

Proposed National Assembly for Wales Commissioner for Standards Measure

Explanatory Memorandum

This Explanatory Memorandum has been prepared by the Committee on Standards of Conduct and is laid before the National Assembly for Wales.

Declaration on Legislative Competence

In my view the provisions of the *Proposed National Assembly for Wales Commissioner for Standards Measure*, introduced by me on 26 March 2009, would be within the legislative competence of the National Assembly for Wales.

Jeff Cuthbert AM

Chair, Committee on Standards of Conduct
Member in charge of the proposed Measure

25 March 2009

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Part 1: Background and Purpose of the Proposed Measure

1 Introduction

On the 21st November 2007 the Committee on Standards of Conduct expressed a wish to prepare and introduce a Committee proposed Measure to create a statutory post of Commissioner for Standards. In June 2008, the Committee initiated a consultation exercise on the principles underpinning the Proposed Measure.

The primary purpose of the proposed Measure is to place the position of the Commissioner for Standards in the National Assembly for Wales on a statutory basis. It will ensure that the Commissioner, once appointed, is seen to be totally independent of the Assembly and therefore able to investigate complaints against AMs with complete objectivity. It will also provide the Commissioner with powers to enable him or her to investigate complaints rigorously, including the power to require third parties to provide relevant information. This will contribute to the maintenance of high standards of public life in the conduct of business in the National Assembly for Wales.

This Explanatory Memorandum has been prepared and laid in accordance with Standing Order 23.18. It explains the background to the provisions in the committee proposed Measure and its scope.

This version of the Explanatory Memorandum has been revised to reflect the amendments agreed at Stage 2.

2 Legislative Background

The constitutional context to this proposal is set out in the *Government of Wales Act 2006*. The Act allows the Assembly to make Measures where it has the 'legislative competence' (i.e. the power) to do so.

Assembly Standing Order 23.91 provides that a committee (other than a legislative committee) may introduce a committee proposed Measure relating to the committee's remit, where the Assembly has existing legislative competence in a policy area.

The legislative competence for this proposed Measure is provided for in Schedule 5 of the Act, which lists the Fields in which the Assembly can have legislative competence:

Field 13: National Assembly for Wales

Matter 13.1:

Creation of, and conferral of functions on, an office or body for and in connection with investigating complaints about the conduct of Assembly members and reporting on the outcome of such investigations to the Assembly.

Standing Order 16.1 confers on the Committee on Standards of Conduct functions in relation to the conduct of Assembly Members. The Committee therefore has the power to prepare and introduce a Measure falling within Matter 13.1.

3 Purpose and Policy Objectives

In the early 1990s allegations of parliamentary “sleaze” at Westminster proliferated, for example, incidents such as the “Cash for Questions” affair, where some MPs were accused of accepting money in order to put down Parliamentary questions. Responding to public concern, the then Prime Minister, the Rt. Hon. John Major MP set up the Committee on Standards in Public Life in 1994, under the Chairmanship of Lord Nolan (“the Nolan Committee”). In its First Report, the Committee said:

We cannot say conclusively that standards of behaviour in public life have declined. We can say that conduct in public life is more rigorously scrutinised than it was in the past, that the standards which the public demands remain high, and that the great majority of people in public life meet those high standards. But there are weaknesses in the procedures for maintaining and enforcing those standards. As a result people in public life are not always as clear as they should be about where the boundaries of acceptable conduct lie. This we regard as the principal reason for public disquiet. It calls for urgent remedial action.²

The Nolan Committee developed the Seven Principles of Public Life which are :

Selflessness

Holders of public office should take decisions solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends.

Integrity

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

Objectivity

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

Accountability

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

Openness

Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.

Honesty

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

Leadership

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² <http://www.archive.official-documents.co.uk/document/parliament/nolan/nolan.htm>

Holders of public office should promote and support these principles by leadership and example.

The “Nolan Principles” were very much to the fore when the foundations were being laid for the new devolved institutions in Wales, Scotland and Northern Ireland. In Wales, the National Assembly Advisory Group recommended that the new Assembly should have a Code of Practice for Members at least as rigorous as that which applied to MPs. It also recommended that a Standards of Conduct Committee be set up in the new Assembly.³ In the first instance, the Assembly also had an Independent Adviser on Standards. The key features and implications of the Standing Orders in relation to the Adviser’s role in the First Assembly were that:

- the Independent Adviser was appointed by the Assembly and was therefore accountable ultimately to the Assembly as a whole;
- the Independent Adviser was obliged to advise and assist the Presiding Officer on request in respect of any matter relating to conduct of Members; the Adviser’s role in relation to the Committee was by invitation and mainly limited to the investigation of factual matters;
- any complaint to be investigated by the Committee on Standards had to be addressed in the first instance to the Presiding Officer in his role of overseeing the general standards of conduct within the Assembly.⁴

In the early meetings of Standards of Conduct Committee in 1999 the role of the Independent Adviser was discussed and the Adviser’s role further defined:

To provide advice and assistance to the Assembly and the Presiding Officer on matters relating to the conduct of members. Upon invitation by the Assembly Committee on Standards of Conduct to investigate factual matters arising out of any complaint referred to the Committee about the financial or other interests of Members and/or Members’ standards of conduct.⁵

The Adviser was not a member of Assembly staff nor a civil servant. He was employed and contracted by the Assembly for a period of three years initially on the basis of an average 2-3 days per month.⁶

The Woodhouse Review

In 2001 the Standards of Conduct Committee commissioned Professor Diana Woodhouse of Oxford Brookes University to conduct a review of the Standards Regime in the National Assembly for Wales.⁷

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³ Laffin M & Thomas A, “Designing the National Assembly for Wales”, *Parliamentary Affairs* 53 (3), July 2000. p.571

⁴ National Assembly for Wales, *The Role of, and Access to, the Independent Adviser on Standards of Conduct*, OPO Note, 2000. <http://www.assemblywales.org/bus-home/bus-committees/bus-committees-first/bus-committees-first-std-home/bus-committees-first-std-independant/bus-committees-first-std-independant-sub.htm>

⁵ Ibid.

⁶ Ibid.

⁷ Professor Diana Woodhouse, Report for the Committee on Standards of Conduct, National Assembly for Wales, http://www.assemblywales.org/diana_woodhouse_report_final_version_2_.pdf

The Term of Reference of the Review were to consider:

- the effectiveness of the current complaints procedure;
- the roles of the Independent Adviser and the Presiding Officer;
- the role and jurisdiction of the Committee on Standards of Conduct;
- the Code of Conduct.

In respect of the roles of the Presiding Officer and the Independent Adviser in the complaints process, the Woodhouse Report noted that the responsibility for maintaining the Register of Members' Interests and advising on registration lay with the Presiding Officer. However, this could be flawed because he also received complaints about infringements of the Code of Conduct, including registration, and although, in practice, these were automatically referred to the Independent Adviser, the opportunity existed, in theory, for the Presiding Officer to exercise some discretion and so have a possible conflict of interest.

The Report suggested that the National Assembly follow the practice in other jurisdictions and separate giving advice from the receipt of complaints. It argued that transferring the receipt of complaints to the Independent Adviser and leaving the advisory function with the Presiding Officer would fulfil this requirement. It also expressed concerns about the Presiding Officer having an advisory responsibility, whether for the registration and declaration of interests, for conduct generally or for complaints. The Report recommended that the advisory function as it relates to the Code of Conduct, including the registration and declaration of interests, should transfer to the Registrar and Clerk to the Standards Committee, acting under the authority of the Committee and consulting with it on matters of policy.

The Report noted that the Independent Adviser had no investigative powers nor could he seek assistance from the Committee on Standards, for it similarly had no such powers. He therefore relied totally on the co-operation of those involved and on political pressure being brought to bear should an AM obstruct his inquiry. This appeared to be a weakness in comparison with other regimes.

The Report concluded that the options before the Committee were:

- maintaining the office of Independent Adviser, with a few adjustments;
- appointing a Commissioner for Standards who has increased responsibilities and a higher profile but no more power; or
- seeking primary legislation for a statutory Commissioner for Standards with increased responsibilities and the power to go with them.

In regard to appointing a Statutory Commissioner, the Report stated:

The third scenario is one in which the office not only assumes responsibility for receiving and sifting complaints and dealing with trivial matters but, in addition, has the power to investigate as he or she sees fit, to send for documents and to require the attendance of witnesses. Regardless of whether the responsibilities extended

to the promotion of standards of conduct, such a role would require a statutory Commissioner for Standards. A statutory Commissioner may seem like taking a sledgehammer to crack a nut, particularly given the lack of any serious complaints in the Assembly so far. However, the importance of having robust machinery in place in case such complaints arise in future cannot be understated and thus a statutory Commissioner would seem the best option.

In 2005, the Committee accepted the second option, as an interim measure. Putting the case for the change in Plenary, the Chair of the Standards of Conduct Committee, Kirsty Williams AM stated:

the Woodhouse review recommended that the Assembly should consider creating a statutory commissioner for standards, in line with practice in other legislatures. This would demonstrate how seriously we take standards of conduct and further embed independence from political interference into our procedures. The committee accepted this recommendation, but recognised that the change would require primary legislation. As an interim measure, the committee agreed that a non-statutory commissioner for standards should be created through our Standing Orders.⁸

Arrangements in the rest of the UK

Westminster

The Office of the Parliamentary Commissioner for Standards was set up by the House of Commons in 1995 as a result of recommendations made by the Committee on Standards in Public Life. The Commissioner is non-statutory, and is appointed by Resolution of the House of Commons and is appointed for a six year period. The Office of the Parliamentary Commissioner for Standards is wholly funded by the House of Commons administration.

The Commissioner's main responsibilities are :

- Overseeing the maintenance and monitoring the operation of the Register of Members' Interests;
- Providing advice on a confidential basis to individual Members and to the Select Committee on Standards and Privileges about the interpretation of the Code of Conduct and Guide to the Rules relating to the Conduct of Members;
- Preparing guidance and providing training for Members on matters of conduct, propriety and ethics;
- Monitoring the operation of the Code of Conduct and Guide to the Rules and, where appropriate, proposing possible modifications of it to the Committee;
- Receiving and investigating complaints about Members who are allegedly in breach of the Code of Conduct and Guide to the Rules, and reporting his findings to the Committee.

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⁸ RoP, 2 March 2005, p.70.

In addition, the Commissioner's office is responsible for maintaining and monitoring the operation of the registers and lists; providing advice about them; and receiving and investigating complaints about them:

The Commissioner presents an annual report to the House of Commons on the work of the office.

Scotland

The Scottish Parliament's Standards Commissioner (SPSC) is a statutory post and was created by the *Scottish Parliamentary Standards Commissioner Act 2002*. The SPSC is appointed by the Scottish Parliament Corporate Body (SPCB), with the agreement of Parliament, for a five year term.⁹ The SPSC may be removed by the SPCB on the recommendation of Parliament following a resolution supported by more than two-thirds of MSPs voting.

The Commissioner investigates complaints that an MSP has broken the Code of Conduct for MSPs. This is carried out independently of Parliament and findings are reported to Parliament. The Code of Conduct gives guidance to MSPs on how to carry out their Parliamentary duties. Breaches of the Code cover things like not being accessible enough to constituents, not making known private interests that might conflict with work as an MSP, accepting rewards in return for promoting particular issues and giving favoured access to people who use lobbying firms.

Salary, allowances and expenses are paid for by the SPCB which also determines the terms and conditions of the office. The SPSC may appoint staff with the consent of the SPCB.

In carrying out functions the SPSC must comply with directions given by the Standards and Public Appointments Committee of the Scottish Parliament. However, he or she need not take direction on how a particular investigation is conducted.

The SPSC must lay an Annual Report before Parliament and report cases of non-compliance with the Code of Conduct by MSPs to the Parliament.

Northern Ireland

In June 2000, the Committee on Standards and Privileges conducted an inquiry into the possible appointment of an Assembly Commissioner for Standards who would be responsible for investigating complaints against Members of the Assembly. It concluded that it should recommend to the Assembly that a Commissioner for Standards be appointed and that that the primary role of the Commissioner should be to investigate complaints against Members.¹⁰ The model proposed that complaints should be made in the first instance to the Assembly Clerk of Standards who would pass them on to the Commissioner. The

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⁹ Scottish Parliamentary Standards Commissioner website. <http://www.spsc.co.uk/index.htm>

¹⁰ Northern Ireland Assembly, Committee on Standards and Privileges, *Inquiry into the Possible Appointment of an Assembly Commissioner for Standards*, 2000. <http://www.niassembly.gov.uk/standards/reports/report1-00r.htm>

Assembly Clerk of Standards would continue to advise Members on the registration of interests.¹¹ In 2001 the Standards and Privileges Committee of the Assembly asked the Assembly Ombudsman to provide an investigatory service to support the Committee in its consideration of complaints against members of the Northern Ireland Assembly.

In May 2007 the Standards Committee of the new Assembly invited the Ombudsman to fulfil the role of Interim Commissioner for Standards. In this role he investigates complaints made against Members under the Code of Conduct and submits a Report to the Committee for its consideration.

4 The Current Policy and Legislative Context

The National Assembly Commissioner for Standards is not at present a statutory post but the post was enhanced in response to recommendations from the Woodhouse Review. Standing Order 16 provided for the appointment of a person to act as the Commissioner for Standards. It states:

The Assembly shall appoint a person who is not an Assembly Member or a member of its staff to act as Commissioner for Standards.¹²

The main duties of the Commissioner are:

- to investigate factual matters arising out of any complaint against a Member;
- to advise the Committee on any matters of general principle relating to the standards of conduct of Members;
- to advise the Committee on any matters of general principle relating to the Registration of Members' Interests and the Recording of Membership of Societies; and
- otherwise render such assistance on matters relating to the standards of conduct of Members as the Assembly may from time to time decide.

The Committee on Standards of Conduct established a formal procedure for dealing with complaints against Assembly Members.

In its 2005 Annual Report, the Standards Committee outlined the role of the Commissioner:

In relation to his duties arising from complaints against Members, the Commissioner has sole responsibility for the preliminary investigation of

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¹¹ Donovan McClelland MLA, Tom Frawley, NI Assembly Ombudsman, John MacQuarrie, Deputy Assembly Ombudsman and John Torney, Principal Assembly Clerk of Standards, Oral Evidence to Committee on Standards in Public Life, Eighth Inquiry on Standards in the House of Commons, 14 June 2002.

¹² Op.cit., NafW, Standing Orders, SO.16.3.

complaints, concluding whether they are 'admissible'. He also has the ability to refer complaints directly to the Committee on Standards of Conduct for consideration, a role that had been previously undertaken by the Presiding Officer.

Stemming from the Woodhouse review, the Committee agreed to seek the co-operation of Party leaders (and others) in building the Standards Culture in the Assembly. This is a task that the Commissioner is taking forward and the Committee is grateful for the efforts made.¹³

The appointments process was conducted by a panel chaired by the Presiding Officer and the appointment was approved by a resolution of the Assembly. The current appointment is for 4 years. The Commissioner provides reports to the Assembly's Standards Committee on a regular basis and produces an Annual Report which is circulated to all Assembly Members.

The Commissioner's post is funded through the Assembly Parliamentary Service (APS) budget. The current Commissioner does not receive a salary but is paid an annual retainer and receives fees on a *per diem* basis. The post is supported by APS staff.

As described earlier, following the comprehensive review of the standards regime in the Assembly by Professor Diana Woodhouse in 2002, the Committee for Standards of Conduct had considered the future role of the Commissioner and a recommendation to seek primary legislation for a statutory Commissioner for Standards. It had favoured the creation of a statutory Commissioner, but agreed that as this was reliant on inclusion in the UK Government's legislative programme it was likely to be a long process. It was therefore decided to establish the interim, non-statutory, post of Commissioner for Standards through Standing Orders.

However, with the *Government of Wales Act 2006* in place, Schedule 5: Field 13 includes as Matter 13.1 provision for creating a statutory Commissioner through the introduction of an appropriate Assembly Measure. The Committee can itself introduce a Measure.

5 Consultation

On the 3 June 2008 the Committee agreed to proceed with a consultation that posed fundamental questions about the role and independence of the Standards Commissioner. The responses to this exercise would enable the Committee to agree drafting instructions to APS lawyers so that the Measure, when introduced, reflected the desired policy outcome. The consultation questions and a list of consultees can be seen in **Annex 1**.

In establishing the general principles of the Measure for Stage 1, the Committee

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¹³ National Assembly for Wales, Committee on Standards of Conduct, Annual Report 2005, paras. 4.11-12
<http://www.wales.gov.uk/assemblydata/N000000000000000000000000041702.rtf#commissioner>

consulted on the following framework questions:

1. Is there a need for an Assembly Measure to establish a statutory role of Commissioner for Standards?
2. What should be the role of the Commissioner for Standards?
3. What fundamental principles should underpin the establishment of the Office?

The need for legislation and fundamental principles of the status of the Commissioner

Consultees who expressed a view supported the legislative approach. It was felt for example that, a statutory post would provide greater protection and authority and ensure that properly defined arrangements were in place. In addition the independence of the post was emphasised.

The Scottish Parliamentary Standards Commissioner (PSC) pointed to the benefits of a statutory basis for his role: in enhancing the status and the independence of the post; establishing a robust and open appointment procedure set out in the legislation; and giving the Commissioner independent powers to compel evidence and summon witnesses. He also noted that arrangements for dismissal should protect the postholder from arbitrary action by those he/she holds under scrutiny.

The Auditor General for Wales (AGW) supports the model for his office and that of the Public Service Ombudsman (PSOW) as the preferred one, in particular for the Commissioner to enjoy the same statutory protection from being removed from office.

Role and responsibilities

Respondents were asked if the Commissioner should have a role in:

- promoting a framework for high standards in public life
- giving general advice on standards of conduct
- advising Assembly Members on their conduct as well as investigating complaints

Responses indicated a broadly supportive view of a Commissioner having a role in the promotion of a framework for high standards in public life, and of giving general advice on standards of conduct.

Views on the question of advice given to Assembly Members on individual matters are more varied. The PSOW thought that should form a part of the duties of the Assembly Commission: *“This would fit in with the Commission’s aims of protecting the reputation of the Assembly and supporting Assembly Members in their work as elected representatives. It would also avoid conflict within the role of the Commissioner.”*

The Scottish PSC commended the arrangements for his role as an independent investigator of complaints about MSP conduct.

Powers Respondents were asked whether the Commissioner should have independent discretion to decide whether to investigate a complaint, and powers to call “people and papers” and conclusively agreed with both aspects.

There was general agreement that the Commissioner should have independent discretion on these matters. There was also a similar level of consensus in the consultation responses that the Commissioner should have the powers to summon persons and papers.

Reporting Consultees were asked whether the Commissioner should have the ability to make findings and conclusions public, and if he/she should report directly to the Assembly, or to the Standards of Conduct Committee.

The consensus of views was that unless there is a compelling reason for confidentiality in a specific case the ability to make findings public is consistent with the principle of being open and transparent.

The PSOW felt that the role should be accountable to the National Assembly as far as the use of public funds is concerned, but for administrative and practical purposes, was of the view that investigation reports should be submitted directly to the Standards of Conduct Committee.

Appointment Respondents were asked how the Commissioner should be appointed and for how long.

Proposals in the consultation responses varied between five and seven years.

The Scottish PSC felt strongly that appointments should not be subject to a re-appointment process but be for a single term, non-renewable.

Resourcing Both the PSOW and the AGW said it would be preferable for the Commissioner to be paid/funded in the same way as their posts, ie directly from the Welsh Consolidated Fund. The Auditor General was also of the opinion that enshrining the funding arrangements of the Office in legislation would help ensure it was adequately resourced.

Consultees were asked if the Standards Commissioner should have dedicated staff be able to appoint those staff, or be supported by another organisation such as the office of the Public Services Ombudsman.

The PSOW pointed out that it already possesses the skilled investigative staff and appropriate case management systems necessary to investigate alleged breaches of standards, and its existing resources could be enhanced to support the work of a statutory Standards Commissioner: *“This would avoid the expense of a new free-standing administration, especially given the likely episodic nature of the workload, and would also enhance the actual and perceived independence of the role.”*

The Auditor General also noted the merits of this approach in terms of reducing overall costs and administrative burden of a Commissioner’s office, and for example in preventing the need for separate accounts to be prepared and audited. The secretariat

of the Standards Commission in Ireland is provided by the Office of the Ombudsman, and the Commission is satisfied with the level of resource provided.

The current Commissioner for Standards is supported by APS staff who also undertake other roles.

Other issues Consultees were asked if the Commissioner for Standards should have the same role relating to Ministers as for other Assembly Members.

In a letter to the Committee Chair (31 January 2008), the First Minister said that “... *The Ministerial Code provides clear lines of accountability in the context of the Government of Wales Act 2006 and any Measure, which proposes to establish a Commissioner for Standards, would need to consider the implications of any conflicts that could arise between the general standards of conduct expected of Assembly Members and the standards expected of Ministers when executing their functions.*”

Other respondents saw no need to alter current arrangements in relation to the Ministerial Code and the ability for complaints to be made directly to the First Minister and suggested that “*the role of the Commissioner for Standards be confined in the first instance to the conduct of Assembly Members rather than Ministers.*”

Consultees were invited to consider the practicalities of making the system work and how the proposed Measure should make provision for these. The Auditor General's view was that the legislation should require the Commissioner to cooperate with both the AGW and PSOW on matters that fall within their respective statutory remits.

The Scottish Parliament is prevented by legislation from directing the PSC on whether and how to investigate an individual complaint, but can give general directions about the conduct of investigations.

A second consultation

A second consultation was undertaken during November and December 2008 on detail contained in the initial draft of the proposed Measure. Responses were received from Richard Penn, NAFW Commissioner for Standards, the Scottish Parliamentary Standards Commissioner, Oonagh Gay and Barry K Winetrobe, Co-conveners of the UK Study of Parliament Group Public Officials of Parliament Study Group (submitted in their personal capacities), and the Auditor General's Office.

Consultees who responded were supportive in broad terms of the key provisions set out in the proposed Measure and indicated agreement that the Measure will achieve its overall purpose and aim. The Auditor General considers that the draft includes suitable provisions for the appointment, independence safeguards, duties to investigate complaints, powers to call for witnesses and documents, and protection from defamation. The current, non-statutory, Commissioner stated a view that statutory status is not necessary to facilitate the type of work the ‘Commissioner’ has been doing for eight years, but that he understands why

there is a commitment to having this Measure. Some specific comments were received with regard to particular aspects of the draft, these are included below.

The consultation also asked if there were further provisions that consultees would like to see added to the proposed Assembly Measure and a number of specific points were made:

Section 1(3) and 1(8) The Committee might consider it appropriate to extend the exclusion of eligibility to include staff of the Welsh Assembly Government.

Section 1(5) A number of contributions were received relating to the further terms of appointment of a Commissioner, recommending further consideration of this issue. Consultees detail that examination of the position in other Commonwealth jurisdictions demonstrates clear evidence of pressure being applied to Commissioners who are seeking a second term. The UK Parliament Public Administration Select Committee (PASC) has recommended that the principle of a single fixed term be applied across the board to ethical watchdogs in its report Ethics and Standards in April 2007. The Wicks Committee (Committee on Standards in Public Life) examined this issue and decided that problems were best avoided and independence best protected by having a single term of five to seven years. In 2008 the Scottish Commission for Public Audit recommended a single 8 year term for future Auditors General in Scotland, so as to avoid any perceived or real threat to independence through pressures associated with reappointment.

Section 1(6)(b) – removal from office

Concern was expressed that a Commissioner could become unpopular simply by dint of doing a thorough job, and suggests that it would be desirable to state the possible grounds for removal from office on the face of the legislation, e.g. inability, neglect and misconduct to demonstrate that there is protection, over and above the voting threshold required, from arbitrary dismissal by those (Assembly Members) who are under the scrutiny of the Commissioner.

Section 4. Contributions were submitted about a study which indicates that independence and accountability are interdependent, reinforcing each other. They commend the clear statement of independence of the Commissioner but believe that the requirement for an annual report to the Assembly under Section 16 should be supplemented by regular appearances before the appropriate committee and would prefer some formal link to be set out in the Measure. They state, a Commissioner who is not seen as accountable to the Assembly is in danger of having their findings rejected in practice.

Section 6(1) One of the responses would like to see a key responsibility of the role being to promote standards generally and to help build the ethical framework of the National Assembly for Wales built in to the Measure much more overtly. He believes that the Commissioner should have the ability to provide advice on matters of general principle; and matters relating to the promotion of high standards of conduct in public life to individual Assembly Members, political parties, etc. as well as to the Assembly. Additionally there was comment there would be benefit in a requirement to include in the annual report how functions to advise the Assembly on standards of conduct included in Section 6 of the Measure have been discharged.

Section 7. The flexibility contained in this section received positive comment. However, one response commented that investigations of complaints should indicate the seriousness of the offence and that the statutory restriction in section 7(4) on the recommendation on the nature of the sanction thus appears rather unnecessary. In addition there was a questioning of the need to include detail in Section 7(3) in the body of the Measure given that even greater flexibility would be afforded if this were to be embedded within Standing Orders or within the rules for consideration of complaints mentioned in Section 7(1)(b).

Section 8 The Commissioner for Standards set out that he has never experienced any problem with Members, complainants or witnesses co-operating with any of my investigations, but accepted that the proposed Measure provides the Commissioner with some 'teeth' in this regard.

Section 13. Restrictions on leaks of investigations are clearly required. Attention was drawn to the Scottish Parliamentary Commissioner's indication that the statutory restrictions on his powers to publicise his work has caused practical problems in highlighting his work. The current drafting of this section is closely based on section 16 of the Scottish Parliamentary Standards Commissioner Act 2002. Respondents suggested that attention is paid to the drafting of this section, to ensure that the Commissioner is not inhibited in drawing attention to the general role and also specific points arising from investigations, in turn enhancing the accountability of the Commissioner to the public. Visibility is an important element in that accountability.

Section 15(1): Concerns were raised about the working of this section in practice.

Schedule Paragraph 5(3) The Commission "must discharge such reasonable liabilities as the Commissioner has lawfully incurred...in employing staff...securing the provision of services, and in relation to the allowances and expenses of persons giving evidence or producing documents." The Auditor General details that this means that the Commissioner would potentially be able to incur very substantial expenses without any prior agreement. As drafted, the Clerk to the Assembly Commission will retain the personal 'Accounting Officer' responsibilities associated with that expenditure The AGW states he would expect, therefore, that the Clerk will wish to satisfy herself that appropriate safeguards are established from the outset over the regularity, propriety and value for money of any public expenditure incurred by or on behalf of the Standards Commissioner, and suggests that the Measure is amended to make the provision for such safeguards explicit through amendment to the draft.

Schedule Paragraph 6 responses to the consultation indicate that the Schedule offers sufficient flexibility in staffing arrangements and the provision of services needed, for example for the Standards Commissioner to be supported by the office of the Public Service Ombudsman for assisting in the exercise of the Commissioner's functions and to be conducive to achieving good value for money in the administration of the arrangements.

There were some additional points made. Attention was drawn to the fact that the duties of the post are very unlikely to become full time, particularly as Ministers are covered by a separate Code. They flag that there are some difficulties in using Assembly staff to support the Commissioner, however, they say it is important that links are retained, as

the advice tendered by clerks on standards matters is relied upon by Members as authoritative (the Wendy Alexander case in the Scottish Parliament illustrated the dangers of too great a separation between the functions of advice and investigation). They support independent resourcing, such as access to independent, external sources of legal advice, by constitutional watchdogs. Above all, they say, the system of investigation must be comprehensible to Members and in this sense 'owned' by them.

The Auditor General considered that an amendment to section 31 of the Data Protection Act 1998 should be sought so as to provide the Commissioner with an exemption from the subject information provisions of that Act. This would prevent investigations being undermined by subject access requests. The exemption is available to the Parliamentary Commissioner for Administration and the Public Services Ombudsman for Wales. If, however, such an exemption is not sought, to avoid confusion, section 13 should make clear that the restrictions do not override the need to comply with subject access requests under the 1998 Act. (This is because, unless section 31 of the 1998 Act is amended, section 27(5) of that Act would override the restrictions in section 13 of the Proposed Measure.)

Changes made to the Measure as a result of the consultation

As a result of the consultation responses the committee made a number of changes to its proposed Measure, these were:

- to extend the exclusion of eligibility to include staff of the Welsh Assembly Government
- to make the appointment limited to a single term
- to add a requirement for the commissioner to appear before the Assembly to the accountability requirements of the role
- to remove detail of grounds on which the Commissioner may dismiss the complaint summarily without reporting on it to the Assembly from the face of the Measure, instead including a requirement for such provision to be made within a complaints procedure
- to amend the drafting of the transitional provision in order to remove any possibility of misunderstanding
- to include a requirement to bring appropriate issues to the attention of the accounting officer
- to introduce a requirement for the Commissioner to consult the Accounting Officer (i.e. the Clerk) in relation to liabilities which the Commissioner proposes to incur as a safeguard to avoid the Commissioner incurring liabilities which the NAFW Commission would be bound to meet, without the Commission's accounting officer having had the opportunity to comment on the lawfulness of the proposed expenditure or to plan for it to be met.

In addition some minor drafting amendments were identified, and the Committee concluded that it would wish exploration to be undertaken with the Wales Office / Ministry of Justice the possibility of an amendment to the DPA 1998 made by the Secretary of State by Order under section 38(1) of the Data Protection Act 1998,

acknowledging that this would not impact on the committee's ability to take forward this proposed Measure.

Full detail of both consultations and the responses received can be found on the webpage of the Committee on Standards of Conduct, which is part of the website of the National Assembly for Wales.

Changes made to the Measure as a result of amendments at Stage 2

At Stage 2 consideration amendments were agreed on a number of themes in the Measure.

In relation to the Principal aim of the Commissioner and Functions of the Commissioner – advice on procedures for making and investigating complaints; amendments were made to give more prominence to the Commissioner's advisory functions. The thinking behind the change is that this will help the Commissioner to promote a healthy standards culture rather than simply acting as an investigator of complaints.

In relation to a new Duty of the Clerk to refer a matter to the Commissioner; amendments introduced new requirements on both the Clerk and the Commissioner in order to strengthen safeguards against misuse of funds whilst seeking to preserve the separation between the function of initiating a complaint and the Commissioner's function of investigating complaints impartially.

In relation to Provision in relation to the office of Counsel General; The Act established the office of Counsel General, who has various legal functions. That office is currently held by an Assembly Member. But the Act enables a person who is not an Assembly Member to be appointed to this post. Other than in relation to specific requirements the Act does not impose on a Counsel General who is not an Assembly Member the disciplinary regime which applies to elected Members, although such a person would of course be subject to the Ministerial Code, which is outside the scope of this proposed Measure. The thinking behind the change is that by limiting the definition of "relevant provision" it restricts the complaints which the Commissioner will be able to investigate against a Counsel General who is not an elected Assembly Member to those which arise under the relevant provisions of section 36.

In relation to Restriction of disclosure of information; a new paragraph was inserted, into subsection (2) of Section 13, to make it clear that the duty of confidentiality imposed by subsection (1) does not override any duty to disclose information which may arise under such other statutory provisions. The aim remains to preserve, as far as possible, the confidentiality of information gathered by the Commissioner when investigating a complaint.

Finally, in relation to Interpretation; an amendment of a technical nature, aimed to make it clear that the Codes and resolutions to be enforced with the assistance of the Commissioner must all have been approved by the Assembly in plenary. Resolutions of the Committee on Standards of Conduct cannot count as “relevant provisions”.

6 Power to make Subordinate Legislation

No powers to make Subordinate Legislation arise from this Measure

7 Territorial Application

This proposed Measure will apply in relation to Wales.

Part 2: Regulatory Impact Assessment

8 Options

The importance of an independent role to maintain and promote high standards of conduct amongst elected members, to support confidence in democracy, is widely recognised across the different levels of government, key stakeholders and the public. The independent nature of the referral and investigative process is vital for member, officer and public confidence in the system. Bodies involved in this role across the UK tend to believe that they should be proactive, aiming to create and maintain organisations with high ethical standards

As a result of the *Government of Wales Act 2006*, there is an opportunity in Wales to use the new legislative powers of the National Assembly for Wales to create through primary legislation an independent office or body with a role to investigate and report on complaints about the conduct of Assembly Members.

The current options are:

Option 1: Do nothing maintain the role of the non-statutory Commissioner for Standards

Option 2: Introduce a proposed Measure.

Option 1: Do nothing – maintain the role of the non-statutory Commissioner for Standards

The Woodhouse Review, back in 2002, noted that the lack of serious complaints suggested that the standards system was, in many respects, working well. The six intervening years, which saw many of the Woodhouse recommendations implemented, including the re-definition of the Independent Standards Adviser as a non-statutory Commissioner of Standards, have not seen an increase in the level of significant complaints. It could, therefore, be argued that the volume and level of the complaints received in the past suggests that that status quo is working effectively and changes are not needed.

However, this would ignore the risk of serious complaints arising in the future which would test the system. As it stands the current complaints procedures is, in effect an internal complaints procedure which does not have the full force of law. The current, non-statutory Commissioner for Standards, lacks the power to call for documents or witnesses and an occasion might arise when a Member is reluctant to co-operate. There might also be an occasion when the facts are uncertain or disputed, in which case the current Commissioner would be ill-equipped to determine the truth. In the case of a serious complaint arising in which the Commissioner was hampered in his investigations, or the process was

not perceived by the public to be open and independent would damage the reputation of the National Assembly for Wales and create distrust in the democratic process in Wales. This point was summed up by Professor Woodhouse in her report:

A statutory Commissioner may seem like taking a sledgehammer to crack a nut, particularly given the lack of any serious complaints in the Assembly so far. However, the importance of having robust machinery in place in case such complaints arise in future cannot be understated and thus a statutory Commissioner would seem the best option.

Professor Woodhouse also made the point that there would be an expectation that someone entitled “Commissioner for Standards”, as the current non-statutory position is, would have the same powers as the position of Commissioner in other institutions and his or her authority could be undermined when the expectation is not realised.

However, one advantage a non-statutory scheme of the kind operated by the Assembly is flexibility. Since the Committee on Standards of Conduct can, at present, revise the Complaints Procedure, over which it has total control, it is possible to respond rapidly to lessons learned from experience in dealing with individual complaints. Any provision contained in legislation can only be amended in accordance with the full procedures for making legislation.

However this could be mitigated by the way in which the legislation is drafted.

The Woodhouse Review posited three options to the Assembly:

- maintaining the office of Independent Adviser, with a few adjustments;
- appointing a Commissioner for Standards who has increased responsibilities and a higher profile but no more power; or
- seeking primary legislation for a statutory Commissioner for Standards with increased responsibilities and the power to go with them.

The Assembly has already implemented the second option so there is little scope to further enhance the position of the non-statutory Commissioner.

Option 2: Introduce a proposed Measure

The second option, as proposed in this Measure, would enshrine in legislation a more robust role backed up by the full force of law. This change would mean that the role would have similar powers to those held by the position of Commissioner in other institutions, strengthening the authority and credibility of the role and better enabling expectations of the ability of a Commissioner to act to be realised.

A statutory Commissioner for Standards would have the power to call for documents or witnesses ensuring that the Commissioner would be fully equipped to determine the truth if an occasion should arise when the facts are uncertain or disputed, or a Member was reluctant to co-operate. In the case of a serious complaint arising the Commissioner would not be hampered in his investigations, and the process would be perceived by the public to be open and independent. This would in turn avoid damage to the reputation of the National Assembly for Wales and help to create trust in the democratic process in Wales.

In addition, adding to roles similar to those currently fulfilled by the existing Commissioner for Standards, the Measure is drafted to include the ability to give advice to the Assembly on any matter relating to the promotion of high standards of conduct in public life.

The advantage of a non-statutory scheme, of the kind currently operated by the Assembly, is flexibility. Any provision contained in legislation can only be amended in accordance with the full procedures for making legislation. However, the Director of Legal Services, Keith Bush assured the Committee of Standards for Conduct that this could be mitigated by the way in which the legislation is drafted. The proposed Measure has been drafted accordingly.

9 Estimate of Costs

Estimate of Costs: Option 1 – do nothing – maintain the role of the non-statutory Commissioner for Standards

The appointment to the current role of Commissioner for Standards is made by the National Assembly for Wales in accordance with arrangements made by the Presiding Officer. The Commissioner is not a member of the staff of the Assembly as defined by Schedule 2 Paragraph 3 of the Government of Wales Act 2006.

Remuneration – Remuneration is currently provided on a per diem basis at £320 per day plus a “retainer” annual sum of £4,500. Travel & subsistence is paid in accordance with National Assembly staff rates.

Time commitment - The post holder is required to work such hours as may be necessary to enable the efficient discharge of the duties of the post. It was envisaged that the average time commitment would be around 5 days per month but this could vary depending on any advice requested by the Presiding Officer or the Committee. On the basis of 8hr days the Commissioner has averaged just over 4 full days per month in the last eighteen months

Resources – A permanent office for the post is located in the National Assembly building Cardiff Bay. The post-holder is linked to Assembly’s IT network and can therefore by agreement, work from home, or from other National Assembly offices linked to the network. Staff from the Assembly Parliamentary Service (APS) support the post-holder. However, this is not dedicated support; rather it is provided within the responsibilities of several staff members, and the estimate based on a proportional split of those staff costs is included in the table below.

During 2007-08 costs associated with the office of the Commissioner for standards were as follows:

	2007-08
	£
Staff Costs	10,250
Accommodation Costs	3,062
Commissioner (inc NI)	<u>22,929</u>
Totals	36,241

These costs are actual costs for the 12 month period. The accommodation costs have been calculated according to method agreed with Wales Audit Office in respect of the audit of the Members' Pension Scheme and are therefore considered robust.

Further, as detailed in earlier sections this has been a period which has not had significant numbers of complaints received.

Estimate of Costs: Option 2 – Introduce a Measure

The estimates of costs for the current Commissioner for Standards provide a general idea of the likely costs of a statutory post. However, the majority of the costs derive from the level of activity needed to undertake investigations into complaints received.

As a result it is not possible to make a reasonable estimate of costs; however, there is no reason to expect substantial change. There are aspects of the Measure which may incur some additional costs as they are different from the current position eg the payment of reasonable allowances to witnesses. New functions, described in section “8 Options” above, could lead to increased levels of activity; however this is not likely to be significant.

A statutory role exists in Scotland. The detail of resources provided for the role are detailed below

Scottish Parliamentary Commissioner:

The Scottish Parliamentary Standards Commissioner Act 2002 provides that the Commissioner will be appointed by the SPCB with the agreement of the Parliament. The SPCB sets the Commissioner's term and conditions of appointment.

Time commitment - their present Commissioner's annual salary is £40,820 for 5-10 days per month. The nature of the Commissioner's work is entirely demand led. He is required to attend for such hours as may be reasonable and necessary for the efficient performance of his duties with a substantial inquiry requiring him to work on a full time basis for a period of several weeks.

Remuneration – total salary costs for the Scottish Commissioner in 2007/08 were £54,665. These were met from the Commissioner's budget of £90k. Given the workload is entirely demand led, we recommend that the post be advertised on a part-time basis of 5-10 days per month on the existing salary plus access to the Principal Civil Service Pension Schemes;

Location – the Commissioner currently works from home

The Auditor General was provided with the detail of costs included in this document and in his consultation response expressed the view that the estimate of costs appear to give a reasonable indication of the likely range of costs of running the arrangements provided for in the proposed Measure.

If accounting requirements were such that a new, and distinct, system was required there would be a significant cost involved in establishing such a system. However, as drafted, the Measure does not require the establishment of such a system, but rather provides requirement in the '*Financial Information*' section of the Schedule, that the Commissioner must provide the Commission with such information about the Commissioner's financial affairs and transactions as the Commission may reasonably require.

In conclusion, there is little reason to believe that the creation of a statutory Commissioner for Standards would in itself create a significant increase in cost. The most significant influence on the cost is the level of activity, which will vary year on year whether the role is statutory or not.

Amendments at Stage 2 give more prominence to the Commissioner's advisory functions. These are intended to help the Commissioner to promote a healthy standards culture rather than simply acting as an investigator of complaints. This could give rise to a higher level of active time spent on functions other than those directly related to the investigation of specific complaints. The most significant influence on the cost remains the level of activity, a significant part of which will remain the undertaking of investigations into complaints received.

10 Report of the Auditor General

As Standing Order 23.18 (viii) requires that the Explanatory Memorandum, must, where the proposed Measure contains any provision charging expenditure on the Welsh Consolidated Fund, incorporate a report of the Auditor General setting out his or her views on whether the charge is appropriate, the Chair of the Committee on Standards of Conduct wrote to the Auditor General for Wales to seek his views on the specific issue of the appropriateness of the charge being made on the Welsh Consolidated Fund.

On 14 January 2009 Jeremy Colman, Auditor General for Wales, wrote stating “I have reviewed the content of the draft proposed Measure and its Explanatory Memorandum. I can confirm that it would be appropriate for the expenditure associated with the salary, allowances, superannuation benefits, pension, gratuities and other expenses incurred by (or on behalf of) the Standards Commissioner to be charged to the Welsh Consolidated Fund.” The document letter is referenced: JC/0785/fgb, and is attached at Annex 2.

Part 3: Explanatory Notes

General scheme of the Measure

1. The Measure consists of 20 sections and a Schedule¹³. Sections 1 to 4, together with the Schedule, contain provisions about the office of National Assembly for Wales Standards Commissioner (“the Commissioner”). Sections 5 and 6 deal with the Commissioner’s functions. Sections 7 to 15 provide the Commissioner with the powers to discharge those functions effectively. Finally, sections 16 to 18 contain general provisions.

Section 1: The Commissioner

2. This section establishes the post of Commissioner, who is to be appointed by the Assembly (although see the explanation of paragraph 1 of the Schedule below). In order to minimise the risk of conflicts of interest, certain persons are disqualified from being appointed, namely Assembly Members (“AMs”) or those who have been AMs within the previous 2 years and, similarly, Assembly or Welsh Assembly Government staff, or those who have been members of the Assembly’s or Welsh Assembly Government’s staff within the previous 2 years. A person appointed Commissioner automatically ceases to hold that office if he or she becomes a candidate for election to the Assembly or joins the staff of the Assembly or Welsh Assembly Government.

3. The Commissioner is to be appointed for a fixed term of 6 years. The Commissioner may not be appointed for a further term or terms (whether consecutive or not).

4. The Commissioner may, before the end of a term, resign or be removed by resolution of the Assembly provided the resolution is passed with a two-thirds majority.

Section 1A: Principal aim of the Commissioner

5. This section explicitly sets out the principal aim of the Commissioner, which is to promote, encourage and safeguard high standards of conduct in the public office of Assembly Members.

Section 2: Further provision about the Commissioner

6. This introduces the Schedule (see below).

Section 3: Appointment of an Acting Commissioner

1.1

¹³ Two new sections, currently numbered 1A and 6A, were added at Stage 2. Renumbering of the sections will take place following Stage 3 consideration.

7. This section enables an Acting Commissioner to be appointed by the Assembly if the Commissioner is unable to act. The Acting Commissioner may be appointed to act in place of the Commissioner generally (for example if the Commissioner is ill) or in relation to certain cases (for example if there was some conflict of interest which made it inappropriate for the Commissioner to act in relation to a particular complaint). Persons who are disqualified from appointment as Commissioner are also disqualified from appointment as Acting Commissioner and an Acting Commissioner automatically ceases to hold office in the same circumstances as does the Commissioner. An Acting Commissioner may resign or may be removed from office by resolution of the Assembly although in the case of an Acting Commissioner a simple majority in support of the resolution will suffice.

Section 4: Independence of the Commissioner

8. Section 4 makes clear the independence of the Commissioner. It provides that the Commissioner is not subject to the direction or control of the Assembly except for complying with section 16 (see below).

Section 5: Functions of the Commissioner

9. Section 5 sets out the functions of the Commissioner.

10. One set of functions is to receive complaints of breaches by AMs of “relevant provisions”, to investigate those complaints, to report on them to the Assembly and to advise AMs and members of the public on the relevant procedures for making and investigating complaints. “Assembly” is defined in the Measure so as to include (other than in relation to the appointment, resignation and removal of a Commissioner or Acting Commissioner) any committee or sub-committee to which functions relating to the investigation of complaints against AMs have been delegated. So, under the Assembly’s current Standing Orders, the Commissioner would report to the Assembly’s Committee on Standards of Conduct.

11. The Commissioner is to have the further functions set out in section 6 (see below).

12. “Relevant provisions” are rules about the conduct of AMs, defined in a way which is based on the functions delegated to the Committee on Standards of Conduct by the current Standing Order 16.1, but with sufficient flexibility to enable extensions to those rules to fall within the Commissioner’s jurisdiction. These rules only apply to the Counsel General when that person is also an elected AM (the Counsel General does not have to be an elected AM), or where they relate to the registration, declaration and promotion of

interests covered by section 36 of the Government of Wales Act 2006 (“the Act”).

Section 6: Further functions of the Commissioner

13. The further functions of the Commissioner referred to in paragraph 11 are set out in section 6. They include advising the Assembly on matters of general principle relating to the conduct of AMs, on procedures relating to the investigation of complaints and on matters relating to promoting, encouraging and safeguarding high standards of conduct by AMs generally.

14. The Commissioner may also advise AMs and the public on procedures for making complaints and for investigating them.

Section 6A: Duty of the Clerk to refer a matter to the Commissioner

15. The Clerk of the Assembly undertakes a number of functions including that of being the principal accounting officer of the Assembly Commission. This section requires the Clerk to report in writing to the Commissioner failure by AMs to comply with any of the relevant provisions (described in paragraph 12 above) that relate to this accounting function (such as misuse of funds). The Commissioner must treat any such referral as a formal complaint under section 5 of the Measure and act accordingly.

Section 7: Investigation of Complaints by the Commissioner

16. This section requires the Commissioner to investigate complaints, and to report on them to the Assembly (i.e. in practice to the Committee on Standards of Conduct) in accordance with Standing Orders and the Assembly’s procedures for investigating complaints. So, the Assembly retains control of laying down the basic rules relating to the handling of complaints. The application of those rules to individual cases will be entirely under the control of the Commissioner. Subject to the provisions of subsection (3) the Commissioner is to report on an investigation to the Assembly (i.e. to the Committee on Standards of Conduct). The Commissioner’s report is not to include any recommendation as to what sanction should be imposed on an AM against whom a complaint is upheld. That will remain the province of the Committee on Standards of Conduct and of the Assembly.

17. If, in the course of carrying out an investigation, the Commissioner becomes aware of any circumstances which give rise to issues of general principle or of general practice that may be relevant to the functions of the Clerk as principal accounting officer to the Commission, then the Commissioner must communicate those circumstances in writing to the Clerk. An example would be if an investigation by the Commissioner were to identify some systemic weakness in the controls which applied to the payment of

allowances to AMs, or some lack of clarity in the rules relating to such payments.

18. The Commissioner must also communicate to the Clerk in writing any circumstances which, upon further consideration by the Clerk, could require the Clerk to take action under section 6(A). This safeguard preserves the Commissioner's independence by ensuring the Commissioner is never required to instigate an investigation without first receiving a formal complaint under section 5 of the Measure.

19. The Commissioner may, in circumstances which will need to be prescribed in rules made under the Assembly's Standing Orders, dismiss a complaint summarily, in which case the Commissioner will not report to the Committee but will, instead, notify the complainant and the AM in question, giving reasons for the dismissal. The current rules (National Assembly for Wales Procedure for Dealing with Complaints against Assembly Members) empower the present non-statutory Commissioner to dismiss a complaint which the Commissioner considers to be inadmissible (paragraph 2.3 of the Procedure), for example if it is not made within a year of the date when the complainant could reasonably have become aware of the conduct complained about or if there is insufficient evidence to support a complaint.

Section 8: Power to call for witnesses and documents and Section 9: Witnesses and documents: notice

20. These sections, which follow the pattern of sections 37 and 38 of the Act, provide machinery whereby the Commissioner may require any person whom the Commissioner believes may have information relevant to an investigation to attend before the Commissioner to give oral evidence or to produce documentary evidence. In order to impose such a requirement the Commissioner must give the person in question written notice.

21. These are key provisions of the Measure. They provide the Commissioner with the powers to carry out rigorous investigation of complaints. The powers to be conferred on the Commissioner are in some respects wider than those which can be exercised by the Assembly (and Assembly Committees) under the Act. The Assembly's powers can only be exercised in support of their scrutiny of the Welsh Ministers and in relation to persons involved in the exercise of functions or the carrying on of activities in relation to Wales. Other than the restriction mentioned in paragraph 23 the only limit on the persons who can be required to give or produce evidence is that evidence must be relevant to an investigation being carried out by the Commissioner.

22. The existence of the power under section 8 (and of the complementary power under section 10) does not mean that the powers in question are likely to be used routinely. The Commissioner will only need to compel a witness to

give evidence or to produce documents if that person refuses to do so voluntarily.

23. Subsection 9(2) provides that notice requiring a person to attend or to produce documents may only be given to a person at an address in Wales or England, since an Assembly Measure may not contain provisions whose legal effect extends outside the England and Wales jurisdiction.

Section 10: Oaths and affirmations

24. Section 10 (which parallels section 40(1) of the Act) enables the Commissioner to require a person who attends to give evidence (whether voluntarily or not) to take an oath or make an affirmation. The importance of this power is that it further strengthens the Commissioner's investigatory power. A witness who, having taken an oath or made an affirmation, gives false evidence, commits the offence of perjury under section 2 of the Perjury Act 1911 (currently punishable by a fine and up to two years imprisonment).

Section 11: Privilege and public interest immunity

25. This section (compare section 37, subsections (8), (9) and (10) of the Act) provides protection for witnesses against being compelled to give the Commissioner certain kinds of evidence. Subsection (1) enables a witness to claim the same privileges as a witness giving evidence in a court of law (for example the privilege against self-incrimination and the privilege against disclosing privileged legal advice). Subsection (2) protects prosecuting authorities from having to disclose information relating to criminal prosecutions (since to do so would be likely to prejudice such prosecutions).

Section 12: Offences

26. This section creates a number of sanctions in support of the Commissioner's powers under sections 8, 9 and 10. The comparable provision of the Act is section 39.

27. It will be a criminal offence punishable by a fine of up to level 5 on the standard scale (currently £5000) and up to 3 months imprisonment for a person who has been required by the Commissioner to give evidence or to produce a document to refuse or to fail to do so without reasonable excuse, to refuse or fail (again without reasonable excuse) to answer a question or to intentionally alter, suppress, conceal or destroy a document which was required to be produced.

28. Subsection (3) makes it an offence (punishable in the same way) to refuse to take an oath or make an affirmation when required to do so by the Commissioner.

Section 13: Restriction on disclosure of information

29. This section restricts the disclosure of information provided by a complainant or any other person to the Commissioner in relation to a complaint. Neither the Commissioner nor anyone working for the Commissioner may disclose such information except to the extent that this is necessary to enable the Commissioner to discharge his or her functions under the Measure (for example as part of the Commissioner's report to the Committee on Standards of Conduct), comply with any other statutory obligation (such as under the Data Protection Act 1998) or the investigation of any criminal offence. No specific sanction is prescribed but unauthorised disclosure would expose the culprit to civil action in a number of ways (see for example paragraph 30).

Section 14: Protection from defamation actions

30. In order to enable the Commissioner to investigate complaints rigorously, those who provide information to the Commissioner in relation to an investigation need to be protected against defamation claims in relation to that information. Section 14 provides this protection. Unauthorised disclosure by the Commissioner (or those working for the Commissioner), contrary to section 13, would mean that the person making that disclosure would lose this protection.

Section 15: Transitional provision

31. This section enables the Commissioner, when appointed, to take over or continue, if directed to do so by the Assembly (i.e. by the Committee on Standards of Conduct), an investigation which has already been commenced under the present non-statutory arrangements.

Section 16: Annual report

32. This section requires the Commissioner to report annually to the Assembly. The Assembly may give directions as to the form of the report and the nature of the information it must contain but the report must in any event include information relating to the financial affairs of the office. (See also paragraph 7 of the schedule below). The Commissioner must also, if reasonably practicable to do so, comply with any requirement by the Committee on Standards of Conduct to attend before the Committee and to

provide information about the matters which are required to be included in the annual report.

Section 17: Interpretation

33. Section 17 defines terms used in the Measure.

Section 18: Short title and commencement

34. The provisions establishing the office of Commissioner and enabling a Commissioner to be appointed are to come into force on the day after the Measure is approved by Her Majesty in Council. The remaining provisions, dealing with the powers of the Commissioner, are to come into force in accordance with the procedure set out in subsection (3) which will be triggered by the appointment of the first Commissioner under the Measure.

The Schedule

35. The Schedule contains a number of detailed administrative matters relating to the Commissioner.

Paragraphs 1 and 2

36. These paragraphs require the process for identifying the person whose name is to be submitted to the Assembly for appointment to involve a fair and open competition. Arrangements for identifying the best candidate and for settling the detail of the terms of the proposed appointment (for example remuneration) may be delegated to the Assembly Commission, to a committee (e.g. the Committee on Standards of Conduct) or to staff (or a combination of these) and allow for an independent element to be included in the selection process.

Paragraphs 3 and 4

37. The Commissioner is to be a corporation sole. Changes in the identity of the person who holds the office will not, therefore, affect legal rights, duties and liabilities associated with the office. Provision is made for the authentication of formal documents.

Paragraph 5

38. This paragraph requires the Commission to pay the Commissioner the salary and other benefits, including any pension, which have been agreed

upon appointment. The Commission must also discharge reasonable liabilities lawfully incurred by the Commissioner in employing staff or purchasing services or in making payments to persons required to attend to give evidence or to produce documents. Payments in respect of the Commissioner's salary and allowances and any pension payments are charged on the Welsh Consolidated Fund and can therefore be made out of the Welsh Consolidated Fund without the need for further legal authority.

Paragraph 6

39. This paragraph enables the Commissioner to employ staff or purchase services and to make arrangements with other public bodies or office holders (e.g. an ombudsman) for that person to provide services to the Commissioner. So, the Commissioner could arrange with an ombudsman or similar official for the supply of the administrative back-up needed by the Commissioner.

40. However, when using these powers, the Commissioner must have regard to the responsibilities of the Clerk, as principal accounting officer for the Commission.

41. The Commissioner must also consult with the Clerk in relation to any financial liability the Commission will be required to discharge (e.g. in relation to the employment of staff, securing provisions of goods and services or in relation to allowances and expenses of persons called to give evidence or produce documents), and must have regard to any representations made by the Clerk in response. This consultation may take place in one of three ways. The Commissioner may agree a budget in advance in relation to particular kinds of expenditure, or may notify the Clerk in advance of a proposal to incur a particular item of expenditure or, in an urgent case may incur the liability without notifying the Clerk in advance but must then do so as soon after as is reasonably practicable.

42. These provisions are intended to preserve a balance between the independence of the Commissioner and the need for the Commissioner to have access to sufficient resources to carry out the functions of the office effectively and the duty of the Clerk to ensure that public funds, provided through the Commission, are expended lawfully.

Paragraph 7

43. In view of the limited scope of the Commissioner's activities the Measure does not require the Commissioner to prepare annual estimates or to produce formal annual accounts. It is anticipated that, instead, the Commission, through whom all payments to or on behalf of the Commissioner will be made, will include information as to the Commissioner's financial affairs as a separate section of the Commission's accounts. This paragraph requires the

Commissioner to provide the Commission with the information necessary to enable this to be done.

Annex 1: Consultation Questions

1. The proposed Measure relates to establishing a statutory Commissioner for Standards. Would it be better for the Assembly to tackle the issue in an alternative way?
2. The Auditor-General for Wales and the Public Service Ombudsman for Wales are “watchdog” bodies which are independent of the National Assembly for Wales and established in law. Should the status of the Commissioner for Standards be established in law in the same way?
3. The Auditor-General for Wales and the Public Service Ombudsman for Wales are currently appointed by the Monarch on the recommendation of the Assembly. How should the Commissioner for Standards be appointed?
4. The Commissioner for Standards is currently appointed for a 4 year period. The Auditor-General for Wales is appointed for 5 years and the Public Service Ombudsman for Wales for 7 years. The Scottish Standards Commissioner is appointed for 6 years and the Parliamentary Standards Commissioner of 5 years. How long should the Commissioner for Standards be appointed for?
5. The current Commissioner for Standards is paid an annual retainer and receives fees on a basis of days worked. The posts of Auditor-General for Wales and the Public Services Ombudsman for Wales are funded from the Welsh Consolidated Fund. How should the post of Commissioner for Standards be funded?
6. The Commissioner for Standards is currently supported by Assembly Parliamentary Service staff who are not appointed exclusively to support his work. Should the Standards Commissioner have dedicated staff and should he or she be able to appoint his/her own staff, or be supported by another organisation such as the office of the Public Services Ombudsman?
7. Should the Commissioner for Standards have a role in promoting a framework for high standards in public life?
8. Should the Commissioner for Standards be able to give general advice on standards of conduct?
9. Should the Commissioner for Standards advise Assembly Members on their conduct as well as investigating complaints?
10. Should the Commissioner for Standards have independent discretion to decide whether or not a complaint merits investigation or to initiate an investigation?
11. Should the Commissioner for Standards have the powers to be able to summon persons, and require papers and records to be provided?
12. Should the Commissioner for Standards have the ability to make findings and conclusions public?
13. Should the Commissioner for Standards report directly to the Assembly, or to the Standards of Conduct Committee?
14. Should the Commissioner for Standards have the same role relating to Ministers as for other Assembly Members?
15. What will be the practicalities of making the system work and how should the proposed Measure make provision for these?

In the first instance the following consultees were contacted:

- Scottish Parliamentary Standards Commissioner
- Scottish Parliament Committee on Standards, Procedures and Public Appointments
- Standards in Public Office Commission – Ireland
- Houses of the Oireachtas - Ireland
- Public Services Ombudsman for Wales
- Auditor General for Wales
- Commissioner for Standards for Wales
- First Minister of the Welsh Assembly Government
- Assembly Commissioners
- Party Leaders in the Assembly
- WLGA
- Northern Ireland Assembly
- House Of Commons
- Study of Parliament Group
- Professor Diana Woodhouse
- The Law Society Office for Wales
- Cymru Yfory - Tomorrow's Wales
- Committee for Standards in Public Life



WALES AUDIT OFFICE
SWYDDFA ARCHWILIO CYMRU

Wales Audit Office / Swyddfa Archwilio Cymru

Date: 14th January 2009
Our ref: JC/0785/fgb
Your ref:
Pages: 1 of 2

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Chair, Committee on Standards of Conduct
National Assembly for Wales
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Jeff Cuthbert

**DRAFT PROPOSED NATIONAL ASSEMBLY FOR WALES
STANDARDS COMMISSIONER MEASURE**

Thank you for your letter of 6 January 2009 concerning the draft proposed Measure to establish a National Assembly for Wales Standards Commissioner.

I have reviewed the content of the draft proposed Measure and its Explanatory Memorandum. I can confirm that it would be appropriate for the expenditure associated with the salary, allowances, superannuation benefits, pension, gratuities and other expenses incurred by (or on behalf of) the Standards Commissioner to be charged to the Welsh Consolidated Fund.


As I understand the current draft proposals, all such expenditure is likely to be met by the National Assembly for Wales Commission (the Assembly Commission) on behalf of the Standards Commissioner, and reported in the Assembly Commission's annual accounts. As a result, the Clerk to the Assembly Commission will retain the personal 'Accounting Officer' responsibilities associated with that expenditure.

I would expect, therefore, that the Clerk will wish to satisfy herself that appropriate safeguards are established from the outset over the regularity, propriety and value for money of any public expenditure incurred by or on behalf of the Standards Commissioner. However (and as I suggested in my consultation response of 22 December 2008), I do consider that it would be appropriate to make the provision for such safeguards explicit through amendment of paragraph 5 of the draft Schedule.

Page 2 of 2
Our reference: JC/0785/fgb
Date: 14th January 2009

I hope that this confirmation is helpful to your Committee's consideration of the draft proposed Measure.

I am copying this letter to Claire Clancy, Clerk to the National Assembly for Wales Commission.

Yours sincerely,


JEREMY COLMAN
AUDITOR GENERAL FOR WALES

cc Ms Claire Clancy