



Northern Ireland
Assembly

AD HOC COMMITTEE

**OFFICIAL REPORT
(Hansard)**

**Assembly Members (Independent
Financial Review and Standards) Bill:
Committee on Standards and Privileges**

29 November 2010

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Mr Fred Cobain (Chairperson)
Ms Sue Ramsey (Deputy Chairperson)
Mr Kieran McCarthy
Mr Daithí McKay
Mr Jim Wells
Mr Paul Givan
Mr John Dallat

Witnesses:

Mr Declan O'Loan)	Committee on Standards and Privileges
Ms Tara Caul)	
Mr Paul Gill)	Northern Ireland Assembly Secretariat
Mr Jonathan McMillen)	

The Chairperson (Mr Cobain):

The Committee will receive oral evidence from the Committee on Standards and Privileges on Part 2 of the Bill, which relates to the Commissioner for Standards. The witnesses are Declan O'Loan, who is the Committee Chairperson; Paul Gill, the Committee Clerk; Tara Caul, who is a senior legal adviser; and Jonathan McMillen, who is a legal adviser.

Mr Declan O'Loan (Committee on Standards and Privileges):

Chairman, I begin by thanking you and the Ad Hoc Committee for inviting us to give evidence. The Committee on Standards and Privileges has been working on the Bill for some time, and we

are very attached and give importance to the report that led up to it. We are very pleased that the Bill will receive this Committee's further examination to see whether it needs further alteration or improvement.

The Committee on Standards and Privileges is grateful for the opportunity to begin the process of engagement with this Committee on the Assembly Members (Independent Financial Review and Standards) Bill. I am here today as the Chairperson of the Committee on Standards and Privileges, and I am supported by the Clerk to that Committee, Mr Paul Gill. Ms Tara Caul and Mr Jonathan McMillen from Legal Services are also in attendance. I also thank you for agreeing to hear evidence on Part 2 of the Bill first.

All Members of the Assembly are required to comply with the requirements of the Assembly's code of conduct. The Assembly agreed a new code of conduct, which came into effect in October 2009. Following that, the Committee on Standards and Privileges began an inquiry into enforcing the code of conduct and the appointment of a Northern Ireland Assembly Commissioner for Standards. The aim of the inquiry was to establish the most appropriate means of maintaining the code of conduct and handling alleged breaches in relation to it. The Assembly has, for a number of years, had an interim arrangement to ensure that allegations of misconduct by Assembly Members would be independently investigated.

A previous Committee on Standards and Privileges concluded that the office of the Assembly Ombudsman was well placed and equipped to discharge the functions of the Commissioner on an interim basis. That interim arrangement is still in place today, and the current Committee is extremely grateful to the Ombudsman and his office for the diligent service that they have provided and continue to provide.

As part of the inquiry, the Committee considered models to deal with the investigation of allegations of misconduct by elected Members in other legislatures. It also carried out a consultation and received written submissions and oral evidence from key stakeholders. Those helped the Committee to conclude that, in relation to handling alleged breaches of the code of conduct, it was appropriate that an independent Commissioner should carry out investigations into complaints, that the Committee should determine whether a breach had occurred and that the Assembly should impose sanctions where appropriate. The Committee also concluded that legislation was required and that the Commissioner's role, powers and independence from the

Assembly in respect of specific investigations should all be set out on a statutory basis. In addition, the Committee agreed that the Commissioner should have the power to initiate an investigation if the Commissioner believes that a breach of the code of conduct may have occurred.

The Assembly endorsed those conclusions when it approved the Committee's report on the inquiry on 1 June 2010. It is important to recognise that the broad principles of the Bill were agreed when the Assembly agreed to that report, when the Committee unanimously agreed the Bill and when the Assembly gave its full support to the Second Stage of the Bill.

The Committee on Standards and Privileges subsequently agreed that the necessary legislative provisions could be included in the Bill being prepared by the Assembly Commission in respect of the independent financial review panel.

I will give you an overview of the main provisions of Part 2 of the Bill. The Bill is in two Parts. Part 1 will establish the independent financial review panel, known as the panel, and Part 2 will establish the Northern Ireland Assembly Commissioner for Standards.

Clause 16 provides for the establishment of the post of commissioner. The official title will be the Northern Ireland Assembly Commissioner for Standards. Clause 17 sets out the commissioner's functions as being to receive and investigate complaints and referrals concerning Members' conduct, initiate investigations and to report the outcome to the Assembly. The commissioner may also be asked to give advice on matters of general principle.

There are, therefore, three different scenarios that can lead to the commissioner carrying out an investigation. First, there is the scenario of when a complaint is made to the commissioner that a Member has breached the code of conduct. Secondly, there is the scenario whereby a matter is referred to the commissioner as per any agreed provision of Standing Orders. Thirdly, there is the scenario of the commissioner initiating an investigation, if the commissioner believes that a breach of the code of conduct may have occurred.

The general nature of the second scenario allows for the commissioner to be a more wide-ranging investigative resource for the Assembly in relation to Members' conduct. The Assembly has already agreed, for instance, that the commissioner should be able to carry out investigations

into matters relating to the conduct of Members on a referral from the Clerk/Director General in respect of issues, such as a potential misuse by a Member of Assembly allowances, relating to the Clerk/Director General's role as accounting officer. Standing Orders would have to be amended to provide for that.

It is possible that in the future the Assembly might identify additional conduct issues that it wished the commissioner to be able to investigate. As long as Standing Orders were amended to allow for that to happen, the commissioner would have the authority to carry out such investigations.

The provision for the third scenario, which allows for the commissioner to initiate his or her own investigation, was considered very important by the Committee. The Committee feels that it is not acceptable that where there are significant, legitimate and evidential concerns in relation to the conduct of Members, but where no formal complaint has been made, that no investigation should be carried out. If there were no investigation in such circumstances, it would undermine public confidence in the integrity of the Assembly. The Committee on Standards in Public Life share that view. When Sir Christopher Kelly gave evidence to the Committee during its inquiry, he specifically recommended that the commissioner should be able to initiate an investigation. An elected public representative should not be able to evade scrutiny in circumstances in which there is clearly a case to answer, but where no complaint has been made.

Clause 18 provides for the commissioner's independence. The independence of the commissioner in carrying out investigations and coming to conclusions is a crucial aspect of the credibility of the accountability arrangements for Members. The commissioner shall, therefore, not be subject to the direction or control of the Assembly, except to the extent allowed under clause 24.

Clause 24 requires the commissioner to comply with directions given by the Assembly. It is envisaged that there will be two types of directions: those that will set a general procedural framework to ensure that the commissioner carries out his or her functions in a consistent and procedurally fair manner; and those that will ensure that the commissioner complies with codes of conduct, etc, and is open and transparent about financial and other interests. It is important to emphasise however that a direction under clause 24 cannot in any way interfere with how the commissioner carries out any specific investigation.

Clause 19 provides for the commissioner to be appointed by the Assembly for a term of five years. A person may only be appointed to serve as commissioner once. The Assembly will be responsible for ensuring that the commissioner is appointed by way of fair and open competition and for determining appointment criteria and the terms of appointment.

In order to ensure that the commissioner is independent and is seen to be independent, a broad range of connections to the Northern Ireland Assembly or individual Members will result in disqualification from eligibility. Schedule 3, provided for by clause 20, makes provision as to the persons who are disqualified from being appointed as, or serving as, the commissioner.

Clause 21 provides for the circumstances in which the commissioner will cease to hold appointment or may be dismissed. Under certain circumstances, the commissioner will automatically cease to hold office. The Assembly may also, by resolution, dismiss the commissioner.

Clause 22 and schedule 4 make administrative and financial provision in respect of the commissioner. Under schedule 4, the Assembly Commission must provide the commissioner with such administrative support, including staff, services and accommodation as the commissioner reasonably requires. Schedule 4 also provides the commissioner with a general power calculated to facilitate the discharge of the commissioner's functions. It also requires the commissioner to provide the Assembly Commission with financial information and to lay an annual report before the Assembly.

Clause 23 enables the Assembly to appoint an acting commissioner to discharge any or all of the commissioner's functions, if, for some reason, the commissioner is unable to act. The disqualifications applicable to the commissioner will also apply to the acting commissioner. The clause also provides for the acting commissioner's resignation and removal.

Clause 25 provides for the commissioner to determine the procedure and timing for any specific investigation and reporting its outcome to the Assembly, albeit with an agreed general procedural framework set out in a direction under clause 24.

Clause 26 allows the Assembly — in practice, the Committee on Standards and Privileges —

to be able to request the commissioner to carry out further investigations following receipt of a report from the commissioner. However, the commissioner does not have to carry out further investigation if the commissioner concludes that such investigation would be unnecessary.

Clause 27 provides that a report by the commissioner may make recommendations but will not be able to recommend the imposition of a specific sanction on any member. The clause also provides for the commissioner's reports to be published.

Clause 28 provides for the commissioner to have the power to require witnesses to attend and give evidence or to provide documents in similar manner to the power of the Northern Ireland Assembly. Therefore, a prospective witness will not be obliged to answer a question or produce a document that would not have to be answered or produced in court.

Clause 31 provides for a number of offences in relation to refusals to provide or otherwise failing to give evidence in accordance with a request under clause 28. Maximum penalties for an offence under the clause will be a fine up to level 5, which is £5,000, on the standard scale or three months' imprisonment. There is provision for the prosecution of company directors who have consented to non-compliance by a company.

Clause 32 provides that for the purposes of the law of defamation, statements by the commissioner will attract absolute privilege and statements to the commissioner will have qualified privilege.

Clause 33, not clause 22 as it says on your memo — I apologise for that typo — provides that information disclosed to the commissioner in the course of an investigation will not be disclosed by or on behalf of the commissioner, except for the purpose of enabling the commissioner to discharge functions or in connection with the investigation or prosecution of an offence.

It is likely that the Committee will recommend a small number of minor drafting amendments and clarifications to Part 2 of the Bill. Those will be submitted to the Committee for consideration prior to its informal clause-by-clause consideration, which is due to take place on 15 December 2010.

A delegated powers memorandum has been submitted to the Committee in respect of clause

20(2) and clause 38(2) of the Bill. Financial costs in relation to the initial establishment of the commissioner have been estimated at £10,000 based on the fair and open competition to recruit the commissioner and start-up office costs. The annual recurring costs of the commissioner are expected to total £25,000, based on the current level of investigations. It should be noted that that estimate includes the cost of administrative support to the commissioner, but it is expected that that could be provided by existing staff of the Assembly Commission.

That concludes my summary of Part 2 of the Bill, Chairman. I am happy to address any questions that you or other members may have.

The Chairperson:

Will the commissioner be able to initiate investigations on his own?

Mr O'Loan:

As I indicated in my opening remarks, the Committee thought very carefully about that provision and takes it very seriously indeed. I recall what Sir Christopher Kelly and the Committee on Standards in Public Life said about that. We had Sir Christopher Kelly before us in this very seat on a previous occasion. They indicated that the commissioner should be able to initiate investigations proactively without waiting for a formal complaint. They made clear the rationale for doing that. They felt that if there were serious allegations about a Member of the Assembly which were in the public domain, but no formal complaint had been made and the commissioner was powerless to act, that would damage public confidence in the system.

What we are fundamentally about is having a code of conduct that the public can have confidence in. We have created that, and are now creating an absolutely rigorous and robust system to enforce that code of conduct. It is not just a theoretical debate.

As a result of the Westminster expenses scandal, issues arose in the public arena, yet no complaint had in fact been entered. One might think that surprising, but a situation may easily occur whereby something could cause intense public concern, yet no specific complaint is entered. It may be significant to the Ad Hoc Committee that the Standards and Privileges Committee at the House of Commons has looked at this matter again, perhaps seeing what we have done, and has recommended that the Parliamentary Commissioner for Standards at Westminster should also have the power to initiate investigations.

I will outline a little more detail of how that would work. It will be set out in a direction under clause 24. That direction does not exist yet, but if the legislation passes, the Committee will be working closely on that. However, the Committee has considered the matter already and has indicated the direction in which it would go. First, an investigation should only be carried out where the commissioner sees prima facie evidential basis to justify an investigation. I might add also that that would be considered closely by the Assembly when appointing a commissioner. I think that the mind of the Assembly would be such that it would not want to appoint a commissioner who did not have the courage to investigate if abuse were suspected in relation to the code of conduct; nor would we want to appoint a commissioner who would set out on witch-hunts. That will be on the Assembly's mind when making an appointment.

The second procedural point is that the commissioner should be able to make preliminary inquiries before deciding to embark on or self-start an inquiry.

The Chairperson:

There is a point on which I want clarity, which is that, for politicians, reputation is a big thing. The very fact that a commissioner would start an investigation would, from a reputation point of view, be hugely damaging to the politician. The Committee was quite clear that it did not have any reservations around giving someone the power to investigate personally if there are any criteria? He would personally decide how serious the issue was?

Mr O'Loan:

We think it very important that significant power and independence is given to the commissioner. I would go as far as to say that, although we had reservations, we were strongly of the view that that power ought to be there. I guess that there is ultimately a balance, which I have already indicated when I talked about the type of person that one might appoint.

The Chairperson:

How would you get that balance right? How would you know in advance whether someone was not going to be a witch-hunter or be easy to roll over? How would you gauge that?

Mr O'Loan:

The Standards and Privileges Committee would give a direction in the form of a formalised paper

that would be given to the commissioner. That would be adjustable if, over a period of time, it was felt that the power was not being exercised as it should be in the legislation. There would be the ability to make future adjustments.

Mr Wells:

I just want to tease something out, Declan. Would the present Commissioner for Complaints be precluded from being our commissioner under one of those definitions that you have laid out in schedule 3? Would he be defined at the moment as an employee of the Assembly?

Mr O'Loan:

My understanding is that he would not be so precluded, although I will defer technical opinion to my colleagues.

Mr Paul Gill (Northern Ireland Assembly Secretariat):

That is absolutely correct. Nothing in the schedule would prevent the current Ombudsman and Commissioner for Complaints from being appointed as the new Assembly Commissioner for Standards if he were identified through the competition. In fact, a specific provision in schedule 4 states that, in the event of an existing office holder being appointed as commissioner, he may use the resources and office support that he already has to support his role as commissioner.

Mr Wells:

Is the ombudsman currently defined as an employee of the Assembly?

Mr Gill:

No. Although he is the ombudsman, he is also carrying out a role as interim Commissioner for Standards under the Assembly's Standing Orders. However, Standing Orders do not make the ombudsman an employee or a member of staff of the Northern Ireland Assembly.

Mr Wells:

Is that the case even though his office is being paid to cover the amount of work that he does for the Assembly?

Mr Gill:

The ombudsman's office has a separate budget, and it uses that to bid for additional resources to

allow the ombudsman to carry out his work as the interim commissioner.

Mr Wells:

The interim commissioner is, therefore, paid by the ombudsman's office rather than the Assembly.

Mr Gill:

Yes.

Mr Wells:

I am just thinking out loud. The economic situation has clearly moved on considerably since we first thought of this idea. People may view the establishment of a completely independent, all new office with a commissioner and staff as a lovely idea. However, given the present economic situation, would it be better to continue to facilitate the ombudsman's work as interim commissioner? Do you think that that would be problematic, given that you are trying to establish a clearly neutral role for the commissioner?

Mr O'Loan:

Obviously, in the mind of the Committee, the starting point was about enabling the Assembly to assert its authority in enforcing its code of conduct. However, the cost issue is certainly a serious consideration. The explanatory and financial memorandum, which I quoted in my opening remarks, states that the set-up costs are in the order of £10,000. That is a one-off cost.

The annual recurring cost of the commissioner, based on the current number of investigations, is expected to total £25,000. However, that cost might vary. If there were no complaints and investigations, the cost would be extremely small. However, if there were a lot of investigations, activity would have to rise to meet that. That figure is, therefore, based on the current number of investigations.

There are three cost components. The first element of cost is £16,500 for 300 hours of work per annum. That figure is not snatched out of mid-air. Rather, it is a reasonable estimate based on two factors: the rate of remuneration paid to the current Welsh Commissioner for Standards; and the number of hours worked by our interim commissioner in the recent past. The second element of cost is £3,500 for legal advice and other expenses per annum, and the third element of

cost is £5,000 for administrative support to the commissioner. In fact, based on our calculation of the overall costs — if we accept that this money will come from the public purse — our system would, in fact, deliver the same service at a lesser cost than the current system.

Mr Wells:

The panel will obviously have to draw up a report on pay, terms and conditions, and expenses — there will be a flurry of activity at the start — and then, presumably, that document will be published and agreed to. However, after that, we could all be like Mother Theresa and nothing would happen because there would be no complaints to investigate. I must say that the cost of a commissioner in Northern Ireland is much less than it is elsewhere, such as in Scotland or Westminster. However, how do you ensure that we not end up paying the commissioner a king's ransom for doing very little?

Mr O'Loan:

It is important to point out that the issue of money must be taken very seriously, particularly given the present context. However, we are talking about a global sum in the order of £25,000, which is not big. I think that most members of the public would regard that as representing very good value for money if it ensures confidence in Members of the Assembly.

In terms of the ongoing costs, you can see the three headings that I gave you. If there were no complaints, most of those ongoing costs would disappear on a recurring basis. The actual cost would be minimal if there were no complaints.

Mr Wells:

We are trying to attract someone of particular standing, independence and knowledge, but with a promise that if all goes well he or she may have little work to do. Why would anyone take that up, if everything worked to plan?

Mr O'Loan:

That would be one of the factors that would be there when it went to open competition. In some ways, we are ahead of ourselves. There is an unpredictable workload; it will depend on the level of complaints that occur. At times, we will be seeking investigations to be conducted with due dispatch. I would have thought that one would be looking to recruit a person who would be able to offer that kind of flexibility, as, for example, the Ombudsman's office is able to give. That

would be a factor. I suppose that the person would have to have a recognition that they might be appointed to the post, and then have to fold their arms and receive no complaints whatsoever for a time. That is an uncertainty.

Mr Wells:

The vast majority of complaints in Westminster related to housing, second homes, expenses for overnight accommodation and issues like that, which do not apply here. It does not matter where you live in Northern Ireland as an MLA — whether you live in Belleek or Strabane — you are not allowed to stay overnight; we do not pay it. You are not allowed to have a second home in Belfast or a flat, or to rent a property to stay in elsewhere in Northern Ireland. A lot of the issues that brought the Westminster system into incredible disrepute do not apply to us. By the way, you are not allowed to buy duck houses or to clean your moats, because you do not have any such properties in the first place. On that basis, about 90% of the areas of contention will not apply to us, because we do not get the money to start with.

Mr O’Loan:

We know that there has been a history of complaints here; the interim commissioner has had work to do. We would all agree that it is vital that there be a code of conduct and a method of enforcing it. I do not think that any of us can predict what the complaint levels will be or the types of complaint that are going to be made. You are right that there are certain types of complaint, because the expenses system is different. I have said that the Clerk/Director General can make direct reference to the commissioner if, in his duty as accounting officer, he comes across something that gives him concern. He can go directly to the commissioner. I think that we would all agree that that power needs to be there. He needs to be able to go somewhere with any concern that he has. I do not know if that gives you any comfort.

A certain number of complaints that we have had relate to whether Members have used appropriate language. We now have such a history of that that we know how to deal with it, and the Committee has recognised the legitimate right of politicians to speak as politicians. Perhaps some of those complaints of that type may disappear out of the system. However, we still end up with a situation where no one can predict what the level of complaints is going to be.

The Chairperson:

Will a retention fee be paid?

Mr O’Loan:

I think that there is in the Welsh system.

Mr Gill:

It is worth clarifying that the legislation provides for the Commission to determine the terms and conditions of the commissioner. The Committee on Standards and Privileges has not sought to say what those terms should be. In its report, the Committee noted the Welsh model, in which there is a retainer of £4,500 per year. After that, it is about £320 per full day that the commissioner works. Having used those figures in respect of the hours that the Ombudsman did for the Assembly last year, we reached the figure of £25,000 per annum running costs. That is not to say that the Assembly Commission may not choose to adopt a different approach when it comes to determining the terms and conditions.

Mr Givan:

You said that it would be cheaper than the current system. How does that work?

Mr Gill:

There are three aspects to the costs of the commissioner: the cost of providing administrative support; the cost of expenses, for example, legal expenses; and salary costs. The administrative costs are likely to be the same whether the Assembly, the Ombudsman’s office or A N Other public body provides them. The expenses are likely to be the same in any event as well, including legal expenses, because those are procured independently by the commissioner. That only leaves the salary costs. The salary cost, based on the Welsh model, is not terribly high. If the Commission chose to remunerate a commissioner along those lines, it would be cheaper to pay someone at that rate than as per the current arrangements.

Mr Givan:

So that type of system cannot be built in to our current Ombudsman and just say that it should be met within the existing budget? He would have to get a fee for carrying out the work and administration costs? There is not the capacity to do what is currently being done?

Mr Gill:

The Ombudsman bids for additional resources to allow him to carry out the role of Interim

commissioner.

Mr Givan:

Is five years enough time for a former MLA to have been out of the Assembly and to be perceived as neutral?

Mr O'Loan:

The Committee gave a lot of thought to that. I was really pleased and impressed by the Committee's discussion, because it considerably amplified the original list. Broadly, it came up with the idea that if a person is politically tainted —

Mr Wells:

Enhanced.

Mr O'Loan:

We wanted to leave the position as open as possible. Clearly, however, we felt that certain persons, if appointed, would not command public confidence or the confidence of Assembly Members. We thought — it can be seen in a number of the categories — that, for people like former Assembly Members or other persons who had political connections, if we created a five-year decontamination period, we would do a reasonable job in allowing them to have a fair chance at the job, that is in not being overly restrictive, and yet still having the confidence of Assembly Members and the public.

Mr Givan:

You touched on the issue of the commissioner having the power to investigate without complaints. How do you prevent MLAs or politicians who do not want to make a complaint but still going to the commissioner and saying that they might want to look into something? If a politician wants to be, to a certain extent, a coward and is not prepared to put their name to a letter to lodge a formal complaint, they will go to the commissioner and whisper in his ear.

Mr O'Loan:

I think that we will be appointing a person with the highest level of integrity, and that conversation will not get opened up at all. I think that the person appointed will simply not go there at all. They will probably have such a position and stature in the community that any

Assembly Member with any sense will know that attempting to influence the commissioner in that way is totally out of order. That might be seen as a matter for investigation in itself.

Mr Givan:

I admire your confidence that that will be the case, but I can certainly see scenarios in which individuals may not be prepared to put their name forward but will whisper certain things. I am concerned that, potentially, that opportunity is opened to people are not prepared to make a formal complaint.

Mr Gill:

If, for example, an Assembly Member had information about another Member and tipped off the commissioner, it is very likely that, during the course of the commissioner's investigation, the commissioner would have to interview the Member who had that information. That would go into the commissioner's report. There is provision in the legislation to ensure that the commissioner's reports will always be published in full, so I imagine that, in those circumstances, the evidence that the Member had would make its way in to the public domain in any event.

The Chairperson:

You talk about openness and transparency, which is a big thing for the Committee. If someone spoke to the commissioner, their identification would have to be made public.

Mr O'Loan:

As Paul indicated, if it became the subject of an investigation by the commissioner and the subject of his report, the evidence that he had gathered would be part of that report. Any report that comes from the commissioner is then made public in our report.

The Chairperson:

If someone were to tip the commissioner off, they would obviously want to investigate that. When the report is prepared, the name of the individual who tipped the commissioner off would have to appear in the report.

Mr O'Loan:

I was envisaging a slightly different scenario. If a Member had a perfectly legitimate concern and felt that they were under a duty to go to the commissioner and say that there was something

unsavoury going on in relation to Member X —

The Chairperson:

I understand all that. I am not saying that other people's reputations are not important, but Members' reputations can make the difference between them getting elected or not. Therefore, they are hugely important. If someone is investigated and the issue raised publicly, obviously their reputation is damaged. However, if someone were to come along and tip the commissioner off — whatever that may mean — and the commissioner goes to investigate that complaint, I assume that in the interests of openness and transparency, that individual will be named in the report. Can we have a guarantee of that?

Mr Gill:

One part of the Assembly's current complaints procedure states that a complainant must provide their name and address. They cannot be an anonymous complainant. However, the code of conduct does say that, in exceptional circumstances —

The Chairperson:

I do not mean that. The point that I am making is not about someone making a complaint; it is about someone tipping the commissioner off. I do not want any difficulty around this issue. I am not making a complaint. If a piece of information leads the commissioner to investigate something and a report is published, the commissioner will then say that the investigation was initiated as a result of a certain Member telling them about it. Making a complaint is a totally different thing. If I make a complaint or anyone makes a complaint, it is officially in the book. I am asking you what happens if someone initiates a complaint based on the idea that they have tipped someone off. If the commissioner decides to investigate, will that individual's name be mentioned in the report?

Mr Gill:

There is no specific provision in the Bill to ensure that that would happen. There is provision in the Bill for the Assembly to issue directions as to how the commissioner should carry out his or her functions, which extend to reporting. Therefore, the Assembly would be within its rights to say in a direction to the commissioner that it should always include the name of anyone who has —

The Chairperson:

Will that be included in regulations?

Mr Gill:

A direction. The Committee —

The Chairperson:

It is not clearly in there at the moment, but it will be, will it?

Mr Gill:

There is provision for the Assembly to do it.

Ms S Ramsey:

The point that Fred and Paul made is that it is a grey area. What strikes me is that we all sit on Committees here and encourage, on a daily basis, whistle-blowing where stuff is not happening correctly. Within society, we encourage people to come forward and stand up, but we need to have a balance when somebody brings information into the public domain. We have all heard of cases of whistle-blowers being victimised.

Every politician in this Building has a bad name among the general public. Rightly or wrongly, they think that politicians are a dirty breed. We need to encourage openness and transparency. If people have relevant information, we need to try to ensure that this is not a closed shop and that we are not pulling down the shutters. It is about how we get that balance. However, the point that the Chairperson is making is that we need to get the balance, because it is easy to throw snowballs at politicians and to make them stick. Therefore, you need to have the balance between having that and protecting us as individuals.

I know what Paul is saying about it being a direction. I am struck by clause 19, which states that:

“The Commissioner shall be appointed by ... the Assembly.”

I take it that it will be a decision of the Standards and Privileges Committee, and then it will go to the Assembly to be ratified.

Mr O’Loan:

That is exactly correct.

Ms S Ramsey:

But then it says that:

“the Assembly will make arrangements for ... ensuring that any person to be appointed as Commissioner has been identified by fair and open competition”.

Have we any idea how that will happen? Will it be through public appointments, or will there be new criteria in place for that? I am concerned when you then talk about:

“a broad range of connections to the ... Assembly”.

What does that mean? We could say, for instance, that Paul’s sister’s husband has a broad connection to the Assembly — I am assuming that you have a sister who is married, Paul. We need to be careful that we are not bending over backwards to please everybody else, but, once again, implying that politicians or people connected to them are dirty. I am conscious of how we get that balance.

Mr O’Loan:

I thank the Deputy Chairperson for her comments. She is in exactly the same position as the Committee. We are concerned that there should be, in the public mind, a clear and demanding code of conduct for Members and a clear system for enforcing it. Equally, we are protective of the legitimate and proper rights of Members. The Committee wants to get that balance right. I hope that I have understood your point about connections between the office holder and the Assembly. That is set out in great detail in schedule 3 to the Bill. It is a matter that the Committee gave careful thought to, and, of course, it is open. Under the legislation, it can subsequently be amended by the Assembly Commission. That is why we refer to the delegated powers. The Assembly Commission could alter that listing in the future, if it wished to do so.

Mr Gill:

The Commissioner for Public Appointments gave evidence to the Committee on Standards and Privileges during its inquiry. The Commissioner for Public Appointments does not have authority over Assembly appointments; they are for Executive and departmental appointments. Nonetheless, the Committee recognised that the commissioner had developed best practice and considered that the Assembly should adhere to that best practice when appointing an individual. The Committee’s report noted the appointment process for the Comptroller and Auditor General, in which there is a public notice and a fair and open competition. Different Members are

involved, and then there is a resolution on the Floor of the Assembly. The Committee considered that that would be an appropriate means of appointing someone. However, the exact detail will be agreed with the Commission and the Committee. The Commissioner for Public Appointments has agreed that she is happy to provide us with advice on the detail of that.

Ms S Ramsey:

I think that we need to be sensible and get the balance right. I have gone through the list. Anybody connected in any way to an MLA cannot apply. That means that aunts, nephews, nieces, uncles or any person related to your spouse cannot apply. I can understand what we are trying to do, but I think that, sometimes, we cut off our noses to spite our faces. It goes back to the fact that if you are in any way connected to an MLA —

Mr O'Loan:

Our overall view is that we want to make it as open as possible, but we do not want to appoint someone at whom fingers will be pointed and the appointment of whom people will say is not appropriate.

Ms S Ramsey:

I appreciate what you are saying, and, sometimes, we need to be whiter than white, but the other part of that is that it is sending out the message that if you are in any way connected to an MLA —

Mr O'Loan:

I take your point. That is the difficult arena that we live in, and probably always will.

Mr Dallat:

This reminds me of the people who go out to check housing benefit — they have a look at the clothes line to see what is on it. We do not want to get to that stage.

Ms S Ramsey:

Not in this weather.

Mr Dallat:

I am quite new to all of this. Will the commissioner have the power to investigate all Members of

the Assembly, including Ministers?

Mr O'Loan:

Yes. The commissioner has the power to investigate all Members of the Assembly acting in their capacity as Members. Ministers are Members of the Assembly, and they are subject to the code of conduct for Members.

Mr Wells:

I recently referred a case to the Committee, and it came back with a blanket letter stating that it could not investigate the matter because the person concerned had been carrying out their functions as a Minister and that I should refer it to the Executive. The chances of getting cross-community support in the Executive to slap any Minister on the wrist are, of course, nil. Are we not going to get into that position? You have been very careful there to define the circumstances in which a Minister can be touched.

Mr O'Loan:

We probably cannot examine individual cases here. However, if a complaint were made about a Member who happened to be a Minister, the first question that the commissioner would ask is whether the action complained about was done in a strictly ministerial capacity or whether it could be regarded as a fault under the code of conduct for Members. Essentially, that is the way in which cases are examined and conclusions are drawn. We have jealously guarded the fact that Ministers are subject to the code of conduct for Members, and the Committee is keen for that to be made clear.

Mr Wells:

I must come back on that point. Ministers may be subject to the code of conduct, but the only way that it can be enforced, if they are acting as Ministers, is with cross-party support.

Mr O'Loan:

That is not the case. During the investigation of a specific case, the Committee on Standards and Privileges and the commissioner are perfectly within their rights to investigate a complaint made against a person who happens to be a Minister using, as the determinant weapon, the code of conduct for Members and may find the Minister in breach of the code. I am not sure whether that has happened, but it is certainly potentially available.

Mr Dallat:

This is probably not worth mentioning, but Jim said earlier that the Assembly does not pay for overnight accommodation. However, in the distant past, there were people who lived a lot closer to Belfast than Belcoo or Strabane who qualified for overnight accommodation.

Mr Wells:

That was stopped.

Mr Dallat:

OK. It is not a relevant issue. We did that without a commissioner.

The Chairperson:

I would like some clarification on the point about Ministers. You said that there is a difference — perhaps I picked this up wrong — between a Minister acting as a Minister and a Minister acting as a Member. Does that mean that a Minister acting in his capacity as Minister is not in breach of the code of conduct if he or she does something wrong in his Department?

Mr O’Loan:

If a complaint is made about a Minister, and the commissioner, on preliminary examination, can see that the Minister has been acting strictly, absolutely and solely in their capacity as Minister, they might say that the matter can be determined only by using the ministerial code. If, however, it overlapped with the code of conduct for Members, the commissioner would be perfectly free to examine it within the terms of reference in the code of conduct for Members.

The Chairperson:

That does not apply to Chairmen, does it? *[Laughter.]*

Mr Wells:

Say, for example, a Minister, acting entirely in his or her role as Minister, stayed in a £500-a-night hotel instead of a £150-a-night hotel, and another Member referred that to the commissioner, could the commissioner touch that?

Mr Gill:

The commissioner would not be able to look at those particular circumstances, which would fall exclusively within the ministerial code of conduct, but there are areas that overlap.

Mr Wells:

The problem is that the only people who can enforce the ministerial code are the Executive, and there is not a pup's chance of getting the member's party representatives on the Executive to vote for that to happen; it would never occur.

Mr O'Loan:

We have no control over the enforcement of the ministerial code. The Committee can only go as far as expressing some concern about the matter.

Mr Dallat:

I initiated that question, but I am now wondering whether I should have done so. It seems to me that if you want to avoid any kind of discipline, always make sure that you use the Minister's headed paper when you do things.

Mr O'Loan:

I could not possibly comment on that.

Mr Givan:

When a report is being done on a vexatious complaint — say, for example, the commissioner gets a tip-off, but there is no evidence to substantiate it — I assume that it will become common knowledge that there has been an investigation. There is damage done in that regard. Will the commissioner be able to say that he or she carried out the investigation because this MLA asked him or her to? That MLA could then be seen to have abused their position in order to attack another.

The Chairperson:

We are going to address that, are we not?

Mr Gill:

There is already a complaints procedure in the Assembly's code of conduct, which sets out admissibility criteria. It is anticipated that that procedure is going to be set out in a direction under clause 24 as to what the commissioner has to do. That means that when the commissioner gets a complaint, he or she will apply the admissibility criteria and, possibly, come to the conclusion that it is trivial, vexatious or substantially related to another complaint and, therefore, does not need to be taken forward. In those particular circumstances, the commissioner can come to the Committee to say that he or she has received such and such a complaint and considers it to be trivial and that no investigation needs to take place. If the Committee agrees, that will be the end of the matter.

The Chairperson:

Will the individual be named?

Mr O'Loan:

That does not need to go into the Committee's report.

The Chairperson:

I am just —

Mr O'Loan:

At that point, no investigation would have happened, so what the commissioner brings to us would not constitute a report and, therefore, would not have to be published by the Committee on behalf of the Assembly.

The Chairperson:

This is an extremely important point. When the commissioner comes to the Committee to say that it is not going to be investigated, will the individual concerned be named?

Mr O'Loan:

He or she would not be named publicly.

Mr Gill:

He or she would not be named publicly by the Assembly.

The Chairperson:

So something could be put into the directions to the commissioner around the point that has been made about identification of people bringing complaints.

Mr O'Loan:

Yes. The legislation will give us the capacity to do exactly that.

The Chairperson:

So there is nothing in here at the moment, but you will look at that again, will you?

Mr Gill:

The Committee will be looking to agree directions as to how exactly all these things should work.

The Chairperson:

Thank you very much.

Mr O'Loan:

We indicated that, as part of your deliberations, we would come to you with a couple of matters. Thank you very much, and I wish you well in the rest of those deliberations.