STATES OF JERSEY

CODE OF CONDUCT FOR ELECTED MEMBERS: COMMISSIONER FOR STANDARDS

Lodged au Greffe on 14th January 2013
by the Privileges and Procedures Committee

STATES GREFFE

PROPOSITION

THE STATES are asked to decide whether they are of opinion –

(a) to agree that a new position of Commissioner for Standards should be established in Jersey to investigate alleged breaches of the Code of Conduct for elected members and make recommendations to the Privileges and Procedures Committee following any such investigation;

(b) to agree that the Commissioner for Standards should be made responsible for keeping the operation of the Code of Conduct and associated procedures under review and for making recommendations for change as necessary;

(c) to request the Privileges and Procedures Committee to bring forward for approval the necessary legislation to give effect to the proposal.

PRIVILEGES AND PROCEDURES COMMITTEE

REPORT

The Privileges and Procedures Committee as previously constituted initiated a review of the operation of the Code of Conduct for elected members, and this review was taken forward after the 2011 elections by the present Committee.

PPC issued a comprehensive Consultation Document (R.34/2012) on 19th March 2012 (see **Appendix**) setting out some of the problems that had been identified with the operation Code since its introduction and raising a number of questions for consultation. These were –

1. Should there be an independent Commissioner for Standards or an independent Investigation Panel in Jersey?

2. Should the manner in which complaints can be submitted be amended?

3. What aspects of inappropriate behaviour or private conduct should be covered by the Code of Conduct?

4. Should complaints be investigated in private or in a public manner?

5. Is the current investigation process fair or should an alternative approach such as adversarial approach, where members are able to call and cross-examine witnesses in public, be used for investigations?

The Committee received a very disappointing response to its consultation, with only one reply being received. The Committee has therefore had to make its own decisions on the appropriate way forward without the benefit of input from other members.

As explained in the Consultation Document, the Committee considers that one of the most significant problems with the current procedures for investigating alleged breaches of the Code of Conduct is that PPC is involved throughout the entire process. This means that the Committee must initially consider whether there are grounds to investigate a complaint and, if it thinks that there are, it must then investigate the matter itself and make adjudication at the end of the process. If a complaint is upheld, the Committee also needs to decide what sanction to recommend when making the adjudication.

It can, in practice, be difficult for PPC to deal with the different phases of an investigation separately. For example, in making an initial decision on whether there are grounds to accept a complaint and begin an investigation, it is almost impossible for the Committee not to stray into the actual investigation and adjudication stages, and this is clearly unsatisfactory. In addition, as indicated in the Consultation Document, political considerations can interfere in the Committee's deliberations as it is clearly difficult, in practice, for any group of politicians to set aside all political allegiances and views when considering a complaint about a political colleague. There are often criticisms as a result that the process is unfair and not impartial.

PPC believes that the evidence from other jurisdictions, as summarised in the Consultation Document, shows that a post of independent Commissioner for Standards works extremely well in other parliaments. A Commissioner is able to undertake the initial investigation into a complaint in an entirely objective and impartial way. He or

she can interview the various parties as required, can call for documents and other evidence, and can then make a recommendation on whether or not he or she considers that the Code has been breached. In some cases, an informal resolution of a complaint is possible if the Commissioner is able to agree with the member concerned that a complaint can be resolved by an apology or through some other action.

It is important to stress that the Commissioners in other jurisdictions do not make the final decision in relation to a complaint. In order to ensure that the important principle of internal self-regulation of parliaments is respected, the Commissioners simply report their findings and recommendations to the relevant parliamentary committee responsible for standards. This committee then makes the formal decision on the case and decides whether to recommend any sanction if a complaint is upheld. PPC was nevertheless reassured to note that it is almost unheard of in other jurisdictions for the committees to do anything other than ratify the Commissioner's recommendations. Once the Commissioner has undertaken a thorough and objective investigation it would, in practice, be very difficult for a parliamentary committee to attempt to 'second-guess' the outcome of the Commissioner's work. As a result the system provides, in practice, a robust independent system of investigation into complaints against elected members without affecting the important principle of internal self-regulation by elected members to avoid any interference in the process by the courts.

As stated in paragraph (a) of the proposition, PPC is asking the States to agree that a new post of Commissioner for Standards be created in Jersey. The Commissioner's role would be similar to that of the officeholders in Westminster, Edinburgh and Belfast as described in the attached Consultation Document.

Complaints that an elected member had breached the Code of Conduct would initially be submitted to the Commissioner, who would consider whether there were grounds to investigate the complaint. If the Commissioner decided that there were grounds to investigate, he or she would undertake the investigation and, in doing so, could interview the complainant, the member concerned and any other person the Commissioner wished to see. The Commissioner would have statutory powers to call for all relevant documentation as part of the investigation. Once the Commissioner had completed the investigation, he or she would summarise his or her conclusions in a report to PPC. This report would then be provided to the member under investigation, who would be given the opportunity to address PPC before the committee made its final adjudication.

Having concluded that a new post of Commissioner for Standards should be created, PPC decided that other matters raised in its consultation, for example the manner in which complaints should be submitted, should be kept in abeyance until after the appointment of the new officeholder. In practice the new Commissioner will need to establish procedures and guidelines on the operation of the system, and it seems fairer to leave these matters to the Commissioner to determine. Paragraph (b) of the proposition makes it clear that the Commissioner will be responsible for keeping the operation of the Code under review and making recommendations, as necessary, if amendments are needed to Standing Orders or to other legislation. This is entirely in accordance with the way in which the Commissioners operate in other jurisdictions.

The volume of complaints in Jersey is fortunately relatively small, and PPC does not consider that the position of Commissioner would be a full-time position. As the volume of work would vary from month to month, the Committee's intention is that a

Commissioner should be recruited who would be able to work a flexible number of hours as required. The position of Commissioner will be an important role, and it will be necessary to recruit a person of proven experience in investigations to ensure that the work can be undertaken fairly and thoroughly. PPC considers that there would also be merit in following the Westminster practice in appointing a Commissioner for one non-renewable 5 year period, as the work of the Commissioner is likely to be unpopular in some quarters, and the fact that the appointment is non-renewable means that the Commissioner never has to be concerned about whether or not decisions he or she takes could influence any decision on re-appointment.

It will be necessary to enact legislation to provide a statutory basis for the Commissioner's work and, if this proposition is approved, PPC will bring forward the necessary draft legislation. The legislation will cover matters such as the powers that the Commissioner will need to obtain documents and require the attendance of witnesses. In addition, the Commissioner will need to be provided with appropriate legal protection to undertake the work. The need for some primary legislation will unfortunately mean that there will be a delay before a Commissioner can be appointed, but PPC will do all it can to bring the legislation forward for approval as soon as possible.

Financial and manpower implications

PPC does not consider it would be reasonable to expect this important work to be undertaken on a purely honorary basis, and considers that a daily honorarium should therefore be payable. The exact level of this payment would need to be determined, but the Committee considers that a daily rate similar, for example, to that payable to the Chairman of the Jersey Appointments Commission is likely to be appropriate. The total annual cost would hopefully not exceed £10,000 to £15,000, and PPC is willing to find this sum within the existing States Assembly budget. The Commission would be provided with administrative support through the States Greffe, which currently deals with the administration of complaints for PPC and which could therefore divert these staff resources to work with the Commissioner instead.

STATES OF JERSEY

CODE OF CONDUCT FOR ELECTED MEMBERS: REVIEW – CONSULTATION DOCUMENT

Presented to the States on 19th March 2012
by the Privileges and Procedures Committee

STATES GREFFE

2012 Price code: C R.34

REPORT

1. Introduction

The new Privileges and Procedures Committee appointed in November 2011 has decided that it intends to review the operation of the Code of Conduct for elected members in an attempt to address some of the difficulties that have been identified in recent years in relation to the Code and the procedures for investigating alleged breaches of the Code.

The new Committee has already reached an initial conclusion that the present procedures for the investigation of alleged breaches are unsatisfactory and the Committee considers that it may be appropriate to introduce some element of independent involvement in the investigation procedures so that PPC itself is no longer involved throughout the whole process when a complaint is dealt with.

Before making final recommendations for change to the Assembly, PPC would welcome views from States members and others on the following 5 questions –

1. Should there be an independent Commissioner for Standards or an independent Investigation Panel in Jersey?

2. Should the manner in which complaints can be submitted be amended?

3. What aspects of inappropriate behaviour or private conduct should be covered by the Code of Conduct?

4. Should complaints be investigated in private or in a public manner?

5. Is the current investigation process fair or should an alternative approach such as adversarial approach, where members are able to call and cross-examine witnesses in public, be used for investigations?

The background to each of the above questions is given in Section 5 of this Consultation Document. In order to assist respondents, PPC has also included in Sections 2 to 4 of this Consultation Document the background to the current Code in Jersey and the research into the operation of Codes of Conduct in a number of other jurisdictions which PPC has considered.

Responses to the Consultation should be sent to the Privileges and Procedures Committee Clerk, c/o States Greffe, Morier House, St. Helier, Jersey, JE1 1DD; or by e-mail to a.goodyear@gov.je. Responses should be received no later than Tuesday 1st May 2012.

2. Background to the present Code of Conduct

The initial ‘in principle’ decision to introduce a Code of Conduct was taken by the States in 2003 (P.32/2003) and the Code and the associated investigation process were then included in the new Standing Orders that came into force in December 2005. There has only been one small change to the Code since 2005, namely an amendment to clarify that members must not disclose publicly any discussion that takes place *in camera* in the Assembly (the present Code as set out in Schedule 3 to Standing Orders is attached at Appendix 1). The requirement for members to abide by the Code

is set out in Standing Order 155 which states that "An elected member shall at all times comply with the code of conduct set out in Schedule 3".

The investigation process is set out in Standing Orders 156 to 158 (attached at Appendix 2).

Under Standing Order 156 all complaints must be submitted to PPC, but PPC cannot accept any complaint: (i) which is made anonymously, (ii) which, in the opinion of PPC is frivolous, vexatious or unsubstantiated, or (iii) from a person who is not a member of the States if the complaint concerns words spoken by, or actions of, an elected member during a States meeting.

Standing Order 157 provides that when PPC has information, whether or not received from a complainant, that suggests that a member may have acted in breach of the Code it must, without delay, inform the member concerned and investigate the act. If the complainant or the member alleged to have breached the Code is a member of PPC, that member can take no part in the investigation.

Standing Orders provide that the investigation can be undertaken by PPC itself or by a panel of 3 persons. Standing Order 157 states that one of the 3 members of any such panel must be a member of the States (although not necessarily a member of PPC) but the other 2 members do not have to be States members. The panel must nevertheless be chaired by a States member appointed by PPC (meaning, of course, that if only one States member was appointed to a panel that person would have to be its chairman). Standing Order 157(8) makes it clear that PPC itself can still undertake any part of the investigation even if a panel has been appointed to investigate. The member who is the subject of the complaint has the right to address the persons investigating the complaint (whether they are PPC itself or a panel) and when doing so has the right to be accompanied by a person of his or her choice.

When the investigation stage is complete and the panel (if any) has reported to PPC the member concerned once again has the right to address PPC (accompanied by any person of his or her choice) and PPC must then decide whether or not it considers that a breach of the Code has occurred. The Committee must then report its conclusion to the member concerned and may inform the States of the outcome, and any action taken, through a report or statement. Standing Orders are silent on the nature of any 'sanctions' that can be imposed if PPC concludes that a breach has occurred but in practice the range of sanctions available include –

(i) a private letter to the member concerned drawing attention to the breach and advising the member to avoid such conduct in the future;

(ii) a public report or statement giving details of the breach but not recommending any further sanction;

(iii) the lodging for debate of a proposition of censure;

(iv) the lodging of a proposition seeking the suspension from the States of the member concerned. Standing Order 164(7) sets out the maximum length of any suspension, and the periods range from 7 days for a 1st suspension during a 3 year term to 28 days in the case of a 3rd or subsequent suspension during the same term. Standing Order 164(4) states that a member loses half of his or

her remuneration during a second suspension and all of his or her remuneration during any third or subsequent suspension. (No remuneration is lost during a first suspension.)

To date, successive PPCs have always been reluctant to require a member to apologise for a breach, as they have considered that any apology should be genuine and a 'requirement' to apologise might simply force a member to make an apology that was not heartfelt. The Committee has also been conscious that a member 'required' to apologise might refuse to do so, or might make a half-hearted apology that did not satisfy the requirement, and further action would then be needed.

There is no current provision in Standing Orders for any monetary 'fine' to be imposed in respect of a breach unless the States vote to suspend a member for at least the second time during a 3 year term of office.

3. Perceived difficulties with the present investigation process

Since the Code of Conduct first came into force, there have been a number of perceived difficulties that have been identified by successive Privileges and Procedures Committees. Some of the difficulties identified, in no particular order, can be summarised as follows –

(1) Investigations can occasionally take an extremely long time to conclude. Despite PPC's best efforts, there are often many months between the submission of a complaint and the conclusion of the investigation.

(2) There is occasionally an interaction with other processes such as criminal or data protection investigations, and this means that PPC cannot deal with complaints in a timely manner and may not subsequently be able to deal with the complaint without 're-opening' an issue that has already been investigated and dealt with in another way.

(3) Concerns have been expressed on a number of occasions about the fact that PPC holds the hearings and meetings in relation to breaches of the Code in private and not in public. (A submission made to PPC by the then Deputy of St. Martin in April 2010 is attached at Appendix 3.) In addition, some members have been concerned that the process does not allow a member under investigation to call witnesses or to cross-examine the complainant at a PPC meeting.

(4) To date, the option of using a panel with non-States members for investigations has never been used, although PPC has occasionally appointed a sub-committee of its own members as a panel to investigate a complaint. The use of a sub-committee does, however, mean that the process can take longer, and the member under investigation has the right to address both the sub-committee and PPC itself when the investigation has been completed.

(5) The restrictions in Standing Order 156, particularly the fact that PPC cannot accept a complaint that it considers to be "frivolous, vexatious or unsubstantiated" have occasionally caused difficulties because the provisions, albeit inserted in Standing Orders for valid reasons to allow PPC to dismiss complaints with no merit, mean that the Committee must make a form of judgement at the outset. This can be particularly difficult when the Committee

has to decide whether a complaint is 'unsubstantiated' before any investigation has been undertaken. Successive committee members have clearly found it difficult to avoid making 'judgements' on the merits of a complaint and on whether or not they consider that a breach has occurred at this very early stage. Because a separate investigation panel with non-States members has never been used, PPC has been involved from the very beginning to the very end of the process and has therefore been responsible for –

(i) agreeing that a complaint can be accepted (Standing Order 156);

(ii) investigating the complaint;

(iii) making a final adjudication on whether or not a breach has occurred.

(6) Some complaints are about what some may consider to be minor issues relating to private conduct, for example, the tone of language used; whereas other complaints might appear to be politically motivated to cause political difficulties for a particular political opponent of the complainant. This has often been perceived to be the case when the complainant is another States member. In addition, PPC members have occasionally found it hard to set aside their own political allegiances when considering complaints about their colleagues.

(7) Some complaints are submitted with very little background information and with no reference to the part of the Code that the member is alleged to have breached. PPC is often left to try to work out which part of the Code the person complaining is referring to and, in practice, it is likely that some complainants may not even have read the Code before submitting a complaint.

(8) There are limited sanctions if a breach of the Code of Conduct is identified, particularly when the breach is not serious enough to merit a vote of censure or suspension. Members of the public and States members occasionally comment that the Code has no 'teeth'.

(9) Concerns have been expressed to PPC by some members that there is no appeal against PPC's decisions and that this raised questions about the human rights compliance of the current process.

One of the most significant issues above is perhaps the fact that PPC is usually involved in the current process from the very beginning to the very end. There is no real separation between the 'investigation' of a complaint and the final adjudication on whether or not a breach has occurred. This contrasts greatly with other jurisdictions, including the UK House of Commons and the Scottish Parliament, where there is an independent Commissioner appointed to undertake initial investigations.

4. Position in other jurisdictions

In order to understand the work of the Commissioners and the interaction with the parliamentary committees that deal with complaints, the Greffier of the States visited Westminster and Edinburgh on behalf of the previous PPC to meet both the 2 Commissioners and staff of the committees that deal with the Code of Conduct at the House of Commons and in the Scottish Parliament, and subsequently reported back to PPC.

4.1. Parliamentary Commissioner for Standards – House of Commons

The key features of the present arrangement at the House of Commons in relation to the investigation of breaches of the Code of Conduct came into being in 1995 following recommendations by the Committee on Standards in Public Life chaired by Lord Nolan and associated recommendations of the Select Committee of the House on Standards in Public Life. The recommendations were for a new Code of Conduct for MPs, an improved register of members' interests, an independent Parliamentary Commissioner for Standards, and a strengthened Committee on Standards and Privileges. The first Parliamentary Commissioner for Standards was appointed in 1995.

The arrangements in place at Westminster represent a careful balance between the need to put in place an effective machinery for upholding high standards of conduct, with a strong independent element, whilst still preserving Parliament's control over its own affairs to ensure that parliamentary sovereignty and autonomy is preserved from interference by the Courts. The traditional right of the House of Commons to discipline its own members is a central element in relation to the concept of parliamentary autonomy.

Although the system for upholding standards of conduct in the House of Commons is described as one of 'self-regulation' there is nevertheless a strong independent element in the process because of the involvement of the Commissioner. The Commissioner is responsible for taking the decision on whether or not to investigate a complaint, for undertaking the investigation and for making a recommendation. The preservation of the House's right to self-regulation arises because the House itself retains the ultimate responsibility for deciding the shape of the investigation system and for taking final decisions in relation to individual cases arising. In addition, because the Commissioner is an Officer of the House of Commons appointed by the House, his work is not subject to oversight or interference by the Courts.

The independent Commissioner is appointed following interviews involving the Chairman of the Committee on Standards and Privileges, 2 senior members of the House of Commons staff and an external member from the United Kingdom equivalent of the Appointments Commission. Recommendations are made to the House of Commons Commission (the overall supervisory body of the House of Commons administration chaired by the Speaker) which meets and interviews candidates before selecting one nominee. The appointment is then formally presented to the House of Commons for ratification and the appointment is for a 5 year non-renewable term. The Commissioner, Mr. John Lyon CB, expressed the view to the Greffier that the non-renewable nature of the appointment was, in his view, particularly important, as the Commissioner knew that this work was likely to be unpopular in some quarters and the fact that the appointment was non-renewable

meant that the Commissioner never had to be concerned about whether or not decisions he or she took could influence any decision on re-appointment.

The Commission's principal duties can be summarised as follows –

(1) overseeing the maintenance of the Register of Members' Interests and the other Register of Interests for members of staff, journalists and all party groups;

(2) advising on the registration and declaration of interests in conjunction with the Registrar of Members' Interests;

(3) advising the Committee on Standards and Privileges on the interpretation of the Code of Conduct;

(4) monitoring the operation of the Code and the Register and making recommendations to the Committee;

(5) receiving, investigating and reporting to the Committee on complaints against members.

The Commissioner's work is very largely dominated by matters relating to the Register of Interests and he deals with virtually no complaints on members' general conduct. This appears to be a significant difference from the nature of the complaints that are normally submitted to PPC in Jersey. The Code of Conduct for MPs makes it clear that the Code applies to members in all aspects of their public life, but the Code does not seek to regulate what members do in their purely private and personal lives. The Commissioner sets a very high threshold before becoming involved in relation to complaints about members' behaviour where the complainant alleges that the member had brought the House into disrepute. The Commissioner pointed out that the wording in the Code of Conduct (which is mirrored in the wording of the Code of Conduct in Jersey) which states that members must "never undertake any action which would bring the House of Commons, or its members generally into disrepute" referred specifically to action which brought the House itself or its "members generally" into disrepute. The Commissioner takes the view that the Code does not therefore cover conduct that simply brings the member himself or herself into disrepute unless the action clearly brings the entire House or its members into disrepute as well. A recent review of the House of Commons Code undertaken by the Commissioner and the Committee on Standards and Privileges (HC 1579 published on 8th November 2011) made it clear that purely private conduct should remain outside the scope of investigation under the Code unless the conduct was so blatant as to bring the whole House into disrepute. In his memorandum to the Committee as part of the review the Commissioner wrote –

"35. (…) I consider that it should be made explicit that the Code should not normally apply to a Member's public life where it is not related in any way to their membership of the House. It should also not normally apply to his or her private and personal life. I recognise the difficulties, identified by the respondents, in making any exception to this provision. But I consider that there are potentially greater difficulties for the integrity and reputation of the House – and for public confidence in Parliament and its institutions – if, despite the extremity of the conduct, the House is seen to be powerless to

> defend its reputation. I consider, therefore, that the Code should recognise that there may come a point where the Member's conduct in certain extremely limited circumstances is so serious and so blatant that it causes significant damage to the reputation of the House. In my judgment it would be potentially even more damaging to the reputation of the House and the public's confidence in the Code of Conduct (which is one of its key purposes) if the House were unable to take action to express its disapproval and uphold its standards in such circumstances. But the conduct would need to be so serious and so blatant as to make it imperative that the House be given the opportunity to consider the damage done to the reputation and integrity of the House of Commons as a whole or of its Members generally. And the House should not consider any damage done to the reputation and integrity of the individual Member. That would be a matter not for the House, but for the electorate to judge."

The Commissioner is the sole gatekeeper in deciding whether to investigate a complaint that is submitted to him. The Committee on Standards and Privileges cannot ask him to investigate a matter he does not wish to investigate. The Commissioner can, at any stage in the investigation process, dismiss a complaint and he does not need to go to the Committee to seek permission to stop an inquiry. In addition he has the ability, through a rectification procedure, to ask the MP to deal with the matter that has led to the complaint. This would normally be used in cases where an MP has overlooked to register an interest and the Commissioner is satisfied that the error is a genuine oversight. These cases would not be referred to the Committee unless they raised a wider issue in which case the Commissioner may report to the Committee.

Complaints against MPs must be submitted to the Commissioner in writing and he insists they are signed and that the complainant gives a full postal address. Complaints submitted by e-mail only are therefore not acceptable. Once the Commissioner receives a complaint he will write to the MP concerned and set out in his letter the questions that he wishes to have answered. The MP is expected to respond in writing to the Commissioner and there may be several exchanges of correspondence before the Commissioner's initial questions are answered. If the MP requests a meeting with the Commissioner at this stage, the meeting is purely informal and no evidence is taken. The Commissioner is happy to talk to MPs about the process that will be followed, but he will not deal with the MP on a more formal basis at this stage in the proceedings and will not allow the member to bring a lawyer to any informal meeting.

Once the written exchanges with the MP concerned are concluded, the Commissioner may need to obtain information from other witnesses. He is able to contact anyone who may help to clarify the facts of the complaint; although he does not apply strict rules of evidence as in a criminal case and is even willing to receive hearsay evidence if it assists his investigation. In relation to complaints relating to the declaration of interests, the Commissioner will often seek information from the authorities of the House of Commons to get relevant documentary evidence.

Once the Commissioner has assembled all the initial evidence, he will provide this to the MP and arrange an interview with him or her. The Commissioner writes to the MP approximately one week before the interview setting out the key question areas that he wishes to cover; although he does not send a full verbatim list of the questions he intends to ask. The MP is notified that he can bring another person to the interview if he or she wishes to. The Commissioner interviews the MP in the presence of one of the Commissioner's colleagues who subsequently produces a note of the meeting. The

meetings are not tape-recorded and the note merely summarises the questions and answers. The note is sent to the MP after the meeting for him or her to agree its contents.

The Commissioner made it very clear that the process he followed was not in any way similar to a Court process and no cross-examination of witnesses was possible. Instead, the Commissioner saw his role as similar to that of a continental 'Juge d'Instruction' (investigating Magistrate).

Once the Commissioner's investigation is complete he will prepare his report and show the MP concerned the factual summary. This will usually be structured with an introduction, a summary of the relevant rules relating to the complaint, details of the investigation and the Commissioner's findings in relation to the facts. This section will include any facts that are not in dispute, information received from witnesses and the member's own response to the complaint. The Commissioner will only add his final conclusions when the report goes to the Committee on Standards and Privileges.

In reporting to the Committee, the Commissioner now gives an opinion of the seriousness of the breach of the Code of Conduct if he concludes that a breach has occurred. The recommendation on the seriousness of the breach is a relatively new provision, having been introduced following the recommendations of Sir Christopher Kelly, KCB, in the light of the MPs' expenses scandal.

The Commissioner is always present when his report is considered by the Committee on Standards and Privileges, but the actual decision on the Commissioner's findings is one for the Committee alone. In general the Commissioner has a very much 'arm's length' relationship with the Committee as, although he will attend the Committee's fortnightly meetings and report on progress, he will only give factual information about the number of complaints he is dealing with and the stage he has reached. He will never, during the investigation stage, inform the Committee what the complaint relates to and will not go into details.

The Commissioner's investigation work is undertaken entirely in private although it is his policy, if asked by a member of the public or the media, to confirm that he has initiated an inquiry. The Commissioner confirmed that some queries had been raised over the human rights compliance of the procedure that he followed, although his own view was that this was not a real concern as he did not make judgements in cases, and the results of his investigations were considered by the Committee on Standards and Privileges and then, if necessary, by Parliament itself.

The Commissioner explained that there are occasionally MPs who do not wish to co-operate with his inquiries and who refused to answer his initial letter. In these circumstances, the Commissioner reminds the members of the requirement of the Code of Conduct that they must co-operate at all stages with his inquiry and in practice this usually has the desired effect. Although he could approach the Committee to report instances of non-co-operation, he has not had cause to do so to date, and would prefer not to do this in view of the independence of his role in relation to the Committee. The Commissioner has found that many MPs do not accept his findings but, as the final adjudication on a breach of the Code is a matter for the Committee on Standards and Privileges, the fact that a member may not accept the Commissioner's findings does not affect the outcome of the complaint.

The Commissioner has found that, on occasions, there is an interaction between criminal investigations and complaints made to him, and as a result he has established a protocol with the Metropolitan Police to set out the interaction between police investigations and complaints under the Code of Conduct. In cases where there is a clear allegation of criminal conduct such as fraud or tax evasion, the Commissioner will simply advise the complainant to go to the police. If the Commissioner believes that criminal offences may have been uncovered during his investigations he will contact the police, although he cannot hand over any evidence collated in the investigation as the papers may be covered by parliamentary privilege and cannot therefore be used in the course of a criminal investigation. In addition, as mentioned above, the Commissioner does not gather evidence to a criminal standard, and the police must therefore undertake their own investigation and evidence-gathering procedures. There are nevertheless occasions when significant delay can occur for the Commissioner if he is waiting for the outcome of a police investigation. In one case, relating to an MP's failure to record in the Register of Members' Interests donations he had received in respect of his campaign for election as deputy leader of his political party, the investigation by the Commissioner was suspended for 10 months pending the completion of a police investigation into the related failure by the member to report the donations to the Electoral Commission, which was a criminal offence.

4.2 House of Commons Committee on Standards and Privileges

At the House of Commons further information was sought from the Clerk to the Committee on Standards and Privileges.

The Clerk indicated that the Committee considered that the Commissioner system worked extremely well, as the Commissioner was in some ways an 'insider' to the parliamentary system and yet fiercely independent in relation to his work. The Commissioner had huge moral authority and was well respected. Realistically it was therefore extremely difficult for the Committee to disagree with his findings. The Commissioner's reports were extremely comprehensive and therefore left the Committee little room for manoeuvre, although the Committee would still give its own views on matters after considering the Commissioner's report.

The Clerk confirmed that the Commissioner gave only very minimal information to the Committee during the course of his investigations into a complaint. When his investigation and report were complete, they were sent to the Clerk under cover of a memorandum from the Commissioner, and the Clerk then forwarded the report to the MP concerned. This would therefore be the first time that the MP had seen the conclusions of the Commissioner because, as mentioned above, the conclusions are not included in the initial version of the report sent to the MP by the Commissioner for factual checking.

The Committee takes the view that complaints must be dealt with quickly, as this is in everyone's interest. The MP concerned is invited to give written comments to the Committee within a matter of days and invited to exercise his or her right to appear before the Committee. The MP is reminded that he or she is not permitted to lobby members of the Committee on Standards and Privileges about the complaint. When the report is sent to the MP who is the subject of the complaint, it is also sent to the members of the Committee.

In most cases the report is sent to the member on a Wednesday and he or she is invited to respond by the following Monday. Most members will reply and, although some

take issue with the Commissioner's conclusions, many will simply accept the conclusions and not challenge the results of the investigation. If the MP concerned wishes to give oral evidence, the Committee will delay making its conclusions for one week to allow the evidence session to be arranged.

If the MP does not wish to give oral evidence to the Committee, the Chairman, the Commissioner and the Clerk will meet on Monday to ascertain the Chairman's initial thoughts on the Commissioner's report. The following day (which is only 6 days after the report has been sent to the member) the Committee will meet and discuss the Commissioner's report with him. After any discussion, the Committee will arrive at a conclusion and this will be done almost without exception by consensus without the need to take any formal vote. It is the Committee's normal practice to issue the report as soon as possible and this is normally done within 2 days of the meeting. In summary, the entire process from the transmission of the Commissioner's report to the Committee to the publication of the Committee's subsequent conclusions is usually undertaken in just over one week. The member who is the subject of the report will only be given one hour's notification before publication to avoid any leaks. The Clerk explained that there were only very rarely delays in the Committee process. These could occur because of factual queries or because the Committee could not agree on conclusions although, in these circumstances, it was common to adjourn for no more than 24 hours before reaching a final conclusion.

It is important to note that the Committee proceedings are undertaken in private, and if an MP wishes to give oral evidence in his or her own mitigation this is not done in public. There is no provision for the process to become adversarial and MPs are not permitted to call witnesses or cross-examine anyone before the Committee. In addition the Committee will not permit MPs who are the subject of complaints to be present during the Committee's deliberations on the case. The Committee's view on this matter was referred to in its fifth report of the 2009 – 2010 Session in relation to a complaint against Mr. Brian Binley MP where the Committee wrote in its report –

"*25. We did not assent to Mr. Binley's request to be present at our discussion of the Commissioner's memorandum. To have done so would have been contrary to the long standing practice of Committees of the House that their deliberations are carried out in private. As an Officer of the House, the Commissioner attends such meetings at our request, to answer any questions that we may wish to put to him on the content of his reports. A member who is the subject of an investigation by the Commissioner has ample opportunity to make his case; first, in the course of the Commissioner's investigations; then, should the complaint be upheld, in written or oral evidence to this Committee; and finally, should a sanction be recommended, on the floor of the House. Mr. Binley was told that he could ask to attend the Committee to give oral evidence but he declined to do so.*"

The Clerk stated that the main criticism of the Committee, particularly from the public, was in relation to the sanctions imposed. The main sanctions that the Committee can recommend are suspension (in very serious cases), the withdrawal of salary without suspension (which is in some ways a form of fine) or the removal of the resettlement grant that is paid to MPs on leaving office. In addition, the Committee can recommend that a member is required to apologise to the House of Commons, and this can occasionally be done in writing. Both Commissioner and the Clerk expressed

the view that MPs do regard an apology to the House as a serious sanction as they consider it to be a public humiliation.

If the Committee recommends a sanction such as suspension or withdrawal of salary, this must be agreed by the House of Commons and a motion is put to the House by the Leader of the House inviting the House to endorse the recommendations of the Committee. Although the MP who is the subject of the debate is theoretically entitled to participate in the usual way in this debate, the normal convention is that the member concerned frequently does not participate at all, and if the member does, it is generally only to apologise before leaving the Chamber. In practice the debates are not lengthy or controversial and are usually unanimously agreed by the House without the need for a formal division.

4.3 Scottish Public Standards Commissioner and the Standards, Procedures and Public Appointments Committee

The system used in the Scottish Parliament to investigate alleged breaches of their Code of Conduct is not dissimilar to the Westminster system, although there are some small but important differences in the process.

The current Scottish Public Standards Commissioner, Mr. D. Stuart Allan, was first appointed in April 2009 as the Scottish Parliamentary Standards Commissioner. Following the coming into force of the Scottish Parliamentary Commissions and Commissioners etc. Act 2010 on 1st April 2011, the work that Mr. Allan also did as Chief Investigating Officer for the Standards Commission for Scotland (a separate body which investigated breaches of the Code of Conduct for local authorities and other public bodies such as National Park Authorities, NHS Boards or Community Justice Authorities) was combined into one single office.

In relation to his work investigating complaints against Members of the Scottish Parliament, the Scottish Public Standards Commissioner is an independent investigator of complaints that an MSP has breached the Code of Conduct, the Interests of Members of the Scottish Parliament Act 2006 or other provisions.

There are certain restrictions on the duties of the Commissioner. As in Westminster, he does not decide on sanctions as this is a matter for MSPs. Unlike his counterpart at Westminster he does not give advice on standards issues as, in Scotland, the Clerks to the Standards, Procedures and Public Appointments Committee are responsible for doing this. He cannot deal with complaints about ministerial action as these must be submitted to the Office of the First Minister. In addition, he cannot deal with complaints about conduct in the Chamber or during Committee meetings as these are addressed by the Presiding Officer or Committee Convener (Chairman) respectively. Further, he cannot deal with complaints about engagement and liaison with constituents by MSPs, and these are referred to the Presiding Officer to resolve informally.

The complaints process in the Scottish Parliament is undertaken in 4 distinct stages and the Commissioner takes part in Stages 1 and 2. Stage 1 requires the Commissioner to consider whether a complaint submitted to him is admissible. To be admissible the complaint must be relevant, namely concerning the conduct of an MSP and not be an ‘excluded complaint’, namely one falling into the categories referred to in the paragraph above. The complaint must involve a potential breach of the Code of Conduct and must therefore relate to the conduct of the MSP during his or her

parliamentary duties. The complaint must name the MSP concerned and identify, and be signed by, the person making the complaint. As at Westminster, e-mail complaints are not acceptable. In addition, the complaint must relate to a matter that occurred no more than one year from identifying the problem. The Commissioner must be of the view that the complaint is of sufficient substance to warrant further investigation. It is of note that the Commissioner's annual report for the period 1st April 2010 to 31st March 2011 identifies that 35 complaints were received during the year (including 5 carried forward from previous years) and, of these, 30 were considered to be inadmissible, 2 were withdrawn, 2 were still under initial consideration on 31st March and only one had been taken to Stage 2.

If the Commissioner decides that a complaint is admissible, the investigation moves to Stage 2, which requires the Commissioner to investigate whether he believes the MSP did indeed carry out the conduct complained of and, if so, whether this meant that the rules were breached. The Commissioner will undertake as much of the investigation as possible by correspondence, and he has formal statutory powers to compel witnesses and require the production of documents. If necessary he will see the complainant, the MSP concerned and any relevant third parties, and all interviews are tape-recorded, unlike the position at the House of Commons where a simple written note is made of such meetings. The investigation nevertheless takes place entirely in private. At the conclusion of Stage 2, the Commissioner reports to the Standards, Procedures and Public Appointments Committee and, before submitting his report to the Committee, the member concerned is given first sight of the draft report and can suggest corrections.

Stage 3 of the process involves consideration of the Commissioner's report by the Standards, Procedures and Public Appointments Committee. The Committee will consider, in private, the report and any representations on the report that have been made by the member who is the subject of the complaint. The Committee is not bound by the Commissioner's findings and may decide that it agrees with the findings and conclusion, or may refer the complaint back to the Commissioner for further investigation or clarification. The Committee is also entitled to conduct its own investigation. If the Committee concludes that a breach of the Code of Conduct has been committed, it will then decide whether to recommend sanctions and report to the Scottish Parliament.

Stage 4 involves the Scottish Parliament deciding on sanctions if the breach is referred to the Parliament by the Standards, Procedures and Public Appointments Committee. The Committee will lodge the relevant motion and the Scottish Parliament will then debate and vote in the usual way on whether or not sanctions should be applied. There have, to date, only been 2 debates following a Stage 3 process and, unlike the position in the House of Commons referred to above, there are therefore no established conventions on whether or not the member concerned will participate. The MSP concerned is clearly entitled to participate if he or she wishes, and in one of the 2 debates the member concerned chose not to speak, whereas in the other case the member spoke robustly in his own defence to challenge the Committee's conclusions. The Scottish Code itself does not provide an exhaustive list of sanctions that can be applied, although sanctions can involve restriction from participation in proceedings relating to a particular matter or exclusion from all proceedings of the parliament. In addition, in certain circumstances, rights and privileges such as access to certain facilities may be withdrawn from the member. Exclusion from proceedings will lead to a consequential loss of salary and therefore a monetary penalty.

It is of particular note that, as at the House of Commons, the procedures followed in Edinburgh are also undertaken entirely in private until the end of Stage 3 if the Committee decides to recommend sanctions to Parliament. Unlike the position at the House of Commons where the Commissioner will confirm that he is dealing with a matter, the Scottish Commissioner is not even permitted to disclose whether or not he has received a complaint in any particular case, and MSPs are prevented by statute from disclosing that a particular complaint is being investigated. Although there may be leaks of information and speculation in the media, there is therefore no official information at all given about any complaint or investigation procedure until the end of Stage 3.

The Commissioner explained that there is inevitably, on occasions, some interaction with criminal investigations, and this problem is accentuated in Edinburgh because the Scotland Act 1998 (which established the Scottish Parliament) makes it a criminal offence to fail to register an interest, to declare an interest or to undertake paid advocacy. Any member who is found to have committed an offence is liable on conviction to a fine not exceeding level 5 on the Scottish Standard Scale (currently £5,000). This is a significant difference from the position at Westminster, where failures to register are dealt with entirely by Parliament and are not criminal offences. (The extent of parliamentary privilege is significantly restricted in Scotland compared to the position at Westminster and Jersey.) As a result of the criminal offence involved, the Commissioner must suspend his investigation if he believes that a breach of the provisions of the Act has occurred, and he must then report to the Procurator Fiscal who will determine whether to pursue the matter as a criminal offence. In one particular case a delay of some 7 months had occurred once the Commissioner had made a reference to the Procurator Fiscal.

The Commissioner tries at all costs to avoid involvement in dealing with complaints of what might be called ‘disrespectful behaviour’ on the part of members. In his opinion the behaviour had to be extremely poor before he would even consider becoming involved, and it had to be clear that the behaviour had taken place as part of a member’s formal parliamentary duties and not simply during his or her private life. The Commissioner made a similar distinction when receiving complaints concerning matters such as Internet blogs. He stated that he would make a distinction between a private blog run by a member, where he would not become involved at all, and an official blog which was run by a member in relation to his parliamentary duties. He had, on one occasion, investigated a blog run by a Scottish member where a member of staff employed by the MSP had placed inappropriate material on the blog.

The Commissioner expressed the view that it was an extremely subjective matter to deal with disrespectful behaviour, as it was ultimately for the electorate to decide what form of behaviour was acceptable for members. It was therefore difficult for any independent investigator to express a view on the appropriateness or otherwise of conduct in respect of matters such as the language used by a member. The Commissioner did mention that issues of inappropriate conduct were more common in his work for local government matters although, even during this work, he did not feel it was appropriate to investigate matters that did not arise directly from an elected official’s public duties.

4.4 Northern Ireland Assembly

The Committee on Standards and Privileges of the Northern Ireland Assembly undertook a full review of the Code of Conduct in that jurisdiction and published its report to the Assembly on 18th May 2010.

The current structure used in Northern Ireland for dealing with breaches of the Code of Conduct mirrors the procedures described above for the House of Commons and the Scottish Parliament, with a system of a Commissioner and a Committee on Standards and Privileges.

The initial recommendation that a Commissioner should be appointed was made by the Northern Ireland Committee on Standards and Privileges in 2001 and, as an interim measure, the Assembly Ombudsman was appointed to discharge the functions of Commissioner for Standards as well. The Assembly Members (Independent Financial Review and Standards) Act (Northern Ireland) 2011 created a separate office of Assembly Commissioner, and the Assembly is currently recruiting to fill this position.

The Committee's report published in May 2010 provides a very useful summary of some of the issues that need to be considered in relation to the most appropriate means of maintaining and enforcing a Code of Conduct for Elected Members. The Committee took advice from across the United Kingdom and Ireland, and its report summarises its conclusions in a number of different areas.

In considering the issue the Committee decided to consider the following points –

- what the role, responsibilities and powers of an Assembly Commissioner for Standards should be;
- whether the position of an Assembly Commissioner for Standards should be placed on a statutory basis;
- how an Assembly Commissioner for Standards should be appointed;
- what the terms and conditions of any appointment might be;
- what the role of the Committee on Standards and Privileges should be in dealing with alleged breaches of the Code of the Conduct;
- what the role of the Assembly should be in dealing with alleged breaches of the Code of Conduct.

In relation to modifying and maintaining a Code of Conduct, the Committee concluded that the current responsibilities were broadly acceptable, namely that the Committee itself had responsibility for recommending modifications to the Code of Conduct while the Assembly had responsibility for actually agreeing those modifications. The Committee did, nevertheless, agree that it would be appropriate for the Commissioner, who has responsibility for interpreting the Code during the course of investigations, to be able to draw to the Committee's attention areas of the Code which may need to be reviewed or amended.

Having reviewed the overall structure used in Northern Ireland for dealing with complaints, the Committee concluded that there was no fundamental problem with the current structure. The current process, much as in the House of Commons or the Scottish Parliament, involves the Commissioner receiving complaints and investigating admissible complaints. In Northern Ireland the Commissioner cannot, however, rule that a complaint is inadmissible and must make this recommendation to the Committee for a final decision on inadmissibility. The role of the Committee on Standards and Privileges is therefore to dismiss complaints brought to its attention by the Commissioner which he or she considers to be inadmissible, and to consider reports on admissible complaints from the Commissioner. The Committee must then determine whether breaches of the Code of Conduct have occurred, and recommend to the Assembly that specific sanctions be imposed on members who have breached the Code. The Northern Ireland Assembly itself has responsibility for imposing sanctions on members who have breached the Code of Conduct in response to reports from the Committee on Standards and Privileges.

During its inquiry the Committee heard evidence from some who were opposed to any sort of self-regulation for the Northern Ireland Assembly and who therefore felt that the current roles described above were inappropriate. The Committee received some responses to its consultation suggesting that the Commissioner should not only investigate alleged breaches of the Code, but should also determine whether or not the Code had been breached and then, if he or she considered it appropriate, impose sanctions. Having considered these views, the Committee nevertheless decided that it would not be appropriate for the various roles and powers relating to the investigation process to be vested in one single individual who would have had unilateral responsibility for enforcing the Code. The Committee agreed that it was important in terms of the Northern Ireland Assembly's credibility for the Assembly to be seen to be showing leadership in respect of conduct matters. The Committee believed it was important that the Code of Conduct represented the collective view of the Assembly on what constituted appropriate and acceptable behaviour and, in common with other jurisdictions, it was therefore important for the Assembly itself to take responsibility for enforcing the Code.

The Committee considered whether the Assembly Commissioner for Standards should be able to initiate his or her own investigation into the conduct of members without having first received a complaint. Under the current Standing Orders in Northern Ireland, the Commissioner is only able to investigate when a matter is referred to him. The Committee received differing views on this issue as there were some who believed it was essential to ensure public confidence in the investigation system that the Commissioner should be able to investigate matters that were, for example, reported in the media, without the need for a formal complaint. Others who expressed a different view felt that a power of discretion for the Commissioner could call into question the Commissioner's judgement whenever he or she decided whether or not to investigate a matter. The Committee eventually concluded that the Commissioner should be able to initiate his or her own investigation without a formal complaint, as it felt it would not be acceptable for the Commissioner to be prevented from investigating where there were significant, legitimate and evidential concerns in relation to the conduct of members, but where no formal complaint had been made. The Committee nevertheless felt that the Commissioner should only launch his or her own investigation when he or she was quite satisfied that there was a sound evidential base to justify an investigation, and the Committee felt that the Commissioner should make preliminary inquiries in respect of a member's conduct before concluding that a 'self-start' investigation was appropriate. The Committee also felt that it should retain

its own power to refer a matter to the Commissioner for investigation, although the Committee envisaged that this would only ever occur in exceptional circumstances.

The Committee considered whether the current inability of the Commissioner to dismiss a complaint that he or she considered to be inadmissible, as referred to above, was appropriate. The Committee recognised that there could be some value in allowing the Commissioner to dismiss complaints that were clearly inadmissible without reference to the Committee. Having considered the merits of change, the Committee nevertheless concluded that the current system was appropriate, as giving the Commissioner the power to determine whether or not a complaint should be investigated would fundamentally alter his or her role. The Commissioner would effectively become a decision-taker in terms of the outcome where someone had sought to make a complaint, and the Committee believed that it was more appropriate for the power to dismiss a complaint as inadmissible to remain with the Committee. The Commissioner would nevertheless continue to provide advice on admissibility to the Committee to assist Committee members in their decision-making.

The Committee considered whether or not the Commissioner should have the ability to recommend a sanction when reporting to the Committee. The current Northern Ireland Standing Orders prevent the Commissioner from doing this. The Committee received no evidence during its consultation that it would be appropriate to allow the Commissioner to suggest an actual sanction, although it was suggested that the Commissioner should be able to include in any report an indication of the seriousness of any breach as a guide to what an appropriate sanction might be, and the Committee concurred with this suggestion.

The Committee considered whether there was any formal role for outsiders in the investigation process. The Committee received evidence from the United Kingdom Committee on Standards in Public Life recommending that the Northern Ireland Committee on Standards and Privileges should have at least 2 lay members with full voting rights. This suggestion was made because it was felt that the inclusion of lay membership would be a useful step in enhancing public acceptance of the robustness and independence of the Assembly's governance arrangements in relation to the conduct of members. The Committee noted that the Committee on Standards and Privileges at the House of Commons had already indicated that it was willing to consider the appointment of independent lay members. The Committee was not unsympathetic to the suggestion and, although it made no final recommendation, it agreed to consider this matter further, having consulted with other jurisdictions such as the House of Commons. Subsequent enquiries with the House of Commons have ascertained that there has been no progress to date on appointing lay members to the Committee on Standards and Privileges.

A significant issue considered by the Committee during its review was whether any appeals procedure should be introduced in relation to decisions reached by the Committee on Standards and Privileges. Although some of the submissions received by the Committee suggested that some appeal mechanism should be introduced, the Committee finally concluded that there should not be a formal appeals mechanism, principally because of the practicalities of identifying a suitable body to which appeals could be made. The Committee noted that the most significant decision against which a member might wished to appeal would be a decision by the Northern Ireland Assembly itself to impose a sanction, and the Committee could not think of any suitable body to deal with appeals against such decisions on the basis that it would be

unsatisfactory to allow the Courts to intervene with the proceedings of the Assembly. It is of interest that the Committee received evidence from the Northern Ireland Human Rights Commission during its inquiry, and a member of that Commission gave his views on the desirability of an appeal mechanism in the following terms –

> *"In principle every legislature around the world should be capable and confident enough to regulate itself, without having to draw the Courts in to determining whether its members have breached its own rules. If the process were to be seen as being open to appeal to a higher court that, in turn, would create all sorts of Article 6 requirements about procedural details. For example it would raise questions about whether members can be obliged to answer questions or to participate in what would otherwise be voluntary procedures and about whether members would be entitled to legal representation in any hearing before the Committee. To turn an internal regulatory process into what would essentially be a judicial process appears to be an unnecessarily complicated thing to do. We do not see any need for the final decision of the Committee, communicated to and approved by the Assembly, to be subject an appeal to an outside court."*

In agreeing that there should not be any appeal mechanism, the Committee concluded that it was of critical importance to ensure that there was procedural fairness in the process for considering complaints. The Committee was of the view that the existing process for considering complaints was procedurally fair, but agreed that further measures might be necessary to bolster procedural fairness and, in particular, to enhance the existing opportunity for members who are subject to investigation to participate and contribute to proceedings once the Commissioner's report had been sent to the Committee.

The final matter considered by the Committee concerned the method of appointing an Assembly Commissioner for Standards.

The Committee agreed that the role of the Assembly Commissioner for Standards should be set out on a statutory basis, and the Northern Ireland Assembly subsequently approved the Assembly Members (Independent Financial Review and Standards) Act (Northern Ireland) 2011 mentioned above to achieve this objective. The Act gives the Commissioner the power to call for witnesses and documents, statutory protection from defamation, and protection from the requirement to disclose information. It is a criminal offence not to co-operate with an investigation of the Commissioner. In order to safeguard the position of the Commissioner, the Act provides that the Commissioner can only be dismissed by the Assembly as a whole, with any resolution for dismissal needing to be passed with the support of at least two-thirds of the members voting.

During its review, the Committee considered that the Commissioner role could be a part-time position and that the post-holder could be paid a daily rate plus an annual retainer. The Act provides that the appointment is for a 5 year non-renewable term to allow the appointee to commit to a long-term programme of work without looking over his or her shoulder wondering whether a re-appointment would come.

4.5 States of Guernsey

The States of Guernsey approved a Code of Conduct for members of the States of Deliberation in 2006, and the Code mirrors very closely many provisions of the Jersey Code, although it also includes certain other matters that are covered by provisions of Standing Orders in Jersey on issues such as the receipt of gifts and hospitality.

The initial investigation of complaints in Guernsey is nevertheless undertaken very differently from the procedures used in Jersey. The States of Guernsey have established a States Members' Conduct Panel, the purpose of which is to investigate complaints in relation to alleged breaches of the Code of Conduct.

The States Members' Conduct Panel comprises a Chairman, a Deputy Chairman and 8 ordinary members appointed in writing by the Presiding Officer (Bailiff) for a period of 5 years. Members of the States and their spouses are not eligible to serve on the Panel.

Any complaint alleging that the conduct of a States Member is in breach of the Code of Conduct, whether from a Member of the States or a member of the public, must be addressed in writing to the Chairman of the Conduct Panel. The Chairman of the Panel will not consider unsubstantiated allegations, and complainants are required to supply the Chairman with supporting evidence. A complaint founded only on a media report will not normally be treated as a substantiated allegation, and anonymous complaints will not be considered.

If the Chairman of the Panel is satisfied that there is *prima facie* evidence to support the complaint, he or she will ask the States Member concerned to respond to the complaint and will then conduct an investigation. For the purposes of the investigation, an Investigation Panel is established from the members of the Conduct Panel. Each Investigation Panel comprises the Chairman and 2 other members from the Conduct Panel, one of whom is nominated by the Chairman with the other being nominated by the Member under investigation. If the Member under investigation declines to make a nomination, or fails to do so within a reasonable period specified by the Chairman, the member forfeits his or her right, and the Chairman makes the appointment of the second member.

The Member under investigation is, at every stage, given full details of the nature of the complaint and is invited to address the Investigation Panel. Members are required to co-operate fully and promptly with the Investigation Panel, even if they consider that the alleged breach is unsubstantiated. As in Jersey, any failure to co-operate with the investigation is, in itself, regarded as a breach of the Code.

The Investigation Panel may require the production of papers and records, and may request the attendance of any person before it. The Panel may also request that specific documents in the possession of a Member relating to its inquiries be produced.

If at any stage during the investigation the Investigation Panel has cause to believe that a criminal offence may have been committed, it is required to suspend the proceedings and refer the matter immediately to the Chief Officer of Police (this also applies at the very first stage when the Chairman is considering the *prima facie* evidence and deciding whether to establish an investigation). Once a case has been referred to the Chief Officer of Police, the investigation cannot resume until the judicial proceedings

have been concluded or the Chief Officer of Police has certified to the Chairman that he or she has no further interests in the matter.

If the Investigation Panel finds that a breach has been substantiated, but is of the view that the breach of conduct is of a minor nature, it will normally dispose of the matter by cautioning the Member concerned. In these cases, a report of the Investigation Panel's decision is forwarded to the Presiding Officer and to the Greffier, and the report is made available for public inspection during normal business hours at the Greffe.

If the Panel finds that a complaint has been substantiated, but is of the opinion that the Member should be formally reprimanded, suspended, removed from a particular office or expelled, it must report its findings to the States Assembly and Constitution Committee which, in turn, must report to the States on the matter with appropriate recommendations. The Panel must also proceed in this way if a Member refuses to accept a caution from the Panel as set out above. Once the matter has been referred to the States, it is for the States to decide whether or not to impose the sanction recommended by the Investigation Panel and referred to it by the Committee. Even if a Member has refused to accept a caution, the States may nevertheless resolve that the Member should be cautioned. The Guernsey authorities have confirmed that the implication of a caution is similar to a censure in Jersey.

Information from Guernsey indicates that since the Code was introduced in 2006 the Panel has dealt with only a small number of cases and only 2 have been referred to the States. In these cases one member was reprimanded and one cautioned. There have been no recommendations for suspension or expulsion.

The Code of Conduct Panel in Guernsey is currently comprised of a former Deputy Bailiff as Chairman and an Advocate as Deputy Chairman. The other 8 members are an Advocate, 2 former States members, a former Dean, a former Director General of the Financial Services Commission and 3 leading business-people. The Panel sits on an honorary basis, with the only remuneration available being a £60 per half-day attendance allowance; although in practice, no such allowance has ever yet been claimed by the members. Any member of the Panel who has any direct or indirect personal interest in a matter referred to it must declare the interest to the Chairman and take no further part in the investigation. If both the Chairman and Deputy Chairman are unable to act due to conflict of interest, the Presiding Officer must appoint one of the other members of the Panel to be acting Chairman in respect of the investigation.

The Panel operates in a confidential way and meetings with the member under investigation are always held in private. In practice, details of a complaint often reach the public domain because the complainant or the member under investigation releases information, and the Chairman of the Conduct Panel will confirm, if asked by the media, that a particular complaint has been received, although the Chairman will not give any details of the investigation until it is completed. If a complaint is not upheld no public document is issued and no public comment is made by the Panel.

There is no formal appeal mechanism as such from the decision of the Panel but, as described above, the Panel can only caution a member in the case of a breach if the member agrees to this course of action. If the member does not agree, or if the Investigation Panel believes the matter is too serious to be dealt with by a caution, it is referred for political consideration by the States. In this way the ability of the States to be solely responsible for managing its internal discipline is preserved.

5. Questions for consideration

It is clear that the investigation procedures used in the House of Commons, the Scottish Parliament, the Northern Ireland Assembly and the States of Guernsey all vary significantly from the current procedures used by PPC in Jersey.

As indicated in the Introduction, PPC is minded to recommend changes to the investigation procedures used in Jersey and would welcome views on the questions set out below.

5.1 Should there be an independent Commissioner for Standards or an independent Investigation Panel in Jersey?

Experience to date in Jersey would tend to suggest that some separation of the investigation of complaints from the final adjudication process would be beneficial, and PPC is keen to receive views on the most appropriate way to achieve this.

There is no doubt that the position of Commissioner for Standards works extremely well at present at the House of Commons and the Scottish Parliament. Both Commissioners are men of great integrity and with great moral authority to deal with complaints. The involvement of a Commissioner enables investigations to be undertaken in an independent manner and at arm's length from political involvement. The Commissioner can undertake in-depth investigations and get to the bottom of the factual basis of a complaint, either by receiving written evidence from different parties or by holding meetings with them as necessary. The Commissioner will prepare a complete report with his conclusions which is then submitted to a Committee of parliamentarians for consideration. The involvement of a Commissioner brings a great deal of independence to the investigation of complaints, whilst still preserving the important principle of internal self-regulation for the legislature without outside interference. Having a Commissioner nevertheless vests a considerable responsibility and power in one individual, and it is therefore clearly essential to appoint a person of appropriate experience and ability who is able to make unpopular decisions without losing the respect of members.

PPC is considering whether it would be worthwhile to pursue the possibility of appointing a Commissioner in Jersey and, if so, whether it would be possible to identify a suitable person to undertake this role and whether or not the position could be undertaken on an honorary basis. If it was considered appropriate to appoint a paid Commissioner, it would be necessary to assess the likely annual resource implications and whether these could be justified in the current economic climate. Alternatively, the Guernsey system of an independent panel could possibly provide a more suitable model for a small jurisdiction.

5.2 Should the manner in which complaints can be submitted be amended?

It is clear from other jurisdictions that there are stricter criteria in relation to the submission of complaints than those used at present in Jersey. Both the House of Commons and the Scottish Parliament require complaints to be submitted in writing identifying the complainant and giving a full postal address. Complaints received by e-mail will not be accepted and the complainant will be requested to write in more formally with a signed letter. In addition, complainants are expected to provide full

details of their complaint and identify which part of the Code of Conduct they believe has been breached, and not expect the Commissioner or the Committee to work this out themselves. The procedures for the submission of complaints in Jersey are currently significantly less stringent, with complaints accepted by e-mail and often with no indication of the section of the Code that is alleged to have been breached.

PPC welcomes views on whether the criteria used in Jersey are appropriate or whether more rigorous standards should be applied before a complaint is accepted.

5.3 What aspects of inappropriate behaviour or private conduct should be covered by the Code of Conduct?

The Commissioners at the House of Commons and in Edinburgh are extremely reluctant to become involved in investigating complaints of simple inappropriate behaviour unless these arise very clearly from the public duties of a member. Both Commissioners consider that the ultimate judgement on behaviour is to be made by the electorate at election time. This can be contrasted with the position in Jersey where PPC has, for example, frequently received complaints relating to matters such as offensive language used in e-mail correspondence or on Internet blogs. PPC has often found it difficult to deal with complaints relating to this type of behaviour, but moving to the position that prevails elsewhere might be seen by some as a weakening of standards.

PPC would therefore be interested to hear views on whether the nature of behaviour that is covered by the Code should be restricted or amended in any way.

5.4 Should complaints be investigated in private or in a public manner?

Several members have expressed concern in recent years about PPC's stance that complaints will be dealt with in private. Some members have gone as far as informing PPC that they will not attend meetings voluntarily unless they are held in public. It is nevertheless of note that both the House of Commons and the Scottish Parliament currently deal with complaints in an extremely private manner, with possibly even greater confidentiality than currently exists in Jersey. It is of particular note that in Scotland there is a statutory restriction on any disclosure of information relating to complaints, and the Commissioner will not even confirm or deny that he has received a complaint and is undertaking an investigation.

The confidentiality that is maintained in the House of Commons and in Edinburgh continues right up to the time when the final report is presented to Parliament, and requests for matters to be dealt with in public have always been refused. It is of interest that when the Scottish Parliament was first established, the Committee took evidence in public when considering disciplinary matters as there was no post of Commissioner, but ever since the creation of the post of Commissioner in Scotland in 2002, the process has been a very private one up to the time of the publication of the Committee's report (the reference to public hearings in Scotland in the then Deputy of St. Martin's submission attached at Appendix 3 is therefore out of date).

It is almost inevitable that there may occasionally be public speculation, 'leaks' or media comment about a complaint that has been submitted to PPC. Any decision to move to a fully 'open' process would nevertheless be a significant change in procedure. PPC therefore welcomes views on whether the current position in Jersey, namely that complaints should be investigated without any public comment (which mirrors the stance taken elsewhere) is appropriate, or whether a more open investigation system should be used.

5.5 Is the current investigation process fair or should an alternative approach such as adversarial approach, where members are able to call and cross-examine witnesses in public, be used for investigations?

It has been suggested to PPC in the past that the Committee should adopt a very different approach to dealing with complaints, by allowing a public process where witnesses could be called and cross-examined by the member who was the subject of the complaint. In his April 2010 submission (Appendix 3) the then Deputy of St. Martin drew PPC's attention to Article 6(1) of the European Convention on Human Rights which is in the following terms –

> *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by Law".*

Different views have been expressed by different bodies in recent years in the UK about the relevance of Article 6(1) to disciplinary proceedings against parliamentarians. As mentioned by the then Deputy of St. Martin (see Appendix 3), the Joint Committee on Human Rights in the Westminster Parliament stated in its 19th Report of the 2008 – 09 session that it had concluded that Article 6 did apply to disciplinary investigations against members of the United Kingdom Parliament. As a result, the Joint Committee recommended that the following basic rights of procedural fairness should be followed by any parliamentary committee hearing a complaint against a member –

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

A separate committee, albeit not a committee of parliament, the United Kingdom Committee on Standards in Public Life, recommended in 2002 that any evidence taking aspects of the disciplinary proceedings against a member of parliament should be held in public. Although the Committee on Standards in Public Life was broadly

satisfied with the manner in which the House of Commons Committee on Standards and Privileges dealt with the generality of cases, it felt that for the most serious or contested cases a separate Investigatory Panel should be established, and that this Panel should comprise an independent legal chair from outside the House and 2 MPs of substantial seniority, with the Panel having the ability to hear witnesses and allow their cross-examination. This recommendation was nevertheless implemented somewhat differently, in that the Standing Orders of the House of Commons were amended to allow the Parliamentary Commissioner for Standards to appoint an Investigatory Panel and not the Committee itself. The reasons for this change were explained in the following way by the then Committee Chairman, Sir George Young, when the amendment to Standing Orders were debated on 26th June 2003 –

> *"One of the Wicks committee's key recommendations, which is designed to improve the fairness with which Members are investigated, is the proposed establishment of an investigatory panel. That proposal was designed to deal with cases – they are expected to arise only infrequently – that in the opinion of my Committee met two criteria: first, proof of the complaint would be likely to lead to the imposition of a serious penalty on the Member; and, secondly, that there appeared to be significant contested areas of fact that would not be properly decided unless the Member was given the opportunity to call witnesses and/or cross-examine other witnesses.*
>
> *My Committee was sympathetic to the aims of that recommendation, but had a number of concerns about the details, not least that it left the Commissioner with neither an obvious role in establishing the facts, nor an opportunity to express an opinion on whether they point to a breach of the code. We have therefore proposed an alternative approach for those circumstances, which we hope are rare, where the Commissioner would sit with two assessors – one legally qualified, the other a Member of the House nominated by the Speaker. However, the Commissioner would retain sole responsibility for reporting the facts to the Committee and for expressing an opinion on whether the code had been breached. The proposed new Standing Order paragraphs (2B) to (2H) would give effect to that.*
>
> *We believe that that approach will meet the Wicks committee's objectives, while maintaining the centrality of the Commissioner's role in investigating complaints. As I said earlier, those arrangements are designed to be used only in the most serious and most difficult cases, and it remains the intention of both the Committee and the Commissioner that our existing procedures should be used to handle the vast majority of cases."*

The composition of the Panel as agreed by the House during the above debate, and as now described in Standing Order 150(5) of the House of Commons, is the Commissioner as Chairman, a legally qualified person appointed by the Commissioner and an MP appointed by the Speaker. Nevertheless, in practice, the Commissioner explained that he has never actually used an Investigatory Panel when dealing with complaints as he does not favour this approach.

Notwithstanding the views expressed by the Committees above, the current approach of the Commissioners and Committees, both at the House of Commons and in the Scottish Parliament, is that the adversarial approach where witnesses could be cross-examined in public is not favoured. The Commissioners expressed concern that an adversarial approach was more appropriate in criminal matters, and their view was that

the regulation of conduct for members of parliament was a different process. A more adversarial approach is used in relation to Scottish local government, but the Commissioner in Edinburgh (who as mentioned above, is also responsible for local government conduct matters) does not consider that this method is suitable in a parliamentary context. It is also of interest that the Northern Ireland Human Rights Commission disagreed with the views of the Westminster Joint Committee on Human Rights when giving evidence to the inquiry undertaken in the Northern Ireland Assembly. In giving evidence, a representative of the Human Rights Commission in Northern Ireland stated –

> *"We have always taken very seriously the quality of self regulation by the Assembly. We are firmly convinced of the necessity of the Assembly's being able to regulate its affairs, as is the norm in every democratic legislature. I accord with Sir Christopher's point that any form of external regulation or intervention in the regulatory process of a democratic assembly is only necessary to the extent that the Assembly fails to regulate its affairs properly.*
>
> *The Commission is broadly content with how the current Code of Conduct and procedures work, but we wish to comment on some of the detail of the process. (……). We are committed to the principle of transparency in the processes and, above all, of fairness. We believe – and on this we differ from the Joint Committee on Human Rights – that Article 6 of the European Convention on Human Rights, which is on the requirements of a fair trial, is engaged in the self regulation of a legislature but that that degree of fairness can be delivered by the self regulatory process."*

The current view taken in the jurisdictions investigated is therefore that an adversarial procedure taking place in public is not appropriate for dealing with complaints against parliamentarians. There is nevertheless unanimous agreement that it is of critical importance to ensure that there is procedural fairness in the process for considering complaints. The Commissioners and Committees at the House of Commons and in Edinburgh are satisfied that their current processes do meet the need for this fairness, although it is probably likely that there will be ongoing calls for amendment to current processes and issues, such as the use of lay members on Committees currently remain unresolved.

In the past, many of the members who have faced an investigation by PPC have claimed that they did not consider that the process had been fair. The current PPC Chairman, in answering a question during the election process for PPC Chairman on 22nd November 2011 stated: *"I myself have been subject to what I thought was an unsatisfactory disciplinary hearing by a former PPC and I think it does need changing"*.

It is probably inevitable that members who are found to have breached the Code may occasionally feel aggrieved and claim that they had been unfairly treated. PPC would nevertheless welcome views on whether the present investigation process could be improved to ensure that it is seen to be as fair as possible for the member being investigated.

5.6 Are the available sanctions adequate in Jersey in case of a breach of the Code and who should be responsible for imposing sanctions?

There has occasionally been confusion in Jersey in relation to the role of PPC in recommending a sanction. It is clear from the other jurisdictions investigated that the relevant Commissioner or Committee on standards cannot impose any sanction although it is, occasionally, possible for the Commissioner or Committee to agree an outcome, such as a rectification or apology, without the need for a formal sanction. If a formal sanction is recommended this must nevertheless be approved by the parliament itself, and in these circumstances the Committee's role is limited to making a recommendation on the appropriate sanction to be imposed. This ensures that the final decision on any sanction is made by the full parliament and not by the Commissioner or Committee. Although the range of sanctions is inevitably limited, it is of interest that monetary sanctions can arise at both Westminster and Edinburgh when a member is excluded from proceedings and thereby loses certain remuneration.

APPENDIX 1

SCHEDULE 3

(Standing Order 155)

Code of Conduct for elected members

1 Purpose of the code

The purpose of the code of conduct is to assist elected members in the discharge of their obligations to the States, their constituents and the public of Jersey. All elected members are required, in accordance with standing orders, to comply with this code.

2 Public duty

The primary duty of elected members is to act in the interests of the people of Jersey and of the States. In doing so, members have a duty to uphold the law in accordance with their oath of office and to act on all occasions in accordance with the public trust placed in them.

Elected members have a general duty to act in what they believe to be the best interests of Jersey as a whole, and a special duty to be accessible to the people of the constituency for which they have been elected to serve and to represent their interests conscientiously.

Elected members must give due priority to attendance at meetings of the States in accordance with the terms of their oath of office and should be present in the Chamber when the States are meeting unless they have very compelling reasons not to do so.

3 Personal conduct

Elected members should observe the following general principles of conduct for holders of public office –

Selflessness
Holders of public office should take decisions solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family and friends, their business colleagues or any voluntary or charitable organization they are involved with.

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

Objectivity
In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.

Accountability
Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.

Openness
Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest, or rules on freedom of information, data protection or confidentiality clearly demand.

Honesty
Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.

Leadership
Holders of public office should promote and support these principles by leadership and example to maintain and strengthen the public's trust and confidence in the integrity of the States and its members in conducting public business.

The principles in practice

4 Conflict between public and private interest

Elected members should base their conduct on a consideration of the public interest, avoid conflict between personal interest and the public interest and resolve any conflict between the 2, at once, and in favour of the public interest.

5 Maintaining the integrity of the States

Elected 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 States of Jersey and shall endeavour, in the course of their public and private conduct, not to act in a manner which would bring the States, or its Members generally, into disrepute.

Elected members should at all times treat other members of the States, officers, and members of the public with respect and courtesy and without malice, notwithstanding the disagreements on issues and policy which are a normal part of the political process.

6 Public comments, etc. regarding a States' employee or officer

Elected members who have a complaint about the conduct, or concerns about the capability, of a States' employee or officer should raise the matter, without undue delay, with the employee's or officer's line manager (or, if he or she has none, the person who has the power to suspend the employee or officer), in order that the disciplinary or capability procedures applicable to the employee or officer are commenced, rather than raising the matter in public.

Elected members should observe the confidentiality of any disciplinary or capability procedure regarding a States' employee or officer and its outcome. If an elected member is nevertheless of the opinion that it is in the wider public interest that he or she makes a public disclosure of or comment upon the outcome of any such procedure, he or she should inform the parties to the procedure before so doing and, when so doing, refer to the individual by the title of his or her employment or office rather than by his or her name.

In this paragraph, "States' employee or officer" means a States' employee within the meaning of the Employment of States of Jersey Employees (Jersey) Law 2005, a member of the States of Jersey Police Force and any officer mentioned in the Schedule to that Law who is not a member of the States.

7 Gifts and hospitality

Elected members should not accept gifts, hospitality or services that might appear to place the recipient under any form of obligation to the giver. In receiving any gift or hospitality, members should consider whether they would be prepared to justify acceptance to the public.

8 Access to confidential information

Elected members must bear in mind that confidential information which they receive in the course of their duties should only be used in connection with those duties, and that such information must never be used for the purpose of financial gain nor should it be used in their own personal interest or that of their families or friends. In addition, members should not disclose publicly, or to any third party, personal information about named individuals which they receive in the course of their duties unless it is clearly in the wider public interest to do so. Elected members must at all times have regard to all relevant data protection, human rights and privacy legislation when dealing with confidential information and be aware of the consequences of breaching confidentiality.

Elected members must not disclose publicly, or to any third party, things said, or information produced, in a meeting of the States that is conducted in camera, unless the States have permitted such disclosure.

9 Co-operation with committees and panels

Elected members shall co-operate when requested to appear and give evidence before or produce documents to –

(a) a scrutiny panel, for the purpose of the review, consideration or scrutiny of a matter by the panel pursuant to its terms of reference and the topics assigned to it, or to a sub-panel or any person appointed by the scrutiny panel to review, consider, scrutinize or liaise upon any particular matter;

(b) the PAC, for the purpose of the preparation of a report upon or assessment of any matter pursuant to the PAC's terms of reference;

(c) a committee of inquiry, for the purpose of the inquiry which the committee is appointed to conduct; and

(d) the PPC, for the purpose of an investigation of a suspected breach of this code, or to any person appointed by the PPC to investigate a suspected breach.

156 Complaint about conduct of an elected member

(1) Any person may complain to the PPC that an elected member has breached the code of conduct.

(2) The PPC shall not accept any complaint –

(a) which is made anonymously;

(b) which, in the opinion of the PPC, is frivolous, vexatious or unsubstantiated; or

(c) from a person who is not a member of the States, regarding words spoken by or actions of an elected member during a meeting.

157 Investigation of breach of code of conduct

(1) Where the PPC has information, whether or not received from a complainant, that suggests that an elected member may have acted in breach of the code of conduct it shall, without undue delay, inform the member and investigate the act.

(2) The PPC may appoint a panel of 3 persons to investigate the act and report upon it to the PPC.

(3) One of the persons appointed must be a member of the States, although he or she need not be a member of the PPC.

(4) The other persons appointed may or may not be members of the PPC or of the States.

(5) The PPC shall appoint a member of the panel who is also a member of the States to be chairman of the panel.

(6) If the elected member whose act is to be investigated is a member of the PPC, he or she shall take no part in the investigation or the appointment of any person to undertake the investigation.

(7) If a member of the PPC is the complainant, or is otherwise connected with or was involved in the act to be investigated, he or she shall take no part in the investigation or the appointment of any panel to undertake the investigation.

(8) The fact that the PPC has appointed a panel to investigate the act shall not prevent the PPC conducting any part of the investigation itself.

(9) The elected member whose act is being investigated shall have the right to address the persons conducting the investigation, whether they are the PPC or a panel, and, when doing so, to be accompanied by a person of his or her choice.

158 Outcome of investigation

(1) When an investigation is complete and the panel (if any) appointed to conduct it has reported to the PPC –

(a) the elected member whose act has been investigated shall have the right to address the PPC and, when doing so, may be accompanied by a person of his or her choice; and

(b) the PPC shall review the matter and form an opinion as to whether or not he or she has breached of the code of conduct.

(2) The PPC –

(a) shall inform the elected member of its opinion and of the reasons for it; and

(b) may report the opinion and reasons, and any action taken by the PPC, to the States.

(3) A report may be presented to the States in writing or made orally by the chairman of the PPC in a statement.

APPENDIX 3

STATEMENT TO PPC BY DEPUTY BOB HILL
APRIL 2010

"Justice must not only be done, but seen to be done" is an important principle. It is enshrined in Article 6 of the European Convention on Human Rights that anyone facing a determination of "civil rights or obligations" or a criminal charge has a right to an independent and impartial tribunal, established by law, sitting in public.

Connétable Gallichan has written to me to say that "PPC has consistently taken the view that out of fairness to all parties and to avoid unwarranted speculation, complaints should be dealt with in private until the Committee has come to a decision". I believe that this is wrong and not in accordance with Members' rights under Article 6 of the Convention. The evidence-taking part of an investigation should be held in public and the Member against whom a complaint has been made must have the right to call his or her own witnesses and to cross-examine anyone who gives evidence to PPC.

Standing Order 157 does not state that investigations by PPC have to be carried out in private. PPC therefore has discretion as to whether to take evidence in public or private. In order to comply with the requirements of Article 6 of the ECHR, it is in my view necessary for PPC to take evidence in public. Even elected politicians have human rights! It is especially important that an elected politician should have any allegations of misconduct determined in an open way. The right to open justice protects not only the individuals whose rights are being determined but also the rights of others (including the news media) to be present to see the proceedings.

The Human Rights (Jersey) Law 2000 states that "functions in connection with proceedings in the States Assembly" are not covered by our local human rights law. For the purposes of this morning's hearing I accept that this means that the 2000 Law does not apply to the investigation of this complaint by PPC.

This does not, however, mean that Article 6 of the ECHR itself does not apply.

Two all-party parliamentary committees in the UK have concluded in recent years that Article 6 applies to disciplinary investigations against MPs and Members of the House of Lords, even though the UK Human Rights Act 1998 has a provision similar to the one in the Jersey law (that "functions in connection with proceedings in Parliament" are not covered by the British human rights legislation).

In 1999, the Joint Committee on Parliamentary Privilege, chaired by Lord Nicholls of Birkenhead, a law lord, stated:[1]

> "Although proceedings in Parliament are excluded from the Human Rights Act 1998 and from the jurisdiction of United Kingdom courts, they may nevertheless be within the jurisdiction of the European Court of Human Rights. The existence of this jurisdiction is a salutary reminder that, if the procedures adopted by Parliament when exercising its disciplinary powers are not fair, the proceedings may be challenged by those prejudiced. It is in the

[1] para. 284 http://www.publications.parliament.uk/pa/jt199899/jtselect/jtpriv/43/4310.htm

interests of Parliament as well as justice that Parliament should adopt at least the minimum requirements of fairness."

In 2009, the Joint Committee on Human Rights accepted that Article 6 applies to disciplinary investigations against Members of the UK Parliament.[2] The Joint Committee concluded that the following basic rights of procedural fairness should be followed by a parliamentary committee hearing a complaint against a Member:

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

In 2002, the UK Committee on Standards in Public Life recommended that "evidence-taking aspects of the disciplinary proceedings" in the UK Parliament should be carried out in public.[3] I understand that this practice is followed in the Scottish Parliament, where the Standards Committee of that legislature holds evidence-taking sessions in public.

It is legally and politically unattractive for a committee of the States of Jersey to claim immunity from the European Convention on Human Rights, while expecting courts and tribunals and other public authorities to follow the spirit and letter of the human rights law. Everyone, including States' Members, should be entitled to the basic human right of a fair hearing in public.

To conclude: in order to ensure that the investigation of the compliant made against me by Senator Shenton is carried out in a way that complies with Convention rights, the evidence-taking part of the investigation must be held in public and I must be allowed the basic rights of a fair hearing that I have just listed.

[2] Joint Committee on Human Rights, *Legislative Scrutiny: Parliamentary Standards Bill* 19th Report of 2008-09 http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/124/12404.htm#a3

[3] Committee on Standards in Public Life, *Standards of Conduct in the House of Commons*, chapter 6 (2002) http://www.public-standards.gov.uk/OurWork/Eighth_report.html