



Northern Ireland
Assembly

Committee for the Environment

OFFICIAL REPORT (Hansard)

Local Government Code of Conduct for Councillors:
Department of the Environment

19 May 2014

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Mrs Pam Cameron (Deputy Chairperson)
Mr Cathal Boylan
Mr Colum Eastwood
Mr Tom Elliott
Mr Alban Maginness
Mr Ian McCrea
Mr Barry McElduff
Mr Ian Milne
Lord Morrow
Mr Peter Weir

Witnesses:

Ms Julie Broadway	Department of the Environment
Ms Mylene Ferguson	Department of the Environment
Ms Linda MacHugh	Department of the Environment
Ms Fiona McGrady	Department of the Environment
Mr Leo O'Reilly	Department of the Environment

The Deputy Chairperson: The permanent secretary is here at the request of the Committee and will outline the reasons for the meeting today. I welcome Leo O'Reilly, the permanent secretary, Linda MacHugh and Julie Broadway. The Committee will be briefed afterwards on the code of conduct. Leo, I ask you to brief the Committee.

Mr Leo O'Reilly (Department of the Environment): Thank you, Deputy Chairperson and your colleagues, for agreeing to hold this special meeting of the Committee this morning. As you noted, I outlined the background in my letter of 8 May to the Committee Clerk. Members may wish to come back on some of the points but, essentially, to understand what has happened here, means looking at the timeline of events from 2 May, when the consultation on the regulations formally closed. The consultation on the code closed on 30 April, but we had a few requests for further inputs after that date, so the effective date for closure of that consultation was also 2 May. It is about the sequence of events since 2 May because, obviously, with the closure of a consultation, it is inevitable that comments come in at the very last minute. That is fair enough because there is a closing date and people can submit things up to that date.

As the briefing to the Committee indicates, we received 20 responses for the regulations and 21 responses for the code. Some of the issues raised required us to go back to our legal advisers and the Departmental Solicitor's Office, particularly in relation to the regulations, because some of the text

of the regulations had to be reviewed. Some of the issues in relation to the code required us also to consult elsewhere in the Department, because some of the issues raised touched on the responsibilities of other parts of the Department and, obviously, significantly in relation to the planning side of the Department as well.

Basically, it was about the sequence of events coupled with the completion of the passage of the primary legislation through the Assembly at the end of April. We got Royal Assent to the primary legislation, as you now know, on 12 May, but we could not move to bring material forward to the Business Committee before the legislation became law on 12 May.

Once we had completed our work on both documents, there was a very tight timeline for bringing material to the Minister, who cleared it very quickly, in one day in one case. That is why the material was brought to the Committee at a relatively late stage, as I explained. In normal circumstances that would be something we would process, but then we ran up against the 22 May date for the elections and the fact that we expect the new councils to have their first meetings in the week or so after that. Obviously, it is highly desirable that, in particular, the regulations are in place to allow the councils to commence work fully in what is referred to in the regulations as the new councils but also for the purposes of, for example, the appointment of new councillors, that we would have the new code of conduct fully endorsed and signed off by the Assembly, ideally before the councils come into operation. In a sense, it was a squeeze at one end for the completion of the consultation on 2 May, the elections on 22 May and the events immediately thereafter that created the request from the Department to the Committee to have this special meeting today to consider the regulations and the code.

The Deputy Chairperson: Thank you. I know that you will appreciate that we reluctantly agreed to this meeting. Many of us were not terribly happy with the situation, given that, sometimes, we would think that the Department did not quite know that this was coming up, which seems a little bizarre. However, we are where we are, and we have agreed to the meeting, so we will continue with that.

Do you want to walk us through the brief in some more detail as to what we are agreeing this morning?

Mr O'Reilly: I will give an overview, because we have other colleagues here who can respond to points of detail. We propose to deal first with the code of conduct for councillors, which, I understand, has already been reviewed in earlier drafts by the Committee on a couple of occasions. As you know, the code is based partly on the existing voluntary code that applies in councils but also draws on similar parallel codes of conduct for councillors in Britain. We have drawn on that material. It also draws on the issues around, for example, the code of conduct for standards in public life, so we have drawn on that material as well. The planning material in particular draws heavily on similar documents that exist in local government in Britain on the role of councillors and in particular the distinction that you see in the code between the role of councillors who are members of planning committees and those who are not.

In a sense, like all these things, you might say that it is stating the obvious, but sometimes it is important to formalise the obvious and put it down. It would certainly reflect the sorts of guidance and standards that apply to Ministers and civil servants, particularly those in the DOE working on planning issues, including the type of approaches we would expect them always to take in managing planning applications and decisions.

The regulations, as the title tells us, are transitional regulations necessary to manage the situation in which we have what are referred to in the regulations as the new councils and the existing councils operating in parallel with each another. They provide mechanisms to allow the new councils to begin to come into operation and perform certain functions while enabling the existing councils to continue to discharge all their responsibilities right up to 31 March next year. The regulations address a number of issues to enable the existing and new councils to operate alongside each another. They also make practical arrangements, such as the requirement for the existing councils to provide the new councils with administrative and other support, and the requirement on Departments and the Housing Executive to provide information as necessary to the new councils to enable them to begin to put in place the arrangements for their future operation.

I could go into more detail, but that is an overview of what the two pieces are about.

Mr Weir: Perhaps we could try to get into the specifics. We saw previous drafts. It might be helpful if you outline where there have been changes, where you have introduced things or, alternatively, where issues were raised and you felt that there was not a need for change. If we could go through the specifics of those, it might be helpful.

Mr O'Reilly: Can we start with the code for that purpose?

The Deputy Chairperson: That would be great. Thank you.

Ms Julie Broadway (Department of the Environment): While Mylene is getting ready, I will give a brief overview. We received 21 responses. As the code was issued before the Bill's Consideration Stage and Further Consideration Stage, quite a few comments were raised about issues that were subsequently dealt with by amendments. For example, appeals mechanisms was an issue raised. The issue of allowing the commissioner to deal with minor complaints without having to go to a full investigation was another issue that quite a few respondents raised. Some people asked for further information about the apportionment of costs of the commissioner's office and about the various pieces of guidance that we plan to issue to supplement what is in the code. There were a lot of questions about how the commissioner would undertake investigations and about exactly how the code would apply to planning. These things will be supplemented by not only the guidance the commissioner will issue but the guidance the Department will issue on planning. Several respondents commented on the code of conduct for officers, asking how the protocol between the code of conduct for officers and that for councillors would apply in both cases. Those were the more general issues. They will not be dealt with in the code; they will be dealt with in the other pieces of guidance. Mylene can take you through some of the issues where we amended the code as a result of responses made to the consultation.

Ms Mylene Ferguson (Department of the Environment): We are making two changes to the code. The rest of the queries related to clarification that we have tried to do by restructuring the final version of the code. We are not saying anything different; we have just clarified it a bit better.

I will deal with the requirement for councillors to report breaches of the code, whereby if a councillor believed that another councillor was breaching the code, he would be compelled to report that breach. Some respondents suggested that that would be quite difficult to police. It was put in initially because it exists in other codes in other local government jurisdictions. We thought that we would put it in to see what the reaction was to it. Considering the responses, we decided that it would be very difficult for it to be monitored appropriately. We are going to remove that requirement from the code. It would be quite onerous on councillors, when a councillor does not report on another councillor who may have breached the code. It would put that councillor in breach and it would be a very difficult situation to address. So, that is being removed.

The other change that we are making is in relation to the term "spouse" that is used in the disclosure of interests. Some respondents identified that the use of the word "spouse" is outdated as there are civil partnerships etc now. We agree that this needs to be addressed. So, the paragraph relating to that will now require a councillor to declare any pecuniary interest, direct or indirect, that they may have in any matter coming before any meeting of the council. It is up to the councillor to make the decision as to whether the interest has any bearing on his personal circumstances. That is where the main changes are. Any other changes are really relating to clarification, and I can briefly go through some of those with you now.

Some respondents were very interested in the guidance and training surrounding the code and wanted to know what was happening about that. We were able to clarify that that is being taken forward elsewhere with the local government training group and the commissioner. It is not an issue for the code itself, but we welcomed that being made and were able to clarify that. The application of the code to existing councils was another issue raised. If it was going to apply to councillors appointed to the new councils, people wanted to know what would happen regarding councillors who were already in existence during the shadow period. Provisions are being made in the regulations that Tracy will be talking about so that existing councillors and those of the new councils will be subject to the code.

There was a reference in the consultation to the commissioner building up a body of precedents. People thought that that meant that the commissioner would be creating a benchmark to apply to other applications of breaches. We took the point that this was not the Department's intention. We were trying to highlight that having the commissioner in place at this time, and with the experience that

comes with his position, would ensure that difficult and sensitive issues would be handled professionally, and would provide assurance to councillors over the formative years of the new councils. The Department believes that each case brought before the commissioner will be dealt with on its own merits. Each will be dealt with as it comes, and each will be very different. There will not be a standard approach, because each case will be dealt with separately.

The consultation also dealt with the provision of indemnities, where we want the proposal to amend the 2012 Order to take account of the new ethical standards framework and which is similar to what they have done in England. There was support for this, and people asked for further clarification on it. One issue raised was in relation to putting a cap on costs. The indemnity provision takes account of the new ethical framework, which will not, hopefully, place an additional cost on councils. It will ensure that where a council has decided to provide an indemnity in relation to a code of conduct case, it must be repaid if a councillor is found to have breached the code if the indemnity, or insurance policy, would otherwise cover the proceedings leading to the finding.

A number of respondents mentioned the cap that exists in Wales. This is a voluntary application that councils have in Wales whereby they have put a cap on the amount of indemnity provided, which is set at £20,000. Councils, as a body corporate, are empowered to decide whether to provide an indemnity and ascertain whether their specific insurance provider would cover it. A cap is seen as a means to protect the proper use of public money, and the issue was raised by the Public Services Ombudsman for Wales because he felt that too many councillors were immediately going for indemnity and it was costing an excess of public money.

The Department has taken on board what people have said, and this is something that we will consider, with the Minister, to see whether he would be prepared to look at this when the code is being reviewed in three to four years' time. We are allowing councils the opportunity to consider what is happening in Wales, on a voluntary basis, and we will keep a watching brief on that during the time between now and when the code is revised.

Some respondents indicated that the protocol that exists on relations between councillors and officers should be part of the code or an annex to the code. It was decided that it would not really be appropriate to have the protocol as part of the code that the commissioner is making adjudication on. It is seen as a link document between the code of conduct for councillors and the code of conduct for officers, and it is currently being developed and updated. Those taking forward the code for officers are in agreement that the protocol should be a link between those two documents.

The issue of surcharge was raised. Some respondents felt that the requirements regarding surcharge should be included in the code so that councillors are aware of what their requirements are on that. Others felt that the surcharge should be removed and that, therefore, it should not be an issue. As the Committee is aware, section 109 of the 2014 Act provides the Department with a power to remove the legislative provisions relating to surcharge by subordinate legislation. We will consider that when the ethical standards framework has had time to bed in. At that stage, we will put a paper to the Minister to consider and see how it is going on.

Reference was made to the terms that are used. Reference is made to "family, friends, colleagues", and we have taken that on board. It is a minor tweak, and we will address that so that councillors know exactly what their position is.

There was an issue in relation to a person who is known by a councillor and who either holds or is a candidate for appointment to any office in a council. Again, respondents wanted some clarification on what we meant by the term "office". The clarification was that the Department would consider this term as including post, position or employment and applying to all appointments in a council.

Clarification was sought on lobbying and access to councillors. This area will be addressed in a training and capacity-building programme that is being introduced by the Department. The Department agrees that the wording of this part will need to be aligned with the part regarding planning matters and will do so where possible. We have tried to do that. Any of the other queries that came out of the consultation related to planning.

Ms Broadway: Quite a lot of the queries were simply asking for clarification of terminology. We have rejigged the code to hopefully make it clearer what is meant by it. There are really only two places where we have significantly changed what is there. One is in relation to the issue about councillors having an obligation to report breaches of the code of another councillor. The view of the commissioner and of the Northern Ireland Local Government Association (NILGA) was that that would

be very onerous on councillors and would place an undue burden on them if they were to have to do that. The view was that, if they did not report another councillor, they could themselves be in breach of the code. That is one of the major changes that have been made, and the other one is in relation to the term "spouse". That has just been clarified so that it means any direct or indirect relationship. Those are the major changes to the code.

The Deputy Chairperson: Thank you for that. Before I bring other members in, I want to ask you a bit more about the appeals process. The Minister has indicated that he may need to introduce a further Bill to provide a separate adjudication process within the ethical standards framework. Obviously, this was originally to be contained in the code of conduct. Can you give us an update on where that is?

Ms Broadway: Yes, we are really scoping out what needs to be done in relation to the appeals process, and we are getting all of the legal advice that we need to ascertain what is needed in a future Bill or whether a future Bill is needed. We are in the process of getting that legal advice. We aim to have a paper on the position on this to the Committee before recess.

Ms Linda MacHugh (Department of the Environment): Clearly, before we brought the code in, we needed to determine whether to leave bringing in the code until we were absolutely certain how the appeals process would work and whether an adjudication panel was required or to bring it in but not start the sanction element. It would be unfair to have investigations if there were no clear line of sight through to conclusion.

The Commissioner for Complaints has said that, in the interim, his office will both investigate and adjudicate until such time as an alternative process is set up. As Julie said, we are in the process now of seeking legal advice on exactly what is required. We will also have to talk to the Department of Justice and the Courts Service about how the appeals process will work in practice to make sure that it all aligns. So, a fair bit of work on this will be going on in the background until we can be absolutely clear about exactly what is needed in legislation.

The Deputy Chairperson: OK. So, in the meantime, the Commissioner for Complaints will deal with anything in the interim. Peter, did you want to come in on this issue?

Mr Weir: Yes, I just wanted to ask about that point. So, to be clear, if we take a real-life example of a complaint being made against someone, are you saying that the commissioner investigates and adjudicates in the absence of knowing what the appeal mechanism would be?

Ms MacHugh: No, there will be the appeal mechanism, because the legislation now clearly says that there will be an appeal to the High Court. As you are aware, the Commissioner for Complaints has an issue with that, and that is the part that we are trying to bottom out.

Mr Weir: Again, I am trying to think a wee bit aloud on this, but I just wonder whether there would be some merit in simply putting any investigations on ice until the appeal mechanism is put in place. I am not sure that it is particularly satisfactory to have a situation where there is mention of an appeals mechanism in legislation but we are not quite sure what that will be, who will deal with it and what legal advice will be sought etc. That would mean that you then have the first stage happening before the second stage is put in place.

It strikes me that, one way or the other, the second stage should be a matter of a few months. On that basis, I just think that it could be quite messy if we had an interim position.

Ms MacHugh: Yes. You are absolutely right, and we are quite clear that, although we can bring in the code, to commence the sanctioning process for breaches of the code before we are absolutely clear about the full process would not be good.

Mr Weir: So, are you going to bring in the sanctioning regime in a separate bit that is linked to the appeal mechanism? How do you intend to bring that in? What is the trigger mechanism for any form of sanctions?

Ms MacHugh: That is what we are trying to work out.

Ms Broadway: We are trying to get legal advice on all this and to discuss it with the Department of Justice and the Courts Service so that we can work out when we need to commence the various provisions. We can commence the code separately, but investigations, adjudication and sanctions are probably best commenced all at once, rather than through bits being taking out.

Mr Weir: So, bringing into play this code at this stage, until the other mechanisms are put in place, will not permit an investigation or a sanction. Will that have to be triggered at a later point?

Ms MacHugh: Yes.

Ms Broadway: Exactly, and it may be only a couple of months before we —

Mr Weir: I appreciate that. It is clear that they must be all in the same package, or else it would not make sense.

Ms MacHugh: No, and you could not be left in a position where investigations were ongoing but there was no ability to bring the matter to a conclusion.

Mr Weir: I have a separate point to raise on certain parts of the code. I think that sections 1 to 8 deal with the bulk of stuff that will happen once these are through, and section 9 deals with the planning stuff that will come in later. At first glance, I have not seen any particular problem with the planning bit. The only point that I would make is that it may be worthwhile having more detailed scrutiny of the planning side, given that a lot of stuff needs to come in fairly immediately. To be honest, the scrutiny that we will be in a position to give it will be limited. However, there is a wee window of opportunity in which to make sure that we are getting it right on the planning side, and it is important that we take a bit of time between now and that coming into effect to see whether any adjustments need to be made. We may simply say, "This is all fine". However, on the other hand, some sort of further regulations may be required to tweak that side of things.

The Deputy Chairperson: Can we pause for a second? I think that Lord Morrow wants in to ask about appeals.

Lord Morrow: Yes, I want to make a supplementary point. I have some reservations about this process and the way that it is going with the Commissioner for Complaints. I am not quite sure how long it takes for a complaint to be processed, but it is certainly not processed within a week or 10 days. At least, that is my experience of it anyway. That is no reflection on the commissioner's office, because I recognise that it has a workload. We will give all this over to that office and say, "Right, you deal with it in the interim". What do we call the interim? Are we talking about a year? Are we talking about two years? Are we talking about two months?

Ms MacHugh: That will depend, first of all, on whether a further Bill is required to set up an alternative adjudication process through an adjudication panel. If that is required, it will depend on how long it takes to get what would be new primary legislation through. It will be a short Bill, but it will be a Bill. So, we are probably looking at a year to 18 months.

Lord Morrow: That is what I thought.

Mr O'Reilly: I just wanted to emphasise that, at the moment, we are urgently seeking legal advice at a pretty senior level. As you know, the issue has arisen because of concerns identified to us by the Commissioner for Complaints, so the focus at the moment is on earthing those concerns, as it were, and establishing clearly the issues of substance. That is because only when we have that will we be able to reach a view on whether a new Bill is required. One point of view is that it is required, but once we get that definitive advice and are clear on the need for a further Bill, we will have a much clearer sense of the timeline that is required to take forward a Bill and, significantly, to put in place the alternative adjudication and investigatory mechanisms that will be required.

Lord Morrow: Is it a late revelation?

Ms MacHugh: It comes as a result of the amendment that was made to the Bill, the introduction of an appeals process to the High Court and the view of the Commissioner for Complaints that that will undermine his constitutional position. That is the nub of it.

Mr O'Reilly: That is the core of the issue that arose.

Lord Morrow: All right. I have heard what has been said, but I still have a concern about it. You are talking about a Bill, and I know that a Bill is a Bill and that there is a procedure and a time factor and so forth to be considered. However, it is not as though we heard about the reform in only the past couple of weeks; this has been on the agenda for three or four years. Yet today, on the very eve of the election to the new councils, we discover that we still do not have all our procedures or the legislation in place. As you rightly say, it will take a minimum of 18 months to complete this. So, we will be doing well to get that done even within this mandate.

Ms MacHugh: As I said, this is a direct result of the amendment that was made to the Bill.

Mr Weir: I want to say something about being as quick off the mark as possible and to comment that I am a little bit disappointed. It has been a few weeks since the Bill went through, and, prior to that, there was Further Consideration Stage, and the amendment had already gone through at Consideration Stage. Prior to it going through at Consideration Stage, it was fairly obvious for a number of weeks beforehand that there was going to be an amendment, and it seemed to have widespread support. I am wondering about getting legal advice on the best way forward. The issue was at least being flagged up two or three months ago, and there does not appear to have been a great deal of focus on the legal advice for what was inevitably coming down the track. There seems to have been a wee bit of slowness in the response.

Ms MacHugh: It took some discussion with the Commissioner for Complaints to pin down his position on this. At the same time, we were going through the Consideration Stage, the Further Consideration Stage and the Final Stage of the Bill and were dealing with all the ramifications and the legislation that were falling out of it. A lot had to be done by 27 May. So, I take your point, but we have been moving as fast as we can on this. As Leo said, we are now seeking counsel advice so that we can be absolutely clear of our legal position.

Mr O'Reilly: Implicit in what is being said is that the Commissioner for Complaints brought an issue to us and that the collective and the Minister's view was that that was a substantial issue that needed to be addressed. However, as you can pick up, we have still some points that we want to clarify in our own minds about the precise nature of his concerns and how they could be addressed.

Lord Morrow: Is that where the real issue is? Is it in the Department, rather than in the revelation of recent times?

Mr O'Reilly: As Linda said, the amendment was made to the Bill. At that point, the Commissioner for Complaints highlighted to us and to the Minister his concern about the implications of the mechanism of appeal to the High Court for his position. So, it has been working through. There were several meetings with him so that the nature and basis of his concerns could be understood precisely, and then there was a move forward from that so that we could seek our own advice on the nature and substance of those concerns.

Lord Morrow: Mr O'Reilly, do you expect that legal advice to be back with you within 48 hours of your asking for it?

Mr O'Reilly: No.

Ms MacHugh: No, not when it is counsel advice. It takes a bit longer than that.

Lord Morrow: Seventy-two hours?

Ms MacHugh: It normally takes several weeks.

Mr O'Reilly: We can and will press for it urgently, given the issues of substance that you identified.

The Deputy Chairperson: Members, I am aware that Cathal and Tom indicated that they wanted to ask a question. I know, Alban, that you wanted to come in on this point. I just want to check whether

Mr Elliott: Mine is on a different point.

Mr A Maginness: I just wanted to clarify the position. The objection that the Commissioner for Complaints made was that it really is a constitutional position that has been undermined by an appeal mechanism to the High Court. He has not rejected the idea of him investigating, but he will not adjudicate on any sanction that might be brought. Is that the current position?

Ms MacHugh: In the interim, they have said that they will look at both investigating and adjudicating, but, in the meantime, in the knowledge that we would be bringing forward, if necessary, another Bill.

Mr A Maginness: Yes, if counsel indicates that it is a necessary Bill to bring forward.

Ms MacHugh: Yes.

Mr A Maginness: However, we still have this gap, and it is difficult to anticipate how that will be filled until you receive that expert legal advice.

Mr O'Reilly: Other than by the indication from the commissioner that he will continue, in the interim, to perform the investigatory —

Ms MacHugh: As well as the adjudication process, until such times as an alternative mechanism is established.

Mr A Maginness: OK. Thank you very much.

The Deputy Chairperson: OK. Can we move back to the planning issue that was raised? Does anybody in particular want to address Peter's points?

I welcome Fiona McGrady to the table.

Ms Fiona McGrady (Department of the Environment): Thank you very much, Deputy Chair. We received six responses from consultees on the planning element of the code of conduct. Most commented on the need for more clarity on lobbying and the need for guidance, capacity building and training. We have covered those elements with the Committee before.

Where clarity on lobbying is concerned, we have amended paragraph 9 slightly. The fundamental message of that paragraph remains the same, but we hope that we have provided clarity in changing some terminology. In addition, we have removed duplication that was causing some confusion, particularly at paragraph 9.7, which was mirroring paragraph 7.4. We have removed that, because it appeared from respondents that it was causing some confusion.

We will be developing the capacity building, training and guidance. We are finalising the development of the guidance, which will enhance the code and provide additional clarity on aspects of it. We have prepared a programme of capacity building and training that will commence roll-out following the elections.

I will now move to the detailed responses. One respondent contended that there was no need for a planning element in the code. The Department was not persuaded by that argument, given, first, its commitments way back as far as 2009 that there would be a separate element of the code, and, secondly, the significance of the transfer of planning to councils. We added a paragraph at the outset to ensure that the planning element of the code is read in conjunction with the full code so that it is all one and not separate.

One respondent questioned whether it was entirely appropriate for councillors who were on a planning committee to attend public meetings. We have researched this in some depth, and best practice suggests that it is entirely appropriate as long as a councillor does not give an opinion for or against a planning application before the material relating to that application has been considered.

On the whole, that was the general thrust of the responses on planning.

Mr Weir: You mentioned the guidance that will be coming out. When will that, or at least a draft of it, be ready?

Ms McGrady: The guidance is well developed. We are currently working in tandem with the commissioner on his guidance, and we hope to consult on this guidance post-summer recess. Obviously, the guidance will come to the Committee at that time.

Mr Weir: There is a certain urgency in getting this code of conduct through. If we were told that this was happening in six months' time, we would be spending two or three sessions going through all the stuff in detail. We have a bit more time on the planning side, and it is important that we get that right, so we need a bit of time to look at the guidance. There is nothing that leaps out at me that says that you have it badly wrong in a particular area, but I think that we need to go through it in a reasonable amount of detail. It strikes me that, from a cultural and political point of view, the planning changes are probably the biggest single leap that councils are going to face, and there will be a lot of challenges. However, a lot of people have not got their heads around the implications of shifting from a position of simply commenting on planning applications to taking decisions. It is important that we get that right and that we have that wee bit of time to do that. Maybe the best time to look at this again will be when the guidance comes out so that we can make sure that the conduct and guidance are right.

Ms McGrady: We are absolutely convinced that the guidance is essential. It will enhance the code and provide even more clarity, and it will be done in conjunction with practical training and role-play training, which will also be essential as planning transfers to councils.

Mr Elliott: Is the guidance the overall guidance? I note that one of NILGA's queries was about councillors' rights. You said that that would be in guidance rather than in the code itself. Is all that guidance, which Mr Weir and others have been asking about, all rolled into one, or will there be separate pieces of guidance?

Ms Broadway: There will be separate pieces of guidance. There will be guidance issued by the commissioner and guidance issued by the Department on planning. Those aspects can be looked at when the training and capacity-building programmes are being rolled out. That could be dealt with then as well.

Ms McGrady: We are working very closely with the commissioner on the guidance to ensure that there are no conflicts between our guidance and his. We will hopefully meet him in the coming weeks to ensure that that is the case.

Mr Boylan: Thank you very much for your presentation. I have a couple of points to make. I am concerned about the lobbying element. There is an expectation that councillors will make planning decisions for constituents. It is all right saying that there will be guidance, but, in setting out guidance for councillors and their conduct, we also need to look at how we get the message out to the public about councillors' new roles and responsibilities and what we are doing. I do not know how we will do that, but I am sure that the Department, either through councils or by itself, will need to look at that. That is one element, so maybe you could touch on that.

The Assembly is reviewing its code of conduct. Have you taken anything from that, or have you looked at it? I know that we are time bound with some of the stuff, but I wonder whether there are any elements of that that could apply.

Ms Broadway: We are aware that the Assembly's code is under review. Should any amendments be made to that code, the Minister may feel that we will have to revisit the code of conduct for councillors. We will do that. We are keeping a watching brief on what is happening with the MLA code of conduct, and the Minister will consider that.

Mr Boylan: What about the planning element?

Ms McGrady: We recognise the importance of communication and have developed a communication strategy that will cover internal and external communication. That will be rolled out post-election for capacity building and training. That is a very important and pertinent point. We have taken that on board and have developed a strategy in light of it.

Mr Boylan: Guidance can be read in many different ways. How can we nail the guidance down so that members adhere to it? Will it be in statute or presented in some other way?

On the reporting mechanisms, the point was raised about councillors not making complaints against other councillors. What about the reporting mechanisms for members of the public? Is that more accessible? How will they make complaints?

Ms Broadway: I know that the commissioner's office is producing leaflets and putting something on its website for members of the public, which will tell them how they can complain. It will be in the section of its website that deals with the code of conduct for councillors.

Mr Boylan: Finally, like everything else, this will obviously be tried through test cases over a period of time. I take it that there will be an opportunity to amend the regulations, if needs be. We cannot predict exactly what will happen. There is case law and things that have happened in the past. I am concerned only because councils will take over the planning element. That is maybe something that we and councillors had not foreseen. I wonder whether there is an opportunity in the future to amend regulations, if needs be. However, it may not be needed.

Ms MacHugh: We have already said that there will be a root-and-branch review of the whole process a couple of years down the line to look at whether the system is working.

Mr Boylan: Thanks.

Mr Elliott: I have a point to make on the general rules of the code of conduct, relating to paragraphs 2.7, 2.8 and 2.9. Paragraph 2.7 suggests that the code of conduct will apply only when councillors are in their roles as councillors or when acting as such. Paragraph 2.9, which seems to be overarching, goes on to refer to:

"conduct which could reasonably be regarded as bringing your position as councillor or your council into disrepute".

I feel that that is the overarching paragraph and that it almost dispenses with the others. Almost anything that you do in life could probably relate back to bringing the council or your role as a councillor into disrepute. I wonder whether there is a conflict between paragraphs 2.7 and 2.8 and paragraph 2.9? I think that I raised the point an earlier Committee meeting as well.

Ms Ferguson: Paragraph 2.7 sets out when you must observe the code. For clarity, that is usually when a councillor is acting as a councillor and is doing council business. Therefore, you must observe the code:

"(a) whenever you conduct the business, or are present at a meeting, of your council;

(b) whenever you act, claim to act or give the impression you are acting in the role of a councillor; and

(c) whenever you act, claim to act or give the impression you are acting as a representative of your council."

Paragraph 2.8 sets out that, if you are on an outside body that has its own code, this particular code will not apply, and you will have to adhere to that code. Therefore, there is a separation of when the code applies, and that is what we are trying to get across in the two paragraphs.

Mr Elliott: I accept that, but what about paragraph 2.9(a)?

Ms Ferguson: Paragraph 2.9 came about because people in other jurisdictions were —

Mr Elliott: By the way, I am not objecting to paragraph 2.9; I am just trying to get clarification.

Ms Ferguson: Yes, I appreciate that. In England, for example, a councillor who was the tenant of a property owned by the council was in arrears, and some members of the public felt that he was getting preferential treatment because he was a councillor. Therefore, the paragraph clarifies that, if somebody thinks that a councillor is getting preferential treatment in his private capacity, a complaint can be made to the commissioner, and the commissioner can resolve that to show, hopefully, that everybody has been treated equally. It is to ensure that councillors make themselves aware and are mindful of the fact that, if they do something in their private capacity, they could bring their position as

a councillor into disrepute, and to ensure that, if they engage with the council in whatever manner in a private capacity, as opposed to in a council capacity, everything is above board. That is what it is trying to do.

Mr Elliott: I appreciate that that might be the intention, but I just feel that the wording is much more wide-ranging than that. Obviously, we will not know until there is a legal challenge at some stage. To me, the wording raises very wide-ranging issues about councillors' conduct when they are not acting as a councillor. For example, is a councillor who sits on a community group acting in the interests of the wider community or bringing his role as a councillor into disrepute?

Ms Ferguson: An issue would arise if anyone at that meeting believed that the councillor was acting inappropriately and bringing his position as a councillor into disrepute. That would come into play only if anyone decided to make a written complaint to the commissioner. The commissioner would then make a judgement call. The paragraph is there to make councillors aware that they must be aware of their behaviour and how they are perceived by people who do not work in the council community.

Mr Elliott: If, for example, a local community group were to apply for planning permission for a new play area for the local community, and someone said to a councillor sitting on the committee, "Perhaps you would speak to the planning officers", the councillor might do that because he is part of the committee but also because he knows the planning officers. However, what if someone else were then to say, "Look, we feel that he acted wrongly and brought his position as a councillor into disrepute, because he used his position as a councillor to speak to the planning officers"?

Ms Ferguson: If members of the public have the opportunity to put their case before a committee, there should be no objections to a councillor doing the same and lobbying for a group if he is representing his constituents, because they have a voice, and he is the way in which to make that voice heard. In that situation, if he were on the planning committee, he obviously would not be involved in the decision-making. It is right that a councillor who is representing his constituents about an issue can take that forward to whatever committee, but he has to ensure that his position on that committee is such that he puts forward only information that will help others to make a decision and that he is not part of that decision.

Mr Elliott: I just think that it is open to significant difficulties, at least until there is a test. I see there being a legal challenge at some time.

Ms Ferguson: It is something that we will flag with the commissioner. Over the next three to four years, up until the code of conduct is reviewed, we will look to see whether any of those issues have arisen and, if so, how they have been dealt with. It is more of a flag for councillors to be aware of the issue and be seen to be above board. It is all about openness and transparency from the councillor's point of view. If he is acting appropriately, there should not be an issue. It may be that the councillor is seeking clarification for someone who raised an issue.

Mr Elliott: There is a separate issue that I should have raised earlier around the surcharge. You said that you are looking at subordinate legislation on surcharges.

The Deputy Chairperson: Sorry, Tom. I will come back to you on that. Lord Morrow wants to come in on the previous issue.

Mr Elliott: That is grand.

Lord Morrow: I have two minor points to make. I was interested to hear the example that you used of the councillor whose rent happened to be in arrears. It so happened that he rented a property from his local council. I cannot understand why anyone would want to say that he was getting preferential treatment unless he was the only person in the borough who was in arrears, which I suspect he was not. That means that he was just like every other human being.

Ms Ferguson: Exactly.

Lord Morrow: It is sometimes perceived that councillors or others in public life get some advantage because of their position and have their misdemeanours skimmed over. I would hope that he was not being treated differently because he was a councillor.

If I am a director on a development association, in whose interests am I the director? Am I a director in the interests of the community or am I a director in the interests of the local council that sent me to be a director? My understanding, and I wonder where the code comes in, is that if I serve on a district development association and have been sent there by the council, I am there to uphold and defend the council's position on that body, not the community's position. That is unique in that, on the one hand, you represent the community but, on the other hand, on another body you represent the council, because it has given considerable subscriptions to that organisation. On the council that I served on for some years, we insisted on having representation on that body. Therefore, I was supposed to be there to look after the interests of the council and not those of the community. Is the code clear on that?

Ms Ferguson: Yes, I think that it is. It depends who you are representing. Being there to represent your council is different from being there because you have been asked along to represent your constituents. It is up to councillors to ensure that, regardless of the reason for them being on the committee, they are clear on why they are there and on what they can and cannot do to ensure that openness and transparency exists.

Lord Morrow: That is fine. Thank you.

The Deputy Chairperson: Tom, would you like to continue from where you left off?

Mr Elliott: My next question was on the surcharge issue. When is it likely that the subordinate legislation will come forward? Is it the Department's opinion that surcharges will be abolished?

Ms Broadway: It is something that the Minister will consider when the ethical standards system has bedded in for a few years. That is the position.

Mr Elliott: Is it the Department's opinion that surcharges will be abolished?

Ms Broadway: We have the enabling power. It will be for the Minister to decide, at an appropriate point, whether it is appropriate to remove the surcharge.

Mr Elliott: There is no opinion at the moment.

Ms MacHugh: Until we have a body of evidence built up from the new ethical standards regime, we will not be in the position to form an opinion or even to provide advice to the Minister.

Mr Elliott: Is it likely that the decision will be made before the shadow councils receive full powers in May 2015?

Ms MacHugh: No.

Mr Elliott: There could be a period in which councillors could be subject to surcharges.

Ms MacHugh: Yes.

The Deputy Chairperson: There are no more questions.

Question, That the Committee for the Environment has considered the local government code of conduct for councillors and recommends that it be affirmed by the Assembly, put and agreed to.

The Deputy Chairperson: Thank you very much.