

REPORT
FOR
THE COMMITTEE ON STANDARDS OF CONDUCT
NATIONAL ASSEMBLY FOR WALES

REVIEW OF THE STANDARDS OF CONDUCT REGIME OF THE
NATIONAL ASSEMBLY FOR WALES

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SUMMARY

This review looks at:

- the Code of Conduct (Section 2)
- the complaints procedures (Section 3)
- the roles of the main actors within these procedures (Section 4).

It considers these in relation to the key requirements of any standards regime, as set out in Section 1, and makes comparisons with the regimes in other jurisdictions. It identifies the main issues and addresses these within the report. It finds much that is excellent in the current procedures and makes recommendations to address areas of weakness, the most significant of which are the role of the Presiding Officer, the limited powers of the Independent Adviser and some issues of openness, fairness and compliance with human rights.

RECOMMENDATIONS

The most significant recommendations are in italics.

CODE OF CONDUCT

1. **Recommendation:** *The Committee considers producing a Code of Conduct, which incorporates the current Guidance and Protocols in a coherent way.* (para 2.3.2)
2. **Recommendation:** The Committee considers supplying all Members with a new pocket guide, accompanied by an explanatory letter. It also considers seeking the agreement of the political parties that new Members should be briefed on the Code of Conduct. (para 2.3.3)
3. **Recommendation:** The Committee considers revising the Code to include specific sections on its purpose and the conduct required of Members, as these relate to the Principles in Practice. (This recommendation should be seen in conjunction with those made in 2.3.2 above) (para 2.4.3)
4. **Recommendation:** The Committee considers reviewing the principles under which the Code operates and whether to include a requirement that Members must not bring the office of Member or the Assembly into disrepute. (para 2.4.5)
5. **Recommendation:** The Committee considers revising the value of tangible gifts, for registration purposes, to a percentage of a Member's salary. (para 2.6.3)
6. **Recommendation:** The Committee considers amending the requirement for the registration of shareholdings in line with either the House of Commons or Northern Ireland Assembly recommendations. (para 2.6.4)
7. **Recommendation:** The Committee considers whether Members should have a wider duty to declare a relevant interest. (para 2.8.3)
8. **Recommendation:** The Committee considers using the phrase 'lobbying for reward or consideration' to replace, or supplement, 'paid advocacy'. (para 2.9.1)

9. **Recommendation:** The Committee considers recommending a test whereby Members consider their interests as viewed through the eyes of an informed member of the public to help them determine when they should refrain from voting. (para 2.10.1)
10. **Recommendation:** The Committee considers whether the term, ‘Agreement for the Provision of Services’, is more appropriate than ‘Employment Agreements’. (para 2.11)
11. **Recommendation:** The Committee considers including a clause in the Code of Conduct which states that the leaking of confidential material from Assembly Committees is contrary to the requirements of confidentiality. (para 2.12.1)
12. **Recommendation:** The Committee seeks the co-operation of the political groups in the development of a culture in which the confidentiality of committee proceedings is respected. (para 2.12.2)
13. **Recommendation:** The Committee considers recommending an amendment to the Government of Wales Act to provide Members with a defence to the offence of failing to register or declare an interest. (para 2.14.1)
14. **Recommendation:** The Committee considers the registration requirements of Assembly Members in the light of the requirements of the Electoral Commission (para 2.15.1)
15. **Recommendation:** *The advisory function as it relates to the Code of Conduct, including the registration and declaration of interests, should transfer to the Registrar and Clerk to the Standards Committee, acting under the authority of the Committee and consulting with it on matters of policy* (para 2.17.5).
16. **Recommendation:** The Committee considers inserting into the Code a section on seeking advice which contains a statement to the effect that ‘Members who act in good faith on the written advice of (whoever is deemed should give advice) in determining a registrable or declarable interest satisfy the requirements of the Code of Conduct. However, this does not guarantee immunity from prosecution under the Government of Wales Act.’ (para 2.18.3)

THE COMPLAINTS PROCEDURE

17. **Recommendation:** *Complaints should be received directly by the Independent Adviser or, alternatively, by the Clerk to the Standards Committee who will record their receipt and pass them automatically to the Independent Adviser. The Independent Adviser should assume total responsibility for sifting complaints.* (para 3.1.2)
18. **Recommendation:** *The Committee adopts a procedure whereby trivial complaints, where the breach has been rectified, are dealt with by a letter either from the Chair of the Committee or the Independent Adviser.* (para 3.2.1)

19. **Recommendation:** The Committee seeks the co-operation of party managers in the development of a standards culture. (para 3.3.2)
20. **Recommendation:** The Committee considers adopting the practice of naming complainants and those against whom complaints are made, unless there are good reasons not to do so. (para 3.3.3)
21. **Recommendation:** The Independent Adviser should determine into which category a complaint falls and, accordingly, either report to the Committee on Standards that it is within its jurisdiction and he is undertaking a further investigation, or, if it concerns a criminal offence, pass it to the police. (para 3.4.2)
22. **Recommendation:** *The Committee considers adopting the practice of hearing oral representations in public, unless there are good reasons not to do so.*(para 3.4.4)
23. **Recommendation:** *The reports of the Independent Adviser to the Committee on Standards of Conduct should normally be published as an annex to the Committee's reports.* (para 3.5.2)
24. **Recommendation:** The Committee considers whether the Independent Adviser can adequately fulfil his function without investigative powers or whether he needs to be provided with statutory powers (and see Role of the Independent Adviser later in Report). (para 3.6.1)
25. **Recommendation:** The Committee considers how it would deal with a complaint where the Member complained about is uncooperative or disputes the facts and whether it needs to seek enhanced powers for such situations. (para 3.7.2)
26. **Recommendation:** the Committee considers implementing a system which gives complainants the opportunity to feedback comments and any concerns about the process. (para 3.8.2)
27. **Recommendation:** *The Committee recommends to the Assembly one of the following appeals options:*
 1. *a right of appeal when the facts are disputed to an ad hoc tribunal, with an external lawyer as chair and two senior Members of the Assembly; or*
 2. *appeal to the Presiding Officer (if he no longer had a part in the complaints process; see recommendation 31 below), the Deputy Presiding Officer and one other senior Assembly Member. Alternatively, if the Presiding Officer retains his current position, appeal could be to the Deputy Presiding Officer and two other senior Assembly Members.* (para 3.9.2)
28. **Recommendation:** The Committee recommends to the Assembly that all its reports on substantiated complaints should always be debated and works with the business managers to ensure that this is the case. (para 3.10.3)

29. **Recommendation:** the Committee considers discussing with party groups possible sanctions for offences which are not serious enough to warrant the exclusion of a Member. (para 3.11.3)

ROLES RELATING TO STANDARDS OF CONDUCT

30. **Recommended:** *The role of the Presiding Officer should be confined to a general oversight of standards in the Assembly. This would enable him, if it was thought appropriate, to hear appeals from the Committee on Standards.* (para 4.1.)
31. **Recommendation:** *the Committee considers recommending to the Assembly that it seek primary legislation for a statutory Commissioner for Standards.* (para 4.2.13)

1. INTRODUCTION

1.1. TERMS OF REFERENCE OF REVIEW

To consider:

- the effectiveness of the current complaints procedure
- the roles of the Independent Adviser and the Presiding Officer
- the role and jurisdiction of the Committee on Standards of Conduct.
- the Code of Conduct.

The terms of reference do not specifically include a consideration of the registration and declaration of interests required of Members of the National Assembly for Wales. However, it seems appropriate to draw attention to any substantial differences between these requirements and those in other jurisdictions.

- confidentiality

The Committee on Standards subsequently asked that the issue of confidentiality of committee proceedings and draft reports be included in the review.

1.2 REQUIREMENTS OF A STANDARDS REGIME

There are a number of key principles which should apply to any effective standards of conduct regime. They include the need for it to be:

- Robust
- Open and transparent
- Clear and coherent
- Independent i.e. impartial and non-partisan
- Fair
- Human Rights compliant
- Preventative rather than punitive
- Proportionate

The Committee on Standards in Public Life sees ‘proportionality as a test to be kept constantly in mind by any body drawing up rules of conduct.’¹

¹ Seventh Report of the Committee on Standards in Public Life (2000) *Standards of Conduct in the House of Lords*, CM 4903-1, para 2.3

These requirements are taken into account when making recommendations about the standards regime in the National Assembly for Wales.

1.3 THE NATIONAL ASSEMBLY FOR WALES: KEY ISSUES.

1.3.1 A number of issues, relating to the above requirements, were identified during the review by those working in various capacities in the Assembly and by others outside the Assembly, including the reviewer. **It is important that they are seen in the context of the very positive comments about the operation of the Committee on Standards of Conduct and the effectiveness of the Independent Legal Adviser. The lack of serious complaints may also suggest that the system is, in many respects, working well.**

The key issues identified included:

1.3.2 Codes of Conduct

- 1) The lack of coherence of codes, resolutions and guidance.
- 2) The lack of awareness of Members of codes etc.
- 3) The relationship between the Ministerial Code and the Code of Conduct.
- 4) The underplaying of the advice aspect of the standards regime.
- 5) The requirement that membership of the Freemasons, but not that of other groups or societies, is registered (the Committee's recommendations on this are likely to go to plenary in the Autumn).
- 6) Differences between the Assembly requirements and those in the Model Code of Conduct for local authority councillors.
- 7) The possible strengthening of the confidentiality requirement as it relates to Committees and reports.

1.3.3 Complaints Procedure

- 1) The lack of a *de minimis* procedure for trivial complaints which means that once classified as a 'complaint' and found to have substance, a matter has to go through the whole complaints procedure.
- 2) The use of the complaints procedure for 'tit-for-tat' political purposes and as a vehicle for gaining political advantage.
- 3) Whether processes and procedures comply with the rules of natural justice.
- 4) Whether procedures are human rights compliant.
- 5) Whether there should be an appeal mechanism.

- 6) Whether the process is fair to the complainant.
- 7) Whether the independence and robustness of the procedure is undermined by the non-publication of the Independent Adviser's report.
- 8) The lack of investigative powers of the Committee and Independent Adviser.
- 9) The lack of a range of sanctions which can be applied to errant Members.

1.3.4 Roles

- 1) The role of the Presiding Officer in the complaints procedure.
- 2) The role of the Standards Committee.
- 3) The role of the Independent Adviser and whether there is a need for:
 - a statutory Commissioner for Standards; or
 - an ad hoc investigator in cases where the facts are disputed.

1.3.5 These issues will be highlighted and considered in the following sections of the report, as they arise.

1.4 THE CONTEXT IN WHICH THE REGULATION OF STANDARDS OPERATES

- 1.4.1** The framework for the regulation of standards derives from Section 72 of the Government of Wales Act 1998. This requires there to be a Register of Members' Interests (subsection (1)) and makes it an offence (subsection (6)) for a Member to take part in any proceedings, interpreted as plenary and committee sessions, without having complied with Standing Orders (SO 4 and Annex) on:
- registration of interests
 - declaration of interests, as they relate to current interests
 - voting in proceedings
 - paid advocacy

Any infringement of these requirements is a matter for the police and may result in prosecution. As a result, the role of the Committee on Standards is more limited than that in many other jurisdictions, notably Westminster.

NB. Although S72 is the most significant part of the GOWA in respect of standards, other parts of the Act also have implications. All of the following may have an impact to some extent:

Sections 46 (regulation of procedure), 47 (equal treatment of Welsh language), 48 (equal opportunities in the conduct of business), 69 (preservation order), 70 (openness), 74 (power to require attendance and production of documents), 75 (witnesses and documents), 77 (defamation), 78 (contempt of court), 79 (corrupt practices), 111 (Welsh Administration Ombudsman) and 112 (Health Service Commissioners).

1.4.2 The proceedings of the National Assembly for Wales, and thus of the Committee on Standards of Conduct, are not covered by Article IX of the Bill of Rights 1689. This means that in common with the Scottish Parliament, but unlike the Parliament at Westminster and the Northern Ireland Assembly, it does not have the right to regulate its own affairs free from judicial interference. Rather, its powers are restricted to those given by the Government of Wales Act and are subject to judicial scrutiny in their exercise. This has a number of effects:

- a) The sanction the Assembly can impose on errant Members is limited to that provided by Section 72 (5) which states that the Assembly may resolve to exclude Members for a specified period. It cannot therefore expel Members, as the House of Commons can, although Members may, of course, be subject to criminal sanctions. Nor are there, currently, lesser sanctions in place, such as admonishment, the requirement to apologise or the removal from a Committee.
- b) While the Assembly has the statutory power to require witnesses to attend or to produce documents (Section 74), this only relates to bodies sponsored by the Assembly, as listed in Schedule 5. Moreover, the power can only be used by a committee if it is expressly authorised by standing orders (section 74(5)) and there is no such authorisation as far as the Committee on Standards of Conduct is concerned. It may be that the Committee could get a resolution from the Assembly to facilitate the production of documentation or the attendance of witnesses from Schedule 5 bodies but this has not been tested and, in any case, is unlikely to be useful in any other than the exceptional case. In contrast, the Westminster Parliament has the power to call for persons, papers and records and where the Committee on Standards and Privileges is concerned, this extends to Members. Thus the Committee can require Members to appear before it and produce relevant documents.
- c) Freedom of speech is not protected by privilege, as it is in the Westminster Parliament, although Section 77 provides the Assembly with absolute privilege from defamation actions for statements and publications. This includes statements made in evidence before a committee and documents laid before it which have been prepared for the purposes of the transaction of its business and formulated, made or published under its authority. This would include the Independent Adviser's Report, providing it was published as an appendix to the Committee's Report.

1.4.3 Under the Government of Wales Act, the Assembly has no power to pass primary legislation. Its ability to reform its standards machinery is therefore limited unless it can persuade the Westminster Parliament, or more accurately the UK government, to legislate for it. In this it differs from the Scottish Parliament and the Northern Ireland Assembly and from regional or state Parliaments in other jurisdictions.

1.4.4 The Assembly is a corporate body which unusually has both executive and legislative functions. There therefore need to be codes or protocols, not evident in traditional legislatures.

2. CODE(S) OF CONDUCT

2.1 All legislatures, assemblies and local authorities in the UK have codes of conduct and, associated with them, registers of Members' interests, which are supplemented by guidance and, in some cases, by other codes and protocols. Registers of interests, of varying intensity and coherence, also exist in other countries, including Australia, Ireland and Canada. However, codes of conduct are not so widespread. The Republic of Ireland operates under such a code as do the Australian state legislatures of New South Wales, Tasmania and Queensland, although the Australian federal parliament has so far resisted recommendations that it should do likewise.² Similarly the Canadian Parliament has yet to implement recommendations, made in 1997 by a Special Joint Committee of Parliament, that it should adopt a code of conduct. In fact, it does not even have a register of members' interests, such registers being confined to the provincial legislatures, where registration and declaration is a statutory requirement.³

2.2 The National Assembly for Wales, because of its constitutional position, has an exceptionally large number of documents which prescribe rules of conduct. They include:

- Code of Standards for Members of the Assembly;
- Guidance on the Registration and Declaration of Members' Financial and other Interests;
- Guidance on the use of National Assembly for Wales Stationery and Resources;
- Guidance on Propriety Issues in the handling of planning casework in the National Assembly for Wales: Code of Conduct for Members of the Planning Decision Panel;
- Code on Access to Information
- Protocol for the role of, and access to, the Independent Adviser
- Protocol for Relations between Assembly Members and Assembly Staff;
- Protocol on Conduct in the Chamber.

In addition to the above, which have a general application, there are more specific documents, namely:

- Code of Conduct for Assembly Ministers;
- Protocol between the National Assembly for Wales, the South Wales Police and the Crown Prosecution Service.
- Civil Service Code

2.3 COHERENCE AND AWARENESS

2.3.1 Most of the above documents are available to Assembly Members on the intranet. However, there is concern that they are not presented in a coherent way. In particular,

² These were made by the Bowman Report in 1979 (Bowman, *Public Duty and Private Interest; Report of the Committee of Inquiry* (1979)) and more recently in 1995 by a Parliamentary Working Group

³ For details see Oonagh Gay, *The Regulation of Parliamentary Standards – A comparative perspective* (2002); research paper for the Committee on Standards in Public Life's inquiry into Parliamentary Standards (see www.public-standards.gov.uk).

the Code and the Principles in Practice are not logically tied together. It is also difficult for Members to relate the requirements in the various documents to the Code of Conduct and some Members seem unaware of some guidance and protocols, most notably the rules relating to the use of Assembly resources, or of changes made to them by Resolutions.

- 2.3.2** In response to these concerns the Committee may wish to consider bringing all the Guidance and Protocols together (excluding the Code for Assembly Ministers, Police Protocol and Civil Service Code) under the Code of Conduct. The Code of Conduct would thus more obviously provide a framework for judging acceptable conduct, including that relating to financial and other personal interests. The Committee may also wish to consider producing a new pocket guide for Members which sets out the relationship of Guidance and Protocols to the Code of Conduct.

Recommendation: The Committee considers producing a Code of Conduct, which incorporates the current Guidance and Protocols in a coherent way.

- 2.3.3** The production of such a document would provide an opportunity for raising the awareness of Members of the Code's requirements and the Chair of the Committee may wish to consider sending a copy to all Members with an explanatory letter. This would follow the excellent practice adopted in 2002 after the amendment to SO 4. The need for education and prevention was stressed by the current House of Commons' Commissioner for Standards, Sir Phillip Mawer. Giving evidence to the inquiry into parliamentary standards, undertaken by the Committee on Standards in Public Life in 2002, he stated that it was necessary to:

'[do] everything ... we can to sustain a consciousness of these matters and to build a relationship as well. Because we believe it is through building that relationship in which members feel a confidence (a) in knowing what is expected of them but (b) to the extent that they are coming and asking before the problems arise, rather than afterwards.'⁴

To this end, he said he was working on guidance notes for Members on different issues and was considering producing a series of Question and Answer notes with simple guidance. He had already held seminars for Members and staff and was considering others. He also had meetings arranged with both the Parliamentary Labour Party and the 1922 Committee.

- 2.3.4** The Committee could similarly consider holding seminars or briefing sessions for Members, although it is recognised that because of the pressure on Members' time, such sessions may not yield a high attendance. It would, however, seem important for new Members to the Assembly to be briefed on the requirements of the Code of Conduct. Such briefing could be undertaken by the Committee or the Independent Adviser, but, to be successful, would need the support of all political parties.

Recommendation: The Committee considers supplying all Members with a new pocket guide, accompanied by an explanatory letter. It also considers seeking the agreement of the political parties that new Members should be briefed on the Code of Conduct.

⁴ Committee on Standards in Public Life (Chair: Sir Nigel Wicks) *Inquiry into Parliamentary Standards*, Minutes of Evidence, 18 September 2002

2.4 GENERAL PRINCIPLES OF THE CODE

2.4.1 The general principles under which the Assembly operates are those advocated by Nolan i.e. public duty, selflessness, integrity, objectivity, accountability and openness, honesty and leadership. These are the principles under which the House of Commons, House of Lords, Northern Ireland Assembly and Scottish Parliament also operate, although in Scotland they are incorporated into nine key principles which include a duty to constituents. Such a duty has also been recommended by the Northern Ireland Committee on Standards and Privileges. In addition, it has suggested the inclusion of principles concerned with equality and respect for others, working relationships in the Assembly and promoting community relationships.⁵ General principles form a sound basis for a Code of Conduct. However, in the National Assembly, their generality causes some problems of interpretation, as does their relation to the ‘Principles in Practice’ and it might be helpful if they were linked more explicitly to the Code, as they are, for instance, in the Northern Ireland Assembly Code which also sets out clearly the Code’s purpose and the personal conduct required of Members, including adherence to the Nolan principles.

2.4.2 Alternatively, the Model Code of Conduct for Members of Local Authorities in Wales⁶ could provide the basis for reworking the principles with clear statements of what they mean. The principles used in the Model Code are:

- Promotion of equality and respect for others
- Accountability and openness
- Duty to uphold the law
- Selflessness and stewardship
- Objectivity and Propriety
- Integrity.

2.4.3 Such reworking would require a reconsideration of the Principles in Practice. These have caused problems because of the wide remit they appear to give the Committee on Standards through para 6, which states; ‘Members shall comply with the Assembly’s standing orders and its codes of practice and protocols’. This suggests a possible overlap between the Committee on Standards and the First Minister, who is responsible for the Code of Conduct for Assembly Ministers. (see para 2.13 below).

Recommendation: The Committee considers revising the Code to include specific sections on its purpose and the conduct required of Members, as these relate to the Principles in Practice. (This recommendation should be seen in conjunction with those made in 2.3.2 above).

2.4.4 An additional uncertainty concerns the jurisdiction of the Assembly Code, that is, whether it extends to the conduct of Members outside the Assembly and, if so, in what regard. In considering its Code of Conduct, the Northern Ireland Standards and Privileges Committee noted; ‘At present it is presumed that Members’ private

⁵ Committee on Standards and Privileges (2002) 02/01R, para 15

⁶ Welsh SI (2001) No 2289 (W177)

activities, those wholly unrelated to a Member's activities as an elected representative and as a Member of the Assembly, are beyond the scope of the Code of Conduct.'⁷ It saw no reason for specifying this in the Code. In contrast, the Model Code of Conduct for Members of Local Authorities in Wales contains a clear statement of when the Code is applicable. It states; 'This code of conduct shall, unless otherwise indicated, only apply to those activities which a member undertakes in an official capacity.'

- 2.4.5** There is, however, a general requirement that members must 'not bring the office of member or the authority into disrepute.' Such a statement is also included in the House of Commons and Northern Ireland Codes of Conduct. The latter states:
'Members should at all times conduct themselves in a manner which will tend to maintain and strengthen the public's trust and confidence in the integrity of the Assembly and never undertake any action which will bring the Northern Ireland Assembly, or its Members generally, into disrepute.'

This is an over-arching principle that the Committee may wish to incorporate into the National Assembly Code, although the Committee should be aware that this may bring complaints about the personal conduct of Members within its jurisdiction.

Recommendation: The Committee considers reviewing the principles under which the Code operates and whether to include a requirement that Members must not bring the office of Member or the Assembly into disrepute.

2.5 REQUIREMENTS OF THE CODE

The Committee on Standards undertook a fundamental review of the framework and rules governing the requirements of Assembly members to register and declare certain interests in 2000. The specific requirements are considered below. In general terms they impose higher standards on Assembly Members than many legislative codes but lesser standards than those imposed on local authority councillors through the Model Code, although recent developments, most notably in respect of indirect interests, have brought the Assembly closer to it.

2.6 REGISTRATION OF INTERESTS

- 2.6.1** The Annex to Standing Order 4 lists the categories of interests to be registered and declared. In most respects, these are more or less the same as the Westminster and Northern Ireland categories, namely, directorships, remunerated employment and, in appropriate circumstances, the name of clients arising from it, gifts and hospitality, financial sponsorships, overseas visits, land and property and shareholdings. One difference is the National Assembly requirement that 'paid or unpaid membership or chairmanship' of any public body, funded in whole or in part by the Assembly, should be registered, although the Northern Ireland Committee on Standards and Privileges has recommended the inclusion of a similar, indeed more extensive, provision which requires registration of membership of all public bodies, including, 'city, district and borough councils, education and library boards, health and social services boards or health trusts, boards of governors of schools, other non-departmental public bodies.'⁸

⁷ Committee on Standards and Privileges (2002) 02/01R, para 1

⁸ Committee on Standards and Privileges (2002) 2/01r, para 39

Apart from this provision, and making allowances for institutional and electoral differences, for example the operation of party lists as opposed to the first past the post system at Westminster, which is relevant in the context of financial sponsorships, the detail of the registration requirements is similar.

- 2.6.2 The content also relates broadly to the Scottish categories of remuneration, related undertakings, election expenses, sponsorship, gifts, overseas visits, heritable property and interest in shares. There are, however, some issues relating to these categories. Of particular note is the requirement that all gifts over £250 must be registered.⁹ This has given rise to two concerns. The first relates to the wide drafting, which means that even personal gifts from a partner or other family member have to be registered, and the second to the amount stipulated, which is seen as too low.¹⁰ With regard to the first concern, the Scottish Standards Committee has recommended following the Westminster practice,¹¹ whereby registration is only required when the gift is in connection with a Member's parliamentary duties. This is already the position in Wales and so no consideration needs to be given to this recommendation.
- 2.6.3 However, the Committee on Standards of Conduct might be interested in the recommendation, regarding the second concern, which suggests that the threshold for the value of gifts to be registered should be 0.5% of a Member's salary across the board. This accords with the requirement of the House of Commons, Northern Ireland Assembly and National Assembly for Wales, as it relates to intangible gifts, such as hospitality etc., but not to the requirement for tangible gifts, such as money or jewellery, which uniformly stipulates a figure of £125. Nor is the Scottish committee alone in recommending an across the board percentage rather than an actual amount, for while the Northern Ireland Committee on Standards and Privileges decided to leave the threshold for tangible gifts unchanged,¹² the House of Commons Committee on Standards and Privileges similarly recommended such a change, suggesting either 0.5 or 1% of the parliamentary salary.¹³ It also suggested increasing the threshold for the less tangible benefits to 1%. Having an across the board percentage threshold might be something the Committee may wish to consider in the future should it be making other amendments to the registration categories. Certainly having a percentage figure for all items within the gift/hospitality category would reduce the need for a periodic revision of the amount to bring it in line with inflation, as is currently the case.

Recommendation: The Committee consider whether a percentage of a Member's salary (possibly 0.5% or 1%) would be appropriate for both tangible and intangible gifts and hospitality.

- 2.6.4 The Committee might also be interested in the recommendations made by the House of Commons and Northern Ireland Committees on Standards and Privileges about shareholdings. The current requirement is that registration is required when the nominal value is greater than 1% of the issued share capital or, if it is less, 'where the value of these shareholdings exceed £25,000.' The Commons' Committee

⁹ Schedule to Members' Interests Order, para 6

¹⁰ Standards Committee (2002) SP Paper 512, para 12

¹¹ see *The Guide to the Rules relating to the Conduct of Members*, para 24

¹² Committee on Standards and Privileges (2002) 2/01r, para 45

¹³ Committee on Standards and Privileges (2000-2001) HC 267

recommended the requirement for registration be changed in this second category to where the value 'is greater at the time of acquisition than the current parliamentary salary,¹⁴ while the Northern Ireland Committee suggested it be changed to where the value amounts to '50% or more of a current Member's Assembly salary.'¹⁵ There are differences in these recommendations which go beyond the value of the shares, as it relates to a Member's salary. The Commons recommendation is concerned with value at the time of purchase and thus makes no allowances for shares increasing, or decreasing, in value, while the Northern Ireland recommendation is concerned with value at the time of registration. Either way the Standards Committee may wish to consider revisiting the requirements relating to the registration of shareholdings.

Recommendation: The Committee considers amending the requirement for the registration of shareholdings in line with either the House of Commons or Northern Ireland Assembly recommendations.

2.6.5 There are categories, in addition to those above, which apply to Assembly Members, notably contracts with the Assembly, paid or unpaid membership or chairmanship of any body funded in whole or in part by the Assembly (but see above para 2.6.1), and, controversially, membership of the Freemasons. The first two can be explained by the dual executive/legislative status of the Assembly; the third by public concern about membership of the Freemasons during the late 1990s and the resultant action of government to require declaration of membership by judges and magistrates. The requirement may, however, be discriminatory and the intention of the Committee on Standards of Conduct to replace it with one that encompasses membership of other groups would seem to be appropriate.

2.6.6 In June 2002 the Northern Ireland Committee on Standards and Privileges recommended the incorporation of a new category, 'Membership of societies, etc.' with guidance which states;
'Membership of all societies, etc., which might reasonably be thought by others to influence the Members' actions, speeches or votes in the Assembly, or actions taken in his or her capacity as a Member of the Northern Ireland Assembly would be registered in this category.'¹⁶

2.6.7 An example of a very wide requirement is contained in the Model Code of Conduct for Members of Local Authorities in Wales (section 14) which states:

'Members must regard themselves as having a personal interest in a matter to the extent that it relates to any membership, or position of general control or management which they have in any organisation.' It continues; 'Such organisations include any: private club or society, such as the Freemasons, a recreational club, working men's club, or private investment club; organisation whose principal purpose includes influencing public opinion or policy such as a lobby group; trade union or professional association; company, industrial and provident society or other organisation which has charitable objects.'

¹⁴ Committee on Standards and Privileges (2000-01) HC 267

¹⁵ Committee on Standards and Privileges (2002) 2/01r, para 53

¹⁶ *ibid*, para 58

2.6.8 Similar provisions are evident in the Australian states of New South Wales, where it is obligatory for Members to register any positions they hold in trade unions and business and professional associations, and Victoria, where disclosure is required of all interests, including non-pecuniary ones, which may appear to raise a material conflict with Members' public duties. Provisions of this nature have also been supported by the Committee on Standards in Public Life which has argued that non-pecuniary interests are relevant because they provided a 'more complete picture of the standpoint of the Member'.¹⁷ However, incorporation of such a provision by the National Assembly would impose a more stringent requirement on Members than that imposed by the Scottish and Westminster Parliaments, the Dail and Seanad in Ireland and the state legislatures in Canada, where the registration of non-pecuniary interests is voluntary, although encouraged where they might be thought by others to influence the actions of Members.

2.7 THE INCORPORATION OF INDIRECT INTERESTS INTO PERSONAL INTERESTS

2.7.1 The Resolution of 19 May 1999 also required Members to register 'indirect interests'. These occur when another person, with whom the Member has a relationship of a personal nature (most obviously a partner or child), has an interest of which the Member knows and which others might reasonably think could influence his or her actions in the Assembly. Such registration was not a statutory requirement. However, following concern about the test relating to indirect interests, the Committee on Standards of Conduct recommended that these should be incorporated into 'direct interests' through an amendment to Standing Order 4 Annex. This was accepted by the Assembly on 5 February 2002 and Standing Order 4 Annex (II) now requires that in the relevant registration categories (i.e. directorships, employment, gifts and hospitality, overseas visits, land and property, shareholding and membership of a body funded, in whole or in part by the Assembly) the interests of the Member's partner and, or, any dependent child of the Member must be registered if these are known by the Member. Such interests must also be declared.

2.7.2 SO 4 Annex (III) defines 'Member's partner to be 'a spouse or one of a couple whether of the same sex or of the opposite sex who although not married to each other are living together and treat each other as spouses' and a dependent child to be 'any person who, at the time of registration is under the age of sixteen or is under the age of nineteen and receiving full time education by attendance at a recognised educational establishment' who is either a child of the Member, his or her stepchild by marriage, his or her legally adopted child (or a child he or she intends to adopt), or a child who has been financially supported by the Member for at least the previous six months.

2.7.3 The incorporation of such interests into the direct or personal interests of a Member means that the failure to register or declare them becomes a criminal offence, the test in this instance being whether the Member could reasonably be expected to know of

¹⁷ Committee on Standards in Public Life, *Standards of Conduct in the House of Lords* (2000) Cm 4903-1, para 2.3.

such interests. This is based on the assumption that it is reasonable for a partner to know the business affairs of his or her spouse.¹⁸

- 2.7.4 The changes in the registration and declaration requirements made by the National Assembly for Wales, as they relate to the incorporation of the interests of partners and dependent children into those of the Member, bring the requirements much closer to those of members of Welsh Local Authorities, as stipulated in the Model Code of Conduct, although the interests covered by ‘personal interest’ in the Model Code are still broader, including ‘one of the member’s family or a friend, or any person with whom the member has a close personal association’ (para 11(a)). The House of Lords’ Code of Conduct may also require the ‘financial interests of a spouse or relative or friend’ to be registered (para 13(c)), although the guidance suggests that registration, as opposed to declaration, is unlikely to be appropriate when the interest is not held by the Member.
- 2.7.5 However, the National Assembly requirements are now more robust than those of the House of Commons, Scottish Parliament or Northern Ireland Assembly, where the requirement to register interests other than those of the Member are confined to gifts and interests in shares held by spouses, partners and cohabitantes. In Scotland, the Consultative Standards Group, established by the Standards Committee of the Scottish Parliament, recommended that registration should be extended to the ‘pecuniary and non-pecuniary interests of spouses/partners and close family members in almost all cases’, but this was not accepted by the Standards Committee which argued, first, that this would ‘represent an intolerable invasion of the privacy of family members who unlike the Member have not chosen to place themselves in the public eye’, second, that it ‘might have ECHR implications’ and, third, that it would ‘increase the complexity of the Register.’¹⁹

2.8 DECLARATION OF INTERESTS

- 2.8.1 The requirement that a Member must make an oral declaration of any registered interest before taking part in any proceedings is contained in the Annex to Standing order 4. This includes, since the amendment of the Annex, those interests which reside with the Member’s partner or any dependent child, still a less stringent requirement than that imposed upon local authority members where an interest in land, for instance, is declarable if ‘a member of the member’s family has a beneficial interest’ (para 4.13). The requirements for declarations are wider than for registration and include a declaration of future interests i.e. ‘any interest which he or she has, or may be expecting to have’ (para 4.5). Failure to declare a future interest, whilst not constituting an offence, may be referred to the Committee on Standards of Conduct. The requirement that future interests should be declared is also present in the House of Commons and Northern Ireland Codes of Conduct and is proposed for the Scottish Parliament.²⁰

¹⁸ D. Melding, Chair of Committee on Standards, during debate in Plenary (4 February 2002).

¹⁹ Standards Committee (2002) SP Paper 512

²⁰ Ibid, para 52

2.8.2 Members of the House of Commons, House of Lords and Northern Ireland Assembly are also required to declare any relevant interest when communicating with ministers or civil servants. The Northern Ireland Guidance on declarations, as revised in 2002 by the Committee on Standards and Privileges, is also specific on the requirements in relation to Assembly colleagues. It states:

‘The requirement to declare a relevant interest at the appropriate time covers almost every aspect of a Member’s Assembly duties extending to correspondence and meetings with Ministers and public officials. Frankness with colleagues is also important. It should be a matter of honour that an interest is declared not only, as at present, in debate in the Assembly and its Committee but also whenever a Member is attempting to influence his or her fellow Members, whether in unofficial committees and gatherings or at any kind of sponsored occasion, with or without entertainment, or simply in correspondence or conversation. Above all it should be disclosed when a Member is dealing with Ministers and civil servants, and this obligation becomes of paramount importance when another government is involved either directly or indirectly.’²¹

2.8.3 Neither the National Assembly nor the Scottish Parliament has such a requirement, although in 2002 the Scottish Standards Committee considered whether to introduce it. It considered the requirement that MSPs should inform a constituent of a relevant registrable interest if this could prejudice, or give the appearance of prejudicing, their handling of a constituency case. It decided that neither requirement was necessary given the ‘availability and “live” nature of the Register.’²² However, this is something the Committee on Standards may wish to look at in the context of the National Assembly.

Recommendation: The Committee considers whether Members should have a wider duty to declare a relevant interest.

2.9 THE PROHIBITION OF PAID ADVOCACY

2.9.1 Standing Order 4 gives effect to the statutory prohibition against paid advocacy, whether this takes the form of monetary payment or ‘benefit in kind, direct or indirect’ which the Member, or to the Member’s knowledge his or her spouse, has received or expects to receive.’ (4.6) A similar prohibition is common across all Codes of Conduct. The Committee may be interested to know that the House of Commons Standards and Privileges Committee recommended a change in title from ‘paid advocacy’ to ‘Lobbying for reward or consideration’.²³ It considered that this more accurately described the conduct that is forbidden. The Northern Ireland Committee has made the same recommendation.²⁴

Recommendation: The Committee considers using the phrase ‘lobbying for reward or consideration’ to replace, or supplement, ‘paid advocacy’.

²¹ Committee on Standards and Privileges (2002) 2/01r, para 51

²² Standards Committee (2002) SP Paper 512, para 48

²³ Committee on Standards and Privileges (2000-2001) HC 267.

²⁴ Committee on Standards and Privileges (2002) 2/01r, para 65

2.10 RESTRICTIONS ON VOTING

- 2.10.1 Assembly Members with registrable or declarable interests are prohibited from voting ‘on a matter in any proceeding of the Assembly if, in relation to that interest, a particular decision might result in a direct financial advantage greater than that which might accrue to persons affected by the decision generally.’ (SO 4.7) As the Guidance recognises, this is ‘hard to interpret precisely.’ The English Model Code of Conduct for local authority councillors uses a test which views the interests of a councillor through the eyes of an informed member of the public. Thus a member of the council is disqualified from voting if a member of the public ‘who knows of the circumstances would view the member’s personal interest as being so significant that it is likely to prejudice the member’s judgement of the public interest.’ The Model Code of Conduct for Members of Local Authorities in Wales similarly instructs councillors that, in determining whether they should withdraw from consideration of a matter, the test is; ‘If that personal interest is such that a member of the public might reasonably conclude that it would significantly affect the member’s ability to act purely on the merits of the case and in the public interest.’ The use of one of these tests might help Assembly Members decide if they should vote.

Recommendation: The Committee considers recommending a test whereby Members consider their interests as viewed through the eyes of an informed member of the public to help them determine when they should refrain from voting.

2.11 EMPLOYMENT AGREEMENTS

Standing Order 4.10 requires that copies of agreements involving the provision of services by Members, in their capacity as Assembly Members, must be deposited with the Presiding Officer. This is a similar, although simpler, provision to that in the House of Commons. The Committee may want to note that the House of Commons Standards and Privileges Committee has suggested that the term ‘Agreements for the Provision of Services’ is more appropriate than the current ‘Employment Agreements.’²⁵ This is also recommended by the Northern Ireland Committee.²⁶

Recommendation: The Committee considers whether the term ‘Agreements for the Provision of Services’ is more appropriate than ‘Employment Agreements.’

2.12 THE REQUIREMENT OF CONFIDENTIALITY

In March 2002 the Presiding Officer asked the Committee on Standards of Conduct to consider, as a matter of principle, the disclosure by Members of Committee proceedings which, under Standing Orders, are held in private.²⁷ It was also asked by the Panel of Chairs to consider, in relation to the Code of Conduct, the unauthorised disclosure of committee reports.²⁸

²⁵ Ibid

²⁶ Committee on Standards and Privileges (2002) 2/01r, para 61

²⁷ STD 01-02(04)

²⁸ STS 01-02 (03).

2.12.1 Such matters are considered as matters of privilege at Westminster and are therefore not subject to investigation by the Commissioner. Matters are not so clear in Scotland and Wales, as neither are privileged institutions. There is a requirement for confidentiality within the National Assembly Code, under 'Principles in Practice'. It states: 'Members must bear in mind that information which they receive in confidence in the course of their Assembly duties should be used only in connection with those duties, and that such information must never be used for the purpose of financial gain'. However, given the vagueness of this provision, in particular the lack of a reference to committee reports, and its link with financial gain, it does not necessarily cover the above situations. The Committee might therefore consider, as the Scottish Parliament has done, a more explicit requirement. This would help to prevent any inadvertent disclosure of confidential documents.

Recommendation: The Committee considers including a clause in the Code of Conduct which states that the leaking of confidential material from Assembly Committees is contrary to the requirements of confidentiality.

2.12.2 The practice suggested by the Panel of Chairs, whereby committee reports are issued in hard copy, marked 'not for publication', would also help to prevent inadvertent disclosure. However, as the Panel noted, this will not prevent those who are determined to leak a document, or an extract of it, from doing so. Neither, given the inherent difficulty in determining who is responsible for a leak, will strengthening the provision within the Code. Such conduct is only likely to be held in check if Members respect the confidentiality of such proceedings and do not seek to use them for political purposes. This requires recognition by the political parties that the reputation of the Assembly is more important than short-term political gain. Unless there is such recognition, leaking is likely to be a fact of life.

Recommendation: The Committee seeks the co-operation of the political groups in the development of a culture where the confidentiality of committee proceedings is respected.

2.12.3 The Committee on Standards can, under its remit, consider any complaint about unauthorised disclosure made against a particular Member and an explicit reference to the confidentiality of committee proceedings in the Code may make such consideration easier. It does not, however, have the discretion of the Scottish Standards Committee to order an investigation when the identity of the person who has leaked information is unknown, neither does it, or the Independent Adviser, have the resources or powers necessary. Whether it is desirable for the Committee to undertake such investigations is debatable. On the one hand, the fact that an inquiry can be instigated may act to deter would be leakers; on the other, an investigation that failed to find the culprit could undermine the Committee's reputation. If, in the future, the Committee's powers are enhanced (see 3.7.2 below), it may want to consider whether it should have jurisdiction to conduct such investigations. However, the best course of action may be for the Assembly to establish a tribunal with an independent lawyer, as chair, and the necessary powers to undertake such an inquiry. This, however, would be an extreme measure for a very serious case and would require an amendment to the Government of Wales Act to provide the necessary authority.

2.13 RELATIONSHIP BETWEEN THE CODE OF CONDUCT FOR MEMBERS AND CODE OF CONDUCT FOR ASSEMBLY MINISTERS

2.13.1 Assembly Ministers, like all Members, are bound by the Code of Conduct for Members and by Standing Order 4 and they are subject to the same sanctions and complaints procedure in respect of these. In addition, they are also subject to the Code of Conduct for Assembly Ministers. Looking at the practice elsewhere, the House of Commons has not generally considered the alleged misdeeds of ministers, conducted in their ministerial capacity, to be a matter for it to investigate. Rather it has seen them as falling under the Ministerial Code. Similarly, the Scottish Parliament, after the ‘Lobbygate’ inquiry, which related to allegations made by *The Observer* about the influence of lobbyists over MSP and Ministers,²⁹ has decided that investigations of allegations of impropriety against the Executive are not within its remit.³⁰ The National Assembly is, of course, in a different position because of its mix of legislative and executive functions and the Independent Adviser has been commissioned to consider this matter. This work is ongoing and the outcome will be reported separately.

2.14 FAILURE TO COMPLY WITH THE CODE: CRIMINAL PROCEEDINGS

2.14.1 Section 72(6) of the Government of Wales Act makes it an offence for a Member to take part in any proceeding without having complied with the standing orders on the registration and declaration of interests, although this only applies to current interests in the case of declaration, voting in proceedings and paid advocacy. The Scotland Act contains a similar provision. Currently, there is no defence for an errant Member of either institution. This is seen as unsatisfactory by the Scottish Standards Committee which has suggested three possible defences:

- i) ‘the member took all reasonable steps and exercised all due diligence to comply with the requirements on registration and declaration of interests’; or
- ii) ‘the member was not aware and neither suspected or had any reason to suspect that they had a registrable or declarable interest’; or
- iii) ‘the Member took such care as in all the circumstances was reasonably required to comply with the requirements on registration and declaration of interests.’ (para 60; 02)

A further defence might be that the Member acted upon the advice of the person with responsibility for advising on registrable interests. Such a protection is provided by the Republic of Ireland’s Ethics In Public Office Act 1995, section 11.

Recommendation: The Committee considers recommending an amendment to the Government of Wales Act to provide Members with a defence to the offence of failing to register or declare an interest.

²⁹ Standards Committee (1999-2000) Str 01

³⁰ For further details see Oonagh Gay (2001) *Parliamentary Standards*, HC Research Paper 01/102

2.15 THE POLITICAL PARTIES, ELECTIONS AND REFERENDUMS ACT 2000

2.15.1 This Act requires that holders of ‘relevant elective office’ disclose donations of over £1,000 to the Electoral Commission (Schedule 7). As the Act’s Explanatory Notes state, one effect will be ‘some overlapping of registers of members’ interests and the Electoral Commission’s register of disclosable donations.’ (para 141) There may also be some overlap of registration requirements regarding the financing of visits abroad and it may be that consideration should be given to ensuring that the registration requirements of the National Assembly are at least as stringent as those of the Electoral Commission.

Recommendation: The Committee considers the registration requirements of Assembly Members in the light of the requirements of the Electoral Commission.

2.16 OVERSEEING STANDARDS OF CONDUCT

2.16.1. Under Standing Order 16 the responsibility for overseeing standards of conduct resides with the Presiding Officer, with the Committee on Standards of Conduct having responsibility for supervising ‘the arrangements for the compilation, maintenance and accessibility of the Register of Members’ Interest, and the form and content of the Register.’ The job description of the Independent Adviser also includes responsibility for helping to develop a standards regime.

2.17 MAINTAINING THE REGISTER OF MEMBERS’ INTERESTS AND ADVISING MEMBERS

2.17.1 The responsibility for maintaining the Register of Members’ Interests and advising on registration lies with the Presiding Officer. However, this may be flawed because he also receives complaints about infringements of the Code of Conduct, including registration, and although, in practice, these are automatically referred to the Independent Adviser, the opportunity exists, in theory, for the Presiding Officer to exercise some discretion. This raises concern about a possible conflict of interest.

2.17.2 Such a concern has arisen with respect to the House of Commons’ Commissioner for Standards who has responsibility for overseeing the maintenance of the register by the Registrar, advising Members, receiving complaints and investigating. Successive Commissioners have argued that there is no substance to the concern. However, the House of Lords, Northern Ireland Assembly and Scottish Parliament have all opted for arrangements which separate advice from the receipt and investigation of complaints in recognition of a possible conflict of interest if these functions are the responsibility of the same person.

2.17.3 In the House of Lords the operation of the register is overseen by a Sub-Committee of the Committee for Privileges and Lords’ Interests and maintained under the authority of the Clerk of the Parliaments by a Registrar, appointed by him. The Registrar also advises Members.³¹ Complaints are made to the Sub-Committee, through the Chair.

³¹ *House of Lords; Code of Conduct* (paras 7,18)

There is therefore a separation between giving advice and receiving complaints and subsequently investigating. In Northern Ireland, the register is maintained by the Clerk of Standards, acting under the authority of the Committee on Standards and Privileges, and he or she gives advice and guidance on registration. The Committee specifically rejected the idea that the Commissioner should have a role in compiling and maintaining the register or in advising Members on registration. It noted that there was ‘the potential for a conflict of interests if the Commissioner was investigating a complaint against a Member and also advising the same Member on the registering and declaring of interests.’³² This potential conflict was also recognised in Scotland by the Committee on Standards which has also given the advisory function to the clerks.³³

2.17.4 The Republic of Ireland uses a different model but one, nevertheless, which separates giving advice from receiving complaints. Under the Ethics in Public Office Act 1995 (ss 8 and 9), responsibility for advising Members and investigating complaints resides with the Members’ Interests Committee of each House, the Dail and Seanad. Complaints are received and filtered by clerks, thus preventing concerns that a complaint may not be progressed if advice has been given.

2.17.5 It would seem appropriate for the National Assembly to follow the practice in other jurisdictions and likewise separate giving advice from the receipt of complaints. Transferring the receipt of complaints to the Independent Adviser (as recommended in Section 3.1.2 below) and leaving the advisory function with the Presiding Officer would fulfil this requirement. However, there is a further concern about the Presiding Officer having an advisory responsibility, whether for the registration and declaration of interests, for conduct generally or for complaints. He is a political actor and even though, in practice, advice may be given mainly by members of Assembly staff, accusations might be made that in a particular case the advice was partisan. There is also a possibility that an Independent Adviser may feel inhibited from investigating a complaint on a matter on which a Member has taken advice from someone who is a senior political actor.

Recommendation: The advisory function as it relates to the Code of Conduct, including the registration and declaration of interests, should transfer to the Registrar and Clerk to the Standards Committee, acting under the authority of the Committee and consulting with it on matters of policy.

2.18 ADVICE AS PREVENTION

2.18.1 Where the registration and declaration of interests is concerned, the onus is very much on the individual Members to comply with the requirements, the Guidance stating: ‘Responsibility for complying with the duties placed upon them rests with Members alone, although they may seek the advice of the Presiding Officer, the Clerk or members of his staff.’ The stress on the individual’s responsibility is important, given that failure to comply with the requirements is a statutory offence and thus, ultimately, for the courts to determine. However, as the aim of any standards regime must be to prevent infringements of the Code of Conduct, including requirements of

Committee on Standards and Privileges (2000) 1/00, para 16 (and see Recommendations 10 and 11)

³³ Standards Committee (2000) SP Paper 186

registration and declaration, it would seem appropriate for Members to be encouraged to seek advice if they are unsure about any aspect of it.

- 2.18.2 The concern that those seeking advice might fail to give all the facts, with the result the wrong advice might be given, can be addressed by the procedure adopted at Westminster, whereby the situation on which advice is sought must be submitted in writing and advice given is also in writing. This formal procedure enables records to be kept and prevents misunderstandings or erroneous recollections.
- 2.18.3** It is recognised that the National Assembly is in a somewhat different situation from the Houses of Parliament at Westminster, in that Members are subject to the law if they fail to comply with the relevant standing order requirements. However, it should still be possible to encourage Members, who are in doubt, to seek advice in writing and, while pointing out that acting on advice may not provide protection from the law, to indicate that, providing any action is in good faith, it would satisfy the requirements of the Code of Conduct. The Assembly may also want to consider requesting an amendment to the Government of Wales Act to allow ‘acting upon advice’ as a defence to a breach of the registration rules (see 2.14.1 above).

Recommendation: The Committee considers inserting into the Code a section on seeking advice which contains a statement to the effect that ‘Members who act in good faith on the written advice of (whoever is deemed should give advice) in determining a registrable or declarable interest satisfy the requirements of the Code of Conduct as it relates to the registration and declaration of interests. However, this does not guarantee immunity from prosecution under the Government of Wales Act.’

3. THE COMPLAINTS PROCEDURE

The complaints procedure consists of a number of elements. They include:

- receiving a complaint
- sifting
- investigating
- determining the specific charge
- substantiating
- reporting on facts
- adjudicating/ hearing representations
- appeal

It is essential that these functions are not all in the hands of one person or group. However, the way in which they are divided varies in the different institutions.

3.1 RECEIPT AND SIFTING OF COMPLAINTS

3.1.1 It is fundamental to public confidence that the complaints procedure is seen as robust and independent. This applies to the receipt of complaints as much as to any investigation. SO 16 requires complaints to be referred to the Presiding Officer. To ensure the independence of the procedure and to avoid the suspicion arising that a complaint has not been forwarded for political reasons, the Presiding Officer feels obliged to pass all potential complaints straight to the Independent Adviser. Thus, in general, he acts as little more than a post box. However, he, or his office, is still involved in determining whether a communication, addressed as a complaint, constitutes a 'potential complaint'. In 2000 four complaints out of twelve did not reach the Independent Adviser, having been dismissed on the grounds that they did not constitute a proper complaint. In 2001 the figures were one out of five. The involvement of the Presiding Officer, however minimal or routine, would seem to undermine the independence of the complaints procedure, lack transparency and could put the Presiding Officer in an unnecessarily compromised position. It is also a very different model to that in other UK institutions.

3.1.2 Most models give responsibility for receiving complaints to the person or body charged with investigating them. Thus in the House of Commons complaints are made directly to the Parliamentary Commissioner for Standards and in the Lords to the Sub-Committee for Privileges on Lords' Interests. In Northern Ireland the Standards Committee has recommended that complaints should be received by the Clerk of Standards. However, this is for administrative purposes only. He will log them and pass them automatically to the Commissioner³⁴ who will decide whether or not to investigate. The same procedure has been recommended in Scotland. It is suggested that a similar model is adopted in the National Assembly.

Recommendation: Complaints should be received directly by the Independent Adviser or by the Clerk to the Standards Committee who will record their receipt and pass them automatically to the Independent Adviser. The Independent Adviser should assume total responsibility for sifting complaints.

³⁴ Committee on Standards and Privileges (2000) 1/00, Recommendation 14, paras 26-28.

3.2 TRIVIAL COMPLAINTS

- 3.2.1 One of the concerns expressed during the review was the lack of a *de minimis* procedure within the complaints system for dealing with minor or trivial complaints, such as a minor infringement of the rules relating to the use of Assembly stationery. Such complaints are dealt with in the same way as the most serious infringements and invoke the full procedure and the involvement of the Committee. The concern is that this undermines the investigation of serious offences.
- 3.2.2 The Committee on Standards in Public Life recommended making a distinction between serious and trivial cases within the investigative procedure.³⁵ However, the Scottish Standards Committee thought that ‘attempting to draw the line between “serious” and “trivial” cases could be problematic’ and there was concern that a case that appears trivial in the initial stages could ‘subsequently manifest itself as being quite serious.’ It therefore proposed a ‘clear, simple procedure which should be applicable to all cases in the first instance although unwarranted complaints, for example, might not be pursued beyond the early stages.’³⁶
- 3.2.3 The House of Commons and Northern Ireland Assembly have devised other ways of dealing with such cases. In the House of Commons the Commissioner has ‘the discretion not to pursue a full investigation on minor issues where, during preliminary consideration, it is clear that the facts are not disputed and the Member immediately rectifies or apologises for a failure to declare or register.’³⁷ Moreover, she ‘may at the end of an investigation decide not to produce a report dealing with the specific complaints. She may instead report to the Committee with a recommendation that the Committee issue a guidance note for Members on her intention to interpret the rules in a particular way on the receipt of further complaints.’³⁸
- 3.2.4 In Northern Ireland the Standards Committee recommended that where complaints were considered by the Commissioner to be ‘trivial in nature’ or after a preliminary investigation were considered ‘to require no further or detailed investigation’, he would ‘report accordingly’ to the Committee. This would be in writing and, in such cases, it would be ‘inappropriate for the Committee to require the Commissioner to reconsider his findings.’ The Committee would ultimately report his findings to the Assembly, ‘together with a statement that the Committee accepted that no further action in respect of the specific complaint against a Member should be taken.’³⁹ There seems no reason why the Standards Committee or the Independent Adviser could not have discretion to likewise deal with trivial cases without going through the full process. In instances where Assembly stationery has been misused but this has been rectified through repayment, a standard letter, sent by the Chair of the Committee, might be appropriate. Alternatively, the Independent Adviser could be given discretion to deal with such complaints and report to the Committee that he has done so.

³⁵ .Committee on Standards in Public Life (2000) *Reinforcing Standards*, Cm 4557

³⁶ Standards Committee, (2000) SP paper 186

³⁷ Committee on Standards and Privileges (2000-01) HC 267, para 48

³⁸ *Ibid*, para 45

³⁹ Committee on Standards and Privileges (2000) 1/00, Recommendation16, paras30-32.

Recommendation: The Committee adopts a procedure whereby trivial complaints, where the breach has been rectified, are dealt with by a letter either from the Chair of the Committee or the Independent Adviser.

3.3 USE OF THE COMPLAINTS PROCEDURE FOR POLITICAL PURPOSES

3.3.1 The National Assembly's complaints procedure has seen its share of politically motivated, 'tit-for-tat' complaints. Such complaints do nothing to help the establishment of a standards regime in which the public can have confidence. They create a bad image and waste Assembly time and resources, for, even if a complaint seems to be politically motivated, it must be processed correctly and, if retaliatory, considered separately from the original complaint.

3.3.2 Other legislatures also experience politically motivated complaints. The House of Commons suffered a number of such complaints during 1997, including one against the chair of the Standards and Privileges Committee himself,⁴⁰ causing the outgoing Commissioner for Standards to comment on the danger they pose for the reputation of Parliament.⁴¹ Preventing the complaints procedure being used for political purposes is notoriously difficult and success is only likely if party managers actively discourage such usage. What is required, therefore, 'is the development of a culture whereby Members recognise that they have a duty to report standards issues about which they have a concern, but also that the complaints procedure is separate from politics and thus not the arena for scoring political points.'⁴²

Recommendation: The Committee seeks the co-operation of party managers in the development of a standards culture.

3.3.3 One way in which politically motivated complaints can be highlighted, which may inhibit those who would make them, is by publishing in all cases the name of the complainant, along with the Member complained about. The policy of confidentiality, which operates in the National Assembly, currently means the reports of the Standards Committee of the National Assembly do not reveal the identity of those against whom complaints have been made, if the complaints are not upheld. Nor do any of their reports reveal the names of complainants or others involved – even if a complaint is upheld. This may undermine public confidence in the system. Publication of names would therefore seem important for this reason alone. However, it could also serve the purpose of exposing situations where the complaint had no substance and was obviously politically motivated. The Committee would, of course, retain discretion not to publish names if it felt that publication could result in a member of the public being victimised. The Committee might also consider adopting the practice, accepted by the House of Commons Standards and Privileges Committee, whereby if it feels 'that a complaint from a Member is frivolous or has been made only for partisan reasons, [it] would expect to state this in any report made about the complaint.'⁴³

⁴⁰ Committee on Standards and Privileges (1999-2000) HC 916

⁴¹ Committee on Standards and Privileges (1997-98) HC 1147, Appendix

⁴² Personal interview with Elizabeth Filkin, when Parliamentary Commissioner for Standards, 10 January 2002

⁴³ Committee on Standards and Privileges (2000-2001) HC 267, paras 46-47

Recommendation: The Committee considers adopting the practice of naming complainants and those against whom complaints are made, unless there are good reasons not to do so.

3.4 INVESTIGATION PROCEDURE

3.4.1 The investigation procedure in the National Assembly follows a similar pattern to that used by other institutions. The first stage is the initial review of a complaint by the investigating body, that is the Independent Adviser, or elsewhere the Commissioner or, in the House of Lords, the Sub-Committee on Members' Interests. This is followed, if necessary, by a further investigation with the relevant Committee simply being informed that an investigation is under way. However, in the National Assembly the procedure contains additional steps, as the Independent Adviser is required to report to the Presiding Officer, recommending, inter alia, that if the complaint is within the jurisdiction of the Committee on Standards, that it be referred to the Committee and a further investigation undertaken.

3.4.2 The involvement of the Presiding Officer would seem unnecessary and inappropriate. The requirement that the Independent Adviser refer a complaint back to the Presiding Officer arises because of the Presiding Officer's role in receiving complaints. If complaints were made directly to the Independent Adviser, there would be no need for this reporting stage. Discretion would lie with him, as in other institutions, to decide into which category a complaint fell and to act accordingly. As it is, in order to protect his position and the independence of the process, there is a general presumption that the Presiding Officer will accept the recommendation of the Adviser. Despite this presumption, the process at this stage is somewhat opaque. The report goes from the Presiding Officer to the secretariat and, if the Independent Adviser has recommended referral to it, subsequently, to the Committee of Standards. However, there is no open audit trail by which the progress of a complaint can be tracked. Moreover, given the automatic referral by the Presiding Officer to the Committee, his place within the procedure seems to serve no purpose.

Recommendation: The Independent Adviser should determine into which category a complaint falls and either report to the Standards Committee that he is undertaking a further investigation, if a complaint falls within its jurisdiction, or refer the complaint to the police if it concerns a criminal offence.

3.4.3 The second stage is the further investigation by the Independent Adviser. This, like the preliminary investigation, is undertaken in private, with the Member against whom a complaint has been made being given the opportunity to respond to the complaint and challenge any evidence. This is common to all the UK institutions, as is the presentation of a report on the facts to the appropriate Committee.

3.4.4 The third stage of the process begins with the consideration by the Committee of the report and any response by the Member. Again the National Assembly is in line with the other institutions in this consideration being in private. All institutions also give a Member the right to make oral representations where a breach of the Code has been identified. However, while in the National Assembly these are always heard in private, this is not the situation elsewhere. In Westminster hearings around which

there is considerable public interest are held in public and have even been televised⁴⁴ and in Scotland and Northern Ireland there is a presumption that hearings will be in public. Thus a private session is an exception and is only likely when the Committee believes that 'special circumstances apply, for example, where publicity would prejudice the interests of justice.'⁴⁵ The practice adopted by the National Assembly is therefore at odds with that in the other devolved institutions and it may infringe the principle that justice must be seen to be done. It is also contrary to the policy of openness adopted by the National Assembly

Recommendation: The Committee considers adopting the practice of hearing oral representations in public, unless there are good reasons not to do so.

3.5 PUBLICATION OF INVESTIGATION FINDINGS

- 3.5.1** Under the current procedures, the reports of the Independent Adviser to the Committee on Standards are not published. This would seem to be a serious weakness and at odds with the National Assembly's policy of transparency. Publication of the Adviser's report is important to preserve public confidence in the system and to dispel any notion that the Committee is likely to support Members against complaints made by the public. It also provides a safeguard for the independence of the Adviser who, the public might otherwise suspect, could succumb to political pressure in his investigations. Indeed, the 'ability to publish, without censorship, that officer's frank opinion of any complaint that was made' is 'the key' to ensuring his or her independence and preventing 'accusations of cover-up.'⁴⁶
- 3.5.2** The reports of all other investigative officers are published, In Northern Ireland the report on the Commissioner's investigation will 'in the interests of openness... in every instance, be appended to the Committee's report to the Assembly.'⁴⁷ The same is the case in Scotland and Westminster, while in Ireland, Canada and Australia reports of investigations by statutory Commissioners are published independently.
- 3.5.2** There seems to be no reason why the reports of the Independent Adviser to the Committee should not be published as an Annex to the Committee's report. This includes the majority of reports which conclude the complaint is unfounded, for while there is an argument that the reputation of a Member, found to be innocent, needs to be protected, publication is particularly important in these cases if the public is to be reassured that the process is independent and there is no danger of a cover-up. The Committee may, of course, decide there are good reasons not to publish a particular report but in the final analysis the reputation of the National Assembly is more important than that of the individual. In some instances, where the press have been made aware of the complaint, publication may, in any case, be in the interests of the Member named.

⁴⁴ As was part of the Hamilton hearing ((1994-95) HC 637)

⁴⁵ Standards Committee (2000) SP Paper186.

⁴⁶ Sir Clifford Boulton in evidence to Committee on Standards and Privileges (2000) 1/00, Q. 111.

⁴⁷ Northern Ireland Assembly, press notice (www.ni-assembly.gov.uk/press_notices/sap_1-02) and see Recommendation 19 and para 38 of the Committee on Standards and Privileges' report 1/00.

Recommendation: The reports of the Independent Adviser to the Committee on Standards of Conduct should normally be published as an annex to the Committee's reports.

3.6 POWERS OF INVESTIGATION: THE INDEPENDENT ADVISER

- 3.6.1 The Independent Adviser has no investigative powers nor can he seek assistance from the Committee on Standards, for it similarly has no such powers (see below). He therefore relies totally on the co-operation of those involved and on political pressure being brought to bear should an AM obstruct his inquiry. There has, so far, been no occasion when this lack of powers has hindered his investigation. Nevertheless, it would appear to be a weakness, at least in comparison with other regimes.
- 3.6.2 In Northern Ireland the Commissioner can, if necessary, ask the Committee on Standards and Privileges to use its powers to send for person, papers and records (as per standing orders) to facilitate his investigation. In the House of Commons, the Commissioner can likewise seek the assistance of the Committee of Standards and Privileges and the Committee has usually been supportive. The weakness of this system was, however, evident when it refused to use its powers in the complaint against Mr Keith Vaz.⁴⁸ This resulted in the Commissioner at the time, Mrs Elizabeth Filkin, suggesting that the Commissioner should be given the power to summon witnesses and documents with the proviso that he or she must discuss its use with the Committee and take account of the Committee's views prior to using it.
- 3.6.3 A key factor in the Scottish Standards Committee's decision on whether to recommend a statutory Parliamentary Commissioner was that the alternative, a Standards Officer or Adviser, would likewise be dependent on the Committee for his or her powers. This, it feared, would impact 'adversely on the perceived independence of the post.' It preferred to follow the Republic of Ireland, the states of New South Wales and Queensland and a number of Canadian provinces, which have a statutory Commissioner whose investigative powers are provided by legislation. The independence this provides the Commissioner was, as far as the Committee was concerned, 'a crucial factor, outweighing the advantages of being able to appoint a Standards Officer/Adviser fairly speedily without enabling legislation.'⁴⁹ It therefore recommended the appointment of a Commissioner with the power to summon witnesses and order the production of documentary evidence, powers, which it believed, would 'enhance the credibility of the post'.⁵⁰ Its recommendation was given effect through the Scottish Parliament Standards Commission Act 2002.

Recommendation: The Committee considers whether the Independent Adviser can adequately fulfil his function without investigative powers or whether he needs to be provided with statutory powers (and see Role of the Independent Adviser, Section 4).

⁴⁸ Committee on Standards and Privileges (2000-01) HC 314

⁴⁹ Standards Committee (2000) SP Paper 186

⁵⁰ Standards Committee (2001) SP Paper 312

3.7 POWERS OF INVESTIGATION: THE COMMITTEE

- 3.7.1 Compared with similar committees, the powers of the Standards Committee of the National Assembly are very limited. Section 74 of the Government of Wales Act provides the Assembly with power to require attendance and the production of documents but this is only in relation to its sponsoring public bodies. Moreover, this power can only be exercised by a committee under specific authority provided by standing orders. SO 16 provides no such authority and thus the Committee on Standards does not even possess this minimum power. It therefore has no power to require witnesses to appear before it. It can only invite attendance. Moreover, its role is limited to a judicial review type role. It checks procedures, ensures that facts are substantiated and that any representations made by a named AM are answered by the Independent Adviser but has no investigative role itself, although it can require the Adviser to undertake a further investigation, if it considers this to be necessary.
- 3.7.2 In contrast, the House of Commons Committee has the power to send for persons, papers and records and may decide to interview ‘any of those involved in a complaint or those who may have given evidence.’⁵¹ It has the power ‘to order the attendance of any Member’ and ‘to require that specific documents or records in the possession of a Member relating to its inquiries, or to the inquiries ... of the Commissioner, be laid before [it].’⁵² It also has the power to investigate of its own accord. The Scottish Committee has similar powers. It can call for persons, papers and records that are within the jurisdiction of the Parliament, can undertake its own investigation and can require witnesses to take an oath.⁵³ Likewise the Northern Ireland Committee on Standards and Privileges can exercise the power, given to the Assembly to send for persons, papers and records,⁵⁴ having been given specific authority under SO 52. These powers, like those in Scotland, are limited to devolved matters and do not apply to some personnel, including ministers, judges and members of tribunals. Nevertheless, they are significantly more than those of the Committee on Standards in the National Assembly. Moreover, the Northern Ireland Committee can interview the complainant(s), the person against whom a complaint is made and anyone else who gave information or evidence to the Commissioner during his investigation and it can, if it so chooses, review the whole case. The Committees in the two Houses of Parliament in the Republic of Ireland have even greater powers with witnesses being required by statute to answer questions⁵⁵ and documents being subject to discovery by the High Court.⁵⁶
- 3.7.3 The powers of the Standards on Conduct Committee in the National Assembly are therefore exceptionally limited when compared with those of similar committees. Moreover, the procedures adopted suggest that it is the rights of the Member complained of, rather than the rights of the Committee, which are paramount. This puts the Committee in a very weak position in a case where the facts are disputed or the Member is uncooperative and the Committee needs to consider how it would deal with such a situation.

⁵¹ Committee on Standards and Privileges (1999-2000) HC 403, para 17

⁵² HC Standing Order 149, para 6

⁵³ Scotland Act 1998, Sections 23-25

⁵⁴ Northern Ireland Act 1999, Sections 74-76

⁵⁵ Standards in Public Office Act 2001, Section 16

⁵⁶ Ibid, Sections 17,18

Recommendation: The Committee considers how it could deal with a complaint where the Member complained about is uncooperative or disputes the facts and whether it should seek jurisdiction to conduct its own inquiry and the powers to enable it to do so (and see below para 4.3).

3.8 RULES OF NATURAL JUSTICE AND COMPLIANCE WITH HUMAN RIGHTS

- 3.8.1** An important issue as far as procedures are concerned is the extent to which they adhere to the rules of natural justice. In the National Assembly a Member against whom a complaint is made is given the opportunity by the Independent Adviser to answer the charge and, if a breach is found, to see a copy of the Adviser's report to the Committee. The Member is entitled to make oral representations to the Committee and may be accompanied by a friend or adviser, who may make representations on the Member's behalf.
- 3.8.2** These safeguards are similar to those found in Northern Ireland and Scotland, although in the case of the latter they are strengthened in the Scottish Parliamentary Commissioner Act. This gives a MSP the right, having seen the draft report, to make representations which, if not contained within the report, are annexed to it. According to the Explanatory Notes to the Bill, this accords with the rights afforded to councillors and members of devolved public bodies in Scotland in relation to reports of the Chief Investigating Officer⁵⁷ and is in recognition of the finding of the 1966 Salmon Report 'that it is more difficult to counter criticism when it appears in a report.'⁵⁸
- 3.8.3** In the Republic of Ireland, the protections are much stronger with all parties being allowed representation by legal counsel and the procedures being more akin to a court of law. However, the situation is somewhat different as the whole regulatory process is prescribed by statute. In contrast, the safeguards in the House of Commons are somewhat weaker. A Member against whom a complaint has been made does not normally receive a copy of the Commissioner's report to the Committee and hence may not know its full content even if called to give oral evidence, although if his or her account of the facts are not accepted, the Member will be informed, in 'sufficient detail', of the Commissioner's findings of fact.⁵⁹ Moreover, on three occasions during the 1999-2000 session, Members, whose alleged breaches of the required standards were particularly serious, were allowed to see copies of the report before giving evidence.
- 3.8.4** The issue of whether procedures comply with the rules of natural justice and fairness has been ongoing in the House of Commons and has extended to the Commissioner's investigation. In evidence to the Committee on Standards and Privileges' inquiry into Appeal Procedures, Lord Neill, then Chair of the Committee on Standards in Public Life, argued that the interests of fairness required parties to be able to challenge evidence directly at the investigative stage and to cross-examine witnesses, while Mr

⁵⁷ Under the Ethical Standards in Public Life (Scotland) Act 2000 (section 14(2))

⁵⁸ Royal Commission on Tribunals of Inquiry (Lord Justice Salmon;1966) Cmnd. 3121

⁵⁹ Committee on Standards and Privileges (1999-2000) HC 403, para 8.

Douglas Hogg called for the member complained against to have the right to a clear statement of the charges, ample time to prepare his defence, legal representation and the right to cross-examine. All these suggestions were dismissed by the Standards and Privileges Committee as contrary to the ‘substantial advantages of speed and convenience’ of the Commissioner’s present procedures.⁶⁰ It was also cautious about providing safeguards at the Committee stage, arguing that as Parliament regulates itself and most MPs engaged in the regulation of standards of conduct are not lawyers, procedures should be based on common sense not adherence to legal principles. Indeed, it suggested that the ‘legalisation’ of procedures would distance MPs from the process and hence undermine notions of self-regulation.

3.8.5 The Standards and Privilege Committee did, however, recommend the establishment of an appeal mechanism (see below para 3.9.4) which a committee of the two Houses of Parliament, the Joint Committee on Parliamentary Privilege (the Nicholls Committee) considered meant that, taken as a whole, the ‘revised procedures ... with some elaboration ... could accommodate adequately the safeguards we have mentioned.’⁶¹ These safeguards require an accused Member be given:

- a prompt and clear statement of the precise allegations;
- adequate opportunity to take legal advice and have legal assistance throughout;
- the opportunity to be heard in person;
- the opportunity to call relevant witnesses at the appropriate time;
- the opportunity to examine other witnesses;
- the opportunity to attend meetings at which evidence is given and to receive transcripts of evidence.⁶²

3.8.6 The House of Lords has adopted these safeguards. Indeed, its Code of Conduct follows the Nicholls report in stating; ‘In the investigation and adjudication of complaints against them, Members of the House have the right to safeguards as rigorous as those applied in the courts and professional disciplinary bodies.’ Thus an individual is entitled to know the case against him or her, have time to prepare his or her case, be legally represented, and be able to call and cross-examine witnesses. The House of Lords thus recognises the judicial nature of the process and the requirements of natural justice and the ECHR in such circumstances.

3.8.7 Such safeguards may also be appropriate in the context of the National Assembly, although there is a fundamental difference between the adjudicating committee in the House of Lords and that in the Assembly which suggests that the requirements of fairness need not be so stringent in the Assembly. This relates to the seriousness of cases brought before the Committee and the possible penalty. The committee of the House of Lords hears complaints on the failure to register or declare interests which, if upheld, can result in serious penalties. Such complaints are a matter for the courts in Wales, not the Committee on Standards. In most cases it may therefore be adequate if, as is currently the practice, the Member is allowed:

- to see the Independent Adviser’s Report;
- time to consider his or her response (and possibly take advice);
- the opportunity to make representations;
- the right to an oral hearing before the Committee;

⁶⁰ Committee on Standards and Privileges (1997-98) HC 1191, paras 17,18

⁶¹ Joint Committee on Parliamentary Privilege (1998-99) HL Paper 43-1 and HC 214, para 291

⁶² Ibid, para 281

- the right to be accompanied at the hearing.

3.8.8 However, the above safeguards may not be sufficient if the facts are disputed. In such cases there needs to be a mechanism which allows the accused Member to call witnesses and to be allowed to cross-examine and, possibly, to have legal representation. (see para 3.9.12 below for recommendation).

3.8.9 It is also important to recognise that the process must not only be fair to Members against whom complaints are made but also to complainants. There needs to be recognition that making a complaint can be very daunting. Members of the public may believe that Members are powerful and could harm them if they pursue a complaint. This may be even more so when registration and declaration is a criminal offence; people may be very wary of getting involved in a criminal inquiry. The process should therefore be monitored with feedback from complainants to see whether they found the system accessible and fair.

Recommendation: the Committee considers implementing a system which gives complainants the opportunity to feedback comments and any concerns about the process.

3.9 RIGHT OF APPEAL

3.9.1 The right of the Member, who has been the subject of an investigation, to appear before the Committee on Standards provides a judicial review type mechanism by which he or she can challenge the procedure and the process by which the Independent Adviser arrived at his conclusions. However, the only appeal against the conclusions contained within the Committee's report is to the Assembly sitting in plenary. This may not be sufficient to satisfy the rules of natural justice or the requirements of Article 6 ECHR as, first, it is not a right, but dependent on there being a motion; second, Members of the Committee on Standards are not barred from voting and are therefore, in effect, acting as judge in their own cause; and, third, there is nothing to stop the Assembly imposing a penalty beyond that recommended by the Committee or imposing a penalty when none is recommended.

3.9.2 In the House of Commons appeal from the Commissioner's conclusions lies to the Committee on Standards and Privileges when it relates to judicial review questions, that is questions of unreasonableness, illegality, unfairness or fresh evidence. If sanctions are recommended against a Member, he or she also has the right to make a statement in the House when their imposition is debated. There is no right of appeal by this, or other means, for the complainant. This was something considered by the Standards and Privileges Committee and dismissed on the grounds that 'it is the Member complained against who is in the position of defendant and who runs the risk of censure by his peers; anyone else is involved as a witness only and must bear his own risks.'⁶³

⁶³ Committee on Standards and Privileges (1997-98) HC 1191, para 20

- 3.9.3 There has, in recent years, been debate about an appropriate appeals mechanism in cases where the Commissioner's findings on matters of fact are disputed. Both Lord Nolan and his successor as chair of the Committee on Standards in Public Life, Lord Neill, recommended that in cases where the Commissioner was unable to agree a remedy with the Member, the matter should be referred to a sub-committee of the Committee on Standards and Privileges, composed of senior members. In evidence before the Committee, Lord Nolan argued that the procedure adopted by the sub-committee should be adversarial, allowing legal representation and cross-examination. If the dispute was between the Commissioner and the Member, he recommended that the Commissioner's case should be presented by Counsel and, if the case was serious, the Member should have the opportunity to be similarly represented. If the dispute was between the Member and the complainant, both should have the chance of being legally represented, with the sub-committee having the power to provide assistance towards the costs and to award costs against the unsuccessful party. Appeal should lie to the full Committee.⁶⁴
- 3.9.4 This approach was rejected by the Standards and Privileges Committee for a number of reasons. These included the lack of time available for senior Members to undertake a complex inquiry, the belief that Members were ill-equipped to carry out such a task, concern that, because reference was to politicians, the process would be perceived as lacking independence, and the inappropriateness of the full committee reviewing the decision of its senior members.⁶⁵ Instead, on matters of disputed fact, it recommended the appointment of an independent tribunal, consisting of three eminent and independent people, including a lawyer and excluding any serving member of the House of Commons, which would rehear the case. The tribunal would determine its own procedures, allow legal representation and permit witnesses to be called and cross-examined, excluding the Commissioner who, the Committee considered, is 'an independent investigator not a prosecutor, and should not be expected to argue a case against a Member or to defend findings before the tribunal.'⁶⁶ The tribunal would report its findings to the Committee.
- 3.9.5 Whilst having some reservations, the Joint Committee on Parliamentary Privilege (the Nicholls Committee) considered that the recommendations provided an appropriate appeal mechanism.⁶⁷ So far, the mechanism has not been tested. Indeed, the required amendment to Standing Orders has yet to be made. The Joint Committee was less happy with appeal to the whole House, recommending, first, that, in its appeal mode, it should not have the power to increase any penalty recommended by the Committee and, second, that 'none of the members of the committee should vote in the House.'⁶⁸
- 3.9.6 The Committee on Standards in Public Life also, subsequently, considered the recommended appeal mechanism for cases of disputed fact. In contrast to the Nicholls Committee, it expressed strong reservations, at least as far as serious cases are concerned. It reiterated its view that any tribunal should include senior Members of Parliament to provide knowledge of parliamentary procedure and contested the notion that appeal on the facts could be separated from appeal of the procedure, noting;

⁶⁴ Committee on Standards and Privileges (1997-98) HC 633, paras 5-10

⁶⁵ Committee on Standards and Privileges (1997-98) HC 1191, paras 11-16

⁶⁶ Ibid, para 32

⁶⁷ Joint Committee on Parliamentary Privilege (1998-99) HL Paper 43-1 and HC 214, para 291

⁶⁸ Ibid, para 298

‘This division of responsibility is most unusual. In general, experience has shown that the fact-finding exercise carried out by a judicial body is inextricably linked with the legal rule or statutory provision which has to be satisfied or shown to be infringed (as the case may be). Facts are not found in the abstract.’⁶⁹

- 3.9.7 It therefore proposed that in serious cases the role of the tribunal should be that of adjudicator and fact-finder. It should, in effect, ‘try the case’, on the basis of the evidence amassed by the Parliamentary Commissioner and that adduced by the Member complained about, with oral testimony only being accepted if the rigorous rules for the admission of fresh evidence were satisfied.’ Thus rather than rehearing the facts and reporting its conclusions to the Committee on Standards and Privileges for its consideration, the tribunal would itself reach a verdict. These counter recommendations have not been accepted by the Commons Committee.⁷⁰
- 3.9.8 However, the House of Lords has provided an appeals mechanism similar to that suggested by Nolan and Neill, that is a right of appeal from the Sub-Committee on Members’ Interests of the Committee of Privileges, which undertakes the investigation, to the full Committee, while in the Republic of Ireland, there is a right of appeal from the Standards in Public Office Commission to the Members’ Interests Committee in the appropriate House. The statutory Commissions or Ethics Officers in Australia and Canada have similar mechanisms of appeal to parliamentary committees.
- 3.9.10 In its inquiry of 2000, the Scottish Standards Committee ‘gave careful consideration to the inclusion of an appeals procedure within the Parliament’s investigative model.’ Unlike the National Assembly Committee, the Scottish Committee has the power to undertake its own investigation. Hence it can consider an appeal, rather than just a judicial review type challenge (as can the Committee in Northern Ireland). It therefore concluded that ‘if a Member wished to challenge the Commissioner’s factual conclusion, he or she could do so when the Commissioner’s report was submitted to the Standards Committee.’⁷¹ The Committee considered that, thereafter, appeal on matters of law, procedure or the proposed penalty lay to the full Parliament when the report and any sanctions were debated, with members of the Committee, while being allowed to speak in the debate ‘in order to outline the basis of their findings’, not having ‘a decision-making role.’⁷² Like the Nicholls report, the recommendation was therefore that they should not be allowed to vote.
- 3.9.11** Article 6 of the ECHR does not require there to be a right of appeal in every case. However, it may require it when the accusations and consequences are serious. It would therefore seem appropriate for the Assembly to put some mechanism in place. This would, in any case, demonstrate the Assembly’s commitment to fairness. The key point is that any appeal must be to a body which has had no previous connection with the case. There are several models that the Assembly could adopt:

⁶⁹ Committee on Standards in Public Life (2000) *Reinforcing Standards*, Cm 4557.

⁷⁰ Committee on Standards and Privileges (2000-01) HC 267, Appendix 1

⁷¹ Scottish Standards Committee (2000) Paper SP 186, para 32.

⁷² *Ibid*, para 50

- 1) appeal when the facts are disputed to an ad hoc tribunal, with an independent lawyer chair and two senior Members of the Assembly; or
- 2) appeal to the Presiding Officer (if he no longer had a part in the complaints process; see recommendations 2.17.5, 3.1.2 and 4.1), the Deputy Presiding Officer and another senior Member of the Assembly. Alternatively, if the Presiding Officer retains his current position, appeal could be to the Deputy Presiding Officer and two senior Members of the Assembly; or
- 3) appeal to the Committee on Standards from a sub-committee of the Committee, convened to receive the Adviser's report, hear representations and decide the complaint. Members of the sub-committee would not sit on the full Committee when it heard the appeal.
- 4) appeal to the full Assembly with Members of the Committee on Standards being required to refrain from voting.

3.9.12 Of these models, 1) and 2) would seem the most appropriate. Model 3) is the option that was recommended by the Neill Committee and rejected as inappropriate by the Committee of Standards and Privileges in the House of Commons. It would also seem inappropriate in the context of the National Assembly, where the use of a sub-committee would undermine the corporate responsibility of the Committee on Standards. Model 4) is the option chosen by the Scottish Parliament on the basis that it is sufficient to satisfy the requirements of the European Convention. While this may technically be the case, the European Convention provides the minimum requirement and it would seem inappropriate for appeal on the facts to lie only to the full Assembly. A Member would, of course, retain the right to contest in plenary the imposition of any sanction by the Assembly.

Recommendation: The Assembly considers adopting one of the following options:

- 1) a right of appeal when the facts are disputed to an ad hoc tribunal, with an independent lawyer chair and two senior Members of the Assembly; or
- 2) appeal to the Presiding Officer (if he no longer had a part in the complaints process), the Deputy Presiding Officer and another senior Member of the Assembly. Alternatively, if the Presiding Officer retains his current position, appeal could be to the Deputy Presiding Officer and two senior Members of the Assembly.

3.10 REPORT TO THE ASSEMBLY/PARLIAMENT

3.10.1 All Standards committees report to their Assembly or Parliament. However, in the National Assembly there is no formal mechanism by which the Committee on Standards can bring a report on the breach of the Code of Conduct before plenary to be debated. This creates presentational difficulties for the Committee as it enables the Member, named in the report, to make a statement to the press which minimises the seriousness of the offence or portrays it as unexceptional, that is, as one in which many Assembly Members engage. It also makes the work of the Committee less

visible to the public than it should be. This contrasts with the position in Northern Ireland, where the Chair of the Committee on Standards and Privileges, in conjunction with the Business Committee, finds an opportunity for a report to be debated in plenary session, and Scotland, where the Standards Committee has recommended that Standing Orders should be amended to ensure that reports are debated within a specified timetable.

Recommendation: The Committee recommends to the Assembly that all its reports on substantiated complaints should be debated and works with the business managers to ensure that this is the case.

3.11 SANCTIONS AGAINST OFFENDING MEMBERS

3.11.1 Under its terms of reference the Committee on Standards of Conduct can ‘recommend action in respect of any complaint referred to it by the Presiding Officer’. However, the sanctions available to the Assembly are limited to the withdrawal of rights and exclusion for a certain period in cases of breaches in registration and declaration. No sanctions have been agreed for dealing with other, less serious, breaches of the Code of Conduct. Thus there is no action the Committee can recommend, other than exclusion, and, in practice, the only punishment mechanism it has at its disposal is ‘naming and shaming’. Receiving bad publicity may be effective punishment and deterrent. However, it is reliant upon press reporting and it may be undermined by a Member claiming the finding is unfair or that the offence is prevalent in the Assembly.

3.11.2 The lack of appropriate sanctions, which the Committee can recommend, may limit its effectiveness. Certainly the Committee on Standards and Privileges in Northern Ireland, considered that its inability to decide what further action was required against a Member, who had breached the Code, limited ‘the operation and effectiveness of the Committee’.⁷³ The situations are somewhat different, in that the Northern Ireland Committee was concerned about its lack of power to make recommendation even in the most serious cases, a defect that was remedied by SO 64 (as amended 4 July 2001) which empowers it to recommend the exclusion of a Member from proceedings and withdrawal of rights and privileges for a certain period. Nevertheless, the principle is similar. It would seem important for a Committee to be able to make recommendations in all cases where a complaint is found to have substance, even if its recommendation is that no sanction should be applied, and for its recommendations to be debated in plenary.

3.11.3 The problem in the Assembly may ease if the Committee accept the recommendation that trivial complaints, such as a minor use of Assembly stationery, should no longer be brought before the Committee and be the subject of a full report (see Recommendation 3.2.1 above). However, there may be occasions when the Committee may feel it appropriate to recommend a sanction less than exclusion, such as a recommendation that the Member be required to give a full apology, or be censured by the Assembly, or removed from a position on a Committee.

⁷³ Committee on Standards and Privileges (2000) 1/00

Recommendation: the Committee considers discussing with party groups possible sanctions for offences which are not serious enough to warrant the exclusion of a Member.

4. ROLES RELATING TO STANDARDS OF CONDUCT

4.1 THE ROLE OF THE PRESIDING OFFICER

As discussed in Sections 2 and 3, the Presiding Officer's role in receiving complaints and advising Members is in danger of undermining the independence of the standards regime, while the requirement that the Independent Adviser reports his initial findings to the Presiding Officer unnecessarily complicates and obscures the complaints procedure.

Recommended: The role of the Presiding Officer should be confined to the general oversight of standards in the Assembly. This would enable him, if thought appropriate, to hear appeals from the Committee on Standards.

4.2 AN INDEPENDENT ADVISER OR COMMISSIONER FOR STANDARDS

4.2.1 In March 2000 the National Assembly for Wales appointed an Independent Adviser, in line with the requirements of SO 16, 'to provide advice and assistance to the Assembly and the Presiding Officer on matters relating to the conduct of members' and 'upon invitation by the Assembly Committee on Standards of Conduct to investigate factual matters arising out of any complaint referred to the Committee about the financial or other interests of Members and/or Members' standards of conduct'.

4.2.2 His principal duties, as defined in *The Role of, and Access to, the Assembly's Independent Adviser on Standards of Conduct* fall into two main categories: first, investigating complaints and advising on the conduct of AMs; second, supporting the Presiding Officer and Committee 'in developing a robust standards framework for the Assembly and Members' understanding of that framework.' This second group of responsibilities has not, as yet, been fully realised because of the pressure of the other work.

4.2.3 One of the key issues facing the Assembly is whether there should be a Commissioner for Standards in place of the Independent Adviser. The House of Commons has a Parliamentary Commissioner for Standards who not only advises the Committee on Standards and Privileges on matters of conduct and investigates complaints, but also, controversially, oversees the maintenance by the Registrar of the Register of Members' Interests and advises Members on registration, the interpretation of the code of conduct and questions of propriety.

4.2.4 None of the pieces of legislation which established the devolved bodies of Wales, Scotland and Northern Ireland included a Commissioner. Indeed, in the case of Northern Ireland neither the Northern Ireland Act nor standing orders made provision for an independent person to investigate complaints. However, subsequent to the inquiry undertaken by the Northern Ireland Committee on Standards and Privileges, the Assembly Ombudsman is to be given statutory powers enabling him to assume the role of a Commissioner for Standards. Unlike his counterpart in the House of

Commons, his role will be mainly investigative. The Commissioner will not advise Members on registration nor maintain the Register of Members' Interests, although he or she will be consulted by the Committee about the form and content of existing and future registers. The Commissioner will also have no role in recommending a penalty or sanction in cases where a complaint has been upheld, the Committee believing that this would confuse the role of independent investigator with that of prosecutor. Interim arrangements are currently in place to enable him to investigate complaints against Members until legislation is passed. The rationale for the Northern Ireland Committee's recommendation, that a statutory Commissioner should be established, was to assure Members 'that complaints against them would be investigated in an impartial and non-political way' and 'to promote the credibility and integrity of the investigative process'.⁷⁴

4.2.5 A similar rationale prompted the Scottish Standards Committee to instigate legislation which creates a free-standing Commissioner with specific responsibilities and powers. The Parliamentary Standards Commissioner Act gives a Commissioner:

- responsibility for receiving complaints against the breach of the Code of Conduct, the Members Interest Order and any relevant Act passed subsequently by Members and by former Members (while they were Members) (Section 3)
- responsibility for investigating the conduct complained of (and no other)
- the power to call for persons, papers and records, although its application is limited, as is that of the Scottish Parliament,⁷⁵ to devolved matters and it does not extend outside Scotland or to Ministers, judges or members of tribunals⁷⁶
- the power to determine 'when and how to carry out any investigation' (Section 5 (4))
- the power to compel witnesses to co-operate
- absolute privilege for all reports, statements and communications on a complaint and thus protection from defamation.

4.2.6 The Act also imposes limitations upon the Commissioner.

- It prohibits him from giving advice on what constitutes a breach of a provision and from giving any general consideration of the efficacy of the statutory provisions (3(6)).
- It requires him to comply with directions from the Standards Committee (Section 4), although his independence is preserved by the stipulation that the Committee may not give directions about the specifics of a particular investigation.
- It requires him to consult with the Committee before using his powers of investigation.
- It prohibits him from disclosing information relating to the complaint other than for the purpose of carrying out his statutory duties (section 14).
- It prohibits him from commenting on appropriate sanctions

The Act envisages that the Commissioner's report to the Committee will be published with the Committee's report and will therefore be in the public domain.

⁷⁴ Committee on Standards and Privileges (2000) Paper SP 186, para 19.

⁷⁵ Scotland Act 1998, S. 23

⁷⁶ Further details can be found in the Explanatory Notes to the Bill at SP Bill 48-EN, para 79

- 4.2.7** Commissioners established by statute are, of course, subject to judicial scrutiny in a way that Commissioners operating in legislatures protected by Article IX of the Bill of Rights 1689, such as the House of Commons, are not. Thus they will be susceptible to challenge on the grounds that they have acted beyond their powers, unreasonably or disproportionately or that they have infringed the rules of natural justice or the European Convention. However, the procedures used to process complaints within bodies, such as the National Assembly for Wales, which were set up under statute and denied the full scope of parliamentary privilege, are already subject to such challenge, so the prospect of judicial intervention is not as foreign as it is in the House of Commons.
- 4.2.8** Not all legislatures have an independent officer whose role encompasses, although is not confined to, investigation. In the House of Lords, the Sub-Committee on Members' Interests of the Committee of Privileges examines the allegation and either dismisses it or investigates further, while in the Irish Republic, this function falls to the Members' Interests Committee, a Committee with statutory powers and responsibilities. However, Ireland also has a statutory Standards in Public Office Commission for ministers and public office holders which investigates serious complaints, and independent officers, established by statute, are also a feature of Canadian provincial legislatures and some Australian states. Thus in Canada, Nova Scotia, British Columbia, Saskatchewan and New Brunswick have Conflict of Interest Commissioners and Ontario and Alberta have Ethics Commissioners, while in Australia, New South Wales has an Independent Commission against Corruption and Queensland a Criminal and Misconduct Commission and an Integrity Commissioner.⁷⁷ Many of these Commissioners have jurisdiction to consider allegations against office holders as well as Members of Parliament.
- 4.2.9** The extent to which statutes detail the powers and responsibilities of Commissioners varies. But should the National Assembly Committee on Standards consider seeking primary legislation to establish a Standards Commissioner, the Scottish Parliamentary Standards Commissioner Act provides a useful model. The options would seem to be maintaining the office of Independent Adviser, with a few adjustments; appointing a Commissioner for Standards who has increased responsibilities and a higher profile but no more power; or seeking primary legislation for a statutory Commissioner for Standards with increased responsibilities and the power to go with them.
- 4.2.10** One of the ways of deciding which option is appropriate is to consider what responsibilities the Assembly wishes this officer holder to have. There are a number of scenarios. The first is that the role remains as it is with the office holder simply conducting preliminary investigations and further investigations, when required to do so. Alternatively, the role remains as it is but with responsibility for receiving and sifting complaints and, possibly, some discretion in relation to trivial complaints. In these cases continuing with an Independent Adviser may be appropriate. However, such an officer will still lack the power to call for documents or witnesses and although to date the Independent Adviser has had no problem in gaining access to the persons and documents required to complete his investigations, there might be an occasion in the future when a Member is reluctant to co-operate. There might also be

⁷⁷ For further details see Oonagh Gay (2002) *The Regulation of Parliamentary Standards – A comparative perspective*; Committee on Standards in Public Life's inquiry (www.public-standards.gov.uk).

an occasion when the facts are uncertain or disputed, in which case the Adviser will be ill-equipped to determine the truth.

4.2.11 The second scenario is that the role assumes responsibility for receiving and sifting complaints and for dealing with trivial complaints (as above) but also extends, as originally intended, to playing a major role in promoting standards of conduct and advising the Assembly, through the Committee, on them. These increased responsibilities would warrant more time being spent on Assembly business by the office holder. They would also warrant the position being more obviously front line and having more authority. Renaming the office ‘Commissioner for Standards’ may achieve this. However, other factors, apart from responsibilities, are important. The fact that the registration and declaration of interests is a statutory requirement does not alter the need for a robust system in which the public can have confidence. This requires someone with the appropriate status which the title ‘Commissioner’ may better reflect than the current title. Giving greater status to the role would also elevate the position of standards of conduct within the Assembly and place greater importance upon adherence to them. Thus, regardless of the responsibilities and powers of such an officer holder, appointing a Commissioner for Standards would demonstrate the serious intent of the Assembly to operate to the highest standards. The position would, however, still lack the powers of the current officer holder and would thus have the same weaknesses. Moreover, there may be the expectation that someone entitled Commissioner for Standard has the same powers as the position of Commissioner in other institutions and his or her authority could be undermined when the expectation is not realised.

4.2.13 The third scenario is one in which the office not only assumes responsibility for receiving and sifting complaints and dealing with trivial matters but, in addition, has the power to investigate as he or she sees fit, to send for documents and to require the attendance of witnesses. Regardless of whether the responsibilities extended to the promotion of standards of conduct, such a role would require a statutory Commissioner for Standards. A statutory Commissioner may seem like taking a sledgehammer to crack a nut, particularly given the lack of any serious complaints in the Assembly so far. However, the importance of having robust machinery in place in case such complaints arise in future cannot be understated and thus a statutory Commissioner would seem the best option.

Recommendation: the Committee considers recommending to the Assembly that it seek primary legislation for a statutory Commissioner for Standards.

4.3 THE COMMITTEE ON STANDARDS

4.3.1 The role of the Committee on Standards of Conduct clearly needs to relate to the roles of the Presiding Officer and the Independent Adviser. If the recommendation, whereby the Clerk to the Committee on Standards assumes responsibility for advising Members on the Code of Conduct, were to be accepted (see Recommendation 2.17.5), the Committee would have responsibility for overseeing this work. It would not be involved in giving advice in individual situations, but would be consulted by the Clerk on matters of general policy. Similarly, if the role of the Independent Adviser (or Commissioner for Standards) were to include active responsibility for

advising the Committee on a robust standards regime and for briefing Assembly Members, the Committee would be involved in responding to recommendations. The balance of work of the Committee might therefore change, particularly if the Independent Adviser (or Commissioner for Standards) had discretion to deal with trivial complaints (see Recommendation 3.2.1). Its role would seem likely to be more concerned with education and prevention than with complaints.

- 4.3.2 However, it would seem appropriate for the Committee to have discretion to undertake investigations itself. For this it would need powers to call Members, and others, to appear before it and to order the release of documents (see Recommendation 3.7.2). Its possession of such powers would seem important both for practical purposes and for the status of the Committee and this position is maintained, regardless of whether the office of Independent Adviser or Commissioner for Standards acquires powers of its own.

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