

ACTING COMMISSIONER'S REPORT

Under s9 of the Scottish Parliamentary Standards Commissioner Act 2002, as amended ("the Act").

Confidentiality

The Act requires that the investigation process shall be conducted in private.

Case Ref:		MSP/3485
Date:		27 August 2021
Complainer(s):		Ms Fiona Johnston and Ms Elizabeth Tennet
COMPLAINT AGAINST		
Respondent:		Adam Tomkins (former MSP)
	Former Member for:	Glasgow (Region)
	Party:	Scottish Conservative and Unionist Party

Acting Commissioner's conclusion:

I have concluded that the respondent has breached the following relevant provision:

- Section 7 paragraph 5 of the Code of Conduct for Members of the Scottish Parliament, 7th Edition, 2nd Revision, dated 7 January 2020.

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Executive summary

The conduct complained about can be summarised as follows:

The MSP concerned posted the following Tweet on his Twitter account on 1 March at 6:23 pm:

“Swinney does the right thing not because it’s the right thing to do but only because it’ll save his neck. Devious unscrupulous manipulative little man.”

It was apparent from the name of the account (Adam Tomkins MSP) that the respondent had posted these comments in his capacity as a member of the Scottish Parliament. Two complaints were submitted to me on 2 March, each of which contended that the Tweet represented disrespect towards another MSP on the part of the respondent.

The Tweet was posted in the context of an upcoming debate on a Motion of No Confidence in Mr Swinney (motion S5M-24260), due to be held in the chamber on 10 March 2021. The Motion moved was as follows:

“That the Parliament has no confidence in the Deputy First Minister, in light of the Scottish Government’s continued failure to publish legal advice called for in two resolutions of the Parliament on 4 and 25 November 2020.”

During the course of this debate, Mr Swinney confirmed the legal advice had been provided in the previous week.

The respondent has confirmed that he posted the Tweet and also referred to the context in which he did so.

The respondent has also contended that each of the adjectives that he used can be defended as part of the robust exchange of political views that took place between the parties on the issues that arose out of Mr Swinney's conduct. He further contended that they are not discourteous or disrespectful of Mr Swinney but rather that they drew attention to the ways in which (in the political judgment of the respondent) Mr Swinney was discourteous and disrespectful of the Parliament.

I have concluded that the conduct complained of is proved as a matter of fact.

Section 7 paragraph 5 of the Code of Conduct for Members of the Scottish Parliament, 7th Edition, 2nd Revision, dated 7 January 2020 requires members to treat other members with courtesy and respect.

I have concluded that the respondent's conduct in posting his Tweet represented a breach of this provision. In reaching this conclusion I have taken account of the context in which the Tweet was posted as well as the respondent's argument to the effect that the content of the Tweet represented a robust exchange of political views. I have also taken cognisance of Article 10 of the European Convention on Human Rights (ECHR) as it applies in the circumstances.

Introduction

The Act established a Commissioner to investigate complaints about the conduct of MSPs and report upon the outcome of such investigations to the Scottish Parliament.

The purpose of this document is to report on the outcome of the Acting Commissioner's investigation.

Background

1. The respondent is a former MSP for Glasgow (Region) and was first returned in May 2016.
2. The complainers submitted complaints to me dated 2 March 2021. The complaint material received is attached, with contact details redacted, as **Appendix 1**.
3. The complaints I received can be summarised as follows: the respondent posted a Tweet that was "derogatory", "vile", "offensive" and "a very personal attack, which shows a lack of courtesy and respect". Both made specific reference to the relevant section of the Code of Conduct.

The complaint

4. The conduct complained about is as follows:

Complaint

1. The respondent posted a Tweet on Twitter in his capacity as an MSP about another member, the content of which was derogatory and personal in nature and therefore disrespectful.

Admissibility of the complaint

5. Section 6 of the Act requires me to complete an assessment of admissibility of the complaint, known as "Stage 1". The 3 tests relate to:
 - relevancy;
 - specific requirements relating to form, content and execution;
 - whether the complaint warrants further investigation if it appears after an initial investigation that the evidence is sufficient to suggest the conduct complained about may have taken place.
6. I required to conduct an initial investigation at stage 1 to assess whether the evidence was sufficient to suggest that the conduct complained about had taken place. The relevant Code of Conduct paragraphs that I considered were set out in

Section 7 paragraphs 5 and 6 of the Code of Conduct for Members of the Scottish Parliament, 7th Edition, 2nd Revision, dated 7 January 2020.

7. I wrote to the respondent on 19 March to ask him to verify whether he had posted the Tweet referred to by the complainers and, if so, to request his responses to the issues raised by them.
8. The respondent replied to me on 6 April by email in response to a reminder email of 1 April. His full response is set out below:

"Thank you for your email, and I'm sorry that you've had some trouble reaching me.

I confirm that I wrote and sent the Tweet complained of. In my view it does not breach the Code of Conduct. Were those comments to have been uttered in the Chamber the Presiding Officer would not have ruled them out of order. There is nothing "unparliamentary" in what I wrote.

I grant that the words in the Tweet are robust and -- very unusually for me -- they are targeted on a person rather than on an idea or argument. But that is because the issue addressed by the Tweet is Mr Swinney's honour. As you will know, the issue was why Mr Swinney chose not to adhere to two Motions passed by the Scottish Parliament until his own job was on the line (in the form of a Motion of No Confidence (MONC)). I do consider that it was devious, unscrupulous and manipulative of Mr Swinney effectively to ignore the two parliamentary Motions until after the MONC was put down -- that is what I was drawing attention to in the Tweet. I also consider that in acting in this way Mr Swinney belittled both himself and his office (and, indeed, the Parliament).

As such, each of the adjectives I used can be defended as part of the robust exchange of political views that took place between the parties on the issues that arose out of Mr Swinney's conduct. They are not discourteous or disrespectful of Mr Swinney. On the contrary they draw attention to the ways in which (in my political judgement) Mr Swinney was discourteous and disrespectful of the Parliament.

For these reasons I do not consider that I have breached the terms of the Code of Conduct.

I hope this is helpful and provides you with the information you need, but please do come back to me if you require anything further or if I have misunderstood anything.

9. I considered the response provided by the respondent and the relevant provisions of the Code alongside guidance and case law on application of Article 10 of the European Convention on Human Rights (ECHR).
10. On 16 July 2021 I concluded that the complaint was admissible for the purposes of the 2002 Act and that I was required to proceed to stage 2 "Investigation of an admissible complaint" in accordance with section 8 of the 2002 Act.

11. The SPPA Committee, the complainers and the respondent were issued with letters to that effect on 22 July 2021.

The investigation

12. As the facts were already established in this case at the admissibility stage, inasmuch as the respondent acceded that he had posted the comments online complained of, no further investigation was required.

The approach to findings

13. I noted the terms of section 9(2)(c) of the Act which requires me to detail the facts found in relation to whether the respondent has committed the conduct complained of. I also noted section 8(2) which provides that the standard of proof is that applicable to civil proceedings, namely the balance of probabilities, i.e. whether it is more likely than not that an event occurred.

The analysis of the evidence and findings

14. I considered the complaints and evaluated the evidence in relation to them in order to make findings on facts.

The Complaints

15. In their complaint forms, the complainers stated that:

i) *"Adam Tomkins sent the following tweet about John Swinney at 18.23 on 1/3/21 "Swinney does the right thing not because it's the right thing to do but only because it'll save his neck. Devious unscrupulous manipulative little man".*

This is a vile offensive tweet that breaks the ministerial code of conduct. Section 7(5) states "Members must treat the following individuals with courtesy and respect: other MSPs". Adam Tomkins has publicly broken this code with his offensive derogatory tweet."

ii) *"He posted this on Twitter on 1 March 2021 at 6.23pm*

"Swinney does the right thing not because it's the right thing to do but only because it'll save his neck. Devious unscrupulous manipulative little man"

<https://twitter.com/ProfTomkins/status/1366453952586350593>

Obviously, I would expect MSPs to criticise each other's actions, but I consider that the second sentence makes it a very personal attack, which shows a lack of courtesy and respect, contrary to section 7, para 4 of the Code of Conduct <https://www.parliament.scot/msps/105594.aspx>"

The Response

16. In response to the complaints, the respondent asserted that his comments should be read in the context of an upcoming motion of no confidence in Mr Swinney. This in turn was related to the failure on the part of the Scottish Government to release legal advice to the Scottish Parliament's Committee on the Scottish Government Handling of Harassment Complaints following two parliamentary motions which

had been passed to the effect that the advice should be released. The respondent's comments were related to the fact that the Scottish Government had released the advice, following the publicly stated intention of opposition parties to support the Motion. The respondent was of the view that the language that he used was not unparliamentary in nature and that each of the adjectives that he used was pertinent to Mr Swinney's actions in the context of the upcoming Motion. The respondent further contended that if he had used the same words during the course of a debate in the chamber of the Scottish Parliament, the Presiding Officer would not have objected.

The Facts

17. The respondent did post the Tweet complained of on 1 March. The Tweet contained personal remarks about another MSP. The remarks were derogatory in nature and were therefore discourteous and disrespectful of another MSP. The respondent's Twitter account was in the name of Adam Tomkins MSP.

The Acting Commissioner's conclusion

18. There is no question that the respondent posted the Tweet and that it contained personal remarks about another MSP which were derogatory in nature. The respondent's Twitter account also clearly identified him as an MSP and I am taking the Tweet to have been posted in the respondent's capacity as an MSP. It is therefore then a matter of judgment for me to determine in this case whether those comments can be deemed to be discourteous and disrespectful having appropriate regard to the provisions of Article 10 of the ECHR. I consider this in more detail below under "Overall determination of the conduct complained about". The Code of Conduct does not define the terms 'courtesy' and 'respect', and for the purposes of this report I am giving the terms their everyday meaning. I have included dictionary definitions in Appendix Two of this report for ease of reference.
19. I consider the above facts of relevance to the overall context and application of the facts to the Code. The duty placed on me under section 9(2)(c) of the Act is to make findings as to whether the respondent has 'committed the conduct complained about'. I am satisfied from the evidence that I have considered that the respondent has committed the conduct complained of.

Overall determination of the conduct complained about

20. Based on the above, I have determined the complaint as follows:

Complaint

1. The respondent posted a Tweet on Twitter in his capacity as an MSP about another member, the content of which was derogatory and personal in nature and therefore disrespectful.

Sufficient evidence to find proved

Relevant provision(s)

21. I went on to consider whether, on the basis of the facts that could be proved, the respondent had breached a relevant provision or provisions.

22. The Code of Conduct for Members of the Scottish Parliament (“the Code”) has been approved by the Scottish Parliament under its Standing Orders to provide a set of principles and standards for its Members. For the purpose of considering this complaint, the relevant Code of Conduct provisions were set out in Section 7 paragraph 5 of the Code of Conduct for Members of the Scottish Parliament, 7th Edition, 2nd Revision, dated 7 January 2020. They are as follows:

“Treatment of others

5. Members must treat the following individuals with courtesy and respect:

- *other MSPs;*
- *parliamentary staff (including contractors providing services to the Parliament);*
- *their own staff and the staff of other MSPs.”*

23. I also considered the Guidance on the Code of Conduct for Members of the Scottish Parliament, (‘the Guidance’). The applicable guidance in this case is as follows:

“Members should have reference to the definitions of unacceptable behaviours set out below in relation to sections 7.5 and 7.6 of the Code of Conduct...These unacceptable behaviours can occur in a variety of contexts, including face-to-face contact, by phone, email, messaging and on social media platforms”.

“Use of social media...

“Treatment of other MSPs and of other MSPs’ staff

4. The Code requires that members must treat other MSPs and the staff of other MSPs with courtesy and respect.”

The Complaints assessed against the provisions

24. I consider that posting a Tweet making personal and derogatory comments about another MSP is, on the face of it, discourteous and disrespectful of that other MSP.

25. In assessing the complaints against the provisions of the Code, I have also to take account of other applicable legislation. In particular, the Code must be construed in the context of the European Convention on Human Rights (ECHR). Article 10 of the ECHR provides for a right of freedom of expression. That right is to be found in Article 10(1). This is a qualified right in that Article 10(2) does permit restrictions of that right, provided that the restrictions are prescribed by law¹, and necessary in a democratic society to protect certain interests. This latter limb requires that the restriction respond to a pressing social need, be for relevant and sufficient reasons, and be proportionate to the legitimate aim being pursued.

¹ This requirement has been found to have been satisfied by, e.g., a Code of Conduct established for elected councillors (*R (Calver) v Adjudication Panel for Wales* [2012] EWHC 1172 (Admin)).

26. As applied by the courts, particular protection applies to those who engage in or who comment on matters of “political expression”. The definition is not fixed. Essentially, these are matters of public concern including, but not limited to, issues of political contention and public administration. The protection is wide and can even extend to comments and activities which some may consider to be inappropriate, wrong or insulting. In my consideration of this case, I had regard to the case of **Heesom v Public Services Ombudsman for Wales** [2014] EWHC 1504 (Admin), in which the judge (at para. 38) derived a number of propositions from European Court of Human Rights cases on Article 10. These are as follows:

“ ...

ii) Article 10 protects not only the substance of what is said, but also the form in which it is conveyed. Therefore, in the political context, a degree of the immoderate, offensive, shocking, disturbing, exaggerated, provocative, polemical, colourful, emotive, non-rational and aggressive, that would not be acceptable outside that context, is tolerated ... Whilst, in a political context, article 10 protects the right to make incorrect but honestly made statements, it does not protect statements which the publisher knows to be false ...

iii) Politicians have enhanced protection as to what they say in the political arena; but Strasbourg also recognises that, because they are public servants engaged in politics, who voluntarily enter that arena and have the right and ability to respond to commentators (any response, too, having the advantage of enhanced protection), politicians are subject to “wider limits of acceptable criticism” ... They are expected and required to have thicker skins and have more tolerance to comment than (sic) ordinary citizens.

...

v) The protection goes to “political expression”; but that is a broad concept in this context. It is not limited to expressions of or critiques of political views ... but rather extends to all matters of public administration and public concern including comments about the adequacy or inadequacy of performance of public duties by others ... The cases are careful not unduly to restrict the concept; although gratuitous personal comments do not fall within it. ...”

27. I also took cognisance of the cases of **Livingstone v Adjudication Panel for England** [2006] EWHC 2533; **Sanders v Kingston (No. 1)** [2005] EWHC 1145 (Admin); and **R (Gaunt) v Office of Communications** [2011] EWCA Civ 692; **Gaunt v United Kingdom** (2016) 63 EHRR SE15, which provide further confirmation that a gratuitous personal attack or offensive abuse do not fall within ‘political expression’.

28. Having considered the content of the respondent’s Tweet, my view is that a proportion of the content could attract the wide protection afforded to political expression under Article 10 of the ECHR. The context in which that statement was made was very relevant to my consideration in this case. A parliamentary committee had been established to examine the Scottish Government’s handling of harassment complaints. It had requested legal advice from the Scottish Government which had not been provided following two resolutions by the Scottish Parliament, neither of which had been fully successful in securing the release of that advice. The timing of the release of the advice to the Committee, coming as it did in advance of the anticipated Motion of No Confidence in Mr Swinney, was clearly relevant to the views expressed by the respondent. It is apparent to me that

the topic was a matter of widespread political debate and comment, of which the matter complained of forms a part.

29. In considering these complaints, the comments made by the respondent were clearly made in a political context and in relation to a matter of public interest. The respondent said that the reason he made the comment was as a result of the decision to release legal evidence in the face of an impending Motion of No Confidence. My view is that the first part of the Twitter post, i.e. *"Swinney does the right thing not because it's the right thing to do but only because it'll save his neck"* could attract the enhanced protections afforded by Article 10. Having said that, I note that the respondent advised me that he did not believe the terminology that he used to be unparliamentary whereas he refers to Mr Swinney as "Swinney" as opposed to "John Swinney", 'Mr Swinney' or "the Deputy First Minister". Notwithstanding this, the following comments made by the respondent in his Tweet were personal comments about Mr Swinney which could be described as gratuitous, particularly in combination. I have again included dictionary definitions of the terms used in Appendix Two for ease of reference.
30. I was not satisfied that the enhanced protection relative to Article 10 applied in the circumstances to the further comments made, i.e. *"Devious unscrupulous manipulative little man"*. It could be argued that the words "devious", "unscrupulous" and "manipulative" might all be afforded protection in the context. I am not however convinced that the same applies to "little man". I note the respondent's argument that this was included to reflect his view that Mr Swinney *"belittled both himself and his office (and, indeed, the Parliament)"* but am not persuaded by this post hoc argument. I am also not persuaded by the respondent's argument that the Tweet was intended to convey that Mr Swinney was discourteous and disrespectful of the Scottish Parliament.
31. Due to the gratuitous, personal and derogatory nature of the comments made, I am of the view that any interference with the respondent's Article 10 rights, which would be involved in a finding of a breach of the Code, is justified. As such, I consider that the conduct amounted to a contravention of section 7 paragraph 5 of the Code, relative to courtesy respect.
32. Accordingly, I reached the conclusion that the respondent breached Section 7 paragraph 5 of the Code of Conduct.

REPORT CONTINUED BELOW

Draft report and the respondent's representations

33. In accordance with section 9(3) of the Act, a draft report was sent to the respondent on 29 July 2021 and the respondent was provided an opportunity to make representations.

34. The respondent provided representations which are annexed to this report **Appendix 3**.

35. The respondent and the Acting Commissioner had a further exchange of correspondence which is annexed to this report at **Appendix 4**.



Ian Bruce
Acting Commissioner

END OF REPORT

Appendix One – Completed Complaint Forms Redacted

REDACTED

From: info@ethicalstandards.org.uk on behalf of Ethical Standards
Commissioner

Sent: <info@ethicalstandards.org.uk>
02 March 2021 10:22

To: investigations@ethicalstandards.org.uk

Subject: Webform submission from: Make a complaint

Categories: New Complaint

Complaint first created on Tue, 03/02/2021 - 10:02

Submitted on Tue, 03/02/2021 - 10:21

Submitted by: Fifijo1

Submitted values are:

Who the complaint is about

Complaint type
MSP

Name of MSP(s)
Adam Tomkins

Details of the complaint

What's your complaint about?

Adam Tomkins sent the following tweet about John Swinney at 18.23 on 1/3/21 "Swinney does the right thing not because it's the right thing to do but only because it'll save his neck. Devious unscrupulous manipulative little man". This is a vile offensive tweet that breaks the ministerial code of conduct. Section 7(5) states "Members must treat the following individuals with courtesy and respect: other MSPs". Adam Tomkins has publicly broken this code with his offensive derogatory tweet.

Supporting documents attached if needed

- [9b86fc44-47d6-4aed-ac43-c2b41a03cf0d.png](#)

Date(s) incident occurred
1/3/21

Complainer's details

Complainer

I am the Complainer

Title

Ms

Full name

Fiona Johnston

Address

[REDACTED]

Phone number

[REDACTED]

Email

[REDACTED]

Signature and Declaration**Digital Signature box**

Yes



Tweet

**Adam Tomkins MSP**

@ProfTomkins



Swinney does the right thing not because it's the right thing to do but only because it'll save his neck. Devious unscrupulous manipulative little man.

18:23 · 01/03/2021 · [Twitter for iPhone](#)

400 Retweets 210 Quote Tweets

1,541 Likes

**Seaweed Muncher** @Sea... · 14h ...Replying to [@ProfTomkins](#)

Wow... How unprofessional of you.
Feel the hate.

**Linda Watson** @landoflindy · 13h ...

Tweet your reply



REDACTED

From: info@ethicalstandards.org.uk on behalf of Ethical Standards
Commissioner
Sent: <info@ethicalstandards.org.uk>
02 March 2021 10:15
To: investigations@ethicalstandards.org.uk
Subject: Webform submission from: Make a complaint
Categories: New Complaint

Complaint first created on Tue, 03/02/2021 - 10:08

Submitted on Tue, 03/02/2021 - 10:14

Submitted by: ElizabethT

Submitted values are:

Who the complaint is about

Complaint type

MSP

Name of MSP(s)

Adam Tomkins MSP

Details of the complaint

What's your complaint about?

He posted this on Twitter on 1 March 2021 at 6.23pm

"Swinney does the right thing not because it's the right thing to do but only because it'll save his neck. Devious unscrupulous manipulative little man"

<https://twitter.com/ProfTomkins/status/1366453952586350593>

Obviously, I would expect MSPs to criticise each other's actions, but I consider that the second sentence makes it a very personal attack, which shows a lack of courtesy and respect, contrary to section 7, para 4 of the Code of Conduct <https://www.parliament.scot/msps/105594.aspx>

Date(s) incident occurred

1 March 2021 at 6.23pm

Complainer's details

Complainer

I am the Complainer

Title

Ms

Full name

Elizabeth Tennet

Address

[REDACTED]

Phone number

[REDACTED]

Email

[REDACTED]

Signature and Declaration

Digital Signature box

Yes



Tweet

**Adam Tomkins MSP**

@ProfTomkins



Swinney does the right thing not because it's the right thing to do but only because it'll save his neck. Devious unscrupulous manipulative little man.

18:23 · 01/03/2021 · [Twitter for iPhone](#)

400 Retweets 210 Quote Tweets

1,541 Likes

**Seaweed Muncher** @Sea... · 14h ...Replying to [@ProfTomkins](#)

Wow... How unprofessional of you.
Feel the hate.

**Linda Watson** @landoflindy · 13h ...

Tweet your reply



Appendix Two – Dictionary definitions of terms referred to in this report

The following definitions are taken from Chambers 21st Century Dictionary, the reference work used by the Official Report of the Scottish Parliament

Terms used in the Code of Conduct

“**courtesy noun (courtesies)** 1 courteous behaviour; politeness. 2 a courteous act. **by courtesy of someone** 1 with their permission. 2 *colloq* from them.”

“**respect noun** 1 admiration; good opinion • *be held in great respect*. 2 the state of being honoured, admired or well thought of. 3 (**respect for something or someone**) consideration of or attention to them • *show no respect for his feelings*. 4 (*often respects*) *formal* a polite greeting or expression of admiration, esteem and honour. 5 a particular detail, feature or characteristic • *In what respect are they different?* 6 reference, relation or connection. **verb (respected, respecting)** 1 to show or feel admiration or high regard for someone or something • *He respected his grandfather*. 2 to show consideration for, or thoughtfulness or attention to, something • *respect her wishes*. 3 to heed or pay proper attention to (a rule, law, etc) • *respect the speed limit*. **respector noun** 1 someone who respects. 2 someone or something that treats individuals unduly favourably • *The disease is no respecter of age or social class*. **in respect of** or **with respect to something** with reference to, or in connection with (a particular matter, point, etc). **pay one's last respects to someone** to show respect for someone who has died by attending their funeral. **pay one's respects to someone** *formal* to present oneself to them, or visit them as a mark of respect or out of politeness. **with respect** or **with all due respect** a polite expression indicating disagreement and used before presenting one's own opinion.”

Terms used by the respondent when describing another MSP

“**devious adj** 1 not totally open or honest; deceitful. 2 cunning; able to think up clever and usually deceitful ways of achieving things, etc. 3 not direct • *came by a devious route*. **deviously adverb**. **deviousness noun**.”

“**unscrupulous adj** without scruples or moral principles. **unscrupulously adverb**. **unscrupulousness noun**.”

“**manipulate verb (manipulated, manipulating)** 1 to handle something, or move or work it with the hands, especially in a skilful way. 2 to control or influence someone or something cleverly and unscrupulously, especially to one's own advantage. 3 to give false appearance to something, change its character, etc • *manipulating the statistics to suit his argument*. 4 to apply therapeutic treatment with the hands to (a part of the body). 5 *word processing* to move, edit or alter (data, files, blocks of text, etc). **manipulable** or **manipulatable adj**. **manipulation noun**. **manipulative** or **manipulatory adj** said of a person: given to or skilled in manipulating or exploiting people or circumstances. **manipulator noun** a person or device that manipulates.”

Appendix Three – representations by the respondent

The following representations were sent by email to the office of Acting Ethical Standards Commissioner for Scotland on 18 August 2021.

[NOTE – the respondent advises that he did not receive a letter by email on 22 July. We have verified that the letter was issued to the correct address via email on that date. It was resent to the respondent on 24 August for reference].

Dear Mr Bruce

Further to your email and attachments of 29 July, I have the following points to make.

1. At para 11 of your draft report you state that I was issued with a letter from you on 22 July 2021. I did not receive this letter and have no record of it.
2. At para 26 of your draft report you correctly identify that political expression is afforded the highest protection under Article 10 ECHR. I agree. At para 25, however, you write that the Code of Conduct must be construed "in the context" of the right to freedom of political expression in Article 10. I disagree with this formulation. The law requires the Code to apply and to be interpreted subject to the Convention rights. "Subject to" is a more stringent test than "in the context of". It is well established in the case law of the European Court that rights, including the right to freedom of political expression, should be interpreted broadly and that any exceptions to or limitations on Convention rights should be interpreted narrowly. I regret to say that I see no evidence of you having taken this approach in your draft report. Indeed, I consider that, throughout the draft report, you have given too little weight to my right to freedom of expression and too much weight to the ways in which speech may be limited by considerations of courtesy and respect. I consider this to be an error of law which has led you to at least some conclusions which cannot be supported, as I seek to explain in more detail below.
3. At para 26 you helpfully cite from decision of the High Court in *Heesom*. However, the analysis in your draft report does not apply what the High Court said in that case. In particular, the Court noted that "in the political context a degree of the immoderate, offensive, shocking, disturbing, exaggerated, provocative [etc] ... is tolerated" even if it would not be protected speech in other contexts.
4. You may very well say that my Tweet was "immoderate, offensive, shocking ... exaggerated, provocative [etc]". I might even agree. But the point the High Court is making is that even if the Tweet was all of these things it would still be protected as political speech. That is the force of Article 10 ECHR and the Code of Conduct, as noted above here (but not as noted in your draft report), must be interpreted and must apply subject to that fundamental right.
5. At para 29 you appear to accept that the first sentence of my Tweet is protected speech and that this sentence (ie, "Swinney does the right thing not because it's the right thing to do but only because it'll save his neck") does not fall foul of the Code of Conduct. If this is indeed your conclusion this should be clear on the face of the report, both at para 29 and in the executive summary.
6. At para 30 you appear to reach no firm conclusion as to the first part of the second sentence in my Tweet (ie, the three adjectives "devious", "unscrupulous", and

"manipulative"). On the one hand, you say that you are "not satisfied" that these words attract the enhanced protection of political speech under Article 10. Yet, in the same paragraph, you also say that "it could be argued" that they do attract such enhanced protection. Which is it? Is your conclusion that my describing Mr Swinney's actions as devious, unscrupulous and manipulative was or was not in breach of the Code? As para 30 is drafted it is unclear what your conclusion is as regards these three words. Were your conclusion to be that these words were in breach of the Code, I would argue that this conclusion would be unlawful, as being a breach of my right to freedom of political expression under Article 10 (for the reasons set out above). Were your conclusion to be that these three words were not in breach of the Code, I would respectfully agree with you.

7. At para 30 your conclusion as to the final words of the second sentence of my Tweet is clear: ie that the words "little man" were in breach of the Code of Conduct. I dispute this conclusion for two reasons. First, you very unfairly castigate my explanation of it as "post hoc". I was not asked to explain it until long after the Tweet had been sent! Of course my explanation was "post hoc". It was offered, to you, on 6 April in response to your email to me of 1 April 2021! Secondly, you state that you are "not persuaded" by my argument that these words were intended to convey my view--to which I adhere, by the way--that Mr Swinney belittled himself and his office, and indeed the Parliament, by acting in the way he chose. Yet you have failed to give any reasons for dismissing this argument, offered to you in good faith. It is of course for you to judge--but in giving judgement you need to give reasons to support your decision. Why are you not persuaded by my argument as to why I added the words "little man" to the end of my Tweet?

I hope you find these points of assistance to you as you finalise your report.

Best wishes,
Adam Tomkins

Appendix Four – further and final exchange between Acting Commissioner and the respondent

From: Ian Bruce <i.bruce@ethicalstandards.org.uk>
Sent: 25 August 2021 16:41
To: Adam Tomkins <REDACTED>
Cc: investigations@ethicalstandards.org.uk
Subject: Re: Our reference: MSP 3485

Dear Professor Tomkins

Thank you for your response. I will ensure that the Committee is provided with a copy of this correspondence also.

Kind regards,
Ian

Please note I am currently working remotely. The best way to contact me is by email.

Ian Bruce
Acting Ethical Standards Commissioner
Tel: 0131 347 3897
www.ethicalstandards.org.uk

This e-mail comes from the office of the Commissioner for Ethical Standards in Public Life in Scotland, Thistle House, 91 Haymarket Terrace, Edinburgh, EH12 5HE.

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contactSCOTLAND-BSL

From: Adam Tomkins <REDACTED>
Sent: 25 August 2021 16:34
To: Ian Bruce <i.bruce@ethicalstandards.org.uk>
Cc: investigations@ethicalstandards.org.uk
Subject: Re: Our reference: MSP 3485

Dear Mr Bruce,

I am grateful to you for your further email. Thank you for engaging with the various points I have raised with you in earlier correspondence.

Whilst I find myself in the regrettable position of not being able to agree with very much of what you have written, I do not propose to extend our correspondence any further. If, however, you could include it in the materials you send to the Committee, I should be most grateful.

Kind regards,
Adam Tomkins

From: Ian Bruce <i.bruce@ethicalstandards.org.uk>
Sent: 25 August 2021 10:40
To: Adam Tomkins <REDACTED>

Dear Professor Tomkins

Thank you for your email and further observations.

I am endeavouring to answer your specific questions below.

My conclusions as to whether a breach of the relevant provisions occurred

My own understanding is that this was already self-evident from the report that I submitted to you although I do understand why you would wish to disagree with my conclusions. Freedom of expression under Article 10 is a qualified right. The Code of Conduct anticipates that a political point is capable of being made in a courteous and respectful way. The relevant case law quoted in my report makes it clear that “a gratuitous personal attack or offensive abuse do not fall within ‘political expression’”. My report in my own view makes it clear that I considered your Twitter post to constitute a gratuitous personal attack.

Your paragraphs 6 and 7

In my report I stated that *I was not satisfied that the enhanced protection relative to Article 10 applied in the circumstances to the further comments made, i.e. “Devious unscrupulous manipulative little man”*. I went on to say that *“It could be argued that the words “devious”, “unscrupulous” and “manipulative” might all be afforded protection in the context. I am not however convinced that the same applies to “little man”*.” I do not share your view that this is unclear. Saying that something could be argued is not the same as saying that I would argue it or did so. It should be clear from the first sentence that I was not doing so. My construction here was deliberate and intended to be balanced. I wished to draw a distinction between what I considered to be potentially debateable and what I did not.

Your representations as well as your original response to my initial investigation have suggested that your use of the term “little man” was meant to convey that *“Mr Swinney belittled himself and his office, and indeed the Parliament, by acting in the way he chose”*. I was not persuaded by this argument for a simple reason. You chose to say “little man” in your original Twitter post rather than saying that he belittled himself and his office or some similar construction which would still have been well within the limits imposed by the format of Tweets. As a consequence, I concluded that your argument had been constructed after the fact to justify the words that you actually used.

Your view that my drawing a conclusion as to whether a breach has occurred is unlawful is not accurate. As I noted in yesterday’s covering email, whether an infringement of your Article 10 rights in this case is appropriate – in determining whether a breach has occurred and whether a sanction is appropriate – will be a decision for the Parliament to make and not me in my capacity as Acting Commissioner. I have simply sought to acquit my statutory functions in reaching a view on whether the relevant provisions have been breached and reporting accordingly.

I trust that this provides my reasons for the conclusions that I have reached and responds to your questions.

If you feel it would be helpful, I would be happy to provide this exchange with you, alongside any response you may wish to make, to the Committee as a supplement to my report.

Confidentiality

This process is conducted under the 2002 Act. I would draw your attention to the confidential nature of my investigation and would request your full cooperation in this regard.

For information about how we process data we collect, including how we process personal data, please see our privacy policy at www.ethicalstandards.org.uk/privacy-policy.

Should you have any queries please contact my office on the following telephone number 0300 011 0550 or email investigations@ethicalstandards.org.uk.

Kind regards, Ian

Please note I am currently working remotely. The best way to contact me is by email.

Ian Bruce
Acting Ethical Standards Commissioner
Tel: 0131 347 3897
www.ethicalstandards.org.uk

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contactSCOTLAND-BSL

From: Adam Tomkins <REDACTED>
Sent: 24 August 2021 17:39
To: Ian Bruce <i.bruce@ethicalstandards.org.uk>
Cc: investigations@ethicalstandards.org.uk
Subject: Re: Our reference: MSP 3485

Dear Mr Bruce,

I'm sorry but, with the greatest respect, I don't think that's good enough.

First, should you not give reasons as to why you disagree with such conclusions as I reach in my observations (just as I sought to give reasons and, where relevant, legal authority for those conclusions)?

Second, at para 6 of my observations I asked for clarification as to what you intended to mean in one passage of para 30 of your draft report. No such clarification has been furnished.

Third, at para 7 of my observations I asked further questions as to why you reach certain conclusions in para 30 of your draft report. Again, these questions remain unanswered.

I had hoped that, prior to your releasing the report to the Committee, you might have addressed these issues, which I have raised with you in good faith. I'm disappointed, to say the least, that this has not happened.

Respectfully yours,
Adam Tomkins

Sent from my iPhone

On 24 Aug 2021, at 16:49, Ian Bruce <i.bruce@ethicalstandards.org.uk> wrote:

Dear Professor Tomkins

Thank you for taking the time to write to me with your observations. I have attached a copy of the email and attached letter which was issued to you on 22 July. I cannot account for your not receiving this but if you would like to receive a copy by regular post, please let me know and provide a full postal address and I will make arrangements for it to be sent to you.

I have included the representations in your email below in full in an annex to my report, which I do not intend to otherwise alter, and will send a copy to the Standards, Procedures and Public Appointments Committee of the Scottish Parliament tomorrow. The report, inclusive of your representations, is being issued in accordance with section 9(3) of the 2002 Act, which I reproduce for you here for ease of reference:

“(3) No report concluding that a member of the Parliament, who is named in the report, has breached a relevant provision shall be made to the Parliament unless the member concerned has been given a copy of the draft report and an opportunity to make representations on the alleged breach and on the draft report; and there shall be annexed to the report made to the Parliament any representations made by that member which are not given effect to in that report.”

You will understand from this that I do not agree with your conclusions and have not therefore given effect to them in my report.

For completeness, I refer to the provisions of the 2002 Act. The ultimate decision in this case will be for the Parliament, which is not bound by the Commissioner's fact-finding nor by the Commissioner's interpretation of the rules (and any consequent decision on breach).

The report will be provided to the Committee in confidence. A copy is attached for your information.

Confidentiality

This process is conducted under the 2002 Act. I would draw your attention to the confidential nature of my investigation and would request your full cooperation in this regard.

For information about how we process data we collect, including how we process personal data, please see our privacy policy at www.ethicalstandards.org.uk/privacy-policy.

Should you have any queries please contact my office on the following telephone number 0300 011 0550 or email investigations@ethicalstandards.org.uk.

Kind regards, Ian

I am currently working remotely. The best way to contact me is by email.

Ian Bruce
Acting Ethical Standards Commissioner
Thistle House
91 Haymarket Terrace
Edinburgh
EH12 5HE
www.ethicalstandards.org.uk

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<image002.jpg>

From: Adam Tomkins <REDACTED>
Sent: 18 August 2021 11:33
To: Ian Bruce <i.bruce@ethicalstandards.org.uk>
Subject: Re: Our reference: MSP 3485

Dear Mr Bruce

Further to your email and attachments of 29 July, I have the following points to make.

1. At para 11 of your draft report you state that I was issued with a letter from you on 22 July 2021. I did not receive this letter and have no record of it.
2. At para 26 of your draft report you correctly identify that political expression is afforded the highest protection under Article 10 ECHR. I agree. At para 25, however, you write that the Code of Conduct must be construed "in the context" of the right to freedom of political expression in Article 10. I disagree with this formulation. The law requires the Code to apply and to be interpreted subject to the Convention rights. "Subject to" is a more stringent test than "in the context of". It is well established in the case law of the European Court that rights, including the right to freedom of political expression, should be interpreted broadly and that any exceptions to or limitations on Convention rights should be interpreted narrowly. I regret to say that I see no evidence of you having taken this approach in your draft report. Indeed, I consider that, throughout the draft report, you have given too little weight to my right to freedom of expression and too much weight to the ways in which speech may be limited by considerations of courtesy and respect. I consider this to be an error of law which has led you to at least some conclusions which cannot be supported, as I seek to explain in more detail below.
3. At para 26 you helpfully cite from decision of the High Court in *Heesom*. However, the analysis in your draft report does not apply what the Hight Court said in that case. In particular, the Court noted that "in the political context a degree of the immoderate, offensive, shocking, disturbing, exaggerated, provocative [etc] ... is tolerated" even if it would not be protected speech in other contexts.
4. You may very well say that my Tweet was "immoderate, offensive, shocking ... exaggerated, provocative [etc]". I might even agree. But the point the High Court is making is that even if the Tweet was all of these things it would still be protected as political speech. That is the force of Article 10 ECHR and the Code of Conduct, as noted above here (but not as noted in your draft report), must be interpreted and must apply subject to that fundamental right.
5. At para 29 you appear to accept that the first sentence of my Tweet is protected speech and that this sentence (ie, "Swinney does the right thing not because it's the right thing to do but only because it'll save his neck") does not fall foul of the Code of Conduct. If this is indeed your conclusion this should be clear on the face of the report, both at para 29 and in the executive summary.
6. At para 30 you appear to reach no firm conclusion as to the first part of the second sentence in my Tweet (ie, the three adjectives "devious", "unscrupulous", and "manipulative"). On the one hand, you say that you are "not satisfied" that these words

attract the enhanced protection of political speech under Article 10. Yet, in the same paragraph, you also say that "it could be argued" that they do attract such enhanced protection. Which is it? Is your conclusion that my describing Mr Swinney's actions as devious, unscrupulous and manipulative was or was not in breach of the Code? As para 30 is drafted it is unclear what your conclusion is as regards these three words. Were your conclusion to be that these words were in breach of the Code, I would argue that this conclusion would be unlawful, as being a breach of my right to freedom of political expression under Article 10 (for the reasons set out above). Were your conclusion to be that these three words were not in breach of the Code, I would respectfully agree with you.

7. At para 30 your conclusion as to the final words of the second sentence of my Tweet is clear: ie that the words "little man" were in breach of the Code of Conduct. I dispute this conclusion for two reasons. First, you very unfairly castigate my explanation of it as "post hoc". I was not asked to explain it until long after the Tweet had been sent! Of course my explanation was "post hoc". It was offered, to you, on 6 April in response to your email to me of 1 April 2021! Secondly, you state that you are "not persuaded" by my argument that these words were intended to convey my view--to which I adhere, by the way--that Mr Swinney belittled himself and his office, and indeed the Parliament, by acting in the way he chose. Yet you have failed to give any reasons for dismissing this argument, offered to you in good faith. It is of course for you to judge--but in giving judgement you need to give reasons to support your decision. Why are you not persuaded by my argument as to why I added the words "little man" to the end of my Tweet?

I hope you find these points of assistance to you as you finalise your report.

Best wishes,
Adam Tomkins

From: Ian Bruce <i.bruce@ethicalstandards.org.uk>
Sent: 29 July 2021 17:20
To: Adam Tomkins <REDACTED>
Cc: investigations@ethicalstandards.org.uk <investigations@ethicalstandards.org.uk>
Subject: Our reference: MSP 3485

Dear Professor Tomkins

Please find attached correspondence relevant to the complaints with case reference 3485, alongside a draft report which the correspondence refers to.

Please don't hesitate to contact my office if you have any questions.

I am currently working remotely. The best way to contact me is by email.

Kind regards, Ian

Ian Bruce
Acting Ethical Standards Commissioner
Thistle House
91 Haymarket Terrace
Edinburgh
EH12 5HE
www.ethicalstandards.org.uk

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<2021-08-25 MSP 3485 FINAL Report of Code Breach - SPPA Committee.pdf>

Clerks

Standards, Procedures and Public Appointments Committee

Scottish Parliament

By email

20 September 2021

Dear Joanna Hardy,

Thank you for your letter of 9 September, enclosing the Acting Commissioner's report on the complaints made that I breached the Code of Conduct.

Regrettably, I will not be able to attend the Committee meeting on 28 October at which the report is intended to be considered. I should be grateful, however, if the following comments could be drawn to the Committee's attention.

I accept, of course, that I sent the tweet which is the subject of the complaint. I do not accept, however, that the tweet breached the Code. Indeed, I am of the view that the Acting Commissioner has erred in law in reaching that conclusion, for the reasons set out below.

The Acting Commissioner correctly sets out the context in which the tweet was sent (see the Executive Summary and para 28 of the report). I am sure that I need not rehearse that context here, save to point out that Mr Swinney's honour was precisely the political controversy of the moment. Twice, Parliament had called on Mr Swinney to comply with motions it had passed. Twice, Mr Swinney had declined to do so. Only at the point where a motion of no confidence had been lodged against Mr Swinney did he act as Parliament had called for.

My tweet was highly critical of Mr Swinney and the criticism was directed at him individually—but this is because the issue of the moment was Mr

Swinney's honour. It would have been impossible to make the political points I was making in the tweet without writing about Mr Swinney individually.

The report's analysis of whether the tweet breached the Code commences at para 24, in which the Acting Commissioner writes that he considers tweeting "personal and derogatory comments about another MSP is, on the face of it, discourteous and disrespectful". This opening statement (which reads more like a conclusion than an opening) manifestly fails to take into account the aforementioned context in which the tweet was sent. It was neither "personal" nor "derogatory". What I said in the tweet was political and critical. I was at the time an Opposition MSP, writing about a Government MSP. Everything in the tweet was political in character. Every word of it was political speech, within the meaning of Article 10 ECHR.

The Acting Commissioner is right that Article 10 ECHR is relevant to his investigation into whether my tweet breached the Code. However, he fails to give the weight to the ECHR which—by law—he is required to give. He says (para 25) that the Code "must be construed in the context of" the ECHR. This is not correct. The legal position is that the Code must be construed and given effect "subject to" the fundamental rights enshrined in the ECHR. "Subject to" is a more strenuous test than "in the context of". Further, case law makes clear that rights in the ECHR (including the right to freedom of expression) must be construed broadly, and that limitations on those rights must be construed narrowly. Regrettably, there is no indication in the Acting Commissioner's report that he has applied the law in the required way. His not having done so has led him into error.

The Acting Commissioner is right about two aspects of the Article 10 right to free speech: first, that political expression is afforded especially high protection; and secondly, that even then the right to free speech is not absolute. It is qualified. Thus, as the case from which the Acting Commissioner quotes states, "gratuitous personal comments" do not fall within the enhanced protection of political speech, even if those comments are made by one politician of another (see para 26 of the report).

The Acting Commissioner concludes that some—but not all—of the words I used in the tweet were gratuitous and personal; that those words were therefore not political speech; and that they were derogatory, discourteous

and disrespectful. I respectfully but strongly disagree. None of the words were “gratuitous personal comments” (to use the phraseology of the High Court) and the Acting Commissioner has erred in law in concluding otherwise.

His errors can be demonstrated by analysing my tweet in the light of the cases he cites in the report. There are four cases cited, although only one of them is actually quoted from in the report. These cases are cited in support of the Acting Commissioner’s view that some of the words I used in my tweet were “gratuitous personal comments” and that they thereby fall outwith the scope of political speech. I have read all four cases. They do not support the Acting Commissioner’s view at all. Indeed, reading these cases shows exactly how the Acting Commissioner has erred in reaching his conclusion that my tweet breached the Code of Conduct.

As Lord Neuberger said in the Court of Appeal in one of the four cases (*Gaunt*, at para 25 of the judgment), case law on free speech is “highly fact-sensitive”. One must always have careful regard to the particular facts of cases before drawing general conclusions about the propositions of law for which you think those cases are authority. Unfortunately, the Acting Commissioner has not done this, which has led him into error. I shall explain this in detail, taking the cases in chronological order.

The first case is *Sanders v Kingston* [2005] EWHC 1145 (Admin). Sanders, a former leader of Peterborough City Council, was commenting (horribly, with abject insensitivity) on the deaths of HM Armed Forces personnel in Northern Ireland. The fact that Sanders was an elected Councillor did not protect his speech from censure and sanction. But, unlike my tweet, Sanders was talking about a matter of public interest that had nothing to do with his own political role as leader of Peterborough Council. My tweet, in contrast, was concerned exclusively with top political story of the day in the Parliament of which I was then a Member. There is nothing in *Sanders v Kingston*—nothing at all—to support the view that anything in my tweet was anything other than political speech. There is nothing in this case to support the Acting Commissioner’s erroneous view that some of the words I used in the tweet were “gratuitous personal comments” and were, for that reason, discourteous and disrespectful.

Livingstone v Adjudication Panel for England [2006] EWHC 2533 (Admin) concerned remarks Ken Livingstone made as Mayor of London. Unlike my tweet, however, his remarks were an attack on a newspaper journalist: they were not remarks addressed to or about a political opponent. Livingstone accused the journalist of acting like “a German war criminal”. Even after he knew the journalist to be Jewish, Livingstone told him, to his face, that he was “just like a concentration camp guard”. As the Court held, this was “indefensible” on Livingstone’s part. But there is the world of difference between a politician accosting a journalist in the street and an Opposition politician criticising a Government politician on twitter. Again, there is nothing in the *Livingstone* case to support the view that any of the words in my tweet were anything other than protected political speech.

The third case is *R (Gaunt) v Ofcom* [2011] EWCA Civ 692. I do not know why this is cited in the Acting Commissioner’s report. It is irrelevant. It concerns not the free speech of a politician but the free speech of a radio journalist who, when interviewing a local government politician live on air, called that politician a “Nazi” and an “ignorant pig”. Plainly, that is not political speech: that is a personal attack which was, in the circumstances of the *Gaunt* case, gratuitous. The words used in this case are of an altogether different order from the words I used in my tweet about John Swinney. I was critical of Mr Swinney, to be sure, but I did not call him a Nazi or an ignorant pig. These slurs would be gratuitous personal comments, but they are readily distinguishable from the words I used in my tweet. Again, the Acting Commissioner has erred in law in failing to distinguish the facts of *Gaunt* from the complaint he was investigating.

The final case is *Heesom v Public Services Ombudsman for Wales* [2014] EWHC 1504. This is the only one of the four cases which the Acting Commissioner actually quotes from. Had he quoted also from the judgments in the other cases perhaps he would not have misdirected himself in law and garbled his conclusions. But even *Heesom* does not support the Acting Commissioner’s conclusions. Heesom was a long-standing local councillor. He was accused of a whole series of incidents in which he intimidated and harassed council officers, threatening them with dismissal. His behaviour was bullying and aggressive towards council officers. Thus, once again, this case fails to support the Acting

Commissioner's core contention that words in a tweet which are directed by an Opposition MSP towards a Government MSP should be castigated as gratuitous and personal (and therefore discourteous and disrespectful) when, in reality, they are political points made about a live matter of public controversy.

The law relating to political speech is robust. The Acting Commissioner quotes some of it at para 26 of his report. It should be noted, in particular, that highly protected "political speech" is "not limited to expressions of or critiques of political views ... but rather extends to all matters of public administration and public concern including comments about the adequacy or inadequacy of performance of public duties by others". Those words, quoted by the High Court in *Heesom* and by the Acting Commissioner at para 26 of his report, come directly from the European Court of Human Rights, in one of its leading cases on the freedom of political speech (*Thorgeirson v Iceland* (1992) 14 EHRR 843). Every word of my tweet falls within this concept of protected political speech: my words were precisely about the adequacy or inadequacy of Mr Swinney's performance of his public duties.

The Acting Commissioner failed to quote this, but the High Court in *Heesom* also said that "there is little scope under Article 10 ECHR for restrictions on political speech or on debate on questions of public interest". Again, the High Court was quoting directly from the case law of the European Court of Human Rights.

For all of these reasons, I am respectfully but strongly of the view that any finding—by the Acting Commissioner or indeed by the Committee or any other public body—that my tweet should be censured or sanctioned or found to be in breach of any Code would be an interference with my right to freedom of political expression under Article 10 ECHR and, as such, unlawful. Having read and studied carefully all the case law cited by the Acting Commissioner in his report, I have every confidence that a Court would so rule were the matter ever to come before it.

I will conclude as the Acting Commissioner concluded, by breaking my tweet into three parts and analysing each against the standards explained above. In the first part I said: "Swinney does the right thing not because it's the right thing to do but only because it'll save his neck". I agree with the Acting

Commissioner's verdict (at para 29 of his report) that this was political and, as such, protected speech that is not in breach of the Code.

In the second part I used several adjectives to describe Mr Swinney's behaviour. The first three were "devious, unscrupulous, manipulative". The Acting Commissioner did not come to a view in his report as to whether these words breached the Code or not (that his decision not to come to a view was deliberate is confirmed in the email correspondence between the Acting Commissioner and me, which the Committee has sight of). Plainly, however, these words are a political critique of the Deputy First Minister on a matter of public interest and live political controversy. There is no argument but that they are as fully protected by the law of political speech as is the first part of my tweet. Unlike *Sanders*, these words are not concerned with a matter of no relevance to the Parliament I was then a member of. Unlike *Livingstone*, these words accused no reporter of acting like a guard at a Concentration Camp. Unlike *Gaunt*, these words were not those of a radio presenter haranguing a local government politician. And unlike *Heesom*, these words bullied no official. In contrast to all those cases, my words were utterly political. They were not "gratuitous personal comments".

The same is true of the last part of the tweet—the fourth adjective—"little". This is obviously not a remark about Mr Swinney's personal stature. It is a remark about how (in my political judgement) his actions were belittling. I do believe that he belittled himself, his office and indeed the Parliament by behaving as he did. That is neither gratuitous nor personal. It is a political judgement. Whether or not members of the Committee agree with it is, with all respect, neither here nor there. The question is whether I have (or had, at the time) a right to say it. I maintain that I did. It is as political a remark as everything else in the tweet, and it speaks directly to the matter of public controversy that the tweet was about: namely, whether the Parliament should continue to have confidence in Mr Swinney as a minister in the Scottish Government. What I plainly meant by the tweet was that Mr Swinney's behaviour was "devious, unscrupulous and manipulative behaviour, which belittles his office". That is political speech. It should be recognised and protected as such.

I accept entirely that MSPs should not be discourteous towards or disrespectful of one another. I accept equally that gratuitous personal comments are not “political speech” and that, even when said by one MSP of another, may constitute a breach of the Code of Conduct. I have sought to show, however, with detailed reference to the leading case law, why the remarks in my tweet do not fall into that category—and why the Acting Commissioner was wrong to conclude otherwise.

I am grateful to the Committee for its kind attention to these observations.

Yours sincerely

Adam Tomkins



The Scottish Parliament
Pàrlamaid na h-Alba

Standards, Procedures and Public Appointments Committee

Ian Bruce
Acting Ethical Standards
Commissioner
Via Email

Room CG.07
EDINBURGH
EH99 1SP

Tel (Clerk): 0131 348 6924
e-mail: sppaccommittee@parliament.scot

4 November 2021

Dear Ian,

Case Ref: MSP/3485

I am writing in connection with your report on your investigation of case reference MSP/3485, which the Committee discussed at its meeting this morning. The Committee agreed to write to you to seek clarification on your report.

The introduction to the Code of Conduct for MSPs sets out that there are some activities which are not covered by the Code. The Code does not cover—

- Members' private and family life
- Members expressing their political views (in their capacity as a member of a political party or organisation)
- Members who are Ministers, when acting as Ministers of the Scottish Government and carrying out functions of the Scottish Government covered by the Ministerial Code

For a complaint to be considered under the Code of Conduct, the conduct complained about must have occurred in relation to an MSP's parliamentary duties therefore.

Before we consider the report more fully, we would like to hear the evidence which led to your conclusion that the tweet which is the subject of this investigation fell within the scope of the Code, i.e. that it was made in relation to the former member's parliamentary duties and was not an expression of his political views (in his capacity as a member of a political party or organisation).

PRIVATE AND CONFIDENTIAL

I would be grateful if you would set this out in a letter to the Committee by 22 November.

Yours sincerely,

Martin Whitfield MSP

Convener

**On behalf of the Standards, Procedures and Public Appointments
Committee**

Martin Whitfield MSP
Convener
Standards, Procedures and Public Appointments Committee
The Scottish Parliament
Edinburgh
EH99 1SP

Sent by email to:
SPPA.Committee@parliament.scot

19 November 2021

Dear Martin

CASE REFERENCE MSP/3485

I am writing to you further to your letter of 4 November, in which the Committee sought a view from me on my decision that the case with our reference MSP/3485 was admissible for the purposes of the Scottish Parliamentary Standards Commissioner Act 2002 (the 2002 Act).

You asked me to respond to the following:

“Before we consider the report more fully, we would like to hear the evidence which led to your conclusion that the tweet which is the subject of this investigation fell within the scope of the Code, i.e. that it was made in relation to the former member’s parliamentary duties and was not an expression of his political views (in his capacity as a member of a political party or organisation)”.

Although the question put to me appears to be a relatively straightforward one, my view is that it is more complex. The decision that the Committee makes about whether the conduct is covered by the Code in this case, quite separately to its view on whether a breach has occurred, will be a very important one. As a consequence, it is incumbent on me to provide a comprehensive response. I will refer to:

- the provisions of the 2002 Act
- the relevant provisions of the Code of Conduct and the guidance on its application
- precedent cases considered by a prior Commissioner and your predecessor Committee
- the respondent’s representations in this case
- a comparator, i.e., the Code of Conduct for Councillors, recently agreed by the Local Government, Housing and Planning Committee, for reference.

I note here, by reference to section 3 (6)(b) of the 2002 Act, that I am expressing a view on the relevant provisions in the context of an investigation into a particular case and on my report on the outcome of that investigation.

In summary, my view is that the exclusions that you have referred me to have not been applied consistently to the conduct of MSPs in prior cases. Further, neither the Code nor the guidance on its application shed any light on why that might be the case. As such, the Committee's view on the conclusion that I have reached in this case, having taken into account this response, will doubtless be very helpful to me, to those who wish to complain, and to the MSPs who are expected to adhere to the Code's requirements.

The 2002 Act

For the purposes of this response, the following extracts from the 2002 Act are relevant:

6 Stage 1: Admissibility of complaints

(1) At Stage 1, the Commissioner shall investigate and determine whether a complaint is admissible.

(2) A complaint is admissible if it appears to the Commissioner that the following three tests are satisfied, namely—

(a) that the complaint is relevant;...

(3) The three tests mentioned in paragraphs (a), (b) and (c) of subsection (2) are referred to as the first, second and third tests respectively.

(4) For the purposes of the first test, a complaint is relevant if—

(a) it is about the conduct of a member of the Parliament;

(b) it is not an excluded complaint or, if it is, that the Commissioner has been directed under section 12 to investigate it; and

(c) it appears at first sight that, if all or part of the conduct complained about is established to have been committed by that member, it might amount to a breach of a relevant provision or provisions identified by the Commissioner.

In this case, the conduct was about a member of the Parliament and it was not excluded from my remit. It also appeared to me at first sight that the conduct complained about had been committed by that member and also that it might amount to a breach of the Code's provisions on respect for others.

The question that you have posed suggests that the conduct may not amount to a breach of the relevant provision of the Code of Conduct because the member concerned was:

“expressing [his] political views (in [his] capacity as a member of a political party or organisation)”.

You have asked what evidence I based my view on. The short answer is that this was set out in my report to the Committee at paragraphs 17 and 18.

The longer answer is that the respondent's tweet, which gave rise to the two complaints in this case, was posted by him from a Twitter account in the name of Adam Tomkins MSP. Prof. Tomkins was clearly identifiable as an MSP from his Twitter account. The Twitter account itself did not seek to qualify his status as an MSP such as stating that any tweets posted were posted in a personal capacity or as a member of a political party. The tweet itself did not clarify that it was posted in his capacity as a member of a political party or qualify it in any other way. The post was related entirely to matters which the Scottish Parliament had under consideration.

As such, and given that there was no evidence to the contrary, I considered that Prof. Tomkins was acting in his capacity as an MSP.

The relevant provisions of the Code of Conduct and the guidance on its application

Your letter referred me to the introduction to the Code of Conduct:

“The introduction to the Code of Conduct for MSPs sets out that there are some activities which are not covered by the Code. The Code does not cover—

- *Members’ private and family life*
- *Members expressing their political views (in their capacity as a member of a political party or organisation)*
- *Members who are Ministers, when acting as Ministers of the Scottish Government and carrying out functions of the Scottish Government covered by the Ministerial Code”*

From this, you have deduced the following conclusion:

“For a complaint to be considered under the Code of Conduct, the conduct complained about must have occurred in relation to an MSP’s parliamentary duties therefore”.

I note that this is similar but not identical to what is on the face of the Code itself:

“1. The Code of Conduct for Members of the Scottish Parliament (“the Code of Conduct” or “the Code”) sets out the standards of conduct for members of the Scottish Parliament in relation to their Parliamentary duties as an MSP.”

I note also that the guidance on application of the Code does not refer to the introduction and so there is no apparent view from the Scottish Parliament on what conduct can be considered to be *“in relation to an MSP’s parliamentary duties”*.

It is my view that an overly narrow interpretation of how I am to determine whether to apply this exclusion in this and in future cases – on the basis that an MSP has to be engaged in some way in parliamentary duties – is potentially problematic. I explain why in more detail under the heading “precedent cases considered by a prior Commissioner and your predecessor Committee”.

In short, it may preclude a finding that a breach has occurred when the conduct is otherwise clearly and seriously incompatible with the Code’s provisions. If, for example, an MSP uses social media to bully and/or harass another individual, their first defence could be that they weren’t engaged in parliamentary duties when doing so. All of the work done to revise the Code to address such behaviours could easily be undone if such a defence was considered legitimate.

I am obliged to observe also that if such a defence is legitimate in the eyes of the Scottish Parliament, it would have to apply equally to all complaints of misconduct regardless of how egregious that conduct is.

Precedent cases considered by a prior Commissioner and your predecessor Committee

a. MSP/1846

The first precedent I wish to refer the Committee to is the case with reference MSP/1846. This report by a prior Commissioner was made to a predecessor SPPA Committee in March 2016. It concerned an MSP retweeting a tweet of an anti-Semitic cartoon. That was the extent of the conduct complained of.

The Commissioner found no breach of the Code in force at the time and the Committee agreed with that conclusion. However, that conclusion was reached because the provisions relevant to conduct in that case were only engaged if the MSP concerned was in contact with an individual who was lobbying them. The conduct did not involve contact with an individual lobbying the respondent and it was dismissed on that basis.

Neither the Commissioner's report nor the conclusion of the Committee at the time made reference to the fact that the conduct was not connected to the parliamentary duties of the MSP complained about. This is in spite of the fact that the same exclusion was included in the Code at the time, i.e. that the Code did not cover *"members expressing their political views (in their capacity as a member of a political party or organisation)"*. By reference to case MSP/3485, I am of the view that such an exclusion should always apply in similar circumstances if that was the intention of the Scottish Parliament.

b. MSP/1870

The second precedent arises in case MSP/1870. In that case, the MSP concerned had written to the press to advise that he had lodged a complaint with the Commissioner about the conduct of a fellow MSP. This was considered to be a breach of the following provision of the Code in force at the time:

"9.1.2 Members must not disclose, communicate or discuss any complaint or intention to make a complaint to or with members of the press or other media prior to the lodging of the complaint or during Stages 1 and 2 of the procedure for dealing with complaints (this procedure is set out in Volume 3, Guidance; Section 9)."

A similar provision is included at section 9.1 of the current Code. As with the first precedent, immediately above, neither the Committee nor the Commissioner made reference to the exclusion in the Code about conduct which represented *"members expressing their political views (in their capacity as a member of a political party or organisation)"*. It appears to me that saying publicly that you have complained about the conduct of another MSP is very likely to represent expressing a political view. As in case MSP/3485, it involves public criticism of a political opponent. It is apparent that the exclusion doesn't apply to this part of the Code even though, on the face of it, the conduct does not appear to be connected per se with the MSP's parliamentary duties.

c. MSP/2119

The third precedent arises in the case with reference MSP/2119. That case, as with the one currently under the Committee's consideration, concerned the treatment of others. I have two observations about the report made by the Commissioner in that case and also the

view of the predecessor Committee which considered it. My first is that the respondent in that case was a Minister of the Scottish Government at the time of the conduct complained of. This exclusion, which is also referred to in the introduction to the Code of Conduct, was not referred to by any party:

“The code does not cover...

- *Members who are Ministers, when acting as Ministers of the Scottish Government and carrying out functions of the Scottish Government covered by the Ministerial Code”*

My second observation is that one of the key pieces of evidence referred to in the report, which supported a finding of sexual harassment (see appendix 8 to the Commissioner’s report), was a screenshot of private direct messages sent by the respondent via social media to the individual identified as Witness A in that report.

I have to conclude that both the Commissioner and the predecessor Committee shared the view that the exclusion about the respondent not being engaged in parliamentary duties when sending those messages did not apply in this case, that is, even in a case involving private direct messages sent by an MSP to an individual.

d. MSP/2141

The fourth and final precedent I would refer the Committee to is in the case with reference MSP/2141. In that case, the respondent was considered by the Commissioner and the predecessor Committee to be in breach of the Code’s provisions relating to confidentiality. The respondent was a member of a subject Committee and did not agree with two paragraphs in a report that the Committee had agreed the content of in private session. The respondent shared with the press, via her party’s press office, the fact that she had dissented in relation to these two paragraphs because that was the position of her political party. That information was shared with the press prior to publication of the report. It is apparent to me from the content of the Commissioner’s report, and the respondent’s evidence from interview, that the respondent was “*expressing [her] political views (in [her] capacity as a member of a political party or organisation).*” This exclusion does not appear to have been considered by either the Commissioner or the Committee when reaching a conclusion that the Code’s provisions on confidentiality had been breached.

In summary, my view is that these cases demonstrate that the exclusions referred to in the introduction to the Code clearly aren’t always considered to be applicable. In particular, it appears that the exclusion would not normally be considered or applied in cases involving conduct on social or other media. That includes cases involving confidentiality, the use by MSPs of Twitter and the treatment of others.

I have not located other cases of a similar nature to MSP/3485, that is, relating to conduct on social or other media, where the exclusion was considered or applied. If there are cases which you would like to draw to my attention, please let me know as I would be happy to consider them.

I note in any case that there is no apparent explanation in either the Code or the guidance for why the exclusions should apply to some types of conduct and not others. This could be particularly concerning when complaints about the treatment of others arise.

The respondent's representations in this case

The respondent's representations in this case, as well as a subsequent exchange that I had with him, were all appended to the report that I provided to the Committee. At no point did the respondent seek to apply to his conduct the exclusion in the Code that you have referred me to. Instead, he admitted the conduct that was the subject of the two complaints made. In his defence, he instead argued that I had not taken proper account of the case law applicable to his rights under Article 10 of the ECHR.

In this context, I note that it is a matter of public knowledge that the respondent is the John Millar Professor of Public Law at the University of Glasgow School of Law.

The Code of Conduct for Councillors

The Committee will be aware from its recent consideration of the Model Code of Conduct for Members of Devolved Bodies that a very similar draft Code of Conduct, in this case for councillors, was recently agreed by the Local Government, Housing and Planning Committee. In each case, the Codes of Conduct and the guidance on their application have been expressly strengthened to ensure that the use by members and councillors of social media, particularly when it comes to respect for others, is encompassed. In the case of Councillors, it is apparent that the Code of Conduct is unquestionably engaged when they are reasonably perceived to be acting in that capacity.

Whilst I recognise that there are differences between the Councillors' Code and the Code which is applicable to MSPs, I would ask the Committee to consider the views of the electorate and prospective complainers in relation to MSP conduct and, in particular, to the use of social media.

It is a matter of public record that complaints about the online conduct of elected officials, particularly in their treatment of others, is on the increase. I am concerned that an intimation from the Committee and my office that such conduct by MSPs is not covered by the Code, on the basis that it is not related to "parliamentary duties", will lead to a decrease in public confidence in the system. It may also embolden MSPs who engage in such conduct to act with impunity.

Additionally, there may be accusations levelled to the effect that double standards are in operation.

Conclusion

I believe that for the regulatory system to operate effectively and to obtain the trust of all parties to it, MSPs, the Scottish Parliament, members of the public and my own office should all have a shared and common understanding of when the relevant provisions do and do not apply to MSP conduct. I would welcome the views of the Committee on the matters which I have set out above, both in relation to case MSP/3485 and any future complaints made to me about similar conduct.

I would, as ever, be happy to discuss the issues raised above with the Committee if the Members would find that helpful.

Yours sincerely



Ian Bruce
Acting Ethical Standards Commissioner