and 3.6 of the Code.

The relevant provisions of the Code are:

***Relationship with other councillors and members of the public***
*3.2 You must respect your colleagues and members of the public and treat them with courtesy at all times when acting as a councillor.*

***Relationship with Council Employees (including those employed by contractors providing services to the Council)***
*3.3 You must respect all Council employees and the role they play, and treat them with courtesy at all times. It is expected that employees will show the same consideration in return.*
*3.5 You must follow the Protocol for Relations between Councillors and Employees attached at Annex C. A breach of the Protocol will be considered as a breach of this Code.*

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

***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.*

***ANNEX C***

***PROTOCOL FOR RELATIONS BETWEEN COUNCILLORS AND EMPLOYEES IN SCOTTISH COUNCILS***

***Principles***

***2.*** *Councillors and employees should work in an atmosphere of mutual trust and respect, with neither party seeking to take unfair advantage of their position.*

***Public comment***

***20****. Councillors should not raise matters relating to the conduct or capability of employees in public. Employees must accord to councillors the respect and courtesy due to them in their various roles. There are provisions in the Code of Conduct for Employees about speaking in public and employees should observe them.*

**Preliminary Matters**

**Appeal**

The Panel noted that at an Appeal Hearing on 4 February 2021, a Sheriff Principal considered an appeal lodged by the Respondent against a decision made earlier by a Panel of the Standards Commission, at a Hearing on 10 September 2020 on the same two complaints (complaint references LA/R/2257 and LA/R/3262), to find the Respondent in breach of the Councillors' Code of Conduct and to disqualify him. The Sheriff Principal did not consider, or make any finding, on the Panel's decisions on breach and sanction, but determined that the Hearing on 10 September 2020 should not have proceeded in the absence of the Respondent, who had informed the Standards Commission that he was self-isolating from 9 September 2020 (having been in close contact with an individual who had tested positive for Covid-19). As such, the Sheriff Principal remitted the matter back to the Standards Commission for a new Hearing Panel to consider afresh the two reported complaints.

The Panel on 3 May 2021 noted that while the Respondent, the ESC's representative and the witnesses had been asked to join the new Hearing, held online on 3 May 2021, at 0900 so that the Standards Commission could check connectivity before the Hearing commenced at 0930, the Respondent had not appeared. The Panel noted that the Respondent had already indicated to the Standards Commission's Executive Director, by text message on 28 April 2021, that he did not intend to attend the Hearing. After waiting until 0935 to see whether or not the Respondent would appear, the Panel adjourned to determine whether or not to proceed with the new Hearing in his absence.

**Proceeding in the absence of the Respondent**

The Panel noted that Councillor Mack had been apprised of the new Hearing date by email on 7 April 2021. The Respondent was asked to acknowledge receipt of this email. The Panel noted that no such acknowledgement had been received. However, due to the nature of further correspondence submitted to the Standards Commission's Executive Director by the Respondent (as outlined in detail below), the Panel was satisfied that the Respondent was, first, well aware of the date of the Hearing and, second, that the intended Hearing was to be held online. As such, the Panel was wholly satisfied that notice of the new Hearing date had been provided, as required by Section 20 of the 2000 Act, and understood by the Respondent.

The Panel noted that the new Hearing had itself been scheduled, adjourned and rescheduled for a number of previous dates. The Standard Commission's Hearing Rules state, at paragraph 3.11, that:

*The Hearing Panel may, at its own discretion or on the application of any of the parties, postpone or adjourn a Hearing. Before any postponement or adjournment is granted, the Hearing Panel will consider: (a) the public interest in the expeditious disposal of the case; and (b) any inconvenience or prejudice to the parties and to witnesses.*

The Panel noted that, in this case, the Respondent made a number of adjournment requests (both explicit and implied) in relation to both the previous Hearing eventually held on 10 September 2020 and this new Hearing. The date, reason for, and Panel's decision on, each request are outlined below:

1. The Respondent requested at the pre-Hearing meeting on 22 July 2020 for the original Hearing scheduled for 19 August 2020 to be adjourned as he was starting a new job. This request was granted.

2. The Respondent advised on 9 September 2020, at 15:10, that he could not attend the Hearing then scheduled for 10 September 2020 as he was self-isolating (having been in close contact with an individual who had tested positive for Covid-19). As noted above, the decision to proceed that day was quashed upon appeal.

3. The Respondent then requested, in an email of 22 February 2021, that a new Hearing then scheduled for 8 March 2021, be adjourned so that he could have more time to prepare. This request was declined. This refusal was because the Sheriff Principal had quashed the decision of the previous Panel to proceed while the Respondent was self-isolating and required a fresh Hearing to be arranged, with a reconstituted Panel. In its effect, the Sheriff Principal's decision had simply put everyone back in the position of the day before the previous Hearing (held on 10 September 2020), when the Respondent had informed the Standards Commission that he was required to self- isolate. The Panel noted that the Respondent had not indicated at any time earlier that he required more time to prepare a response before the previous Hearing and, indeed, it had previously been adjourned at the Respondent's request. As the Respondent had intended to appear at the previous Hearing, the Panel considered it was therefore reasonable to conclude that the Respondent was, or should have been ready for it and, as such, should not reasonably require more time to prepare for a new Hearing about the same complaints. In support of this, the Panel considered that the detailed submissions on whether there had been a breach of the Code in respect of the complaints, presented in the summary application and the note of argument for the appeal, presented clear evidence that significant case preparation had been undertaken either by the Respondent or on his behalf. The Panel noted that the preparation would have required the involvement of the Respondent and that he would have been aware of the submissions made.

4. The Respondent next requested, on 2 March 2021, that the Hearing scheduled for 8 March 2021 be adjourned as he was due to have medical treatment that day. As this request was supported by appropriate evidence, in the form of a hospital admission letter, it was granted.

5. The Respondent further requested, on 31 March 2021, that the Hearing then re-scheduled for 7 April 2021 be adjourned on health grounds. The Respondent supplied a Statement of Fitness to Work covering the period 2 March to 13 April 2021 ("First Fit Note"). Having particular regard to the First Fit Note, the Panel noted the following:
   - Despite the First Fit Note being dated 2 March 2021, the Standards Commission was not informed of its existence until 31 March 2021.
   - Despite the First Fit Note covering the period from 2 March 2021 until 13 April 2021:
     a) the Respondent engaged in regular email correspondence with the Standards Commission's Executive Director and with other councillors throughout this period;
     b) the Respondent attended an online meeting of Renfrewshire Council on 4 March 2021; and
     c) the Respondent attended Renfrewshire House (being his place of work) on 25 March 2021.

The Panel noted that this appeared to demonstrate to a satisfactory extent that, despite the First Fit Note, the Respondent was not prevented, by any health or other reasons, from participating in pre-Hearing correspondence and carrying out some forms of "work".

The Panel noted that in further email correspondence the Respondent was asked to clarify why he considered he was unable to attend the Hearing scheduled for 7 April 2021 when he was able to attend online council meetings and to engage in his work as a councillor during the period covered by the First Fit Note; and, additionally, why the Respondent did not send the First Fit Note until 31 March, despite it having been issued to him on 2 March 2021 according to the information it contained. The Panel noted that no such clarification had been provided.

The Panel nevertheless decided not to proceed on 7 April 2021, in light of the timing and volume of the further information received by the Standards Commission in the form of a lengthy email from the Respondent. In particular, the decision to adjourn was taken:

- to allow the Panel due time to consider the further information provided;
- to allow the Panel, once such consideration has taken place, to set a new Hearing date that takes information into account;
- to ensure fairness to all parties involved in the Hearing Process; and
- to ensure the integrity of the Hearing process itself was protected and upheld.

The Panel noted that the Respondent was then advised by email on 7 April 2021 that the Hearing would be held on 3 May 2021.

6. The Panel noted that, on 12 April 2021, the Respondent sent, as an attachment to an email to the Executive Director, a Statement of Fitness to Work covering the period from 9 April until 11 May 2021 ("Second Fit Note"). The Panel noted that no text was included in this email, other than the Respondent's name. The Executive Director acknowledged receipt of the Second Fit Note by email the following day and asked for clarification on whether the Respondent was seeking an adjournment of the Hearing scheduled for 3 May 2021. The Panel noted that no response was received, and no clarification whatsoever was offered.

   After allowing the Respondent one week from the date of the Executive Director's email to reply, and having received no such response, the Panel concluded that it was reasonable to infer that the Respondent's email of 12 April 2021 and enclosing the Second Fit Note was intended as a request to adjourn the Hearing scheduled for 3 May 2021. The Panel noted that the adjournment request was in identical terms to the request centred around the First Fit Note of 31 March 2021, namely the provision of a Statement of Fitness to Work. The nature of the First Fit Note and the Second Fit Note were the same; they both stated that the Respondent was not fit for work for health reasons. On the basis that the Second Fit Note merely stated that the Respondent was not fit for work and was not in any material way different from the First Fit Note, the Panel rejected the Second Fit Note as the basis for the Respondent's latest adjournment request for the same reasons (as outlined under point 5 above), having also had regard to the case law referred to below.

   The Panel had regard to case law surrounding the reliance on such medical evidence as a reason for adjournment. In particular, the case of ***Levy v Ellis-Carr* [2012] EWHC 63**, was considered. In that case, the need for medical evidence to "*identify with particularity what the patient's medical condition is and the features of that condition which (in the medical attendant's opinion) prevent participation in the trial process*" was highlighted.

   The Panel referred also to the case of ***Forrester Ketley & Co v Brent* [2012] EWCA Civ 324**, where it was stated: "*An adjournment is not simply there for the asking. While the Court must recognise*

*that litigants in person are not as used to the stresses of appearing in Court as professional advocates, nevertheless something more than stress occasioned by the litigation will be needed to support an application for an adjournment. In cases where the applicant complains of stress-related illness, an adjournment is unlikely to serve any useful purposes because the stress will simply recur on an adjourned hearing*".

Applying the discretion afforded to it, and having had regard, among other things, to the aforementioned case law, the Panel was not persuaded that the Second Fit Note was sufficient, in itself, to justify an adjournment and to become the basis of further delay.

The Panel considered that any medical certificate which purported to explain a failure to attend a Hearing should, at a minimum, comply with the following criteria:

- Identify the medical attendant and give details of familiarity with the party's medical condition detailing all recent consultations;
- Specify the health condition assessed, detailing the nature and extent of any medical condition from which he was suffering;
- Specify how long the condition has been suffered and for how long it might continue;
- Provide a reasoned prognosis; and
- Identify with particularity the features of that condition that in the opinion of the doctor prevent attendance at, or participation in, the process. It should specify why the health condition renders the party unfit to attend.

The Panel noted that it had not been provided with any evidence that complied with the listed criteria. The Panel noted, however, that even the production of a certificate satisfying said criteria would not in itself result in an automatic adjournment, because any proposed adjournment would still have to be weighed against other factors.

The Panel noted that the Respondent was advised on 20 April 2021 of the Panel's decision and reasoning (including the case law on which it had relied). The Respondent was advised of the minimum criteria a Panel expect a medical certificate to comply with and was further advised that while submission of a certificate that met the criteria outlined above would be considered, it would not necessarily result in an adjournment of the Hearing and, instead, would be weighed up against other factors.

7. In addition to these implied and explicit requests, the Respondent also indicated, at various stages, that he was unable to attend various iterations of this Hearing as he was suffering from a different medical condition to that outlined in both the fit notes and also as a result of not having a suitable WiFi connection. The Respondent further indicated that he was not willing to attend a Hearing unless it was held in person. The Standards Commission advised the Respondent that he would need to submit medical evidence confirming he was unable to attend the Hearing as a result of the different medical condition. To date, no such evidence has been produced. Turning to the Respondent's stated WiFi issues, the Respondent was advised that the Standards Commission would make arrangements for him to have access to a laptop and WiFi in the Council's offices, if required. The Panel noted that the Respondent had managed to both attend and to participate in the online pre-Hearing meeting on 22 July 2020, and an online Council meeting on 4 March 2021. As such the Panel was content that there were no technical barriers to the Respondent's participation in any future online Hearing. Last, with regard to the Respondent's desire for an in-person Hearing, the Standards Commission confirmed that it was unable to hold the Hearing in person, due to the travel restrictions in place as a result of the Covid-19 pandemic (and uncertainty as to whether / when travel restrictions would be lifted and the possibility of participants having to self-isolate).

In making this decision, the Standards Commission had regard to the Government's Guidance on working from home where possible as well as its duty to protect the health and safety of its staff and members whose exposure to the coronavirus could be reduced by having the Hearing online. The Standards Commission noted that, over the past year, it had successfully conducted 12 Hearings online. The Standards Commission noted that this was the current practice adopted by most other regulatory bodies. The Respondent was additionally advised that the Panel would be willing to consider any requests to make adjustments to the normal procedure (such as allowing extra breaks or holding part of the Hearing in private) if a request to that effect was received. No such request was made. The Respondent was also advised that he could make submissions in writing or ask someone to represent him at the Hearing if he was unwilling or felt unable to attend. In this regard, the Panel noted that the Respondent had been represented in respect of the appeal.

In weighing up its decision to reject the Respondent's last adjournment request, and the decision as to whether or not to proceed with the Hearing in his absence, the Panel had to consider not only fairness to the Respondent, but also fairness to the process itself, the public and the other parties involved in the Hearing (including the Standards Commission).

The Panel noted that the last incident of alleged misconduct by the Respondent that was the subject of the complaints took place a year ago. It agreed that the public interest, or the interests of constituents, was not best served by a protracted Hearings process. The Panel noted that, following investigation, the ESC had concluded that the Respondent's alleged behaviour could amount to bullying and harassment. The Panel considered that a failure by a councillor to meet the expectations and provisions of the Councillors' Code of Conduct in respect of bullying and harassment can be an especially serious matter and, therefore, there is a significant public interest in a decision being made at a Hearing, as to whether there had been a breach of the Code. The Panel further noted that unless a sanction was imposed, provided a breach of the Code was found to have occurred, there was nothing to prevent anyone from engaging in similar conduct as that alleged in the complaints.

The Panel was of the view that councillors acting in breach of the Code should face scrutiny and sanction. Public confidence in local government is a significant concern and a key part of the Standards Commission's wider statutory function and role. As such, the Panel was of the view that there was a very strong public interest element in avoiding any further delay to an already drawn-out case. The Panel was also concerned that the Respondent had not indicated a time frame within which he would be able to attend a Hearing and consequently was concerned that the case could continue to be subjected to further repeated delays.

The Panel noted that adjourning the Hearing again would also cause inconvenience to the ESC, the witnesses (who had taken time to prepare and make themselves available to participate) and the Standards Commission itself. While the Panel accepted that proceeding in the Respondent's absence could create a risk of prejudice to the Respondent, given he would not be able to present his case or put questions relevant to the subject of the Hearing to the witnesses, it noted that this could be mitigated by Panel Members ensuring that witness evidence and ESC submissions were questioned and scrutinised, where appropriate taking account of the matters raised in the Respondent's appeal submissions. The Panel also noted that adjournments had already been granted at the Respondent's request and, further, that the Respondent had not taken the opportunity to refute the allegations by submitting a statement of case, despite being required by the Hearing Rules, and several requests, to do so.

The Panel noted that in ***Alexis Maitland-Hudson v Solicitors Regulation Authority*** **[2019] EWHC 67 (Admin)**, a case relating to regulatory proceedings, the Court held that *"even when a defendant faces*

*very serious charges, an inability to defend himself, because of unfitness, does not automatically mean that the important public interest in the pursuit of the proceedings is set aside."*

The Panel noted that the public interest point was further examined in ***General Medical Council v Adeogba* [2016] EWCA Civ 162**, where the Court stated that: *"the fair, economical, expeditious and efficient disposal of allegations made against medical practitioners is of very real importance"*. The importance of having *"regard to all the circumstances of which the Panel is aware, with fairness to the practitioner being a prime consideration"*, but fairness to the regulator and the interests of the public was also highlighted. The Court concluded that: *"it would run entirely counter to the protection, promotion and maintenance of the health and safety of the public if a practitioner could effectively frustrate the process and challenge a refusal to adjourn when that practitioner had deliberately failed to engage in the process. The consequential cost and delay to other cases is real. Where there is good reason not to proceed, the case should be adjourned; where there is not, however, it is only right that it should proceed".*

The Panel noted that, by virtue of being elected as a councillor and in having signed his declaration of office, the Respondent had accepted that he was required to adhere to the Code and the enforcement regime related to it. The Panel noted, however, that the Respondent had failed in his burden of responsibility to engage with the process in any substantive way (since his participation in a pre-Hearing meeting in July 2020), in that he had failed repeatedly to submit a statement of case and to provide other information as required and requested. The Panel noted that prior to an earlier scheduled Hearing, the Respondent had requested that the Standards Commission cite witnesses (in one case a Police Officer whose identity the Respondent did not know). It was unclear whether the Respondent had, as required of a Respondent, asked these prospective witnesses to attend prior to asking the Standards Commission to cite them. The Respondent failed to clarify this, despite being asked to do so. Further, it was noted that the Respondent had failed, again despite being required and requested to do so, to set out the nature of the evidence such prospective witnesses might be able to provide. The Panel noted that the conduct of the Respondent could be seen as an attempt to frustrate the process itself. The Panel was obliged to take this into account in its assessment. The Panel noted that it could not reasonably accept indefinite adjournment or frustration of the process as a way to avoid a potential decision and sanction that could be adverse to the Respondent's interests. The Panel further noted that, by its very nature, the Hearing process could be stressful for any parties involved. This could not be avoided by protracting the process as any stress would simply recur on an adjourned Hearing. The Panel noted that the conclusion of the adjudication process could in fact help relieve any such stress and, as such, it may be in the Respondent's best interests for it to proceed and conclude the adjudicatory process.

Having considered carefully all these matters, the Panel reached the view that, on balance and in the particular circumstances of the case:

- the public interest in the expeditious disposal of the matter;
- the need to maintain the integrity of the ethical standards framework; and
- the overall interests of all the parties (including the Respondent),

outweighed the risk of prejudice or unfairness to the Respondent.

As such, the Panel decided it should proceed with the Hearing in the Respondent's absence.

## <u>Evidence Presented at the Hearing</u>

### Witness evidence on behalf of the ESC

The ESC's representative led evidence from two witnesses, being the complainers Councillor Alistair Mackay and Councillor Eddie Devine.

Councillor Mackay advised that he had volunteered to be a member of the Council's Emergency Board. When the Board met for the first time in response to the Covid-19 pandemic, on 20 March 2020, he had noted that the Respondent, who was not a member of the Board, had attended and had sat in the public gallery. Councillor Mackay advised that, the following day, the Respondent sent an email to the Council's Chief Executive, all elected members of the Council and the press criticising decisions taken by the Board and implying that he was unhappy to have been excluded from the meeting. Councillor Mackay advised that, as he considered the tenor of the Respondent's email to be inappropriate and unfair, he responded to it by email on 22 March 2020, noting that all elected members had been given the opportunity to volunteer to be on the Emergency Board, and asking the Respondent to apologise. Councillor Mackay stated that his complaint concerned an email the Respondent had sent to him on 24 April 2020, apparently in response.

Councillor Mackay noted that the Respondent's email of 24 April 2020 was sent from his Council email address and had been copied to all other elected members, council officers (including the Chief Executive), and two media outlets. Councillor Mackay noted that, in his email, the Respondent had:

- referred to Councillor Mackay, in his email of 22 March 2020, as having talked to him as if the Respondent was his "fu#£ing butler";
- ridiculed Councillor Mackay's clothes;
- questioned whether Councillor Mackay was "self-intoxicating";
- referred to Councillor Mackay having his "cocktail hour in the piano nobile at The Savoy, quaffing a burra peg and slapping orphans, thinking you're defying Hitler"; and
- referred to Councillor Mackay and his "chums" as "using other peoples [sic] money".

Councillor Mackay further noted that the Respondent had stated in his email that, "in any decent society someone would simply have come round to your hoose, amputated your right arm with a blunt spoon and hit you over the heid with the soggy end, you smug, self-satisfied, precious, pious, puffed-up pompous little prick."

Councillor Mackay advised that he had found most of the contents of the email and, in particular, the assertions about his character and lifestyle, as well as the suggestion that he might misappropriate funds, to be unprofessional, offensive and insulting. This was especially the case as the Respondent knew nothing about him and his assertions bore no resemblance to Councillor Mackay's lifestyle and circumstances. Councillor Mackay further advised that while he had initially considered the email to simply be another of the Respondent's "rants", he had become concerned, on reflection, about the reference to someone going to his house to inflict violence on him. Councillor Mackay advised that he had found this to be intimidating as he had never had any conversations or dealings with the Respondent, outwith the exchange of everyday salutations. In addition, Councillor Mackay explained that as he did not know who would see the email and did not know who might follow the Respondent, he was concerned that it could be taken as an invitation to fulfil the suggestion that he deserved to be the target of violence. Councillor Mackay advised that he had been sufficiently concerned, on receipt of the email, to contact the police.

In response to questions from the Panel, Councillor Mackay noted he had not had any interaction with the Respondent between his email of 22 March 2020 and the Respondent's reply of 24 April 2020. Councillor Mackay accepted that, however ill-judged, there was a possibility that the Respondent was attempting to be humorous or to engage in banter when making references to Councillor Mackay being the subject of violence, but advised that he had never heard the phrases used before and had not taken it that way and perceived the content of the email to be a possible threat.

The ESC's second witness, Councillor Devine, explained that the background to his complaint was that the Respondent had taken exception to the fact that Councillor Devine's daughter had been allocated a specific council house. Councillor Devine stated that his complaint in this regard concerned a series of emails on the subject that were sent by the Respondent over a period of seven months (in March, May, June, August and September 2019) to various other councillors (including Councillor Devine), senior officers and others; and, also, to comments the Respondent made at a full Council meeting on 27 June 2019. Councillor Devine advised that, in his emails, the Respondent had repeatedly accused him of seeking preferential treatment for his daughter and of inappropriately influencing the housing allocation decision. Councillor Devine advised that the accusations had escalated over time, with the Respondent then accusing senior officers of lying and bullying junior staff in order to cover up Councillor Devine's alleged involvement.

Councillor Devine drew the Panel's attention to an email from the Respondent of 11 March 2019, which was sent to him and all other elected members and copied to the Council's Director of Communities, Housing and Planning. Councillor Devine noted that, in this, the Respondent purported to be acting on behalf of a constituent Ms A. The Respondent stated that Councillor Devine had "managed to obtain" one of the Council's "most sought after and palatial properties" for his extended family, and daughter in particular, at the expense of Ms A. Councillor Devine noted that, in the email, the Respondent accused him of abusing his position of authority and of "cronyism".

Councillor Devine explained that he had no involvement at all in the allocation of the property in question. Councillor Devine advised that, in light of the Respondent's allegations, the allocation was the subject of two internal reviews; one undertaken by the Director of Communities, Housing and Planning and, the other, by the Head of Audit. After a motion proposed by the Respondent seeking an independent inquiry was agreed, Audit Scotland had then conducted an external, independent review. Councillor Devine advised that he had welcomed the review as he knew that he had done nothing wrong and wanted this to be established beyond all doubt. Councillor Devine confirmed that the investigations undertaken, including the one conducted by Audit Scotland, had found no impropriety or wrongdoing whatsoever.

Councillor Devine advised that he had been a councillor for some 15 years and was leader of the Labour group. Councillor Devine indicated that while the Respondent had been expelled from the Labour Party before he became the group leader, he nevertheless seemed to bear some sort of grudge, which involved him engaging, over a lengthy period of time, in verbal and written attacks on Councillor Devine and other Labour councillors. Councillor Devine advised that he had made a complaint to the ESC about the Respondent's email of 11 March 2019 as he had become "sick and tired of putting up with it", and was also upset that the Respondent had also involved his daughter.

Councillor Devine noted that after he had submitted his complaint to the ESC, the Respondent sent a further email, on 22 March 2019, to the Director of Communities, Housing and Planning that was again copied to all elected members, in which he had accused Councillor Devine of nepotism and of putting a more deserving family "out on the street to ensure the Devine dynasty continues its privileged, luxurious lifestyle". In this email, the Respondent indicated that the allocation of the property was a "disgraceful, venal, and a *prima facia* case of fraudulent misrepresentation which simply won't withstand independent examination". The Respondent stated that it was "an unconscionable act perpetrated by a nest of vipers, rife with greed, serial offenders not averse to putting their thumb on the scales if it can be advantageous to their brood."

Councillor Devine drew the Panel's attention to an email from the Respondent of 28 March 2019, which was sent to him and all other elected members and the Council's Chief Executive. Councillor Devine noted that, in this, the Respondent referred to him and another councillor as being "guilty of

lying by omission as to opposed to their daily routine of lying by commission", and of being "bullies who have abused their positions of power".

Councillor Devine referred the Panel to an email of 29 March 2019 from the Respondent, entitled 'Final Exorcist II', which he purportedly sent to a journalist and which was copied to the Council's Chief Executive. In this, the Respondent stated he had a "huge unrequited crush" on his boss and referred to an image of Councillor Devine's daughter springing up from a grave and "squealing like a banshee, her head rotating 360 degrees, spewing green projectile vomit". Councillor Devine advised that he had found the contents of the email to be particularly bizarre and scary, as he considered the words suggested that the Respondent was not in control of himself.

Councillor Devine advised that the Respondent kept falsely accusing him of interfering in the allocation of the property and also began to accuse council officers of covering up his alleged involvement. In this regard, Councillor Devine drew the Panel's attention to an email of 26 May 2019 the Respondent sent the Chief Executive, which was copied to all elected members, in which he stated she should "suspend the Director of Communities, Housing and Planning; Head of Planning and Chief Auditor pending an investigation into a cover-up of a cover-up or a white-wash on a white-wash, which ever you prefer." The Respondent had also suggested that the Chief Executive should consider her own position. The Respondent stated that he had "incontrovertible evidence to prove" that Councillor Devine was involved in the allocation of the property, that he had been "bullying and intimidating staff", and that he had "never done an honest days [sic] work in his life".

Councillor Devine noted that the Respondent had also accused officers of corruption and advised that he found this to be particularly frustrating as the officers had no means of defending themselves or any public right of reply. Councillor Devine also found the reference to him not having worked for a living to be disrespectful, as the Respondent knew this to be untrue. Councillor Devine stated that he was really angry that the Respondent had repeatedly called him a liar and a bully, when he was neither of those things.

Councillor Devine advised that at a full Council meeting on 27 June 2019, the Respondent proposed a motion calling for an independent inquiry into the allocation of the property, which was agreed unanimously. Councillor Devine confirmed that he had left the room while the motion was being discussed and voted upon, but advised that he had been happy with the outcome and decision to seek an independent inquiry, as he knew he had done nothing wrong. Councillor Devine advised that the meeting was recorded, with the recording thereafter published on the Council's website. Councillor Devine advised that he had later become aware that the Respondent had continued with his public accusations that Councillor Devine was guilty of corruption, cronyism and abuse of power at the meeting on 27 June 2019.

Councillor Devine advised that he had been particularly upset, angered and disgusted by an email the Respondent sent to the ESC on 16 August 2019, which was copied to the Council's Chief Executive and all elected members in which he had falsely accused Councillor Devine of being a "White Supremacist". In this email, the Respondent referred to his allegations that there had been a cover-up by senior council officials and stated that this resulted in a "broth of malfeasance, incompetence and inertia bordering on criminality".

Councillor Devine referred the Panel to an email of 6 September 2019, which had been copied to him, from the Respondent to the Council's Chief Executive, in which the Respondent accused the Chief Executive of a cover-up in respect of the housing allocation. The Respondent stated that he had "lifted a stone and uncovered a nest of vipers" and accused senior Council officers of "destroying and

doctoring documentation" and of "bullying, intimidating and coaching staff" involved in the allocation of the property to Councillor Devine's daughter.

Councillor Devine advised that the second part of his complaint concerned a motion he had lodged before a Council meeting, that took place on 27 February 2020, calling for the former Cabinet Secretary for Finance, Mr Derek Mackay, to resign from his role as a local Member of the Scottish Parliament in light of him having sent sending inappropriate texts to a 16-year old. Councillor Devine advised that, after his motion was lodged, the Respondent had sent him an email, copied to all other elected members, on 1 February 2020, in which he falsely accused Councillor Devine of having been "paid handsomely to assist in the cover-up" of similar, historic (but unrelated) conduct. Councillor Devine advised that not only was this was categorically untrue, but the Respondent knew it to be entirely false. Councillor Devine stated that, as such, the Respondent's accusation had left him feeling upset and angry.

Councillor Devine advised that while he was accustomed to having political disagreements with other councillors, it never went beyond that and became personal. Councillor Devine stated, however, that the Respondent's accusations amounted to personal attacks as well as to bullying and harassment. Councillor Devine advised that he felt the Respondent's behaviour had become increasingly bizarre over time and threatening in nature to the extent that he had become concerned about his family's safety. Councillor Devine advised that he had therefore contacted the police, who had offered to provide panic alarms to him and his daughter, which following family discussions involving Councillor Devine, his wife and daughter, they decided not to introduce into their homes due to concern regarding the impact the explanation of the arrival of the alarms might have on Councillor Devine's (at the time school aged) grandchildren. Councillor Devine stated that he was unsure whether his daughter, who had also been elected to the Council, would seek re-election due to the impact of the Respondent's behaviour.

In response to questions from the Panel, Councillor Devine stated categorically, on oath, that he had not at any time contacted any council officer regarding the allocation of the property ultimately allocated to his daughter. Councillor Devine accepted that the Respondent was entitled to make representations on behalf of his constituent, Ms A, about the housing allocation but that it was his insistence on making serious and false accusations about both Councillor Devine and senior council officers, with the associated distress caused to his family that was the issue. Councillor Devine further accepted that 'rough and tumble' was part and parcel of political life but that he considered the Respondent's behaviour went far beyond that.

**Submissions made by the ESC's Representative**

The ESC's representative noted that there had been a number of opportunities at the investigation stage for the Respondent to have denied being the author of the emails in question, which appeared to have been sent from his Council email address. The ESC's representative argued that as the Respondent had not taken any such opportunity, the Panel was entitled to conclude the emails had been sent by him. Similarly, having viewed the video recording of the Council meeting on 27 June 2019, and in the absence of any evidence or assertions to the contrary, the Panel was entitled to accept the remarks attributed to the Respondent at the meeting as having been made by him.

The ESC's representative advised that the Respondent's constituent, Ms A had sent a letter of complaint to the Council, dated 26 April 2018, alleging that there had been corruption involved in relation to the allocation of the council property to Councillor Devine's daughter. The Council's Head of Planning and Housing Services had responded advising that, following investigation, he was satisfied that the process and procedures had been followed correctly. The ESC's representative noted that the

Respondent had then become involved in the matter and, as a result of his intervention, the Council's Director of Communities, Housing & Planning had undertaken a further review. The Director of Communities, Housing & Planning had concluded that the property allocation was made entirely in accordance with policy and that there was no influence, or opportunity for influence, over the selection process, by any elected member. The Respondent had been informed accordingly in an email of 12 March 2019.

The ESC's representative advised that when the Respondent indicated he was unwilling to accept the findings of this review, the Director of Communities, Housing & Planning had asked the Council's Chief Auditor to investigate his concerns. Following investigation, the Council's Chief Auditor informed the Respondent, in correspondence dated 17 May 2019, that her independent review had concluded that the Council property was appropriately let to Councillor Devine's daughter and that there was no influence, or opportunity for influence, over the selection process, by any elected member.

The ESC's representative noted that after the Respondent's motion calling for an independent inquiry into the allocation of the property was agreed at the full Council Meeting on 27 June 2019, the matter was referred to Audit Scotland. Audit Scotland undertook an investigation and reported, in November 2019, that it had concluded that there was no evidence to suggest that: (a) Ms A was wrongly deprived of the allocation of the property; (b) there was deliberate manipulation of the waiting list or the property allocation process; and/or (c) there was any attempt to manipulate the allocations process by, or at the request of, elected members of the Council.

The ESC's representative noted that despite the Respondent having alleged that he had "incontrovertible evidence" to support his accusations that Councillor Devine had been involved or had influenced the property allocation decision, and despite being asked to do so, the Respondent had never produced or provided any.

The ESC's representative argued that, in continuing over a long period of time, to make unfounded accusations of wrongdoing about Councillor Devine and senior officers in emails and at the council meeting, without providing any proof whatsoever, the Respondent's conduct had been entirely disrespectful and amounted to a breach of paragraphs 3.2, 3.3, 3.5, 3.7, and paragraphs 2 and 20 of Annex C of the Code.

The ESC's representative contended that the accusations were of a serious nature and had been combined with offensive and abusive comments about Councillor Devine and his daughter. This had included the entirely false and gratuitous accusation that Councillor Devine was a "White Supremacist" and was not hard-working, and an equally gratuitous and disturbing reference to his daughter emerging from a grave. The ESC's representative argued that the distressing impact of the comments and accusations had been compounded by the fact that the Respondent had copied multiple individuals into his emails. The ESC's representative argued that, in doing so, it was evident the Respondent was attempting to publicly undermine and demean Councillor Devine and the officers in question.

The ESC's representative noted that, rather than being reassured by the reviews of the housing allocation that had been undertaken at his behest and even after all the investigations had entirely cleared Councillor Devine of having any involvement in the housing allocation matter, the Respondent had continued with his unrelenting attacks on him and, indeed, had targeted others. The ESC's representative noted that the Respondent had proceeded to accuse senior officers of impropriety, of covering-up the matter and of bullying other staff and had even suggested certain individuals be suspended. The ESC's representative noted that the Respondent had done so at the Council meeting

on 27 June 2019, despite the video footage of the meeting demonstrating that the Chair had reminded those present that the Code prohibited elected members from criticising officers in public.

Turning to Councillor Mackay's complaint, the ESC's representative noted that while the Respondent's email of 24 April 2020 appeared to have been sent in response to Councillor Mackay's email about the Emergency Board's work or decisions, the Respondent had made no attempt to outline any concerns he may have had about these. The ESC's representative contended that, instead, the Respondent's email amounted simply to personal attack on Councillor Mackay and appeared to be designed to be offensive and disrespectful. The ESC's representative noted that the email had been sent to a media outlet (albeit it appeared to be incorrectly addressed), and had been copied to multiple individuals. The ESC's representative contended that it was evident, therefore, that the Respondent's intent was to publicly demean, disparage and ridicule Councillor Mackay.

The ESC's representative drew the Panel's attention to the Standards Commission's Advice Note on Bullying and Harassment, which notes that:

- harassment is any unwelcome behaviour or conduct that has no legitimate workplace purpose and which makes someone feel offended, humiliated, intimidated, frightened and / or uncomfortable;
- bullying is inappropriate and unwelcome behaviour that is offensive and intimidating, and which makes an individual or group feel undermined, humiliated or insulted;
- even if behaviour is unintentional, it can still be classed as a form of bullying or harassment as it is essentially about what the recipient deems to be offensive, not about what was intended;
- harassment can occur as an isolated incident or as a course of persistent behaviour; and
- while bullying tends to be a pattern of behaviour or course of conduct, it can also be a one-off serious incident that becomes objectionable or intimidating.

The ESC's representative argued that the relentless and offensive nature of the Respondent's attacks on Councillor Devine, over a lengthy period of time, amounted to bullying and harassment. The ESC's representative further contended that the intimidatory nature and tone of the Respondent's email to Councillor Mackay and the clear intent to demean, humiliate and insult him also amounted to bullying and harassment. As such, the ESC's representative contended that the Respondent had also breached paragraph 3.6 of the Code in respect of both complaints.

The ESC's representative noted that the enhanced protection of freedom of expression, afforded by Article 10 of the European Convention on Human Rights (ECHR), to politicians when they are engaging in matters of public debate or concern, can apply to value judgements made in a political context. Such comments are tolerated even if untrue, so long as they have some or any factual basis. In this case, the ESC's representative argued that it could not be said that there was any factual basis for the Respondent's accusations about Councillor Devine being inappropriately involved in the property allocation. This was because the Respondent had never provided any evidence to support his claims, despite stating he had such evidence in his possession and being given the opportunity to do so; and further, because he had not awaited the outcome of any of the reviews to determine if there was any merit in his claims, before he proceeded to repeat and escalate them. The ESC's representative noted that the Respondent had also not provided any evidence or any basis to support the entirely false claim he made in his email of 1 February 2020 to the effect that Councillor Devine had been involved in the cover-up of inappropriate behaviour.

The ESC's representative contended, in any event, that the protection afforded by Article 10 did not extend to the making of gratuitous, abusive and offensive personal comments that caused other individuals to feel intimidated. The ESC representative noted that the Standards Commission's Advice Note on Article 10 recognises that while councillors should be able to undertake a scrutiny role,

represent the public and any constituents, and make political points, it notes that there is no reason why they cannot do so in a respectful, courteous and appropriate manner without resorting to personal attacks, being offensive, abusive and / or unduly disruptive. As such, the ESC's representative concluded that the interference to the Respondent's right to freedom of expression resulting from any finding of a breach of the Code and the application of a sanction would be proportionate and justified.

In response to questions from the Panel, the ESC's representative accepted that the Respondent was entitled to pursue the housing allocation matter on behalf of his constituent, Ms A. The ESC's representative argued, however, that it was the manner in which the Respondent had done so and the tone, words and imagery he had used, that was the issue. The ESC's representative contended that the Respondent had accused officers of serious misconduct, without having the courtesy of waiting for the outcome of the independent review, and had then rejected its findings despite without producing any evidence or reasonable argument as to why. The ESC's representative further accepted that, as a politician, the Respondent was entitled to engage in political debate and to use language that was colourful and emotive. The ESC's representative contended, nevertheless, that the Respondent had gone well beyond that and, instead, had indulged in hostile and offensive abuse, that contained references to violence.

**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 Mack.

2. In respect of the complaint by Councillor Devine, the Respondent had breached paragraphs 3.2, 3.3, 3.5, 3.6, 3.7, and paragraphs 2 and 20 of Annex C of the Code.

3. In respect of the complaint by Councillor Mackay, the Respondent had breached paragraphs 3.2 and 3.6 of the Code.

**Reasons for Decision**

The Panel noted that paragraph 3.1 of the Code makes it clear that section 3 of the Code applies in situations where the Respondent is acting as a councillor or could be perceived to be acting as such. The Panel noted that the Respondent's alleged conduct in respect of the complaints occurred in emails, which had all been sent from his Council email address, and at a council meeting. In addition, the conduct related to the Respondent's response to the allocation of a council property, a council motion raised in respect of a local MSP, and an email about the work of the Council's Emergency Board. As such, the Panel was satisfied that the Respondent was acting, or could reasonably be perceived to be acting, in the capacity of a councillor at the time he participated in the Council meeting and sent the emails in question. The Panel concluded, therefore, that the Code applied to all aspects of the two complaints before it.

The Panel noted that both witnesses had given evidence in a measured way. The Panel was satisfied that both had been careful to be as objective and factual as possible and, as such, considered them to be credible and reliable. The Panel was further satisfied, on the balance of probabilities, from the material before it (and in the absence of any evidence or submissions to the contrary), that the Respondent had sent the emails and made the remarks that were the subject of the complaints.

Turning first to Councillor Devine's complaint, the Panel accepted that the Respondent was entitled to raise concerns about the allocation of council housing, particularly if he was doing so on behalf of a constituent. The Panel noted, however, that it was the manner in which the Respondent pursued the matter that had given rise to Councillor Devine's concerns. The Panel agreed with the ESC's representative that councillors should be able to undertake their scrutiny role, represent the public and any constituents, and make political points in a respectful, courteous and appropriate manner, without resorting to personal attacks or being offensive and abusive. The Panel noted that it was evident from the Respondent's correspondence that he was an articulate individual and considered, therefore, that there was no reason why he could not have represented Ms A and raised any concerns she may have had at the outset, in respect of the housing allocation matter, in an appropriate manner.

The Panel noted that two senior Council officers had conducted separate reviews of the Respondent's concerns about the housing allocation and that it was then the subject of an independent inquiry by Audit Scotland. The Panel was satisfied, therefore, that there was evidence that officers dealt with the Respondent's concerns and ensured they were investigated. The Panel noted that the Respondent had failed to provide evidence to support his allegations, despite stating he had such evidence and despite having had numerous opportunities to do so. The Panel found that the Respondent refused to await and / or accept the outcome of both the internal and external reviews before making serious accusations about the conduct of Councillor Devine and senior Council officers.

The Panel noted that Councillor Devine had confirmed, on oath, that he had not, at any time, interfered or become involved in the allocation of the property ultimately allocated to his daughter. The Panel noted that the investigations undertaken had found no impropriety whatsoever.

The Panel was satisfied that, instead of accepting the outcome of the reviews or providing evidence to dispute them, the Respondent had embarked upon an unrelenting course of conduct in which he accused Councillor Devine of lying, corruption and cronyism, and of being a White Supremacist and a bully.

The Respondent had further accused senior officers of covering up the housing allocation matter, of bullying and intimidating staff and of engaging in conduct that was bordering on the criminal. The Panel was satisfied that the Respondent's accusations, made in numerous emails over an extended period of time, as well as at the Council meeting on 27 June 2019, amounted to personal attacks and were offensive and abusive. The Panel also considered that, in copying in all elected members to some of the emails, in purportedly sending one to a newspaper and in making comments at a full Council meeting, the Respondent had made his accusations public. The Panel was of the view that, in doing so, it was evident that the Respondent either actively wished to inflict reputational harm, or had failed to give any consideration to the fact that he might do so.

Having reviewed all the evidence, both in the productions (including the video recording of the Council meeting on 27 June 2019), and given verbally at the Hearing, The Panel was particularly concerned that the Respondent:

- Accused Councillor Devine of having given his daughter the property, in an email to the Director of Communities, Housing & Planning of 22 March 2019 that was copied to all elected members. In the email, the Respondent accused everyone involved in the housing allocation of fraud.
- Made comments in an email to the Chief Executive, on 28 March 2019, that was copied to all other elected members, to the effect that Councillor Devine and another councillor had abused their positions of power and had lied.
- Accused the Chief Executive, in an email of 29 March 2019 purportedly sent to a columnist for the Observer newspaper (which was copied to the Chief Executive and Councillor Devine), of having prevented a more deserving family from getting the council house that had been allocated

to Councillor Devine's daughter. In the email the Respondent accused Councillor Devine of intimidating and bullying Council officers.
- Called for the Director of Communities, Housing and Planning, the Head of Planning and the Chief Auditor to be suspended, in an email of 26 May 2019 to the Chief Executive and all other elected members, and stated that the Chief Executive should consider her own position. The Respondent alleged that their complete absence of any attempt to recognise the plight of the individual who had missed out on the allocation of the council property in question was "bordering on the criminal".
- Made comments at the Council meeting on 27 June 2019, to the effect or insinuated that Councillor Devine had inappropriately intervened or "meddled" in the council property allocation process to benefit himself or his family; and that the Council and its officers had covered this up. The Panel noted the Respondent had also stated that there were councillors who had "rigged" the Council property allocation system to ensure their family gained an advantage and that it was "patently obvious" the system was "rotten".
- Referred, to Councillor Devine as a "White Supremacist" in an email of 16 August 2019, sent to the ESC, which was copied to the Council's Chief Executive and all other elected members.
- Accused senior officers of the Council, in an email to the Chief Executive of 6 September 2019, of "coaching witnesses and destroying and doctoring documentation" to suit their "whitewash of a cover-up", and of "bullying, intimidating and coaching staff" involved in the allocation of the Council property.

In respect of Respondent's conduct arising from the motion Councillor Devine lodged before a Council meeting on 27 February 2020 calling for the former Cabinet Secretary for Finance to resign from his role as a local MSP, the Panel was satisfied that the Respondent sent an email to Councillor Devine, on 11 February 2020, with all other elected members copied in, in which he stated that there was "something creepy" about Councillor Devine "leading the charge" on the former Cabinet Secretary for Finance's resignation. The Respondent stated that he considered that Councillor Devine had been "paid handsomely to assist in a cover-up" of crimes or conduct "of a similar nature".

The Panel noted that Councillor Devine had confirmed categorically, under oath, that the Respondent's accusations, as outlined in the email, were untrue. The Panel further noted that the Respondent had, again, failed to provide any evidence to support such serious accusations. The Panel concluded that the Respondent's conduct, in accusing Councillor Devine of misconduct that bordered on criminality, without any basis or foundation, again amounted to a personal attack and was gratuitous, unwarranted and abusive. The Panel was of the view that the pattern of making gratuitously offensive and damaging comments was also apparent in the email.

The Panel considered that in persisting with unrelenting personal attacks of an offensive and abusive nature towards Councillor Devine, over a lengthy period of time, the Respondent had engaged in conduct that was, or would have been, intimidating. The Panel noted that Councillor Devine had felt sufficiently threatened by the Respondent's behaviour to contact the police. The Panel was of the view that this was a reasonable course of action to take, give the disturbing nature of some of the imagery the Respondent had employed and given the public manner in which he had made his accusations and remarks. The Panel concluded, therefore, that the Respondent's conduct was not only disrespectful, but also amounted to bullying and harassment. The Panel further considered that in making serious and unwarranted public accusations about the conduct of officers, the Respondent's conduct was offensive and fell well below the standard to be expected of a councillor, as required by the Code.

In respect of Councillor Devine's complaint, therefore, Panel concluded that the Respondent had, on the face of it, failed to comply with paragraph 3.2, 3.3, 3.5, 3.6, 3.7 and paragraphs 2 and 20 of Annex C of the Councillors' Code of Conduct of the Code, which oblige councillors to:

- treat officers and their colleague with respect at all time, including at Council meetings;
- avoid any conduct that amounts to bullying and harassment; and
- refrain from raising matters relating to the conduct or capability of officers in public.

Turning to the second complaint, the Panel was satisfied that the Respondent had made a number of gratuitous personal comments and offensive, demeaning remarks about Councillor Mackay in his email of 24 April 2020. These included insinuating that Councillor Mackay had treated him like a servant and been under the influence of alcohol or drugs when sending an email. In addition, the Panel noted that the Respondent had made lurid remarks about someone going to Councillor Mackay's house and inflicting personal harm on him. The Panel noted that Councillor Mackay had found the remarks to be intimidatory in nature; sufficiently so for him to contact the police about the matter. The Panel considered that the contents of the email were intimidating, disrespectful and demeaning. The Panel further considered that as the email was widely circulated, thus inviting public ridicule, the Respondent's conduct in sending it amounted to harassment towards Councillor Mackay. The Panel determined, therefore, that the Respondent had also, on the face of it, breached paragraphs 3.2 and 3.6 of the Code in respect of Councillor Mackay's complaint.

The Panel noted, however, that before coming to a final finding on the complaints, it was obliged to consider the provisions of Article 10 of the ECHR and the Respondent's the right to freedom of expression.

The Panel accepted that some of the Respondent's comments and statements concerned matters of public interest, namely the allocation of council housing and the resignation of the Cabinet Secretary for Finance. As such, the Panel noted that the Respondent could attract the enhanced protection of freedom of expression afforded under Article 10. The Panel noted that the Courts have interpreted Article 10 widely and have found that the enhanced protection for politicians can even extend to comments which some may consider to be inappropriate, offensive and emotive. In addition, comments made in the political context which amount to value judgments are tolerated even if untrue, so long as they have some or any factual basis.

In this case, however, the Panel was satisfied that as:

- the accusations about the housing allocation matter had progressed after the two internal reviews found no wrong-doing;
- no evidence of wrong-doing was produced, despite the Respondent saying he had "incontrovertible evidence", and despite him having been given opportunities to provide this;
- the Respondent persisted, during the Audit Scotland review, with wholly unfounded accusations of a cover up and malfeasance by officers; and
- there was no evidence of wrongdoing or manipulation of the process,

it was not possible to conclude that the allegations had any basis in fact or that the Respondent had any reasonable basis for continuing to believe or contend they had any factual basis.

In any event, the Panel noted, however, that gratuitous personal accusations and / or comments that amount to simple offensive abuse do not attract the enhanced protection afforded to politicians. The Panel was of the view that, when viewed individually, and as whole, the comments and accusations as made by the Respondent, as quoted, were of that nature. As such, the Panel concluded that the Respondent was not entitled to the enhanced protection for political expression afforded under Article 10.

The Panel concluded that the Respondent's conduct was unacceptable and that, as such, it was satisfied that a finding of breach, and subsequent application of a sanction, was justified in the circumstances and would not amount to a contravention of Article 10.

The Panel determined, therefore, that the Respondent had contravened paragraphs 3.2, 3.3, 3.5, 3.6, 3.7 and paragraphs 2 and 20 of Annex C of the Councillors' Code of Conduct.

**MITIGATION**

The Respondent was advised that he could send written submissions in respect of mitigation or the sanction to be applied in advance of the Hearing, to be considered by the Panel in the event that a breach of the Code was found. The Respondent had not taken advantage of this opportunity.

**SANCTION**

The decision of the Hearing Panel is to disqualify the Respondent, Councillor Mack, for a period of 16 months, from being, or from being nominated for election as, or from being elected, a councillor; with effect from the date of this written decision.

The decision is made in terms section 19(1)(d) of the Ethical Standards in Public Life etc. (Scotland) Act 2000.

**Reason for Sanction**

In considering sanction, the Panel noted that, despite being provided with an opportunity to do so and repeatedly reminded of this opportunity on a number of occasions, the Respondent failed to offer any submissions in mitigation.

In making its decision on sanction, the Panel has had regard to the Standards Commission's Policy on the Application of Sanctions, a copy of which was sent to the Respondent with the notification of Hearing. 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 noted that disrespect, bullying and harassment towards officers and other councillors is serious in that it has the potential to disrupt effective working relations and can be a threat to reputation of the council and the role of an elected member. The Panel was of the view that officers, in particular, should be able to work in an environment where they are not subjected to unwarranted and serious public criticisms and accusations. The Panel was especially concerned that the Respondent had continued to subject senior officers to repeated and unmerited abuse, despite them having agreed to review the housing allocation matter.

The Panel was concerned about the scale and seriousness of the allegations made, particularly in the context of the Respondent having not provided any evidence to support his accusations and the officers having no right of public reply. The Panel was keen to emphasise that councillors have a right to challenge officers and have a key role in scrutinising the service provided by their local authority. The Panel reiterated, however, that this did not entitle councillors to ignore any response received and evidence provided or to make (and continue to make) unfounded accusations.

The Panel was also concerned about the nature of the Respondent's correspondence with the complainers. The Panel was concerned that he had made extremely serious and wholly unfounded allegations against Councillor Devine and had subjected both complainers to offensive and demeaning personal attacks that went well beyond what might be considered normal or even acceptable in a party-political context and, instead, amounted to harassment. The Panel was of the view that, as

politicians, councillors may be expected to tolerate a degree of inappropriate, emotive or even offensive criticism. They should not, however, have to put up with being harassed or being made to feel unsafe. 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.

The Panel noted that the following mitigating factors applied and, as such, took them into account:

- that the Respondent had attended two training sessions offered by the Standard Commission, one in December 2017 and the other in February 2020.
- that the Respondent has been a councillor, and had, therefore been in public service, for some 13 years in total; and
- that the breaches of the Code conferred no apparent personal gain or benefit to the Respondent (other than to potentially promote a misguided perception that he was somehow acting in the best interests of his constituents).

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 following aggravating factors applied and, as such, took them into account:

- the duration and frequency of the Respondent's actions. The Panel noted that the breaches of the Code arose from a course of conduct, of a repeated nature, that took place over a lengthy period of time;
- the breach having occurred as part of deliberate conduct. The Panel was satisfied, on the balance of probabilities, that the nature of the emails and in-person attacks were such that the conduct was intended to be disrespectful, to cause offence and to harass;
- that there had been two previous contraventions of the Code by the Respondent. The Respondent had been suspended for three months in October 2016 and then for seven months in October 2017, both for breaches of the respect provisions in the Code;
- that there was no evidence of any understanding, reflection, insight and/or acceptance by the Respondent in relation to his actions. The Panel considered this this failure was exacerbated particularly when the earlier contraventions were taken into account and led it to the conclusion that the Respondent had failed to learn from the previous two suspensions. There was no evidence that the Respondent had made any attempt to moderate his behaviour or indeed to consider how it could impact others. Rather, the Respondent had previously expressed his disdain and disregard for the statutory framework in place to promote and uphold the Code, despite having signed his Declaration of Office on 5 May 2017 confirming that he would abide by its provisions;
- at no point had the Respondent indicated any remorse over his behaviour, nor had he offered an apology to any individuals affected by his behaviour;
- the Respondent had failed to co-operate in any meaningful way with either the investigative or adjudication process and the Standards Commission;
- the Respondent had not taken any opportunity to rectify his actions;
- the Respondent had continued with his course of conduct/behaviour even after it was brought to his attention. The Panel noted that the first complaint was received by the ESC in March 2019, who made the Respondent aware of the complaint shortly thereafter. Despite this, the second complaint relates to an email that was sent in April 2020; and

- the Respondent appears to have ignored the training on the Code provided by the Standards Commission at the training events held in Glasgow on 15 December 2017 and in Ayr on 4 February 2020, which he attended.

Though not specifically listed as a potentially aggravating factor in the Policy on the Application of Sanctions, the Panel again considered the Respondent's length of service as a councillor and noted that, in addition to being a mitigating factor, it should also be considered as an aggravating one. This was because the Respondent has had some nine years as an elected member to familiarise himself with the initial version of the Councillors' Code of Conduct, which came into force in May 2003 and the subsequent versions, which came into effect in December 2010 and July 2018. Indeed, the Code itself specifies at section 1.5 that it is a councillor's personal responsibility to comply with the Code and any guidance from the Standards Commission. The Panel considered that there was little evidence that the Respondent had taken any heed of this obligation.

The Panel regarded one of the principal aims of the use of sanctions to be the preservation of the ethical standards framework. The public must have confidence in the framework and the statutory instruments that underpin it, such as the Councillor's Code of Conduct, the ESC and the Standards Commission. On this particular point, the Panel noted that, throughout, the Respondent had acted with blatant disregard for the adjudication process. The Respondent had almost entirely failed to co-operate with the Hearing Rules and had not provided the information requested to allow the process to proceed promptly.

The Panel considered that the public cannot be satisfied that Councillors will comply with their Code if the Standards Commission cannot enforce it. The actions of the Panel and the sanctions given must act as a credible deterrence.

Having weighed up all mitigating and aggravating factors, and particularly in light of lack of remorse, insight and the fact that the conduct occurred despite the two previous suspensions, the Panel determined that it had no confidence that the Respondent would change his behaviour and adhere to the requirements of the Code. Indeed, the Panel noted that the Respondent had indicated, both at previous Hearings and in recent correspondence to the Standards Commission that was "theologically opposed" to the ethical standards framework and argued that his "right to absolute privilege as a politician" trumped any need to comply with the Code. The Panel did not, therefore, consider censure or suspension to be appropriate or potentially effective disposals in this case. As such, the Panel noted that disqualification was then the only remaining option.

The Panel noted that disqualification would result in Respondent losing the allowance to which he is entitled to as a councillor. The Respondent had previously advised the Standards Commission this was his only source of income. The Panel nevertheless considered disqualification to be the only disposal that would prevent the Respondent's conduct from recurring, thus protecting those who have been, and others that potentially could be, affected by his behaviour. This was because a suspension only affects a councillor's entitlement to attend future Council meetings and would not prevent the Respondent from engaging in disrespectful conduct or from bullying and harassing others, either in correspondence or in person, outwith a meeting setting. Indeed, the Panel noted that the Respondent's previous suspensions had had no discernible effect on his behaviour.

The Panel also noted that there was a significant public interest in this case in maintaining effective working relationships and public confidence both in local government and the role of a councillor, and that this aim could only be achieved through a lengthy disqualification, which the Panel determines is necessary, proportionate and appropriate in the circumstances.

In considering the appropriate duration for the disqualification period, the Panel noted that the maximum period of disqualification was for a period of five years. The Panel was of the view that a disqualification for a period that extended towards that maximum duration would be appropriate, for example, for cases involving criminal behaviour that did not result in automatic disqualification as a councillor, under Section 31 of the Local Government (Scotland) Act 1973 (for convictions that result in a custodial sentence of more than three months) or other egregious conduct. In this case, the Panel considered that as the Respondent's conduct did not reach this threshold, a maximum period of disqualification would be disproportionate. Equally, however, the Panel noted that the sustained and serious nature of the Respondent's conduct was such that a brief disqualification would not be proportionate.

Following careful consideration, the Panel determined that a disqualification period of a third of the maximum duration would reflect the nature and seriousness of the breach and the considerations noted above, and therefore a period of 20 months was appropriate. The Panel agreed, however, that it was fair for it to discount four months from this, to represent the period between the start of October 2020 (when the disqualification imposed at the previous Hearing took effect) until 4 February 2021 (this being the date of the Interlocutor from the Sheriff Principal in the appeal quashing the previous Hearing decision). This was because the appeal decision essentially meant the Respondent had already served four months of disqualification for reasons that were not his fault.[i] Having undertaken this exercise, the Panel determined to disqualify the Respondent for 16 months. The Panel noted that Renfrewshire Council had confirmed that the Respondent had been paid the allowance to which he was entitled, as a councillor, for the period covered by the previous suspension.

The Panel noted that, given the set nature of the electoral cycle, there inevitably may be occasions when the timing of an adjudication decision and date on which a disqualification might expire might result in the sanction having a disproportionate effect upon a Respondent due to the date of an election. In this case, the Panel noted that the period of disqualification imposed means that the Respondent will be unable to stand for election in the Local Government elections due to take place in May 2022. The Panel was of the view, however, that any effect arising from the timing of the election should, in all the circumstances of this case, not impede what the Panel considered to be the fair, just and reasonable period of disqualification and it was neither disproportionate nor did it outweigh an overriding public interest in the imposition of a sanction that would:

- act as a credible deterrent;
- protect others from intimidating and offensive behaviour;
- maintain public confidence in the ethical standards framework, local government and the role of a councillor;
- ensure effective working relationships were maintained, to enable a Council to function effectively; and
- reflect its view that, as someone who was not prepared to abide by the Code, the Respondent was not fit to hold office as a councillor.

The disqualification is effective from the date of this written decision.

**RIGHT OF APPEAL**

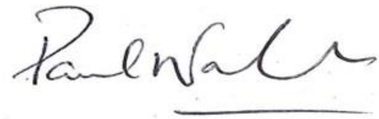
The Respondent has a right of appeal in respect of this decision, as outlined in Section 22 of the Ethical Standards in Public Life etc. (Scotland) Act 2000, as amended.

**Date:** 10 May 2021

STANDARDS COMMISSION FOR SCOTLAND

INTEGRITY IN PUBLIC LIFE

**COUNCILLOR PAUL MACK**
**RENFREWSHIRE COUNCIL**



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

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[i] It should be noted that the period to be discounted was incorrectly noted, in the decision read verbally at the Hearing, as being between the start of October 2020 and 7 April 2021 (being the date on which the new Hearing was due to take place, after an adjournment had been granted at the Respondent's request). The Panel subsequently recognised that, in fact, the Respondent was a councillor from the date the previous Hearing decision was quashed (4 February 2021) and, therefore, had served a four-month suspension, and not six, as described. The Panel adjusted the overall disqualification time accordingly.