

Y Pwyllgor Safonau Ymddygiad

SOC(3)-01-09 papur 2

Teitl: Y Comisiynydd Safonau – ymatebion i'r ymgynghoriad

Cefndir

Mae'r papur hwn yn crynhoi'r ymatebion a gafwyd i ymgynghoriad â rhanddeiliaid a phartion perthnasol eraill ynghylch drafft i Fesur arfaethedig sydd â'r bwriad o sefydlu swydd y Comisiynydd Safonau drwy statud.

Yn ei gyfarfod ar 20 Hydref 2008 cytunodd y Pwyllgor i gynnal ymgynghori ynghylch manylion y Mesur drafft arfaethedig a'r Memorandwm Esboniadol.

Anfonwyd gwahoddiad i gyflwyno tystiolaeth erbyn 31 Rhagfyr. Mae Atodiad 1 i'r papur hwn yn crynhoi'r ymatebion a gafwyd.

Bydd yr ymatebion i'r ymgynghoriad hwn yn galluogi'r Pwyllgor i gytuno ar y cyfarwyddiadau y dylid eu rhoi i gyfreithwyr Gwasanaeth Seneddol y Cynulliad o ran gwelliannau i'r drafft fel bod y Mesur a gyflwynir yn cyflawni ei amcanion cyffredinol.

Camau i'w cymryd

Gwahoddir y Pwyllgor i:

Ystyried yr ymatebion a ddaeth i law ac i drafod y materion sy'n deillio ohonynt.

Gwasanaeth y Pwyllgorau

Annex 1

Consultation questions

Having undertaken a consultation exercise on its intention to propose an Assembly Measure to establish the office of a statutory Commissioner for Standards, the Committee on Standards of Conduct agreed the wording of its draft proposed Measure and undertook a further consultation period. The Committee asked for the views of interested parties on whether

they support the key provisions set out in the proposed Measure,

they think the proposed Assembly Measure will achieve its overall purpose and aim,

they think the estimated financial costs of introducing the proposed Measure, detailed in the Explanatory Memorandum, are accurate,

there are further provisions that they would like to see added to the proposed Assembly Measure

In addition the consultation was available via the web site of the National Assembly for Wales, and open to all.

Responses to Consultation

Responses were received from the following:

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.

Summary of Responses

A) Do you support the key provisions set out in the proposed Measure?

Consultees who responded were supportive in broad terms of the key provisions set out in the proposed Measure. 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.

B) Do you think the proposed Assembly Measure will achieve its overall purpose and aim?

The responses indicate agreement that the Measure will achieve its overall purpose and aim

C) Do you think the estimated financial costs of introducing the proposed Measure, detailed in the Explanatory Memorandum, are accurate.

The Auditor General's view states that the estimate of costs set out in the Explanatory Memorandum appear to give a reasonable indication of the likely range of costs of running the arrangements provided for in the Proposed Measure. But makes clear he is not in a position to say whether the estimated costs are accurate.

The non-statutory Commissioner for Standards felt that a statutory Commissioner's remuneration and contracted hours of work may be higher than those experienced during his time in office. He felt there are aspects of the Measure which may incur some additional costs as they are different from the current position and which could be flagged in the Explanatory Memorandum eg the payment of reasonable allowances to witnesses and issues relating to staff and services. He acknowledges that the majority of historical costs derive from the level of activity generated from the investigation of complaints, and that it is not possible to provide a reasonable estimate of this aspect.

D) Are there further provisions that you would like to see added to the proposed Assembly Measure?

Summary of comments received relating to specific sections:

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

The Scottish Standards Commissioner expresses concern 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. Oonagh Gay and Barry K Winetrobe write that their study 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) The Commissioner for Standards considers that a key responsibility of the role should be to promote standards generally and to help build the ethical framework of the National Assembly for Wales. He would like to see this side of the Commissioner's work 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.

Oonagh Gay and Barry K Winetrobe feel that 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, Oonagh Gay and Barry K Winetrobe 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. The Commissioner for Standards queried the need to include 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. Oonagh Gay and Barry K Winetrobe draw attention 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. They suggest 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): The NAFW Commissioner has concerns about the working of this section in practice. The EM para 27 - specifies that the transitional provisions relate to investigations that have commenced under **present arrangements**. Under those arrangements, the Assembly does not receive complaints, they are made directly to the Commissioner who reports to the Committee only if the complaint proceeds to formal investigation. In addition, present arrangements mean the Assembly would not be investigating a complaint unless the Commissioner had already referred it on – it would not therefore be appropriate to refer such complaints back to the Commissioner.

Schedule and other comment

The Auditor General considers that there is a need for some modification of the finance provisions.

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 so that the terms of employing staff, procuring services and meeting the allowances and expenses of persons giving evidence are subject to the prior agreement of the Clerk to the National Assembly for Wales Commission (as Accounting Officer for that expenditure). Further he considers that it would be appropriate to make the provision for such safeguards explicit through amendment of paragraph 5 of 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.

Oonagh Gay and Barry K Winetrobe made some additional points. They draw attention 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 considers 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.)

In addition the current NAFW Commissioner for Standards expressed a view that the Measure should reflect the existing role name to provide consistency, to become the 'Proposed National Assembly for Wales Commissioner for Standards Measure'.

The Clerk to the Assembly, as Accounting Officer for the Commission, has requested that the Measure should require the Commissioner, where an investigation reveals issues relevant to the functions of the accounting officer (e.g. lack of clarity in rules relating to expenses), to bring those issues to the attention of the accounting officer.

Finally, the Scottish Commissioner pointed out an error in the EM under the Arrangements in the rest of the UK Section. The EM states (under the Scotland heading) that the Scottish Commissioner is appointed for a 3 year term, but it's actually a 5 year term.