

**DECISIONS OF THE CERTIFICATION OFFICER ON AN APPLICATION UNDER
ARTICLE 90A OF THE TRADE UNION AND LABOUR RELATIONS (NORTHERN
IRELAND) ORDER 1995**

Catherine McCarthy

v

**The Northern Ireland Public Service Alliance
(NIPSA)**

Date of Decisions:

29 March 2013

1. Decision and Declarations:

Upon application by the applicant under Article 90(A) (1) of the Trade Union and Labour Relations (Northern Ireland) Order 1995 (as amended) (“the 1995 Order”):

- 1.1 I refuse to make the declaration sought that the Union at its General Council meeting on 18 May 2012 breached paragraph 23 of its Standing Orders for the Transaction of General Council Business and rules 12.1, 6.9b, 6.1 and 2.20c of its rules, in that it failed to be bound by the findings of a report by Mr McDowell into complaints by the applicant, and counter-complaints of another NIPSA member, without having rescinded the decision of its General Council on 15 December 2011 to be bound by Mr McDowell’s report.
- 1.2 I refuse to make the declaration sought that the Union at its General Council meeting on 18 May 2012 failed to comply with rules 12.1, 11.4, 11.2, 6.1, and 2.20c of its rules relating to the process where there is the potential for disciplinary action.
- 1.3 I refuse to make the declaration sought that the Union at its General Council meeting on 18 May 2012 breached rules 11.4, 11.2, 6.1, 2.20c and 1.3e of its rules in that the Union failed during this meeting to apply the processes required to prevent an act or acts of discrimination against the applicant, thereby discriminating in favour of another NIPSA member.
- 1.4 I declare that the Union at its General Council meeting on 18 May 2012 breached “NIPSA Standing Orders for the Transaction of General Council Business: Annex 1 Guidance on Conflicts of Interest at NIPSA Meetings” in relation to the management of a conflict of interest.

- 1.5 I refuse to make the declaration sought that at its General Council meeting on 18 May 2012 the Union, by failing to take action against another NIPSA member, breached its NIPSA Conference Policy and rules 12.1, 6.1, 5.1 and 2.20c of its rules in relation to its cyber bullying policy.
- 1.6 I refuse to make the declaration sought that the Union at its General Council meeting on 18 May 2012 breached rules 12.1, 6.1, 2.20c and 1.3a of its rules in failing to protect the applicant from “further intimidation” by another NIPSA member.

2. The Applicant’s Complaints:

- 2.1 By an application dated 25 June 2012, the applicant, Mrs C McCarthy, made six complaints against her Union NIPSA. The complaints, confirmed in her own wording to my office, were:

2.2 Complaint No 1

On 18 May 2012 at its meeting in Harkin House 54 Wellington Park Belfast the NIPSA General Council failed to be bound by the finding of a report by Sid McDowell into complaints made by me and counter complaints made by Jim Owens without having rescinded the decision made by the General Council at its meeting on 15 December 2011 that it would be bound by Mr McDowell’s findings

- 2.3 This action was in Breach of Standing Orders for the Transaction of General Council Business Paragraph 23 Rule 6.9b which gives the General Council power to

“...make, vary, suspend or rescind regulations and by-laws for the conduct of business of the union and all committees or bodies of the Union”

- 2.4 The General Council determined that the regulations for the conduct of General Council business are as laid down in “Standing Orders for the transaction of General Council business”.

Paragraph 23 of Standing Orders for the transaction of General Council business states

“Rescinding of previous decisions: No decision of the General Council may be rescinded unless notice in writing of the motion to rescind has been forwarded to the General Secretary not less than 10 working days before the date of the General Council meeting at which it is to be discussed or in exceptional circumstances by a unanimous decision of the General Council”

- 2.5 By failing to be bound by Mr McDowell's findings without having rescinded the previous decision to be bound by them the Council breached Standing Order No 23.

This is in breach of Rule 6.1 which states

“Between meetings of the delegate Conference, the General management and control of the Union and the handling of the whole affairs shall be vested in the General Council (hereinafter referred to as “the council”). The Council shall conduct its affairs in accordance with these rules and with the principles and policies of the Union as determined by the Delegate Conference”

- 2.6 By failing to comply with the rules the General Council breached Rule 12.1 which states

“All members are bound by these rules

and Rule 2.20c which states

“Members shall at all times observe the Rules of the union and any regulations made thereunder. They shall abide by decisions properly made under the rules and shall carry out any duty or obligation imposed and any orders or directions given by or under the rules”

2.7 Complaint No 2

On 18 May 2012 at its meeting in Harkin House 54 Wellington Park Belfast the NIPSA General Council failed to comply with the Rules relating to the process to be undertaken in cases where there is the potential for disciplinary action.

- 2.8 Mr McDowell's report identified matters which are potential disciplinary matters under Rule 11.2.

Rule 11.2 states

“ A Disciplinary Sub Committee of the General Council set up in accordance with Rule 11.11 shall have the power to take disciplinary action against a member who

a fails to conform to the rules of the union

b acts deliberately in a manner inimical to the interests of the Union

c discriminates for or against any person or intimidates any person on grounds of his or her colour, race, ethnic, or national origins, political opinion, religious belief, sex, disability, marital status or sexual orientation”

2.9 Rule 11.4 states

“..... If disciplinary action is being considered by the general council, it shall conduct preliminary enquiries and if it has reasonable grounds for believing that there is a case to be answered it shall formulate the charge to be put to the member concerned”

2.10 Mr McDowell’s report provided reasonable grounds for the General Council to believe that there was a case to be answered. The General Council in reaching its decision to note Mr McDowell’s report and issue general circulars to members on conduct and branch relationship, failed to follow the procedure laid down in Rule 11.4. The Council therefore acted in Breach of Rule 11.4

2.11 By failing to follow the procedure laid down in the Rule 11.4 the General Council also breached rule 6.1 and 12.1 and 2.20c

Rule 6.1 states

“Between meetings of the delegate Conference, the General management and control of the Union and the handling of the whole affairs shall be vested in the General Council (hereinafter referred to as “the council”). The Council shall conduct its affairs in accordance with these rules and with the principles and policies of the Union as determined by the Delegate Conference”

Rule 12.1 states

“All members are bound by these rules”

Rule 2.20c states

“Members shall at all times observe the Rules of the union and any regulations made thereunder. They shall abide by decisions properly made under the rules and shall carry out any duty or obligation imposed and any orders or directions given by or under the rules”

2.12 **Complaint No 3**

On 18 May 2012 at its meeting in Harkin House 54 Wellington Park Belfast the Broad Left members of NIPSA General Council who were present discriminated in favour of Jim Owens a fellow member of the Broad Left by failing to apply to process required by Rule 11.4

2.13 Rule 11.4 states

“.....If disciplinary action is being considered by the general council, it shall conduct preliminary enquiries and if it has reasonable grounds for believing that there is a case to be answered it shall formulate the charge to be put to the member concerned”

2.14 Rule 1.3e states

“To promote equal opportunities for all members and to develop positive policies to promote equality of opportunity regardless of colour, race, ethnic or national origins political opinion, religious belief, sex, disability, age, marital status or sexual orientation”

2.15 Rule 6.1 states

“Between meetings of the delegate Conference, the General management and control of the Union and the handling of the whole affairs shall be vested in the General Council (hereinafter referred to as “the council”). The Council shall conduct its affairs in accordance with these rules and with the principles and policies of the Union as determined by the Delegate Conference”

2.16 Rule 11.2 states

“ A Disciplinary Sub Committee of the General Council set up in accordance with Rule 11.11 or a general meeting of a branch to which a member belongs shall have the power to take disciplinary action against a member who

a fails to conform to the rules of the union

b acts deliberately in a manner inimical to the interests of the Union

c discriminates for or against any person or intimidates any person on grounds of his or her colour, race, ethnic or national origins, political opinion, religious belief, sex, disability, marital status or sexual orientation”

2.17 The Broad left members who discriminated in favour of Jim Owens because of his political opinion did not comply with the principles of the Union and its conference Policy in breach of Rules 1.3e, and Rule 6.1. By failing to comply with the rules they also breached Rule 12.1 which states

“All members are bound by these rules”

2.18 And Rule 2.20c which states

“Members shall at all times observe the Rules of the union and any regulations made thereunder. They shall abide by decisions properly made under the rules and shall carry out any duty or obligation imposed and any orders or directions given by or under the rules”

2.19 **Complaint No 4**

On 18 May 2012 at its meeting in Harkin House 54 Wellington Park Belfast the NIPSA General Council failed to abide by the Guidance on Conflict of Interests

This action was in Breach of Standing Orders for the transaction of General Council Business Annex1 Rule 6.9b which gives the General Council power to

“... make, vary, suspend or rescind regulations and by-laws for the conduct of business of the union and all committees or bodies of the Union”

2.20 The General Council determined that the regulations for dealing with Conflicts of Interest at General Council meetings are as laid down in “Standing Orders for the Transaction of General Council business Annex 1”

2.21 Rule 6.1 states

Between meetings of the delegate Conference, the General management and control of the Union and the handling of the whole affairs shall be vested in the General Council (hereinafter referred to as “the council”). The Council shall conduct its affairs in accordance with these rules and with the principles and policies of the Union as determined by the Delegate Conference”

2.22 Rule 12.1 states

“All members are bound by these rules”

2.23 Rule 2.20c states

“Members shall at all times observe the Rules of the union and any regulations made thereunder. They shall abide by decisions properly made under the rules and shall carry out any duty or obligation imposed and any orders or directions given by or under the rules”

2.24 By failing to comply with Standing Orders for the transaction of General Council business Annex 1 the council breached Rule 6.1, Rule 12.1 and Rule 2.20c

2.25 Complaint No 5

On 18 May 2012 at its meeting in Harkin House 54 Wellington Park Belfast the NIPSA General Council failed to abide by NIPSA Conference policy in relation to Cyber bullying established under Rule 5.1 in breach of Rule 6.1

2.26 Conference policy in relation to cyber bullying is one of zero tolerance.

2.27 Rule 6.1 states

Between meetings of the delegate Conference, the General management and control of the Union and the handling of the whole affairs shall be vested in the General Council (hereinafter referred to as “the council”). The Council

shall conduct its affairs in accordance with these rules and with the principles and policies of the Union as determined by the Delegate Conference”

2.28 Rule 12.1 states

“All members are bound by these rules”

2.29 Rule 2.20c states

“Members shall at all times observe the Rules of the union and any regulations made thereunder. They shall abide by decisions properly made under the rules and shall carry out any duty or obligation imposed and any orders or directions given by or under the rules”

2.30 By failing to take action against Jim Owens for sending emails the language of which was judged by Mr McDowell to be intemperate and intimidating and which did not take into account the effect of this on the recipient the General Council did not comply with Conference policy in breach of Rule 6.1, Rule 12.1 and Rule 2.20c

2.31 Complaint No 6

On 18 May 2012 at its meeting in Harkin House 54 Wellington Park Belfast the NIPSA General Council failed to protect me from further intimidation by Jim Owens

Rule 1.3 states

“The objects of the Union shall be:

(a) to represent, protect and promote the interests of its members”

2.32 Rule 6.1 states

“Between meetings of the delegate Conference, the General management and control of the Union and the handling of the whole affairs shall be vested in the General Council (hereinafter referred to as “the council”). The Council shall conduct its affairs in accordance with these rules and with the principles and policies of the Union as determined by the Delegate Conference”

2.33 Rule 12.1 states

“All members are bound by these rules”

2.34 Rule 2.20c states

“Members shall at all times observe the Rules of the union and any regulations made thereunder. They shall abide by decisions properly made

under the rules and shall carry out any duty or obligation imposed and any orders or directions given by or under the rules”

- 2.35 The Unions failure to protect me from further intimidation by Jim Owens is in breach of Rules 1.3a, 6.1, 12.1 and 2.20c.

3. Pre-Hearing Process and Preliminary Issues

- 3.1 These matters were investigated in correspondence and, as required by Article 90B(2)(b) of the 1995 Order, the parties were offered the opportunity of a hearing, which took place on 17 January 2013.
- 3.2 The Union was represented by Mr B. McKee of Counsel, instructed by Mr J. McShane, Solicitor, of McCartan Turkington and Breen Solicitors. The Union’s General Secretary, Mr B. Campfield, attended and gave evidence for the Union. The applicant, Mrs C. McCarthy, acted in person and gave evidence on her own. Each side submitted a skeleton argument prior to hearing. A 215 page bundle of documents containing relevant correspondence, papers, and a mediation report, was prepared by my office for the hearing.
- 3.3 The relevant rules of the Union, including a relevant Standing Orders extract with its annexes, and a Union booklet on Dignity at Work, were included, along with relevant statutory extracts and the GBCO Decision in Fradley v The Transport Salaried Staffs’ Association. The 2011 Rules of the Union were in evidence.
- 3.4 At the outset of the hearing Mr McKee BL made application to introduce four pages of correspondence. The application was not objected to by the applicant. I accepted the application.
- 3.5 Also at the outset of the hearing, I accepted an application for a wording amendment to complaint 3 from the applicant. This was granted after the Union requested a brief adjournment which was granted so that it could consider the matter. The amendment was made with consent of the Union.

4. Background Facts

- 4.1 The facts were not in dispute between the parties:
- 4.2 In response to a complaint made to the General Council by the applicant against a Union colleague, Jim Owens, and a counter claim against the applicant made by Mr. Owens, the General Council decided at its meeting of 15th December 2011 to be bound by an independent report which was to be

commissioned from an Independent Mediator/Arbitrator. As per the Minute of that meeting this decision was recorded in the following way:

- 4.3 **123.4 Other Matters:** *The General Secretary advised that he had received a number of complaints that were interrelated. A letter from C McCarthy alleging harassment by J Owens and a similar complaint from Jim Owens regarding C McCarthy. In addition a letter of complaint had been received from Branch 503 regarding allegations that J Owens was interfering in the affairs of Branch 501. [The minute should read 503 here.]*

Under the Standing Order for the Transaction of General Council business 2011/12, Annex 1 (Guidance on Conflicts of Interest at NIPSA meetings) the Vice-President asked J Owens to leave the room. J Owens refused to leave. After some discussion the Vice-President requested that as J Owens was not going to leave the room that C McCarthy be invited to return.

C McCarthy indicated that she would not be returning to the meeting as she believed there was a conflict of interest. The Vice President again asked J Owens to leave the meeting. J Owens finally agreed to leave the meeting. P Donaghy, S Morton and S McDonald also left the meeting.

*The General Secretary then outlined the broad areas of complaint and indicated that a possible way to deal with the complaints by seeking to engage someone possibly an ex-General or Deputy General Secretary of NIPSA to seek to mediate a resolution of the issues between the two parties and if that did not resolve the issue then the same person be [sic] asked to carry out an investigation and report back to the General Council **with a binding decision.** (my emphasis).*

Following further discussion it was agreed to offer mediation and if necessary arbitration on the above basis.

C McCarthy, J Owens, S Morton, P Donaghy and S McDonald returned to the meeting.

- 4.4. According to the letters to both the applicant and Mr Owens from NIPSA General Secretary, Brian Campfield, dated 20 December 2011:

*The General Council as I explained to you, decided that in the first instance, we should request the assistance of a former senior HQ Official (to be determined) to explore a mediated solution to these complaints. If that was not successful then the former senior official would **act as an arbitrator.** (my emphasis).*

- 4.5. According to the evidence given by Mr Campfield, Mr McDowell was given complete delegated authority to investigate, mediate and arbitrate. Thus, the parties and the Council were obliged to abide by the McDowell report under the self-imposed obligation as decided by the meeting constituted on 15th December 2011.

- 4.6. According to the evidence of Mr Campfield, Mr McDowell was not retained under any detailed terms of reference, other than to investigate, explore a mediated solution and in the absence of resolving the matter by agreement of the parties, he was to act an Arbitrator.
- 4.7. Mr McDowell duly investigated and attempted unsuccessfully to mediate between the applicant and Mr. Owens in an effort to achieve an agreed resolution. He was unable to do so. However, Mr. McDowell did not make any decision on the case as would be expected of an Arbitrator.
- 4.8. The final report received by the Council was a discussion of issues and a series of findings concluding with a recommendation to the Council:

“So far as NIPSA is concerned my view is that there are lessons to be learned from this issue. This leads me to conclude by recommending that NIPSA should consider taking such action as is considered appropriate to prevent or discourage any further repetition of unacceptable behaviour such as this which carries reputational risk, endangers facilities time and access to other arrangements, and which, through a failure to comply with the rules of the union, appears to cross branch boundaries and is in breach of proper procedures”.

- 4.9 . The Council duly engaged in such ‘consideration’ at its meeting on 18th May 2012. The Council decided not to invoke any formal action against either of the parties.

5. The Relevant Statutory Provisions

5.1 *Right to apply to Certification Officer*

90A. –

(1) *A person who claims that there has been a breach or threatened breach of the rules of a trade union relating to any of the matters mentioned in paragraph (2) may apply to the Certification Officer for a declaration to that effect, subject to paragraphs (3) to (7).*

(2) *The matters are –*

(a) *.....*

(b) *Disciplinary proceedings by the Union (including expulsion)*

(c) *.....*

(d) *the constitution or proceedings of any executive committee or of any decision-making meeting;*

(e) *.....*

5.2 **Declarations and orders**

90B. –

- (3) *Where the Certification Officer makes a declaration she shall also, unless she considers that to do so would be inappropriate, make an enforcement order, that is, an order imposing on the union one or both of the following requirements –*
- (a) *to take such steps to remedy the breach, or withdraw the threat of a breach, as may be specified in the order;*
- (b) *to abstain from such acts as may be so specified with a view to securing that a breach or threat of the same or a similar kind does not occur in future.*

6. The Union's Rules (extracts from NIPSA Rule Book 2011) and relevant Standing Orders extract plus annexes

6.1 The NIPSA rules most relevant to these complaints are given below.

Objects

1.3 The objects of the union shall be:-

- (a) *to represent, protect and promote the interests of its members*
- (e) *to promote equal opportunities for all members and to develop positive policies to promote equality of opportunity regardless of colour, race, ethnic or national origins, political opinion, religious belief, sex, disability, age, marital status, or sexual orientation.*

6.2 Duties of Members

2.20 The following duties shall apply to all members (whether ordinary, associate, honorary or life):-

- (c) *Members shall at all times observe the rules of the union and any regulations made thereunder. They shall abide by any decisions properly made under the rules and shall carry out any duty or obligation imposed and any orders or directions given by or under the rules.*

4.5 The responsible body in each branch shall be the branch committee. In general the branch committee shall constitute the link between individual members, the Group Executive Committee and the General Council. In particular they shall be responsible for:-

(a) *The day to day management of branch affairs including representation on matters of sole concern to the members of the branch and the distribution of all circulars and literature issued NIPSA;*

(b) *calling and organising branch meetings as prescribed in these rules;*

6.3 Annual Delegate Conference

5.1 The Annual General Conference shall determine the principles and policies of the Union.

6.1 Between meetings of the Delegate Conference, the general management and control of the Union and the handling of the whole affairs shall be vested in the General Council (hereinafter referred to as “the Council”). The Council shall conduct its affairs in accordance with these rules, and with the principles and policies of the Union as determined by the Delegate Conference.

6.4 Powers of the General Council

6.9 The Council shall in particular but without limiting its general or other powers under these rules have power:-

(b) Except as specifically provided for elsewhere in these rules, to make, vary, suspend or rescind regulations and by-laws for the conduct of the business of the Union and all committees, or bodies of the Union.

11.2 A Disciplinary Sub-committee of the General Council, set up in accordance with rule 11.11 or a general meeting to which a member belongs, shall have power to take disciplinary action a member who:-

- (a) fails to conform to the rules, or
- (b) acts deliberately in a manner inimical to the interests of the Union, or
- (c) discriminates for or against any person or intimidates any person on grounds of his or her colour, race, ethnic or national origins, political opinion, religious belief, sex, disability, marital status or sexual orientation

- 11.4** If Disciplinary action is being considered by a branch, the Branch Committee should conduct the preliminary enquiries and if it has reasonable grounds for believing that there is a case to be answered it shall formulate the charge to be put to the member concerned. If disciplinary action is being considered by the General Council, it shall conduct the preliminary enquiries and if it has reasonable grounds for believing that there is a case to be answered, it shall formulate the charge to be put to the member concerned.

6.5 NIPSA STANDING ORDERS FOR THE TRANSACTION OF CENTRAL COUNCIL BUSINESS

- 23.** Rescinding of previous decisions: No decisions of the General Council may be rescinded unless notice in writing of the motion to rescind has been forwarded to the General Secretary not less than ten days before the date of the General Council meeting at which it is to be discussed, or in exceptional circumstances by a unanimous decision of the General Council.

ANNEX 1

6.6 GUIDANCE ON CONFLICTS OF INTEREST AT NIPSA MEETINGS

1. Members of the General Council, Executive Committees, panels, departmental/section committees, or any other NIPSA body are selected or elected to serve NIPSA members. Consequently, their primary responsibility to the NIPSA body on which they are serving is to discharge in the interests of members the functions of that body as determined by the NIPSA constitution, any rules made in accordance with the constitution and NIPSA policy as determined in accordance with the constitution.
2. In order to discharge effectively the functions of NIPSA bodies a degree of trust between members is essential. This calls for a high standard of integrity and members must have confidence that those with whom they are serving will avoid conflicts of interest.
3. Members of NIPSA bodies should not participate in the discussion or determination of matters in which they have a direct personal interest. If a member has a direct personal interest s/he should withdraw from the meeting while the matter is under discussion so that the other members can discuss the matter in a free and open way and without being open to accusation that they were influenced by the presence of the member concerned.
4. An indirect interest may arise because of a close family, personal or commercial relationship with a person who has a direct interest in the matter under consideration. A member in such a position should

declare his or her interest and seek the guidance of the chairperson on whether or not s/he should withdraw from the meeting. Preferably this consultation with the chairperson should take place before the meeting starts.

5. Withdrawal from a meeting, while it is considering a matter in which a member has an indirect interest will depend on the degree to which the following factors arise in the continued presence of the member:-
 - (a) Is it likely that a free and open debate will be constrained?
 - (b) Is it likely that the decisions of other member be perceived to be unduly influenced?
 - (c) Is likely to create the impression of undue favour for or against any party to the matter under consideration?
 - (d) Is it likely to create a perception of bias on the part of the NIPSA body concerned?
6. The application of this guidance in a specific case should preferably be agreed between the member and the chairperson of the meeting, but it may sometimes be necessary for the chairperson to make a ruling.

JUNE 2012

ANNEX 2

6.7 GUIDANCE ON CONDUCT AT NIPSA CONFERENCES AND MEETINGS

Introduction

1. This guidance on conduct at all NIPSA conferences and meetings has been approved by NIPSA's General Council. It draws on the provisions in the NIPSA constitution, in particular Rule 1.3(e) (promotion of equal opportunities), Rule 2.20(c) (duty of members to observe the rules of the union), Rule 4.14 and Annex B (model branch rules), Rule 11.2 (grounds for disciplinary action) and the policy goals set under these rules. The guidance sets out the principles and procedures on conduct to be observed at all NIPSA conferences and meetings.
2. The guidance applies to NIPSA members and NIPSA employees. Consequently all references in the guidance to members, persons, participants, etc includes NIPSA members, NIPSA HQ Officials, NIPSA Seconded Officers and NIPSA employees.

Principles

3. The purpose of NIPSA conferences and meetings is to further the interests of NIPSA members, in accordance with the NIPSA rules and NIPSA policies. As a key principle, every participant at a NIPSA meeting must have the right to speak and vote without fear of harassment, abuse, ridicule, hostility or any form of intimidation. To achieve this principle the aim at any NIPSA meeting must be to create a good and harmonious working environment where all members, employees and other persons present are treated with respect and dignity. In such an atmosphere all participants are encouraged to deploy their diverse talents to maximise the benefits for members.
4. At NIPSA Conferences and meetings members have the right to criticise the views, opinions, etc of others, and to question the position or decisions of others. This right has, however, to be balanced against the right of participants set out in paragraph 3 above, to participate free from any form of abuse or harassment. Any such behaviour at a NIPSA Conference or meeting is unacceptable for the conduct of NIPSA business. A person engaging in such behaviour could become liable to disciplinary proceeding under NIPSA Rules 11.1 to 11.16 (members) and Rules 7.4(f) and 7.8 to 7.16 (employees) or legal proceedings for slander or for unlawful discrimination if it is motivated by consideration of religious belief, political opinion, sex, marital status, disability or race (as defined in law).
5. Views and opinions can be expressed strongly, without being abusive, insulting or degrading to any person. Listen to other peoples view. Express disagreement without the use of language which would impugn the character or integrity of any person, or expose a person to hatred, ridicule or contempt whether s/he is present or not.
6. At Conferences or meetings, harassment can include unwelcome verbal or physical conduct, which is unreasonable, offensive to the recipient and creates a hostile environment. Statements, remarks, jokes, gossip, etc should be avoided on the subject of colour, race, ethnic or national origins, political opinion, religious belief, sex, disability, age, marital status or sexual orientation.
7. This guidance also applies to conduct by NIPSA members in connection with NIPSA Conferences and meetings. In particular no person should be subjected to verbal, written or physical behaviour which intimidates or harasses any person in connection with any matter due to be considered at a NIPSA Conference or meeting. Similarly no person should be subject to such behaviour, non co-operation or isolation because of s/he participated in or voted at a NIPSA Conference or meeting.

Role of Chairperson

8. For business to be conducted in a manner consistent with this guidance and all relevant Standing Orders, the role of the person chairing the Conference or meeting is most important. S/he must be impartial. Where there are differences of opinion, the role of the Chairperson is to ensure that all parties have an equal and fair chance to express their views.
9. The Chairperson of the Conference or meeting is responsible for ensuring that conduct at meetings does not subject any person to intimidation, harassment, bullying or any similar derogatory behaviour. In considering challenges about behaviour the Chairperson should bear in mind that it is the effect on the recipient which is paramount. If a person is behaving in a manner inconsistent with this guidance, the Chairperson must immediately call the person to order and ask him or her to desist from his or her behaviour.
10. If any delegate at a NIPSA Conference or any member at a meeting considers that another person is behaving in a manner inconsistent with this guidance, s/he must immediately raise it with the Chairperson as a point of order. The Chairperson shall then make a ruling on the point of order. This ruling may be challenged in accordance with the NIPSA Rules or the Standing Orders for the body concerned.

Complaints Procedure

11. In addition to the provisions in paragraphs 9 and 10 above on points of order, any person is entitled to lodge a complaint, if s/he considers that s/he has been the subject of behaviour inconsistent with this guidance at a NIPSA meeting. This also applies to behaviour outside a NIPSA meeting, but in connection with a matter considered, or to be considered, at a NIPSA meeting. In the case of NIPSA employees complaints can be lodged by their recognised trade union.
12. In the first instance the complaint should preferably be made in writing to the Chairperson for the NIPSA Conference or meeting to which the allegedly unacceptable behaviour related. The Chairperson shall arrange for the complaint to be considered within an appropriate time scale and report back on the outcome to the person who made the complaint or to the recognised trade union for a NIPSA employee.
13. If the person who made the complaint is not satisfied with the outcome of the process described in paragraph 12 above and the person allegedly responsible for the unacceptable behaviour is a member of the same NIPSA branch as the complainant, s/he may ask his or her Branch Committee to consider instituting disciplinary proceedings against the alleged perpetrator. Alternatively s/he may write to the

NIPSA General Secretary requesting that the General Council consider instituting disciplinary proceedings against the alleged perpetrator.

14. In all cases, except those covered by paragraph 13 above, where there is dissatisfaction with the outcome of the process described in paragraph 12 above, the aggrieved person, or the recognised trade union in the case of a NIPSA employee, may write to the NIPSA General Secretary requesting that the General Council consider instituting disciplinary proceedings against the alleged perpetrator.

7. REASONS FOR FINDINGS ON COMPLAINTS 1,2,3,5 and 6

Complaint 1

- 7.1 The applicant claims that the General Council of the Union failed to be bound by the McDowell report without having rescinded its decision to be bound by the said report.
- 7.2 I find that there was no 'binding decision' as such in the McDowell report. The final recommendation of the McDowell report was that the matter should be referred back into the hands of NIPSA General Council to 'consider' making a final decision itself and taking any action that it felt was appropriate, bearing in mind the findings of his report.
- 7.3 Therefore I find that Mr. McDowell did not complete an arbitration process and instead his report might be compared to a 'narrative verdict'. The role of deciding outcomes was placed back with NIPSA, which in my judgement is completely at odds with the original motivation and rationale for appointing Mr. McDowell, but nevertheless, Mr. McDowell did not complete a full decision making process.
- 7.4 It is true to say that the Union had imposed a binding obligation upon itself regarding the outcomes of the independent decision maker's decision, but as the McDowell report did not in fact contain a binding decision to implement, the Council felt bound to follow the report as it saw fit and within the parameters of its own authority. The Council followed the final recommendation of Mr McDowell and in my judgement it was open to it to do so. It was also open to the Council to refer the report back to Mr McDowell requesting that he complete the process as Arbitrator, as per his instructions. However, the decision made by the Council at its May meeting was to follow the recommendation, which whilst not unreasonable, it was perhaps the decision that carried certain risks in respect of conflicts of interest (more detailed discussion on this is at Complaint 4 paras. 7.30 – 7.75).
- 7.5 Given that the Council was applying the final recommendation of the McDowell report it was not acting contrary to the obligation imposed at the December meeting and so it follows that there was no requirement to rescind

its previous decision to be bound by Mr. McDowell. The Council followed the recommendation and it is documented in the Minute of the May meeting that the Council duly considered taking what it considered to be 'appropriate action.'

- 7.6 It is not open to the Certification Officer to judge the merits of the decision taken by the Council as to whether its ultimate decision on the McCarthy/Owens matter constituted 'appropriate' action in my own personal opinion. Under the 1995 Order I can only look at how the decision was made in procedural terms and whether any specific rules were breached in the process of making the decision.
- 7.7 Mr. McDowell's report merely required the Union to follow its own discretion and apply its own judgment, which it did as recorded in the Minute of the meeting of 18th May 2012. Therefore the discretion of the Union was neither constrained by any rule nor any direction in Mr McDowell's report compelling it to take a particular action; the outcome was purely a matter for the judgment of the Council at the meeting of 18th May 2012.
- 7.8 Whilst complaint 1 has the potential to fall within Article 90 A, I agree with the case put forward by the respondent in that the Council abided by its previous decision and there was no requirement for rescission of the previous decision. I find no rule breach in respect of this complaint.

Complaint 2

- 7.9 I find that the Union did not breach any specific rule in respect of the process employed to deal with the complaints of the applicant and Mr. Owens, in terms of disregarding the potential to invoke the Union's disciplinary proceedings in the face of certain findings within the McDowell report.
- 7.10 Section 11 of NIPSA Rules is the relevant section on Disciplinary Procedures. At Section 11.4:

'If disciplinary action is being considered by The General Council, it shall conduct the preliminary enquiries and if it has reasonable grounds for believing that there is a case to be answered it shall formulate the charge to be put to the member concerned'

- 7.11 Thus, the rules on disciplinary action will only apply IF the Union is considering disciplinary action. The respondent's argument in response to this complaint was that the Union was never considering disciplinary action in the McCarthy/Owens complaints; the matter did not reach that stage. It was merely a case of allegations which were under investigation and the Union was awaiting the outcome of that investigation before considering action, if any. The applicant argued that the Council was considering the issue of disciplinary action and 11.4 had been engaged. I would tend to agree with the applicant on this point. The General Council may not have instigated any disciplinary action, but it clearly was engaged in a process of considering

whether or not there may be any potential for disciplinary action in the McCarthy/Owens matter which suggests that Rule 11.4 had been engaged.

- 7.12 The Union is required under Rule 11.4 to firstly 'conduct the preliminary enquiries'. Therefore, the actions of the Union would come within the requirement of Rule 11.4, if one interprets the engagement of Mr. McDowell as the early stage of the consideration of disciplinary matters. The Union was in compliance with the requirement under Rule 11.4 to conduct such preliminary enquiries because that is exactly what Mr McDowell was doing on behalf of the Union.
- 7.13 It would then follow under Rule 11.4 that the Union is required to act on the evidence from those enquires and formulate a charge to be put to a member 'if it has reasonable grounds for believing there is a case to answer'. The words 'if' and 'reasonable' allow the Union to exercise its discretion in adhering to this rule. What is 'reasonable' is therefore a matter for the General Council to determine.
- 7.14 The applicant makes the complaint that some of the findings in Mr.McDowell's report were of such a degree in terms of severity that there was clear potential for instigating disciplinary action against Mr. Owens and not to do so was in breach of the requirement of Rule 11.4 to formulate a charge to be put. The applicant makes the case that there was a failure to invoke a disciplinary process when there was clear evidence from the McDowell report of conduct on the part of Mr. Owens which amounted to, inter alia, 'unacceptable behaviour' and that the content of the communications of Mr. Owens were 'intemperate and intimidating'. Thus, it is argued, the Union did have reasonable grounds for believing there was a case to answer against Mr. Owens and failure to do so was a breach of the requirement under Rule 11.4
- 7.15 I would tend to agree, in principle, with Mrs.McCarthy's argument that such findings of behaviour described by Mr. McDowell as 'intimidating' may well give an organization to have cause for concern regarding the conduct of the individual, but it is not fair to say, in my judgement, that the Union have acted so wholly against any reasonable standards by not invoking the disciplinary process against Mr. Owens which might render its decision not to put a charge to Mr Owens as being unconscionable.
- 7.16 Whilst Mr. McDowell has stated that the communications from Mr.Owens were intemperate and intimidating, and further that he was found to have engaged in 'unacceptable behaviour' there is no explicit finding that Mr. Owens was judged by Mr. McDowell to have been guilty of, for example, gross misconduct. Further, the report also states that Mr. McDowell formed the view that 'neither party has any claim to a monopoly of sin or virtue'.
- 7.17 The Council clearly had to consider the complaint and counter complaint together, and decided to take no disciplinary action against either party. It is not for me to look at such a decision and disagree with the merits of the Council's reasoning, unless I were to find strong evidence of an

unconscionable decision having been taken that no reasonable person would take in the same circumstances, which may suggest an abuse of process. I find no such evidence here. Thus, as Certification Officer I can see no grounds as to why I would have any authority to challenge or question the Council in exercising its discretion when deciding whether or not to discipline Mr. Owens, or indeed the applicant herself, based on the content of the McDowell report.

- 7.18 It should also be noted that Rule 11.2 does not compel NIPSA to invoke disciplinary proceedings in the face of certain findings or where there is 'potential' for disciplining a member. Rule 11.2 simply gives the Union the power to discipline members. The Union cannot be found to be in breach of any rule on the grounds of **not** taking disciplinary action in the face of particular evidence against an individual. By way of illustrating the point, there is no 'zero tolerance' rule within any of the NIPSA rules that the Union must immediately take action if there is evidence that a member is guilty of 'intemperate behaviour' or 'intimidating behaviour'. Therefore the fact that the findings of Mr McDowell confirm that Mr Owens was found to have engaged in such behaviour does not automatically invoke the provisions of any rule that requires the Union to instigate any minimum standard of punitive action. Such matters are discretionary under Rule 11.4 and not prescribed by any other NIPSA rule.
- 7.19 As a result of the terms of the McDowell report, the Union was given the discretion under Rule 11.4 to determine the outcome of these complaints. It is true to say that a possible outcome may have been disciplinary action, but that was not the ultimate decision taken by the Council. It is not for the Certification Officer to question the merits of the decision taken. The applicant may not agree with the way in which the Council decided to deal with the matter but the Union was not in breach of any rule by its decision not to take any disciplinary action against either party or both parties.
- 7.20 Whilst the complaint regarding a failure of the Union to invoke a disciplinary process may have potential to fall within the jurisdiction of the Certification Officer, I find that there has been no rule breach in this case and this complaint must fail.

Complaint 3

- 7.21 The applicant alleges that the Union, at the General Council Meeting of 18 May 2012 failed to 'apply the processes required to prevent an act or acts of discrimination against the applicant' breaching rules 11.4, 11.2, 6.1, 2.20c and 1.3e.
- 7.22 Rule 1.3e is in fact an object of the Union and thus outside the remit of Article 90A (Mrs R. Fradley v The Transport Salaried Staffs' Association D/28-30/03 23 October 2003 refers.)

- 7.23 There is no provision under Rule 11.2 or 11.4 (which relate to disciplinary procedures) which require the Union to prevent acts of discrimination.
- 7.24 Neither can I find such a requirement in Rules 6.1 or 2.20c.
- 7.25 The act of discrimination alleged by the applicant occurred at the meeting of 18th May when the Council considered the report of Mr. McDowell and then voted on the final decision regarding the McCarthy/Owens case. The applicant makes the case that there was an inherent bias within the Council as constituted at the May meeting attaching to shared links of Mr. Owens and several Council members to the NIPSA Broad Left, resulting in an approach of undue leniency towards him by some members during that voting process.
- 7.26 This is a matter that in fact relates to the issue of conflicts of interest which is discussed under Complaint 4.
- 7.27 This complaint as it stands has no grounding in the rules. It is therefore misconceived and must be dismissed.

Complaint 5

- 7.28 This complaint regarding a breach of procedure in failing to abide by NIPSA policy in the matter of 'cyber bullying' is an alleged breach of a policy, not a rule and therefore outside the remit of Article 90A and not a matter that can be brought before the Certification Officer. This complaint is misconceived and must be dismissed.

Complaint 6

- 7.29 This complaint regarding a breach of policy in failing to protect the applicant from intimidation is again a complaint about an alleged breach of a policy, not a rule and therefore it is outside the remit of Article 90A and not a matter that can be brought before the Certification Officer. This complaint is misconceived and must be dismissed.

Reasons For Upholding Complaint 4

- 7.30 Whilst I have found that the Union did not breach any rules in respect of its requirement to follow the report of Mr. McDowell nor in respect of potential or actual disciplinary processes, the Union did act in a way that was contrary to Standing Orders For The Transaction of General Council Business, Annex 1: 'Guidance on Conflicts of Interest at NIPSA Meetings' at its meeting on 18th May 2012.
- 7.31 The first question in this complaint is jurisdiction. Under Article 90A of the 1995 Order, a complaint can be brought to the Certification Officer for a breach of rule if that rule relates to any of the matters mentioned in Article 90A (2) (a) – (e). Under paragraph (2) (d) of Article 90 A, a complaint can be brought before me in relation to:

The constitution or proceedings of any executive committee or of any decision-making body

7.32 In the case of *Fradley v The Transport Salaried Staffs' Association (2003)* the Certification Officer of Great Britain stated that the statutory jurisdiction of the Certification Officer, in his judgment, describes two 'types' of rule. These are (i) rules which relate to the constitution of the executive committee or of any decision making body, such as rules about the membership or quorum of those committees or other such issues relating to their constitution and (ii) rules which relate to the proceedings, such as the procedural rules as to the way business must be conducted. The Certification Officer found that the word 'proceedings' does not give the Certification Officer jurisdiction over any decision made by a relevant committee. The Certification Officer can only consider the proceedings in the content of the rules that guide the proceedings to a decision, not the decision itself.

7.33 The matter of declaring conflicts of interest is a matter relating to the process of guiding the way in which decisions are taken. It is a matter of procedure and governance at meetings and is separate from the merits of a decision taken. It is therefore a matter within the jurisdiction of Article 90A (2) (d).

7.34 It is stated at paragraph 4 of Annex 1 Guidance:

An indirect interest may arise because of a close family, personal or commercial relationship with a person who has a direct interest in the matter under consideration. A member in such a position should declare his or her interest and seek the guidance of the Chairperson on whether or not s/he should withdraw from the meeting.

7.35 The second question for me to determine therefore is whether the non-adherence to Annex 1 Guidance by the NIPSA General Council at the meeting on 18th May 2012 constitutes an actual breach of a Union 'rule' within the parameters of Article 90A. Is this document a rule of the Union or not?

7.36 I note *Harvey on Industrial Relation and Employment Law*, Vol 2, where is it stated at 3909 that:

Whether an item is or is not a 'rule' of the Union is to be judged as a matter of substance, not form (*Rawlins and The British Medical Association D/1-5/07, 2 February 2007*) – the Councils' 'standing orders' were in fact rules of the union; circulated 'election rules' for candidates were not.

7.37 I have also noted the authority of *Jacques v Amalgamated Union of Engineering Workers [1986] ICR683* and the statement of principle of Warner J:

'the rules of a trade union are not to be construed literally or like a statute, but so as to give them a reasonable interpretation which accords with what in the court's view they must have been intended to mean, bearing in mind their authorship, their purpose and the readership to which they are addressed'

- 7.38 I would agree with the reasoning in the *Rawlins* case that the Standing Orders should be treated as a rule upon the Union. Moreover, in considering the Guidance of Annex 1, it is clear that this document is an integral part of the Standing Orders and is intended to be read in conjunction with the Standing Orders.
- 7.39 Furthermore, the reasoning in the *Jacques* case states that Union rules should not be construed literally and emphasis should be placed upon what they ‘must have been intended to mean’. Annex 1 Guidance contains the following:
2. **In order to discharge effectively the functions of NIPSA bodies a degree of trust between members is essential. This calls for a high standard of integrity and members must have confidence that those with whom they are serving will avoid conflicts of interest.**
 3. **Members of NIPSA bodies should not participate in the discussion or determination of matters in which they have a direct or indirect personal interest**
- 7.40 Annex 1 Guidance represents clear direction on the Standing Orders and is in fact an indivisible part of the Standing Orders of NIPSA. The intention of the document is clear and that is that ‘*NIPSA members should not participate in the discussion or determination of matters in which they have a direct or indirect personal interest*’.
- 7.41 Thus bearing in mind the *Rawlins* case and the authorship, purpose and intended readership of Annex 1 Guidance, I find that Annex 1 is a part of the rules of the Union having originated by way of Union Standing Orders and thus it possesses sufficient authority and Union wide support to taken as a binding rule rather than a mere policy or statement. I find the purpose and intention of Annex 1 Guidance to be clear and this is most apparent from Section 2 and 3 of Annex 1.
- 7.42 Thus, it is clear that the intention of Annex 1 Guidance is to ensure that members are aware of the responsibility to declare conflicts and to act in such a way at Council meetings that protects the integrity of the proceedings. NIPSA members are therefore required to understand the duty to declare conflicts.
- 7.43 Members affected by a direct conflict are required under Annex 1 to
‘withdraw from the meeting while the matter is under discussion’
- 7.44 Members affected by an indirect conflict are required under Annex 1 to
‘declare his or her interest and to seek the guidance of the chair person on whether or not s/he should withdraw from the meeting’

7.45 In this case, according to the Minute of the meeting of the General Council on 15th December 2011, The Council decided at the meeting of December 2011 that it was dealing with **both** direct and indirect conflicts. The parties to the complaint and counter-complaint – the applicant and Mr. J Owens - were directly conflicted and withdrew from the meeting at the point when the matter directly affecting both members was on the agenda for discussion. I find that the direct conflicts of the parties to the original complaint were declared and managed by withdrawal of those parties at the meeting of 15th December 2011 which adheres to Annex 1 Guidance.

7.46 However, the indirect interests were slightly more complex as there were several members at the meeting who were deemed to be potentially conflicted on the grounds of perceived significant common affinities with the parties in dispute. These affinities are connected to the affiliation of Council members to certain divisions within NIPSA. It was acknowledged by the Council that Members connected to Mr. Owens through NIPSA Broad Left may be perceived to have an indirect conflict of interest when determining a complaint against Mr. Owens which may have the potential to impede the objectivity of their decision making in this context.

7.47 Indeed Mr. Campfield confirmed this perceived potential for conflict In his letter to my office dated 22nd October 2012:

It is unclear from the documentation in which way the NIPSA General Council failed to abide by the Guidance on Conflicts of Interest'. I am assuming that it relates to members of the 'Broad Left' on the NIPSA General Council, present at the meeting, on 18th May 2012 participating in the discussion on the report from Sid McDowell.

*However, everyone at this meeting, other than the permanent officials, would have been similarly conflicted and therefore any discussion involving any member of the General Council would have involved a potential conflict of interest for everyone present. Of course that would create an absurd situation. **But it was for precisely this reason that the complaints from both Cathy McCarthy and Jim Owens were referred in their entirety to Mr. McDowell for him to decide** (my emphasis).*

7.48 I make no comment about whether this connection with NIPSA Broad Left is in fact an indirect conflict in my personal opinion. I am merely concerned with the fact that the Council itself anticipated this to be an indirect conflict of interest at its meeting in December 2011 and, according to Mr Campfield's evidence, this was the reason for delegating the complaint entirely to an independent decision maker.

7.49 Thus it is clear that a decision was taken by the Council at the December Meeting that some members of the Council held an indirect interest which may cause concern over the probity of the decision that was required to be taken collectively by the members in respect of the McCarthy/Owens matter.

- 7.50 According to the evidence presented by NIPSA, Mr. McDowell was given complete delegated authority by the Union to decide the issue independently: to not only investigate but to mediate and if necessary to conclude proceedings by acting as an arbitrator. Thus, the engagement of Mr. McDowell by the General Council was intended to remove the indirectly conflicted members of the Council from the investigation and decision making process on this particular issue. In this way, the Union removed the conflict from the meeting, as opposed to having the members withdraw from the meeting which, to echo Mr. Campfield's point, would have been wholly impracticable.
- 7.51 I also note that according to the Minute of the December Meeting that three other members of the Council withdrew from the meeting along with Mrs. McCarthy and Mr. Owens. It is not recorded as to why these members felt it necessary to leave. I must presume it was because of the conflict issue and those three members believed that was the best way to deal with their own potential conflicts at the December Meeting, because those three members were recorded as returning to the meeting with Mrs. McCarthy and Mr. Owens when the McCarthy/Owens discussion had concluded. These three members were named Donaghy, Morton and McDonald.
- 7.52 Whilst Annex 1 Guidance is silent on what should be done when a number of members hold the same indirect conflict of interest, I do accept that the Council was acting in accordance with the general principle of Annex 1 by adopting the safeguard of delegating the matter to an independent person, Mr S McDowell to observe the intention of Annex 1 - '*NIPSA members should not participate in the discussion or determination of matters in which they have a direct or indirect personal interest*'.
- 7.53 I find that the actions of the General Council at the meeting on 15th December 2011 were compliant with Annex 1 Guidance on the issue of both direct and indirect conflicts at that meeting.
- 7.54 In respect of the meeting on 18 May 2012, I find that the actions of the General Council were compliant with Annex 1 Guidance in respect of the direct conflicts of Mrs McCarthy and Mr. Owens, who again, according to the Minute of that meeting, are recorded as both having left the meeting at the point that the McDowell report came up for discussion. However, The Council did not act in accordance with those rules contained in Annex 1 in respect of declaring the indirect conflicts of the other members, who, because of the non-decisive nature of the final report of Mr McDowell, did in fact still face the same potential indirect conflict as originally identified at the previous meeting.
- 7.55 Indeed the entire Minute of the meeting of 18th May 2012 is completely silent on the issue of those indirect conflicts, and the members Donaghy and McDonald, two of the three people who absented themselves at the relevant stage at previous meeting (the member named as Morton, the third, is listed as an apology) did not take any similar action at the May meeting.

7.56 The lack of declaration of the indirect interest was perhaps because members believed that the conflict had been completely removed by the delegation of the decision making function in the matter to Mr. McDowell back at the December meeting. Arguably this may have been a reasonable assumption - to again echo Mr Campfield's point, this was precisely the reasoning for delegating the matter entirely to Mr. McDowell. However, Mr. McDowell's approach to the determination of the complaints did not in fact remove the indirect conflict from the Council. The same conflict re-surfaced when the matter required personal input from members to reach the decision at the May meeting and thus required a declaration and re-consideration of the same indirect conflict.

7.57 Given the previous actions of the Council at the December Meeting and the evidence of Mr. Campfield I must find that some members of the Council Meeting were deemed by the General Council itself to be affected by an indirect conflict of interest on 15th December 2011, which was declared as required by Annex 1. The members constituting both the meeting in December and the meeting in May were essentially the same. As a consequence I must also hold that the same indirect conflict of interest arose once again at the meeting of 18th May 2012, which was not declared as required by Annex 1. It is not necessary to look at each member and analyse their interest or their ultimate voting preference on the McCarthy/Owens issue. It is sufficient that the Council acknowledged in December that significant numbers at the General Council held a potential indirect interest which required action to manage it.

7.58 The question therefore must be – was it acceptable for the Union to proceed to decide the McCarthy/Owens issue at the Meeting of May 2012 without declaring the indirect conflict as required by Annex 1, which states on the issue of indirect conflicts:

4. A member in such a position should declare his or her interest and seek the guidance of the Chairperson on whether or not s/he should withdraw from the meeting.

7.59 It goes on to say:

5. Withdrawal from a meeting, while it is considering a matter in which a member has an indirect interest will depend on the degree to which the following factors arise:

- A) Is it likely that a free and open debate will be constrained?*
- B) Is it likely that the decisions of other members be perceived to be unduly influenced*
- C) Is it likely to create the impression of undue favour for or against any party to the matter under consideration?*
- D) Is it likely to create a perception of bias on the part of the NIPSA body concerned?*

6. *The application of the guidance should preferably be agreed between the member and the chairperson of the meeting, but it may sometimes be necessary for the chairperson to make a ruling.*
- 7.60 The Union has made the case that the delegation to Mr. McDowell had dealt with the conflict and thus one could argue that there was no need to declare the conflict when the issue came up for mere ratification of Mr McDowell's independent and binding 'decision'. I would tend to agree with such an argument but only if the McDowell report had in fact contained a final decision, but it did not. This was not a straightforward issue of ratification of a prescribed binding outcome
- 7.61 The Council followed the recommendation of Mr. McDowell, and treated that recommendation as being the binding decision of Mr. McDowell, which in my judgement was an acceptable approach. However, Mr. McDowell's report did not in fact direct specific prescribed action and instead made a recommendation which placed the decision making function as to the action to be taken regarding McCarthy/Owens complaints back within the power of the meeting as constituted on 18th May 2012, which was populated by the same conflicted members as had been present at the December 2011 meeting.
- 7.62 The decision to treat Mr. McDowell's recommendation as a binding requirement is not of itself a problem in my judgement. However, the nature of the McDowell recommendation carried a requirement for the Council to proceed with caution, bearing in mind the indirect conflict that had previously been acknowledged and accepted to exist and to potentially have an impact on the probity of the Council's decision making on this issue. In my judgement, there was a requirement for the indirect conflict to be declared and considered under Annex I Guidance, before the Council engaged in the process of deciding outcomes from the complaint.
- 7.63 Mr. Campfield was not present at the meeting of 18th May and so could not give evidence about it. I must therefore rely solely on the written record of the meeting. The Minute of the meeting makes no reference to the Council having recognised the potential for conflict nor is there any section in the document referencing the issue of declaring conflicts of interest.
- 7.64 One must make the distinction here between compliance with the requirement to implement the report of Mr McDowell, and compliance with the rules relating to declaring indirect conflicts of interests at meetings under Section 4 of Annex 1. The former was done correctly, the Council was required to consider taking appropriate action by the recommendation in the report, and it duly considered this. The latter required the Council to firstly consider and declare the conflict of interest that had resurfaced when the Council was placed back into the function of decision making on this issue previously agreed to be sensitive and to pose a conflict to Council members. There is no evidence of this obligation having been observed at the May meeting.

- 7.65 I find that the determination on outcome was not prescribed by Mr. McDowell as he referred the matter back to the Union in an incomplete state. He did not act as an arbitrator as per his instructions. He returned his findings without a decision, leaving that as a matter for the discretion and personal judgment of NIPSA General Council. Thus, persons already deemed, by the Council itself at the previous meeting, to have an indirect conflict in this issue were placed back into a position of potential conflict.
- 7.66 It is not open to me to judge how the conflict could or should have been best managed if it had been declared or identified at the May meeting. Arguably had the meeting minute recorded a declaration of the conflict and a statement from the Chairperson in respect of how it was proposed to be dealt with, then that would be the end of my remit on this point. It is not for me to dictate **how** the Union **manages** conflicts at meetings, but it is for me to ascertain if NIPSA has **failed to declare the conflict** in accordance with its own specific rules on how to deal conflicts of interest at NIPSA meetings under Annex 1.
- 7.67 Each and every meeting carries a requirement to adhere to this guidance on declaring interests. According to the evidence, this was not done by any member present when the conflict re-emerged at the May meeting.
- 7.68 According to the evidence, the Council went ahead with members voting on the final outcome as to what action should be taken if any against the parties, without declaring or otherwise acknowledging the indirect conflict issue, which is a breach of the Annex 1 Guidance.
- 7.69 I am hesitant to be overly critical of Council members on this point as it is fair to presume that members may have expected Mr. Mc Dowell to have made a complete decision with findings on fault and specifically directing outcomes. A member going into the meeting without having had prior sight of the report may not have had sufficient time to anticipate the conflict arising again. It would be reasonable to have expected the report to only require noting and to be for implementation only. After all, this is the precise reason why Mr. McDowell was engaged in the first place according to the evidence from the Union – to lift the entirety of the decision out of the hands of the conflicted members of the Council to the remit of an independent party in the interests of probity.
- 7.70 The conflict should have become apparent when the report was debated at the meeting and members were required at the meeting to exercise personal judgment and to consider the possibility of action to be taken or sanctions to be imposed, if any. Such a consideration and/or determination was a matter of personal judgment, not ratification of a prescribed action. Thus it must be recognised as being similarly constrained by the previously acknowledged indirect conflict or potentially perceived bias of members who may have been perceived to favour one party over another.
- 7.71 As a mere observation I would comment with the benefit of hindsight, that the ambiguity of the McDowell report may have been avoided if Mr. McDowell had been given clear directions or terms of reference requiring him to fully

arbitrate the case before returning to NIPSA with his report, and making it clear that he was required to give a full and binding decision on both his verdict and his recommended sanctions or directions, in the absence of agreed resolution.

- 7.72 Therefore, I find that members of the Council should not have progressed to a decision on Mr. McDowell's recommendation at the meeting before declaring the conflict and seeking the guidance of the Chairperson as to the appropriate measures or safeguards that should have been put in place to address or manage the conflict.
- 7.73 Such a breach could be easily avoided in future if the structure of future meetings addressed the issue of conflicts in general at the outset of the meeting. In terms of general best practice in matters of governance, members should be asked to declare any direct or indirect interests, real or perceived, affecting any items on the agenda and all interests apparent or declared should be carefully recorded in the minutes.
- 7.74 For an organisation such as a Trade Union the issue of political affinities and common interest groups will be a regular issue, and it may be prohibitive to the efficient conduct of business to expect members to withdraw in large numbers, as would have been the case for Broad Left members at the subject meetings in December 2011 and May 2012. However, this does not, of itself, excuse the Union from its duty under Annex 1 Guidance to declare and consider conflicts seriously. A simple statement within the Minutes under 'Conflicts of Interest' acknowledging the conflict and recording that it was discussed with comments as to how it would be managed may well be enough to bring the proceedings within the Annex 1 Guidance
- 7.75 I must therefore find that the material decision taken to decide the outcome of the McCarthy/Owens complaint was procedurally flawed because there was a breach of Union Rules in respect of the declaration of conflicts of interests at the NIPSA General Council Meeting of 18 May 2012.

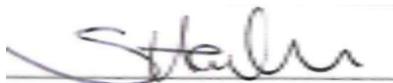
8. Order(s) of The Certification Officer

- 8.1 In terms of the remedy sought by the applicant and her circumstances now (she is no longer a member of the Union and does not seek for the matter to be reopened and referred back to the Council to take the decision again) I do not order that the decision must be re-taken with adherence to Annex 1 Guidance (although it is open to me to make that Order) The applicant is not seeking retrospective action but rather seeks preventative action on the part of NIPSA to inform future practice.
- 8.2 Therefore, pursuant to the powers of Article 90(3)(b) of the 1995 Order, I order that the Union puts appropriate safeguards and measures in place to ensure that the issue of conflicts of interests, particularly potential indirect conflicts of interests, is given the recognition and importance at decision making meetings as required by Annex 1 Guidance, that members are

formally reminded and made fully aware of their personal responsibility to disclose and declare real or perceived conflicts at every meeting and that all future templates for Agendas and Minutes of Meetings contain a section prompting Members, the Secretary of the meeting and particularly the Chair to raise the issue of the requirement and personal duty of members to declare and consider both direct and indirect conflicts of interest at every meeting and to fully record having done so within the Minutes of all Meetings, in accordance with the standards set out at Annex 1 Guidance.

9. Summary of the Conclusions of the Certification Officer

I uphold the applicant's Complaint No. 4 and make the Order at paragraph 8.2 and I dismiss her Complaints 1,2,3,5 and 6.

A handwritten signature in black ink, appearing to read 'Sarah Havlin', written over a horizontal line.

Sarah Havlin

Certification Officer for Northern Ireland