Northern Ireland
Assembly

STANDARDS AND PRIVILEGES COMMITTEE

OFFICIAL REPORT
(Hansard)

Inquiry into enforcing the Code of Conduct and Guide to the Rules Relating to the Conduct of Members and the appointment of an Assembly Commissioner for Standards

17 February 2010

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Declan O'Loan (Chairperson)
Mr Willie Clarke (Deputy Chairperson)
Mr Thomas Buchanan
Mr Trevor Clarke
Rev Dr Robert Coulter
Mr Billy Leonard
Mr Paul Maskey
Mr Alastair Ross
Mr George Savage
Mr Brian Wilson

Witnesses:

Sir Christopher Kelly	)	Committee on Standards in Public Life
Mr Peter Hawthorne	)	
Mr Ciarán Ó Maoláin	)	Northern Ireland Human Rights Commission
Ms Angela Stevens	)	

The Chairperson (Mr O'Loan):

I welcome Sir Christopher Kelly, the Chairman of the Committee on Standards in Public Life, who is here to give evidence to this Committee's inquiry into enforcing the code of conduct and guide to the rules relating to the conduct of Members and the appointment of an Assembly

Commissioner for Standards. He is accompanied by Mr Peter Hawthorne, who is the assistant secretary to the Committee on Standards in Public Life. Thank you both for taking the trouble of coming over from London.

Sir Christopher, I know that you have had a distinguished career in the Civil Service, including many years at the Treasury, and, latterly, as permanent secretary at the Department of Health. You know your way around the corridors of power, which stands you in good stead.

The Committee on Standards in Public Life is an independent public body. It advises government on ethical standards across the whole of public life in the UK. Essentially, the committee is the guardian of the seven principles of public life. I remind members that that committee launched its own inquiry into MPs allowances and expenses in April 2009 and published its report in November 2009. Members will be aware of the great interest that there has been in the report from that inquiry. Some of the report's recommendations are directly relevant to the work that this Committee is undertaking in its inquiry. We are most grateful to Sir Christopher for agreeing to give evidence today.

The Committee on Standards in Public Life submitted written evidence in advance of today's meeting. I invite Sir Christopher to brief the Committee, after which, I am sure, he will be happy to take questions.

Sir Christopher Kelly (Committee on Standards in Public Life):
Thank you, Chairman. I am grateful for the opportunity to give evidence to this important inquiry. I will not say a great deal by way of introduction. We have already submitted written evidence to the Committee, giving our views. I welcome the fact that the Assembly has decided to appoint a permanent commissioner and to undertake consultation on his or her future role, not least because increased accountability and transparency can only be a good thing in enhancing public trust in, and understanding of, the working of the Northern Ireland Assembly, as is the case for other legislative bodies.

Although it is not necessarily relevant to the subject of the inquiry, I hope that members will forgive me for saying that it is clear that wherever one goes in the United Kingdom, there is great public disillusionment with politicians and with the democratic process itself. Expenses are not the only issue: there is growing public scepticism about double mandates, the employment of

family members and the extent or otherwise of the transparency of political donations. I am happy to talk further about those issues if members so wish. However, I will not say any more on that for the moment, except that in its report, my committee recommended that dual mandates should go, ideally by the next Assembly election in 2011, or if not, by 2015 at the latest, and it recommended that the employment of family members should stop after a transitional period. I say that because the steps that we recommended are essential and necessary in restoring public confidence in politicians and the political process. They are necessary but not sufficient.

The subject of this Committee's inquiry is very much part of the same process. The surveys that the Committee on Standards in Public Life has undertaken of public views of politics and those in public office have consistently found that there is a widespread feeling that those who hold public office are not sufficiently brought to account when they misbehave, or if they do misbehave they are let off lightly, particularly when they are judged by their peers. If the response to that is that there has to be proper process and the appointment of robustly independent people to investigate complaints of wrongdoing and ensure transparency of the process and the reports that are produced, I welcome the fact that those are your objectives too. Those objectives are central to the process, but a lot depends on the precise way in which they are implemented.

That is all that I want to say by way of introduction. I am happy to answer any questions.

The Chairperson:

Sir Christopher, thank you for setting the scene. In the present time, this Committee is conscious of its role in re-establishing public confidence in the conduct of elected representatives; specifically, in this case, Members of the Northern Ireland Assembly. We see this inquiry into how we maintain our code and how we should appoint a Commissioner for Standards as being an important element of that.

We shall move to questions on that key issue. Members should be clear that we shall not refer to any particular case during questioning.

Mr Ross:

We have gone through a painstaking process on the code, so we have probably asked enough questions on that.

Sir Christopher, in your submission you said that you believe that a Commissioner for Standards should be able to initiate his own inquiries and that, when he brings a report to this Committee, he should give stronger indications of the severity of a breach of conduct and should possibly recommend sanctions. The Committee has the power to initiate an inquiry already, and we have done so recently. We decide on sanctions and everything else. How would you see the Committee's role changing if the Commissioner for Standards were to have the ability not only to initiate inquiries but to provide guidance on the sanctions that should be operated?

Sir Christopher Kelly:

I shall begin by explaining why I believe that the commissioner should have the power to start investigations proactively. The view that a commissioner ought to be able to investigate on his or her own initiative is not only my personal view but one that the Committee on Standards in Public Life has taken under previous Chairmen.

One of the reasons for the commissioner having that power can be best illustrated by the fact that, at times, the Parliamentary Commissioner for Standards at Westminster has come under criticism for appearing to do nothing when public criticism of a Member of Parliament appears in the press. He has had to say that he cannot do anything because no one has made a complaint for him to investigate, which sounds rather lame. The Assembly would be wasting its time if it were to establish a commissioner who did not have public confidence; therefore, whatever you do, it is important that you create circumstances in which the commissioner does not appear to have one arm tied behind his back.

Some people have said that that would run the risk of the commissioner having to launch all sorts of trivial investigations. That does a disservice to the sort of person whom I imagine you will wish to appoint. I am sure that if you appoint someone with the qualities that you would want for that type of role, they will be able to distinguish between idle tittle-tattle and serious allegations that require further investigation and have a proper evidential base.

If that were the case, I do not see that the role of the Committee would change greatly. It would still be open to the Committee to ask the commissioner to start investigations that it thought were necessary, and some cases would be initiated by the commissioner without a request from the Committee. I see the process after that as being exactly the same as the current process.

Mr Ross:

In Northern Ireland, the experience has been that if there is any hint of a scandal, Members are not slow in making a complaint.

You mentioned that the Committee should include two lay members. How would that benefit the process? We are a Committee of the Assembly that is made up of Assembly Members — I was going to say elected Members but there are now two of us for whom that is not necessarily the case. Could the fact that the Committee contained two members who were not Assembly Members create a potential difficulty?

Sir Christopher Kelly:

I am not an expert on Assembly procedure. I realise that the Assembly has been established differently from the Westminster Parliament. The Committee on Standards and Privileges at Westminster has not yet implemented that recommendation but it has told us that it accepts it.

The reasons for that proposal go back to what I said in my introduction: a lot of people believe that even if people who misbehave are brought to book, they are not dealt with in an adequate manner. That claim is sometimes quite difficult to substantiate. I apologise for not having looked into decisions of this Committee, but if one considers some of the decisions of the Committee on Standards and Privileges at Westminster, one will see that that allegation is not necessarily justified. However, on some occasions the Committee's treatment may seem lenient to someone who is not part of the whole process, who has not seen the evidence and who is going on only what they have read in the press, which may not always be accurate. The presence of lay members on a Committee of this kind would give the public greater confidence that it was not a question of peers being soft on each other. It may also afford greater protection to Committee members against accusations that that was happening. That is not a complete solution, but it is one small and necessary step.

Mr Ross:

My final question relates to the composition of the Committee. Last week we heard evidence from the Chairperson of the Welsh equivalent of our Committee. He said that in recent years they have moved away from having a large standards Committee to one with appointees from just the four main parties in Wales. Rightly or wrongly, even if it is not the reality, it is the perception that many decisions in our Committee are taken along party lines or on nationalist/unionist lines.

That is something for which we have been criticised. Sir Christopher, what is your view on our having a smaller Committee with four or five members, with one from each of the main parties? Do you believe that that would engender more public confidence and make our role easier?

Sir Christopher Kelly:

I have not thought about that a great deal, so I will be giving an off-the-cuff response. I suspect that there might be something in the argument that members would be less likely to divide along party political lines if it were more obvious that people were being appointed to the Committee as individuals, because of their seniority or reputation for integrity and fairness, rather than as representatives of political parties. However, I hesitate to express a firm view because I know how complex the political circumstances are here.

Mr P Maskey:

I welcome the witnesses and thank them for coming over. You suggested that the commissioner should have the power to investigate without a formal complaint having been lodged. How do you envisage that happening? Sometimes allegations are made or there are media reports that cannot be further from the truth, although, in other cases they might be truthful. How would a commissioner start to investigate such allegations without having received a formal complaint? What remit would the commissioner have to investigate a particular issue?

Sir Christopher Kelly:

I would expect the commissioner to approach whoever was making the allegation to see what evidence they had to support it, at which stage some evidence either would or would not be produced. If it were produced, the commissioner would be able to make a judgement on whether it established a prima facie case for investigation or whether it was just malicious gossip. In the absence of evidence, the commissioner would be in a strong position to say that he or she had approached whichever part of the media was making the allegation and that nothing could be produced to substantiate it. To me, that seems to put the Member concerned in a stronger position than simply allowing allegations to remain on the table.

Mr P Maskey:

Thank you for that answer. I can see how that approach could work and how it could put the individual concerned on a stronger footing. If that proposal were adopted, would it diminish or enhance the responsibility of this Committee?

Sir Christopher Kelly:

It would enhance the Committee and give it greater strength. I do not see how it could take anything away from the Committee.

Mr W Clarke:

You are very welcome, Sir Christopher. I want to raise a few points, the first of which is about the independence of a future commissioner. What interests — such as political dealings, political influences, membership of secret organisations and monetary interests — will a future commissioner have to declare? Would those interests have to be declared in advance? How would that work?

My second point is about the employment of family members by Assembly Members. Will you outline your dealings in that regard and how you see us as failing on it?

Over lunch, we discussed the issue of Members' careers outside of Parliaments. Will you outline your thoughts on that? A balance is required; all institutions and Parliaments need expertise from all walks of life. However, in general, the public want elected representatives to serve the people by dedicating enough time to the role that they are elected to.

Sir Christopher Kelly:

Those are three interesting questions. I will start with the question about what interests I would expect a commissioner to declare. Transparency is one of the principles of public life, and people in such posts should be prepared to be as transparent as possible about their interests. That is no different for the Committee on Standards in Public Life; there is a register of interests for all of its members. That does not include details of salaries but it includes declarations regarding all bodies with which members have a significant association and that might, therefore, influence our judgement on important issues in some way. The same rules should apply to the Assembly Commissioner for Standards. The Committee might think that it is necessary for someone who investigates MLAs to subject themselves to the same disclosure requirements that apply to MLAs. On the face of it, that seems reasonable.

The employment of family members was possibly the most difficult issue that our committee had to face. A significant number of Members — about 200 out of approximately 640 — of the

Westminster Parliament employ family members, and I am conscious that an even greater proportion of legislators in this Assembly employ family members. I am also conscious that we received a great deal of evidence that many of those family members — mainly, but not only, spouses — work enormously long hours and perform beyond expectations that should be placed on any staff.

In Westminster, we started from a scandal that involved the employment of family members and from a presumption, which far too many people now have, that politicians of all kinds cannot be trusted. Furthermore, in no other sphere, with the partial exception of GP practices, would it be for one moment considered remotely appropriate to use public money to employ family members.

Taking all that into account, we came to the view that the employment of family members should cease after a reasonable transitional period. Unless and until that happens, the Westminster Parliament will be unable to feel and demonstrate that the arrangements for supporting MPs have been completely cleaned up. It is absolutely essential now that Westminster should be able to demonstrate that the expenses system has been completely overhauled and is free not just from abuse, but from the appearance of abuse.

I recognise that in Northern Ireland, as is so often the case, particular circumstances and a particular history account for so many family members being employed by Members of the Assembly. I hesitate to get into that matter because, frankly, I do not know as much about it as the Committee members. However, it would surprise me if exactly the same principles did not apply to Members of the Assembly as to Members of Parliament. I am encouraged in that belief by the fact that there is a trend in other legislatures to come to exactly the same conclusion. The employment of family members has now been stopped in Scotland; it was supposed to be stopped in Wales, although there is some doubt as to how that will proceed; it has been stopped in the House of Representatives in the US; and it has been stopped in the European Parliament.

Some would claim that that falls foul of various pieces of discrimination legislation. However, legal advice has been obtained by us and by the Independent Parliamentary Standards Authority (IPSA) that says that, although people can challenge anything, there is a perfectly adequate defence against such allegations.

Your third question was about MPs holding more than one job. We came under considerable pressure in that regard. There was a lot of evidence on this issue, with a number of witnesses wanting us to ban second jobs altogether. I have some sympathy with that view, on the grounds that, at one extreme, being a Member of the Westminster Parliament is, or ought to be, a full-time job and doing another full-time job is incompatible with doing that. At the other extreme, the committee took the view that there was absolutely no objection to a Member of Parliament undertaking some political or non-political journalism, or those with professional backgrounds undertaking bits of work sufficient to keep their professional hand in, so that they would have a profession to go back to when they left the House of Commons. There is a much-cited case of one MP who is a dentist. I am not sure that I would want to go to a dentist who only practiced one day a week, but that is another matter. All of that seemed to us to be perfectly reasonable.

Where those two views meet in the middle — that is, what any reasonable person would think of as too much of an outside commitment for a Member of Parliament to expect to do his job properly as opposed to things that are perfectly legitimate for them to do — is a matter of judgement. We took the view that the right approach to that was transparency. Not only should MPs declare in the House what else they are doing besides being a Member of Parliament, but, when standing for election, they should tell the electors what they intend to do. They should declare, for example, "I want to be your MP but, by the way, I intend to carry on my almost full-time practice of being a criminal barrister." That is an essential part of informing the electorate.

There is a particular issue in Northern Ireland because of dual mandates. After this election, it is said that there will be no other examples of dual mandates; that is, between other devolved legislatures and Westminster. There is one example in Scotland at the moment, but that Member has already announced that he will not be standing for a Westminster seat. There are no examples in Wales.

My committee took the view that, if it is wrong for someone to do something that amounts to a full-time job as well as being an MP, that must also apply to someone's being a Member of this Assembly and a Member of Parliament. Therefore, we recommended that the practice should be brought to an end, ideally by the next Assembly election in 2011 but failing that, by the following election in 2015. We are encouraged in that belief because the leaders of, I think, all the political parties told us that they also took the view that double-jobbing or dual-mandates should come to an end, albeit without agreement as to when that should happen.

We hope that in making the recommendation, we are providing something around which views can coalesce so that the practice can be brought to an end. I am conscious that there are particular reasons why there may be dual mandates in Northern Ireland as opposed to in Scotland and Wales.

Mr Leonard:

Gentlemen, you are welcome. Sir Christopher, you forthrightly spoke about the general opinion of politicians, and I will not start defending some of the things that have come out in recent times. Do you agree that such behaviour sullies the reputation of people in politics who work full-time, keep to the required standards and give a lot of their lives devoted to serving the public? As well as referring to the negatives, some of which are disgraceful, do you think that more reference should be made to the good side of the coin as opposed to the bad side?

I have two points on the nitty-gritty of your presentation. In discussing proactive investigation by a commissioner, you referred earlier to a situation wherein allegations are made and a commissioner could have a chat with the person or people concerned. Could that system be open to manipulation? Could it mean that the commissioner will go off on the basis of the latest rumour? You said that the standing of the commissioner may mitigate that possibility, but there would have to be clear guidelines for the role of the commissioner, such as an evidence-gathering part of the process that involves absolutely no inference whatsoever. To facilitate that action, which you recommend, there would have to be a related provision in the description of the commissioner's role.

I appreciate what you have said about lay members, in that the perception would be that it is not simply peers investigating each other. That is an important issue. However, is there not the possibility that the couple of lay people involved would end up being under pressure to be the validators of the political machine and the politicians involved in the workings of that machine?

Sir Christopher Kelly:

To answer your first question, one of the tragedies of the current situation is that the good name of all MPs, and one suspects of politicians generally, has been brought into disrepute by what has happened. For the considerable number of Members of Parliament who have conducted themselves with integrity, in this area and in others, that is a great shame. I am second to none in

my admiration for the work that many MPs do.

Having said that, there were many people in Westminster who must have known that the expenses system was flawed, and who stood aside when the House of Commons authorities tried, unsuccessfully in the end, to resist the application of the Freedom of Information Act 2000 to Members of Parliament and their expenses. They are, therefore, guilty of going along with a flawed system.

In their defence, even though some of them might have suspected that something was wrong — as, indeed, the rest of us might have done — it was not until the full details of expenses were revealed, initially by the 'Daily Telegraph', that many of them became aware of the extent to which a number of their colleagues were exploiting the system, particularly the support offered for mortgages and the flipping of main homes and second homes, which applies in Westminster but does not apply here. It will be some time until the reputation of politicians improves.

You asked whether there is a danger of political manipulation of the commissioner. Of course there is; there must be. One has to depend on the good sense, intelligence and robustness of the commissioner to deal with that. I still think that the commissioner initiating investigations is a better option than only allowing the commissioner to react to complaints that are formally made, because not everyone will understand that that is what they need to do.

I want the lay members to endorse the decisions taken by this Committee. The key thing about the lay members is that there should be a sufficient number of them. I do not think that one lay member is enough because, unless they are a very exceptional individual, one lay member can easily be leant on. In the case of the Committee on Standards and Privileges at Westminster we recommended that there should be three members, which seemed to us to be sufficient to ensure both that there would be lay members at any individual meeting and that they could provide mutual support to each other, so that if they came to the conclusion that something was radically wrong and that decisions were being determined along party lines, they would have sufficient support for each other to press back against that, and, if necessary, make their views public.

Rev Dr Robert Coulter:

Sir Christopher, we meet again. In your report you suggested that the commissioner should give an indication of the seriousness of any breach of the rules. Would that in any way pre-empt the

judgement of the Committee, or would it cast a shadow on its ability to make a proper judgement?

Sir Christopher Kelly:

I do not think that it would necessarily pre-empt the decision of the Committee. I am not sure how different that would be in practice from what happens at present. At the moment I suspect that it is often done by words being used in a certain way. It seems to me that, as part of being able to demonstrate that justice had been properly done, both in punishing people whose misbehaviour has been really serious and in exonerating those who have done nothing wrong, the process would be further strengthened by the commissioner explicitly indicating whether, in their view, it was fairly trivial or was something to be taken seriously. That does not necessarily prevent the Committee from deciding that something the commissioner thought was serious was not serious, but if the Committee did that, you would no doubt have to explain why you took a different view.

Rev Dr Robert Coulter:

If the commissioner declares that someone has not broken the rules, is it right for the Committee to go against that decision?

Sir Christopher Kelly:

It has to work both ways. I do not know how often it happens in practice, but if the Committee took a different view from the commissioner, you would be obliged to explain your reasons. That would seem to me to be a good part of the checks and balances.

Rev Dr Robert Coulter:

We had a situation in which the commissioner declared that someone had not broken the rules and, when some of us voted according to the commissioner's declaration, we were accused of voting on sectarian lines. What is your view on that?

Sir Christopher Kelly:

I have no knowledge of that case, so I am not sure whether I can comment on it.

Rev Dr Robert Coulter:

Is it a reflection on the commissioner or the Committee?

Sir Christopher Kelly:

If the Committee were to take a different view from that of the commissioner, it might cause some people to question the commissioner's judgement. It depends on the reasons for the decision being taken. As I said, if a full explanation is given for a difference in views, that is an important safeguard.

Mr Ross:

How do you envisage lay members being appointed to the Committee? Would they be appointed by the Assembly or through the Commissioner for Public Appointments?

Sir Christopher Kelly:

The way in which members were appointed to IPSA set a good precedent. Such appointments are the formal responsibility of the Speaker, his commission and, ultimately, the House of Commons. To all intents and purposes, the process that was followed was analogous to an ordinary public appointments process. That is to say, a panel was appointed under an independent chairperson, which included members of the Speaker's commission as well as other independent members. One of those independent members, although not formally appointed by the Office of the Commissioner for Public Appointments (OCPA), the public appointments regulator, is, nevertheless, someone who is experienced and fulfils the same role as an assessor appointed by OCPA, which is to say someone who is able to certify that proper processes have been followed.

That panel then made recommendations to the Speaker, who made recommendations to the House. Either the House or the Speaker could have overturned those recommendations. That did not happen, because they wanted to demonstrate that the process had been independent and conducted properly. Unlike some public appointments, the independent panel did not offer a choice, it simply recommended people for appointment. It seems to me that that process is a good model for making such appointments.

Mr B Wilson:

I wish to refer to the appointment of the lay members, which would be an important role. Would either lay member be able to become the Chairperson of the Committee?

Sir Christopher Kelly:

That is an interesting question. There is an analogy in England, although I do not think that it applies here. In England, all local authorities have their own standards committee, the chairperson of which, I believe, always has to be an independent member. Indeed, I was the chairperson of the standards committee for the London borough of Camden, which is where I lived for some years, although, in that time, we did not have any cases.

We did not make that recommendation in relation to the Westminster Parliament. I am not an expert in the area; however, before recommending that lay members be allowed to become the Committee's Chairperson, I would want to consider carefully whether any privilege issues would be involved in doing so. For example, this Committee will make judgements about the behaviour of Assembly Members in the Assembly, which is a privilege issue. I am not sure that having an independent Chairperson would sit very well with that role. However, that is a technical issue, on which, as I said, I am not very well qualified to express an opinion.

Mr Savage:

Do you agree with the House of Commons Committee on Standards and Privileges that, for an inquiry by the commissioner to take place, there must be a firm evidential basis? How, for example, would the commissioner be expected to respond to media allegations of a breach of the code of conduct?

Sir Christopher Kelly:

Yes, of course I think that there should be a firm evidential base to inquiries and recommendations. However, there are two different stages: one is the decision to initiate an inquiry and the other is the recommendations of the inquiry. At the point at which an inquiry is initiated, what needs to be established is not that some misdemeanour has occurred but that there are reasonable grounds — a prima facie case — for thinking that that has happened. As I said in answer to an earlier question, I would expect that as a first step in responding to media allegations of misbehaviour, the commissioner would ask the journalist concerned to demonstrate his evidence for those allegations. If there were no evidence, I would also expect the commissioner not only to not undertake an investigation but to say that having contacted the media, there was nothing of substance to support the allegation that had been made.

Mr P Maskey:

Reverend Coulter touched on some of the decisions that a commissioner might take to the Committee. I believe firmly that each of us, as members of different political parties, should leave our political baggage at the door when we come to this or any other meeting. It is important to ensure that, no matter what we are discussing, we do not work on the basis of political allegiance, particularly in this Committee.

I want to ask you about the lay members that may be on the Committee. Reverend Coulter mentioned that the Committee had considered certain cases on which members voted in different ways. A commissioner might be faced with a situation in which someone disagrees with his decision. Have you given any thought to the possibility that the two lay members could work alongside the commissioner when he is carrying out an investigation and producing a report? I am conscious that the commissioner would be working alone, but if the two lay members, who might also be members of this Committee, were to work alongside him, would that add a bit more strength to the commissioner's report?

Sir Christopher Kelly:

I had not thought of that. There is a distinction between the role of someone who carries out an investigation and that of someone who sits in judgement on the results of that investigation. I guess that it would be important to keep those roles separate, not least because there is no appeal mechanism. Natural justice requires that there should be a separation and a two-stage process in which an individual is either found guilty or not guilty, or whatever terms the commissioner chooses to use. An individual would then have the opportunity, if he or she so wished, to make a case to the Committee, which might, as in the previous example, decide to exonerate that person despite the commissioner's report. I suspect that a separation of roles is probably important.

The Chairperson:

You referred to the commissioner having the right to initiate an inquiry of his or her own accord. Do you have any view on the effect that that would have on the workload and resources needed for the office?

Sir Christopher Kelly:

There would be no point in making that provision unless it increased the workload to some extent. I have no information to go on to judge what the effect of that would be. I suspect that it

is a case of suck it and see.

The Chairperson:

You talked about the Assembly commissioner being able to say something in his report about the seriousness of a breach. Why do you think that that should be done? Do you not think that that might pre-empt the Committee's judgement? Is it not the Committee's role? If the commissioner were to include that in a report, how would he do that? Would it be done by using a form of words, or would it be done in a more formal way, using a scale of seriousness?

Sir Christopher Kelly:

I would not expect the commissioner to say that a situation was so serious that it required, for example, suspension from the Assembly for three months, or, perhaps, expulsion. That really would be a pre-emption of this Committee's role. It would be perfectly natural and helpful to the Committee and the Member concerned for the commissioner to say either that an investigation has taken place and, in his or her view, there was a misdemeanour, albeit a relatively trivial one, or that the misdemeanour was a serious one that the Committee would want to consider. I am not sure that that would pre-empt any decision that the Committee might wish to take. It might force the Committee to be more explicit about its reasons for taking a different view from that of the commissioner, either by giving a trivial response when the commissioner recommended a serious one or vice versa.

The Chairperson:

The Committee has the power to call for witnesses and documents; should such powers for the commissioner be set in legislation?

Sir Christopher Kelly:

There is something to be said for that. Experience will show whether it is absolutely necessary. If it is known that the commissioner has only to appeal to the Committee to get it to lend its support to a requirement for documents, such legislation may not be necessary in practice. However, the commissioner ought to have the ability to do that, whether he or she is given the power explicitly or whether it happens because everyone knows that if they do not co-operate with inquiries, the Committee will step in and require them to do so.

The Chairperson:

Are there any other powers, duties or responsibilities for a commissioner that could usefully be set down in statute?

Sir Christopher Kelly:

I misled myself. I am not sure that the commissioner's role should be statutory. It is not statutory in Westminster. I am not an expert on the matter, but I am told that if it were statutory, the commissioner's actions would be subject to judicial review. There is a place for judicial review, but it is for the Committee to carry out the second stage of a review of a decision. I am not sure that, in such cases, judicial review would be helpful. We do not want the decisions of the commissioner or the Committee to be second-guessed.

The Chairperson:

Should there be a quorum rule that requires the presence of at least one lay member?

Sir Christopher Kelly:

There should be at least one lay member present at each meeting. The issue for decision is whether there should be a quorum requiring two members, for the reason I gave earlier about mutual support.

The Chairperson:

Is it necessary for quorum purposes?

Sir Christopher Kelly:

Yes.

The Chairperson:

Some people have put the view to us that rather than having an open competition for the post of commissioner, the office should become a separate role that is attached to an existing public office. What is your view on that? In those circumstances, do you have any concerns about how the commissioner might be accountable to the Assembly?

Sir Christopher Kelly:

I see no reason why someone performing two roles could not, in one role, be accountable to the

Assembly and accountable to someone else for their performance of the other role. It is largely a practical question. It is important to appoint the right person, and the process by which he or she is appointed should be seen to be manifestly above suspicion to ensure that the appointee is the best person for the job and has sufficient independence of mind. Whether or not two posts could be combined depends on how much business is expected. If there is little business, it might be practical and sensible to combine two posts, as I understand has happened with the interim commissioner. There is a practical issue about the manner of the appointment that must be overcome.

The Chairperson:

There is a distinction between conducting an open competition and appointing someone who holds another role and permanently attaching the post to another office.

Sir Christopher Kelly:

It is necessary to be pragmatic about such matters.

The Chairperson:

The Committee has heard some views about managing the cost, which can vary over time. It was suggested that the Assembly secretariat could provide permanent secretarial support. Do you have a view on that? Would that breach the independent nature of the function in any way?

Sir Christopher Kelly:

It is most important for the commissioner to have had no previous relationship with the Assembly. Whether the staff supporting him or her need also to be similarly separated by Chinese walls from the Assembly depends on two things. The first is the amount of work that there is and, if it is only intermittent work, it would be a waste of resources to employ full-time support staff. The second issue is the credibility of Assembly staff. If one goes back to the expenses in Westminster, the way in which the fees office in Westminster dealt with expenses claims — even with the unclear rules that then existed — has meant that it has lost all credibility. Therefore, as long as those staff members remain in the fees office, no one could reasonably expect them to be used to support the Independent Parliamentary Standards Authority.

Although Scotland has an analogous arrangement, no one has raised any questions about the credibility of the Scottish parliamentary staff to support an expenses system, and that seems to

work perfectly well. The answer partly depends on the credibility of Assembly staff, and that, I am afraid, is an issue on which I do not have enough experience to pass a judgement.

The Chairperson:

I want to go back to one of the foundation points. Is it possible to defend the right of Members of Parliament or Members of the Assembly to police themselves, rather than having a totally independent system?

Sir Christopher Kelly:

Where do I begin? It is an oddity. Increasingly in other professional walks of life, the expectation is that although peers are involved in judgements, there is a strongly independent element and, finally, in the health professions, a completely independent element takes judgements. One has to justify why that should not be the case in relation to MPs, Members of the Assembly or Members of the Scottish Parliament. There are two answers: one is that Assembly Members ought to take responsibility for themselves. If external regulation has to be applied, it is because internal regulation has failed. There needs to be a change in culture in Westminster in relation to expenses, and there are some signs that that change in culture might happen or, at least, there are good reasons to hope that it will happen, not least with the large number of new MPs that are likely to arrive after the next election. The first part of the answer is that you should take responsibility for yourselves.

The second part of the answer goes back to privilege. In Westminster, it is a fundamental issue going back to the Bill of Rights that — I am paraphrasing this and undoubtedly I will get it technically wrong — there should be no external constraint on the freedom of Members of Parliament to say what they think in Parliament. I know that privilege in the Assembly is different, because it is based on statute rather than on the Bill of Rights. However, I suspect that the same point applies.

The Chairperson:

I am sure that you will agree that if this Committee is to police Members of the Assembly, it will put a heavy duty and burden on its members to demonstrate the same principles in the conduct of their affairs that they will demand of other Members of the Assembly.

Sir Christopher Kelly:

Absolutely.

The Chairperson:

Sir Christopher, that finishes the questioning. Thank you for that very useful session. We are deeply obliged to you for coming.

Sir Christopher Kelly:

It has been a pleasure. Thank you.

The Chairperson:

Our second evidence session is with representatives of the Northern Ireland Human Rights Commission (NIHRC). I welcome Ciarán Ó Maoláin, head of NIHRC legal services, and Angela Stevens, a caseworker for NIHRC legal services. I thank you both for waiting patiently.

The Northern Ireland Human Rights Commission is an independent statutory body that was set up in 1999. Its role is to promote awareness of the importance of human rights in Northern Ireland, to review existing law in practice and to advise government on what steps need to be taken to fully protect human rights in Northern Ireland. Over the years, the commission has provided advice and evidence to the Committee on a number of occasions. For that reason, we are particularly grateful to able to hear from the commission once again in the context of this inquiry. The commission submitted a paper to the Committee in advance of today's session. I invite Ciarán to brief the Committee before we move to members' questions.

Mr Ciarán Ó Maoláin (Human Rights Commission):

Thank you very much. First, I wish to apologise on behalf of the chief commissioner, Professor Monica McWilliams, and other commissioners who are unable to attend today's evidence session because of a pressing prior engagement. It is not ordinarily the practice that we send members of staff to give evidence to Assembly Committees, and we will try to avoid that in future. That said, I have had the pleasure of appearing before this Committee, or rather its predecessor, in 2002, along with our then chief commissioner.

We have always taken very seriously the quality of self-regulation by the Assembly. We are firmly convinced of the necessity of the Assembly's being able to regulate its affairs, as is the

norm in every democratic legislature. I accord with Sir Christopher's point that any form of external regulation or intervention in the regulatory process of a democratic Assembly is only necessary to the extent that the Assembly fails to regulate its affairs properly.

The commission is broadly content with how the current code of conduct and procedures work, but we wish to comment on some of the detail of the process. For example, we would like the number of possible recommendations from the commissioner to the Committee to be limited to two. We are committed to the principle of transparency in the processes and, above all, of fairness. We believe — and on this we differ from the Joint Committee on Human Rights — that article 6 of the European Convention on Human Rights, which is on the requirements of a fair trial, is engaged in the self-regulation of a legislature but that that degree of fairness can be delivered by the self-regulatory process.

In our submission, we have commented on the nature of the commissioner post and on the desirability of having the type of independent appointment process that Sir Christopher alluded to, should it be decided to create a separate statutory appointment. However, we have noted that the current Northern Ireland Ombudsman has fulfilled the role to date, and we do not see any pressing reason to deviate from that arrangement so long as the ombudsman's other duties allow him to continue with that function.

I would be happy to take any questions from members.

Mr P Maskey:

You are both welcome. I asked the previous witnesses about the issue of lay members. Has the commission given much thought to whether lay members can or should be members of the Committee on Standards and Privileges?

Mr Ó Maoláin:

That is not a matter on which the commission took a position. We have no fundamental objection to lay members being brought onto the Committee if they provide necessary expertise, but Members of an Assembly ought to have the type of expertise that is needed to police their affairs. That said, the chair of the commission's audit committee is an independent person, and to the extent that the Committee on Standards and Privileges is analogous to an audit committee, a case could be made for having an independent member, and even an independent Chairperson, of the

Committee. We have no objection to the Assembly choosing to involve that kind of outside expertise. However, if the Assembly is content that it can regulate its own affairs, the commission would not recommend any departure from that.

Mr P Maskey:

How would the Human Rights Commission react to, for example, a situation in which a commissioner investigated a Member's conduct without an official complaint having been made to the Committee?

Mr Ó Maoláin:

That is a slightly more problematic area. Most national human rights institutions, like our commission, and most ombudsmen, are able to investigate suo motu — on their own motion — when a concern is raised. It would be problematic if an Assembly Commissioner for Standards were able to do that. That raises the question as to what is the proper threshold for launching an investigation. Would allegations made in a newspaper report or a television programme, for example, be enough to cause an investigation to be launched, or in what circumstances would an investigation not be launched?

Such a provision would generate more work for the commissioner and it would call into the question the commissioner's judgement whenever he or she decides whether or not to investigate on foot of a report. The commissioner would be forced into making judgements about the credibility of a media report or a rumour that caused him or her to launch an investigation. It is probably best that there ought to be an evidence base before any kind of investigation is formally launched.

It could be that, as has been suggested, the commissioner could have a private conversation with a Member who has been impugned in some way by rumour or by media reportage before deciding whether to launch an investigation. That raises questions about the fairness of procedure and whether the Member concerned is entitled to refuse to answer questions. Ideally, in every case, the commissioner's role should only kick in when a formal complaint is presented that has some basis on which to proceed. Otherwise, the commissioner has rather more discretion than he or she could really be comfortable with when it comes to deciding whether or not to investigate on foot of suspicion or media report.

Rev Dr Robert Coulter:

Thank you for coming today. Do you think that it is a breach of a MLA's human rights and those of his or her family members that they would be barred from being employed by the MLA just because they are family members?

Mr Ó Maoláin:

That matter goes somewhat beyond the Human Rights Commission's settled position. The commission has not addressed that particular issue. In general terms, of course, the Human Rights Commission favours fair, open and transparent procedures for selection and employment. I can only speculate as to what its position might be, but I would expect it to take the view that appointments to any kind of employment that is funded from the public purse should, in general, be on the basis of open competition and merit.

Rev Dr Robert Coulter:

Is it a breach of those people's human rights if they are not allowed even to apply to be employed, even though they may be fully qualified to take the post?

Mr Ó Maoláin:

It would certainly require justification. The exclusion of any person from eligibility for employment purely on the basis of something over which they have no control — such as their being the son, daughter or spouse of an Assembly Member — would require a strict justification as to why it would be improper to allow that person to compete for the post. The Human Rights Commission would say that, in principle, such posts ought to be open to all comers and appointments should be made on the basis of merit.

Mr Savage:

How much importance do you place on the Assembly's authority to regulate its own code of conduct?

Mr Ó Maoláin:

It is the norm in every democratic legislature that the conduct of Members should be regulated by their peers. That is by far the best way of doing things, so long as the Assembly can be confident that it has the capacity among its membership to regulate its own affairs. To some extent, it would be an admission of failure by the Assembly if it were required to go beyond its own

membership to regulate its affairs. So long as the regulatory system meets the standards of fairness and transparency to encourage public confidence in the system, then, as far as possible, regulation should reside with the Assembly itself.

Mr W Clarke:

You are very welcome. In your submission you said that the commissioner should appoint his or her own staff, subject to normal rules. Other people have said that that should be done in-house, using the Assembly secretariat, to reduce administration costs and cut down expenditure.

As regards the independence of a future commissioner, do you envisage that he or she will have to declare his or her interests, as an Assembly Member does?

Mr Ó Maoláin:

To begin with you second question: certainly, the Commissioner for Standards needs to be someone who is above reproach and enjoys full public confidence. It seems reasonable that he or she ought to be subject to the same disclosure requirements as apply to those whom they regulate.

As I understand it, under current arrangements, the ombudsman, in exercising the role of interim commissioner, is able to call on his own staff to provide any assistance that is needed with investigations. I see that as being preferable to Assembly staff being drawn into investigations of allegations against individual MLAs, given that they interact with MLAs from day to day. It could potentially create, if not mere embarrassment, difficulties in day-to-day working relationships between a MLA and a member of Assembly staff if each is aware that the other is subject to, or involved in, an investigative process.

Therefore, ideally the commissioner should be able to control and direct his or her own staff in a way that does not allow even an appearance that the Assembly has control over the direction and conduct of the investigation.

Mr Ross:

In your submission, you said that the appointment of a commissioner should be for a fixed term. Last week, we discussed that matter with the Commissioner for Public Appointments. Is the fixed term that you have in mind the lifespan of an Assembly? What length of term do you envisage? Can you go into more detail as to why you believe that a fixed term would be

preferential to a permanent appointment?

Mr Ó Maoláin:

With regard to national human rights institutions and ombudsmen throughout the world, the principle of a fixed term of reasonable duration is seen as key to independence. The term should not necessarily be tied to the life of a particular Assembly, because then there would be a suggestion that each Assembly appoints the commissioner that suits it or that allows it to get away with whatever it wishes to get up to.

If the commissioner had a term of office of, say, seven years, that would allow a transition during the life of the Assembly to a new appointee. The current arrangements, whereby the interim commissioner, as ombudsman, essentially holds a career-long appointment, may work well for the ordinary running of the ombudsman's work to investigate complaints about administration. However, if a new office of Assembly Commissioner for Standards were created, the commission would prefer a fixed-term model, which allows the office holder to plan for the exercise and end of his or her period in office and leaves the commissioner free from any suggestion of dependence on the favour of Assembly Members for reappointment when his or her term is finished. The point of a fixed term is that it allows the commissioner to be independent of the influence of MLAs and the appearance of being subject to MLAs' influence with regard to possible reappointment.

Mr Ross:

Presumably, then, that individual could not go forward for reappointment? Would he or she be allowed to hold the office only once?

Mr Ó Maoláin:

The norm with regard to appointments of ombudsmen and human rights commissioners is that a second term can be allowed. If during his or her first tenure, the office holder expresses a desire to go forward for a second term, there should be a presumption in favour of reappointment. However, after two fairly long terms, it may be that it is time for a change, and a new office holder could see things differently. It could be a single fixed term of five or seven years, or it could be a fixed term with the possibility of one reappointment, but it should not be a life-long appointment, as is the case with the appointment of the ombudsman. That is no reflection of the integrity of the current ombudsman, for whom we have the highest respect.

Mr Leonard:

It is good to see you, Ciarán and Angela: you are very welcome. You came down pretty strongly in favour of the commissioner responding to formal complaints rather than undertaking proactive investigation. You also said that there are no fixed positions, and that you are in listening mode. Referring back to the questions from other members, in a situation in which a formal complaint is not made, can you see any space in the human rights context to allow evidence gathering that will not involve anybody being impugned? Are there circumstances in which a commissioner could go out and gather evidence, with it being made clear to the people concerned and the public at large that it is only evidence gathering and that it may never lead to a formal action?

When is a formal complaint is made, that has to be reacted to, obviously, but if there is a proactive approach, could there perhaps be a buffer zone without impugning anybody? Is that fair play within the human rights context, or do you see real problems with it?

I have another question in relation to paragraph 17 of the NIHRC submission, which states that:

"The role … should be defined in greater detail and would best be set out in statute, or in the interim with a more detailed Standing Order".

Are you, by implication, saying that it must be set out in statute, no matter how long it takes? What is your position on judicial review? Should we worry about the system being clogged by judicial reviews, or is that very understandable in the human rights context?

Mr Ó Maoláin:

Those questions are interlinked, in that the possibility of judicial review is a safeguard against any kind of unreasonable exercise of the investigative power. If the commissioner is empowered to launch investigations without a formal complaint being made, there is an expectation that he or she must exercise that power reasonably. The kind of oversight that would be provided by the possibility of judicial review would require the office to be established in statute. That is why the questions are interlinked; if there is a statutory basis for it, there is judicial review.

Departing from Sir Christopher's viewpoint, we are not afraid of judicial review. We think that it is a good safeguard to have when someone is exercising considerable powers over people who have been elected by the public to govern them. It is quite a serious matter for the conduct

of any elected representative to be investigated. It is not something that should ever be done lightly, and, in the absence of a formal complaint to found an investigation, it is necessary for the commissioner's own protection that there be some safeguard against even the appearance of arbitrariness or political influence in deciding whether to investigate an allegation that impugns any Member of the Assembly.

On the whole, the preference has to be that investigations should follow from a formal complaint. If the Assembly is minded to give the commissioner power to launch investigations without such a complaint, it is necessary that there be some protection, such as would be provided by a statutory basis for the office and, thereby, the possibility of judicial review.

Mr Leonard:

So, even with a proactive approach, you are saying that it would have to be in statute and, therefore, subject to challenge?

Mr Ó Maoláin:

If the commissioner did not have a statutory basis and was able to launch complaints purely on a whim, it would not do much to build confidence in the office of commissioner. Every time that the commissioner decided to launch an investigation, or decided not to do so, he or she would be open to question. Without recourse to judicial review, there is no real option for being able to prove that the investigation was properly founded and was anything other than politically motivated.

The Chairperson:

I do not think that you touched on the possibility of appointing lay members to the Committee on Standards and Privileges. Do you have a view on that subject?

Mr Ó Maoláin:

The subject came up earlier. The commission has not addressed that question in its discussions about the proposals, but it is not averse to the notion of lay membership. Indeed, the chairperson of the commission's audit committee is a lay member and a non-commissioner. We would go along with Sir Christopher's view that the selection process for independent members must be transparent and open to ensure that the right level of expertise and independence is brought to the Committee. In principle, the Committee itself should be sufficient to regulate the affairs of the

small body of men and women in the Assembly.

The Chairperson:

What are your thoughts about a possible appeals process? That might touch on what you said about judicial review. In your written submission, you said that no practical purpose would be served by giving the Assembly an appeal function. Why should there not be a normal appeals mechanism for decisions of the Committee?

Mr Ó Maoláin:

The requirements of procedural fairness in article 6 would normally mean that a chain of appeals is expected. However, when one is talking about a legislature, the first problem is that the Assembly is a creation of Parliament, and the Act that created the Assembly gave it the power to regulate its own affairs, so Parliament would have to revise that legislation to allow for an appeals mechanism that goes beyond the Assembly.

The second problem is that it is difficult to identify a possible appellate jurisdiction. The Judicial Committee of the Privy Council is one possible avenue. However, beyond acting as the final court of appeal to various overseas territories, it has very limited appellate roles. The Royal College of Veterinary Surgeons is about the only profession that is currently subject to its oversight, and I am not sure whether all Members of the Assembly would be comfortable with the idea of the Judicial Committee of the Privy Council being the final arbiter of their performance and integrity.

A number of procedural issues would arise if the Judicial Committee or some other body were to be designated as a court of appeal. For example, if a Member appealed against a sanction, would the Assembly be the respondent? How would the Assembly be represented, and who would bear the costs of an appeal, which, at that level, could be considerable? We have experience of taking cases to the House of Lords, and, if the costs were comparable, you would be talking about many tens of thousands of pounds to hear a single appeal about what, ultimately, might be a fairly trivial breach.

In its role as a possible appellate jurisdiction the Judicial Committee ordinarily deals with courts that are below it. However, in making final determinations the Assembly would be, in effect, constituting itself as a court, and that would be the court against which the MLA would be

appealing to a higher court. The whole process would create an uncomfortable area of confusion between legislative and judicial powers. In principle, every legislature around the world should be capable and confident enough to regulate itself, without having to draw the courts in to determining whether its Members have breached its own rules.

If the process were to be seen as being open to appeal to a higher court, that, in turn, would create all sorts of article 6 requirements about procedural details. For example, it would raise questions about whether Members can be obliged to answer questions or to participate in what would otherwise be voluntary procedures and about whether Members would be entitled to legal representation in any hearing before the Committee. To turn an internal regulatory process into what would essentially be a judicial process appears to be an unnecessarily complicated thing to do. We do not see any need for the final decision of the Committee, communicated to and approved by the Assembly, to be subject to an appeal to an outside court.

The Chairperson:

Finally, in your submission, you caution against an appointment that might "unduly fetter … successive legislatures", which I take as meaning a future mandate of this Assembly. Why did the commission raise that as a concern?

Mr Ó Maoláin:

The very fact that the Committee is reviewing the code of conduct and procedures in 2010, having revised them in 2008 and considered them in the years between, shows that, from time to time, and in the light of experience, any legislature sees a need to review and revise its procedures. Therefore, the creation of a permanent appointment, such as is the case for the ombudsman, might be viewed differently by a future Assembly. However, if the post were permanent rather than for a fixed-term, which would expire, there would be no easy option for change. In principle, just as no Parliament can bind a successor Parliament, this Assembly should not seek to set in stone permanent regulatory mechanisms that a future Assembly cannot easily revise in the light of experience.

The Chairperson:

Yes; therefore, everything could be changed, but not easily revised.

Mr Ó Maoláin:

Indeed, and it may be that, three or four years from now, some other event or experience will lead the Assembly to think that some aspect of the procedure or of the appointment of a commissioner requires a different approach. Once a permanent lifetime or career-long appointment is made, it becomes so much more complicated to change.

The Chairperson:

Members have no other questions. I thank the witnesses. You must have dealt with your brief very well, Ciarán, because Angela did not need to come to your rescue.

Mr Ó Maoláin:

I was relying on her to answer any technical questions.

The Chairperson:

In that case, perhaps our questions were too easy. The Committee is obliged to you for your contribution.