

# Proposed National Assembly for Wales Standards Commissioner 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 the view of the Committee on Standards of Conduct the provisions of the *Proposed National Assembly for Wales Standards Commissioner Measure*, introduced by on **xxxxxx**, would be within the legislative competence of the National Assembly for Wales.

**xxxxxx**

Member in charge of the proposed Measure

**Date**

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# **Part 1: Background and Purpose of the Proposed Measure**

## **1 Introduction**

On the 21<sup>st</sup> 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.

## 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.<sup>2</sup>

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**

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.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup>

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.<sup>6</sup>

## **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.<sup>7</sup>

### **1.1**

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

<sup>4</sup> 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>

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> 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](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.<sup>8</sup>

## **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.

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 three year term.<sup>9</sup> The SPSC may be removed by the SCPB 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 SCPB 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.<sup>10</sup> 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

## 1.1

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

<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

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

### 1.1

<sup>11</sup> 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.

<sup>12</sup> Op.cit., NafW, Standing Orders, SO.16.3.



- 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

In establishing the general principles of the Measure for Stage 1, the Committee 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. The Auditor General for Wales (AGW) noted that whilst the current arrangements work well, a statutory post would provide greater protection and authority and ensure that properly defined arrangements were in place. He supported the application of the principles outlined in Professor Woodhouse's 2002 report "*Review of the Standards of Conduct Regime of the National Assembly for Wales*" to the office.

The Public Services Ombudsman for Wales (PSOW) likewise supports the post being established in law and to be, “*insofar as is feasible, independent of the National Assembly for Wales.*”

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

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.

#### *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. Both the PSOW and the AGW considered that promoting a framework of high standards in public life would be consistent with such a (high profile) role.

The PSOW noted that the Commissioner would have an overarching perspective on standards of conduct by Assembly Members that would make her/him well placed to undertake the function of issuing general advice on standards of conduct, and that there should also be provision for powers to issue statutory guidance.

Following the Woodhouse report principle of “Advice as Prevention”, the Auditor General also considered that the Commissioner should be able to give both general advice and advice to Members on conduct, but both the request and response should be in writing.

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. There is a deliberate splitting of roles in the Scottish Parliament, with the Clerk to the Standards, Procedures and Privileges Committee advising Members in relation to the code of conduct, so that the Commissioner does not have to investigate a complaint about an issue on which they have previously given advice. The Scottish PSC noted there were some advantages in combining the roles, as in Westminster, but *“I think the need for the Commissioner to be demonstrably independent from the Parliament or Assembly and unbiased and impartial in investigation persuades me that the separation of roles is preferable.”*

In Ireland the Standards Commission’s principle functions include the provision of advice and guidelines on compliance with the Ethics Acts, the administration of disclosures of interests and tax clearance provisions, and investigations into possible contraventions, whether as a result of complaint or on its own initiative. They also publish and distribute the Code of Conduct, which is drawn up by the appropriate Committees on Members’ Interests, and by the Government for Office Holders, following statutory consultation with the Standards Commission.

#### *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.

The PSOW thought there should be independent discretion to decide whether or not a complaint merits investigation and to initiate an investigation: *“From the experience of the office, some complaints are insufficiently serious to warrant an investigation and to do so would not be an appropriate use of public money.”*

The AGW noted that independent discretion to decide on investigating a complaint or initiating an investigation was common practice in other models and supported by the Woodhouse report.

The PSOW supported powers to summon persons, and require papers and records to be provided: *“This would reflect the powers of the Ombudsman which have proven an indispensable aspect of the role. Without such powers, it would be difficult if not impossible to properly investigate allegations.”*

The AGW also felt that the Commissioner should not be reliant on the cooperation of Members or on the Standards of Conduct Committee to exercise its discretion in calling people or papers.

The Scottish PSC considers it very important to have independent powers to call and not rely on powers of the Committee or Assembly, even if those powers rarely need to be used. The Standards Commission in Ireland also has the power to call papers under the Ethics Acts.

### *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 AGW considered 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. (No examples of 'compelling reasons for confidentiality' were detailed in his response). The PSOW similarly supported this for reasons of transparency and public accountability.

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.

The Standards Commission in Ireland holds public hearings and publishes investigation reports. It provides an annual report to the Minister for Finance which is laid before the Irish Parliament no more than two months later.

The Scottish PSC said that the Commissioner should be able to investigate complaints independently of the Committee and the Assembly prior to reporting to the Committee on Standards of Conduct.

### *Appointment*

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

The AGW suggested that as the UK Parliamentary Commissioner is appointed by resolution of the House of Commons and the Scottish PSC following an open recruitment by the corporate body and subsequent agreement of Parliament, that the Commissioner for Standards be similarly appointed by a resolution of the National Assembly. He also suggested a period of seven years, within the range of other similar offices.

The PSOW has given detailed consideration to appointment and taken the views of the British and Irish Ombudsman Association into account. He has concluded that in order to achieve the desired levels of objectivity and independence, the appointment should be for a term of five years or more.

The Scottish PSC felt strongly that appointments should not be subject to a re-appointment process but be for a single term, non-renewable. The main justification being the *“undesirable potential pressure on the independence and perceived independence of the postholder”*. He noted that The Committee on Standards in Public Life has also concluded this in relation to the equivalent post in Westminster, recommending that in future the PSC should have a single term of 5-7 years. The AGW also supports appointment on a non-renewable basis in line with evolving practice for other offices.

The legislation in Ireland provides that the Chairperson and ordinary members of the Standards Commission are appointed for a six year term and may be reappointed for a second or subsequent term.

### *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. He has provided the Committee with details of current arrangements, including providing standards-related advice to Members, processing complaints and dealing with correspondence and enquiries. In relation to handling complaints, the Commissioner emphasises that any role for staff has been limited to gathering evidence or clarifying facts and that it is for the Commissioner alone to consider that evidence.

The Commissioner notes that Assembly Commission staff have maintained the distinction between supporting his independent role as Commissioner and their responsibilities in regularly providing advice and guidance to Members in other roles, and that Assembly Members are also aware of the distinction between the two roles. His response recognises the need for further consideration of the way in which the Commissioner is supported in light of the proposed Measure, and that this presents an opportunity to create a properly resourced independent office in line with the revised role and enhanced profile. It is hoped that those elements that currently work well for the Commissioner in his non-statutory role will be continued and where necessary enhanced when support to the statutory Commissioner is considered.

#### *Other issues*

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

The First Minister referred the Committee to his previous letter of 31 January 2008 to the Committee Chair, and set out that *“The Ministerial Code covers every aspect of Ministerial practice with particular emphasis on those areas where potential difficulties and conflicts may arise. The code places a clear duty on the First Minister to ensure that Ministers comply with the Code. The fundamental principle is that investigations into the conduct of Ministers in the performance of their Ministerial duties must remain a matter for the First Minister.”*

In addition he highlighted 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.”*

The AGW 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.”*

The PSOW said that the arrangements should apply in the same way for Ministers when they are acting in their capacity as Assembly Members; and recognised there are other mechanisms already in place with regard to Ministers' conduct in respect of their executive/administrative functions.

In Ireland the Standards Commission has a supervisory role under their Ethics Acts. The broad focus of the Ethics Acts is to provide for disclosure of interests, including any material factors which could influence a Government Minister or Minister of State, a member of the Houses of the Oireachtas or a

public servant in performing their official duties. The legislation also requires the drawing up of codes of conduct for ordinary members of the Houses, for office holders (e.g. Ministers of the Government and Ministers of State) and for public servants.

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.

## **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.

The advantage a non-statutory scheme, of the kind currently operated by the Assembly, has 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.

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.

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

There are demands which would result in an increase to cost. New functions could equal increased levels of activity; however this is not likely to be significant. 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.

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.

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## **Part 3: Explanatory Notes**

### **General scheme of the Measure**

1. The Measure consists of 18 sections and a Schedule. Sections 1 to 4, together with the Schedule, contain provisions about the office of National Assembly for Wales Standards Commissioner (“the Commissioner”). Sections 5 to 7 deal with the Commissioner’s functions. Sections 8 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 staff or those who have been members of the Assembly’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.
3. The Commissioner is to be appointed for a fixed term of 6 years. However, it will be open to the Commissioner to apply, after the end of that term, for appointment for a further term.
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 2: Further provision about the Commissioner**

5. This introduces the Schedule (see below).

### **Section 3: Appointment of an Acting Commissioner**

6. 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**

7. 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.

#### **Section 5: Functions of the Commissioner**

8. Section 5 sets out the functions of the Commission.
9. One set of functions is to receive complaints of breaches by AMs of “relevant provisions”, to investigate those complaints and to report on them to the Assembly. “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.
10. The Commissioner is to have the further functions set out in section 6 (see below).
11. “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.

#### **Section 6: Further functions of the Commissioner**

12. The further functions of the Commissioner referred to in paragraph 10 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 high standards in public life generally.
13. The Commissioner may also advise AMs and the public on procedures for making complaints and for investigating them.

#### **Section 7: Investigation of Complaints by the Commissioner**

14. 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 is to retain 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). 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 and of the Assembly.

15. The Commissioner may, in certain circumstances, 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 relevant circumstances include a failure, when making the complaint, to comply with the requirements of the relevant procedure, a lack of evidence in support of the complaint, a complaint of conduct which, even if established, would not amount to misconduct and a complaint which is trivial in nature.

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

16. These sections, which follow the pattern of sections 37 and 38 of the Government of Wales Act 2006 ("the 2006 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.
17. These are key provisions of the Measure. They provide the Commissioner with the powers to carry out rigorous investigations 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 19, 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.
18. 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.

19. 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**

20. 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 (punishable by a fine and up to two years imprisonment).

### **Section 11: Privilege and public interest immunity**

21. This section (cf. 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**

22. 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.

23. 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.

24. 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**

25. 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). No specific sanction is prescribed but unauthorised disclosure would expose the culprit to civil action in a number of ways (see for example paragraph 26).

#### **Section 14: Protection from defamation actions**

26. 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**

27. 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**

28. 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 below.)

#### **Section 17: Interpretation**

29. Section 17 defines terms used in the Measure.

#### **Section 18: Short title and commencement**

30. 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**

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

### **Paragraphs 1 and 2**

32. 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**

33. 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**

34. 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**

35. 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.

### **Paragraph 7**

36. 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.

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## 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?