



**Independent investigation
into allegations concerning**

**Councillor Adrian Fluker
of
Maldon District Council**

**Report into a
complaint by**

Councillor Richard Siddall

3 August 2020

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1: Executive Summary

- 1.1 On 3 February 2020, Councillor Richard Siddall submitted a Code of Conduct complaint against Councillor Adrian Fluker, Leader of Maldon District Council ('the Council'). Councillor Siddall, who is also a member of the Council, documented several incidents in his complaint to demonstrate what he describes as bullying, intimidatory and homophobic behaviour by Councillor Fluker towards him, since February 2019.
- 1.2 This investigation has concluded that by his conduct, Councillor Fluker did fail to treat Councillor Siddall with respect and bullied him over the period relevant to this investigation. This was demonstrated by his:
 - a. shouting 'Siddall' in front of other councillors prior to the August Council meeting, with the clear intent of drawing attention to the fact that his attire was not compliant with the Conservative Group's dress Code.
 - b. making a joke to Council officers about what Councillor Siddall would do when he got home to his husband.
 - c. talking to Councillor Siddall in a deliberately affected / camp manner at the September Council meeting, both in relation to his attire and with the comment 'Hello Sailor'.
 - d. making a throat cutting gesture towards Councillors Siddall and Fleming when they abstained from a vote at the September Council meeting.
- 1.3 Given our conclusions, it is difficult to see how Councillor Fluker's actions could do anything other than reduce the public's confidence in the members being able to fulfil their role. As Leader of the Council, Councillor Fluker should be setting the highest standards of conduct, knowing that others will likely take their lead from him.

2: Councillor Fluker's official details

2.1 Councillor Fluker was at the time of the alleged conduct, Leader of Maldon District Council representing Southminster Ward. Councillor Fluker is a member of the Conservative Party. His current term of office ends in 2024.

2.2 Councillor Fluker currently sits on the following committees and groups:

- Appointments Board
- Appointments Committee
- Council
- COVID 19 Interim Measures Group
- District Planning Committee
- Investigating and Disciplinary Panel
- Licensing Committee
- Performance, Governance and Audit Committee
- South Eastern Area Planning Committee
- Statutory Annual Council
- Strategy and Resources Committee

3: Relevant legislation and protocols

The Localism Act 2011

- 3.1 Section 27 of the Localism Act 2011 (the Act) provides that a relevant authority must promote and maintain high standards of conduct by members and co-opted members of the authority. In discharging this duty, the Authority must adopt a code dealing with the conduct that is expected of members when they are acting in that capacity. For the purposes of this investigation, the relevant authority is Maldon District Council.
- 3.2 Section 28 of the Act provides that the Authority must secure that its code of conduct is, when viewed as a whole, consistent with the following principles: -
- (a) Selflessness;
 - (b) Integrity;
 - (c) Objectivity;
 - (d) Accountability;
 - (e) Openness;
 - (f) Honesty;
 - (g) Leadership.
- 3.3 The intention of the legislation is to ensure that the conduct of public life in local government does not fall below a minimum level which engenders public confidence in democracy, as was recognised by Beatson J, as he then was, in *R (Calver) v The Adjudication Panel for Wales* [2012] EWHC 1172 (Admin) when he held that there was a clear public interest in maintaining confidence in local government while, at the same time, bearing in mind the importance of freedom of political expression or speech in the political sphere.
- 3.4 Under 28(6) of the Act, Local Authorities must have in place (a) arrangements under which allegations can be investigated and (b) arrangements under which decisions on allegations can be made. By section 28(7), arrangements put in place under subsection (7)(b) must include provision by the appointment of the authority of at least one “independent person” whose views are to be sought, and taken into account, by the authority before it makes its decision on an allegation that it has decided to investigate. For the purposes of this investigation, the relevant authority is Maldon District Council.
- 3.5 Section 28(11) of the Act provides that if a relevant authority finds that a member or a co-opted member of the authority has failed to comply with its code of conduct it may have regard to the failure in deciding (a) whether to take action in relation to the member or co-opted member and (b) what action to take.

Maldon District Council's Code of Conduct

3.6 Under Section 27(2) of the Localism Act the Council established a Code of Conduct for members (the Code).

3.7 The Code adopted by Maldon District Council includes the following paragraphs:

General Obligations

3.2 You must treat others with respect.

3.5 (b) You must not bully any person.

European Convention on Human Rights (ECHR)

3.8 Section 3 of the Human Rights Act 1998 (HRA) requires that primary and subordinate legislation must, as far as possible, be read and given effect in a way which is compatible with the Convention rights. By virtue of section 6, it is unlawful for a public authority to act in a way that is incompatible with Human Rights.

3.9 Article 10 of the ECHR provides:

Freedom of expression

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

3.10 In considering these matters it is important to note the words of Collins J in the standards case of *Livingstone v The Adjudication Panel for England* [2006] EWHC 2533 (Admin) [at para.39]:

“The burden is on [the Adjudication Panel for England] to justify interference with freedom of speech. However offensive and undeserving of protection the appellant’s outburst may have appeared to some, it is important that any individual knows that he can say what he likes, provided it is not unlawful, unless there are clear and satisfactory reasons within the terms of Article 10(2) to render him liable to sanctions”.

3.11 The right to freedom of expression is a crucially important right in a democratic society and it is clear that it may only be interfered with where there are convincing and compelling reasons within Article 10(2) justifying that interference. A key issue for determination is thus whether a finding of a breach of the Code on the facts as found, would represent no greater an impairment to an elected member's right to freedom of expression than is necessary to accomplish the legislative objective of the Code.

3.12 In *Heesom v Public Service Ombudsman for Wales* Mr Justice Hickinbottom considered a councillor's right to free speech in some detail. His considerations drew attention to a number of earlier cases in which the following propositions could be derived:

While freedom of expression is important for everyone, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests.

- a. The enhanced protection applies to all levels of politics, including local.
- b. 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.
- c. 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.
- d. 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.
- e. Past cases draw a distinction between fact on the one hand, and comment on matters of public interest involving value judgment on the other. As the latter is unsusceptible of proof, comments in the political context amounting to value judgments are tolerated even if untrue, so long as they have some – any – factual basis. What amounts to a value judgment as opposed to fact will be generously construed in favour of the former; and, even where something expressed is not a value judgment but a statement of fact (e.g. that a council has not consulted on a project), that will be tolerated if what is expressed is said in good faith and there is some reasonable (even if incorrect) factual basis for saying it, "reasonableness" here taking account of the political context in which the thing was said.

- f. As article 10(2) expressly recognises, the right to freedom of speech brings with it duties and responsibilities. However, any restriction must respond a “pressing social need”.
- g. Politicians are required to have a thick skin and be tolerant of criticism and other adverse comment. Civil servants are, like politicians, subject to the wider limits of acceptable criticism. However, unlike politicians they are involved in assisting with and implementing policies, not making them. As such, they must enjoy public confidence in conditions free from perturbation if they are to be successful in performing their tasks and it may therefore prove necessary to protect them from offensive and abusive attacks when on duty.

4: The evidence gathered

Our appointment

- 4.1 The Council's Monitoring Officer appointed ch&i associates to conduct the investigation into the complaint on 4 March 2020. This investigation was conducted by Alex Oram, who was assisted by Mark Hedges. Alex has been conducting member conduct investigations since 2003. He was previously employed by Standards for England as its principal investigator who was responsible for conducting many of their most complex, politically sensitive and high-profile investigations into member conduct. Mark has worked for ch&i associates since 2017; prior to this he was a Detective in the Police Service for 21 years. He has considerable experience in investigation, interviewing, report writing and dealing with confidential/sensitive information.

The complaint

- 4.2 In his complaint, Councillor Siddall asserted that over the past year he has been subjected to bullying, intimidation, and homophobia by Councillor Fluker. Councillor Siddall's complaint, found at Annex A of this report, highlights several occasions where he has considered Councillor Fluker's conduct unacceptable.

The investigation

- 4.3 During this investigation we have carried out telephone interviews with the following members of the Council:
- i. Councillor Siddall (Conservative)
 - ii. Councillor Bamford (Conservative)
 - iii. Councillor Jarvis (Conservative)
 - iv. Councillor Fleming (Conservative)
 - v. Councillor Durham (Conservative)
 - vi. Councillor Stamp (Independent)

We also interviewed another member of the Council, however we have decided not to include their evidence because of their desire to remain anonymous.

In addition to the interviews, we listened to audio recordings of Council meetings and read documentary evidence supplied both by the Council and Councillor Siddall.

Councillor Fluker has not responded to any of our attempts to speak to him about this matter and has offered no evidence in response to the complaint made. Our findings are based on the evidence we have been able to obtain.

The evidence

Background

- 4.4 Councillor Siddall is a member of the Witham Conservative group. Councillor Fluker is a member of the Maldon Conservative group. During this investigation we have heard evidence that there may be some division between these groups.
- 4.5 In his complaint, Councillor Siddall stated that his concerns about Councillor Fluker's conduct started before he even became a councillor; during the Conservative Group's selection process in February 2019 for the May 2019 Council elections. Councillor Siddall said that during the discussions about candidates (for which he was not present, however his partner was) Councillor Fluker made derogatory and negative comments about his suitability for the role. Councillor Siddall told us that his partner reported that Councillor Fluker had told those present that Councillor Siddall was not well liked, unlikely to be dedicated to the role of councillor and unable to handle the IT aspect of the role.
- 4.6 Councillor Siddall told us that he had never met Councillor Fluker before and so assumed that he had based his 'assessment' of Councillor Siddall's suitability as a candidate on information given to him by Councillor Maddie Thompson, the Council's Deputy Leader (who he knew). Councillor Siddall said that he suspected that Councillor Fluker did not support his candidacy because he was a member of the Witham Conservative Group, over which Councillor Fluker had less control.
- 4.7 Despite Councillor Fluker's comments, Councillor Siddall was selected as a Conservative candidate and elected to the Council in May 2019 as Ward Member for Great Totham. We were informed though that, at the May 2019 election, the Conservative majority in Maldon District Council was significantly reduced and that the potential knock-on effect was that Councillor Fluker, as Group leader, needed to maintain an even tighter control on its members.
- 4.8 In his complaint, Councillor Siddall documented his concerns chronologically, month by month¹. Given though that this is a complaint about alleged repeated behaviours over a significant period, we have decided to assess the evidence thematically.

Matters related to the allegation that Councillor Fluker repeatedly talked over Councillor Siddall in Conservative Group meetings

- 4.9 Councillor Siddall told us that when he attended his first Conservative Group meeting, in March 2019, he tried to make a point about what the Witham Conservative Group were doing in preparation for the upcoming election. Councillor Siddall said that Councillor Fluker immediately spoke over him, saying that this was not what he wanted to hear. Councillor Siddall described Councillor Fluker's manner as being *rude* and *off hand*: "*I felt extremely embarrassed and*

¹ Found at annex A

undermined, especially as most people were strangers. They would also become my fellow members if I were successful in being elected.”

- 4.10 Councillor Siddall alleged that since his election, Councillor Fluker has talked over him several times during meetings. Councillor Siddall said that it quickly became evident to him that there were two sets of rules for Conservative Party members; one for those who Councillor Fluker favoured and one for those who he did not.
- 4.11 The other members of the Conservative Group all supported Councillor Siddall’s description of Councillor Fluker’s behaviour, though they did not necessarily feel that Councillor Siddall was being ‘singled out’. It was generally agreed that Councillor Fluker would interrupt those members that he did not favour while allowing those he did to speak.
- 4.12 Councillor Jarvis told us: *‘Councillor Fluker likes to pretend that he is listening to people, but really he has made up his mind and likes to drive home his own viewpoint. He talks over people and in Group meetings insists that members put their hand up to speak. I understand this to a degree, but what this would mean in practice is that Councillor Siddall would put his hand up and Councillor Fluker would ignore him, whereas one of the Councillors with whom he is more friendly would just jump in without putting his hand up.’*
- 4.13 Councillor Bamford told us: *‘He (Councillor Fluker) takes complete control and is not a team player. He does not work well with other people, especially those who do not agree with him. Anybody who does not behave how he expects them to he picks on. Councillor Fluker has a habit of talking over everybody and I do not think he is necessarily singled out Richard [Councillor Siddall]. Adrian [Councillor Fluker] has a distinct trait of doing that anyway.’*
- 4.14 Councillor Fleming told us: *‘Councillor Fluker likes the sound of his own voice and is prone to speaking over people. If someone was saying something that was positive towards Councillor Fluker’s viewpoint, he would let them speak. However, this would not necessarily be the case if that person was saying something with which he disagreed.’*
- 4.15 Councillor Durham told us: *‘Anybody who has a contrary view to Councillor Fluker generally finds themselves shouted down and disregarded. This is often Councillor Siddall because he [Councillor Fluker] does not like to be challenged and Councillor Siddall challenges him. Once Councillor Fluker gets a dislike to somebody that’s it; and Richard [Councillor Siddall] isn’t the only victim of that. Councillor Fluker has been known to belittle people and does talk about them outside of meetings.’*
- 4.16 Based on the evidence provided to date, we are satisfied (based on the balance of probabilities) that during Conservative Group meetings, Councillor Fluker regularly interrupts / shuts down those councillors with whom he disagrees or does not favour. Councillor Siddall does not appear to be the only councillor treated in this manner.

Matters related to the allegation that Councillor Fluker inappropriately targeted Councillor Siddall about his attire at meetings.

- 4.17 In his complaint, Councillor Siddall stated that during a Conservative Group meeting in June 2019, Councillor Fluker made a snide comment to him about what he was wearing. Councillor Siddall explained that although he always considered himself to dress smartly when attending Council meetings, this had not always included wearing a tie. Councillor Siddall told us that at the Group meeting in June 2019, Councillor Fluker (who was also not wearing a tie at the time) said to him: *“Look at me Richard, I’m not properly dressed either”*. Councillor Siddall replied that he must be setting a trend.
- 4.18 None of the other Conservative members we spoke to could recall hearing this comment. Most though said that they considered Councillor Siddall to always be smartly dressed.
- 4.19 At the subsequent Group meeting, on 23 July 2019, Councillor Fluker raised the issue of ‘dress code’ for their male councillors as an agenda item. Councillor Siddall told us that he felt that the matter had only been included on the agenda by Councillor Fluker so that it could be used to ‘put him down’. Councillor Siddall, who had opposed the introduction of the dress code, stated *“I was shouted down by Councillor Fluker and other members, and told I was being ridiculous. When things got more heated towards me, I informed him this was bullying and intimidation, he [Councillor Fluker] made a remark that I was bullying him. I informed the group that it was sexist and illegal, but I was talked over. I raised the fact that we should therefore have a dress code for women, but this was not supported by others at the time.”* The dress code was implemented by the Conservative group and the policy was emailed to Group members the following day.
- 4.20 Councillor Siddall told us: *‘The dress code was to be for Council meetings. The whole thing seemed completely pointless, as I always made an effort to be dressed appropriately anyway. The only thing I did not wear all the time was a tie and when it got hot indoors, I would take off my jacket. I definitely felt that this was a deliberate and unnecessary policy aimed at me. To my knowledge, he had not picked on anyone else. My dress code at worst was smart casual. One of the things I did raise at that meeting was that the Deputy Leader had gone to the North West planning committee in jeans, which she then went on to excuse. At the end of that meeting, the Deputy Leader said that I needed to get a thicker skin and stop being so sensitive.’*
- 4.21 When attending the Council meeting of 25 July 2019, Councillor Siddall did not wear a tie. On 5 August 2019, Councillor Fluker emailed Councillor Siddall:
- “At the Maldon District Council Conservative Group meeting on Tuesday 23rd July in consideration of Agenda Item 4 a proposal was made that ‘Gentlemen Members when attending Council and Programme Committee meetings, would wear a collar, tie and jacket’ the vote in favour of the proposal was 13 to 1 after which time the proposal became Group policy. It was noted that you*

were at that meeting. The Group Secretary confirmed the policy in an email to all Group members on Wednesday 24th July at 14:51hrs. It was observed that at the meeting of full Council on 25th July you joined the conservative benches dressed in a way that did not accord with the agreed policy. I hope that your actions were no more than an unfortunate oversight on your part and that going forward you will without exception, comply with Group policy.”

- 4.22 When attending the following meeting of the Council, in August 2019, Councillor Siddall chose not to wear a jacket as it was particularly hot. Councillor Siddall told us that immediately before the meeting, as he was waiting to get a drink, Councillor Fluker saw him and shouted from approximately twenty yards away: ‘*SIDDALL*’. Councillor Siddall said that he did not respond to the shout and that Councillor Bamford told him to “*leave it*”. Councillor Siddall also recalled that as Councillor Fluker then walked into the chamber, he audibly commented to a female member who was wearing a jacket, ‘*oh it’s good to see some people are team players*’. Councillor Siddall pointed out that as soon as the meeting started, the Chair informed members that they may take off their jackets.
- 4.23 Recalling the introduction of the dress code policy, Councillor Jarvis told us: ‘*Councillor Fluker made a big issue about dress code at Council meetings, insisting that we all needed to wear ties. It seemed to me that he was picking on people. Councillor Fluker drew up some detailed rules about what the men should wear but was not really interested in what women members should wear. It seemed to me to be a targeted issue towards Councillor Siddall. I recall Councillor Siddall pointing out to Councillor Fluker that he thought this was a silly protocol. Instead of causing Councillor Fluker to back off, this seemed to harden his determination to try and get Councillor Siddall to perhaps not wear a tie so that he could then chastise him. I feel this was playground type stuff. Councillor Siddall, in my opinion, is always dressed smartly, whereas a number of councillors who wore ties looked shoddy. A number of the ladies would wear smart jeans, and nothing would be said. Councillor Fluker seemed to get a bit of enjoyment from winding Councillor Siddall up. Councillor Fluker would consider this to be banter but I felt that the repetitive nature of it was something which I can understand Councillor Siddall getting annoyed at. Councillor Fluker made an issue out of something he did not need to.*’
- 4.24 Councillor Durham told us: ‘*At formal Council meetings there had always been an unwritten dress code that all gentlemen should wear a jacket and a tie. From what I gather, Richard had attended a few (granted, not full council meetings) with an open necked shirt on, so it was noticeable that it was contrary to the unwritten protocol. There is another gentleman, not within the Conservative Party, who deliberately dresses down to an outrageous degree to deliberately aggravate and offend, but everybody has become used to that. However, he was never challenged to the degree that Richard was as far as I am aware, although I was not at that meeting.*’
- 4.25 Councillor Bamford told us: ‘*Councillor Fluker singled out Councillor Siddall, saying that he wasn’t properly dressed, which led to a group discussion over the dress code. Richard is quite sensitive, so I feel as though he saw it as targeted only to him when really it was not necessarily; there were even discussions over*

female dress code. Overall though I think that Councillor Fluker was merely being picky over his dress and not showing the same pickiness towards others, such as an independent member who dresses in the most bizarre way. Overall, it was generally agreed in the Group that men should wear jackets and women were encouraged to.’ Councillor Bamford could not though recall Councillor Fluker shouting at Councillor Siddall before the August Council meeting.

- 4.26 Councillors Stamp, Fleming and Durham all recalled Councillor Fluker shouting at Councillor Siddall about his attire at the August Council meeting. They told us respectively:

“Councillor Fluker admonished Councillor Siddall because of his dress code at a meeting. I recall that Councillor Siddall was very upset about this. I don’t recall what the comment Councillor Fluker made to Councillor Siddall was, but I recall him having a dig at Councillor Siddall’s manner of dress.’

‘At the August 2019 meeting of Full Council, I remember Councillor Fluker shouting something at Councillor Siddall, something like “Siddall, what are you wearing?’

‘In August I recall Councillor Fluker shouting across the chamber at Councillor Siddall over his attire and I remember being taken aback. It was a very hot period and the Chairman is expected to exercise common sense with gentlemen able to remove jackets and such. I can recall Richard wearing an opened neck shirt and it might even have been short sleeved. I can’t remember, but it was smart nevertheless and he certainly wasn’t even the worst dressed person in the room.’

- 4.27 Based on the evidence we have seen to date; we are satisfied that shortly after Councillor Siddall was elected to the Council, Councillor Fluker introduced (with the overwhelming agreement of the Group) a dress code for Conservative members. It is difficult with any certainty to conclude that this was specifically targeted at Councillor Siddall, though it did coincide with his election to office and he appears to have been the only member opposed to it. We are satisfied that Councillor Fluker subsequently reminded Councillor Siddall of the policy (by email) and that he later shouted ‘Siddall’ in front of other councillors prior to the August Council meeting with the clear intent of drawing attention to the fact that his attire was not compliant with the agreed dress code.

Matters related to the allegation that Councillor Fluker made homophobic comments towards and about Councillor Siddall.

- 4.28 Councillor Siddall told us at interview that as a gay man he has had to become robust generally in life. In his complaint though, Councillor Siddall documented several occasions where he alleges Councillor Fluker made inappropriate comments about his sexuality, both towards him and about him, that he found difficult to deal with.
- 4.29 Councillor Siddall said that in September 2019 he was told by an officer who he was meeting with that Councillor Fluker had made a homophobic remark about

him at an earlier meeting; words to the effect *'I think we can all imagine what Councillor Siddall will do when he gets home to his husband.'* Councillor Siddall told us that at this stage he had not discussed his sexuality with officers and therefore Councillor Fluker effectively 'outed' him to them.²

- 4.30 During this investigation we approached the officer who Councillor Siddall said relayed Councillor Fluker's comment to him; they however declined to give any evidence on the matter, preferring not to involve themselves in this matter. Given the pressures officers can often feel when asked to give evidence against the Leader of their Council, we place no weight either way on their non-co-operation when considering whether Councillor Fluker acted as alleged. And with no denial from Councillor Fluker or any reason to disbelieve Councillor Siddall, we accept his account as fact.
- 4.31 Councillor Siddall alleged in his complaint that during the Conservative Group meeting in September 2019, Councillor Fluker mispronounced the word 'annal' as 'anal'. Councillor Siddall acknowledged that he did not know whether this was done deliberately or not; he was clear though that having done so, Councillor Fluker looked straight at him and laughed. None of the other Conservative Group members we spoke to could recall this incident.
- 4.32 Councillor Siddall told us that on another occasion in September 2019, while he and Councillor Fluker were both visiting the toilets at the same time, Councillor Fluker made a remark about his using the disabled toilet: *'I knew it would be the one you wanted to go into Richard as I knew you would prefer it, as it has a throne'*. Councillor Siddall told us that he was concerned that the implication being made was that he was a 'queen'; he added though that the remark could equally have been a reference to the fact that Councillor Fluker suspected that Councillor Siddall was looking to replace him as Leader. There are no other witnesses to this incident that we are aware of.
- 4.33 On 12 September 2019, Councillor Fluker and Councillor Siddall attended a meeting of Full Council. In his complaint, Councillor Siddall stated that he attended the meeting wearing a jacket and tie. When Councillor Fluker came into the chamber, he said 'in a very affected manner': *'ohh Richard, don't you look nice'*. Councillor Siddall said that he could not imagine Councillor Fluker saying that in a similar manner to a straight man.
- 4.34 Councillor Bamford supported Councillor Siddall's account, stating: *'In September, Councillor Siddall wore a jacket and tie and Adrian made a comment along the lines of 'oh don't you look nice' in an affected tone but that is just how he behaves. To Adrian all these things are just jokes.'* None of the other members we spoke to could recall witnessing such a comment, though Councillor Siddall recalled that it was said in front of more than one of his colleagues. Based on the accounts given by Councillors Siddall and Bamford, we are satisfied that Councillor Fluker made the comment alleged.

² Councillor Siddall would acknowledge though that it was never his intent to hide his sexuality and that he was not greatly concerned about them knowing.

- 4.35 During the Council meeting there was a discussion about the Maldon Yacht Club. When Councillor Siddall spoke on the issue, he mentioned that he was a keen sailor. Councillor Siddall told us that Councillor Fluker, who is also a keen sailor, spoke to him again in 'a very affected manner': *'I didn't realise he was a sailor as well, all I can say is "Hello Sailor!"*
- 4.36 Councillor Siddall told us that this was clearly a remark about his sexuality and that it was said in a very camp manner. Councillor Siddall said that from his perspective everyone in the room appeared shocked by the comment and that during the meeting, he received messages on his phone from others asking if he was ok. Councillor Siddall told us that after the meeting, Councillor Maddie Thompson (the Deputy Leader of the Conservative Group) approached him to try and excuse Councillor Fluker's behaviour, saying that she believed it to have been a reference to what prostitutes used to say to sailors when they came back off the ships.
- 4.37 All the councillors we spoke with clearly recalled Councillor Fluker acting as alleged. Councillor Durham told us that the remark caused him to take a sharp intake of breath; his assumption though was that it was made in jest. Councillor Bamford said that she too thought that it was intended as a joke, albeit one that she considered inappropriate. Her view was that it did not immediately come across as homophobic and that Councillor Fluker had not intended for it to be interpreted in that way. Councillor Fleming told us that she was sitting next to Councillor Siddall and could immediately see that he had been upset by the comment.
- 4.38 Councillor Stamp told us: *'I was at the meeting when the alleged homophobic comment was made. I believe it was made in "private business" and not during formal open Council³. The homophobic comment was made during a discussion regarding Maldon Barges, when Councillor Siddall referred to "protecting our heritage". Councillor Fluker's body language that accompanied the comment and the tone of it made it, in my opinion, inappropriate, pointed and aimed. Prior to Councillor Fluker's comment, I was unaware of Councillor Siddall's sexuality and, therefore, Councillor Fluker made me, and potentially others, aware.'*
- 4.39 Councillor Jarvis told us: *"My opinion of this is that it clearly came across to Councillor Siddall as a homophobic remark. If I am absolutely honest, I do not know if Councillor Fluker entirely intended it as such. Councillor Fluker is a keen sailor and Councillor Siddall was talking about the fact that he also sails. Councillor Fluker had just had some success with a speech, which had gone down well, and I think he got carried away. I think he realised afterwards that the remark may have been ill judged. I believe that most people knew that Councillor Siddall is married to a gentleman. The remark was definitely delivered with an affected voice and in a gay manner. Knowing, as he would have done, that Councillor Siddall is gay, I believe this to have been a very clumsy remark. I believe Councillor Fluker did subsequently apologise and so he should have done. I am not gay and therefore perhaps do not fully appreciate how offensive*

³ As such, it is not included in the video recording of the relevant meeting.

that might be so I may be under playing it. I think it was a careless remark, but I don't think it was aggressively delivered.'

Matters related to the allegation that Councillor Fluker made a throat cutting gesture towards Councillor Siddall.

- 4.40 Also at the September Council meeting, members discussed the composition of a new working group. It was proposed that the group should only contain Conservative members, meaning that no Independent members were included. This matter had previously been discussed at the Conservative Group meeting and according to those members we spoke with during the investigation, this proposal was not universally supported; Councillors Siddall, Fleming and Jarvis were amongst those who disagreed with it. The matter was though put to the vote at the Group meeting and the motion passed. As such, it appears that there was an expectation amongst the Conservative leadership that their members would all support the proposal when it came before full Council.
- 4.41 When members were called to vote on the proposal at Council, Councillors Siddall and Fleming both abstained. Councillor Siddall stated in his complaint that Councillor Fluker then made a throat cutting gesture across his neck towards the two of them (Councillors Fleming and Siddall were sitting close to each other, opposite Councillor Fluker). Councillor Siddall added that Councillor Maddie Thompson (the Deputy Leader) clearly mouthed the word 'bastards' towards them. Councillor Siddall said that throughout the rest of the meeting, Councillor Fluker stared and frowned at him.
- 4.42 Councillor Siddall's account was supported by the majority of the councillors we interviewed:

Councillor Durham: 'Councillor Fluker mimed slitting his throat to Councillor Siddall and Councillor Fleming who had both abstained. I also saw the Deputy Leader had called them 'bastards' which shocked those around her. Councillor Fluker was glaring and was clearly not happy.'

Councillor Stamp: 'When Councillors Siddall and Fleming abstained Councillor Fluker made a throat cutting gesture. His face was very red and angry. I have seen Councillor Fluker make a similar gesture before during a South East Planning meeting – not when I was an elected district councillor and I cannot recall when. The gesture was made directly towards Councillor Siddall and Councillor Fleming... Councillor Fleming appeared visibly shaken by the gesture, Councillor Siddall remained expressionless.'

Councillor Jarvis: 'At the Group meeting before, we had agreed to vote in a particular way, which I believe was something to do with who was going to go on which Committees. We sign to say which way we are going to vote, which I think is quite wrong. The only exception to this is if there is a matter of conscience, in which case we have to let Councillor Fluker know and may abstain. We all knew that the expectation was that we would all vote in a particular way, despite our personal feelings on the matter. In this particular vote, Councillor Siddall and Councillor Fleming

both abstained, which surprised me and I felt it was a direct challenge to Councillor Fluker's authority. They had raised their objections in the Group meeting beforehand, as had I, but the decision of the Group was to vote in favour of the particular proposal. Because the vote had a very marginal decision, it required the Chairman, who is a Conservative, to cast his vote in order for the motion to be carried. I could see the look of surprise on Councillor Fluker and the Deputy Leader's faces. In my opinion, Councillor Fluker was livid – he went red and I am in no doubt that he was annoyed at the Councillors and directed a throat cutting gesture towards both of them. I don't, for one minute, think that he was saying to them I am going to cut your throat, but it was a hostile gesture which I interpreted in an 'I am going to get you' kind of way. It wasn't done in a jokey way, he was very serious, it was very aggressive, and he was really annoyed. There is no doubt in my mind why Councillor Fluker made this gesture, but what annoyed me even more is the fact that he then lied to the Monitoring Officer about the incident and said that he'd done it to cut the conversation short because it was going on a bit and he wanted to move on.'

Councillor Fleming: 'Before the September 2019 Full Council meeting, we had had a Group meeting. During this meeting, Councillor Fluker stated that he was proposing that a Working Group was set up to deal with the air quality on Market Hill, but that the Group would not include the two Ward Members, who happened to be Independents. I said that I disagreed with this and that they should be on the Working Group as Ward Members. Some other Councillors agreed with me, including Councillor Siddall. However, we lost the argument and, therefore, when the matter came before Full Council, I was supposed to vote in line with the rest of the Conservative Group. However, at the meeting of Full Council, I abstained on the vote. I sit on the top tier of the horseshoe shaped chamber, directly in the line of sight of Councillor Fluker. During the vote, when I didn't put my hand up to vote for the proposal, Councillor Fluker looked straight at me and made a throat slashing gesture. Councillor Siddall was sitting two seats away from me. I felt that Councillor Fluker was targeting his gesture specifically at me and I was surprised that he thought it was an appropriate thing to do. I was surprised that something that I didn't regard as particularly important provoked such a strong reaction in Councillor Fluker. Councillor Siddall also abstained, there was only one other person in between us but I felt that Councillor Fluker was making the gesture to me; it may well have been that it was directed towards both of us.'

Councillor Stamp told us that she raised a complaint to the Monitoring Officer about the gesture after the meeting and that she was aware that other members had also raised complaints about this and the 'Hello Sailor!' comment.

4.43 The following morning, Councillor Fluker emailed Councillor Siddall:

'Confidential

Morning Richard

I understand that you are upset with regards to a comment I made in the chamber last night can I assure you it was meant in the context of the fact that we are both yachtsman and nothing else. If you are offended then I apologise unreservedly as no offence was meant whatsoever – in fact having unexpectedly found out that we share an interest in sailing I was hoping that you might like to come for sail on my boat some time. Its berthed at Bradwell marina and I leave it in all winter so there will be plenty of opportunities if you wish.

Moving back to the coal face the circumstances of your voting last night were unfortunate and will need to be resolved as soon as possible and hopefully before the next group meeting. Jane has accounted for her actions and apologised to me as Leader – I would ask you to considering doing the same and as light as you wish so that I can get the Group to move on and focus on what we need to deliver on.

In passing can I thank you for your input into the Thematic Strategies Working Group and that said and subject to us all getting back on an even keel I look forward to working with you on more specific working groups in the future.'

4.44 Councillor Siddall replied to this email the same morning. He apologised for not contacting Councillor Fluker before abstaining on the vote and accepted the apology for the 'Hello Sailor' comment.

4.45 In his complaint, Councillor Siddall stated that he decided that the best thing to do was to accept the apology offered by Councillor Fluker and in turn, apologise for abstaining in the vote. Councillor Siddall told us though that he was later informed by Councillor Durham that Councillor Fluker confessed that he had deliberately made the 'Hello Sailor' comment to Councillor Siddall in order to wind him up. As a result, Councillor Siddall sent a further email to Councillor Fluker to rescind his previous acceptance of Councillor Fluker's apology.

4.46 Councillor Durham confirmed Councillor Siddall's evidence at interview: *'The following morning, (after the meeting) Councillor Fluker rang me and asked if we could have a chat asking for advice saying, 'what are we going to do about those two renegades'; referring to the two abstaining members. I spoke with him and told him that the 'sailor' comment was a bit ill thought given Richard's situation, but I honestly thought that Councillor Fluker would have said it to any member - one yachting person to another. To this he [Councillor Fluker] replied, saying 'of course I meant it', which surprised me... whether he truly meant it or was showing bravado to me I didn't know.'*

4.47 In his complaint Councillor Siddall said that he was subsequently told that Councillor Fluker shared the contents of his emailed apology and subsequent retraction with various other Group members, which he believed was a breach of

confidentiality and GDPR. Councillor Siddall told us that Councillor Fluker did this to undermine him and instil the belief within the Group that he was ‘the enemy’. Councillor Siddall said that Councillor Fluker also misled other members by informing them that, as part of his apology, Councillor Siddall had invited him to dinner. Councillor Siddall stated that he was forwarded an extract in which Councillor Fluker had stated: *“and given the invite I have received to dinner party in Gt Totham my penance is due to be served!”* Councillor Siddall pointed to the obvious inference that coming to dinner with him should be considered a form of punishment.

Matters related to the Council meeting of 21 November 2019

- 4.48 During the Council meeting of 21 November 2019, during Leader’s Questions, Councillor Fluker addressed the following questions:
- a. Councillor Durham asked about the future of Maldon Yacht Club. In his response, Councillor Fluker apologised if any offence had been caused by any comments he had made when the matter was discussed previously.
 - b. Councillor Helm asked whether Councillor Fluker agreed that should a Member wish to make a complaint regarding another member, that this should only be raised with the Monitoring Officer. In his response, Councillor Fluker agreed with this statement.⁴
 - c. Councillor Stamp (Independent) asked about the terms of reference for Committees and working groups. Councillor Siddall told us that during his response, Councillor Fluker said that he had reviewed the composition of working groups and realised how strongly members felt. He also apologised for the gesture he had made, which he acknowledged might have been perceived as aggressive.
- 4.49 During the question about Maldon Yacht Club, Councillor Siddall attempted to make a ‘point of order’ on the basis that the response should be focused on the Club and was not meant to be an opportunity for Councillor Fluker to address members about his own conduct at the previous meeting. The Chair advised Councillor Siddall that his point was not valid.
- 4.50 In his complaint, Councillor Siddall stated that the three questions had been pre-arranged by Councillor Fluker so that he could try and get ahead of any complaints that might have been about him. Whilst one of the questions was asked by Councillor Stamp, an independent member who would not have been primed to ask a pre-arranged question, his assertion was supported by Councillor Durham, who confirmed that he had been instructed by Councillor Fluker to ask his question and that Councillor Fluker responded to it with a pre-prepared statement; indeed, all the members we spoke to were of the view that the exchanges had been pre-arranged by Councillor Fluker. Councillor Siddall added

⁴ It should be noted that Councillor Siddall had submitted a complaint about Councillor Fluker’s conduct with the Conservative Party.

that Councillor Fluker also used the occasion to announce that he had completed a Diversity training course.

- 4.51 In his complaint, Councillor Siddall said that Councillor Fluker's conduct at the meeting was a form of psychological bullying: *"During these questions I felt emotionally attacked and my mind was a blur. I don't even really remember what Councillor Fluker said in detail. I felt completely traumatised that he was using the situation to his advantage with no real consideration to the people involved. This had an emotional impact on me that lasted over 5 days. At times afterwards I felt angry and also depressed. At no point did Councillor Fluker mention my name or directly apologise, so what he said was meaningless. He has also, by doing this, admitted his guilt that he has made the bullying gestures and that he is homophobic. By doing this he has circumvented the correct procedure and acted unethically. Due to purdah, the joint Standards Committee meeting to discuss this matter had been postponed. As his answer was part of leader's questions it gave no right to reply. It is obvious that he thinks that this is just a game and not to be taken seriously. At the end of the meeting Councillor Fluker was congratulated by Councillor Dewick and Councillor Helm. I heard them both say well done. I therefore felt psychological and emotionally undermined by their attitude, as they seemed to be pleased to be congratulating each other in front of me. Any remorse expressed earlier seemed to have disappeared and they appeared to be celebrating a victory.*

Standards Committee meeting, 30 January 2020

- 4.52 On 30 January 2020, the Council's Standards Committee considered three complaints about Councillor Fluker's conduct at the September 2019 Council meeting. We have not looked in detail at the findings of that investigation, however, in light of Councillor Fluker's failure to respond to our efforts to speak with him, we considered it prudent to examine his response to those complaints before reaching our conclusions in relation to Councillor Siddall's complaint. .
- 4.53 In the summary of findings as set out in the document pack for the meeting, it states:

"In both writing and at an interview Councillor Fluker stated that he meant the [throat-cutting] gesticulation as a signal to 'stop and move on'. Councillor Fluker stated that he has used this gesture in the past and that it was a means of communicating to the Conservative Group Members to cease some activity "i.e. to stop pontificating, wind up the debate or move on to the next part of the debate". This gesture was used at a time in the meeting where a vote had been taken which had resulted in a close vote. There was also a level of general noise within the chamber. Councillor Fluker stated that he wished members to cease and move on as the motion had been passed. Councillor Fluker felt that to preserve good order in the chamber matters should move on and that this gesture was directed to the whole administration. Councillor Fluker has stated that he was not directing the gesture to any individuals but to the administration. Councillor Fluker stated that *"The gesticulation is commonly used in debates and the Speaker of House of Commons has used it himself. It is also used as a*

signal to stop a process or progression for example an aircraft or other engine or an unfolding event.” Councillor Fluker stated that the interpretation of throat slitting is very offensive and has stated that “*that was not in my mind*”. Councillor Fluker has stated that the gesture is one he has used on previous occasions and that it is a common gesture used to indicate that a behaviour should be ended, usually where communicating verbally is not appropriate or possible.

The comment “Hello Sailor” was made. Councillor Fluker stated that he made this comment without being aware of the connotations it had or that it would cause offence. He added that, on leaving the meeting, he realised the possible homophobic nature of the comment. Councillor Fluker contacted Councillor Siddall the morning after the meeting and apologised for any offence that may have been taken from his comment. Councillor Fluker advised the Head of Paid Service and the Monitoring Officer of his actions by email on the 13 September 2019”.

5: Reasoning as to whether there have been failures to comply with the Code of Conduct?

Capacity

- 5.1 Before we make a recommendation as to whether Councillor Fluker's conduct amounts to a failure to comply with the Code of Conduct, we need to decide if he was acting as a Councillor (i.e. acting in his official capacity). Section 27(2) of the Localism Act 2011 requires all relevant authorities to adopt a code of conduct "dealing with the conduct that is expected of members ... when they are acting in that capacity." The District Council have reiterated this in their Code:

You must comply with this Code whenever you conduct the business of your authority (which includes the business of the office to which you are elected or appointed) or act, claim to act or give the impression you are acting as a representative of your authority.

- 5.2 While we are confident that the electorate would expect their councillors to adhere to the highest of standards in all aspects of their lives, the Localism Act only gives the District Council's Monitoring Officer jurisdiction to consider allegations of misconduct when councillors are conducting Council business. The Code only applies to members when conducting the business of their authority or when carrying out their constituency work; it does not seek to regulate what members do outside of this. A distinction must be drawn between the individual as a councillor and the individual as an individual; a councillor is not a councillor twenty-four hours a day. Conduct that might be regarded as reprehensible and even unlawful is not necessarily covered by the Code; a link to that person conducting Council business is required.
- 5.3 There can be no doubt that Councillor Fluker was conducting Council business when attending the full Council meetings referred to in the report. It is also generally understood that a councillor's interactions with officers of the Council will also fall within the scope of the Code. Councillor Fluker's conduct during Conservative Group meetings is far less clear cut. The Code of Conduct was not introduced in order to regulate conduct / resolve disputes within a political group and is not generally applied when the alleged misconduct relates to political party business; as an example, Standards Board for England guidance and decisions made by the First Tier Tribunal (and prior to that, the Adjudication Panel for England) were clear that matters related to electioneering, even by sitting councillors, did not engage the Code.
- 5.4 In offering our own views on this we recognise that the Localism Act is vague on the key point of what acting 'as a member of the Council' involves. Nor do we have any case law specifically arising from the Localism Act to assist us on this. What we do have, however, is well established case law from earlier hearings under the previous standards regime. Whilst the wording in Localism Act varies slightly from the previous model codes of conduct, the Council have adopted the exact wording as provided in the previous national Code. As such, cases concerning the former model codes remain of relevance to how councils must

interpret what ‘official capacity’ means; we have set out some general considerations and precedents in Annex B of this report.

- 5.5 Councillor Siddall’s concern at Councillor Fluker’s conduct started during the selection process for Great Totham Ward. Although Councillor Fluker was a councillor at this time, he was not conducting Council business or acting as a representative of his authority. Matters of Political Party candidate selection fall outside the jurisdiction of the Localism Act; as such it would be inappropriate for me to consider the veracity of the concerns raised.
- 5.6 As part of his complaint, Councillor Siddall also drew attention to what he describes as Councillor Fluker’s rude and controlling behaviour as Conservative Group leader, at Group meetings and in Group emails. Based on the evidence obtained during the investigation, we are satisfied that Councillor Fluker does regularly interrupt / shut down those councillors in Group meetings with whom he disagrees or does not favour. Indeed, Councillor Siddall does not appear to be the only councillor treated in this manner.
- 5.7 In deciding whether this conduct falls within the jurisdiction of the standards framework however, we are also mindful that Councillor Siddall has chosen (and continues to choose) to be a member of the Conservative Group. It is for the members of the Conservative Group to decide who to elect as their leader, in the same way that it was those members who voted to adopt the dress code (which Councillor Siddall also expressed concerns about). It is not unusual for a Group Leader to act in a controlling manner with members of their own political party and it has long been accepted that practices like ‘whipping’ will be utilised when allowed.
- 5.8 Political Groups do have a specific position within a Council’s constitution and so, at times, matters which happen within the Group or Party could fall within the scope of the Code – for example, a councillor putting someone under undue pressure at a Group meeting to vote a particular way on a planning application in which they have a pecuniary interest could clearly be conceived as misusing their position as councillor for personal gain. However, it is our view that matters of internal party management or disagreements within meetings, including conduct that would be considered disrespectful if it took place during a Council meeting, are a Party matter and fall outside the jurisdiction of the Localism Act.

Has Councillor Fluker failed to comply with the Code of Conduct?

- 5.9 The intention of the Code is to ensure that the conduct of public life at the local government level does not fall below a minimum level which engenders public confidence in democracy. In adhering to the principles set out in the Code there is an expectation that members will treat their fellow councillors with respect. This is not to say that councillors should not be encouraged to engage in vigorous public debate on matters pertaining to the Council; however, the impact of such debate is diminished, rather than accentuated, when it is cast in abusive or offensive terms.

Code Principles

- 5.10 Paragraph 3.2: Failure to treat others with respect will occur when unreasonable or demeaning behaviour is directed by one person against or about another. The circumstances in which the behaviour occurred are relevant in assessing whether the behaviour is disrespectful. The circumstances include the place where the behaviour occurred, who observed the behaviour, the character and relationship of the people involved and the behaviour of anyone who prompted the alleged disrespect.
- 5.11 Paragraph 3.5(b): There are many definitions of bullying and harassment and both terms are often used interchangeably. The definition for bullying that we apply is based on classification provided by ACAS. The definition for harassment that we apply reflects the definition set out in Section 26 of the Equality Act 2010. These are both definitions that we apply in Parliamentary investigations.

Bullying may be characterised as offensive, intimidating, malicious or insulting behaviour involving an abuse or misuse of power that can make a person feel vulnerable, upset, undermined, humiliated, denigrated or threatened. Power does not always mean being in a position of authority and can include both personal strength and the power to coerce through fear or intimidation. Examples of bullying may include, but are not limited to:

- Verbal abuse, such as shouting, swearing, threatening, insulting, being sarcastic towards, ridiculing or demeaning others, inappropriate nicknames or humiliating language.
- Physical or psychological threats or actions towards an individual or their personal property.
- Practical jokes, initiation ceremonies or rituals.
- Overbearing or intimidating levels of supervision, including preventing someone from undertaking their role or following agreed policies and procedures.
- Inappropriate comments about someone's performance.
- Abuse of authority or power, such as placing unreasonable expectations on someone in relation to their job, responsibilities or hours of work, or coercing someone to meet such expectations.
- Use of unfair sanctions in relation to disciplinary or attendance procedures.
- Ostracising or excluding someone from meetings, communications, work events or socials.
- Sending, distributing or posting detrimental material about other people, including images, in any medium.

Harassment is any unwanted physical, verbal or non-verbal conduct that has the purpose or effect of either violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. Under the Equality Act 2010, harassment is related to one or more of the relevant 'protected characteristics' which include age, sex, race, disability, religion or belief, sexual orientation and gender reassignment. Harassment may be persistent or an isolated incident. It can also be intentional or unintentional; for example, if a

person speaks or behaves in a way that they do not find offensive, but that another person does, then it can still be harassment – the feelings of the recipient are crucial. Examples of harassment (other than sexual harassment), may include, but are not limited to:

- Deliberate exclusion from work activity or conversations.
- Sending or displaying offensive material in any format (including posters, graffiti, emails, messages, clips or images sent by mobile phone or posted on the internet).
- Mocking, mimicking, belittling or making jokes and comments about a person (or a group stereotype) in relation to their age, disability, gender reassignment, race, religion or belief, sex or sexual orientation.
- Use of unacceptable or inappropriate language or stereotypes relating to race or ethnicity.
- Deliberately holding meetings or social events in a location that is not accessible for an individual with a disability.
- Using profanities or swearing that could have the effect of intimidating a person.

5.12 Paragraph 3.5(e) - a member's behaviour in office will bring the office into disrepute if their conduct could reasonably be regarded as such that it reduces the public confidence in that member being able to fulfil their role; or adversely affects the reputation of members generally in fulfilling their role.

Councillor Fluker's conduct

5.13 In his complaint, Councillor Siddall alleged that Councillor Fluker had subjected him to bullying, intimidation and homophobic behaviour over a sustained period. As part of his complaint, Councillor Siddall drew attention to what he describes as Councillor Fluker's rude and controlling behaviour as Conservative Group leader.

5.14 We have concluded that these aspects of the complaint do not fall directly within the scope of our considerations. Councillor Fluker's conduct towards Councillor Siddall at these meetings do however demonstrate an attitude towards Councillor Siddall that goes to support those matters that are caught by the Code.

5.15 Bullying and harassment can affect anyone, in any career, at any time, at any level and within any workplace. Such behaviour can take the form of easily noticed, physically threatening or intimidatory conduct with immediate impact, or it can take place behind closed doors, or be much more subtle or camouflaged and difficult to identify, at least at first. It can start, for example, with what appear to be minor instances, such as routine 'nit-picking' or fault-finding, but which become cumulative or develop into more serious behaviour over time, enabling the perpetrator to isolate and control the person.

5.16 Some bullies lack insight into their behaviour and are unaware of how others perceive it. Others know exactly what they are doing and will continue to bully if they feel they are unlikely to be challenged. Bullying and harassment can sometimes be overlooked, as a result of common euphemisms being used by

way of explanation or justification, referring to someone as having a “poor leadership style” or a “bad attitude,” for example, or to the problem being due to a “personality clash”.

- 5.17 Councillor Siddall has highlighted several occasions which he says evidences his allegation of disrespectful and bullying behaviour by Councillor Fluker; incidents that do clearly fall within the scope of the Code. These include his:
- shouting ‘Siddall’ in front of other councillors prior to the August Council meeting, with the clear intent of drawing attention to the fact that his attire was not compliant with the Conservative Group’s dress Code.
 - making a joke to Council officers about what Councillor Siddall would do when he got home to his husband.
 - talking to Councillor Siddall in a deliberately affected / camp manner at the September Council meeting, both in relation to his attire and with the comment ‘Hello Sailor’.
 - making a throat cutting gesture towards Councillors Siddall and Fleming when they abstained from a vote at the September Council meeting.
- 5.18 When considering these matters, we would firstly make clear that the role of this investigation is not to effectively reconsider the complaints that were put before the Standards Committee on 30 January 2020. While elements of Councillor Siddall’s complaint clearly reference two of the incidents adjudicated on at that hearing, they are considered here as part of our overall deliberation as to whether Councillor Fluker has demonstrated a pattern of behaviour towards Councillor Siddall that amounts to disrespectful and bullying behaviour. And while I understand that the Standards Committee did not uphold these earlier complaints, concluding that Councillor Fluker did not fail to comply with the Code of Conduct (contrary to the view of both the investigator and Independent Person), it was a non-precedent decision and does not bind us to agree with either the facts (as they found them) or their reasoning.
- 5.19 That said, and in light of Councillor Fluker’s decision not to actively engage with this investigation, his responses to the earlier complaints do allow us to more fairly consider the allegations raised in Councillor Siddall’s complaint.
- 5.20 In his complaint, Councillor Siddall accused Councillor Fluker of making a threatening throat cutting gesture towards him during a Council meeting. Councillor Fluker contended the gesture he made across his throat was not intended to be aggressive or intimidatory; it was simply meant to indicate that he wanted Conservative Group members to end the debate. In our view there are two quite distinct gestures: one is a cutthroat gesture that is performed by drawing the hand (or a finger or two) across their throat and means that the gesturer or the person it is directed at is metaphorically being killed; it is rarely if ever used literally to refer to death, but rather a theatrical way of making a threat. The second gesture which Councillor Fluker stated he made, which can mean to “cut,” “stop,” or to discontinue a particular action, is usually done with the palm

facing downwards and all fingers sweeping quickly across the throat; often quickly and repeatedly⁵.

- 5.21 All of the people who we spoke to who witnessed the gesture were clear that they interpreted Councillor Fluker's gesture as the former; no doubt Councillor Fluker's body language and the context (including the Deputy Leader supposedly mouthing the word '*bastards*') reinforced that interpretation. As such, we reject Councillor Fluker's explanation and are satisfied that it was intended to be threatening and was targeted at those councillors, including Councillor Siddall, who had just abstained from the vote.
- 5.22 Councillor Fluker's conduct towards Councillor Siddall appears to be designed to deliberately undermine and humiliate him whenever the opportunity arises. Councillor Fluker's occasional use of Councillor Siddall's sexuality to achieve this is a particularly concerning aspect of this complaint. Given the description of Councillor Fluker's 'camp'⁶ manner when saying 'Hello Sailor', we have no doubt that he was trying to mock Councillor Siddall based on his sexuality.⁷ Councillor Fluker's subsequent apology, which included his explanation that he only realised of its connotations after the meeting, would be more convincing had it been an isolated incident. As it is, Councillor Siddall was able to give an example of Councillor Fluker adopting a similarly camp manner when commenting on his attire at the same meeting.
- 5.23 While all of the councillors we spoke with said that they had personally witnessed Councillor Fluker behave inappropriately towards Councillor Siddall at some point (to a greater or lesser extent), some suggested that comments such as 'Hello Sailor' should not be taken too seriously because they were likely made in jest (rather than vindictively). It seems to me that Councillors Fluker and Siddall do not enjoy the type of relationship where such a comment, made in public during a Council meeting, could be written off as a joke; I have no doubt that others would have been offended by it even had Councillor Siddall not been. Members have a responsibility to understand that 'banter', which some may think is okay within an individual's circle of friends, is not acceptable in a professional environment.
- 5.24 Offensive language / actions not only have an immediate impact on the individual targeted; they can strongly influence how others behave towards that person. As Leader of the Council, Councillor Fluker should be setting the highest standards of conduct, knowing that others will likely take their lead from him. While the

⁵ Scuba divers use this gesture with the palm swept across the throat to indicate that they have run out of air

⁶ Meaning ostentatious, exaggerated, affected, theatrical; effeminate; pertaining to a stereotypical characteristic of homosexuals

⁷ In 2003 the Independent Television Commission suspended an advert for WKD, in which a group of male friends were shown in a locker room after a football match. They tricked one of their mates into standing in an effeminate way, with hand placed on hip, and taunted him with greetings such as "ooh, hello sailor". While the advertisers tried to argue that it was meant to be a joke, the ITC stated that there was a significant risk of offence being caused to homosexual men; in particular the mocking was typical of the kind of bullying that took place in the playground and that the commercial, by presenting this behaviour as acceptable, could be capable of encouraging it.

scope of this investigation is limited to considering Councillor Fluker's conduct, it is unsurprising to hear anecdotal evidence of others within the Group also behaving inappropriately towards Councillor Siddall given Councillor Fluker's conduct toward him.

- 5.25 On the basis of the evidence we have seen to date, when considered against the principles set out in paragraphs 5.10 and 5.11 of this report, we recommend that Councillor Fluker is found to have failed to comply with paragraphs 3.2 and 3.5(b) of the Council's Code.
- 5.26 Turning to considerations as to whether Councillor Fluker has brought his office or authority into disrepute. It is difficult to see how Councillor Fluker's actions could do anything other than reduce the public's confidence in the members being able to fulfil their role; his throat cutting gesture alone gives the impression that members of the Council are not free to decide what is best for their own constituents for fear of some form of retribution⁸.
- 5.27 I note that Councillor Fluker does appear to have made a public apology for both this gesture and the 'Hello Sailor' comment, however I share Councillor Siddall's concerns about the way in which that occurred (at the November Council meeting) and, indeed, what Councillor Fluker's motive might have been. Councillor Fluker's decision to try and address the matter on his own terms clearly had a detrimental emotional impact on Councillor Siddall. And, given Councillor Fluker's failure to co-operate with this investigation, it is difficult to argue with Councillor Siddall's assertion that it was somehow stage managed in an attempt to avoid proper scrutiny and circumvent the correct procedure. While it is of course Councillor Fluker's prerogative, we are disappointed by his refusal to engage with this process in a meaningful way. The current standards framework to an extent relies on the co-operation of the councillors and their commitment to upholding the Code and its associated procedures. One would expect the Leader of a Council to set an example in this regard as his behaviour is likely to set the tone within the authority.
- 5.28 Accordingly, our view is that Councillor Fluker's conduct does represent a failure to comply with paragraph 3(e) of the Code.

⁸ While we have no doubt that it was not used literally, as stated previously, it is commonly used as a somewhat theatrical threat.

6: Conclusion

- 6.1 Our finding is that by his conduct, Councillor Fluker failed to comply with paragraphs 3.2, 3.5(b) and 3.5(e) of the Council's Code of Conduct.

Annex A

Councillor Siddall's complaint

Over the past year I have been subjected to bullying, intimidation and homophobia by Councillor Fluker. During this time, I have documented and recorded each incident. Whilst some of this commenced before I became a councillor, I think it is important to include this as it gives more context to the situation.

I have established with witnesses to these actions wherever possible and I will provide the witnesses names if necessary.

2019

February

- Councillor Fluker's bullying and intimidation began in February when he was underhand and he made false allegations about me. This was during my selection process for the Great Totham Ward. This was witnessed by several people and Councillor Fluker did this before I came into the selection interview. He stated that the destructive comments to stay private, however my partner was in the room. My partner told me the comments afterwards, which were all derogatory and negative. Councillor Keyes was also attending the meeting, therefore undermining me with a member, with whom I would be working closely.

March

- At a group meeting in March which was my first attendance, we were discussing what WCCA was doing in relation to the campaign. I tried to contribute to the meeting and he immediately talked over the top of me His manner was rude and off hand and he told me that is not what I want to hear or interested in.
- I felt extremely embarrassed and undermined, especially as most people were strangers. They would also become my fellow members if I was successful in being elected.

June

- At the June group meeting he made remarks, after I hadn't always worn a jacket and tie at meetings, Councillor Fluker came into the meeting and said in a snide way 'look at me Richard ,I am not properly dressed either'. I replied that I must be setting a trend, which he did not respond to. He then during the meeting shut me down when I tried to raise points, whilst allowing others to talk over the top of him.

July

- In the July Conservative group meeting Councillor Fluker made inaccurate comments and what happened at the Overview and Scrutiny committee and made it obvious that it was me he was referring to me. He made remarks about respecting the chair and behaviour and conduct of members. The behaviour of another councillor at another meeting, which had been worse and also involved a confrontation with an officer of the council, using the worst possible swear words, was not mentioned. I had already resolved the issue with the chairman of the committee and afterwards he was surprised that it had even been mentioned.
- At the same meeting of the group, Councillor Fluker then formally raised the issue of dress code as part of the agenda, as he wanted it as part of group policy. There could have only one reason he wanted it as policy and that was a way of putting me down. I informed him that I disagreed with the policy as I said it was sexist and illegal. I was shouted down by Councillor Fluker and other members, and told I was being ridiculous. When things got more heated towards me, I informed him this was bullying and intimidation, he made a remark that I was bullying him. I informed the group that it was sexist and illegal, but I was talked over. I raised the fact that we should therefore have a dress code for women, but this wasn't supported by others at the time, when votes were taken on the policy.
- During the rest of the meeting whenever I tried to speak, he talked over the top of me, while allowing others to interject
- At the corporate working governance group, I put a different viewpoint and Councillor Fluker talked over the top of me again. I then made my point again and it was agreed as part of the policy and became part of the standards. At the weekend he emailed certain conservative councillors putting his point of view and discrediting mine. I wasn't included in the email circulation. The policy was not however changed.
- In an email for an unknown reason he wrote an implied threat about impartiality. He said he was going to circulate this content to the rest of the group but never did. He also sent another email about confidential information, which he said he was going to send the same content to everyone else, but again never did. I can only imagine that this content was intended to intimidate me. A copy of this email can be provided.

August

- In response to an email I had sent, as part of Councillor Fluker's reply, when he said there are more important things to focus upon. I replied and informed him about the quality of a communication from an MDC officer to town and parish councils. He never responded to my email, but he then forwarded my email to the officer and their manager without my permission. This infringes the GDPR rules. He also included my personal email address, again without permission, disclosing this to the officers.

- Councillors Fluker's motive to forward my email to the officers, I can only imagine was to try and undermine me and build a negative impression. I then contacted the officers to discuss the email and also as I was part of the Thematic Strategy working group and hadn't been able to make the first meeting, to arrange to give them my input into the strategies.
- At the subsequent evening of the full council meeting, I was not adhering to the dress code as the temperature was 29c. as I was standing to get a drink, Councillor then came out of his office. He then from his doorway at least 20 yards away, yelled my surname 'SIDDALL!' at the top of his voice, as if we were in a school playground. I did not respond to his shouting. During the meeting, for a great deal of the time, he stared at me, his face aggressive and frowning.
- As he came into the chamber, he made comment to another councillor just before the meeting commenced, when she was wearing a jacket 'oh it's good to see that some people are team players'

September

- When meeting the officers to discuss the email and the Thematic strategies, they informed me of a remark Councillor Fluker had made about me at another meeting at which the officers were present. During the meeting the officer informed me that he had made a homophobic remark, this was along the lines of we can all imagine what Councillor Siddall will do when he gets home to his husband.
- The officer has confirmed in a private email, that Councillor Fluker did make comments about me. By making the comments, he disclosed my sexuality to them, as at that stage the officer had not even met me and knew nothing about me privately.
- At the next full council meeting I wore a jacket and tie. As Councillor Fluker came into the chamber, he made a remark in a very affected manner when I was dressed in a jacket and tie saying 'ohh Richard don't you look nice'. I can't imagine him saying this to a straight man. I then questioned him and said, 'do I?' to which he did not reply.
- During the September Conservative group meeting Councillor Fluker made a mispronunciation of the word 'annal' for 'anal', using the biological pronunciation, rather than the historical term. He then said it again and then looked at me directly when doing so.
- When going into the toilets Councillor Fluker made a remark about using the disabled toilet. He said 'I knew it would be the one you wanted to go into Richard as I knew you would prefer it, as it has a throne' - does this imply I am a queen.
- During the full council meeting after I abstained, he made a throat cutting gesture towards me and to another councillor who had also abstained. At

the same time, I could also see the Deputy Leader mouth the word bastards. This was right next to the Monitoring Officer, who I am sure would have heard the comment. Throughout the rest of the meeting as he has done on previous occasions, he stared and frowned at me. I am directly in his eye line.

- Later at the same meeting he used the phrase the term 'hello sailor' clearly a homophobic remark. He also said it a camp and effective manner. He would not have made this comment to a heterosexual member.
- As Councillor Fluker left the meeting, he said 'I am not sure what actions I need to take on this Richard, there could be consequences, we shall have to see'. I felt further threatened by these remarks and it worried me what I was going to do.
- When I received his email the next day, I decided that because of the threat, it would be best to accept his apology, as I did not want any repercussions from my abstention. I felt very threatened and worried about this at the time, because of him implying that there could be implications for me, I decided that the best approach was for me to apologise back. This was a short email, explaining my position. He subsequently informed another member that my apology was one and half pages long. I also thought he was being sincere in his own apology, which turned out that I was being naïve.
- As part of my reply to Councillor Fluker, I asked him if it would be a good idea for us to meet to discuss things face to face. He did not respond to this at all.
- At that time another member said to him in a conversation the next day that the 'hello sailor' remark must have been a slip of the tongue. He informed the member that he said it deliberately to 'wind me up'. I was informed of this the next month. As a result of this additional information I subsequently rescinded my acceptance of his apology, as I realised his apology was insincere and was more about self-protection, than true remorse.
- He told the same member in an email, that I had invited him and his wife to dinner, as way to apologise for my abstention. I was forwarded an extract - *and given the invite I have received to dinner party in Gt Totham my penance is due to be served!* – Therefore, implying that coming to dinner with me is a punishment.

October

- The agenda for the Conservative group meeting was sent and I noticed that for the majority of nominations for Chairman and Vice Chairman involved me as either proposer or seconder. These could easily have been spread amongst members. When I questioned Councillor Fluker during the group meeting, he said he hadn't realised. In a subsequent email response, he admitted I was in his line of sight and I was being lumbered. There was no reason why he couldn't choose other nominators, but it was

obviously done to put me in my place and at the full council meeting to show that I am under his control.

- During the full council meeting I was again glowered and stared at whenever I made eye contact with him.

November

- I rescinded my acceptance of his apology, based on the fact that he said he did it deliberately to wind me up. I feel his apology was insincere and was based on covering up the issue.
- Councillor Thompson telephones Councillor Bamford to discuss my refusal of Councillor Fluker's apology. This means that he has discussed a confidential email with Councillor Thompson, and she has then breached confidentiality as well, by discussing it with Councillor Bamford. This is also an infringement of GDPR. I am advised by Councillor Bamford that if I want to raise a complaint, I would have to go through group, where Councillor Thompson is the whip.
- I have subsequently informed that Councillor Fluker has told at least 5 other members about the contents of this email. Again, breaching privacy and confidentiality. This has been done to undermine me and make me look the enemy.
- At the full council meeting Councillor Fluker gave 3 questions to members to be asked at the meeting. This meant that he could go back to the comments he made at the September council meeting. The first was about working groups and he said that he had reviewed the working groups and realised how strongly members felt and apologised for the gesture which might have been seen as aggressive
- The second question was about members having grievances and that they should not go externally with any problems and use the external council procedures. This is obviously his attempt at trying to ensure none of this goes to the Conservative party.
- The third question was about the Maldon Yacht Club, rather than address the issues which are currently causing lots of bad publicity, he gave a vague answer and then went onto apologise for the homophobic remark and said he would possibly go on diversity training.
- I then stood up to make a point of order, that the question was about the future of Maldon yacht club and not remarks made previously at council. This was dismissed by the chairman. Councillor Fluker at this point was obviously trying to make me react and I found the whole thing very upsetting. These statements are all a form of verbal psychological bullying. Lots of members asked me if I was ok, as they could see how upset I was. So rather than appeasing the situation he has intimidated and demeaned me further.

- During these questions I felt emotional attacked and my mind was a blur. I don't even really remember what Councillor Fluker said in detail. I felt completely traumatised that he was using the situation to his advantage with no real consideration to the people involved. This has an emotional impact on me that lasted over 5 days. At times afterwards I felt angry and also depressed.
- At no point did Councillor Fluker mention my name or directly apologise, so what he said was meaningless. He has also by doing this admitted his guilt that he has made the bullying gestures and that he is homophobic.
- By doing this he has circumvented the correct procedure and acted unethically. Due to purdah the joint standards committee meeting to discuss this matter, had been postponed. As his answer was part of leaders questions it gave no right to reply. It is obvious that he thinks that this is just a game and not to be taken seriously.
- At the end of the meeting Councillor Fluker was congratulated Councillor Dewick and Councillor Helm. I heard them both say well done. I therefore felt psychological and emotionally undermined by their attitude, as they seemed to be pleased to be congratulating each other in front of me. Any remorse expressed earlier to seem to have disappeared and they appeared to be celebrating a victory.

January 2020

- During the strategy and resources meeting, I was sitting in front of Councillor Fluker in the inner horse show of the chamber. I had questions I wanted to ask the officers to ensure that matters relating to the strategy and any expenditure are dealt with in the right way. At the fourth agenda item I raised my hand again to speak and ask a question. At that point I heard Councillor Fluker make a comment of 'Jesus' as if exacerbated that I was speaking again. This would have been heard by members sitting next to him and clearly undermines me as a member. I have been informed that every time I spoke, he reacted in his body language and whispered to Councillor Thompson

Annex B

Considerations related to 'official capacity'

To recap briefly section 27(2) of the Localism Act 2011 requires all relevant authorities to adopt a code of conduct "dealing with the conduct that is expected of members ... **when they are acting in that capacity.**" (my emphasis)

This narrowed the remit of the previous national Code of Conduct, which applied not only when a member was acting in their capacity as a councillor but also when they were purporting to do so. Some local authorities have kept this wider definition within their Code, adding '*or act, claim to act or give the impression you are acting as a representative of your authority.*' While we would not be critical of any authority for promoting high standards of conduct even where councillors are not directly conducting Council business, we are not convinced that this wider definition would be legally enforceable. Relevant cases quoted below were in fact based on this old wider scope⁹, but the cases remain valid and the principle remains the same.

What is clear is that the Government's intention was that the law should not seek to regulate what members do purely in their private and personal lives. The Localism Act therefore only applied the Code to members when conducting Council business or when carrying out their constituency work or acting as a representative of the authority. A distinction must be drawn between the individual as a councillor and the individual as an individual; a councillor is not a councillor twenty-four hours a day. Conduct that might be regarded as reprehensible and even unlawful is not necessarily covered by the Code; a link to that person's membership of their authority and specifically their role as a councillor is needed.

While some activities will clearly have no link with the Council – for example, a purely domestic matter or something which the member may do while employed in work completely unrelated to the Council – there is a greyer area around public pronouncements and postings on social media, for example, as the councillor may well be a well-known figure associated with the Council and may be making statements which could be broadly regarded as political in nature or pronouncements on matters of local public interest.

In *Livingstone v Adjudication Panel for England* [2006] Mr Justice Collins considered the scope of the Code in relation to when a councillor is acting in their official capacity. Mr Justice Collins stated at paragraphs 27 to 29:

"Conduct which is regarded as improper and meriting some possible sanction will often be constituted by misuse of a councillor's position. He may be purporting to perform his functions if, for example, he seeks to obtain an advantage by misusing his position as a councillor. Such misuse may not amount to corruption; it may nonetheless be seen not only to be improper but to reflect badly on the office itself. If the words "in performing his functions" are

⁹ The Localism Act ended the involvement of the Tribunal in such cases and very few cases under the current regime have progressed to the Courts, in part due to the significant reduction in available sanctions.

applied literally, it may be said that such misuse, and other misconduct which is closely linked to his position as such may not be covered. Thus where a member is not acting in his official capacity (and official capacity will include anything done in dealing with staff, when representing the council, in dealing with constituents' problems and so on), he will still be covered by the Code if he misuses his position as a member. That link with his membership of the authority in question is in my view needed. This approach is very similar to that adopted in Scotland and in my judgment accords with the purpose of the Act and the limitations that are appropriate. It is important to bear in mind that the electorate will exercise its judgment in considering whether what might be regarded as reprehensible conduct in a member's private life should bring his membership to an end in due course. It seems to me that unlawful conduct is not necessarily covered. Thus, a councillor who shoplifts or is guilty of drunken driving will not if my construction be followed be caught by the Code if the offending had nothing to do with his position as a councillor. Section 80 of the Local Government Act 1972 provides for disqualification for election to a local authority of those who have within 5 years before the date of election been convicted of any offence which has resulted in a sentence of 3 months imprisonment (whether or not suspended) or more. Parliament could for example have provided that conviction of any offence carrying imprisonment whatever the sentence should lead to consideration of some punitive action by the Standards Board. It seems to me that if it is thought appropriate to subject a member of a local authority to a code which extends to conduct in his private life, Parliament should spell out what is to be covered."

The Livingstone judgment was considered in detail in "Bartlett v Milton Keynes Council [2008] APE 0401" in an appeal from the local standards committee. In the Tribunal's view, the Livingstone judgment established that for a councillor to be acting in an official capacity:-

- *the councillor should be engaged in business directly related to the Council or constituents.*
- *the link between the councillor's office and the conduct should have a degree of formality.*

In a later decision of the Adjudication Panel for England in APE0458 (Sharratt), the tribunal observed:

"The dedication of many councillors to activities in public life means that often their social and professional lives are shaped by their roles as councillors and in turn shape how they approach those activities. However while they may always be conscious of their office as councillor and carry out a wide range of activities in which that is a factor in their thinking, no reasonable observer would conclude that they are carrying out the business of the office of councillor; a test which, in the light of the decision in Livingstone, should be narrowly construed."

A further consideration is whether a councillor, although not conducting council business, could be said to be acting as a representative of the Council. For example, a councillor attending a conference as a delegate on behalf of their authority would not

directly be conducting the business of the authority but could be said to be there representing the Council and hence be expected to abide by the Code.

Judge Ward considered the meaning of the phrase ‘acting as a representative’ in Upper Tribunal Case No. GLSE/1111/2010 MC v Standards Committee of LB Richmond. Judge Ward drew an important definition between the terms ‘councillor’ and ‘representative of his authority’; for Judge Ward a member acting, claiming to act or giving the impression that he was acting as a councillor is not on its own sufficient to find them acting in their official capacity. For a member to be found within capacity when not directly conducting the business of their authority, they would have to either be formally acting as a representative of their authority or, in cases involving freedom of expression, purporting to be speaking as the ‘voice’ of their Council rather than just as an individual councillor. In his view, it was wholly possible for members to interact with Council officers in their private capacity when they were not actively conducting the business of their authority at the time. Indeed, it was considered possible for a councillor to interact with staff in their personal capacity even if the reason related to Council business where the nature of their involvement was clearly personal. As a rule of thumb, if the councillor was engaging with a with a member of staff on the basis that they were a recipient of a Council service (for instance, if they were personally submitting a planning application, claiming housing benefit or paying their Council Tax), the member would generally be considered to be acting in their personal capacity.

Turning now to matters related to public pronouncements and postings on social media. When it comes to social media, councillors can often have ‘blurred identities.’ This is where a member has a social media account where they comment both as a councillor and as an individual; for example, using the same Facebook account a councillor posts about a great night out (personal) and then explains their authority’s position on pothole repairs (councillor). Such blurred identities can have implications where a councillor’s individual views are taken as those of their organisation or political party, rather than their personal opinion.

A report on Ethical Standards in Local Government, published in January 2019 by the Committee on Standards in Public Life, noted that “*The widespread use of social media presents a particular challenge to determining whether a code of conduct applies to instances of behaviour.*” The report suggests that high standards are expected of public office holders in their use of social media, even when this purports to be in a personal capacity. What is relevant to the public is not just whether an individual is acting in an official capacity or a personal capacity, but also whether the behaviour itself is in public or in private. Restrictions on what an individual may do or say in public are different in kind from restrictions on an individual’s private life. While the report makes it clear that the current legislation does not reflect this fully when it comes to considering the conduct of councillors in England¹⁰, it does state: “*it is clear to us that when a social media account identifies the individual as a councillor or an individual makes comments related to their role as a councillor, then the code of*

¹⁰ hence the need for their recommendation that “*Councillors should be presumed to be acting in an official capacity in their public conduct, including statements on publicly accessible social media. Section 27(2) of the Localism Act 2011 should be amended to permit local authorities to presume so when deciding upon code of conduct breaches*”.

conduct applies. This would be the case even if the individual posts a 'disclaimer' to suggest that the account is a personal one."

In our view this last statement is not actually supported by the current legislation and is more an indication of what the Committee would like changed. At previous standards tribunals, it was established that even if it became clear that an individual who was posting on a forum or writing in a newspaper, for example, was a councillor, the Code of Conduct would not automatically be engaged. The question was whether in the specific post or article by the councillor, he or she was either conducting Council business or giving the impression that he or she was acting in the role of councillor and purporting to represent the views of the Council (rather than his or her own). Tribunals have said that this would be fact sensitive and would very much depend on the content.

As noted above, the Localism Act has narrowed this test still further so that, even if the Councillor were purporting to act as a Councillor that would not be enough to engage the Code. They must actually be engaged on Council business or commenting on Council business or have been tasked with acting as a representative of the Authority to be deemed 'within capacity'. Cases have made clear that being known as a councillor is not sufficient to engage the Code of Conduct unless the context (and not simply the alleged behaviour) is such as to bring the individual within the ambit of the Code.

In First Tier Tribunal Case No. LGS/2011/0537, Judge Laverick took the view it was perfectly reasonable for a councillor to write posts in their private capacity even if they clearly identified themselves as a councillor in the relevant article / on their social media profile. According to Judge Laverick, the key determining factor when considering whether a councillor was writing within their official capacity is whether the content is the content of the specific post was sufficiently connected to Council business in order for the Code to be engaged; to consider otherwise was found to be a disproportionate restriction of an individual's freedom of speech and right to a private life. Judge Laverick accepted that under those circumstances a councillor could make offensive and possibly defamatory comments that may affect the reputation of the Council without necessarily breaching the Council's Code of Conduct.

We are of the view that a councillor's role includes providing a bridge between the community and the Council. As well as being an advocate for their local residents, representing their views at council meetings and signposting them to the right people within their authority, councillors are responsible for communicating back to their constituents about the decisions they and their Council make, providing a view as to the general effectiveness of their local authority and its officers. As such, for a blog / social media post to be considered 'within capacity' the defining element becomes less about not whether the person posting it is immediately identifiable as a councillor¹¹, and much more about whether the content of the relevant blog / social media post etc concerned Council business or not.

¹¹ In *McTigue v Middlesbrough Council* (2009) APE 421 a councillor was deemed to be acting in her official capacity when posting on an online forum despite writing under a pseudonym which did not identify her as a councillor, because she was writing about a matter that directly related to Council business.

All the judgments referred to above recognised that any consideration of a councillor's comments or expressions automatically engaged the individual's right to freedom of speech as set out in Article 10 of the European Convention on Human rights. Collins J stated:

"The burden is on [the Adjudication Panel for England] to justify interference with freedom of speech. However offensive and undeserving of protection the appellant's outburst may have appeared to some, it is important that any individual knows that he can say what he likes, provided it is not unlawful, unless there are clear and satisfactory reasons within the terms of Article 10(2) to render him liable to sanctions".

The right to freedom of expression is a crucially important right in a democratic society and it is clear that it may only be interfered with where there are convincing and compelling reasons within Article 10(2) justifying that interference.