

NATIONAL ASSEMBLY FOR WALES COMMISSIONER FOR STANDARDS MEASURE 2009

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

General scheme of the Measure

3. The Measure consists of 21 sections and a Schedule. Sections 1 to 5, together with the Schedule, contain provisions about the office of National Assembly for Wales Standards Commissioner (“the Commissioner”). Sections 6, 7 and 8 deal with the Commissioner’s functions. Section 9 sets out the duty of the Clerk of the Assembly to refer matters to the Commissioner. Sections 10 to 18 provide the Commissioner with the powers to discharge his or her functions effectively. Finally, sections 19 to 21 contain general provisions.

Section 1: The Commissioner

4. 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”), which for these purposes includes the Counsel General where that office holder is not an AM, 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 a number of circumstances arise, namely if he or she: becomes a candidate for election to the Assembly; is appointed to the office of Counsel General or is temporarily designated to exercise the functions of that office; or joins the staff of the Assembly or Welsh Assembly Government.
5. 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).
6. 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 2: Principal aim of the Commissioner

7. 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 3: Further provision about the Commissioner

8. This introduces the Schedule (see below).

Section 4: Appointment of an Acting Commissioner

9. 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 5: Independence of the Commissioner

10. **Section 5** 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 19 (see below).

Section 6: Functions of the Commissioner

11. **Section 6** sets out the functions of the Commissioner.
12. 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.
13. “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).
14. The Commissioner may also advise AMs and the public on procedures for making complaints and for investigating them.
15. The Commissioner is to have the further functions set out in section 7 (see below).

Section 7: Further functions of the Commissioner

16. The further functions of the Commissioner 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.

Section 8: Ministerial Code

17. **Section 8** emphasises that the powers of the Commissioner (as set out in sections 6 and 7 of the Measure) do not extend to expressing any view on the standards of conduct of those AMs who are Ministers when acting in their separate ministerial offices. Such matters will continue to be dealt with exclusively under the terms of the Welsh Ministerial Code.

Section 9: Duty of the Clerk to refer a matter to the Commissioner

18. 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 13 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 6 of the Measure and act accordingly.

Section 10: Investigation of Complaints by the Commissioner

19. 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.
20. 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.
21. 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 9. 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 6 of the Measure.
22. 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 on Standards of Conduct 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 11: Power to call for witnesses and documents and Section 12: Witnesses and documents: notice

23. 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.
24. 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 26 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.

25. The existence of the power under section 11 (and of the complementary power under section 13) 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.
26. Subsection 12(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 13: Oaths and affirmations

27. Section 13 (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 14: Privilege and public interest immunity

28. 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.
29. 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, and the Counsel General where proceedings have been instigated in accordance with subsection (3), from having to disclose information relating to criminal prosecutions (since to do so would be likely to prejudice such prosecutions). Subsection (3) makes it clear that the Counsel General may rely on the immunity provided for in subsection (2) in proceedings instituted by or on behalf the Welsh Ministers, the First Minister or the Counsel General.

Section 15: Offences

30. This section creates a number of sanctions in support of the Commissioner's powers under sections 11, 12 and 13. The comparable provision of the Act is section 39.
31. 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.
32. 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 16: Restriction on disclosure of information

33. 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 to 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 34).

Section 17: Protection from defamation actions

34. 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 17 provides this protection. Unauthorised disclosure by the Commissioner (or those working for the Commissioner), contrary to section 16, would mean that the person making that disclosure would lose this protection.

Section 18: Transitional provision

35. 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 19: Annual report

36. 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 that Committee and to provide information about the matters which are required to be included in the annual report.

Section 20: Interpretation

37. Section 20 defines terms used in the Measure.

Section 21: Short title and commencement

38. 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

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

Paragraphs 1 and 2

40. 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

41. 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

42. 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

43. 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.
44. However, when using these powers, the Commissioner must have regard to the responsibilities of the Clerk, as principal accounting officer for the Commission.
45. 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.
46. 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

47. 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

*These notes refer to the National Assembly for Wales
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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.