



Northern Ireland

# Local Government Commissioner for Standards

## Local Government Act (Northern Ireland) 2014

### In the Matter of Councillor Colin Kennedy – C00095 (Ards and North Down Borough Council)

### Decision of the Acting Northern Ireland Local Government Commissioner for Standards following Stages 1 and 2 of the Adjudication Hearing

The Northern Ireland Local Government Commissioner for Standards, Ms Margaret Kelly, has appointed Mr Ian Gordon, OBE, QPM, as Acting Local Government Commissioner (the Acting Commissioner) in relation to the Adjudication Hearing process in respect of this complaint. Mr Gordon was assisted by Mr Michael Wilson, Solicitor, Legal Assessor.

## 1. COMPLAINT

A complaint by Councillor James Menagh (Reference C00095 - Appendix A<sup>1</sup>) was made to the Commissioner which alleged that an elected member of Ards and North Down Borough Council, Councillor Colin Kennedy (Respondent), had or may have failed to comply with the Northern Ireland Local Government Code of Conduct for Councillors (the Code)<sup>2</sup>. The allegation was investigated by the Deputy Commissioner for the Local Government Ethical Standards (LGES) Directorate of the Northern Ireland Ombudsman's Office.

**The complaint** was investigated by Mr Paul McFadden, then Deputy Commissioner for the Local Government Ethical Standards (LGES) Directorate of the Northern Ireland Ombudsman's Office.

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<sup>1</sup> A reference to an Appendix is to the relevant Appendices in the Investigation Report dated 11 July 2019.

<sup>2</sup> <https://nipso.org.uk/site/wp-content/uploads/2016/02/Code-of-Conduct.pdf>

The relevant parts of the Code where it was alleged the Respondent had failed to comply with the Code were:

**Paragraph 4.2:** *“You must not conduct yourself in a manner which could reasonably be regarded as bringing your position as a councillor, or your council, into disrepute”.*

**Paragraph 4.13(a):** *‘You must show respect and consideration for others’.*

**Paragraph 4.13(b):** *‘You must not use bullying behaviour or harass any person’.*

Following his investigation, the Deputy Commissioner, submitted a report, dated 11 July 2019, to the Acting Commissioner in accordance with sections 55 and 56 of Part 9 of the Local Government Act (Northern Ireland) 2014. At paragraph 107 of his report, the Deputy Commissioner concluded there was sufficient evidence that the Respondent had failed to comply with the three provisions of the Code noted above.

## **2. PRE-ADJUDICATION HEARING REVIEW**

On 24 June 2020 the Acting Commissioner determined to hold an Adjudication Hearing into the Complaint. In a letter dated 6 November 2020, the Respondent submitted his Response to the Deputy Commissioner’s Investigation Report.

Due to Covid, it was decided that meetings of the Northern Ireland Local Government Commissioner for Standards would be held ‘virtually’ to ensure the safety of participants. A Pre-Hearing Review Meeting was convened by the Acting Commissioner, under paragraph 37 of the Procedures for the Adjudication of Cases<sup>3</sup> (Procedures) document, for Wednesday 9 December 2020. The Respondent declined to attend but, in an email dated 9 December 2020, he stated:

*“I am content, however, that given Mr McFadden has failed to provide any evidence to substantiate the claims he had made and which I have contended, I am happy for Mr Gordon to proceed to adjudication”.*

The Procedures document, at page 7 paragraphs 25 to 27, sets out the procedure that permits the Acting Commissioner to determine whether there has been a breach of the Code without holding an Adjudication Hearing:

### **Paragraph 25: Determination of Adjudication without an Adjudication Hearing**

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<sup>3</sup> <https://nipso.org.uk/site/wp-content/uploads/2016/09/Adjudication-Procedures-September-2016.pdf>

*“The Commissioner has the discretion to adjudicate to determine whether there has been a breach without an Adjudication Hearing if she considers that she requires no further evidence and any one of the following circumstances apply:*

*25a. If no reply is received in response to the notification provided to the Respondent within the specified time or any extension of time allowed by the Commissioner; or*

*25b. If the Respondent states that he or she does not intend to attend or wish to be represented at the Adjudication Hearing; or*

*25c. The Respondent does not dispute the contents of the investigation report”.*

In this instance, the Acting Commissioner determined that in view of the contents of the Respondent’s e-mail dated 9 December 2020, paragraph 25b applied.

#### **Paragraph 26**

Where the Commissioner decides not to hold an Adjudication Hearing, paragraph 26 requires him to

*send to the Respondent a list of the facts, together with any other supporting evidence, that she will take into account in reaching her decision. The Respondent will have 15 working days to submit any further written representations before the Commissioner make her adjudication.”*

Having invoked paragraph 25b the Acting Commissioner then sent the Respondent a list of facts and supporting evidence in accordance with paragraph 26.

#### **Paragraph 27:**

*“In circumstances where the Commissioner has made a determination as to breach without holding an Adjudication Hearing, she will, except in exceptional circumstances, hold an Adjudication Hearing to make a determination as to sanction.”*

### **3. STATEMENT OF FACTS SUPPLIED TO THE RESPONDENT**

In accordance with paragraph 26 of the Procedures document a Statement of Facts, obtained from the Report of the Deputy Northern Ireland Local Government Commissioner for Standards dated 11 July 2019 and the Response Form of Councillor Kennedy received on 9 December 2020, was sent to the Respondent on 8 January 2021. He did not respond.

**Relevant Facts:**

1. The Local Government Act (NI) 2014 provides that the Code will apply to all Councillors. Councillor Kennedy is an elected member of Council on Ards and North Down Borough Council from 4 June 2014 to the present date. He has served as a Councillor for 6 years.
2. Councillor Kennedy signed an undertaking on 4 June 2014 that he had read and would observe the Local Government Code of Conduct for Councillors (the Code). The Code was in effect when the conduct complained of occurred
3. At the relevant time, 30 November 2016, Councillor Kennedy was a member of the Council.
4. On 30 November 2016, the Council held 'a Gateway Signage Sub-Committee meeting' at the Signal Centre in Bangor, County Down, to discuss new signs for five local towns. Councillor Kennedy attended the meeting as a member of the Council.
5. At the end of the meeting, an exchange occurred between a Councillor Robinson and Councillor Kennedy which continued in the car park at the rear of the Signal Centre.

**From Witness Statements:****A. Councillor James Menagh (Appendix B)**

1. Councillor Menagh provided a written statement of complaint in which he stated that he had received a telephone call from Councillor Noelle Robinson on 30 November 2016 about the Regeneration Committee meeting at the Signal Centre in Bangor that evening.

**B. Councillor Noelle Robinson (Appendix H)**

1. Councillor Robinson attended a Gateway Signage - Regeneration meeting at 5.30 pm on Wednesday 30 November 2016 at the Signal Centre in Bangor.
2. She has stated that she jokingly asked for the prototype 'Newtownards' sign and remarked how pleased her friend and council colleague, Councillor Jimmy Menagh, would be as she intended to give the sign to him.

3. Councillor Robinson stated: prior to her leaving the room, Councillor Kennedy started to remonstrate with her in full view and hearing of those still present in the room.
4. She stated: he raised his voice and pointed his finger at me.
5. He stated very forcefully *"Noelle, you are not giving that sign to Jimmy Menagh"*
6. Councillor Robinson stated: *"I would describe Councillor Kennedy as having been right on top of me, he was right in my face. He was very aggressive and intimidating, his face was very red, I think he may have been attempting to block me from leaving"*.
7. Agnes Eaton approached her after she left the building and said words to the effect of; *'that was terrible, that fella is a big bully'*.
8. Councillor Robinson stated: Councillor Kennedy started shouting across at her when she was standing beside her car in the carpark at the rear of the Signal Centre.
9. Councillor Robinson stated: it was *"pitch dark"* at that time with some street lighting in the carpark and that she *"was quite intimidated by him, his face appeared to go white, he was very angry"*.
10. She asked him why she should not give the sign to Councillor Menagh, he responded with *"a diatribe about the UVF and insinuated that Jimmy was in the UVF.....I am certain that he said that Jimmy was in the UVF"*.
11. In respect of the discussion, Councillor Robinson said to Councillor Kennedy; *"everyone has a past"* and added that he responded by stating; *"Jimmy has a past and a present"* – Councillor Robinson interpreted this to mean that Councillor Menagh was still active in a paramilitary organisation. She added that he had also said that *"Jimmy's friends were drug dealers and thugs"*.
12. Councillor Robinson stated: she told Councillor Kennedy that he could have the sign, but he walked away, refusing to take it. She asked Mrs Eaton to return the sign to *'White Noise'* as she was too upset to go back in.
13. Councillor Robinson stated: that she contacted Councillor Menagh after she arrived home that night and told him about what had happened.
14. Councillor Robinson contacted the Chief Executive of the Council (Mr Stephen Reid) that night by email (Appendix H) and provided an account of Councillor Kennedy's behaviour.

15. In conclusion, she stated: *"I would like if he (Councillor Kennedy) would be big enough to apologise to me"*.

**C. Agnes Eaton (Appendix I)**

1. Mrs Eaton stated that, as Councillor Robinson was leaving with a Perspex sign, she remarked that she would be giving the sign to *"Jimmy someone"* – she could not recall the surname. In response to this, Councillor Kennedy reportedly said; *"what did you just say?"* in a loud voice and she said, *"he definitely was not calm"*.
2. Mrs Eaton stated: *"I got the impression he wanted the sign. It appeared obvious to me that something had ticked him off. Noelle said: "I'm giving it to Jimmy" and said his surname. He responded: "I don't think you are"*.
3. She stated: Councillor Kennedy said to Councillor Robinson; *"I don't care what it's for, he's not getting it"*. Councillor Kennedy then followed Councillor Robinson out towards the carpark. She observed Councillor Kennedy *"towering over"* Councillor Robinson in the carpark.
4. She stated: *"I could see that Noelle was looking frustrated – they appeared to be having a heated debate. He was right up in Noelle's face. I would describe him as being very tall and well built, he looks like a big farmer. I could hear him talking about the man called Jimmy"*.
5. Mrs Eaton stated: *"I would say that he came across as a bully. He was neither a good representative of himself nor his party. I spoke with both of them to try and diffuse the situation. Noelle was chalk white. I hope I never witness the likes of this again"*.
6. Mrs Eaton stated: Councillor Robinson had told her that Councillor Kennedy had *"accused her of supporting terrorists"* and *"supporting paramilitaries and drug dealers"*. Mrs Eaton had not heard this being said.
7. She returned the sign at Councillor Robinson's request and told Brian Dorrian that *"Councillor Kennedy had "tore strips" off Noelle and that he is a bully"*.
8. Mrs Eaton stated: *"I could not even sleep that night; I was so shocked. Had he behaved towards me in that manner, I would have called the PSNI. It was a horrible situation"*.

**D. Mark Mulholland, Company Director of White Noise Graphic Design Studio (Appendix J)**

1. Mr Mulholland stated: Councillor Kennedy said something inappropriate to Councillor Noelle Robinson at the start of the meeting. He could not recall what was said but thought that it was most inappropriate. Councillor Kennedy's demeanour was not particularly pleasant...whilst he could not recall what Councillor Kennedy said, he would say it created an uncomfortable atmosphere in the room.
2. He stated: Councillor Robinson left along with Agnes Eaton, whom, he stated, returned about 5-6 minutes later. He described Mrs Eaton as being '*clearly distressed – she was white*'. She said to Claire (Jackson) that she was returning the sign and referred to some sort of a conversation in the carpark. He assumed that this related to Councillor Kennedy – he did not hear all of the conversation

**E. Claire Jackson, Corporate Communications Manager, the Council**

1. Claire Jackson stated: Agnes Eaton (Agatha) had told her that she had witnessed an exchange in the carpark between Councillors Kennedy and Robinson. She described Agatha as 'evidently upset and shaking' and stated that Agatha had told her that Councillor Kennedy had 'behaved in an aggressive manner towards Councillor Robinson and had made allegations concerning paramilitary activity on the part of Councillor Jimmy Menagh'.
2. Ms Jackson stated: she could recall that Councillor Robinson had requested a 'small mock-up sign of Newtownards'. She had indicated her intention to give it to Councillor Menagh.
3. Ms Jackson said: she had told Councillor Kennedy that the ladies (Councillor Robinson and Mrs Eaton) had taken the sign and jokingly said words to the effect of '*you will have to chase them out to the carpark*'. She added that she did not think that he would go out after them. She described Councillor Kennedy 'as appearing to be slightly agitated – he definitely wanted to know where the sign was'.
4. Ms Jackson stated: she had sent an email to the Chief Executive of the Council, Mr Stephen Reid that night which indicated:
  - 'Colin Kennedy had a row with Noelle Robinson in the carpark. It was to do with Jimmy Menagh who he apparently described as a paramilitary who has no business in Ards (or words to that effect).

- She was not there but it was witnessed by a business owner from Bangor (Agatha) who came back into the meeting to tell her about it. Agatha was fairly upset and said Noelle was the same’.

**F. Ms Foreman, Assistant Regeneration Officer at the Council.**

1. Ms Foreman stated: she was unaware of any tension during the meeting. Councillor Robinson had asked for a sample of gateway signage and had taken it with her and left along with Agnes Eaton.
2. Agnes Eaton came back in from the carpark and made a general comment along the lines of *‘that was very rude’* – Ms Foreman did not know what this referred to and believed that Agnes had brought the sign back.

**G. Stephen Reid Chief Executive, the Council (Appendix M)**

1. Mr Reid stated: he received an email from Councillor Robinson at 20.08 on Wednesday 30 November 2016 in which she had raised her concerns about her interaction with Councillor Kennedy and that he responded to her email that night.
2. He stated: he had also received an email from Claire Jackson who advised: *‘Colin Kennedy had a row with Noelle Robinson in the carpark’* and that he also responded to Claire that night.

**H. Interview of Councillor Kennedy (Appendix N)**

1. Councillor Kennedy was interviewed on 24 August 2017 at the Northern Ireland Public Services Ombudsman’s Office in Belfast. Councillor Kennedy was not accompanied during the interview. The interview was audio recorded.
2. He said: he spoke to Councillor Robinson as she was leaving and told her that she could not take the sign and should not be giving it to anybody *‘especially Mr Menagh but again she ignored me’*. He added that he certainly had not shouted at her but stated that *“the tone of my voice would’ve been obviously firm”*.
3. He said: Councillor Robinson does not represent Newtownards town and if the sign was going to be given to anybody that it should go to one of the representatives for the District Electoral Area.
4. When asked, why he told Councillor Robinson that the sign should not be given to Councillor Menagh: he said, *“in my view it shouldn’t be given to anybody who is, or*



*has connections with, or who is an apologist for those who are a blight on the local communities. And, as the evidence that I submitted, and everybody knows, well if that means nothing, because we're talking about evidence here, but Councillor Menagh has connections with, eh, local paramilitary groupings".*

5. He described the carpark as *"... sufficiently well-lit to make it safe and that you can see the boundaries of it. Now actually to be honest I mean I can't say for sure"*. He said that he saw Councillor Robinson as he left and thought that the other lady may have joined them afterwards.
6. When asked to describe Councillor Robinson, he initially gestured with his little finger and described her as: *"...she's slim, tall, well tall, slim"*. *"That's just as opposed to me who, yes, I'm 6ft 3 and 22 stone, yes, Noelle is you know, she's, we are the physical antithesis of each other"*.
7. Asked how Councillor Robinson may have responded to him, he said: *"Disproportionate. Disproportionately I thought at the time. Because she was so vociferous and so passionate, eh, in what she was saying in defence of Jimmy to the point where she may well have been in tears at the end of it. That was as she left to get in her car, and I went to get in my car, and she could well have been in tears, yeah"*.
8. He was asked, in hindsight, and in light of their contrasting physical statures, if he could see how Councillor Robinson may have perceived his behaviour as somewhat intimidating or harassing. He responded by stating *"Yes, I actually can. I can see it from her point of view now. However, yes, it would be a misrepresentation of how I behaved because at the end of it, if the same thing was to happen again, I would behave exactly the same"*.
9. He was later asked what Mrs Eaton may have seen when she approached both Councillors Kennedy and Robinson in the carpark. He stated: *"Well she would've seen sort of this hulk standing, you know, face to face, well not face to face obviously, but speaking, having this conversation with Noelle who would have been fairly animated"*.
10. Councillor Kennedy denied behaving in a disrespectful and bullying manner towards Councillor Robinson.
11. Councillor Kennedy denied that he said Councillor Menagh was a member of the UVF (Ulster Volunteer Force).

## **I. Councillor Colin Kennedy's Response to the Investigation Report**

Councillor Kennedy has disputed the content of some of the Investigating Officer's Report but has offered no evidence to support his position. In his Response, Councillor Kennedy has said the following:

1. *"Councillor Menagh was not present at the meeting nor witness to any of the events under consideration".*
2. *"It was 'pitch black' in the car park making it impossible for anyone to make comment on the colour of one's skin".*

## **4. STAGE 1 – CONCLUSION OF FINDINGS OF FACT**

In his Response Form (9 December 2020), to the Investigation Report, the Respondent has commented on some of the findings by the Deputy Commissioner. He does not, however, categorically contest any of the evidence set out in the statements of the witnesses. The Respondent concluded:

*"I am content, however, that given Mr McFadden has failed to provide any evidence to substantiate the claims he had made and which I have contended, I am happy for Mr Gordon to proceed to adjudication".*

As noted above a Statement of Facts compiled by the Acting Commissioner was sent to the Respondent on 8 January 2021 but the Respondent did not respond to that document.

The Acting Commissioner has accordingly determined that the facts set out in part 3 above represent the findings of fact in this matter.

In summary, the Acting Commissioner is satisfied there is clear evidence in the Investigation Report, from both the Respondent and Councillor Robinson, together with a number of independent witnesses, that the incident arose from a dispute over the road sign. The cause of the dispute is also clear, Councillor Robinson wanted to give the sign to Councillor Menagh whilst Councillor Kennedy was adamant that would not happen. The incident escalated outside in the car park and that was witnessed by Mrs Eaton. It is also apparent, from Councillor Robinson's statement and from the interview with the Respondent, that he has a strong dislike of Councillor Menagh, which was a key factor in the escalation.

## 5. STAGE 2 – DETERMINATION ON BREACH

The evidential test for consideration of findings of fact is whether the Deputy Commissioner established to the satisfaction of the Acting Commissioner, on the ‘Balance of Probabilities’, there had been a failure to comply with the Code.

The Acting Commissioner considered all of the evidence and found as follows:

- A. The Councillor’s Code of Conduct applied to the Respondent. In reaching his decision on the failures to comply with the Code, the Acting Commissioner has taken into account the Commissioner’s Guidance on the Code.
- B. The Respondent has failed to comply with the Code at:
  - 1. **Paragraph 4.2: “You must not conduct yourself in a manner which could reasonably be regarded as bringing your position as a councillor, or your council, into disrepute”.**

The Commissioner’s Guidance on the Code (Page 17 p. 4.5.4)<sup>4</sup> states that *“when considering whether a councillor’s actions or behaviour could reasonably be regarded as bringing their position, or their council, into disrepute, she will assess:*

- a. whether that conduct is likely to diminish the trust and confidence the public places in your position as councillor, or your council, or is likely to result in damage to the reputation of either; and*
- b. whether a member of the public – who knew all the relevant facts – would reasonably consider that conduct as having brought your position as a councillor, or your council into disrepute.”*

The Acting Commissioner noted that the Respondent’s exchange with Councillor Robinson initially occurred during, then immediately after, a council meeting and continued in a carpark and that both were acting as members of their council with members of the public and council officers present or nearby.

The Acting Commissioner was satisfied that, taking all the facts as a whole concerning the incident, the Respondent’s conduct was likely to diminish the trust and confidence the public places in his position as councillor.

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<sup>4</sup> <https://nipso.org.uk/site/wp-content/uploads/2018/02/Guidance-for-Councillors-from-the-Northern-Ireland-Commissioner-for-Complaints-April-2017-2-1.pdf>

The Acting Commissioner determined that a member of the public, knowing all of the relevant facts, would reasonably consider that the Respondent's conduct was such that it brought his position as Councillor into disrepute.

However, whilst the Acting Commissioner found that Councillor Kennedy had breached paragraph 4.2 of the Code, he did not find evidence that the Respondent's conduct had brought his council into disrepute. In coming to this conclusion, the Acting Commissioner noted and accepted the submission of the Deputy Commissioner who referenced the case of Livingstone v Adjudication Panel for England<sup>5</sup> which concerned offensive comments made by the then Mayor of London, Ken Livingstone. In that case the court drew a distinction between an elected representative bringing themselves into disrepute and bringing his or her office into disrepute:

*"While the appellant has a high profile as Mayor, I doubt that many people would regard what he did as bringing disrepute on the office rather on him personally. Misuse of the office can obviously bring disrepute on the office, but personal misconduct will be unlikely to do so."*

Although the Respondent's behaviour in the incident was unacceptable and offensive, there is no tangible evidence to support the conclusion that it brought the Council into disrepute.

## **2. Paragraph 4.13(a): 'You must show respect and consideration for others'.**

The Acting Commissioner has carefully considered the analysis by the Deputy Commissioner set out in Paragraphs 94 and 95 of his Investigation Report in which he noted:

1. The Respect Principle (Code page 8) where it is acknowledged that exchanges may be robust but that should not extend to individuals being subjected to unreasonable and excessive personal attack. and
2. In the Guidance to the Code at Paragraph 4.6.5: where it states, you should keep in mind that rude and offensive behaviour may lower the public's regard for, and confidence, in councillors.

The Acting Commissioner was satisfied that based on the findings of fact the Respondent's behaviour and words, for example, in the evidence of Councillor Robinson and Mrs Eaton, amounted to an unreasonable and excessive personal attack on Councillor Menagh. The behaviour was also patently rude and offensive to Councillor Robinson.

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<sup>5</sup> [2006] EWHC 2533 (Admin)

The Acting Commissioner has had regard to the potential effect of Article 10 of the European Convention on Human Rights, which attracts ‘*enhanced protection*’ when a councillor’s comments are political in nature; in a political context, the immoderate, offensive, exaggerated and aggressive may be tolerated where it would not otherwise be.

However, the principles set out cases such as *Heesom v Public Services Ombudsman for Wales*<sup>6</sup> make it clear that the protection afforded by Article 10 does not extend to gratuitous personal comments.

The Acting Commissioner agreed with the conclusion of the Deputy Commissioner, that the Respondent’s words were ill-tempered, and the incident occurred in a public car park. It was not in the context of a debate in the interests of informing the public nor did what was said relate to a matter of public administration or public concern. As such, it did not attract the enhanced protection under Article 10.

Accordingly, the Acting Commissioner found that Councillor Kennedy had failed to comply with paragraph 4.13(a) of the Code and the Respect Principle.

**3. Paragraph 4.13(b): ‘*You must not use bullying behaviour or harass any person*’.**

The evidence of Councillor Robinson makes a number of references that she felt intimidated by the Respondent’s behaviour, both in the Council building and then in the car park. She was embarrassed by his behaviour in the room, described him as angry and shouting at her in the car park and, in reference to his accusations about Councillor Menagh, said that “*they took my breath away and shocked me to the core*”. She was too upset to take the sign back into the building and asked the witness Eaton to do so. Councillor Robinson was still upset when she drove home.

The evidence of Agnes Eaton, Mark Mulholland, Claire Jackson and Stephen Reid make reference to the Respondent behaving in an aggressive manner and to Councillor Robinson being upset because of the incident.

The Acting Commissioner was satisfied there was sufficient evidence to show that Councillor Robinson felt intimidated and offended by the behaviour of the Respondent, which included offensive accusations about Councillor Menagh. The Acting Commissioner was also satisfied that the behaviour by the Respondent towards Councillor Robinson, during the confrontation, was bullying and harassing in nature.

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<sup>6</sup> [2014] EWHC 1504 (Admin)

The Commissioner's Guidance on the Code<sup>7</sup> at pages 25 to 26, describes bullying and harassment:

- 4.6.6 *"unwanted behaviour that makes someone feel intimidated or offended"*.
- 4.6.7 *"if your criticism is a personal attack on a councillor...or is of a highly offensive nature, this is likely to be considered bullying or harassment and therefore a breach of the Code"*.
- 4.6.8 *"allegations of bullying and harassment will be considered from the perspective of the alleged victim"*.

The evidence of Councillor Robinson and Mrs Eaton clearly describe the offensive nature of the Respondent's behaviour and words to Councillor Robinson, together with the upset it caused to her. This behaviour falls within the definitions of bullying and harassment set out above and accordingly the Acting Commissioner found that Councillor Kennedy has breached paragraph 4.13(b) of the Code

## **6. STAGE 3 - SANCTION**

On 11 June 2021, Stage 3 of the Adjudication Hearing was held on WebEx. The Acting Commissioner said restrictions imposed by Covid 19 were designed to protect the public by avoiding in person public meetings, and accordingly this Stage 3 was being conducted on a virtual basis.

Ms Michaela McAleer                      Acting Deputy Commissioner presented the case.

Councillor Colin Kennedy              The Respondent, represented himself.

The Hearing was recorded by a stenographer.

The Acting Commissioner reiterated that Stage 1 Finding of Facts and Stage 2 Determination had been conducted under Paragraph 25 of the Procedures document, in particular, paragraph 25(b), where the Respondent did not intend to be present or represented at Stages 1 and 2.

The Acting Commissioner had made a determination in Stages 1 and 2, on 2 March 2021, and he was satisfied that the Respondent had failed to comply with the Code at:

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<sup>7</sup> <https://nipso.org.uk/site/wp-content/uploads/2018/02/Guidance-for-Councillors-from-the-Northern-Ireland-Commissioner-for-Complaints-April-2017-2-1.pdf>

**1. Paragraph 4.2:**

*'You must not conduct yourself in a way which could reasonably be regarded as bringing your position as a Councillor, or your Council, into disrepute'.*

**2. Paragraph 4.13(a):**

*'You must show respect and consideration for others'.*

**3. Paragraph 4.13(b):**

*'You must not use bullying behaviour or harass any person'.*

The determination was sent to the Respondent, and he was given the opportunity to respond.

The Acting Commissioner considered the submissions by both parties on sanction and the Guidance on Sanctions document. In summary, the respective submissions were as follows:

**Submissions by the Acting Deputy Commissioner:**

**Mitigating Factors:**

1. The Respondent has no history of breaching the Code.
2. He did not bring the Council into disrepute.
3. There had been co-operation and engagement in the investigation.
4. The incident was a one-off occurrence and there had been no further incidence of non-compliance in the intervening period.

**Aggravating Factors:**

The Acting Deputy Commissioner said that an important factor in this case was the protection of the public interest in terms of public confidence in the institution of local government through those democratically elected to represent constituents. The legitimate aim being pursued by the Code was to provide for and secure the high standards required from elected councillors and in turn the purpose of sanction was preservation of confidence in local government representation.

The Acting Deputy Commissioner referred to the list of aggravating factors in the Commissioner's Guidance on Sanctions and drew on four aggravating factors which she

considered applicable to this case and a further few factors that should be taken into account which do not appear in that non-exhaustive list, but which, in her view, were relevant.

1. The Respondent's actions had brought his role as a councillor into disrepute. Its seriousness reflected perhaps in the fact that it was specifically mentioned as a justifying factor under the suspension and partial suspension categories of decision. In this instance a member of the public, Mrs. Eaton, specifically referred to the Respondent as "not being a good representative of himself or his party".
2. Despite a number of witness accounts being provided which went some way to supporting Councillor Robinson's account of events, and those were contemporaneous accounts, the Respondent did not attach any weight to these and rather described the Deputy Commissioner as having failed to provide any evidence to substantiate the claim that he, the Deputy Commissioner, had made.
3. The Respondent referred to a medical issue for Councillor Robinson which she shared with Council before the 2019 local government election. The inference Councillor Kennedy was inviting, in her view, to be drawn from this statement was that Councillor Robinson's account was unreliable. No reference is made by Councillor Kennedy to the fact that the events took place in 2016 and there was an independent witness to some of the incident. The Acting Deputy Commissioner suggested that this provided some evidence of Councillor Kennedy seeking unfairly to blame other people.
4. The complete absence of any provocation or backdrop to the events that occurred. Moreover, the Respondent chose to follow Councillor Robinson to the car park where his conduct escalated, despite Councillor Robinson's decision to walk away having presented him with an opportunity to desist from his behaviour and de-escalate matters.
5. The allegations made by Respondent were serious and could have had serious personal safety consequences for another Councillor and potentially for the Respondent himself were they to find their way into the wider public domain.

The Acting Deputy Commissioner addressed the categories of decision for sanction. She noted paragraph 6 of the Sanction Guidelines:

*"The Acting Commissioner will take account of the actual consequences that have followed as a result of the Respondent's conduct and will also consider what the potential consequences might have been even if these did not occur".*



### **1. No action:**

This was not a suitable outcome given the deliberate nature of the conduct, which gave rise to the Acting Commissioner's determination and breach of the Code. This was not an inadvertent failure, rather this was conduct that was driven by the Respondent's own actions with him choosing to follow Councillor Robinson to the car park where matters escalated.

### **2. Censure:**

Given the weight of public interest the Acting Deputy Commissioner suggested in this case, as opposed to the minor failures envisaged under this outcome, it would be highly questionable in her view whether censure could cater for the public interest in the circumstances.

### **3. Partial Suspension**

The provision was designed to meet circumstances in which a councillor's breach was such that it was limited to a particular activity or section of council business from which the councillor could be easily extracted. The conduct here, which involved bullying and harassing behaviour leading to disrepute and disrespect, was conduct of a pervasive nature and one which therefore went to the heart of public representation and the role of the councillor at every level and in every matter.

### **4. Suspension**

The Acting Deputy Commissioner had considered Councillor Kennedy's case within the framework set out in the Sanctions Guidelines as to when suspension might be appropriate. She noted that suspension may be adequate in addressing the public interest insofar as it upholds public confidence in the standards regime and reflected the severity of the matter and conveys that the matter should not be repeated.

The Respondent had brought the office of councillor into disrepute and also been found to have failed to comply with Rules 4.13(a) and (b). Added to which, Councillor Kennedy referred to behaving in the same way again if the same thing was to happen. The possibility of repeat conduct, therefore, cannot be easily ruled out.

The Acting Deputy Commissioner looked at case law from other jurisdictions. She considered the case of Councillor Jim Swift where the Standards Commission for Scotland decided to impose a sanction of a one-month suspension for a breach of the Scottish Code. The panel noted that Councillor Swift had been shouting at the complainer during an exchange and that his demeanour, tone and body language were aggressive and intimidating. It was,

nevertheless, of the view that the respondent's conduct did not warrant a more severe sanction because it was satisfied that the incident was a one-off, was of limited duration, and that there was no evidence of any previous transgressions by that Respondent.

The Acting Deputy Commissioner distinguished the Respondent's case from Councillor Swift:

1. The potentially serious nature of the comments made by Councillor Kennedy which amounted to an excessive personal attack on another councillor who was not present to defend himself or respond.
2. Three people were directly affected by Councillor Kennedy's conduct, one of whom was a member of the public.
3. There had been no formal acknowledgment of regret or apology by Councillor Kennedy.
4. There had been only partial rather than full cooperation with the adjudication process.
5. There was some evidence of challenging the evidence to the end.
6. She highlighted that there was no finding of disrepute (in Swift) relating to the role or office of the councillor.

The Acting Deputy Commissioner considered that suspension would be in line with the decisions on sanction in the previous case and it would meet the public interest.

## **5. Disqualification**

The Acting Deputy Commissioner referred to Paragraph 19 of the Sanctions Guidelines, where disqualification is described as the most severe of the options open to the Acting Commissioner. It goes on to list from A to H those circumstances in which disqualification may be an appropriate outcome. She had not identified that Councillor Kennedy's conduct fell within any of those subparagraphs.

The Acting Deputy Commissioner said the key question in determining whether disqualification was appropriate was the extent of the reputational damage and she highlighted that as to the Council and not the Respondent. The Deputy Commissioner's Report and the Acting Commissioner's determination made it clear that the disrepute in this case did not extend to the Council.

On that basis, the Acting Deputy Commissioner's submission was that the Respondent's case was one which fell within the suspension category and one which may attract a period of two to three months.

The Acting Deputy Commissioner referred to financial impact should the Respondent be suspended. In accordance with *"Section 59.5 or Section 61 of the Local Government Act Northern Ireland 2014, where a councillor is suspended from carrying out their duties the part of basic allowance, special responsibility allowance, chairperson and vice chairperson allowance payable for the period of suspension to the councillor will be withheld."*

There would be a financial impact on the Respondent.

### **Submissions by the Respondent**

The Acting Commissioner informed the Respondent that he had passed a copy of his written submissions, submitted on 4 June 2021, to the Stenographer to be inserted into the transcript for Stage 3. There were some parts in those submissions, linked to family, where the Acting Commissioner would have taken that evidence in 'private mode'. The Acting Commissioner directed that those sections would not appear in the public transcript of today's Hearing nor would the Respondent's email address. The Acting Commissioner said he understood that the Respondent was content for his submissions to go into the transcript without reading it out in the Hearing, and confirmed that the Respondent would have the opportunity to speak on mitigation. The Respondent agreed to this course of action.

The Respondent also referred to the Paragraph 3 of the Sanctions Guidelines and observed:

1. The exchange between himself and Councillor Robinson which was the foundation for the complaint was limited to himself and Councillor Robinson; it did not take place in a public/Council forum/setting; nor was the detail of the exchange witnessed by any member of the public, with only one person making observations from sufficient distance away that they could not hear what was being said.
2. The author of the report submitted by the Ombudsman's Office made serious allegations regarding his actions yet failed to provide any evidence whatsoever to substantiate said allegations. In fact, in Paragraph 87, the author stated that he is "persuaded" that evidence exists, yet no such evidence has ever been submitted.
3. While he is on record as having acknowledged Councillor Robinson's interpretation of their exchange insofar as she was offended and upset, at no time did he intend to come across in a bullying or intimidating fashion, with the only evidence offered being an

observation that he was considerably taller and larger than Councillor Robinson, which neither of them could do much about.

4. Section 8 of the “Sanctions Guidelines” states, “Circumstances where the Commissioner may find it appropriate to determine that no action needs to be taken in respect of a failure to comply with the Code include:

- a. An inadvertent failure to comply with the Code.
- b. A written undertaking from the Respondent that, despite the lack of sanction, there is not likely to be any further failure to comply on the part of the Respondent.

In the first instance, it was clear from the evidence provided, that there was no malice associated with his comments to Councillor Robinson; neither was there any premeditation involved. It was an organic exchange that flowed from earlier events. If his actions did indeed breach the Code, it was certainly inadvertent on his part and wholly unintentional.

In the second instance, it has always been his stated position, that irrespective of the rights and the wrongs of what happened, he was always more than happy to issue a full apology to Councillor Robinson. The only reason this did not happen was because he was not made aware of the fact that Councillor Robinson had been hurt and offended until he received correspondence from the Ombudsman's Office in relation to a complaint which had been submitted by a third party. Had he been made aware of this at an earlier stage, he would not have hesitated to apologise to Councillor Robinson both in person and in writing.

## **Mitigation**

In regard to mitigation, to say that he had learned a salutary lesson from this incident was an understatement and he was on record as having expressed regret in relation to how Councillor Robinson felt following their exchange and he was truly sorry for any hurt he caused. He was glad to say that Councillor Robinson and himself were on good speaking terms at the end of the last Council term. It matters little whether or not he intended to upset her that night and he was still more than willing to issue an apology.

He had absolutely no intention of letting this sort of incident happen ever again. Up until this point in his life he had never been investigated or disciplined in relation to his behaviour in any part of his life, professional or private. He had a blemish free record heretofore and a completely clear criminal record. He had never sought to react to events in a knee-jerk fashion, or to let emotion dominate reason and, as a Christian, he strove to take time to know and understand other people.

Without seeking to dismiss the hurt felt by Councillor Robinson, he would simply wish to stress that their exchange was only witnessed by one other person, and at a distance. He had never denied that the exchange took place or that Councillor Robinson and he had a heated discussion in relation to appropriate behaviour of public representatives. However, it was clear that they had markedly differing opinions as to what actually happened that evening. In any event, there was no media coverage of the incident; there was no coverage on social media and there was no mention of it within the Council. The potential damage caused to the perception of councillors was therefore very limited.

The personal impact of an adverse judgement could have a catastrophic impact upon his life, relationships and livelihood. At present his only income was through his role as Councillor and with 18-month and 8-week-old daughters to provide for, things were incredibly hectic to say the least.

The Respondent commented on the submission by the Acting Deputy Commissioner concerning her statement that his inclusion of the information regarding Councillor Robinson's personal health was included in some way to deflect where in fact it was the opposite. The reason he included that information was to emphasise his own regret at what took place that evening. Certainly, if he had known that the circumstances may have been different.

The Respondent said that no point had he attempted to escape any responsibility that he had for anything that happened that night other than to perhaps attempt to explain from his own point of view what had happened and that will come across. So, beyond the submission he had made that will be included in the record, he did not have anything else to say.

## **Sanction**

The Acting Commissioner considered sanction, as set out in paragraph 68 of the Procedures document, in ascending order of severity, and taking into account the Sanctions' Guidelines:

### **1. No action**

To take no action in this case was not an appropriate response to the failure by the Respondent to comply with the Code. His conduct was of a more serious nature and not merely an 'inadvertent' failure to comply with the Code.

### **2. Censure**

The Acting Commissioner noted the submission by the Acting Deputy Commissioner on balancing the public interest in this case against the Respondent's conduct. That conduct was not a 'minor failure' as envisaged in paragraph 9 of the Guidance on Sanctions. The sanction of Censure was not a suitable sanction.

### **3. Partial suspension**

Is more likely to be appropriate where the conduct related to a particular activity or Council business from which the Councillor could be easily removed. The Respondent's conduct, which led to this breach of the Code, was not related to any particular area of Council business. The Acting Commissioner did not find that he had brought his Council into disrepute. The sanction of partial suspension was not a suitable sanction.

### **4. Suspension**

The Sanctions Guidelines state that suspension is to be considered where the conduct is not sufficiently serious to warrant disqualification, but the conduct is of a nature that:

- a. it is necessary to uphold public confidence in the standards regime and/or local democracy.
- b. there is a need to reflect the severity of the matter; and
- c. there is a need to make it understood that the conduct should not be repeated.

### **5. Disqualification**

The Acting Commissioner had considered whether or not Disqualification would be an appropriate sanction, however he was satisfied that, taking into account the Sanctions' Guidelines, the conduct in this case did not require disqualification. Of particular relevance was his finding that the Respondent did not bring the Council into disrepute.

The Acting Commissioner considered suspension to be the appropriate sanction for this case.

#### **Reasons:**

Councillor Kennedy had submitted challenges to the Deputy Commissioner's Investigation Report and to the facts and determination the Acting Commissioner had made in Stages 1 and 2 of the Hearing. He declined to attend the Pre-Hearing Review and, Stages 1 and 2 of the Adjudication Hearing, when he could have categorically contested any of the evidence set out in the statements of the witnesses. He had not presented evidence to support his written comments on the Report nor in the Adjudication Hearing proceedings.

**Mitigating Factors:**

1. The Respondent has a previous record of good service and compliance with the Code. He was re-elected to the Council in May 2019.
2. He did not bring the Council into disrepute.
3. There has been co-operation and engagement in the investigation.
4. The incident was a one-off occurrence and there has been no further incidence of non-compliance in the intervening period.
5. The Respondent has shown remorse for what occurred and has expressed his willingness to apologise. He has met with former Councillor Robinson since the incident and there has been no further issue between them.
6. The Respondent has made further relevant submissions which the Acting Commissioner has considered in private.

**Aggravating Factors:**

1. The serious nature of the conduct leading to a breach of the Code
2. The conduct of the Respondent was deliberate in that he followed Councillor Robinson into the car park to challenge her about the town sign.
3. The Respondent's actions had brought himself into disrepute.
4. A lack of sufficient insight by the Respondent as to his actions that night. There was some evidence of continuing to deny the facts despite clear, contrary evidence, and challenging the investigation and adjudication to the end

The Acting Commissioner noted the submission from the Deputy Commissioner in relation to the Council allowance paid to the Respondent. He also noted the Respondent's submission concerning the impact of suspension on his family.

The Acting Commissioner recognised there had been a significant period between the incident and this Hearing, which in the main, had been brought about by external events. He took that into consideration.

The Acting Commissioner had considered the objectives, set out in paragraph 3 of the Sanctions Guidelines, and found that the following objectives were relevant to determining sanction in this case:

1. the public interest in good administration
2. upholding and improving the standard of conduct expected of councillors
3. the fostering of public confidence in the ethical standards regime introduced by the 2014 Act

Any sanction imposed must also be justified in the wider public interest and should be designed to discourage or prevent the particular Respondent from any future failures to comply with the Code or to discourage similar conduct by other Councillors.

The Acting Commissioner had considered a suspension for a period of three months. He was, however, persuaded by the submissions from both of the parties and the circumstances of this case, that it would be appropriate to reduce that period of suspension. He found that a sanction of suspension for six weeks was a proportionate sanction in the circumstances of the failures to comply with the Code and the outcomes of the Respondent's conduct.

The decision of the Acting Commissioner, made under Section 59(3)(c) of Part 9 of the Local Government Act (Northern Ireland) 2014, was to suspend the Respondent for a period of six weeks and the suspension was to have effect from 18 June 2021.

## **7. RIGHT OF APPEAL**

The Respondent may seek the permission of the High Court to appeal against a decision made by the Acting Commissioner, which must be made within 21 days of the date that the Respondent receives written notice of the Acting Commissioner's decision.

A handwritten signature in blue ink, appearing to read 'Ian A Gordon'.

Ian A Gordon

Acting NI Local Government Commissioner for Standards  
30 June 2021



