

Agenda – Standards of Conduct Committee

Meeting Venue:

Committee Room 4 – Tŷ Hywel

Meeting date: 24 April 2018

Meeting time: 09.30

For further information contact:

Meriel Singleton

Committee Clerk

0300 200 6565

SeneddStandards@assembly.wales

1 Introductions, apologies, substitutions and declarations of interest

(09.30)

2 Code of Conduct – Review

(09.30 – 10.00)

(Pages 1 – 14)

SoC(5)–08–18 Paper 1 – National Assembly for Wales Dignity and Respect Policy (draft)

SoC(5)–08–18 Paper 2 – National Assembly for Wales Dignity and Respect Policy – Accompanying Guidance on inappropriate behaviour (draft)

3 Consider reports from the Commissioner for Standards in accordance with Standing Order 22.1(i)

(10.00 – 10.30)

(Pages 15 – 89)

SoC(5)–08–18 Paper 3 – Report 01–18 under Standing Order 22.9

SoC(5)–08–18 Paper 4 – Report from Sir John Griffith Williams QC under paragraph 8.6 of the procedure for dealing with complaints against Assembly Members



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Report 01-18 to the Assembly under Standing Order 22.9

April 2018



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Report 01-18 to the Assembly under Standing Order 22.9

April 2018



About the Committee

The Committee was established on 28 June 2016 to carry out the functions of the responsible committee set out in Standing Order 22. These include:

- the investigation of complaints referred to it by the Standards Commissioner;
- consideration of any matters of principle relating to the conduct of Members;
- establishing procedures for the investigation of complaints; and
- arrangements for the Register of Members' interests and other relevant public records determined by Standing Orders.

Committee Chair:



Jayne Bryant AM

Welsh Labour
Newport West

Current Committee membership:



Gareth Bennett AM

UKIP Wales
South Wales Central



Paul Davies AM

Welsh Conservative
Preseli Pembrokeshire



Llyr Gruffydd AM

Plaid Cymru
North Wales

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Recommendations

Recommendation 1. The unanimous decision of the Committee is to recommend to the Assembly, in accordance with 7.12(vii) of the Procedure for Dealing with Complaints against Assembly Members, that a breach has been found and that the Member should be sanctioned under Standing Order 22.10 (i) and (iii). The Committee agreed that the Member should be censured and excluded from Assembly proceedings for the period of seven calendar days immediately after this motion is agreed.....Page 10

1. Introduction

1. The terms of reference of the Standards of Conduct Committee (the Committee) are set out in Standing Order 22.¹ In accordance with functions set out in Standing Order 22.2 the Committee must:

“investigate, report on and, if appropriate, recommend action in respect of any complaint referred to it by the Commissioner for Standards.”²

2. This report is made to the Assembly under Standing Order 22.9 and paragraph 8.1 of the Procedure for Dealing with Complaints against Assembly Members³ (the Procedure), in relation to a complaint made against Michelle Brown AM.

3. The report from the Commissioner for Standards (the Commissioner) on his investigation of the complaint is attached at Annex A. It sets out the details of the complaint and the findings of the Commissioner’s formal investigation.

4. This report sets out the details of the complaint and the way in which the Committee arrived at its recommendation.

5. Jayne Bryant AM, Standards of Conduct Committee Chair, absented herself from all Committee deliberations relating to this complaint under Standing Order 22.5. One of the complainants, Hannah Blythyn AM, submitted a complaint on behalf of the Labour Group in the Assembly, in her then role as Chair of the Labour Group, which includes Jayne Bryant AM. It was agreed that Paul Davies AM should act as temporary Chair for the course of the deliberations.

¹ Standing orders

² Standing order 22.2(i)

³ The National Assembly for Wales’ Procedure for Dealing with Complaints Against Assembly Members

2. Consideration of the Complaint

6. The complaint alleged that the Member concerned failed to comply with paragraph 4 (b), of the Code of Conduct for Assembly Members, which states:

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

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, 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.”⁴

7. In this instance the Commissioner concluded the Member concerned used racist and discriminatory language regarding a Member of Parliament during a telephone conversation with her former Senior Advisor Nigel Williams on 14 May 2016. A recording of a telephone call was released to the Daily Post newspaper by Nigel Williams in which the Member concerned referred to Chuka Umunna MP as a ...⁵ coconut. During the weekend of 22-23 July 2017 and the week of 24 July 2017, the press, in particular the Daily Post and the Western Mail, reported on the conversation and the part of the recording regarded as newsworthy was made available on the press websites.

8. The Commissioner found that the use of the term coconut in this instance fell below the standard of conduct required of Assembly Members to maintain and strengthen the public’s trust and confidence in the integrity of the Assembly and therefore brought the Assembly into disrepute.

9. The Committee met on Tuesday 28 November 2017 to consider the report of the Commissioner. The Committee was satisfied with the Commissioner’s report and noted that the Member concerned had indicated she intended to send further written evidence and make an oral representation to the Committee.

⁴ Code of conduct

⁵ Redacted swear word

- 10.** The Committee received the additional evidence from the Member concerned on 4 December 2017. In addition to this, the Committee received additional written evidence from Neil Hamilton AM, (2 January 2018) who was nominated as the Member's advisor.
- 11.** The Committee met again on Tuesday 16 January 2018 to consider the further written information received. The Member and her advisor attended the meeting on 16 January 2018 to provide oral evidence to the Committee.
- 12.** At the meeting on 16 January 2018, the Member concerned confirmed that there were no concerns in relation to the factual accuracy of the Commissioner's report.
- 13.** The Committee agreed its report in respect of this complaint on Tuesday 23 January 2018.

Committee's Consideration of its Decision

- 14.** The Committee undertook its inquiry in line with its responsibility set out under Standing Order 22.2(i).⁶
- 15.** In considering whether a breach took place, the Committee reviewed the information within the Commissioner's report; the Commissioner's opinion that a breach had taken place and the evidence submitted both in writing and orally by the Member concerned and her advisor.
- 16.** In a written statement, the Member concerned stated that she made the comments during a private and personal conversation between two friends and party colleagues and did not know that the conversation was being recorded.
- 17.** In her initial written response to the Commissioner, dated 15 November 2017, the Member concerned has acknowledged that

“in private I do swear and if anyone is offended by my use of the word ‘...’⁷ I am sorry. However, I do not apologise for the using the verbal short-cut ‘coconut’”.⁸

- 18.** The Committee noted that in her initial submission to the Commissioner the Member concerned did not consider that her actions constituted a breach of the code of conduct.⁹

⁶ Standing order 22.2(i)

⁷ Redacted swear word

⁸ Statement of Michelle Brown AM, 15 November 2017

19. The Committee also noted the arguments put forward by the Member concerned and her advisor that this was not a racist term, but instead a socio-political point. However, the Committee also notes that the submission from the Member's advisor does accept that this can be considered a term of racial abuse stating:

(5) Insofar as the word "coconut" in this specific context is a term of racial abuse, it is at the lowest level of severity.¹⁰

20. The Committee has concluded that while the Member is entitled to make the socio-political point made, the term used in this instance was a term of racial abuse, and as such utterly unacceptable.

21. The Committee noted that this was a private conversation which was covertly recorded. However, we are in agreement with the Commissioners view that the code of conduct applies to Members at all times, in their public and private lives, and his assertion that:

"...it is not realistic to say that the conversation was private and personal and that Ms Brown was not speaking as an Assembly Member (see paragraph 14 of her statement) as she was discussing as an Assembly Member the terms of employment of a person whom she was considering employing in her office as an Assembly Member."¹¹

Having reviewed the report from the Commissioner for Standards and the additional evidence from the Member concerned, the Committee finds that a breach of the Code of Conduct has taken place by Michelle Brown AM in relation to bringing the Assembly into disrepute.

Committee's Recommendation - Sanctions available.

22. The Committee considers that a breach by any Assembly Member is a serious matter. The reputation of the National Assembly for Wales as an institution, and the public's trust and confidence in it, rely upon Members demonstrating integrity and leadership by their actions.

23. The Committee agreed that the use of such language is below the expectations of an Assembly Member and that racism has no place in society.

⁹ Paragraph 15, Statement of Michelle Brown AM, 15 November 2017

¹⁰ Statement by Neil Hamilton AM, page 10

¹¹ Paragraph 27, Commissioner for Standards Formal Report

24. The Committee notes that although the Member did not apologise in her initial written statement to the Commissioner, she did apologise for any offense her words may have caused in her additional written response.

25. In coming to its conclusion, the Committee noted that this was the first time the Member had been subject to a complaint report under Standing Order 22.2 and that the Member used the term in a private conversation with somebody she considered a friend. Nevertheless, the Committee concluded that the use of a racist term is a severe breach of the code of conduct and therefore, that a sanction should be recommended. In agreeing the sanction, the Committee considered the mitigating factors referenced above and reached a unanimous decision.

Recommendation 1. The unanimous decision of the Committee is to recommend to the Assembly, in accordance with 7.12(vii) of the Procedure for Dealing with Complaints against Assembly Members, that a breach has been found and that the Member should be sanctioned under Standing Order 22.10 (i) and (iii). The Committee agreed that the Member should be censured and excluded from Assembly proceedings for the period of seven calendar days immediately after this motion is agreed.

26. A copy of this report was provided to the Member concerned, who was also notified of her right to appeal under section 8 of the procedure.¹²

27. Paragraph 8.1 of the agreed procedure, gives the Member concerned 10 working days to submit an appeal to the Llywydd. The Member concerned appealed on 5 February 2018. In accordance with the procedure, the Llywydd appointed an independent legally qualified person (Sir John Griffith Williams QC) to consider the appeal. Sir John Griffith Williams QC dismissed the appeal on 17 April 2018, and a copy of his report, setting out his reasons, was laid on 18 April 2018.

28. The temporary Committee Chair has tabled a motion (in accordance with Standing Order 22.11 and paragraph 9.1 of the procedure) calling on the Assembly to endorse the Committee's recommendation.

¹² The National Assembly for Wales' Procedure for Dealing with Complaints Against Assembly Members

Matters arising from this Complaint

29. This complaint highlights an important point that Assembly Members are governed by the Code of Conduct in both their public and private lives, and that the public have every right to expect that as AMs we adhere to the high standards set out in the Code at all times.

30. The Committee was concerned that the nature of the complaint made by the Chair of the Labour Group on behalf of the Group meant that there was no Labour representative involved in the complaint process. The nature of the Standards of Conduct Committee role is quasi-judicial and gains strength from all parties being represented. The complaints system in Wales as established means that a complaint made by a number of people carries no more weight over those made by an individual. Therefore, we would not expect to see complaints being made by party groups in this way again, as it has a detrimental impact on the process.

31. The Committee was also concerned that information relating to the complaint made by Hannah Blythyn AM was released to the Daily Post at the point of submission to the Commissioner for Standards.¹³ The complaint process should be confidential at all times until the Commissioner and the Committee have reached a conclusion and the process should not be impeded by releasing information to the media or used for political advantage.

¹³ www.dailypost.co.uk/news/north-wales-news/ukip-am-reported-assembly-watchdog-13370979Or

Annex A – Report from the Commissioner for Standards

From: Sir Roderick Evans, Commissioner for Standards

To: Standards of Conduct Committee

FORMAL INVESTIGATION REPORT

Michelle Brown AM

The Complaints

1. On Friday 21st July 2017 newspapers carried a report of a telephone conversation between Michelle Brown AM and her former Senior Adviser Nigel Williams in which Ms Brown referred to Chuka Umunna MP as a “coconut”. A recording of the telephone call, or perhaps parts of it, had been released to the Daily Post by Nigel Williams. Over the weekend and into the following week follow-up reports featured in the press, in particular the Daily Post and Western Mail, and the part of the recording regarded as newsworthy was made available on press websites.
2. The passage is as follows:

“I don’t say this lightly, right, but Chuka Umunna is a fucking coconut. He’s got, he’s got as much understanding of an ordinary black man’s experience as I have because he may be black but his mother or father was, was British from a very, very influential family. He is an absolute coconut; black on the outside, white on the inside and Barack Obama is exactly the same.”
3. Mr Williams was quoted as being “appalled” by her comments.
4. I received three complaints that Ms Brown’s remarks were racist and discriminatory. The complainants are:
 - (i) Hannah Blythyn AM who wrote in her capacity as Chair of the Labour Group in the Assembly;
 - (ii) Leighton Andrews;
 - (iii) Dave Cross;Copies of those complaints are attached to this report. Ms Blythyn also sent me a copy of an audio file of the passage set out at paragraph 2 above.
5. On 31st July I wrote to Ms Brown. I sent her copies of the complaints, a copy of the audio file and asked Ms Brown for her response to the complaints.
6. On the same day I wrote to Nigel Williams to tell him that I was making enquiries relating to a conversation he had had with Ms Brown a recording of part of which he had released to the press. I asked him for the date of the conversation, the circumstances in which it came to be recorded and

released to the press and for “an audio file of an unredacted version of the whole conversation”.

7. On 8th August Ms Brown wrote to me agreeing that she had made the comment which was the subject of the complaints. She pointed out that she had not heard a full recording of the conversation, had not been aware that the private conversation had been recorded and had not consented to its being released to the press.
8. I was satisfied that the requirements of paragraph 3.1(i)-(vi) of the Procedure for Dealing with Complaints against Assembly Members had been fulfilled and that the complaint was admissible. Accordingly, I moved to the formal investigation stage.

The Investigation

9. Following Mr Williams’ initial response to my letter of 28th July in which he asked me to “formally identify” the conversation about which I was enquiring he responded substantively on 17th August by way of a twelve page letter. Much of that letter dealt with matters relating to an on-going employment dispute between him and Ms Brown and it is necessary for the committee to know a little of the chronology of that matter.
10. The telephone call which is the subject of the present complaints took place on the morning of Saturday 14th May 2016. Mr Williams phoned Ms Brown and the discussion focussed on the possibility of Ms Brown employing Mr Williams as a member of her Assembly staff, the kind of work he might do and the level or grade at which he might be employed. A transcript of the conversation has been prepared by Ms Brown from the recording supplied by Mr Williams. It is referred to in her statement which, together with the transcript, is attached to this report.
11. Following this conversation Ms Brown employed Mr Williams as an Adviser and his employment ran from 11th May 2016. After a probationary six month period Mr Williams’ employment was confirmed on 11th November 2016 but soon thereafter the relationship between them broke down and Mr Williams was suspended from his post. An internal enquiry was held which considered the grounds of Mr Williams’ suspension and a list of grievances which Mr Williams raised against Ms Brown. On 12th May 2017, following the conclusion of the enquiry, Mr Williams was dismissed from his post. He appealed against his dismissal but his appeal was rejected on 8th June 2017.
12. My latest information (19th October 2017) on the status of the employment dispute is that “the employment matter is now subject to proceedings

which may lead to a full employment tribunal hearing in due course.” This was received from Mr Williams’ wife in a context to which I shall refer later.

13. During the period when the internal enquiry and the subsequent appeal were proceeding Mr Williams wrote to me to complain about Ms Brown. The majority of the matters about which he complained were issues he had raised in the employment dispute and were the subject of that enquiry or were complaints about the process being followed. I declined to intervene in the employment dispute process. He made one free-standing complaint into which I made preliminary enquiries and, having done so, I was satisfied that there was no substance to that complaint.
14. In his letter of 17th August Mr Williams states that at the Appeal Hearing on 8th June “once again no-one was interested in the truth, despite the overwhelming evidence before them. Would you not expect then, someone in the situation where they have not been listened to seek to talk with people who have listened – i.e. the press in this case?” He says that his disclosure of Ms Brown’s comments was in the public interest and that she made them freely and without any prompting.
15. Sent with the letter of 17th August were audio files of recordings of extracts of the phone conversation which had attracted press attention and it was not until the end of the month that an audio file of the full recording was sent. This audio file is available for the Committee to listen to. On 31st August that file was made available to Ms Brown for her to listen to it and to make any further comments. Mr Williams also claimed that Ms Brown was aware that his phone calls were being recorded and he sent another audio file of a different phone call between Ms Brown and him which he claimed supported this assertion. This too was made available to Ms Brown.
16. On 22nd September Ms Brown provided me with further comments. She stated that she had no idea that Mr Williams was recording telephone conversations or that he was recording telephone conversations with her. She pointed out, correctly, that the recording supplied by Mr Williams and relied on by him as demonstrating that she was aware that he was recording phone calls does not do so.
17. On 3rd October I interviewed Ms Brown by which time she had prepared the transcript of the telephone conversation. She queried whether the recording of the telephone call had been edited as there appeared to be interruptions in the recording during part of the passage complained about. She did not resile from her position that she had said the words complained about but wondered whether the recording had been edited to excise words demonstrating Mr Williams agreeing with her.

18. Following this meeting with Ms Brown, my office tried to contact Mr Williams to obtain an assurance that the recording he had supplied me had not been edited. After a short delay, the response received from Mr Williams wife was that he was in France and telephone reception in the area in which he was staying was difficult. Further requests produced the response on 19th October that as there may be a full employment tribunal hearing in due course (see paragraph 12 above) Mr and Mrs Williams had been advised “that at the moment Nigel should not submit his statement or other linked information to you as this contains information which will certainly be used in those proceedings and therefore may prejudice matters in his case.” Despite a request pointing out that the query raised permits of a yes or no answer and that the recording does not form any part of a complaint which was raised in the employment dispute no response has been received.
19. On 15 November 2017 Ms Brown supplied me with a signed statement which confirmed the content of her earlier letters and our conversation of 3rd October and in which she states that she does not consider that she has breached the Code of Conduct for Assembly Members in any way.

Facts Found by the Commissioner

20. The passage complained of, and in particular the reference to Chukka Umunna as a “coconut”, were spoken by Ms Michelle Brown.
21. The conversation, of which this passage is part, was a private conversation between two close colleagues, if not close friends. At the time of the conversation neither party anticipated that their words would end up in the public domain.
22. Although Mr Williams asserts that Ms Brown knew that he was recording telephone conversations there is nothing to demonstrate that and the recording upon which he relied for support does not do so. I accept Ms Brown’s assertion that she had no idea that Mr Williams was recording telephone calls between them.
23. The recording of the conversation, or part of it, was released to the press without the consent of Ms Brown.
24. Despite Mr Williams’ claim that he was appalled by the comments made by Ms Brown and that he released the recording or part of it to the press in the public interest, there is no indication in the recording that he demonstrated any concern or discomfort with them. Thereafter, he accepted employment with Ms Brown and when steps were taken to terminate his employment he fought them.

25. Despite efforts made to enable me to do so, I cannot assure the Committee that the recording, as we now have it, has not been edited.
26. The point which Ms Brown was making, namely, that despite his heritage Chukka Umunna, because of a privileged upbringing, had no greater understanding of the life issues which an ordinary member of the BME community faces than she has is a point which, whether one agrees with it or not, is within the range of points that a politician is entitled to make.
27. However, all that said, the fact remains that Ms Brown in making her point resorted to using a term of racial abuse and although this conversation was a private one it was, nevertheless, between a Member of the National Assembly and a person whom she was considering employing and involved discussions about the terms upon which he might be employed. The Code of Conduct for Assembly Members applies to Members at all times even in their private lives and when not engaged on matters arising out of membership of the Assembly. However, in this instance it is not realistic to say that the conversation was private and personal and that Ms Brown was not speaking as an Assembly Member (see paragraph 14 of her statement) as she was discussing as an Assembly Member the terms of employment of a person whom she was considering employing in her office as an Assembly Member.

Conclusion

28. I am satisfied that using the term “coconut” falls below the standard of conduct required of Assembly Members to maintain and strengthen the public’s trust and confidence in the integrity of the assembly and its conduct which brings the assembly into disrepute contrary to paragraph 4b of the Code of Conduct for Assembly Members.
29. In my view these complaints do not raise any new issue of general principle.

Requirements under the Procedure for Dealing with Complaints

30. I confirm that the Member concerned and the three complainants have been provided with a draft of my report and given the opportunity to comment on its factual accuracy.
31. On 20th November Ms Brown made the following comments on the report. They do not appear to me to amount to identifying factual inaccuracies and perhaps might more appropriately have been included in Ms Brown’s statement but I set them out in full below so that the Committee can consider them.

“Paragraph 11 & 24: Williams did not mention my comments about Umunna in his grievance or at any other time before he leaked the recording to the press. Williams also chaired a meeting in Northop on 8th July 2017 calling for my expulsion from the party. After the meeting a petition, voted for by those at the meeting including Williams, was submitted to the NEC calling for my expulsion from the party but the petition made no mention of my comments about Umunna.

Paragraph 12: Williams made a claim at the tribunal on the 11/10/17 under the whistle blowing legislation. The claim does not relate to my Umunna comments but to the recruitment of Richard Baxendale. I am not sure how much detail you require, so please let me know if you need any further information about this.

Paragraph 14: The appeal submitted by Williams was considered and rejected by a member of the Assembly staff.

Paragraph 24: Williams was laughing and agreeing in the background leading up to the comments.”

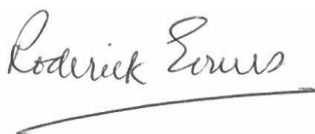
32. The complainants were asked to notify me of any factual inaccuracies in the report by Tuesday 21st November. Leighton Andrews replied on 19th November that he had no comments to make. The other two complainants have not responded.

Attachments

33. I append to this report:

- (i) the three letters of complaint
- (ii) the signed statement of Michelle Brown AM dated 15 November 2017
- (iii) the transcript of the telephone conversation prepared By Michelle Brown AM
- (iv) the audio file of the recording of the telephone conversation.

Sir Roderick Evans



22 November 2017

From: Dave Cross <mailto:david.a.cross@gmail.com>
Sent: 22 July 2017 07:16
To: Standards Commissioner <Standards.Commissioner@assembly.wales>
Subject: Complaint: Michelle Brown

I wish to make a formal complaint regarding the recent reports of Michelle Brown's racism.

The UKIP AM has no further part to play in Welsh politics and devalues the whole Assembly.

<http://www.bbc.co.uk/news/uk-wales-politics-40688367>

<http://www.walesonline.co.uk/news/politics/ukip-am-calls-chuka-umunna-13368693>

Regards,
David Cross.

From: Leighton Andrews [<mailto:leighton4labour@gmail.com>]

Sent: 22 July 2017 12:54

To: Standards Commissioner <Standards.Commissioner@assembly.wales>

Subject: Formal complaint against Michelle Brown AM

Dear Commissioner,

I wish to make a formal complaint against the conduct of Michelle Brown AM and the specific remarks she made which have appeared on tape at this website:

<http://www.dailypost.co.uk/news/north-wales-ukip-am-calls-13368297> (although some of the profane language appears to have been 'bleeped' out).

Her remarks are racist, discriminatory and bring the National Assembly into disrepute. I believe that they consequently breach the code of conduct for Assembly Members.

Yours sincerely,

Leighton Andrews

Twitter @leightonandrews

Facebook Page: [Facebook.com/lifeafterpolitics](https://www.facebook.com/lifeafterpolitics)



Commissioner for Standards
National Assembly for Wales
Cardiff Bay
CF99 1NA

21/07/2017

Dear Commissioner,

I have been made aware of a series of overtly racist comments made by Michelle Brown AM which I believe to be a clear breach of the code of conduct for Assembly Members.

I am writing to ask you to investigate these as a matter of urgency, given the highly offensive and discriminatory nature of these distressing remarks.

I enclose below a transcript of some of the most offensive remarks, and attach an audio recording of the relevant conversation, which has come to light via a journalist.

Transcript:

*"I don't say this lightly right but Chuka Umunna is a f***** coconut. He's got, he's got as much understanding of an ordinary black man's experience as I have. Because he may be black but his mother or father was, was British from a very, very influential family. He is an absolute coconut, black on the outside, white on the inside and Barack Obama is exactly the same." (1 minute 10 seconds)*

I believe that these comments constitute a clear breach of the Code of Conduct for Assembly Members including the following section:

"4 (b) Integrity: ... 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 refrain from any action which would bring the Assembly, or its Members generally, into disrepute."



I would ask you to look into this matter at the earliest possible opportunity.

Yours sincerely,

A handwritten signature in black ink that reads "Hannah". The signature is written in a cursive style with a long, sweeping underline.

Hannah Blythyn
Chair of the National Assembly Labour Party

Statement of Michelle Brown AM

1. Since the Assembly elections on 6th May 2016 I have been an Assembly Member for the North Wales Region.
2. I acknowledge that I am aware of the Code of Conduct for Assembly Members and in particular, in relation to these complaints, of the requirement to comply with paragraph 4b of the Code which reads:
“.....
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 refrain from any action which would bring the Assembly, or its Members generally, into disrepute.
.....”
3. On or about the 23rd July 2017 a man called Nigel Williams released to the North Wales Daily Post part of a recording of a telephone conversation I had had with him and in that conversation I said:
“I don’t say this lightly, right, but Chuka Umunna is a fucking coconut. He’s got, he’s got as much understanding of an ordinary black man’s experience as I have because he may be black but his mother or father was, was British from a very, very influential family. He is an absolute coconut; black on the outside, white on the inside and Barack Obama is exactly the same.”
4. Following the publication of these comments the Commissioner for Standards received three complaints accusing me of making racist and discriminatory remarks and, thereby, bringing the Assembly into disrepute. I make this statement to put my making these comments into context and to refute the complaints made against me.
5. The telephone conversation, of which the passage complained about was part, took place on Saturday 14th May 2016. By that time I had known Nigel Williams for nearly eighteen months; he was the Chair of the Delyn Constituency UKIP Association and I was Chair of the neighbouring Alyn and Deeside UKIP Association. Nigel Williams was my most trusted friend and associate in the party.
6. He rang me early on the 14th May to discuss the possibility of my employing him in my office and during the conversation we discuss the role he might fill and the level of the post to which he might be appointed. In due course I appointed Nigel Williams to be my senior adviser and his employment was back dated to 11th May. I had no idea that Nigel Williams was recording the conversation.
7. During the conversation I mentioned a friend of mine who would set up our internet security and website. That friend lives in Stoke Central the MP for which was Tristram Hunt. People who pretend to be something they are not in order to make political capital disgust me and I commented that he was typical of the Labour Party - representing a working class area but he was the son of a peer, a public school boy and Oxbridge

graduate. Nigel Williams agreed saying “....they’ve got no idea of normal life, half of them”. I then made the comments set out above about Chuka Umunna who has been used by the Labour Party to try to demonstrate that they intimately understand the issues faced by the BME community and who was being used for that purpose in the EU Referendum campaign which was in full swing at the time of the conversation (I can provide evidence of this if required). My view was and is that Chuka Umunna’s African heritage was being used for political purposes when in reality, because of his upbringing, he had no greater understanding of the life issues which an ordinary member of the BME community faces than I have.

8. The term “coconut” is widely used amongst the BME community in precisely the context in which I used it. It is not racist or discriminatory; it is a shorthand term used to make a relevant socio-political point.
9. I attach to this statement a transcript which I have produced from the recording of the telephone call which the Commissioner for Standards provided me having first obtained it from Nigel Williams.
10. Although Nigel Williams claimed to the press that he was “appalled” by my comments, his assertion does not stand up to scrutiny. He accepted employment with me following this conversation and after a six month probationary period he accepted my offer to make his employment permanent from 11th November 2016. He can also be heard laughing in the background throughout my comments about Hunt and Umunna in the recording.
11. Towards the end of 2016 I had concerns about the way Nigel Williams was carrying out his duties. In particular, my concerns centred on his attempting to bring me into disrepute and his breaching his duty of confidentiality. I suspended him from duties and an internal enquiry was held into the dispute which existed between us. On 12th May 2017 I dismissed Nigel Williams from my employ. He appealed but his appeal was dismissed on 8th June 2017.
12. During the period when the internal review was being held Nigel Williams made numerous complaints against me to the Commissioner for Standards but the Commissioner found none of those complaints to be admissible. Therefore, by mid-June Nigel Williams had failed in all his attacks upon me.
13. On or about the 14th July 2017, David Soutter, a friend of Nigel Williams, told the National Executive Council of UKIP of the existence of this recording and said that if the party expelled me this recording would not be sent to the Daily Post. I am aware of this because I was told by a senior member of the party. The party refused to be blackmailed in this way and in due course the recording was released to the press without my consent. I am firmly of the view that Nigel Williams and David Souter, having once believed that if I were removed from my seat Nigel Williams would be able to be nominated to take my place in the Assembly and discovered that it impossible, now seek to secure my expulsion from the party (I can provide evidence of this if necessary) and my resignation. The recording was subsequently released to the press without my consent.

14. The comments complained of were made during a private and personal conversation between two friends and party colleagues. In private I do swear and if anyone is offended by my use of the word “fucking” I am sorry. However, I do not apologise for using the verbal short-cut “coconut”. I did not use that term in public and as this was a private phone call it was not used by me speaking as an Assembly Member; my words were recorded and released to the press without my consent and the motivation for the release was personal spite not a desire to further the public good. It is now some three months since the matter was placed before the public by Nigel Williams and there is no evidence that the Assembly or its members have been brought into disrepute.
15. I do not consider that I have breached the Code of Conduct for Assembly Members in any way.

Signed



Date

15/11/17.

Transcript of conversation between NW and MB (dated 14.05.17 according to the file name)

NW: Yeah, did I wake you up, I'm sorry.

MB: It's alright

NW: Look this thing[LINE BREAKS DOWN A LITTLE] I've just been out for two and half hours with the dogs, they dragged me out of bed [starts laughing]

MB: Well yes, the cats, well, Cernie dragged me out of bed about 6 o'clock this morning to give him some biscuits because he was hungry erm er

NW; Oh well, it's a nice morning, I've been out doing my walk and doing a few bits and pieces....I've just picked up this piece of paper now and looked at it, sorry not piece of paper, series of paper and obviously we didn't get a chat to chat last night so you want this....what what what obviously, there's a role I don't care what I do personally, I just want to ensure that UKIP do well, erm, er, so, er, erm, do we know what that might entail now or?

MB: Well, erm.....(says to herself, fucking hell...),

NW: Is it too early to say?

MB: I'm going to need some, I'm going need some, well, I mean, I've got Richard erm but I'm going to need somebody who has got experience dealing with....I mean the thing is, I mean, if you don't want a job with me, I'm not going to offend Nigel...

NW: No that's fine, I'd like to do it to be honest with you, because I think it would be good experience anyway to er er to do this really to be honest for me er an also pushes me on towards next time shall we say really and also, dare I say it, I think probably, I may be the right person in terms of all the people I know around North Wales...

MB: Exactly, exactly, I mean you know how to talk to people, you know, you know what to say, you're streets ahead of me in that way erm I think that I need erm someone who knows what they're doing basiscally...

NW: Essentially, I'll do what you need me to do, it doesn't have to necessarily be defined defined because you know I'm used to doing anything and everything really, so if there's something to do or go and even be your rep somewhere and talk, I'm happy to do that

MB: Yes

NW: That's not an issue, you can't be everywhere either, I understand that too, you know, so

MB: I'm, I mean I don't particularly want an office as such, that's gonna be, I don't want a door, a door that people have to knock on it or to make an appointment ...I want something with an open door so that people can just walk in

NW: Exactly, I mean obviously if you've got private appointments with people in terms of matters which are er er you don't really want obviously you need a place which is apart so that you can shut the door and talk to people about private matters but er in that you know, I think, that all AMs should be approachable anyway really because that's the way you know, a we find out what's going on and b we er we get votes because people start to see you, like you, like the party and then that helps everyone else then you know

MB: Yes

NW: So, er, er, so, so, so that's it, I mean I was looking at it, it's quite (laughs) it's weird isn't it as a form? I've just had a good look through it actually and I thought, "Oh my God" so, er, erm, what does that mean?

MB: Did you want full time or part time?

NW: That depends, er dare I say it, because it depends on what the role is and where it is.

MB: OK

NW: So, er, er and the reason I'm saying that

MB: It's up here for a start

NW: Well probably, I mean I'll work any hour of the day to be honest and you know my flexibility certainly untilI need to be able to get Alice to school until she's passed her test and then...

MB: Yes

NW: I will do my best to ensure that that's as quickly as possible really and once she's more mobile, then obviously I become more, more flexible then but I'm not

MB: The thing is it's like I've said to Richard, this isn't going to be exactly a 9 to 5 gig

NW: Well, that's exactly right, there'll be evenings in Lllangfni dare I say it of all places and stuff like that and I understand that and as long as I've got enough notice particularly in the afternoon, I'll just phone Alice and say go to your friends and I'll pick you up later or I'll see you tomorrow, so that's not an issue really, erm, so I can be er, as flexible as you would need me to be really and in fact I would prefer it that way really, where you know, like I've done for years with this business, sometimes we start at 8 o'clock in the morning, or since, doing the work, have a cup of coffee and then do a bit

more and then go out in the evening and do whatever really, so it's sort of, the 9 to 5 hours, there's nothing worse and of course, your job's going to be the same as an AM isn't it?

MB: Yes

NW: So you ...

MB: I think primarily it's going to be you and Richard, you and Richard are going to be first point of contact in the shop erm and then erm sort of dealing with constituents. I mean I've got David Soutter erm but he's kind of...I toyed with the idea of employing him but he's a national role kind of guy erm, I mean really, I mean David Soutter's not the right person to be dealing with constituents, erm, I think he's, I think he's quite good with the press and probably organising appointments and things with businesses and that but but dealing with constituents and doing the face to face stuff, no, no...

NW: Well, we'll be doing that...

MB: He's, he's, yeah, but the intention, the plan is, that, 'cos Neil Hamilton will pay, will be refunding me David's salary out of group funds..

NW: Right

MB: ...it's just that he can't be employed centrally by the group at the moment because, well, because of the reputation and stuff...

NW: ...yeah...

MB: I mean Richard gonna be, Richard's full time, I've had to take him on full time, he couldn't do part time, because he's got to leave his job, I'm going to need at least one person full time anyway, the constituency, erm, you're down as Casework Manager...

NW: Right

MB: David's kind of down as constituency manager but he's not really, you're gonna be, you're really constituency manager

NW: Yes

MB: David, inevitably gonna do, he's not going to have time to do the constituency stuff anyway...

NW: No

MB: ...and between the three of us, we should be able to pick up most things...

NW: Yen, exactly, it's a bit sort of jack of all trades isn't it, really..

MB: Yeh

NW: ...we're just going to do, just because you're defined as something doesn't mean you know that you can't take on other things and I would agree with you on that, you need to be able to do loads of stuff really, so I'm happy to do that, to be honest, you know...

MB: And the thing is, as well, even if we're not in the shop, we're still gonna be doing stuff outside the shop, so there is every justification for, I mean there isn't at the moment, well, actually there is, I mean I'm getting an absolutely unbelievable number of emails, Nigel...

NW: I can believe it. We've been getting them here and honestly now they've stopped and are going to you (laughs)

MB: Yeah, well, they're coming into the personal account and they're coming through my Assembly account as well, nobody's got access to the Assembly account right now because obviously I can't give access to that..

NW: No..

MB: I'm having a bit of a nightmare giving David Soutter access to my outlook calendar, I'm going to have to speak to my friend Za Za about that, I'll bring Za Za in because she said she'll set up the internet security for us and our website...

NW: Right

MB: ...she's absolutely the best person to do that, I'd trust her with my life to do that, cos she does it for a living and she wouldn't, she wouldn't do anything to me, she wouldn't do, anything to us anyway, because I think she's er, all she needs to do is meet the UKIPpers up here and she'll be going to UKIP I think...

NW: (cannot make out what NW says here)

MB:... well, she says, she was saying before the election, cos when I first told her that I'd joined UKIP, she laughed, right and I was a bit offended by that and so I said, well, you know what I'm like Za Za, you've known me long enough to know, do you really think I'm the kind of person who would join a joke party, or join something that wasn't worth thinking about, you know, I'm a sensible rational, serious person and anyway, she's in Tristram Hunt's constituency in Stoke...

NW: Oh is she?

MB: She likes him, she thinks he's a nice guy, I think he's a twat but anyway...

NW: (laughs)

MB: ...well, I do, I can't bear him, he's just typical of the Labourite, the Labour party that, you know, he's representing a seriously working class area

NW: Well, a name like Tristram doesn't help...(laughs)

MB: a..and he's. No, his father's a lord, his father's lord somebody of Chesterton, his title is the honourable Tristram somebody of Chesterton, you know

NW: Yep

MB: They've not spent five minutes in Chesterton in the last twenty, thirty years

NW: No, that's right..you know

MB: He's a public school boy, Oxbridge, far back as fuck, he's like Chukka Ummuna. I'm sorry, I know it's a bad thing to say...

NW: that's exactly right, I mean they've got no idea of normal life half of them...

MB: I don't say this lightly, right, but Chukka Umuna is a fucking coconut, he's got, he's got as much understanding of an ordinary black man's experience as I have have...

NW: (laughs)

MB: because he may be black ...

NW: (laughs) yes

MB: ...but his mother or his father was, was British from a very, very influential family...

NW: (laughs) Yes, yes, I know

MB: He's

[recording is interrupted at 11.27 minutes in]

MB: he's black on the outside and white on the inside

[Recording has had a section cut] 11.31 minutes in plus dramatic change in tone by MB

MB: And Barack Obama's exactly the same.

[recording may have been tampered with at 11.33 minutes – sounds like a section has been

MB: I just wanted to ask you one more thing, I need to talk to you about salaries

NW: Yeh?

MB: I'm just opening the document that has the salary table on it

NW: Ok

MB: The Assembly lay out the salary [wobble in recording during first words but can be heard at 11.45 mins in] in a series of bands

NW: I'm aware of that, I've worked for the Assembly, so

MB: Ok, Ok, so you would be either erm, I can't afford to have two senior advisors, mind you then again I probably can because Neil's going to refund me from em, em, from the group funds for David Sutter, em, so I'm guessing that I'll get at least half of David Soutter's salary back from Neil em, because the way it's gonna work is that I'll lend David Soutter out to the group

NW: Yup

MB:... and then Neil's gonna repay me for the time he spends on group activities [interruption in recording]... keep the accounts straight now you're either a Senior Adviser or a band 1

NW: Yup

MB: The first paypoint for a senior adviser is £31733, em

NW: Yup

MB:... band 1 is £23583, there's a hell of a jump

NW: There is

MB: Well, em

NW: I think I'm worth 31 (laughs)

MB: Yes, well, I know, I know, this is it, because really, really you're a senior adviser just like David is, David's a group, a group employee

NW: Yes

MB: So, Neil's going to refund me from em, right that's the full time salary, so, so....

NW: Hello, hello, are you still there?

MB: I am still here, yep,

NW: Sorry, I thought you'd gone, there, the phone just did a pop, I thought you'd gone but you're there...

MB: Sorry, I'm working, I'm trying

NW: I'm happy to work full time, if you want me to work full time but if you initially you want to save some money, if you want me to work on a part time basis, at that salary then I'll do it

MB: Ok, you're going full time, then? Right ok. That makes sense, Nigel because really the constituency manager thing is gonna be, even if you're on a part time you'll end up being full time anyway because a it's the way you are and b that's the way it's gonna go

NW: Yah. Cos I will work, I work dawn to dusk now anyway every day of my life, I do (laughs)

MB: What I don't want to do is put you on a part time contract, employ somebody else and then not be able to move you up to full time

NW: Yep, yep

MB: So, the main people need to bags the funds now, em, I've got a maximum of 95 but I've also got to take into account the increments later but I'll have got rid of David by then

NW: Well, er, er, exactly, to be honest ...

MB: To be honest it sounds horrible saying that but he won't be on my budget then

NW: Yes, exactly, so

MB: So, I can probably, I need to, I'll, do my sums

NW: Yep

MB: Erm

NW: Well, I'll leave it with you (says something else that I can't hear)

MB: ...it's not a problem

NW: Ok

MB: Cos we've just had this, because we've just had this, because, they voted, they gave us a £10000 a year increase didn't they, em, so the salary is now £64000, so if need be I can always top up the salaries from that

NW: Yeah exactly, so er, erm, no that's fine

MB: Because I can move funds between the two erm, so yes, so I'll do my sums and see, and see if they'll let me do it

NW: But at the end of... you do that, I'll fill the papers in and I mean I'm around over the weekend, I'm around Monday, er and we'll meet whenever you need to meet really and chat and I can pass this paperwork

MB: I need to confirm the salary to the business unit on Monday perm and I'm employing Richard on the lowest band

NW: Ok

MB: em, because he's got no experience, he's got no qualifications for it, he's very much, I mean I discussed it with him last night, he's quite happy, erm even on the lowest band, just over 18000 he'll be on more money than he would be if he stayed doing what he's doing

NW: Exactly, so and of course very quickly, he'll get himself in a position where, for his own CV, you know, his employability in terms of you will go up as well, so he'll go up the back door really

MB: Yes

NW: So that's brilliant

MB: I can move him up to an appropriate band at the end of the year

NW: Yep

MB: Erm, but because of the increment Senior Adviser then ends up after 5 years on 38762, so that's not bad

NW: No, it's Pretty good...absolutely.....and that falls within all the

MB: These bindings are wrong really, they need a fourth band between senior adviser and band 1 because you've got a jumps, a jumps of 8000

NW: Righty o, I'll let you get on with your morning, if there's anything else you need to chat to me about, give us a ring, I'm only out and about and what have you and er,,if there's anything, I'll fill in this thing now, er and I'll speak to you when I meet you either tomorrow or Monday

MB: Yep, ok then

NW: Alright Michelle, have a good morning, take care, bye now.

MB: Bye

Annex B – Statement from Michelle Brown AM

Ty Hywel
Cardiff
CF99 1NA

4th December 2017

Chairman of the Standards Committee
National Assembly For Wales
Cardiff
CF99 1NA

Emailed to: SeneddStandards@assembly.wales

Dear Mr Chairman

I am writing to the committee with my additional response to the complaints made against me.

I acknowledge that I was an AM and should have had that in mind when I had the conversation with Williams. I was not aware that the conversation was being recorded, but nevertheless I should not have used the terminology I did.

I used a verbal short cut, believing it to be innocuous, to make a socio-political point which the Commissioner for Standards has acknowledged I was entitled to make. However, I should not have used those words. My language was unprofessional and crass and if I had considered my words properly before speaking, I would have said what I needed to say in a professional and civilised way.

Had I known or suspected the conversation was being recorded or would be disclosed to a third party, I would not have used any words that could be considered insulting or able to cause offence, as I have no desire to cause offence to anyone. I fully accept that I should have ensured there was no chance of causing offence, by not using the language I did. In my past there has never been any suggestion that I have made racially offensive comments.

I did not intend any slur on Mr Umunna's heritage or ethnicity and I particularly regret using the words I did since they have been perceived as such. I therefore sincerely apologise for the terms I used and any offense they have caused.

Yours faithfully

Michelle Brown AM

Annex C – Statement from Neil Hamilton AM, in advisory role to Michelle Brown AM

SUBMISSION BY NEIL HAMILTON AM TO THE STANDARDS COMMITTEE IN THE MATTER OF THE COMPLAINT AGAINST MICHELLE BROWN AM

1. I am concerned about the wider implications for Assembly Members of treating as admissible evidence the recording of a private and confidential conversation between two people which was
 - (a) clandestinely recorded
 - (b) deceitfully redacted
 - (c) maliciously published
 - (d) in revenge for dismissal for gross misconduct (including breach of confidence), and which has
 - (e) led to complaints which appear to be politically motivated.

PRIVATE AND CONFIDENTIAL CONVERSATION PUBLISHED BY MR WILLIAMS

2. The word “coconut” was uttered in a conversation which Mr Williams and Ms Brown which clearly was and both regarded as private and confidential at the time.
3. The Commissioner finds (vide para 21) that the conversation complained of was:

“between two close colleagues, if not close friends. At the time of the conversation, **neither party anticipated that their words would end up in the public domain.**”

In those circumstances, it is difficult to see how the material words could possibly have brought the Assembly into disrepute, unless Mr Williams himself was offended by them. The Commissioner found by inference that he had not been so offended (vide para. 24)

4. Ms Brown’s evidence is that Mr Williams agreed enthusiastically with what she said. Furthermore, Mr Williams appears to have covertly redacted the recording to remove sections apparently showing him agreeing with Ms Brown.

Far from demonstrating that he was “appalled,” the recording shows Mr Williams laughing with Ms Brown. Furthermore, he subsequently sought and accepted a job as her Chief of Staff.

DATE OF RECORDING

5. It is material that it occurred on 14 May 2016, just a few days after Ms Brown’s election and before she had absorbed the Code of Conduct. It is not widely appreciated that the Code may be interpreted as covering private and confidential conversations of AMs.

There should, in my opinion, be a very high threshold before invoking its provisions to impose punishment for words spoken in a private and confidential setting.

Clause 3(1)(v) of the Code states that to be admissible a complaint must be made “*within one year from the date when the complainant could reasonably have become aware of the conduct complained about.*” The purpose of such a limitation period is to avoid stale complaints.

As Nigel Williams did not leak the recording until over a year after it was made, the limitation provision is not strictly relevant. However, I submit that the Committee should bear in mind the lapse of time and the isolated nature of the potential breach of the Code by Ms Brown. There is no evidence of any other potentially offensive expressions used publicly or privately by Ms Brown either before or in the eighteen months since.

POTENTIAL DAMAGE RESULTS FROM MR WILLIAMS’ MALICIOUS PUBLICATION NOT MS BROWN

6. Accepting, for the purposes of argument, that the word “coconut” in this context is a term of racial abuse (a decision which the Commissioner has not sought to justify), any damage to the Assembly’s reputation (of which no evidence has been produced) results not so much from Ms Brown’s private words but from Mr Williams’ publication of his clandestine recording.

NO EVIDENCE OF ACTUAL DAMAGE TO ASSEMBLY REPUTATION

7. Is there any evidence of damage to the Assembly’s reputation? None whatever, in my submission.

A report of the incident appeared on WalesOnline on 12 June 2017. By the latest update, 21 July 2017, it had attracted only 58 comments from 22

correspondents, some supportive of Ms Brown and others who are manifestly bigoted opponents of UKIP. I attach the complete print-out. But here is a sample of its anti-UKIP abuse:

fella1971: “the party for middle English racists is finished....”

Bluebird1982: “You’d think looking the way she does, you know, generational inbred look with the classic overbite features...with teeth like that you could flip her upside down and rake the garden.”

ChristopherWilliams: “United Kingdoms Ignorant People.”

Dafydd Williams: “Can’t we just throw these UKIP jokers out of the Assembly immediately?”

There is no evidence that the general public, as opposed to UKIP’s political opponents, is in any way bothered by the term “coconut.” If the Committee thinks otherwise, in my submission, it should produce credible evidence to justify its opinion.

8. AN ACT OF MALICE AND REVENGE

Nigel Williams sent the recording to the *Liverpool Daily Post* as an act of malice and revenge following

(a) his dismissal from Ms Brown’s employment for gross misconduct and

(b) the failure of an attempt by his confederate, David Soutter, to pressure UKIP into deselecting Ms Brown in the deluded hope that Mr Williams could replace her as an AM for North Wales (deluded because Mr Williams was not on the ballot-paper as one of the four UKIP candidates nominated by UKIP in North Wales).

9. In my respectful submission, this recording should not be admitted in evidence by the Committee because –

(a) It records a private conversation between “two people who were close colleagues, if not friends” – as distinct from unrelated members of the general public;

- (b) it was recorded by Mr Williams clandestinely and
- (c) was not intended at the time by either party to be released into the public domain;
- (d) it was covertly redacted by Mr Williams to disguise his agreement with the words he has complained of (which is a deception); and
- (e) published by him as an act of malice following his dismissal for breach of confidence (amongst other things).

VALIDATION OF DISREPUTABLE CONDUCT BY ASSEMBLY STAFF

10. There are clear risks for all Assembly Members in creating a precedent by treating this tainted evidence as admissible.

It creates a licence for employees and others to make secret recordings of conversations and meetings with Members for potentially malicious use in disputes and in acts of personal or political revenge. In particular, as regards employees, it must strike at the heart of the relationship of trust and confidence which ought to exist between Members and their staff. Do we really want to live in such a “Big Brother” society?

11. It is a basic principle of UK law that a litigant should come to court with “clean hands” and not profit by his wrong-doing, least of all where his complaint is malicious and he has tampered with the evidence to show himself in a better light. Mr Williams’ complaint is unmeritorious on those grounds.

12. Ms Brown had no idea that she was being recorded or that her unguarded words might be published to the world at large. She had no intention of causing public offence or diminishing the Assembly’s standing in anyone’s eyes.

LEGAL ISSUES AND CLANDESTINE RECORDINGS

13. The Committee should be aware of a number of legal issues associated with secret recordings, which may mean they are inadmissible as evidence or may otherwise carry an adverse consequence in Courts and Tribunals.

An AM is entitled to expect that her rights are no less respected in an Assembly disciplinary forum akin to a court or tribunal, especially where it has the power to recommend serious penalties, including exclusion and loss of earnings.

14. Relevant issues include:

- recording someone secretly may breach their human rights;
- secret recordings are sometimes allowed as evidence, but the party who made the recordings is penalised when the court is deciding who pays which legal costs;
- the party being secretly recorded might sue for breach of confidentiality;
- the recording may breach the other party's data protection rights (there is specific guidance in the Information Commissioner's Employment Practices Data Protection Code and CCTV code of practice);
- a recording of an employee may be a breach of the duty of mutual trust and confidence.

15. In deciding whether to admit secret recordings in evidence, two conflicting interests have to be reconciled. The Court of Appeal considered the arguments in *Jones v University of Warwick* [2003] 1 WLR 954.

In criminal cases, such evidence may be admitted to rebut false or exaggerated claims, the acceptance of which might lead to a miscarriage of justice. There is an obvious public interest in preventing false claims being asserted.

But that is a quite different situation from Ms Brown's case, where she does not deny using the words complained of but says that she never intended that they should be made public or cause offence, still less to damage the Assembly's reputation.

POLITICALLY-MOTIVATED COMPLAINT

Let us be frank. This complaint is made by political opponents: Hannah Blythyn AM (on behalf of the Labour Group) and Leighton Andrews. It seems likely from the tone of his complaint that Dave Cross is also politically motivated, although he provides no information on who he is or where he lives. No-one else has complained. In my submission, a large percentage of the population would not be offended by Ms Brown's use of the word "coconut" in the context in which it was used.

16. In passing, I point out that UKIP AMs are frequently the victims of derogatory abuse by other AMs e.g. Joyce Watson AM has described UKIP AMs as "rabid dogs" and Leanne Wood has falsely accused me of being a "holocaust denier" amongst other things. On neither occasion were they called to order by the Llywydd or DPO.

I have made no complaint about these abusive remarks as I think we should be adult enough to take such things in our stride. If the Committee takes a draconian view in Ms Brown's case, clearly, I shall have to consider making complaints against them and others.

LEGITIMATE POINT OF VIEW

17. The Commissioner has said that:

“the point which Ms Brown was making, namely that despite his heritage Chukka Umunna, because of his privileged upbringing, had no greater understanding of the life issues which an ordinary member of the BME community faces, is a point which, whether one agrees with it or not, **is within the range of points that a politician is entitled to make.**” (vide para. 26)

In my submission, whilst the context was obviously Mr Umunna's skin colour, Ms Brown's invective was not aimed at his race but his perceived hypocrisy. Had she used a gratuitous term of abuse like n****r, it would be quite different.

Whilst the use of the word “coconut” is disparaging, there was no connotation of racial inferiority. Indeed, according to the Oxford English Dictionary it is “black English” slang i.e. it originated in the BME community.

Is it racist for a black person to criticize another for being an “Uncle Tom?” (i.e. “a black person, especially a man, considered by other black people to be subservient to or curry favour with white people – a person who exhibits excessively deferential behaviour”).

What is the material difference between that and calling someone with ginger hair a “carrot-top” or making some other disparaging reference in private conversation to a person's looks such as weight, baldness, height etc? Are these also potentially to be treated with equal gravity?

I believe that normal people would judge as more repugnant the monitoring of AMs' private conversations as potential disciplinary matters. The nightmare world of “Thoughtcrime” beckons.....

18. Like it or not, the term “coconut” is widely used. The Collins English Dictionary defines it as follows:

“a black or Asian person who conforms to white culture at the expense of his or her ancestral culture, the idea being that, like a coconut, he or she is dark on the outside and white on the inside“

Collins English Dictionary. Copyright © HarperCollins Publishers

19. As recently as 24 August 2015, that pantheon of political correctness, *The Guardian*, published an article by South African black activist, Panashe Chigumadze, (copy attached) containing the following:

“I had already taken my first steps on the road to becoming a fully-fledged coconut, that particular category of “born free” black youth hailed as torchbearers for Nelson Mandela’s “rainbow nation” after the fall of apartheid; the same category of black youth that are now part of the forefront of new student movements calling for statues of coloniser Cecil John Rhodes to fall”, and for the decolonisation of the post-apartheid socio-economic order.

We all know what a coconut is, don’t we? It’s a person who is “black on the outside” but “white on the inside”. This term came into popular South African usage in apartheid’s dying days as black children entered formerly white schools. At best, coconuts can be seen as “non-white”. At worst, they’re “Uncle Toms” or “agents of whiteness”.

I’ve chosen to appropriate the term and self-identify as a coconut because I believe it offers an opportunity for refusal. It’s an act of problematising myself – and others – within the landscape of South Africa as part of the black middle class that is supposed to be the buffer against more “radical elements”.

Lecture given by Panashe Chigumadzi at Wits University, as part of the [Ruth First fellowship](#).

<https://www.theguardian.com/world/2015/aug/24/south-africa-race-panashe-chigumadzi-ruth-first-lecture>

[NOTE ON MS CHIGUMADZE

Panashe Chigumadzi was born in Zimbabwe and grew up in South Africa. Her debut novel Sweet Medicine (2015) won the 2016 K. Sello Duiker Literary Award. She is the founding editor of Vanguard Magazine, a platform for young black women coming of age in post-apartheid South Africa. A contributing editor to the Johannesburg Review of Books, her work has featured in titles such as The New York Times (USA), The Washington Post (USA),

Transition (USA), The Guardian (UK), City Press (SA), The Sunday Times (SA) and Die Zeit (Germany).

Prior to this, she was as a journalist for CNBC Africa, columnist for Forbes Woman Africa, and project executive to the Managing Director of the Africa Business News Group.

In 2015, she became a Ruth First Fellow. Having completed her Masters Degree in African Literature at the University of Witwatersand, she was the curator of Soweto's inaugural Abantu Book Festival, the first of its kind and magnitude for black readers and writers in South Africa's largest township, which took place in December 2016. In 2017 she was a resident of Iowa University's International Writer's Program.]

“GUILTY MIND” ESSENTIAL

20. In a criminal case, (“strict liability” offences like speeding excepted) the intention of the accused is crucial.

Generally, you cannot be convicted if you did not have a “guilty mind” i.e. intended the offence or it was the natural and ordinary consequence of an action (in this case, the words in their material context).

- (a) Clearly, Ms Brown did not intend to offend anyone by her words spoken in private conversation with Mr Williams.
- (b) There is no evidence that the word “coconut”, in this specific context, is regarded by ordinary people as so offensive as to bring the Assembly into disrepute.

21.

The Standards Commissioner is an independent advisor to the Committee, whose report should be treated with respect. But the Committee is entitled to question his judgments and to reach a different conclusion. Indeed, the existence of a system of appeals implies the possibility of disagreement with his judgments.

In my respectful submission, it is a matter for discretion whether to admit tainted evidence such as Mr Williams’ partially-redacted recording. Each case will turn on its merits and judges exercise discretion in the particular circumstances of each case. One judge might well differ from another, without undermining the general rule.

Where the detriment to the public interest from publication of the offending words exceeds the detriment to the accused's human or other legal rights, the discretion might be exercised to admit the evidence.

In my submission, this is not such a case, for the reasons stated above, which I summarise:

- (1) The conversation occurred within a few days of Ms Brown's election and before she was fully aware of the ramifications of the Code.
- (2) It was a private conversation of a general nature between friends and political allies in the same party, only part of which concerned a potential staff appointment.
- (3) Ms Brown was entitled to regard it as confidential and was unguarded in her use of language on that basis.
- (4) Any harm to the Assembly's reputation (as to which no evidence has been produced) resulted more from the unauthorised publication and subsequent political furore than the offending word itself.
- (5) Insofar as the word "coconut" in this specific context is a term of racial abuse, it is at the lowest level of severity (compare with an indisputable racially-derogatory word like "n****r").
- (6) The gravamen of the word in the specific context of the conversation was not "racial inferiority" but "hypocrisy", which the Commissioner accepts is "within the range of points a politician is entitled to make".
- (7) The public interest in maintaining Ms Brown's right to confidentiality in this case outweighs any harm done from using language which some (but far from all) might regard as racist. Had she used exceptionally abusive and derogatory terms stigmatising an entire race (e.g. "n*****r"), the opposite consideration would apply.

- (8) There is a public interest in maintaining the duty of trust and confidence between AMs and their staff, which is undermined by validating breaches, such as Mr Williams' clearly malicious actions in this case.
- (9) There is a clear public interest in maintaining freedom of speech and conscience, especially in conversations which are ostensibly private and this interest should be over-ridden only in cases of egregious harm to some other public interest.
- (10) It is not clear why some forms of abuse ("coconut") should be regarded as actionable but others not (e.g. "rabid dogs").
- (11) It is clearly a matter of opinion whether the term "coconut" in the context of this case "falls below the standard of conduct required of AMs to maintain and strengthen the public's trust and confidence in the integrity of the Assembly." The Commissioner is entitled his view but I and my group respectfully disagree. Too draconian an approach to such complaints is at variance with what is publicly acceptable to a substantial proportion of the people we represent.
- (12) In this instance, the Committee's decision will be seen by many as political rather than quasi-legal and this risks undermining the party consensus on confidence in the Assembly's Code of Conduct.

22. Finally, a submission on the Committee's sentencing powers:

Clause 3 of the Code obliges the Committee to have regard to the following considerations:

"In deciding what sanction(s) to recommend to the Assembly, the Committee will make a judgement based on the specific circumstances of the case in question. It will consider

- (a) the severity of the breach,
- (b) the extent to which it may have brought the Assembly into disrepute, and

(c) whether the case in question is a repeat offence, or
(d) shows persistent conduct which may be considered to show contempt for Assembly colleagues, the rules or the institution.

(e) The Committee will also take account of intent, i.e. whether a breach is deemed to have been committed intentionally or not, and

(f) whether any dishonesty or deceit is deemed to have been involved.”

23. CONCLUSION

(A) In my respectful submission, there has been no breach of the Code.

(B) If the Committee thinks otherwise and can justify its opinion, I submit that the breach is at the lowest level of severity.

There is no evidence of actual damage to the Assembly’s reputation.

It is an isolated case and there has been no repetition.

Ms Brown had no intention to breach the Code and there has been no dishonesty.

In the circumstances, Ms Brown should either be acquitted or receive the lowest possible sanction.

Finally, in principle, the Assembly should be loath to restrict AMs, as elected representatives of the People, in what they say or how they say it, especially in private conversation. The People should generally be the ultimate arbiters of taste, via the ballot box, not political opponents in the Assembly.

Certain limits on freedom of speech may be justifiable within the Assembly to maintain order and civility but attempts to control speech outside, especially in private conversation, are fundamentally oppressive and undemocratic.

It should be for the law, not a politically-constituted Assembly, to take action if the parameters of free speech outside it are thought to have been exceeded.

14 December 2017

Annex D – Record of Proceedings from Standards of Conduct Committee, 16 January 2018

09:44

Ystyried Adroddiadau'r Comisiynydd Safonau yn unol â Rheol Sefydlog 22.2(i): Sesiwn Dystiolaeth

Consider Reports from the Commissioner for Standards in accordance with Standing Order 22.2(i): Evidence Session

[1] **Paul Davies:** Okay. Good morning. So, if we go on to item 2 on our agenda, and that's an evidence session, can I welcome Michelle Brown and her adviser, Neil Hamilton, to the meeting? The purpose of this session, of course, is to give you an opportunity to give evidence to us regarding this complaint. And, just to advise you that, under paragraph 7.8 of the procedure for dealing with complaints against Assembly Members, a transcript of the oral hearing will be provided, which you'll be able to check for factual accuracy in due course. And I'd also advise you that the oral hearing, obviously, will not be transmitted. Can I also advise you, obviously, Mr Hamilton is here purely as an adviser, but we have no issue in him participating in the proceedings as well? And can I—? Before we go into questions, can I ask if you have any comments on the factual accuracy of the commissioner for standards' report? Are you happy with the accuracy of that report?

09:45

[2] **Michelle Brown:** Yes.

[3] **Paul Davies:** Yes. Okay. Can I also confirm if you are happy for us to accept Mr Hamilton's submission to us as your adviser?

[4] **Michelle Brown:** Yes, quite happy.

[5] **Paul Davies:** Okay. So, before we go into questions, can I perhaps invite you to give us a brief oral statement on the complaint and any comments you'd like to make before we go into questions?

[6] **Michelle Brown:** I've already commented in writing on my—what I said. You know, there was no intention to cause any offence to anybody. It was a private conversation, as I thought. It was disclosed out of spite, pure spite, not out of concern for the public interest. I think Neil has—. I think I'll hand over to Neil.

[7] **Neil Hamilton:** With your permission.

[8] **Paul Davies:** Mr Hamilton, yes, of course.

[9] **Neil Hamilton:** Well, there's no dispute that the term 'coconut' used in this context was a term of abuse. I argue that it wasn't a term of racial abuse, because it wasn't in any way to diminish the subject of the epithet, Chuka Umunna, by virtue of his race, but more by virtue of his conduct, which Michelle Brown regarded as hypocritical. I have an issue—a major issue, actually—with a private conversation clandestinely recorded, maliciously published, of an Assembly Member's private conversation, which both parties regarded at the time as confidential, being used as the subject of a complaint. Because this seems to me to be a highly dangerous precedent for us to set, that anybody can record any of us, at any time, because the commissioner for standards, correctly in my view, interprets the code of conduct as applying to all Assembly Members at all times, in all respects, as to their conduct, behaviour, language, et cetera. This is a very, very high bar for us to have set against us as individuals in public life, and I do believe that even though there might be a technical infraction of the code of conduct—that's perfectly arguable in this instance—it would be wrong to impose any kind of punishment upon Michelle Brown on the facts of this case. And I've submitted evidence to that effect, although it wasn't circulated with the documents that I received of the use of this term in other contexts, which perhaps exemplifies what I've argued. I've sent around this copy—*[Interruption.]* No, that's a different document.

[10] **Llyr Gruffydd:** Sorry.

[11] **Neil Hamilton:** Oh, that one, yes. Which is a perfect example of how this term can be used in a way that I think is not racist in tone or intent. Yes, we all get abuse from time to time. I mean, I've been abused most days of my life for the last 40 years in politics, and I've been abused in this institution by individuals in the party from whom the principal complaint against Michelle derives, and I've not made any complaint that Joyce Watson has described all UKIP members as behaving like rabid dogs, for example. I haven't complained even when Leanne Wood accused me, quite falsely, of being a Holocaust denier, but when we get into—. And that was in the public domain, not in the Assembly itself, so I could have made a complaint against her. I didn't even contemplate doing it. In public life, we're in a rough-and-tumble existence, and I think we should take the rough with the smooth, and we shouldn't be snowflakes in the way that we look at each other. Of course, there are terms of abuse that we shouldn't tolerate, and I've given some redacted examples in the course of my written evidence. And, yes, I think we have to look at these things in their proper context, and I've no dispute with the commissioner in his finding, except to the extent that I disagree with his conclusion, for which he's given no actual reason, other than there have been the odd legal cases in magistrates' courts, where, again, of course, no reason is given for the decision that the term 'coconut' and similar terms are terms of racial abuse.

[12] I do think that, before we create a precedent, which you have the capacity to do as a result of this decision, we ought to think very, very carefully indeed about what the potential, perhaps unintended, consequences might be. I've made all my arguments in written form, so I won't repeat them now, except to say that, you know, we should, I think, be realistic in the sense that we live in the real world and in private conversation we're often not cautious about what we say. We don't expect our words to be repeated outside and if we had to behave in a way whereby we thought that we were being recorded at all times that would be an intolerably oppressive society in which to live. And I don't think that this committee should in any way give any comfort to those who want us to live in those conditions. And I have to say that the code of conduct hitherto has been accepted by all parties and all Members without any real argument or dispute, but I do see here there is a potential dispute about free speech and about the importance of private life. This, therefore, is a highly important case and should be treated with extreme gravity, I think, by you in coming to a conclusion.

[13] **Paul Davies:** Okay. Well, thank you for those comments. Before I invite other Members to ask questions, if I can just kick off just by asking a couple of questions around the submissions—. Now, Michelle Brown, obviously, you submitted a paper to the standards commissioner, and I think in point 8 of that submission you suggest that, obviously, the term 'coconut' is widely used among the BME community, and therefore suggesting that there's nothing wrong in using that term. However, in your letter dated 4 December, you acknowledge that, and I quote:

[14] 'I was an AM and should have had that in mind'.

[15] And you go on to say,

[16] 'I should not have used those words'.

[17] Do you therefore regret using the term 'coconut'?

[18] **Michelle Brown:** With hindsight, I regret using that term in that conversation, yes. It's not something that I would normally do. I mean, it is a complete aberration. It's not—. It isn't a term I would normally use, it's a term I used on that occasion, as—you know, in a context that I clearly explained to the person I was speaking to, who wasn't offended by what I said. In fact, he was laughing and agreeing with me in the background.

[19] **Paul Davies:** So, you accept it's a form of racial abuse.

[20] **Michelle Brown:** No, I don't think it is. I think, for starters, context is everything.

[21] **Paul Davies:** But, in your letter dated 4 December, you do apologise for using those

words. So, do you therefore accept that you shouldn't have used those words in the first place?

[22] **Michelle Brown:** With hindsight, but I think—. You know, I regret the offence that it's caused, I regret that it—. I regret the time that's been spent on this matter because of it, but I do not believe that that term was racially abusive, then or now.

[23] **Paul Davies:** Okay. Llyr, would you like to come in on this?

[24] **Llyr Gruffydd:** But you do admit in your letter that it was a slur on Mr Umunna's heritage and ethnicity.

[25] **Michelle Brown:** Where?

[26] **Llyr Gruffydd:** In the final paragraph.

[27] **Michelle Brown:** No, that's not an admission. That's not an admission. That's just a clarification of my intention at the time.

[28] **Llyr Gruffydd:** Okay.

[29] **Paul Davies:** Okay. You also, obviously, refer to the code of conduct in your submissions, and I think in your submission dated 15 November you say that obviously you were aware of the code of conduct, but I notice that in your adviser's submission it says you did not absorb the code of conduct when this conversation took place. So, were you aware of the code of conduct when this conversation took place?

[30] **Michelle Brown:** I was dimly aware. I was aware of the existence of the code of conduct. I wasn't aware of the detailed provisions of the code of conduct. And, until the standards commissioner admitted this complaint and started investigating it, I was not aware that the standards code of conduct applied to private conversations. I believed that that code of conduct just covered public statements and that—. Actually, I also thought that it covered activity in the Assembly. I've discovered since that it doesn't cover statements made in the Chamber. So, you know, I was eight days into my term as an Assembly Member, having never expected to get in as an Assembly Member.

[31] **Paul Davies:** But you do accept that you're an Assembly Member 24 hours a day.

[32] **Michelle Brown:** I do now, but we're 18 months on.

[33] **Paul Davies:** Okay. Okay, thanks. Llyr.

[34] **Llyr Gruffydd:** Mr Hamilton's just told us that he's not sure that the code of

conduct should apply all the time, every hour of the day, to every single Member, in all capacities, if you like, be it private or public. When should the code of conduct not apply, then? I'm just sort of—. Because either you have a code of conduct that is applied fully, or, really, it's unravelling, isn't it, surely?

[35] **Neil Hamilton:** I think the point I was making was perhaps a rather subtler one.

[36] **Llyr Gruffydd:** Okay, go on. You'll need to be less subtle than me. [*Laughter.*]

[37] **Neil Hamilton:** Yes, the code of conduct should apply to all hours of the day and night, even when you're asleep—who knows what you might say in your sleep, of course. Then, nevertheless, we ought, I think, to be slow to impose censure upon any Assembly Member for anything that might be said or done during that 24 hours in private, as well as in public. I think that each case must be looked at very carefully upon its facts, and I think the intent of the Member is very important in this respect, and the gravity of the offence, I think, is determined not by a word taken out of all context, but by the circumstances in which it is used. Personally, I don't find the word 'coconut' very offensive at all. I'm at a loss to understand why this should be regarded as a racial epithet, as I said in my written submission, any more than any other term of abuse that relates to a personal characteristic should be regarded as inherently degrading the person at whom it is aimed in all circumstances. So, what I'm saying is that, yes, you should retain the power to censure Members for anything they do in the course of a day, but it's the way in which the code of conduct is applied that is important, I think, in this case.

[38] So, I believe in the institution preserving its dignity, and Members should be slow to use language that is abusive. Certainly, in public, there can be no excuse for it, but in private conversation, and particularly where the publication arises for unmeritorious reasons, as in this case—. It's quite clearly Nigel Williams trying to get his own back on Michelle for being dismissed from his employment, paradoxically, among other things, for breach of confidence. So, he has actually, I think, condemned himself by his own action in this respect in his employment case as well. And so I do think that it's a case of the application of the code, rather than the extent to which it is potentially operable.

[39] **Llyr Gruffydd:** So, you're not suggesting it should be changed, as such.

[40] **Neil Hamilton:** No, I wouldn't argue that it needs to be changed, but just that we need to interpret it and apply it in a sensitive way, so as to preserve what we regard as, you know, tolerance and liberal principles in free speech and a normal way of life. I mean, I think it would be intolerable if we had always to be looking over our shoulder at what we do and say in private and have to behave as though we're, you know, dressed in our Sunday best and the minister is listening in on what we are saying.

[41] **Llyr Gruffydd:** But in this context, of course, Michelle was discussing terms of

employment, and clearly wearing a potential employer's hat. Well, you're shaking your head. You know, could you respond to that, then? Because, clearly, the discussion was around—

[42] **Michelle Brown:** Yes, it's not as black and white—

[43] **Llyr Gruffydd:**—you know, 'I might employ you. When would you work? How flexible would your hours be?'

[44] **Michelle Brown:** It's not as clear cut as that, Llyr.

[45] **Llyr Gruffydd:** Okay.

[46] **Michelle Brown:** I met Nigel—. I met Nigel Williams when I first became a member of the party. He was my branch chair. He and the people in Delyn were my branch.

10:00

[47] Later on, when I became chair of the neighbouring branch, he was a fellow co-chair and we had a very, very close relationship. I thought we were friends and allies. That was not just Joe Bloggs phoning me touting for a job; that was somebody with whom I had an existing and established relationship of trust, because of the things that we'd been through—all the shenanigans with the selection and everything. Somebody who I'd supported. It wasn't just a normal candidate phoning up, it was somebody with whom I had a relationship, because of something that happened way before the Assembly, because of the party, phoning me and using that relationship to tout for work. That's a little bit different from Joe Bloggs phoning me on a Saturday morning, somebody I don't know or somebody I've just known in passing. Nigel and I were not in that kind of relationship, we were in a relationship where we were friends and there was supposed to be mutual trust and confidence. There obviously wasn't, because he was secretly recording what I said.

[48] **Llyr Gruffydd:** But you can't deny that you discussed roles and responsibilities, because there's reference in the transcript here to having him down as a casework manager, someone else as a constituency manager, but he's actually going really be the constituency manager.

[49] **Michelle Brown:** Yes, but you'll also see from that transcript that he's still touting for work, he's still justifying why I should give him work.

[50] **Llyr Gruffydd:** So, he's speaking to you, in parts of this discussion, as an AM then, in your role as—

[51] **Michelle Brown:** No, he's speaking to me as a person he knows who can give him a job.

[52] **Llyr Gruffydd:** So, in what other capacity could you have given him a job?

[53] **Michelle Brown:** Well, yes, but—

[54] **Llyr Gruffydd:** Okay, but as far as I'm concerned—

[55] **Michelle Brown:** You're talking about this as if he was just some anonymous person who phoned up; he wasn't.

[56] **Llyr Gruffydd:** No, I'm not. No, I'm not. You can discuss jobs and terms of employment with anyone, really.

[57] **Neil Hamilton:** Can I suggest that this is a bit of a blind alley, because the commissioner has, in my view, correctly interpreted the code of conduct as applying to, and I quote, 'Members at all times, even in their private lives, and when not engaged on matters arising out of membership of the Assembly'. So, whether the context was a conversation about the possibility of Nigel Williams having a job with Michelle is not terribly germane to the outcome of the proceedings this morning, and—

[58] **Llyr Gruffydd:** Well, the point was being made about it being a private conversation and I'm just teasing out how official, or otherwise, it was.

[59] **Neil Hamilton:** Yes, but it was a private conversation, it was never intended to be made public, is the point that I was making, and it was clandestinely recorded. Michelle was not aware she was being recorded. If she had been aware she was being recorded, presumably she would have spoken very differently. I think that is the key point that we ought to have in mind here. I think the intention of the individual who is the accused on one hand is important, and I think also there is a distinction between private life and public life, and, yes, there is a crossover, as in this instance where there's a combination of the two: two people who knew each other very well, trusted one another implicitly. That trust was broken even at the time this conversation was being held, but unknown to Michelle.

[60] I think she is a victim here as well and, therefore, we should be slow to reward those who are themselves breaching what are regarded as the normal rules of acceptable conduct in order to seek revenge or whatever. If Assembly Members allow themselves collectively to be put in such a position, then it's going to undermine the way in which we operate as Assembly Members. I think another point that ought to be borne in mind here is that we're all human, this is a human institution, and, yes, we poke each other in the eye, metaphorically, on a regular basis, but we all, more or less, get along with one

another and work together happily and I think we should, therefore, approach cases of this kind in that spirit.

[61] **Paul Davies:** Gareth, do you have any questions?

[62] **Gareth Bennett:** Not on what's come up so far, no.

[63] **Paul Davies:** Can I just come back to you with regard to the term 'coconut'? Do you accept that people have been charged and found guilty of using this particular term? I'll give you an example. A councillor, back in 2010, was given a conditional discharge after being found guilty of racial harassment at Bristol magistrates' court in June 2010. So, do you accept that using the term 'coconut' is seen as racially abusive, given that people have been prosecuted and charged and found guilty of using that particular term?

[64] **Neil Hamilton:** Well, that was the case in the magistrates' courts in Bristol, and of course you don't get a reasoned judgment in a magistrates' court; it's a case of summary judgement. So, we have no idea why the magistrates arrived at that conclusion. It was never appealed, so the point has never actually been considered by higher authority that is binding, and of course magistrates' court decisions are not citable as precedence in English and Welsh law. So, I wouldn't, myself, regard that as a strong argument for saying that it is racial abuse.

[65] Also, the context of that was quite different. The use of the word 'coconut' in that context was quite different to in Michelle's case, because if you look at the facts of the case, this was a black councillor referring to an Asian councillor, actually. The term 'coconut' was not used because the black councillor, who used the term, thought that the Asian councillor was a hypocrite; it was just a term of racial abuse, which, actually, in the context it was used, was meaningless, because the term 'coconut' means somebody who has the outward signs of one lifestyle, but actually is trying to pretend to be something very different. It refers to a form of hypocrisy. Another term that used to be used was an 'uncle Tom'—somebody who behaves like a white person or who betrays his black heritage in order to curry favour with the white masters, in southern American nineteenth-century usage. So, I don't think that you can cite that one case to justify any decision to condemn Michelle in this case. I think the facts are very distinguishable.

[66] **Paul Davies:** Okay. Thank you. Are there any other questions from Members? No. Can I therefore thank you both for attending today's committee meeting? Just to advise you, obviously we will be making our decisions in due course and producing a report, and we will let you know the outcome of that in due course. So, thank you very much indeed for—

[67] **Neil Hamilton:** Can I just say one thing before I go, and that is on any potential penalty? The penalties that are available to the committee have been set out in one of the

memoranda that—

[68] **Paul Davies:** Yes, and that will be a matter for us as a committee, of course.

[69] **Neil Hamilton:** I'm not arguing that we should find that no breach has been found and the complaint is dismissed; that's the first thing. I am arguing that it is possible that a breach has been found, but the failure is of such a minor nature that the complaint should be dismissed. The alternative is number 3: that a breach has been found, but that no further action should be taken. My feeling is that 3 is probably the most appropriate outcome in this case, if I may, in my respectful submission, make that point to you.

[70] **Paul Davies:** Okay. Point received loud and clear, but of course it will be a matter for us as a committee to make that decision. Thank you very much for your attendance today.

Daeth yr eitem i ben am 10:09

The item ended at 10:09

IN THE MATTER OF AN APPEAL BY MICHELLE BROWN AM TO THE PRESIDING OFFICER, PURSUANT TO THE PROVISIONS OF PARAGRAPH 8.1 OF THE NATIONAL ASSEMBLY FOR WALES PROCEDURE FOR DEALING WITH COMPLAINTS AGAINST ASSEMBLY MEMBERS, AGAINST THE RECOMMENDATION OF THE COMMITTEE ON STANDARDS OF CONDUCT MADE ON 23 JANUARY 2018

THE REPORT OF SIR JOHN GRIFFITH WILLIAMS QC

INTRODUCTION

1. In circumstances to be considered in more detail later in this Report, complaints were made in July 2017 to the Commissioner for Standards [“the Commissioner”] alleging that Michelle Brown AM [“Ms Brown”], an Assembly Member for the North Wales Region, had made racist and discriminatory remarks. The Commissioner investigated the complaints and concluded Ms Brown had used a term of racial abuse and that her conduct fell below the standard required of Assembly Members to maintain and strengthen the public’s trust and confidence in the integrity of the Assembly and as such brought the Assembly into disrepute contrary to the provisions of paragraph 4 (b) of the Code of Conduct for Assembly members [“the Code”].

2. The Formal Investigation Report of the Commissioner was considered by the Committee on Standards of Conduct [“the Committee”] together with additional evidence and representations, both oral and in writing, submitted by and on behalf of Ms Brown. In their Report finalised on 23 January 2017, the Committee concluded unanimously that Ms Brown had breached the Code and that the breach brought the Assembly into disrepute. The Committee decided unanimously to recommend to the Assembly pursuant to paragraph 7.11 of the National Assembly for Wales Procedure for Dealing with Complaints against Assembly Members [“the Procedure”] and paragraph 22.10 (i) and (iii) of the

Code that Ms Brown should be censured and excluded from Assembly proceedings for a period of seven calendar days. Ms Brown has appealed to the Presiding Officer against the conclusion and decision of the Committee.

3. In accordance with paragraph 8.2 of the Procedure, the senior presiding judge of the Wales Circuit nominated me to decide the appeal, a nomination which the Presiding Officer accepted. Ms Brown was afforded the opportunity to make any representations against my appointment (see paragraph 8.3 of the Procedure). She has not done so and I have accordingly considered and determined the appeal. This is my Report pursuant to paragraph 8.6 of the Procedure.

THE RELEVANT PROVISIONS.

4. The Code of Conduct for Assembly members provides:

Purpose of the Code

1. The purpose of this Code of Conduct is:

(a) to provide guidance for all Members of the National Assembly on the standards of conduct expected of them in the discharge of their Assembly and public duties;

(b) 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. This Code applies to all Members of the National Assembly who have not taken leave of absence.

General Standards of Conduct

Personal conduct

3. Members of the Assembly:

(a) must comply with the Code of Conduct for Assembly Members;

(b) should act always on their personal honour ...

Paragraph 4 of the Code 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. Paragraph 4(b) of the Code provides:

“Assembly members should at all times (emphasis added) 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.

Paragraph 18 of the Code provides that any allegation of non-compliance with the Code will follow the process set out in the Procedure.

5. Complaints against Assembly Members of non-compliance with the Code should be made to 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 (paragraph 3) 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 is 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:

3.1.vi 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 if proved might amount to a breach of any of the matters encompassed within Standing Order 22.2(i).

6. If admissible the Commissioner must proceed in accordance with the provisions of paragraph 4 to a Formal Investigation 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 report to the Committee. That report 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 the Standing Order.

7. Standing Order 22 provides:

22.2 The responsible committee must:

(i) investigate, report on and if appropriate, recommend action in respect of any complaint referred to it by the Commissioner for Standards that a Member has not complied with: ...

(d) any Assembly resolution relating to Members' standards of conduct ...

8. No report concluding that a member has breached one of the matters in the Standing Order may be made to the Committee unless the Member and the complainant have been given a copy of the draft report and the opportunity to comment on any factual inaccuracy. 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.

9. Following receipt of the report, 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 Standards Committee is set out in paragraph 7 of the Procedure. Following 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 if a breach is found. The Procedure, under the heading **Considerations** in paragraph 7 of the Procedure provides 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.

10. If the Committee determines to recommend to the Assembly, pending any appeal by the Member concerned, that a breach has been found and that either no further action should be taken or 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 an appeal is made, the Committee's report will remain confidential and may not be published and laid before the Assembly until the determination of the appeal. Following the determination of the appeal 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 report (or revised report under paragraph 8.6i) of the Committee. The Chair of the Committee must then table a motion calling on the Assembly to endorse the Committee's recommendations. The provisions relating to an appeal will be considered later in this Report – see paragraph 45 *post*.

THE FACTS

11. On the morning of Saturday 14 May 2016, Nigel Williams telephoned Ms Brown. They were known to each other as chairs of neighbouring constituency UKIP associations. Ms Brown regarded him as her most trusted friend and associate in the party (paragraph 5 of her statement dated 1 November 2017 *post*). Mr Williams recorded their conversation covertly. Ms Brown has produced a transcript of a copy of the audio recording which Mr Williams produced to the Commissioner at the end of August 2017.

12. Much of the conversation related to the prospective employment of Mr Williams by Ms Brown as her senior adviser, the kind of work he might do and his remuneration but during the course of the conversation Ms Brown was critical of two members of parliament, whose background, she asserted, gave them no understanding of the people they represented. Of Chukka Ummuna MP she said:

"I don't say this lightly, right, but Chukka Ummuna is a fucking coconut, he's got, he's got as much understanding of an ordinary black man's experience as I have because he may be black but his mother or his father was, was British from a very, very influential family ... he's black on the outside and white on the inside ... and Barak Obama's exactly the same".

13. Following this conversation, Ms Brown employed Mr Williams as her senior adviser, his employment being back dated to 11 May 2016. Following a 6 months' probationary period, his employment was confirmed on 11 November 2016 but the relationship between them broke down shortly thereafter leading to the suspension of Mr Williams and in due course his dismissal on 12 May 2017. His appeal against his dismissal was rejected on 8 June 2017

14. It was against this background that Mr Williams released a recording of an extract of the telephone conversation to the Daily Post which on Friday 21 July 2017 reported the above cited passage. Other newspapers, including the Western Mail carried reports of the conversation over the following weekend and in to the following week.

THE COMPLAINTS

15. Three complaints in writing were received by the Commissioner about the conduct of Ms Brown. The first dated 21 July (the date of press publication) was from Hannah Blythyn AM who wrote in her capacity as Chair of the National Assembly Labour Party and so on behalf of the members of the Labour party group. Ms Blythyn, who had access to a transcript of the extract of the recording, drew its terms to the attention of the Commissioner, alleging that the remarks were of a “highly offensive and discriminatory nature”. It seems she also sent the Commissioner a copy of the audio file of the relevant part of the recording. Information relating to this complaint was released to the Daily Post at or about the time, it was made to the Commissioner. I observe this was most unfortunate; I shall return to this later in the Report. In its Report, the Committee stated that the complaint process should be confidential at all times until the Commissioner and the Committee had reached their conclusions and should not be released to the media or used for political advantage.

16. By email dated 22 July 2017, David Cross complained to the Commissioner of the racism of Ms Brown and averred she has no further part to play in Welsh politics and “devalues the whole Assembly”.

17. The third complaint, also by email on 22 July 2017 was from Leighton Andrews drawing the Commissioner’s attention to the fact that the recording was available on the web. He averred the remarks were racist, discriminatory and brought the National Assembly into disrepute.

THE INVESTIGATION

18. The Commissioner wrote to Ms Brown on 31 July, sending her copies of the complaints and the extract from the audio recording. Ms Brown replied by letter dated 8 August 2017; she agreed she had made the comment the subject of the

complaints but she said she had not heard the full recording, was unaware a private conversation had been recorded and had not consented to it being released to the press. The Commissioner was satisfied the requirements of paragraph 3.1 (i)-(iv) of the Procedure (see paragraph 5 above) had been fulfilled and that the complaints were admissible.

19. In the Formal Investigation the Commissioner established the Facts particularised in paragraphs 11 to 14 above. In his Report to the Committee, he informed the Committee that Mr Williams had made complaints to him about Ms Brown during the period when he (the Commissioner) was conducting his enquiry. The Commissioner was satisfied the majority of the matters about which he complained were issues he had raised in the employment dispute and he (the Commissioner) declined to intervene in that dispute. There was one free-standing complaint which the Commissioner investigated but concluded had no substance.

20. The Commissioner reported Mr Williams had claimed he was appalled by Ms Brown's comments and the disclosure of her comments was in the public interest; they had been made by her freely and without any prompting. He also claimed she knew his phone calls were being recorded and provided an audio recording of another telephone call between Ms Brown and himself, which he asserted proved she knew he was recording his telephone calls.

21. On 22 September 2017, Ms Brown provided the Commissioner with further comments. She said she had no idea Mr Williams was recording his telephone calls or his calls with her and pointed out correctly the other recording he had provided to demonstrate she knew he was recording his phone calls, did not do so.

22. On 3 October 2017, the Commissioner interviewed Ms Brown by which time she had prepared the transcript of the audio recording of the telephone conversation of 14 May 2016. She queried whether the audio recording had been edited as there appeared to be interruptions in the recording during part of the passage complained about. While she did not resile from her position that she had said the words complained about, she wondered whether there had been editing to remove words of agreement by Mr Williams. I observe that despite a number of approaches to Mr Williams by the Commissioner in an attempt to ascertain whether there had been any editing, no response was received.

23 .On 15 November 2017, Ms Brown provided the Commissioner with a signed statement in which she acknowledged she is aware of the Code and in particular paragraph 4(b) – see paragraph 4 above; she repeated her admission to speaking the words complained of; she said Mr Williams had telephoned her on the morning of 14 May 2016 to discuss the possibility of her employing him; she explained the context in which the words were spoken (see below) and said they were made during a private and personal conversation between two friends and party colleagues. She admitted to swearing in private and apologised for the use of the f-word but she expressly refused to apologise for using the word “coconut”, which she described as “a verbal short-cut”; it had been spoken in private and was not used by her speaking as an Assembly member; she said the words were recorded and released to the press without her consent as an act of personal spite on the part of Mr Williams and not to further the public good; she said there is no evidence that the Assembly or its members have been brought into disrepute. I observe the complaints do not relate to the use of bad language, which while regrettable was used in a private conversation and for which Ms Brown has apologised.

24. The audio recording establishes the context in which the words were spoken. Ms Brown had said she had no time for Tristram Hunt MP who she said is typical of the Labour Party; she said he is the son of a peer, public school and Oxbridge educated and representing a seriously working class area. She then mentioned Chukka Ummuna in the terms cited in paragraph 12 above.

25. The Commissioner having considered the facts and the representations of Ms Brown found the following facts:-

(i) the passage complained of and in particular the reference to Chukka Ummuna as “a coconut” were spoken by Ms Brown as part of a private conversation between two close colleagues;

(ii) neither anticipated that their words would end up in the public domain;

(iii) there is nothing to demonstrate that Ms Brown knew Mr Williams was recording telephone conversations and the other recorded call upon which he relies to support that contention does not do so;

(iv) Ms Brown had no idea the call was being recorded and that the conversation or a part of it was released to the press without her consent

(v) there is no indication from the recording that Mr Williams demonstrated any concern or discomfort with the comments; he had accepted employment with her and fought the steps taken to terminate his employment.

The Commissioner, despite his efforts to ascertain whether the recording had been edited could not assure the committee it has NOT been edited. I observe that these findings of fact may well raise arguable criticisms of the behaviour and motives of Mr Williams but it is the conduct of Ms Brown which is relevant in a consideration of the alleged breach, although the conduct of Mr Williams may be relevant on a consideration of any sanction (see *post*).

26. He reported to the Committee the point Ms Brown was making (that because of his privileged upbringing, Chukka Umunna had no greater understanding of the life issues which an ordinary member of the BME community faces than she has) was within the range of points a politician is entitled to make, whether one agrees with them or not. The Commissioner advised (paragraph 27 of his Report):

*“However, all that said, the fact remains that Ms Brown in making her point resorted to using a term of racial abuse and although this conversation was a private one it was nevertheless between a Member of the National Assembly and a person she was considering employing and involved discussions about the terms on which he might be employed. The Code of Conduct for Assembly Members applies to Members at all times even in their private lives and when not engaged on matters arising out of membership of the Assembly. However, in this instance it is not realistic to say that the conversation was private and personal and that Ms Brown was not speaking as an Assembly Member - as Ms Brown asserted (see paragraph 23 above, although she was to later resile from this in her statement of 4th December 2017 paragraph 30 *post*) – as she was discussing as an Assembly Member the terms of employment of a person whom she was considering employing in her office as an Assembly Member”.*

27. The Commissioner concluded that the use of the word “coconut” fell below the standard of conduct required of Assembly Members to maintain and strengthen the public’s trust and confidence in the integrity of the Assembly and was conduct which brought the Assembly into disrepute contrary to paragraph 4b of the Code – see paragraph 4 above. I observe the Committee is not required by the Procedure to accept any findings of fact or conclusions in the Commissioner’s Report.

28. After being provided with the Commissioner's Report in draft and the opportunity to comment on any factual inaccuracy in accordance with paragraph 4.3 of the Procedure, Ms Brown on 20 November 2017 made a number of representations which are set out in full in the Commissioner's Final Report. It is unnecessary to detail them for the purposes of this Report because they relate to the conduct of Mr Williams and not to the complaints made against her. I observe she made no comment on the factual accuracy of the Report but at the oral hearing before the Committee on 16 January 2018, she did confirm its factual accuracy.

29. The three complainants were also afforded the opportunity to comment on any factual inaccuracies. None was communicated. The Commissioner then provided the Committee with his Report. I observe that the Commissioner in his letter dated 22 November 2017 to the Clerk to the Standards of Conduct Committee drew to her attention that the Chair of the Standards of Conduct Committee, Jayne Bryant AM, is a member of the Assembly Labour Party and so is a complainant. Ms Bryant took no part in the Committee's deliberations and was replaced by Mr Paul Davies AM as temporary chair. The three members of the Committee are members of the other political parties represented in the National Assembly – Plaid Cymru, the Wales Conservative Party and UKIP.

30. On 4 December 2017 Ms Brown wrote to the chairman of the Committee setting out her "additional response" to the complaints made against her. She acknowledged that she should have had in mind that she was an Assembly Member when she spoke to Mr Williams; she said that while she was unaware the conversation was being recorded, she should nevertheless not have used the terminology. She said the terminology was "a verbal short cut" which she believed to be innocuous, to make a socio-political point which the Commissioner accepted she was entitled to make. Nonetheless she accepted she should not have used the words; her language was unprofessional and crass and had she considered what she said before speaking, she would have said what she said in "a professional and civilised way". She said that had she known or suspected the call was being recorded or would be disclosed to a third party, she would not have used any words that could be considered insulting or able to cause offence because she has no desire to cause offence to anyone. She wrote:

"I fully accept that I should have ensured there was no chance of causing offence, by not using the language I did. In my past there has never been any suggestion

that I have made racially offensive comments. I did not intend any slur on Mr Umunna's heritage or ethnicity and I particularly regret using the words I did since they have been perceived as such. I therefore sincerely apologise for the terms I used any offense (sic) they have caused"

31. The Committee received on 2 January 2018 what they term in their Report written evidence from Neil Hamilton AM, Ms Brown's advisor. I will consider this later in the Report – see paragraph 35 – but I observe the document itself is correctly entitled Submissions and was treated as such by the Committee (see the Transcript at [3]).

32. The Committee met to hear oral evidence on 16 January 2018. Paragraph 7.7 of the Procedure provides the general presumption is that the Committee will only ask questions of the Member or witnesses to clarify matters of fact and that while the Member or any witnesses have the right to ask and have answered factual questions about procedural or technical matters, they have no right to question the Commissioner or the Committee about other matters.

33. When afforded the opportunity to make a brief oral statement on the complaint and to make any comments, Ms Brown said she had already commented in writing, she had not intended to cause any offence to anybody, it was a private conversation, disclosed out of spite and not of any concern for the public interest. She then "handed over " to Mr Hamilton, who made a number of submissions. Later when asked by a member of the Committee she said she now regretted using the term "coconut", that it was not a term she would normally use but was made in the context of a conversation with Mr Williams who was not offended but laughing and agreeing with her. She did not accept it was a form of racial abuse although she regretted the offence its use had caused. She said her words in the final paragraph of her letter dated 4 December 2017 "I did not intend any slur on Mr Umunna's heritage or ethnicity" did not amount to an admission that the words used were a slur on his heritage or ethnicity. Asked about her statement of 15 November 2017 that she was aware of the Code and in particular paragraph 4 (b) – see paragraph 23 above – she said she was "dimly aware" of the Code of Conduct but was unaware of its detailed provisions and in particular she was unaware the Code applied to private conversations; she observed she had only been an Assembly Member for 8 days. Later she said the conversation with Mr Williams was not a "clear cut" conversation about his employment.

34. At its meeting on 16 January 2018, the Committee, pursuant to the provisions of paragraph 7 of the Procedure, considered the Commissioner’s Final Report together with the additional written evidence of Ms Brown (see paragraph 30 above), the oral evidence of Ms Brown and the submissions made on her behalf by Neil Hamilton AM. In accordance with paragraph 7.7 of the Procedure, a verbatim transcript of the proceedings of the oral hearing of the evidence has been prepared. Copies were provided by email to both Ms Brown and Mr Hamilton on 16 January 2018; both were provided with the opportunity to agree the transcript or provide any amendments. Receipt of the emails was acknowledged by both; while Mr Hamilton’s office indicated by email on 18 January 2018 that the transcript was “fine by him”, Ms Brown has not replied – this may be because she relied upon Mr Hamilton as “her adviser”. I am satisfied the transcript is accurate.

35. The transcript records that Ms Brown was happy for the Committee to accept Mr Hamilton’s submissions as her adviser. I summarise his submissions, oral and in writing dated 14 December 2017 and received by the Committee on 2 January 2018. While he accepted the term “coconut” was a term of abuse, it was not a term of racial abuse because there was no connotation of racial inferiority but if it is a term of racial abuse it is at the lowest level of severity. He submitted the public interest in maintaining Ms Brown’s right to confidentiality outweighed any harm done by use of the term which some (but far from all) might regard as racist although if an “exceptionally abusive and derogatory terms stigmatising an entire race” had been used, an opposite consideration would apply. He submitted there is a clear public interest in maintaining freedom of speech and conscience and the duty of trust between Assembly Members and their staff. He submitted the Assembly should be loath to restrict Assembly Members in what they say, especially in private conversation; he submitted attempts to control speech outside the Assembly, especially in private conversation “are fundamentally oppressive and undemocratic”. In his oral submissions Mr Hamilton seemed to suggest that while the Code had been accepted by all parties there is a potential dispute about free speech and the importance of private life, although when questioned he said he was not arguing for a change in the Code but rather its interpretation and application in a sensitive way.

36. He argued that a clandestinely recorded and maliciously published private conversation should not be admissible in evidence but if admissible there should be a very high threshold before the imposition of any punishment. He submitted

that the admissibility of such evidence should be tested in the same way as the admissibility of unfairly obtained evidence is tested in courts and tribunals when a consideration may be made of a person's human right to privacy.

37. He submitted there is no evidence of any damage to the reputation of the National Assembly but if there was any such damage it was a consequence of the unauthorised publication and the subsequent political furore. He submitted the complaints were politically motivated. Relying upon the Commissioner's conclusions, he submitted the invective was aimed at the Member of Parliament's perceived hypocrisy. He submitted that by analogy with criminal cases there should be evidence of a guilty mind. He submitted Ms Brown was a recently elected Assembly Member and as such was not fully aware of the "ramifications of the Code".

38. He submitted it is a matter of opinion whether the use of the term "Coconut" falls below the standard of conduct required of an Assembly Member by the Code but too draconian an approach would be at variance with what is publicly acceptable to "a substantial proportion of the people we represent" – I observe no evidence was provided in support of this contention.

39. In conclusion Mr Hamilton submitted there was no breach of the Code but if there was it was at the lowest level of severity; he repeated there is no evidence of actual damage to the Assembly's reputation; Ms Brown did not intend to breach the Code, this was an isolated case with no repetition and so she should be either acquitted or receive the lowest possible sanction. In his oral submissions he said he believed there might be a technical infraction of the Code.

40. The Committee concluded unanimously that while Ms Brown was entitled to make a socio-political point, the use of the word 'coconut' "in this instance" was a term of racial abuse and that there had been a breach of the Code in relation to bringing the Assembly into disrepute. Its Report was agreed on 23 January 2018.

41. The Committee observed that the reputation of the National Assembly for Wales as an institution and the public's trust and confidence in it, rely upon Members demonstrating integrity and leadership by their actions and any breach is a serious matter. The Committee observed further that the use of such language is below the expectations of an Assembly Member and that racism has no place in society. The Committee noted that while Ms Brown had not

apologised in her initial statement to the Commissioner dated 15 November 2017 (see paragraph 23 above), she did apologise in her additional response of 4 December 2017 (see paragraph 30 above) for any offence her words may have caused. The Committee noted this was the first time Ms Brown had been subject to a complaint under Standing Order 22.2 and that the term was used in a private conversation with someone she regarded as a friend. The Committee concluded unanimously that the use of a racist term is a severe breach of the Code and therefore there had to be a sanction. Considering the mitigation, the unanimous decision was to recommend to the Assembly in accordance with paragraph 7.12(vii) of the Procedure that a breach had been found, that Ms Brown should be sanctioned under Standing Order 22.10 (i) and (iii), censured and excluded from the Assembly for the period of seven calendar days immediately after the motion is agreed.

42. A copy of the Committee's Report was emailed to Ms Brown on 23 January 2018. She then had 10 working days in which to appeal to the Presiding Officer (paragraph 8.1 of the Procedure) i.e. by 6 February 2018.

43. On 2 February 2018, BBC Wales published on-line a report of the proceedings with references to the complaints, the Commissioner's Report and the Committee's recommendation to the National Assembly. I am informed a copy of the Committee's report had been leaked to the BBC by a person or persons unknown.

44. On 5 February 2018 Ms Brown appealed to the Presiding Officer. Her grounds of appeal are:-

[1] No evidence has been provided to or by the Commissioner or the Committee that the word "coconut" in the circumstances and context in which it was used was racially abusive or racist.

[2] Neither the Committee or the Commissioner provided the reasoning behind their statement that the term was racially abusive or racist in the specific circumstances of this case.

[3] No evidence was provided that the Assembly has been brought into disrepute and the Committee has not explained why they believe that to be the case.

[4] The lack of evidence or explanation of the Committee's reasoning makes the decision entirely subjective; their subjective reasoning is insufficient to justify

their decision particularly in the light of the serious penalty they have recommended with the resulting restriction on her right to freedom of expression under Article 10, Schedule 1 of the Human Rights Act 1998.

[5] On the basis of the Committee's Report, the Committee can make a subjective and inevitably political decision to label a word "racist" or similar and so penalise Assembly Members with no further responsibility to justify their decision.

[6]. The Committee, when making its decision regarding sanction failed to take into account the Considerations – see paragraph 9 above - and in particular the extent to which the Assembly has been brought into disrepute and whether the breach was committed intentionally; it is submitted that if the Assembly has been brought into disrepute, it is to a minor extent only; it is submitted further that no account was taken by the Committee that she did not intend any racism or racial abuse and did not intend her comments to become public; it is submitted that no account was taken that she had been an Assembly Member for 11 days and did not appreciate the Code applied to private conversations.

[7] The publicity – see paragraph 15 above - surrounding the disclosure of the complaints to the Commissioner and the announcement by the Labour group that they intended to make a complaint prejudiced her right to a fair hearing before the Committee; she had already been subjected to a "trial by media"; the disclosure placed pressure on the Committee to propose a more severe sanction than they might otherwise have done.

[8] The disclosure of the Committee's Report before it was laid before the Assembly breached the requirement in paragraph 8.1 of the Procedure that the Committee's Report must be treated in confidence by all parties until the Committee lays it before the Assembly; the disclosure has prejudiced her case.

THE APPEAL

45. The Procedure makes the following provisions.

Consideration of Appeals

8.4 Appeals will only be considered on the following grounds:

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

While an appeal lies only against the recommendations of the Committee, in my opinion paragraph 8.4 (ii), which unlike sub-paragraph (i) is not restricted to proceedings before the Committee, should be construed to relate to any procedural irregularity in the course of the Procedure as a whole and so a procedural irregularity in the Investigation stage would be relevant if its effect was to prejudice a member's right to a fair hearing whether before the Commissioner or the Committee

8.5 The (person) appointed to decide the appeal will consider only the reports of the Commissioner and the Committee and any additional representations made by the appellant. That person will not conduct oral hearings or consider representations from any other source.

8.6 The person appointed to decide the appeal must prepare and provide to the Member and to the Committee a report of his or her consideration of the appeal and must either:

i if the grounds of appeal are established uphold the appeal and refer the complaint back to the Committee for further consideration or

ii dismiss the appeal.

46. I observe that the provision in paragraph 8.5, if strictly construed, would appear to exclude from my consideration the submissions made by Mr Hamilton but that would be unfair in the present case because it is clear from the transcript – see paragraph 33 above - that Ms Brown relied upon him not only as an adviser but also to argue her case, without objection from the Committee – but see the Addendum to this Report. To determine the appeal, I have accordingly considered:-

1. the report of the Commissioner with its appendices – the complaints, Ms Brown's statement dated 21 July 2017 and the transcript of the telephone conversation – like the Commissioner and the Committee I have also listened to a copy of the audio recording.
2. the additional response of Ms Brown dated 4 December 2017.
3. the submissions dated 14 December 2017 of Mr Hamilton.
4. the transcript of the further evidence of Ms Brown and the submissions made on 16 January 2018 by both Ms Brown and Mr Hamilton.

5. the Committee's Report.

THE GROUNDS OF APPEAL

47. Grounds 1 & 2 can be summarised and considered together - there was no evidence that the word "coconut" was racially abusive or racist in the context in which it was used and that neither the Commissioner or the Committee provided their reasons for concluding it was. The submissions, by and on behalf of Ms Brown in this regard, merely repeated her case that while the word is undoubtedly offensive and insulting and may have a racial element, in the particular context in which it was used on this occasion - to make her socio-political point - it was not.

48. No factual inaccuracy, significant or otherwise has been identified. The Commissioner and the Committee were entitled to have regard to the general understanding of the term and its use as an ethnic slur. I note that Mr Hamilton, in his written submissions, appeared to concede the word is a term of racial abuse - see paragraph 21 (5) - and in his oral submissions said he was not arguing there was no breach of the Code, an implicit acceptance that the term was used in a racist context. I note also that during the hearing on 16 January 2018, the chairman referred Mr Hamilton to the conviction at Bristol Magistrates' Court in June 2010 of a councillor of an offence of racial harassment, committed when she used the term to insult another councillor during a heated debate. Mr Hamilton's response that decisions of magistrates create no precedent and the decision was not appealed and so has not been considered by a higher binding authority, is disingenuous - the conviction provided evidence (if any be needed) that the word can be used in a racist context.

49. The issue for both the Commissioner and the Committee was whether Ms Brown used the word in a racist context. That is not a matter of subjective assessment - see Ground 5; it required an objective assessment of her evidence. The context is very important as the audio recording demonstrates. There was no need to use racist language as Ms Brown conceded; her point could have been made without reference to colour. That she said "I don't say this lightly" provides evidence she used the term both deliberately and in a racist context. The conclusion she had done so was a reasonable one for both the Commissioner and the Committee to draw; their reasoning required no exposition.

50. Ground 3: Paragraph 4 of the Code makes clear that it is the responsibility of Assembly Members to behave 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. Such issues are for the Assembly to determine as matters of inference. Racism has no place in our society and so it goes without saying that racist conduct by an Assembly Member will inevitably reflect on the Assembly and bring the Assembly into disrepute in the minds of right-thinking people. Evidence that the use of the term on the facts of this case brought the Assembly into disrepute is not necessary and neither the Commissioner or the Committee have to explain why they believe it to be the case; there is no requirement in the Code to quantify the extent of the disrepute – that would be impracticable. I note neither Ms Brown or Mr Hamilton suggest how this could be achieved.

51. Grounds 4 & 5 fail because Grounds 1,2 & 3 have failed. Even so, I observe there is no evidence or material which supports an assertion that the Commissioner and the Committee members reached findings of fact and/or their conclusions subjectively or made an “inevitably political decision”. While the Procedure makes no express provision for objective assessments, such an approach is implicit – see Standing Order 22.2(i) (paragraph 7 above) and paragraphs 4.1 and 7.9 of the Procedure (paragraphs 6 & 9 above); further, on a reading of both Reports, it is clear that both the Commissioner and the members of the Committee acted objectively.

52. Ground 6: it is submitted the Committee was in breach of the Considerations in paragraph 7 of the Procedure (see paragraph 9 above) by failing to take into account, when recommending a sanction, what it is submitted was the “very minor extent” to which the Assembly had been brought into disrepute, the lack of intent to use racist abuse, the lack of her intent to make her comments public and the fact Ms Brown had only been an Assembly Member for 11 days when the conversation took place. I observe first that the Committee in fact acknowledged the comment was made in a private conversation which was covertly recorded and secondly that the transcript provides the evidence the word was used intentionally. I observe also this ground of appeal is premised on an acceptance by the Committee of the mitigation relied upon when in the absence of any mention of these matters, it does not follow that the Committee accepted the mitigation.

53. The fact Ms Brown had only been an Assembly Member for 11 days when the conversation took place was relied upon by her in this context: she claimed in her oral evidence (see paragraph 33 above) she was dimly aware of the Code but was unaware of its detailed provisions and in particular that it applied to private conversations. This would appear to contradict her acknowledgment on 15 November 2017 (see paragraph 23 above) that she was aware of the Code and in particular paragraph 4(b). I observe ignorance of the provisions provides no excuse.

54. Ground 7: the disclosure to the Daily Post of the complaint made by Ms Blythyn AM was an action outwith the complaint procedure. It follows this is not arguably a procedural irregularity and Ground 7 is not an admissible ground of appeal. Even so there is no evidence or material that the disclosure of the complaint to the Daily Post soon after the disclosure of the audio recording, both occurring in July 2017, and so some 6 months before the hearing on 16 January 2018, deprived Ms Brown of her right to a fair hearing or influenced the Committee to propose a more severe sanction. In the absence of any evidence to the contrary, the presumption must be that the members of the Committee acted fairly, impartially and objectively. I observe that Ms Brown raised this criticism or complaint for the first time in her Grounds of Appeal. If this is a genuine concern, the expectation would be that it would have been mentioned much earlier.

55. Ground 8: the disclosure of the Committee's report to the BBC was again an action outwith the complaint procedure and so is not arguably a procedural irregularity. It follows Ground 8 is not an admissible ground of appeal.

56. The re-assertion of Ms Brown's case before the Commissioner and the Committee in the Grounds of Appeal - the case rejected by both - raises no arguable case that the decision of the Committee was flawed. The Grounds of Appeal have identified no factual inaccuracies which, had they been known might have led the Committee finding differently. Further they raise no arguable ground that there were any procedural irregularities in the Formal Investigation or in the referral process to the Commission or in the proceedings before the Committee which prejudiced Ms Brown's right to a fair hearing.

CONCLUSION

The Appeal is accordingly dismissed.

ADDENDUM

I am concerned that while the Committee was entitled to allow Ms Brown to be accompanied by an adviser – Paragraph 7.6 of the Procedure provides *“At any oral hearing, the Member complained of or any witnesses who chose to give evidence may be accompanied by an adviser”* - her adviser Mr Hamilton was permitted to present Ms Brown’s appeal and to argue her case at length, both in writing and orally in what I am satisfied was a clear breach of the procedure. If it was the intention of the Assembly that a Member should have the right to be represented, specific provision would have been made in that regard. An adviser’s role is to advise and not to advocate. The role can be likened to that of a McKenzie friend, who is permitted to sit with a litigant to advise the litigant but who has no rights of audience before the tribunal. He or she is not permitted to make any submissions to the tribunal. If the Procedure intended the role of the adviser should be pro-active, it would have so provided. I observe the Procedure implicitly restricts the role of an adviser. Paragraph 7.7 provides *“..... The general presumption is that the Committee will only ask questions of the Member or witnesses to clarify matters of fact. The Member or any witnesses would have the right to ask and have answered factual questions about procedural or technical matters; they do not have the right to question the Commissioner or the Committee about other matters”* – there is no reference to the adviser.

My view is that the Procedure is clear and the role of an adviser should be restricted to providing advice to the Member or any witness for whom he or she acts. If it is considered there is any ambiguity in the Procedure in this regard I invite the Assembly to consider an amendment to the relevant paragraph.

John Griffith Williams

17th April 2018