

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

**THE REPORT OF SIR JOHN GRIFFITH WILLIAMS QC**

**INTRODUCTION**

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

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

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

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

#### THE RELEVANT PROVISIONS.

4. The Code of Conduct for Assembly members provides:

##### ***Purpose of the Code***

*1. The purpose of this Code of Conduct is:*

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

*(b) to provide the openness and accountability necessary to reinforce public confidence in the way in which Members of the National Assembly perform their Assembly and public duties*

*2. This Code applies to all Members of the National Assembly who have not taken leave of absence.*

##### ***General Standards of Conduct***

*Personal conduct*

*3. Members of the Assembly:*

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

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

Paragraph 4 of the Code provides that Members of the Assembly should observe the seven general principles of conduct identified by the Committee on

Standards in Public Life; these include Integrity. Paragraph 4(b) of the Code provides:

*“Assembly members should at all times (emphasis added) conduct themselves in a manner, which will tend to maintain and strengthen the public’s trust and confidence in the integrity of the Assembly and refrain from any action which would bring the Assembly or its Members generally, into disrepute.*

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

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

*3.1.vi it appears that there is enough substance to justify further investigation (i.e. there is enough evidence to suggest that the conduct complained about may have taken place, and if proved might amount to a breach of any of the matters encompassed within Standing Order 22.2(i).*

6. If admissible the Commissioner must proceed in accordance with the provisions of paragraph 4 to a Formal Investigation with a view to establishing the facts in relation to whether the member has committed the conduct complained of and if so whether the member has breached one of the matters encompassed within Standing Order 22.2(i) requiring the Commissioner to make a report to the Committee. That report must include details of the complaint, details of the investigation carried out by the Commissioner, the facts found by the Commissioner in relation to whether the member has committed the conduct complained of and the conclusion reached by the Commissioner as to whether the member has as a result of that conduct breached one of the matters encompassed in the Standing Order.

7. Standing Order 22 provides:

*22.2 The responsible committee must:*

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

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

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

9. Following receipt of the report, the Committee must inform the Member of his or her right to make written representations to the Committee within a specified time and to make oral representations at an oral hearing. The procedure for a hearing before the Standards Committee is set out in paragraph 7 of the Procedure. Following any oral hearing the Committee will meet in private to consider whether the Member is in breach of any of the matters encompassed in the Standing Order and if so, what action it should advise the Assembly to take if a breach is found. The Procedure, under the heading **Considerations** in paragraph 7 of the Procedure provides that in deciding what sanction or sanctions to recommend to the Assembly, the Committee will make a judgment based on the specific circumstances of the case in question. It will consider the severity of the breach, the extent to which it may have brought the Assembly into disrepute and whether the case in question is a repeat offence or shows persistent conduct which may be considered to show contempt for Assembly colleagues, the rules or the institution. The Committee will also take account of whether the breach was committed intentionally or not and whether any dishonesty or deceit is deemed to have been involved.

10. If the Committee determines to recommend to the Assembly, pending any appeal by the Member concerned, that a breach has been found and that either no further action should be taken or the Member should be censured in accordance with Standing Orders or that the Member should be excluded from Assembly proceedings for a specified time, or certain rights and privileges should be withdrawn from the Member or if appropriate any combination of the above sanctions, the Member must be provided with a copy of the Committee's report. The Member may within 10 working days of being provided with the Report

appeal to the Presiding Officer. If an appeal is made, the Committee's report will remain confidential and may not be published and laid before the Assembly until the determination of the appeal. Following the determination of the appeal the Committee must lay before the Assembly the report of the person appointed to decide the appeal together with the report of the Commissioner and the report (or revised report under paragraph 8.6i) of the Committee. The Chair of the Committee must then table a motion calling on the Assembly to endorse the Committee's recommendations. The provisions relating to an appeal will be considered later in this Report – see paragraph 45 *post*.

### THE FACTS

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

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

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

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

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

### THE COMPLAINTS

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

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

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

### THE INVESTIGATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **THE APPEAL**

45. The Procedure makes the following provisions.

### ***Consideration of Appeals***

*8.4 Appeals will only be considered on the following grounds:*

*i. that the Committee's conclusions are based on significant factual inaccuracies which, had they been known might have led to the Committee finding differently.*

*ii. that there had been procedural irregularities that prejudiced the Member's right to a fair hearing*

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

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

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

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

*ii dismiss the appeal.*

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

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

5. the Committee's Report.

**THE GROUNDS OF APPEAL**

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

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

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

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

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

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

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

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

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

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

## **CONCLUSION**

The Appeal is accordingly dismissed.

## **ADDENDUM**

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

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

John Griffith Williams

17<sup>th</sup> April 2018