

STRICTLY CONFIDENTIAL

IN THE MATTER OF AN APPEAL BY NEIL McEVOY AM TO THE
PRESIDING OFFICER OF THE NATIONAL ASSEMBLY FOR WALES,
PURSUANT TO THE PROVISIONS OF PARAGRAPH 8.1 OF THE
NATIONAL ASSEMBLY FOR WALES PROCEDURE FOR DEALING WITH
COMPLAINTS AGAINST ASSEMBLY MEMBERS, AGAINST THE
RECOMMENDATIONS OF THE COMMITTEE ON STANDARDS OF
CONDUCT MADE ON 23rd OCTOBER 2019

THE REPORT OF SIR JOHN GRIFFITH WILLIAMS QC

INTRODUCTION

1. The purpose of the Code of Conduct for Assembly Members [“the Code of Conduct”] is to provide guidance for all Members of the National Assembly for Wales on the standards of conduct expected of them in the discharge of their Assembly and public duties and to provide the openness and accountability necessary to reinforce public confidence in the way in which Members of the National Assembly perform their Assembly and public duties.

2. Paragraph 3 of the Code of Conduct provides that Members must comply with its provisions and should act always on their personal honour. They must never accept any financial inducement as an incentive or reward for exercising parliamentary influence; they must not vote on any order or motion, or ask any question in plenary or a committee, or promote any matter in return for payment or any other material benefit (the “no paid advocacy” rule). Paragraph 4 of the Code of Conduct provides that Members of the Assembly should observe the seven general principles of conduct identified by the Committee on Standards in Public Life; these include Integrity and Leadership. Paragraph 4(b) of the Code of Conduct provides:

“**Integrity:** Holders of public office¹ should not place themselves under any financial or other obligation to outside individuals or organisations that might influence them in the performance of their official duties. *Assembly members*

¹ The seven principles apply to “holders of public office”. Assembly Members are holders of public office

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 refrain from any action which would bring the Assembly or its Members generally, into disrepute. Members should not ask Assembly Commission or Welsh Government staff to act in any way which would compromise the political impartiality of the Civil Service and/or Assembly Commission staff or conflict with the Civil Service Code and/or the Assembly Commission Staff Code of Conduct [emphasis added; see paragraph 23 post]. Paragraph 4 (g) provides: "Holders of public office should promote and support these principles by leadership and example". Paragraph 18 of the Code of Conduct provides that any allegation of non-compliance with the Code will follow the process set out in the National Assembly for Wales Procedure for Dealing with Complaints against Assembly Members ["the Procedure"].

3.The Assembly's Dignity and Respect Policy ["the Policy"] was agreed by the Assembly on 18th May 2018. Its Aim is to ensure that everyone feels safe, respected and comfortable when they engage with the Assembly; that the people who work in the Assembly feel safe, respected and comfortable in their working environment; that behaviour that adversely affects the dignity of others has no place in the Assembly. The Policy requires of everyone who works in the National Assembly that they have a high degree of respect for the dignity of others and behave appropriately. Inappropriate behaviour means any behaviour that adversely affects the dignity of another person. It includes, harassment, sexual harassment, bullying, intimidation and unlawful discrimination but it is wider than that. It covers all unwanted behaviour, that is behaviour which is not encouraged or reciprocated by the recipient, regardless of whether it was meant to cause offence and whether it is repeated or an isolated incident.

4.Complaints against Assembly Members of non-compliance with the Code of Conduct must be made to the Commissioner for Standards ["the Commissioner"]. The procedure for dealing with such complaints is set out in paragraphs 3 & 4 of the Procedure. In summary, the Commissioner must determine first whether the complaint is admissible - a complaint is admissible if it is made in writing by a complainant who is not anonymous and is clearly identified so that there can be further communication. The complaint must be about a clearly identifiable Assembly Member and made within one year of the date when the complainant could reasonably have become aware of the conduct complained about and it appears that there is enough substance to

justify further investigation [i.e. there is enough evidence to suggest that the conduct complained about may have taken place, and that if proved, it might amount to a breach of any of the matters encompassed within Standing Order 22.2(i)]. Standing Order 22.2 provides there must be a responsible committee [the Committee] “to investigate, report on and, if appropriate, recommend action in respect of any complaint referred to it by the Commissioner that a member has not complied with ... (d) any Assembly resolution relating to Members’ standard of conduct”.

5. Provided the complaint is admissible, the Commissioner is required to carry out an investigation in accordance with the provisions of paragraph 4 of the Procedure with a view to establishing the facts in relation to whether the member has committed the conduct complained of and if so whether the member has breached one of the matters encompassed within Standing Order 22.2(i) requiring the Commissioner to make a formal investigation report to the Committee. I observe that Paragraph 10 of the National Assembly for Wales Commissioner for Standards Measure 2009 provides “... it is for the Commissioner to decide when and how to carry out an investigation and to report on its outcome” and Paragraph 1.5 of the Procedure provides that the Commissioner will decide “when and how to carry out any investigation”. The Procedure is based on the principle that Assembly Members will co-operate fully with any investigation into a complaint: see the Procedure paragraph 5.1. The formal investigation report [paragraph 4.2 of the Procedure] must include details of the complaint, details of the investigation carried out by the Commissioner, the facts found by the Commissioner in relation to whether the member has committed the conduct complained of and the conclusion reached by the Commissioner as to whether the member has, as a result of that conduct, breached one of the matters encompassed in Standing Order 22. It is expressly provided [paragraph 4.2.(v)] that the report must not include any comment or recommendation as to what sanction, if any, should be imposed upon the member in question.

6.No report concluding that a member has breached one of the matters in the Standing Order may be made to the Committee by the Commissioner unless the member and the complainant have first been given a copy of the draft report and the opportunity to comment on any factual inaccuracy [paragraph 4.3]. If the Commissioner does not accept the accuracy of any such comment, he must include details of the disputed fact or facts in his final report to the Committee, which must also be made available to the member and the complainant.

7. Following receipt of the report, the Committee will meet first in private when it will make no findings of substance on the complaint but will consider whether in the light of the Report and any other written evidence it considers appropriate whether any witness should be invited to give evidence to the Committee and whether the hearing should be in public or private [see paragraph 7.1-7.4 of the Procedure]. The Committee must inform the member of his or her right to make written representations to the Committee within a specified time and to make oral representations at an oral hearing. The procedure for a hearing before the Committee is set out in paragraph 7.5-7.8 of the Procedure. Following the receipt of any written representations and/or any oral hearing, the Committee will meet in private to consider whether the Member is in breach of any of the matters encompassed in the Standing Order and if so, what action it should advise the Assembly to take. Under the heading Considerations in paragraph 7 of the Procedure it is provided that in deciding what sanction or sanctions to recommend to the Assembly, the Committee will make a judgment based on the specific circumstances of the case in question. It will consider the severity of the breach, the extent to which it may have brought the Assembly into disrepute and whether the case in question is a repeat offence or shows persistent conduct which may be considered to show contempt for Assembly colleagues, the rules or the institution. The Committee will also take account of whether the breach was committed intentionally or not and whether any dishonesty or deceit is deemed to have been involved.

8. If the Committee determines to recommend to the Assembly, pending any appeal by the member concerned, that a breach has been found and that the member should be censured in accordance with Standing Orders or that the Member should be excluded from Assembly proceedings for a specified time, or certain rights and privileges should be withdrawn from the member or if appropriate any combination of the above sanctions, the member must be provided with a copy of the Committee's report. The Member may within 10 working days of being provided with the report appeal to the Presiding Officer. If no appeal is lodged the Committee's report along with the Commissioner's report to the Committee must be laid before the Assembly. If an appeal is made, the Committee's report will remain confidential and may not be published until the dismissal of the appeal.

9. Upon receipt of a Notice of Appeal, the Presiding Officer must request the senior Presiding Judge of the Wales Circuit to nominate a legally qualified person to decide the appeal. Following the nomination and prior to the appointment of

the legally qualified person, the Presiding Officer shall afford the member the opportunity to make written representations within five working days as to any ground for the non-appointment of such person. Absent any objection the Presiding Officer will appoint the legally qualified person to determine the appeal.

10. Appeals will only be considered upon the following grounds [paragraph 8.4 of the Procedure]:

- i. that the Committee's conclusions are based on significant factual inaccuracies which had they been known might have led to the Committee finding differently
- ii that there had been procedural irregularities that prejudiced the Member's right to a fair hearing.

The Procedure provides [paragraph 8.5] that the legally qualified person shall consider only the reports of the Commissioner and the Committee and any additional written representations made by the appellant². There will be no oral hearings or representations from any other source.

11. The person appointed to decide the appeal must provide to the Member and to the Committee a report and his or her conclusion upholding or dismissing the appeal. If the appeal is dismissed, the Committee must lay before the Assembly the report of the person appointed to decide the appeal together with the Report of the Commissioner and the Committee's Report. The Chair of the Committee must then table a motion calling on the Assembly to endorse the Committee's recommendations.

THE FACTS

12. On 22nd May 2019, the Commissioner received a complaint from Mick Antoniw AM that on 21st May 2019, while on his way through the Cwrt to the Siambr he was approached by Mr McEvoy AM who was both physically and verbally aggressive towards him. He told him he did not want to speak to him, but he continued ranting at him. When Mr Antoniw walked off, Mr McEvoy followed him, shouting at him and blocking his path. The whole incident took place in front of a number of witnesses. The Commissioner investigated the complaint. He concluded the incident in question can be traced to a debate in Plenary on Wednesday 15th May when there was a debate on a report

² I asked the Chief Legal Adviser, Mr Huw Williams for his advice as to whether an Assembly Member is the holder of a public office. His Advice, dated 31st March 2020 is appended.

concerning the Future Generations Commissioner. The recording of the proceedings in the Siambr - see paragraph 4 of the Commissioner's Report - is unfortunately incomplete. While the contributions of Mr Antoniwi and Mrs Jane Hutt AM can be understood, the interjections of Mr McEvoy AM spoken over Mr Antoniwi's contribution to the debate are unclear. What is clear is a response of Mr Antoniwi to something said by Mr McEvoy. He can be heard saying to Mr McEvoy "You are just a convicted bully, aren't you?".

13. The witnesses to the events of 21st May are Mr Antoniwi and six others, all employees of the National Assembly in one capacity or another. None of the employees wants their names made public or made known to Mr McEvoy as they are concerned that they will be in contact with him in the future and they do not want future relationships coloured by the incident. The Commissioner, who decides "when and how to carry out any investigation" [see Paragraph 5 above] acceded to their requests for anonymity and Mr McEvoy was provided with copies of the witness statements, redacted to remove evidence of their identities.

14. The evidence in the written statements is particularised in paragraphs 10-17 of the Commissioner's Report. In brief summary, the six witnesses all described the aggressive and threatening behaviour of Mr McEvoy. Witness 1 described Mr McEvoy walking very closely behind Mr Antoniwi in the Cwrt, talking loudly and aggressively and pointing his finger at him. Witness 2 described Mr McEvoy pacing in an animated fashion in the Siambr between his desk and the desk of Mr Antoniwi before he approached Mr Antoniwi's desk, all the while acting aggressively. Witnesses 3 and 5 described Mr McEvoy approaching Mr Antoniwi's desk once. Witnesses 4 and 6 described Mr McEvoy rising from his seat on some two or three occasions and going towards Mr Antoniwi's desk. The Commissioner concluded some of the witnesses saw less or more than others and the detail given was varied but no account was inconsistent with Mr Antoniwi's account in his letter of complaint dated 22nd May 2019.

15. There is CCTV footage with no sound of Mr McEvoy and Mr Antoniwi making their separate ways through the Cwrt to the Siambr on 21st May. Mr McEvoy did not see the coverage until after the Commissioner had reported but that does not amount to a procedural irregularity because the evidence was not withheld, any delay was the fault of Mr McEvoy who did not ask to see the CCTV footage until 6th September – see paragraph 36(iii) *post* - and he had seen it by the time

he gave oral evidence to the Committee on 8th October by which date the Committee had decided they did not need to see it: see paragraph 19 *post*.

16. The Commissioner concluded that Mr McEvoy, by his conduct on 21st May 2019, had failed to conduct himself in a way which would maintain and strengthen the public's trust and confidence in the integrity of the Assembly and had behaved in a way which would bring the Assembly into disrepute. He had also failed to promote and support by way of leadership and example the principles of how those in public life should behave. The Commissioner concluded also that Mr McEvoy's intimidatory and threatening conduct breached the Assembly's Dignity and Respect Policy and falls to be dealt with by the Committee under Standing Order 22.2. His formal investigation report dated 14th September 2019, which was provided to the Committee, is appended to this report.

17. The Committee considered the Report on 24th September 2019. They decided they did not require to hear from further witnesses as they had sufficient information in the Commissioner's Report. In correspondence with the Committee, Mr McEvoy raised concerns that he had not had the opportunity to question the accuracy of the Commissioner's Report. When told of these concerns by the Committee, the Commissioner replied that Mr McEvoy had been given the opportunity in emails dated 5th, 9th and 13th September – see the Commissioner's Report at paragraph 24 - to challenge the accuracy of the Report but had not done so. Mr McEvoy also suggested there were a number of witnesses he would have liked to provide evidence to the Commissioner. When told of this complaint, the Commissioner referred the Committee to paragraphs 7,8,and 9 of his Report and to his attempts to engage Mr McEvoy in his investigation when Mr McEvoy was unco-operative.

18. The Committee took evidence from Mr McEvoy on 8th October 2019. In the course of the hearing Mr McEvoy raised again the issue of the unfairness of the anonymity of the witnesses; he said the CCTV evidence calls in to question some of the statements of the witnesses and of Mr Antoniwi. He said he got up from his desk only once and did not get up from his desk three times as alleged by two of the witnesses. As to this allegation the Committee concluded that the number of visits was immaterial – see paragraph 19 of the Committee's Report. Importantly, Mr McEvoy volunteered in the evidence session "First of all, there is the issue of my behaviour. I did lose my temper. I was aggressive and that behaviour will not be repeated". He repeated this admission a number of times

– see the transcript of 8th October. The Committee noted Mr McEvoy had “accepted that during the incident in question he had lost his temper and that his behaviour towards (Mr Antoniow) was aggressive” – see paragraph 23 of the Committee’s Report. It follows not only that he admitted approaching Mr Antoniow aggressively once and was at fault but that the Committee proceeded to its conclusions on the basis that there was probably just the one approach.

19. The Committee met on 15th and 23rd October 2019 to consider and to reach its conclusion in respect of the complaint. It was persuaded “by the balance of evidence and did not feel it necessary or appropriate on data protection grounds, and to preserve the important principle of confidentiality inherent in the procedure” to view the CCTV footage” – see paragraph 22 of the Report. This is a decision which caused Mr McEvoy no disadvantage. I observe the Commissioner placed no reliance on this evidence and having seen the CCTV footage, I am satisfied it provides no support for the allegations of Mr McEvoy’s behaviour outside the Siambur. It is neutral in its effect.

20. The Committee concluded unanimously that Mr McEvoy is in breach both of paragraphs 4(b) and (g) of the Code of Conduct and of the Policy. Having considered matters of mitigation, the Committee decided unanimously to recommend to the Assembly pursuant to the provisions of paragraph 7.12(vii) of the Procedure that Mr McEvoy should be excluded from Assembly proceedings for 21 days and that his right of access to Ty Hywel and the Senedd be suspended for a similar period. Mr McEvoy served Notice of Appeal to the Presiding Officer against the determinations of the Committee. In accordance with paragraph 8.2 of the Procedure, the Senior Presiding Judge of the Wales Circuit nominated me to decide the appeal. Mr McEvoy was informed of my nomination and raised no objection.

21. Mr McEvoy has provided grounds of appeal which supplement his original grounds which lacked particularity – see his email of 30th October. These grounds of appeal purport to be signed by counsel, JG Mendus Edwards, otherwise Jonathan Edwards. I observe he has no standing in this matter: see paragraph 10 above. Even so I have decided to consider the grounds of appeal as the representations of Mr McEvoy, observing that they are prolix and in large part irrelevant because they fall outside the permitted grounds of appeal - see paragraph 10 above. I summarise the grounds of appeal as I understand them.

GROUNDS 1 & 2:

22. It is submitted the Committee fell into a procedural irregularity by creating a general offence “outside the context of financial obligations to others”; it is submitted that paragraphs 4(b) and 4(g) – see paragraph 2 above – should be construed in accordance with the ordinary rules of construction; that there should be regard to the fact that breaches of the requirements may have serious consequences; that the construction should be restricted to that necessary to give effect to the ordinary meaning of the words and the nature of the scheme of which they are part. That scheme, it is submitted, is the prohibition of Assembly Members from placing themselves under financial or other obligations to others – see paragraph 3 of the Code of Conduct in paragraph 1 above. It is submitted that the context of paragraph 4(b) and 4(g) is paragraph 3 of the Code.

23. It is accepted that the provision in paragraph 4(b) – see the italicised passage in paragraph 2 above - does not fit easily into the suggested scheme and so it is submitted care is needed in giving effect to that passage. It is submitted it should not be read as creating a wide offence of bringing the Assembly or its Members into disrepute; rather it should be read as reinforcement of the requirement to avoid conflicts of interest.

24. It is submitted that the requirement in paragraph 4(g) that holders of public office should promote and support these principles by leadership and example is restricted to the provisions regarding conflict of interest; it should not be read as requiring leadership and example in connection with conduct more widely defined by any wide offence of bringing the Assembly or its members into disrepute.

25. It is submitted that the requirement in paragraph 4(g) to promote and support the seven principles should be restricted to the overall scheme supporting the avoidance of conflicts of interest and so the Committee fell into a procedural irregularity by creating a general offence. In so doing, it is submitted, Mr McEvoy’s right to a fair hearing was prejudiced. This submission with those which purport to support it is contrived and without merit.

26. The purpose of the Code of Conduct could not be clearer; it is unambiguous and its language is intelligible. It provides guidance for all members of the Assembly, who have not taken leave of absence, on the standards of conduct expected of them in the discharge of their Assembly and public duties and to provide the openness and accountability necessary to reinforce public confidence in the way they perform their Assembly and public duties. The

members of the Assembly must comply with the Code of Conduct, they should act always on their personal honour and must never accept any financial inducement as an incentive or reward for exercising parliamentary influence; they must also not vote on any Order or motion or ask any question in plenary or committee, or promote any matter in return for payment or any other material benefit. Importantly, the prohibitions in the Code of Conduct and the seven principles on financial inducement or reward, are but a part of the Personal Conduct expected of Assembly members and must be read as such. The seven principles relate to a variety of requirements; these include the requirements that Assembly 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 members should not ask Assembly Commission or Welsh Government staff to act in any way which would compromise the political impartiality of the Civil Service and/or Assembly Commission staff or conflict with the Civil Service Code and/or the Assembly Commission Staff Code of Conduct – see the italicised passage in paragraph 2 above. Paragraph 4(b) and (g) should not and cannot be construed as creating “an offence generally outside the context of financial obligations to others”. The “offence” is non-compliance with one or more of the provisions in the Code of Conduct which breaches one or more of the matters encompassed within Standing Order 22.2(i).

27. Paragraph 18 of the Code of Conduct provides that any investigation into allegations of non-compliance with the Code will follow the Procedure with a view to determining whether the conduct complained of breached “one of the matters encompassed within Standing Order 22.2(i)”. The Code of Conduct makes provision for General Standards of Conduct, which include Personal Conduct and a number of Specific Standards of Conduct by which an Assembly member will be judged in accordance with the Procedure. I observe the evidence establishes that the Commissioner and the Committee followed the Procedure to the letter – there is no submission to the contrary.

GROUND 3:

28. It is submitted that insofar as the Commissioner presented a complaint of a breach of the Dignity and Respect Policy by Mr McEvoy AM's intimidatory and threatening behaviour, this complaint is distinct from the complaints of breaches of paragraph 4(b) and (g). It is submitted that the Committee erred by proceeding on the basis that the complaint was of infringing the dignity of Mr

Antoniw in breach of the Aims of the Policy, which is only a Preamble and which holds no one to account. It is submitted the Commissioner failed to consider defences available to Mr McEvoy and/or evidence and/or cross-examination of witnesses to the effect that “the conversation” did not objectively reach the level of intimidation or threatening behaviour; it is submitted further that the Commissioner failed to conclude that the use of words and a gesture of extending a hand was within acceptable bounds of behaviour with elected politicians in a democratic society. It is submitted that the Commissioner conflated the complaint of a breach of the Policy with the defective breaches of paragraph 4(b) and (g).

29. There is no merit in this ground of appeal. The Committee adopted, as it was entitled to do, the conclusion in paragraph 21 of the Commissioner’s report - “The Dignity and Respect Policy adopted by the National Assembly requires everyone who works at the National Assembly for Wales to show a high degree of respect for the dignity of others. Mr McEvoy’s intimidatory and threatening conduct breaches this policy”. This was a free standing breach of the Policy even though on the facts, the behaviour amounted also to breaches of paragraph 4(b) and 4(g) and the breaches were therefore conflated. The aim of the Policy is clearly not a preamble. It has to be read with all the provisions in the Policy and with the seven general principles and so Assembly Members can be held to account for their inappropriate behaviour (as defined in the Policy) which breaches the aim of the Policy.

30. Further it was not for the Committee to consider “defences available” to Mr McEvoy unless they are relevant and particularised. Mr McEvoy denied that he had approached Mr Antoniow three times and said that the CCTV evidence contradicted the evidence in one of the witness statements that he had blocked Mr Antoniow but his admission and the Committee’s approach [paragraph 18 above] makes these factual issues otiose. I observe that in his oral evidence on 8th October, Mr McEvoy mentioned a number of matters of mitigation which the Committee took into account when considering the disposal of the complaint.

31. Not one of these alleged “defences” was mentioned by Mr McEvoy in his correspondence with the Commissioner and the Committee or in his oral testimony before the Committee. It is not for the Committee to speculate about any possible defence or at all. While Mr McEvoy said there witnesses who he believed could give relevant evidence, he has not identified any and he did not ask the Committee if he could call witnesses; it follows there were no witnesses

and no cross-examination of witnesses to the effect that “the conversation” did not objectively reach the necessary level of intimidation or threatening behaviour or at all. Yet further, no defence was advanced that the use of words and gesture extending a hand fell within acceptable bounds of behaviour by elected politicians in a democratic society with an interest in the existence of debate and competition between political parties.

32. None of these matters can be considered as a ground of appeal. They are no more than speculation with no factual or evidential base. I observe that these grounds of appeal and those under Ground 4 *post* are contradicted by and inconsistent with Mr McEvoy’s admission in his oral testimony on 8th October.

GROUND 4

33. It is submitted that the Committee fell into procedural irregularity which prejudiced Mr McEvoy’s right to a fair hearing because they failed to give any or any careful consideration of the evidence likely to be available which demonstrated gaps and conflicts in the evidence; they failed to consider how the conflicts or gaps might be resolved by calling witnesses and/or viewing the CCTV evidence; it is submitted the Committee failed to make any enquiry of Mr McEvoy why he was relying on no witness evidence when he had said he would (see the email of 17th September); it is submitted the Committee gave undue weight to the report of the Commissioner and insufficient weight to apparent conflicts and/or gaps in the evidence.

34. There is no merit in this ground of appeal. There was no procedural irregularity. It was not for the Committee to take in to account evidence *likely to be available* (emphasis added) which it is said demonstrated gaps and conflicts in the evidence or for the Committee to make any enquiry of Mr McEvoy as to why he was not relying on witness evidence when he had said he would be. Further, the chart compiled by Mr McEvoy which it is submitted demonstrates inconsistencies is inadmissible. All the evidence incorporated in the chart and relied upon as demonstrating factual inaccuracies was available when the Commissioner and the Committee were investigating the complaint; they should have been explored before the Commissioner and/or the Committee. There is no fresh evidence save that Mr McEvoy took the opportunity to provide evidence of mitigation.

GROUND 5:

35. It is submitted the Committee's consideration of the evidence was defective; it is submitted the Committee's conclusions of fact were based on significant factual inaccuracies, which had they been known might have led the Committee to finding differently because there were conflicts and gaps in the evidence. It is submitted the Committee did not carry out a careful analysis of the evidence, closed their eyes to the CCTV evidence and gave excessive weight to Mr McEvoy's admission as to aggression without considering whether the same referred to Mr McEvoy's intention and/or words used and/or actions.

36. There is no merit in this ground of appeal. The alleged significant factual inaccuracies are not particularised – if reliance is placed on the evidence of the number of times Mr McEvoy approached Mr Antoniw's desk, that is no longer an issue (see above). While paragraph 15 of the Code of Conduct - and paragraph 5.1 of the Procedure - provide that members shall cooperate at all stages with an investigation into their conduct by the Commissioner, Mr McEvoy chose not to:

(i) The Commissioner wrote to Mr McEvoy on 11th June 2019 enclosing the letter of complaint and inviting a reply in the context of paragraphs 4(b) and (g) of the Code. Mr McEvoy replied on 4th July 2019 saying that Mr Antoniw had called him a "convicted bully" in the chamber (Siambur) but no action was taken against him. He (Mr McEvoy) called him privately a spineless red tory and he (Mr Antoniw) ran off to a practising high court judge and tried to get his Tory mate involved. Mr McEvoy said he would not apologise but if the Commissioner wanted to bring his office into disrepute he should investigate the complaint but he would be providing no further comments.

(ii) When the Commissioner concluded, following his preliminary investigation that the complaint against Mr McEvoy was admissible he wrote to Mr McEvoy on 18th July to give him an opportunity to reconsider and to provide comments. Mr McEvoy replied on 1st August to ask what part of the Code he had broken. He continued in the course of correspondence to ask to be referred to the relevant part of the Code. On 5th August, the Commissioner provided a detailed reply by reference to paragraph 4 (b) and 4(g) and the Policy. Mr McEvoy replied on 7th August saying he was not admitting any conduct. He told the Commissioner he had the facts he was mandated to investigate, anything else would be interpretation and conjecture. He concluded "And the other fact is that I am sure you have already come to a biased conclusion against me so I see no point in wasting more of my time on this. Good luck with your investigation".

Notwithstanding that reply, the Commissioner provided Mr McEvoy under cover of a letter date 5th September with a draft copy of his Report with an invitation to comment on its factual accuracy.

(iii) On 6th September Mr McEvoy asked to see the CCTV coverage. On 11th September, he wrote he had observations on the whole of the report which he wanted a full opportunity to present. He said there were issues he wished to dispute and there were witnesses he wanted to see. None were particularised then or subsequently.

(iv) By letter dated 13th September, the Commissioner commented upon the “ample opportunity” Mr McEvoy had had to engage with the investigation and told him he would have the opportunity to make observations to the Committee. As he had not identified any factual inaccuracy in the Report, the Commissioner said he would be submitting it to the Committee. Mr McEvoy replied on 13th September that he did want to contest the accuracy of the report but it seemed the Commissioner had not afforded him the opportunity. This is contradicted by the email trail which demonstrates Mr McEvoy’s refusal to engage constructively with the Commissioner.

(v) In the course of his evidence to the Committee on 8th October, Mr McEvoy said he did dispute the accuracy of the Report; he said he did not get up three times. He said he had wanted to view the CCTV before commenting – he has since seen it. He complained again about the anonymity of the witness statements. He said he was concerned about the similarities in some of the witness statements. He said “I do have an issue with the Commissioner but I’ll address that at a separate time”.

37. When Mr McEvoy gave evidence to the Committee he had the opportunity to draw the Committee’s attention to his concerns about the evidence. He chose not to. I observe that Mr McEvoy did not comply with the mandatory requirement [Code of Conduct paragraph 15] “at all stages with any investigation” to co-operate with Commissioner and the Committee and so he cannot now seek to rely upon matters which he could and should have deployed with the Commissioner and/or the Committee.

GROUND 6:

38. Mr McEvoy “seeks an examination of the attitude of the Standard’s Commissioner towards him (including his hostility) and its possible effect on the decision of the Conduct Committee”. He refers to other proceedings in which

the Commissioner was investigating a complaint against Mr McEvoy by a third party.

39. I reject this ground of appeal without the need for any consideration of the evidence. The now admitted evidence of the one approach to Mr Antoniw's desk by Mr McEvoy who by his own admission was in a temper and aggressive provides the evidence of the breaches of the principles in paragraph 4 (b) and (g) and of the Code of Conduct and so there can be no factual challenge to the Committee's conclusion. Mr McEvoy, who volunteered he had an issue with the Commissioner chose not to adduce the evidence and he cannot now seek to rely upon it in these proceedings. It follows this ground of appeal calls for no consideration by me.

CONCLUSION

For all the above reasons, this appeal is DISMISSED

Sir John Griffith Williams

29th April 2010

Gwasanaethau Cyfreithiol | Legal Services

1. Mr Neil McEvoy AM has appealed under paragraph 8.2 of the Complaints Procedure for dealing with complaints against Assembly Members, in respect of a finding of a breach of the Members' Code of Conduct following a complaint made by Mr Mick Antoniw AM.
2. The person appointed to consider the appeal (The Hon Sir John Griffith Williams) has requested legal advice on the meaning of a "public office holder" and whether an AM falls within such a definition.
3. Legal Services have given initial consideration to the meaning of "public office holder" generally, as set out in an email from the Clerk of the Standards Committee, which is annexed to this further note of advice.
4. This further note addresses the specific question of whether an AM holds a public office.
5. AM's are elected and hold office in accordance with Part 1 of the Government of Wales Act 2006 ("GOWA"). An AM holds office from the time at which they are declared to be returned until the dissolution of the Assembly, in accordance with section 14 – Term of Office of Assembly members, GOWA.
6. An AM is also required to take the oath of allegiance in the form set out in section 2 of the Promissory Oaths Act 1868, before exercising their functions as an AM (with limited exceptions) or receiving any remuneration as an AM (see s.12 GOWA).
7. The form of oath prescribed is that generally used for public non-judicial roles and is also distinct from the "official oath" prescribed additionally for certain offices of State (e.g. the office of Secretary of State) and from the judicial oath and the Lord Chancellor's oath (see sections 3 to 6A) and specific oaths for other purposes (e.g. the jurors' oath)(see section 14).

8. Further assistance in determining the status of an AM can be derived from other provisions of GOWA. Section 157A defines a “Devolved Welsh Authority”. The definition is relevant at various places in GOWA concerned with defining the extent of legislative competence that remains reserved to the Westminster Parliament (see e.g. section 108A and Schedule 7B, Part 1, para 10 which reserves to Westminster the powers to modify the functions of a public authority unless it is a devolved Welsh Authority).
9. Section 157A of GoWA provides (to the extent relevant here) that a devolved Welsh Authority is either a body listed by name or type in Schedule 9A (by virtue of sub-section (1)(b)) or it meets the conditions specified in sub-section 2, namely that its functions:
 - a. are exercisable only in relation to Wales, and
 - b. are wholly or mainly functions that do not relate to reserved matters.
10. It is also relevant to the question of the status of AM’s that after identifying in Schedule 9A certain Welsh institutions by name (e.g. the National Assembly Commission), Section 157A goes on at sub-section (8) to also provide that a “public authority” means “a body, office or holder of an office that has functions of a public nature”.
11. In considering if the Assembly itself is a devolved authority it should be recalled that the Assembly is the body of the members of the Assembly. The Assembly collectively does not have a corporate legal personality of its own (hence the need for the Assembly Commission and equivalent bodies in the other UK legislatures with a legal personality to provide the services and support that the members require to discharge their functions). Nevertheless the AM’s collectively make up a distinct body and each Member is also the holder of an office (see section 14 GoWA, referred to above).
12. The other requirement of s.157A(8) relates to the public nature of the functions discharged. In that regard the functions of

deliberation and the passing legislation into law and holding to account the Welsh Government are plainly functions of a public nature. Although the office held by AM's is distinct from the official office held by Ministers under GOWA Part 2 or by UK Secretaries of State, but it is nevertheless an office held for public purposes.

13. Some support for this conclusion can be found by parity of reasoning in the decision of the High Court in *Harmon CFEM Facades (UK) Ltd v The Corporate Officer of the House of Commons* [1999] All ER (D) 1187³ at paras. 160 – 162, which concerned the status of the Corporate Officer of the House Commons (a body equivalent to the Assembly Commission) and the a claim of a failure to comply with European Directives and the Public Works Contracts Regulations 1991. The Court stated (at para. 162) that “the defendant is plainly a public authority for it was created by Parliament to serve the House of Commons which is obviously a public body”. On a similar basis the Assembly is a public body and those who hold office as members such a public body are the holders of a public office.
14. For these reasons, I am of the opinion that an AM is the holder of a public office.

Huw Williams
Chief Legal Adviser
31.03.202

Annex

Dear Sir John,

³ <https://www.bailii.org/ew/cases/EWHC/TCC/1999/199.html>

We have done some research here, and unfortunately there is no single accepted definition of 'holder of a public office', or other formulations such as 'public office holder'.

The Committee lawyer advises that an offence of misconduct in public office is a common law offence, which has been subject to a reasonable body of case law, although typically only used where an alternative statutory offence is not available:

- There are four elements to the offence, set down in *Attorney General's Reference (No 3 of 2003)* [2004] EWCA Crim 868. A public officer acting as such.
- Wilfully neglects to perform his duty or wilfully misconducts himself.
- To such a degree as to amount to an abuse of the public's trust in the office holder.
- Without reasonable excuse or justification.

Although the courts have not made any definitive statement as to what is a public officer, they have given some general guidance. In *R v Bembridge (1783)* 3 Doug KB 32, the role was defined as "an office of trust concerning the public, especially if attended with profit ... by whomever and in whatever way the officer is appointed". In *R v Whitaker (1914)* KB 1283, the court said "a public office holder is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public."

In *R v Belton [2010]* WLR (D) 283, the defendant was an unpaid voluntary member of the Independent Monitoring Board for Prisons. The Court of Appeal held that remuneration was not an indispensable requirement for the holding of a public office, or for liability to prosecution for the offence of misconduct in a public office.

The [Equality and Human Rights Commission: Code of Practice on Employment \(2011\)](#) reflects [section 50\(2\) of the Equality Act 2010](#) stating at paragraph 11.35:

"A public office holder is a person who is appointed by a member of the executive or whose appointment is made on the recommendation of, or with the approval of, a member of the executive or either Houses of Parliament, the National Assembly for Wales, or the Scottish Parliament."

Halsbury's Laws of England, Tort (Volume 97 (2015)), 11. Public Authorities, at para. 808 dealing with the tort of misfeasance in public office sets out in footnote 2:

“Public officer’ includes a public body: *Three Rivers District Council v Bank of England* (No 3) [2003] 2 AC 1 at 142, [2000] 3 All ER 1 at 8, HL, per Lord Steyn; *Three Rivers District Council v Bank of England* (No 3) [2001] UKHL 16 at [126], [2003] 2 AC 1 at [126], [2001] 2 All ER 513 at [126] per Lord Hutton. See also *Henly v Mayor and Burgesses of Lyme* (1828) 5 Bing 91 at 107–108 per Best CJ; *Dunlop v Woollahra Municipal Council* [1982] AC 158, [1981] 1 All ER 1202, PC; *Jones v Swansea City Council* [1990] 3 All ER 737, [1990] 1 WLR 1453, HL (local authority exercising private law functions as a landlord). A public body may also be liable vicariously for the misfeasance of its employee: *Racz v Home Office* [1994] 2 AC 45, [1994] 1 All ER 97, HL.”

There are various specific statutory definitions which reflect the general approach set out above, such as:

The Marine and Coastal Access Act 2009

322 Interpretation

(1) In this Act—

.....

“public authority” means any of the following—

- (a) a Minister of the Crown;
- (b) a public body;
- (c) a public office holder;

“public body” includes—

.....

“public office holder” means a person holding any of the following offices—

- (a) an office under the Crown;
- (b) an office created or continued in existence by a public general Act or by devolved legislation (see subsection (3));

(c) an office the remuneration in respect of which is paid out of money provided by Parliament or a devolved legislature (see subsection (3));

.....

(3) For the purposes of the definition of “public office holder” in subsection (1)—
“devolved legislation” means legislation passed by a devolved legislature;

“devolved legislature” means—

- (a) the Scottish Parliament;
- (b) the National Assembly for Wales;
- (c) the Northern Ireland Assembly.

Hope this is helpful,