

ENVIRONMENT, PLANNING AND TRANSPORT COMMITTEE

Date: Wednesday 29 May 2002
Time: 2.00 to 4.45 pm
Venue: Committee Room 3, National Assembly Building

REVIEW OF THE NANTYGWYDDON INVESTIGATION PROCESS

Purpose

1. This paper summarises the comments on the investigation process and invites the Committee to identify lessons for future investigations.

Background

2. The Nantygwyddon investigation was an innovative process for the National Assembly and its subject committees. Views expressed on whether it was a success have been highly positive, and it is possible that in future there may be similar investigations. As part of its oversight of the process the Committee decided to review the investigation process to identify lessons for any future investigations, including ways in which the process could be improved. The views of all the participants were invited.

Comments received

3. Comments were received from those individuals and organisations listed at **Annex A**, copies of individual responses have been circulated to Committee Members. A summary of the main issues raised is at **Annex B**, grouped under themes suggested by the Committee for consideration.

Overview

4. There was a widespread belief that such an investigation would not have happened prior to devolution, and respondents praised the fact that Committee Members had approached it in a way that was not dominated by party politics. Most respondents felt that the Nantygwyddon investigation offered a model for future investigations; achieved its objectives; and was an open and accessible process. Principal areas for consideration are: powers of investigations;

the need for guidance for investigators and participants on roles and responsibilities; desirability of greater support for lay people; how to strike the right balance between enabling the views of participants to be expressed frankly and protecting individuals and organisations from unfair criticism and unsubstantiated allegations.

Implementing the recommendations

5. A strongly held view was that the ultimate success of the investigation would depend on successful implementation of the Committee's recommendations. Local residents have asked for a single individual to be accountable for implementation of the recommendations and to be involved in all decisions relating to the Nantygwyddon site.

6. On 17 July the Minister for Environment is scheduled to report to the Committee on the work underway to implement the Committee's recommendations. **The Committee may wish to invite the Minister to include a report on the steps taken to involve and keep the local community advised of progress relating to the Nantygwyddon site.**

Taking forward the Committee's comments on the process

7. **The Committee may wish to suggest best practice to the Panel of Subject Committee Chairs.**

8. Issues on which the Committee may wish to express a view are as follows:

- **Establishment of an investigation** – subject committees do not have the power to establish investigations. They require a delegation of the necessary powers by the National Assembly in full plenary session. Although Standing Orders make specific provision for initiating a public inquiry (SO 31.4 and 31.5) there is no corresponding provision for initiating an investigation. Members may want to suggest that the Panel of Subject Committee chairs consider whether a standard procedure for setting up investigations along the lines of the Nantygwyddon investigation is desirable;
- **Powers** – the question of the powers available to the Investigator was raised by a number of participants. In considering whether to set up an independent investigation or, alternatively, a public inquiry under section 35(1) of the Government of Wales Act 1998 the Assembly will need to bear in mind the difference in powers available to each, but also the other relative pros and cons. The main advantages of an independent investigation relative to a public inquiry are that it can be completed quickly and at relatively limited cost. On the other hand it has limited power to compel individuals to attend or make information available to the investigation. The main advantage of a public inquiry is that it provides legal power to summon persons and documents, however the process is lengthy and costly. Most respondents thought that an independent investigation model was suitable for Nantygwyddon and the favourable

reception to the Investigation generally supports this view. Members may wish to stress that when a proposal to hold either an Investigation or an Inquiry is being considered, care should be taken to weigh these pros and cons by reference to the particular subject to be investigated;

- **Scope** – at the beginning of the investigation the Committee held two meetings to enable interested parties to identify the scope of the issues needing investigation. The Committee also approved detailed terms of reference for the Investigator. The holding of "scoping" meetings was well received and Members may wish to suggest that the detailed terms of reference of an investigation should not be fixed finally until the outcome of such meetings and the views of the investigator and other interested parties can be fed into them. This would ensure that the detailed terms of reference finally adopted reflect exactly the areas of concern to be addressed;
- **Investigation team** – the Nantygwyddon investigation was carried out by a single Investigator, although he needed to seek outside advice on some issues. Members may wish to suggest that the options of appointing more than one person to conduct an investigation jointly, or of an "assessor" to support the investigator on particular issues, should be considered when the topic to be investigated spans a number of areas of expertise;
- **Support for the investigation** - Members may wish to recommend that careful consideration should be given to the level and nature of legal support required by future investigations. A dedicated legal adviser to the investigation could assist an investigator at public hearings where issues arise as to whether proposed evidence falls within the investigation's terms of reference, or is otherwise inappropriate in content. Such an adviser could also be seen as a protection of witnesses who felt themselves to be vulnerable when giving evidence and could also assist the investigator in ensuring that all relevant areas are covered by the evidence and in assisting in the compilation of the report. Members may also wish to advise those proposing any future investigation of the vital role of the staff needed to manage the resource centre and investigation budget;
- **Support for lay people** - Members may wish to recommended that investigations establish a local resource centre with a computer and photocopier where interested parties can access evidence. Members may also want to identify as an issue to be addressed when considering any future investigation that of providing support for lay people in preparing evidence, and ensuring, as was the case in relation to the Nantygwyddon Investigation, that the procedures for the investigation ensure, as far as possible that lay people are not deterred from nor disadvantaged in presenting their evidence;
- **Collecting the evidence** - the procedure adopted in relation to the Nantygwyddon Investigation was for the investigator to rely on participants, at least in the first instance,

to identify relevant documents and topics to be covered in their evidence. Members may wish to suggest that the process could be accelerated if future investigators take the initiative in identifying relevant material, for example by reviewing the files of public bodies, organisations and individuals themselves and identifying what needs to be placed before the investigation, rather than placing the onus (often resource intensive) on those in possession of the information to determine which information is or may be relevant to the investigation. This could limit the burden on those presenting evidence, and ensure that relevant information was not overlooked;

- **Investigator's reports** – a difficult issue is that of the extent to which those whom an investigator may wish to criticise should have an opportunity to respond before the criticism becomes public. The Nantygwyddon investigation conformed with the strict legal requirement for such an opportunity to be given to those who were to be the subject of criticism of their conduct and who had not previously had the opportunity to defend themselves, but this did leave other individuals and organisations feeling that there were grounds for criticism and possible factual inaccuracies which they should have been given the chance to rebut. Although given an opportunity to make their response to the Committee after the report was published, this was not felt to be a wholly effective means of answering such criticism or correcting such inaccuracies. Members may wish to suggest that there is built into the procedure of future investigations an opportunity for all those subject to potentially critical comments an opportunity to make representations to the investigator before they are finally released into the public domain;
- **Guidance** - Members may wish to suggest that guidance be drawn up to assist a future investigator on the principles for conducting the process; the degree of openness and transparency; how evidence will be presented and assessed; the content and style of report, and any requirement for peer review of the report. The Committee may wish to suggest that the written guidance also be provided to participants in an investigation explaining the nature and timing of all stages of the investigation process and outlining their requirements. The Welsh Assembly Government may wish to separately advise public bodies of their expectations;
- **Recommendations** - Members may wish to recommend that when an investigation is established particular attention is given to incorporating into the overall procedure provision for reporting to the relevant Committee and interested parties on progress towards implementing any recommendations which are adopted by the Assembly.

Recommendation

9. The Committee is invited to consider the suggested lessons for future investigations identified above (see paragraph 8) and agree that they be forwarded to the Panel of Subject

Committee Chairs as a basis for a statement of best practice for any future investigations.

Committee Secretariat

May 2002

ANNEX A

RESPONDENTS

Investigation team

David Purchon, independent investigator

Individuals

June Bacon

Belinda Coutts

Ron Davey

Gwyn Evans

D Hughes

Audrey and Len Long

Brenda May

Garrod Owen

Gareth Thomas

Joan Thomas

William Thomas

D van Steenis

Graham Wayman

Organisations

FoE Cymru Network

Public bodies

Bro Taf Health Authority

Environment Agency Wales

Rhondda Cynon Taf County Borough Council

South Wales Police

Welsh Assembly Government

ANNEX B

SUMMARY OF RESPONSES

1 Terms of reference

a) The scope of the investigation

Many felt that the terms of reference appeared appropriate and enabled major issues to be addressed and lessons for the future identified, and made explicit the purpose, areas for consideration and outcomes expected. One perceived a potential conflict of interests in National Assembly civil servants contributing to terms of reference that would investigate the role of the Assembly, and it was suggested that for future investigations interested parties be involved in drawing up terms of reference. Some commented that the timetable was unrealistic and not enough time was spent on the way forward.

b) Powers of the investigation

Most considered the lack of powers of the investigator and Committee to compel witnesses to give evidence in person or make documents available to the investigation a major weakness,

and some felt that key questions remained unanswered. Others felt that the powers available to the investigator were adequate. Some felt that it was unrealistic to expect individuals to subject themselves to criticism without legal support, others asked that the reasons for non-attendance of key persons be published.

Most considered that the process followed could provide a model for future investigations, but there would be no one-size-fits-all model. Many argued that the process could have been explained more clearly to participants from the outset. Some respondents would have preferred a public inquiry, with some wishing to see an ascription of blame, whilst others considered the avoidance of 'lawyer-domination' to be a strength.

c) Role of the Environment, Planning and Transport Committee

Many commended the efforts of the Chair and Committee, and felt that Committee Members were open minded and non-party political throughout. Some felt that the interface and relationship between the investigator and Committee could have been clarified, whilst the role of parties were reasonable clear to others. Some suggested that the Committee should have had access to expert advice on a range of areas to assist in considering technical issues.

d) Role of an independent investigator

Most felt that the individual chosen as investigator was fundamental to success of the investigation, others that he had not fulfilled the requirements made explicit in terms of reference. The investigator was seen by most as independent, securing public confidence in the investigation process. It was suggested that future investigations could be conducted by a panel of experts, rather than an individual, or that the investigator should be able to appoint experts. There was praise for the investigation team who managed the investigation process.

e) Role of the National Assembly for Wales

Many congratulated the Assembly on setting up and financing the investigation, though one thought the budget was limited. Most commented that the investigation would not have occurred prior to devolution, which one respondent summed up as "no National Assembly for Wales, no independent investigation, it is as simple as that", another as "a beacon for devolution". Others were unclear about the responsibility of the Assembly and distinction between legislature and executive, Members and civil servants. Some felt that the Assembly could have been clearer about what it expected from public bodies, who in turn commented that it was not always clear whom to address concerns about the process during the investigation.

2 Evidence

a) Preparation of written evidence

A number of bodies faced substantial tasks in assembling written evidence, and some said they were unclear about the format and level of detail required. The local authority was commended for making information available and highlighting key issues that formed an integral part of the investigation. Many highlighted that whilst official bodies had resources and assistance of lawyers to prepare evidence, lay people did not, which led to an imbalance, though in their view did not alter the outcome of the investigation.

b) Attendance at public hearings

Most commented that hearings were well attended, welcomed by local residents and seemed well-designed to enable interested parties to participate at minimum inconvenience. Some commented on the lack of wider public or political interest in the investigation. Several witnesses considered that liaison over timing was good, another that changes were made at short notice. Many felt that the submission of oral evidence in advance was good practice, but others commented that official bodies did not always appear to have read evidence or transcripts relevant to their response, with some bodies explaining this was due to delays in publishing transcripts. One body had been unclear about the reasons why individual officers had been invited to give evidence on its behalf.

c) Publication of evidence

Many commented that publication of evidence at the Resource Centre and on the website demonstrated a clear commitment to openness. Some suggested guidance was needed on the information that would be published and its timing.

d) Commercial confidentiality and evidence offered "in confidence"

Most felt that the evidence available to the investigator enabled him to discharge his main functions. Some suggested that consideration should be given to accepting information "in confidence", one that the principle of equity could be undermined by not considering all available evidence, others that evidence should not be accepted "in confidence" as it could not be tested by all parties.

e) Non co-operation of key players – see above under 'powers'.

f) Level of support for lay people

The Resource Centre was commended and proposed as best practice for major inquiries, e.g. planning. Many felt that for future investigations the level of support to lay people should be increased (e.g. legal and clerical support in preparing evidence and making computers

available), as there was inequality in the resources available compared with public bodies. Some commented that the lay people in this case had a high level of expertise, but that this may not always be the case.

g) Protection from defamation proceedings vs. Protection of individuals from unsubstantiated allegations

Several raised concerns that criticisms about individuals made during public sessions had been published in transcripts of the proceedings on the website without those named being informed, given the opportunity to challenge the criticism, or to reply, particularly where observations were made by members of the audience. Others argued that all parties had ample opportunity to state their case and challenge criticisms, both before the investigator and the Committee. Some drew attention to the fact that the investigator had advised witnesses that the proceedings were not privileged for the purposes of the law of defamation, and that unsupported allegations should have been investigated, or witnesses asked to substantiate their views.

3 Consideration of the evidence

a) Testing of evidence at public hearings

Only the investigator was able to 'test' the evidence at public sessions, though some witnesses were happy to take questions of observations from the floor. This was appreciated by the public, but some witnesses considered it unfair, as they could not test assumptions behind the questions posed. Some felt that it was difficult for the investigator to 'test' the evidence of unrepresented lay people whilst maintaining their confidence in the investigation, and that having Counsel to the investigation, rather than the investigator, testing the evidence would have helped.

b) Consideration of evidence by the Independent Investigator

Some, primarily public bodies, were not clear to what extent the investigator or his team carried out research over and above considering evidence submitted to the investigation, commenting that the investigator did not have access to technical experts to assist with consideration of the evidence, and that criteria used to assess and weigh up evidence were not made explicit or published. Some also felt that the evidence did not lead to the conclusions in the investigator's report, and that professional and technical evidence had been omitted from the report.

c) The Independent Investigator's report

Many thought that the investigator's report was comprehensive, well written and easy to understand, whilst others questioned whether it should have incorporated a fuller exposition of the relevant evidence. Some felt the role of the two specialist studies commissioned by the investigator (British Geological Survey and Institute for Environment and Health) could have been more clearly set out in the report, others commenting that the studies had been published relatively late in the process and did not comment on evidence presented to the investigation, nor were they peer reviewed. One body commented that factual inaccuracies in the investigator's report reflected the failings of the process. It was suggested that future reports include a Regulatory Impact Assessment as part of the investigator's brief.

d) Commenting on the Independent Investigator's report

It was suggested that all individuals or organisations reported on or criticised in the investigator's report should have been given the opportunity to respond before the report was published, to reduce subsequent claims of factual inaccuracy. Others were happy with the process.

e) Committee consideration of the evidence

The rigour of the Committee's assessment of the investigator's report disappointed some, whilst others felt that that due consideration was given to the evidence. Some were surprised that the Committee had only questioned public bodies on their response to the investigator's report, others that the Committee sessions appeared to duplicate the work of the investigator. There was frustration that an individual who had hitherto refused to give evidence to the investigation was permitted to give evidence directly to the Committee, without prior scrutiny by the investigator.

f) The report of the Environment, Planning and Transport Committee

Many felt that the Committee's report gave the public a clear indication of the problems in relation to Nantygwyddon, and that it was helpful in identifying which public bodies were responsible for individual recommendations, though there was an expectation that the investigator's report would have formed an annex to the Committee report. One organisation felt that the Committee did not look sufficiently closely at recommendation relating to considering human rights implications of public and quasi-public bodies using legal sanctions against protestors.

4 Conclusions

a) Plenary consideration of the Committee's recommendations

One response stated that "all party approval was refreshing in a climate where politicians are viewed as being in office for themselves and not the good of the public". Some felt that the debate was generally informative and allowed other Assembly members the opportunity to comment. The Minister welcomed the opportunity to set out her views and the way forward. Some felt that Members had failed to consider the long term implications of the recommendations. There was some disappointment amongst local residents at the limited number of seats in the public gallery for plenary sessions.

b) Machinery for implementing and monitoring the recommendations

Many were strongly of the view that the key to the success of the investigation was the implementation of the Committee's recommendations, and that the local community should be informed and involved in all decisions relating to Nantygwyddon site. Some considered the arrangements to be appropriate, others that they had not been made explicit, and concern was expressed about progress in agreeing terms of reference for health studies. It was suggested that someone be appointed to oversee the implementation of the recommendations and act as contact point.

5 Openness and transparency

a) The Resource Centre - see above under 'level of support for lay people'.

b) Accessibility of public hearings

Described as "near perfect", being close to the affected area it was seen to serve the community well, the timing of sessions also being convenient to local residents and the venue accessible by bus and rail. Residents commented that they were made to feel an important part of the process.

c) Accessibility of Committee meetings

Many expressed their gratitude that the Committee had met in the Rhondda, and that seating availability was increased to accommodate interested parties, although there was limited car parking in Cardiff Bay.

d) Transparency of decision making

Some were of the view that there was full transparency, others that the process failed to demonstrate how decisions were made, and concern expressed that residents were now being excluded from decisions taken by public authorities.

e) Use of the National Assembly website – see above under 'written evidence'.

6 General comments on the process

General comments included the view that the investigation was a good way of calling official bodies to account, but that the process had not succeeded in building a new relationship between the local community and public bodies, suggesting the continued involvement of the Committee or Members to bridge the gap. One body felt that the process generally lacked clarity and at times transparency and openness, and that in future where issues were highly political, a judicial inquiry should be used.

Detailed comments were received from FoE Cymru Network proposing lessons for Bro Taf Health Authority, and from Environment Agency Wales on what it considered to be factual errors and misunderstandings in the investigator's report.