



Northern Ireland
Assembly

Committee on Standards and Privileges

OFFICIAL REPORT (Hansard)

Review of the Code of Conduct:
Equality Commission for Northern Ireland

4 June 2014

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Mr Alastair Ross (Chairperson)
Ms Anna Lo (Deputy Chairperson)
Mr Steven Agnew
Mr Cathal Boylan
Mr Colum Eastwood
Mr Declan McAleer
Mr Fra McCann
Mr Ian McCrea
Mrs Sandra Overend
Mr Mervyn Storey

Witnesses:

Mrs Roisin Mallon	Equality Commission for Northern Ireland
Dr Michael Wardlow	Equality Commission for Northern Ireland

The Chairperson: Dr Wardlow and Mrs Mallon, you are very welcome to the Committee. Please formally introduce yourselves for Hansard and make some introductory comments. Following that, we will take questions.

Dr Michael Wardlow (Equality Commission for Northern Ireland): For the past two years, I have been the chief commissioner of the Equality Commission for Northern Ireland.

Mrs Roisin Mallon (Equality Commission for Northern Ireland): I am a senior policy officer with the Equality Commission.

Dr Wardlow: Thank you for allowing us to come. We have given you a fairly detailed view in our briefing paper, but I thought that it would be useful if we each spent up to five minutes highlighting some issues. I will cover leadership and say a little about free speech and the equality and good relations principles. Roisin will look into the wording of the equality and good relations principle and say a little about what we feel about the enforceability of rules. There are lots of other things, such as the public/private debate, on which we are happy to engage with you.

We feel that the code of conduct is very important, and we are glad that you are taking this opportunity to engage with people and listen to a range of stakeholders. For us, the code is not simply a rule book — it is that, but it is not simply that. Over the past number of years, when we have talked to the public, there has been a growing challenge function. People are saying, "I'm involved in other stuff. Governance is very high, and accountability and probity are very high". I think, rightly so. However, the code is not simply a rule book or a set of restrictions. This is much more about aspiration and

trying to lay the way ahead for a united community and saying that this is what leadership looks like, and these are the aspirational principles that should underpin it.

You will, of course, have read the 'Standards Matter: A Review of Best Practice in Promoting Good Behaviour in Public Life' report, and I know that you have taken evidence from the US. All say the same thing: ethics are extremely important. How we do things, and the DNA of how we do them, are as important as what we do. That is the context in which we want to talk to you. Although we will talk about rules, we are trying to say that, in a sense, the rules are the foundation and that the code of conduct is "rules plus".

That brings me to leadership. We said very clearly that we need to be sure that the Members elected to here provide a model of effective, democratic and good, positive leadership. People tell us that they expect that from those whom they elect, and not just here; they expect it of me in my public position. When I take decisions, I am always aware that I take them as the chair of a board but that there must also be an attempt to model good leadership. Those who have a significant leadership role need to be champions of the promotion of the equality of opportunity, not simply reactive defenders. It is about proactively promoting. As you know, that ties in with the section 75 duties, which, regardless of whether you feel that they are good, set us apart from a lot of places. They put a requirement on public bodies not simply to react but to promote equality and good relations.

The public life section of the 'Standards Matter' report contains a great quote about standards and behaviour:

"High standards of behaviour need to be understood as a matter of personal responsibility, embedded in organisational processes and actively and consistently demonstrated".

This is about demonstrating competence and leadership over a period. It is not simply a skill set that you carry with you in a CV. We are saying that this should be demonstrated, and it should be capable of being seen to be demonstrated by all individuals in leadership roles. Even if a behaviour or language does not constitute a breach of the code, perhaps because the words were said privately or casually, it is not about a set of rules to catch people out. The report in GB said that, sometimes, people use the code to avoid something. We are saying that you should understand the significant, negative and detrimental impact that inflammatory language and behaviours can have. It is not enough for people simply to ask whether they can do enough to pass the code, although that is important. Rather, it is about asking whether the code sets aspirations for what would constitute good leadership in a given situation. That is not forensic. This is case by case. There are no absolutes, except the principles that we want to talk about.

We get into, then, a second issue, which is free speech. There has been a lot of debate and discussion, and I am happy to engage with some of that. We have said publicly, as I have when interviewed, that there is a misunderstanding that freedom of speech is unfettered, which is not true. We know that it is fettered by, for example, obscenity laws and libel and slander laws. Generally, in the United Nations and according to international human rights, free speech is about the principle of doing no harm or offence. So we need to have a discussion about what free speech looks like and about the fact that just because you can does not necessarily mean that you should. Therefore, we are looking for people to act in a way that does not offend the underlying principles. The code is not simply a set of rules; it has underlying aspirational principles.

That leads me to the final area that I want to deal with, the principles of conduct, particularly those that obtain to equality and good relations. We will be consistent on this because these need to be clear, relevant, concise and understandable. There is no use having airy-fairy stuff about which you have to ask what it all means. We have the Nolan principles, which go beyond requirements. There is, obviously, a precedent for those in public office who have signed up to Law Plus. We are simply saying that when we look at this code, we are saying yes to the law and regulations, to equality and international human rights standards, but that there should be more than that. There should be a need to promote this good relations and equality context.

Therefore, section 75 duties are one element to which we want to link this, but we know that you have also signed off on Together: Building a United Community. Frankly, we are moving beyond orange and green. We are looking at how we might promote a united community, not communities. Although there is still sectarianism and lots of issues between the two main traditions, we are increasingly becoming a more diverse society. Just under 5% of people who now live in this place were not born here, which says something about those equality and good relations principles.

We need a code that requires Members to act for the entire community. Therefore, it is important for us to have principles, not just rules. They need to be made clear in more documents than just 'Standards Matter'. Sometimes, if we do not have principles and simply react to the regulations, there can be a restriction. At times, principles allow us to lift beyond regulations and get a vision, idea or aspiration of what good leadership would be. Adherence to a code of conduct might not necessarily, in every circumstance, provide for a defence of poor behaviour or good behaviour. Something between these aspirational principles should draw us up, and the founding principle of the regulations should be clear and concise and able to be determined.

My final point is that the code should encourage Members to act in a manner that proactively requires them to seek to challenge prejudice and promote understanding. They should stop prejudice and challenge it when they see it, but, more importantly, it is about creating an aspirational leadership that shows what good relations should be.

Mrs Mallon: I will follow on from Michael's comments and turn to the equality and good relations principles currently in the code of practice. We feel that a number of changes are required. We believe that they need to be clarified, strengthened and amended so that they more accurately reflect the types of behaviour to which Members should aspire. At the moment, we do not feel that they adequately do that.

First, I will outline our recommended changes to the equality principle. You will be aware that the current wording is that Members should promote equality "by treating" people in a certain way. There is some ambiguity in that, so we suggest that the wording be amended to read that Members should promote equality of opportunity and not discriminate against any person, treating people with respect regardless of race, age, religion etc. We want changes to the wording "by treating" because that is not clear.

We also recommend changes to the good relations principle. You will be aware of the current wording in the code:

"acting justly and promoting a culture of respect for the law."

Again, we do not feel that that accurately reflects the proactive nature of the good relations duty. We recognise that neither good relations nor promoting them is defined in legislation. There are four words in our guidance for public authorities on what we meant by promoting good relations, and you will see that in our paper:

"to promote respect, equity and trust, and embrace diversity in all its forms."

We are considering a revised definition of good relations in the context of the Together: Building a United Community (T:BUC) strategy. In coming to a proposed wording, we are also looking to what is happening in Great Britain under the Equality Act, which talks about "tackling prejudice" and "promoting understanding". Although we do not have a final definition for the Committee at this stage, we are happy to engage further, but we ask the Committee to look at focusing on the need to tackle prejudice and promote understanding between people on a number of equality grounds. We will come back to the Committee with our updated position.

I turn now to enforceable rules. It was very clear in the issue paper that the Committee was of the view that, for principles to be meaningful, there have to be rules that explain how they apply in specific circumstances. We recommend, in addition to the equality and good relation principles, enforceable rules directly linked to those principles. We give one suggestion in the paper for the equality principle. We recommend the inclusion of an enforceable rule that makes it clear that Members must not discriminate on any equality grounds or act in a manner that is in breach of hate crime legislation.

We also recommend consideration of the inclusion of an enforceable rule directly linked to the principle of good relations, but, as I said, we are still looking at a revised position on that, so I cannot give you an exact formulation of the wording. We will come back to the Committee on that.

The Chairperson: Thank you very much. I have just a couple of questions before I go to other members. Both of you spoke about principles, not just rules; about aspiring to what good leadership would look like; and how Members should aspire to a particular type of behaviour. Then you talked about enforceable rules linking to aspirational language. You gave two examples: one about Members not discriminating against individuals; the other about hate speech, but those are already

prohibited. Previous advice to the Committee was that there is no need to restate that in our code, given that it already is the legal position that Members cannot do that. If Members were to engage in that kind of behaviour, existing laws govern that. Do you think that there is an issue with restating existing law, given that some of the legal people say that that is bad practice, or do you think it so important that you need to restate it?

Dr Wardlow: This is a public document, and there is a sense in which we should state within it some of the types of behaviours. The other point is one that we have not yet touched on, but it is in our paper. My personal view is that, once you get the code, it is very helpful to state that this is the anti-discrimination legislation plus the hate crime. To name those does not diminish what is already out there. If anything, it reinforces and them and holds them up. I do not think that you are running contrary to any legal precedent by including them.

For us, once you have that code, something else has to happen. We will work towards developing guidance alongside it. That guidance might show indicative examples of what you could and could not do to help colleagues, but it would be tied into training and induction. In other places, when talking about good relations, everybody thinks that they know all about it, but then, suddenly, some new legislation comes in, and people are looking for the code to find out whether they can or cannot do something. We thought that stating it in the code would demonstrate that everyone knows all this stuff: everyone knows that this is the baseline, but we are restating it. If new legislation comes, you can, of course, update it. For us, the more important thing is to state it, and a form of regulation needs to be tied in to see whether, outside the law, you have crossed the line somewhere. We are saying that the high-level principles should draw us up. You already have the Nolan principles of selflessness, integrity and so on. We know that it is very difficult to test for integrity. We do not suggest that you have 27 regulations tied to each principle, because that just would not work. The trick will be how you use the principles to draw you up and how, within the great principles governing equality and good relations, you get something that at least allows you to test through a regulation whether people were actively promoting good relations or equality beyond what is well trusted and well tested. The legal field is full of tests on equality. Quite frankly, there are very few on good relations. We know what reasonableness looks like in equality legislation, but good relations remain to be tested. This will be in T:BUC when we are looking at the good relations indicators, so it is not only you who will struggle with it. We do not think that inclusion diminishes what already exists; in fact, we think that it is elevated by being included. If there was a legal ground from, say, a professor of law saying that it does not need to be there, I would defer to that.

Mrs Mallon: I agree with Michael. The House of Commons code specifically says that Members must not discriminate. That has been pulled out as a separate duty even though it is clearly in the equality legislation in Great Britain. We mentioned the paper in Wales. It is a local government code of practice, so it is not quite the same, but it also has a clear enforceable duty that it must not discriminate. So we see that there is value in having an overarching principle followed up by an enforceable rule.

The Chairperson: You also said that Members should be champions for equality. Members should not discriminate against people in their job, but how can a Member be a champion for equality? How can you have a code that imposes a duty on a Member to be a champion for equality, particularly when you can envisage a circumstance in which a Member has been democratically elected on a platform not perceived as promoting equality? How could the code impose on that Member a duty to be a champion for equality?

Dr Wardlow: I hope that I said "equality and good relations". If I did not, please amend that for the record because it certainly was not just equality. This is in the aspiration. This is not about equality in one particular area, whether it is disability, gender, LGB or sexual orientation. When people look at a code, they are not simply looking for a set of rules that say, "Here is what you must work within." People tell us that they want to see, as do we, "Here are your aspirational principles." It is not saying, "This is your working definition of equality." You are already bound by anti-discrimination legislation across six characteristics anyway. We are saying that how you work is promoting good relations and equality. In that sense, you are modelling and being a champion. We are not saying that you should advocate for one particular issue on equality, although, by all means, if that is in your mandate, do so; we are saying that this is an active call to do that. It is a bit like section 75(1) and (2). It is not enough to ensure that you cover the law. The requirement put on public bodies was to work towards the promotion of equality of opportunity. In the same way, we are saying that you should work towards the promotion of equality and good relations.

The Chairperson: Is it not easier to place that duty on a corporate body than an individual? Frankly, we have 108 Members here, all with different views.

Dr Wardlow: We are in our place, the Human Rights Commission is there, and other bodies do certain bits of discrimination law. We look to elected MLAs, who are here as leaders and are meant to set the vision for this "united community". You say in your preface to T:BUC that it is built on fairness, equity and justice. We are simply restating that, if that is the case and that is the aspiration in the Programme for Government and in T:BUC, it needs to be evidenced in what you say and do here. It is not about 108 individual champions running about; it is the DNA. That is the rock, and, if you broke it open, that is what you would see written on it.

Mrs Mallon: Absolutely. I will tease out the difference between promoting equality and not discriminating. The rule is what the law states, which is "do not discriminate". The principle that we suggest is more aspirational and goes beyond that. The principle is to promote equality and good relations. As Michael mentioned, that links into the existing duty on public bodies to have due regard for the need to promote equality and good relations. We feel that Members can promote equality and inclusion rather than simply not discriminating. They can encourage the participation in public life of disabled people and women. That goes beyond just not discriminating. That is taking proactive steps that encourage others to go beyond simply not discriminating.

Dr Wardlow: I think, for example, the publication for consultation this week of the race strategy is an absolute way in which you are championing equality and inclusion. That is the sort of thing that I am talking about. As opposed to one party putting its stamp on it, it became a united launch. Of course, parties will do their own things, but, when parties unite, do not underestimate the power that that has to set a model. I do not need to tell you that lots of people do not vote. When something like the race strategy happens, it sends a signal of modelling effective, good leadership. That is what we are saying. We are not saying that there should be a test: he said "X" or she said "Y", and so they fail the test of promoting good relations. That is not what this is about. We are not trying to catch people out. We are asking this question: how do we say that this is "legislation plus"? We have done that, for example, in workplaces, which now do many things that they do not necessarily have to do because they see that diversity is good thing and brings results and greater productivity. Incomers have added about 0.5% to GDP here. We know that that is happening. So, Alastair, that is what it is about. It is not about setting somebody up, giving them a test and saying that they have failed it.

The Chairperson: Before I open the meeting to questions from other members, let me ask about freedom of speech, which is, of course, of particular interest at the moment. I do not want to go into any specifics, but it is an issue, and it has been an issue for the Committee over the past number of months. When discussing a number of topics, the issue of freedom of expression and speech has come up. Perhaps, when someone has said something that is not controversial, it is dead easy to say that we all support freedom of speech. It becomes increasingly difficult when someone says something that is perceived as offensive or damaging to good relations. Do you believe that the code should go beyond stating the legal definition of freedom of speech? Of course, freedom of speech is not absolute. There are caveats on incitement to hatred and so on. Are you of the view that the code should go beyond the legal position?

Dr Wardlow: Roisin will answer that, and I will then pick up on some of what we have been trying to say over the past couple of weeks at a more strategic level.

Mrs Mallon: You are quite right in saying that freedom of speech is not absolute; it is qualified by criminal law, which includes hate crime and public order offences, equality law and human rights legislation. There are a lot of restrictions on freedom of speech. What we have said is nearly, in a sense, what is already reflected in the code, which is that Members should be free to express any political opinion that they hold but not to do so in a way that offends the underlying equality or good relations principles.

We agree that the wording must be compliant with human rights legislation. We know that there is already a tension, and it is set out in the issues paper, between to what degree Members can express political opinion and still not be manifestly in contradiction of the principles. We agree that it should be compliant, but when you look at the wording to ensure compliance, we want you to take a proportionate approach to striking the appropriate balance between permitting Members to express a lawful political opinion and expressing it in such a way that does not offend the underlying principles.

Dr Wardlow: Let me give you an example. Without naming anything in particular, let us take the subject of interfaith dialogue that I have been speaking publicly about recently. I think that we should have more of that and that the Churches should engage much more with other faith communities. I have been brought up to understand that a faith tradition, a religious belief, is open for discussion and debate. I have had really strong debates with colleagues from other traditions, both Protestant and Catholic and beyond the Christian traditions. I am quite open to people saying that my belief system is terrible and then having a robust debate. Freedom of speech is all over that. The issue is when you take that and somehow build up and predicate a characteristic on a group or a race. "So-and-so cannot be trusted", or whatever it happens to be. That, I think, moves beyond what I understand as freedom of speech and expression.

When someone comes to us and asks, "Is this discrimination?", we do not make that call. That is for the courts or tribunal to make. We cannot say whether something is or is not covered by freedom of speech because, in fact, that is the job of the International Court of Justice. Even our colleagues in the Human Rights Commission are looking for guidance from the UN on what, in the current position, constitutes freedom of speech. I think that you will have to struggle with this. For us, the big principle is always this: do no harm and cause no offence. You do not have the right not to be offended, and make that clear. However, just because you can say something to offend does not mean that you should. If you say, "Here is our set of principles, regulations or rules that set out the things that you can and cannot say", it allows the match to go on in the middle. You could have a three-dimensional architecture, which says, "The other things that guide me are these questions: am I, by doing this, simply expressing freedom? Or am I, in some shape or form, damaging good relations or equality in the bigger sphere, not to do with the rules and regulations but to do with building a better community?". I think that that is one of the balancing acts that I have all the time, as do you.

Sometimes, we say things, casually, that we do not mean, and then we apologise for them. At other times, we say something because it will push people's buttons. This debate is around what that discussion would look like so that I am not closing down your right to freely express what you believe by saying, "Hold on; you're going to offend me". That is the place to get to.

As Roisin said, whatever you do in defining this, make sure that the cornerstones are around proportionality and that international human rights law is there as your foundation. However, that should not be seen as some sort of straitjacket. Heaven help us if we cannot have robust discussion. There is something here about how that is done. I know that you have the cut and thrust up here that would be very different if you were outside. That is fine, but, sometimes, when that transfers itself outside, you should not do something simply because you can. That is the modelling that I was talking about. I would hate it to be, "Here is a definitive forensic definition of freedom of speech", and we have to keep going back to it to see if it has been broken. This is the difference between regulations and principles.

Mr I McCrea: My question goes back to part of the question that you referred to, Chair, around the enforceable rules. I believe that there should be things within the code that Members have to accept. The Chair referred to issues that are currently within the law. I am not sure that we should restate those, other than to reference certain aspects of certain laws. You gave the example of Wales using the enforceable rule of discrimination. Other than that, do you have any examples of places where enforceable rules are used in respect of discrimination and good relations and equality?

Dr Wardlow: Does the new district council code have it?

Mrs Mallon: No, not at the minute.

Dr Wardlow: It was being discussed there.

Mrs Mallon: We have responded to the DOE code of conduct for councillors and recommended changes to the wording on equality and good relations, because, clearly, there is a crossover in clauses. We have raised concerns with them in relation to that.

Mr I McCrea: In essence, it is a Northern Ireland thing because it is a good relations thing.

Dr Wardlow: No, I understood; I just wanted to make sure if something had been said in the DOE debate, which is exactly on that line.

Mr I McCrea: Do not worry; I am on the Committee for the Environment, so I will get that.

Mrs Mallon: If you are talking about a code, the only one that I am aware of is at the House of Commons. Its code has the statement, "they must not discriminate". The only other one that I am aware of, which is in the paper, is in Wales. Its local government code makes it clear that there is a duty not to discriminate.

Dr Wardlow: Ian, is your concern about restating? Regardless of whether they are there, restated or not, they are there, if you know what I mean, and colleagues will know. Our point is that, by being there, they are a reminder and a reinforcement. It is not adding anything extra to people's responsibilities. Is your concern about —

Mr I McCrea: My focus, which, I think, is that of most members, is that we are trying to reduce the code in size and take out some of the unnecessary stuff, certainly those things that are already in law. Do we need to have them restated? As the Chair said, if something is already in law, why should we restate it in our document? Anybody who has a query around whether we have lived up to those will have their opportunity to test that through the court. Why do we always have to add more? Some people suggest that less is more. My concern is probably more so around that.

Dr Wardlow: I am not a lawyer and not technical, so let us imagine that someone is referred because they breached the code. At the minute, that breach is held against a regulation, as I understand it, or criminal law, if it happens to be that.

Mrs Mallon: It can be manifestly in conflict with the principles as well as the conduct.

Dr Wardlow: If you did not have the regulations and someone was referred, the point they would take as a baseline would, presumably, be the law as it exists. I do not know if that diminishes the ability to test whether someone has breached something if it is not stated there. If you are saying that this is about brevity, we are simply saying that nowadays, with electronic stuff, most people are going to have this on something that is electronic or a PDF or something. We have said why we think that it should be there. It is up to you if you want to reduce that for brevity, as long as it does not diminish your ability, if it comes to the test, to see whether or not someone has breached. That is the bit for me.

Mrs Mallon: Part of the reason is that the Committee itself said that if you are going to have a principle, you should have an enforceable rule linked to it, so we are saying that, clearly, you should have equality and good relations principles and, therefore, should have corresponding rules. The Committee has recognised a need to link rules with principles.

The Chairperson: For clarity, I do not think that we have said that if you have a principle, you have to have a corresponding rule. What we have said as a Committee is that we want to see perhaps a separation between principles and rules. The principles would be potentially aspirational, and we recognise them as aspirational, but the rules are the enforceable bits. That is where the Committee is coming from. We have had a number of discussions over a long time about how we want a simple and straightforward code. That is maybe why some members feel that things should not necessarily be restated if they are already in law.

There is also the case that if we were to go beyond the legal position, that is challengeable in the courts. We know that from other places in the United Kingdom where Members were found to have breached a code of conduct but took that to court and the decision was overturned because they did not break any laws. We are cognisant of that as well.

Dr Wardlow: What we were saying, Alastair, is that you are already doing that signing the Nolan principles, because Nolan principles are not legally binding but you still assent to them that in some way that is the direction of travel. We are saying that these aspirations are, in the same way, taking you beyond the law.

No one is saying that you say something and, "Oh, we need a regulation to tie that down — that he or she has breached a regulation on good relations by doing x". That is back to this simply being a set of rules as opposed to being, of course, a rule book but, more than that, an aspirational manual. I think that you are saying that you are going to leave the regulations out for brevity. That is your call as long

as you are not limiting how you are able to hold someone to account for breach. Some legal view will have to be taken from your end on that one.

Mr Boylan: Thank you very much for your presentation. I suppose that the first question to ask is whether you can give me the definition of "good relations" and start from there. I do not think that it is brevity. We want a clear and precise code because we have noticed, especially over the past number of weeks, the types of complaints that are coming in and being investigated.

You keep mentioning equality and good relations. I do not want to use a specific case, but I will refer to an issue where a public representative goes out and acts in a manner to protect their community. In essence, you could look at it as an equality issue, because they are representing those people. The situation then turns around, and it gets them into a wee bit of trouble.

We should look at it in those terms. We need to strike a balance between protecting a Member and what they are trying to do. We will not get into the law, because law is about meanings and is a minefield. I want to leave that aside because —

Dr Wardlow: Cathal, to be clear on the first bit, there is a very simple definition in the 2010 Act in Britain, which says, basically, that it is tackling prejudice and promoting understanding. One of the things that we have said about T:BUC is that you could do worse than just take that as a very simple definition. That is saying actively tackle prejudice and actively promote tolerance. I know that you were playing with us.

Mr Boylan: No, I am familiar with it, and we will get there in the end, but it is key. I appreciate today's presentation because it has opened up another minefield for us in what way we want to go with this. Everybody mentioned enforceable rules. You mentioned them in terms of equality and good relations. Are there any other enforceable rules that, you think, we may need to introduce? Have you responded on that?

Dr Wardlow: Other than what is already in the code?

Mr Boylan: Yes. Have a wee think about that.

The other question I want to bring up is about the issue of personal and private life. In what circumstances is there a public interest to justify such an intrusion into a Member's personal life?

Dr Wardlow: We dealt with this in quite significant detail, so I will be as brief as I can. I am a public representative, too. As soon as I tweet or go on my Facebook, I am Michael Wardlow, the chief commissioner of the Equality Commission, no matter whether it is private or not. I always take the view that, whenever I do anything in the public domain, people will confuse me. I am very nervous about that, so that is the rule I take. We said in the paper that you have two circles and, in the middle, there is an intersection. This is me, and I have a public and a private life. The bit in the middle is hugely grey. We are saying that your private life does not start the minute you walk out of the Assembly Building. Also, we are not saying that every time you say something, you are a public representative. There are ways in which that grey area in the middle can be tested, whether you use reasonableness, presumption or perceptions. We have advanced some of those things. If you are moving into the area of private life, it is not enough for somebody to say, "That's private; leave it alone" or for somebody else to say, "Everything you say is public". There is some negotiation in the middle of that.

If you are going into someone's private life, it needs to be proportionate and needs to have the benefit of public good. It also needs to be clear that it holds up and is held up by international human rights standards. You have, if you like, a field that is fenced in. If you want to go into that place called private, you need to be sure that there is a good reason and just cause to do so. It also needs to be in the public interest. You must not interfere unnecessarily or with the international human rights standards. Most importantly, it must be proportionate. That is a well-accepted standard, but that is not saying that you should not do it.

In Westminster, they have a comment that says that you should not investigate personal conduct:

"unless such conduct significantly damages the reputation and integrity of the House of Commons as a whole or of its Members generally."

That is almost nuclear. Let us say that somebody goes on 'Celebrity Big Brother' and says something really stupid about the House of Commons. You could see how, arguably, that may well be them invoking the code. They have a determinant of what might constitute private intervention. We are saying that, first, you must ask what private is. That is something you need to look at. Is it reasonable? Is it presumption? Is it perception? Secondly, if you are going to go in there, make sure that what you do has sound legal advice, proportionality and the public interest in it. Make sure also that it is superintended and is held up by international human rights standards.

The Chairperson: I listened to your point about there being a grey area. In everything in life, there is a grey area. Those who do not see grey areas probably do not quite understand the challenges we face. The grey area is covered by someone bringing the House into disrepute. Again, what does that actually mean? The whole idea of the principles is about what they look like in the real world. Ultimately, the commissioner will decide whether somebody has breached the code of conduct. Where is the test for the whole idea of bringing the House into disrepute?

Dr Wardlow: That is what we have said about the guidance. We are happy to work with you. In other places, we have given examples of what might promote a good and harmonious workplace and what would not. We help people to develop worked examples. People learn from the examples. We, and others, I am sure, would be very happy to work along with you to say, "Look, this is the sort of stuff that might, arguably, bring you into disrepute or cause problems, so avoid it; don't go fishing here". That is one way of doing it. Along with the regulations and your code, you have a guidebook, but that would need to involve training or induction at least and continuing professional development (CPD), because rules change. I might say something in a tweet and then withdraw it, and suddenly, my tweet is still all over the place. We have seen that.

The other thing is that the rules have moved from what you did in 2008. Social media have moved on dramatically since then. You have everything from pictures to the spoken word to innuendo. You cannot say for all time forensically, "This is what brings it into disrepute". It is possible, through training, guidance and working with us and others, that, together, we could help you to look at that so that it would not be just so grey.

Mr Boylan: Chair, with your indulgence, I have another point. You mentioned that you responded on the councillors' code of conduct. There is a good opportunity through the community planning element to look at that. We should not miss that. We have not really got down to the bones of it in terms of the public view. The public expectation is that we should represent them and act in such a manner. I am wondering about your views. Maybe there is a case study that we can look at that will help us to develop a good code. Is there anything that we can incorporate in the code from how you have dealt with public cases?

Dr Wardlow: It is fascinating. We have over 3,000 phone calls every year and, of those, we have about 300 applications for support. We support about 100, and the top three consistently are race, gender and disability. When you talk to people, you find that it is not just about the law but about how people actively promote good working relations. Reasonable adjustment is one of the biggest ones for disabled people. It could be a chair. It is about talking to people about what they would like and expect. So, I think that what you are saying is right. I think that there is an engagement process here, because you will get 27,000 different views on what you should be doing, but there are some key things that people expect from public elected representatives, and the guide may well help with that. It is useful to engage with and work through some examples, and we have done that in a lot of other areas. Employers do that regularly with us and test stuff out with us.

Mrs Mallon: We have also done it with public bodies. We have our guide on promoting good relations for public bodies, and we outlined the type of things that they can do to promote good relations. We have given clear guidance.

Dr Wardlow: That is feedback, by the way. That is evidence-based; it is not just us thinking that. That is when people come forward and say, "I went to that district council and look what it did to me". Everything that we are trying to put forward will be evidence-based, and, if you want, we will be very happy to work with you to develop that. It will not be a forensic guide, but it will certainly help you to say, "This is the type of stuff". That is a growing thing. As it grows, it will build more, not just where you are but with the new public bodies as well.

Mr Agnew: What would you say is the role of this Committee?

Dr Wardlow: Today or in future?

Mr Agnew: I suppose that we are looking at the future. What should the role be?

Dr Wardlow: You could end up almost as a judiciary. It is a bit like the internal reviews in the police or something else. Of course, you have that sort of role, but there is something about the aspirations and the drawing up. You are able to set a code and contact that says, "This is what, we think, leadership in this new place that we call home, or however we refer to it, looks like". If, as a mature society, we are building a united community and are signed up to that, this is what we would expect of our leaders, and we are going to help model that. So, of course, you have the forensic nature of calling people to account, but if you were able to say that this is important enough to have continuing professional development and that people should be required to have a top-up on an annual basis, lots of people would help with that. You are then building up the residue of having a challenge function, drawing people on and helping to say, "Here is what the principles are".

The other thing is to commend good practice. I do not think that there is enough of that. We could do well in commending. One thing that we do more and more is to commend good practice. We have just published a guide of best practice in the area of disability, and people opened it up and said, "I did not realise that by doing this, I could —". It is the best kept secret. There are some brilliant examples of good practice in what you do in the Assembly. There is absolutely brilliant stuff where you have worked together and it has not been orange and green but has been a common cause. Disability is one that I can think of. There are others, and I think that those are brilliant exemplars. The members of the public need to know that. You maybe have a job in doing a good bit of PR there. The other thing is listening. You can listen to what you said, Cathal, about what the great unwashed are saying or what they expect. So, in a sense, you are also able to be eyes and ears. That allows you to be like the heartbeat.

Mrs Mallon: This is a significant role of the Committee in bringing forward a robust code. We see it as absolutely key and extremely important. It is a clear task, and, of course, you have a role in investigating complaints. I have looked through a number of the outcomes of some of the complaints, and it has struck me that, sometimes, you even say, "Although this is not a breach, the Member needs to be cautious and act in a reasonable way". You have not just said that it is not a breach but have gone further. That has been really helpful, as have your views on a particular complaint. As Michael said, highlighting good practice is another role that could be enhanced.

Dr Wardlow: You have done. This is beyond party politics. I am not hearing, and have never really heard, party politics in this. If this happens, it sends a signal that, whether we are orange, green or all colours in between, we can pull together for the greater good. That is a huge thing; we need that. You have shown leadership. The problem is that it does not leak outside these walls; it does not get out.

Mr Agnew: You mention leadership a lot. I am trying to understand — we, as a Committee, struggle with this sometimes — where the role is for us as a Committee in enforcing standards and the code-setting standards. How much is that the role of the electorate? You talked about promoting equality. Absolutely. We also talked about prejudice. The views of some parties are prejudiced by their nature. It is not our role to direct parties' policies; that is for the electorate. We can set aspirations, but how far do we go in promoting things that we think are good? Even T:BUC is a political policy, albeit an agreed one, by and large. I have certain issues with it. Perhaps the best way of putting it is that it is a consensus policy. It is a political decision. The Committee should be apolitical. Do you not have concerns that, in some of the things that you outlined, we are starting to take on —

Dr Wardlow: I do not think so. Let me give you an analogy from a previous life. In integrated education, when a new school was set up, six foundation governors were elected. In fact, they were not elected; they were the foundation governors who set the school up. Twenty-five or 30 years on, Lagan College still has six foundation governors. They retain the right to challenge the others on the foundational principles on which the school was set up. They, in a sense, are the ethos at the core. I see a similar role for the Committee. You should embody, through the code, the ethos of what makes this place work, as well as the core and the raising standards that others have talked about. These are common. The Nolan principles pick off the seven, but there are others as well that we can add. If, somehow, you draw people back to those apolitical common-good principles, you will not go far wrong.

People sometimes say, "Will you ever tell us whether we should do this or that?". We say, "No, we don't make decisions for you. We give you parameters within which you make the decision, and then the democratic process takes over". You know that better than I do. You can help to add value only by your comments and by showing good practice. You cannot superintend or override the democratic process. It is not easy. We, and other bodies, are happy to help how we can. If we have to be the bad cop or the good cop, we are happy to do that. That is a good working relationship that we would look forward to.

Mrs Mallon: Our views on the principles of equality of good relations — Michael mentioned this earlier — are that they are consistent with section 75 duties, which the Assembly agreed that public authorities must have. By asking members to promote equality and good relations, we are saying that this is consistent with an Assembly that has already placed a duty on all public bodies to have due regard to the need to promote equality and good relations. That is why we say that it is not a big leap to ask members to promote equality and good relations when the Assembly has already passed a law saying that public bodies must regard —

Dr Wardlow: The difference, and where people get confused, is that there are three, six and nine protected groups, if I can use the shorthand. There are three groups in section 75. Section 75(1) has nine groups, and the anti-discrimination legislation covers six. When we are talking about promoting good relations, the anti-discrimination legislation that we talked about earlier covers the six groups. Some may ask about the nine groups under section 75(1), which includes marital status and dependants. There is a third that I cannot remember. Although there are no protections under the anti-discrimination legislation, we expect that you would do that. That is an example of law-plus that I was struggling for earlier. There is no reason why you would not have wanted that in there. We have signed up to it under section 75(1). That is the sort of stuff that we are saying to remind people. If you think that it is important enough to profile, you should be trained in it, and there should be a guide. You should consistently be trying to feed-in good examples. There is a political thing in this, too. In your party there is a good example of a worked way in which good leadership has been shown. There is no reason why that does not travel. It does not have to be so apolitical that it is only the lowest common denominator. You have some really good stuff going on here, but it needs to get out there.

Mr Agnew: You said that there is no right not to be offended, but challenging political views will sometimes, by its very nature, be almost offensive. I think of issues such as flags, where if you come down strongly in any one way, someone will be offended even if you have not expressed yourself in an offensive way. How far is that for us to judge as a Committee and how much is it for the electorate to judge, if it is within the law, obviously?

We have even had examples of one Member calling another a juvenile name. That is offensive. Some say that is the cut and thrust of political debate, but how far do we go? If that is poor leadership and representation, it is up to the electorate not to re-elect those people. It is not for us to say.

Dr Wardlow: Ultimately, you are right — the electorate will have its say. Let me give you a personal example. I grew up in a cross-community tradition, so I had lots of friends. I happened to be perceived as Protestant, so I grew up with a lot of people who were Catholic. My Catholic friends constantly referred to me as a non-Catholic until once I took one aside and said, "I am not a non-Catholic". That is a bit like an atheist saying, "There is somebody who does not believe in God", and my atheist friends say, "Do not call me that; call me something different".

Was I offended or not? I dealt with it with that individual, but he says, "Hold on, you're a Prod, and sometimes your people say the Pope's the Antichrist". We got into a debate about what was offensive. It was fascinating because in our 20 years of friendship we had never talked about this stuff. Part of it is opening up discussion because I genuinely think that people sometimes offend and do not mean to, and that is not me defending. There is something that we said to open a discussion about free speech.

The other thing is the challenge function of thinking before you speak. Does it add value; is it a good thing to do; is it promoting the common good? Those are the high-level principles that we are talking about in a society emerging from what we have come out of. That will be an increasingly hard one for us to struggle with, Steven.

You cannot have a litmus test for when somebody says something — it goes blue when they have transgressed. Surely the important thing is that you have a debate about how it could be done differently. The only remedy, presumably, is not that he or she has breached the code but about having a discussion about how we might avoid it next time.

The Chairperson: With respect, that is exactly what we are asked to do: we are asked to determine whether or not somebody has breached the code.

Dr Wardlow: I know that.

The Chairperson: In an ideal world, the scenario that Steven outlined about somebody showing a lack of respect to somebody else, whether through actions or language, it is not the Committee's role to bring those people together for dialogue. We have to determine whether there was a breach of the code.

Dr Wardlow: Alastair, I am not saying that you act as mediator. What I am saying is that, if this comes in and you act as judge and jury and say that someone did or did not breach the code, that is a forensic determination. That does not say whether it caused harm in the public domain or infringed the principle of equality, so there needs to be something. That is why I am saying that you are not the answer to everything. The next stage is how you have an open conversation around, "This shouldn't happen again. What do we do to stop it getting here again? How to we promote good, proper, strong principles of leadership?"

This is outwith what you do. However, if you are setting the standards for talking about the principles and how you draw people on, it feeds to somewhere else now where that debate and discussion take place. The electorate has its say, but I would hate to think that it was the final one.

Mr Agnew: It is back to the MLA, public and private. You outlined principles, and I want to press you on some practical applications. I believe that an MLA who speaks on Twitter is acting in a public capacity, particularly if they have "I am MLA for wherever" as a part of their description. I am interested in your view on that.

Take another example — the political rally. I attend a lot of trade union marches. As far as I am concerned, I do that as an MLA, not because it is my job to do so. I do not think that I am required to, but it is a political act and I am elected in a political capacity. I very much feel that that should be the scope of the code. I am interested to know to what degree attending such a march is reasonably perceived as acting as an MLA.

Dr Wardlow: Let me say something strategically on that. I have heard arguments recently that there should be an agreed code governing the use of social media, and that it should be established whether it is in the public domain. That is for the Committee. We would not say whether there should or should not be one. However, the longer it remains a grey area, the longer you will run into difficulties. Very few people have two accounts. When I tweet, I have only one account, and, therefore, I am very careful about what I say.

The bigger issue about presumption or reasonableness is that you need to come to an understanding about how you determine what is and what is not said in the private realm. We have said some stuff there, Roisin.

Mrs Mallon: In the paper we say that there is a range of tests: there is the test of being "reasonably presumed"; the DOE code, which talks about "giving the impression" which is another test; and then there is the House of Commons code, which talks about damaging the reputation and integrity. We have not chosen one. We have just said that there are advantages and disadvantages to each, but we have not specifically said which one we feel is right. However, whatever one you pick, it has to be compliant with human rights, and if you are going to intrude into Members' lives, it has to be proportionate and it has to clear the public interest hurdle.

Dr Wardlow: The bit before that is this. In a rally I say, "Joe Bloggs is an idiot". The first question, when someone hears that, is whether they presume that I am speaking as a public rep. Once it is established that I am, the code applies. However, if that is not established, the second question is whether, even if it is in private, it is a significant event.

There are two things. First, you need to have something determinate. I suggest that the test should be the same for councils as for the Assembly. If councils have a different test from the Assembly, we will run into problems. Whatever you decide, the test should apply to both. Secondly, once you make that determination — whether it is presumption, reasonableness or whatever — you need to be sure that when you go into someone's private life it should be all the things that we said: proportionate and so on.

Perhaps it would be nicer if we said that one is better than the other. However, it should be the one that is clearest for you, and, whether it is the test of presumption, perception or reasonableness, you really need to have it across the two. The test of reasonableness has a lot of precedents in law. There is a legal precedent, in the Wednesbury case, for a definition of reasonableness. There is an argument for that. Another argument runs: "Leaving that aside, I assumed that he or she was acting as an MLA"; but then that means that the offence is perceived a bit like a hate crime. It depends on the route that you want to go down.

Mrs Mallon: Whatever test you ultimately come up with, we agree that there should be guidance on it, and you should provide indicative examples of types of conduct so that people are clear.

Dr Wardlow: Yes. This is the guidance that we talked about earlier.

Mrs Mallon: There can be inflammatory language and behaviour by Members that does not breach the code. Therefore we make it absolutely clear that, in the guidance, you remind Members that their inflammatory behaviour and language may not breach the code, but it can have a significant impact so that Members are aware of that.

Dr Wardlow: That is the bit that we said earlier. It is not that the Committee is the court, but it is trying to promote the principles actively. You cannot hold people to account if they breach the principles, but at least you can actively promote them.

Mr F McCann: Most of the questions that I was going to ask have been asked already. Steven raised an interesting point about when he goes to a trade union march. On those occasions, he goes as an MLA, but what is the perception of the crowd? I am a trade unionist and have been going to trade union marches since before I was an MLA. You have to work out that difference. I use a Twitter account, but I do not use an MLA account.

Dr Wardlow: However, if you tweeted something about the Assembly, Fra, such as: "Why don't they get on with X?" The perception is likely to be, since you are an elected MLA, that you are speaking about this place.

Mr F McCann: I accept that, but I also tweet about a lot of things that have nothing to do—

Dr Wardlow: Absolutely.

Mr F McCann: — with it and people may perceive me as tweeting them as an MLA.

Dr Wardlow: That is where perception falls down.

Mr F McCann: Much of this has to do with people's perceptions and expectations. Go back to the private/public aspect; you can get into debates and arguments with people who believe that once you put yourself up for election you are public property and you have no private life. It is difficult; it is a problem. You try to explain to people who have that perception why you do that, but they say, "No, you have put yourselves up for election." Some of this stuff will probably end up, like most stuff, being challengeable until a point of law is set against it with a description of it. That might be the only way of —

Dr Wardlow: The other thing that I strongly advocate is that there should be curricular possibilities to do that in schools. I know from my background in youth work that young people learn about civic democracy. We should introduce young people to the notion of free speech early in the curriculum. We have a generation of young people now who get this because they have been through civics at school; they get some of this stuff more than we would have done. That is very clearly one or the other. I am very hopeful. However, there may be something in looking at social media and their use. You might decide that all social media are fair game if you have your name to them. I do not know, but it is worth looking at.

Mr Storey: Michael and Roisin, you are very welcome. You talked earlier about forensic guidance. There has been a lot of talk about being definitive in what you want to describe. We all live in the real world and deal with flawed humanity, so mistakes will happen. In the past, even your own organisation has had to admit to procedures and practices that were not seen as fair and equitable.

How do you have a prescriptive definition of actively tackling prejudice? I listened earlier, Michael, when you talked about actively tackling and challenging prejudices — Steven made reference to it — but prejudice is defined in different ways, such as unfavourable opinion or unjustified or incorrect attitudes. However, for the person making that statement, it is something that they genuinely believe. You alluded to one earlier, which I will not go into the detail of, but I may hold the same view on a particular issue. Should I be challenged or pursued because that is a prejudice or because it is something that I genuinely believe but that the way in which I express it should not in any way be seen as being offensive to any other individual?

Dr Wardlow: Mervyn, you make a good point. This is not about the thought police or about challenging people's political or public or private opinion, whether theological or not. The question is how you act on it and how you use and choose your words. Some people say that it is a preference or a choice rather than a prejudice. At present, we do not have a definition of good relations, whereas we have definitions of equality. That is why I am saying that the law is clear on those things.

As we move into T:BUC, we will actively seek a definition of good relations in the legislation. At least then we will know what it means. Once it is there, there is at least something to hold it against. We are not saying that there should be 27 rules or regulations written in to define how you promote or attack prejudice. They would be part of the operating principles that you are trying to draw people towards. The exemplars in the guidance are things such as, "You may hold this view, but to express it in this way or in that context would not be the most helpful thing in the world". It is about behaviour. Laws change people's behaviour; they do not change attitudes. This is not necessarily about wanting everybody to come off the same production line. However, laws are sometimes necessary to make sure that behaviour is modified in certain circumstances. More important, it is to help people's attitudes to learn from the other. That is what the principles do. They try to help people in their attitudes, not change or challenge beliefs. This is about how we might be able to express ourselves to help this place move on. Heaven help us if we close down such conversation or say, "You are not allowed to hold that belief"; I would not want to live in that universe. That is certainly not what we are advocating.

Mr F McCann: We have had this debate a number of times, and all of us have said in the Committee at one time or another that we defend the right of people to have free speech, but it is how you determine when it is grossly offensive to sections of the population. That is where the problem is.

Dr Wardlow: There needs to be a test. Discrimination is not always unlawful. You could give free eyesight tests to people over 60: that is discrimination. You can give young people who are unemployed preference in jobs: that is OK. We need to move away from discrimination being a dirty word and that it cannot happen. It is the type of discrimination that we have lived with. Therefore, we are saying that, of course, you need to have some test and, of course, that is necessary. It is an art and a science. You are defining the science through the code, and we are saying that that science should have some art in it that allows you to move. That is why it is three dimensional rather than a flat structure. We are around lots of people like ourselves who have worked with this stuff, and part of the role is to try to do this together. We are more than happy to come back to help with guidance or whatever. That is one of the reasons why we are here.

I commend you. What you are doing is not easy, but you have a good opportunity to send a big signal. The race strategy is another opportunity for people to come back, and when T:BUC is launched, we will come back and talk on that.

The Chairperson: OK. Thank you very much. We appreciate your time.