



Cynulliad Cenedlaethol Cymru **The National Assembly for Wales**

Y Pwyllgor Safonau Ymddygiad **The Standards of Conduct Committee**

Dydd Mawrth, 21 Chwefror 2012
Tuesday, 21 February 2012

Cynnwys
Contents

Cyflwyniad ac Ymddiheuriadau
Introduction and Apologies

Adolygu'r Cod Ymddygiad a'r Weithdrefn Gwyno: Gweithdrefn Gwyno Ddiwygiedig Ddraft
Review of the Code of Conduct and Complaints Procedure: Draft Revised Complaints
Procedure

Cofnodir y trafodion hyn yn yr iaith y llefarwyd hwy ynndi yn y pwyllgor. Yn ogystal,
cynhwysir cyfieithiad Saesneg o gyfraniadau yn y Gymraeg.

These proceedings are reported in the language in which they were spoken in the committee.
In addition, an English translation of Welsh speeches is included.

Aelodau'r pwyllgor yn bresennol
Committee members in attendance

Mick Antoniw	Llafur (Cadeirydd y Pwyllgor) Labour (Committee Chair)
Mark Isherwood	Ceidwadwyr Cymreig Welsh Conservatives
Kirsty Williams	Democratiaid Rhyddfrydol Cymru Welsh Liberal Democrats

Eraill yn bresennol
Others in attendance

Gerard Elias QC	Comisiynydd Safonau Cynulliad Cenedlaethol Cymru National Assembly for Wales's Commissioner for Standards
-----------------	--

Swyddogion Cynulliad Cenedlaethol Cymru yn bresennol
National Assembly for Wales officials in attendance

Sarah Bartlett	Dirprwy Glerc Deputy Clerk
Lara Date	Clerc Clerk
Joanest Jackson	Uwch-gynghorydd Cyfreithiol Senior Legal Adviser

Dechreuodd y cyfarfod am 9.33 a.m.
The meeting began at 9.33 a.m.

Cyflwyniad ac Ymddiheuriadau
Introduction and Apologies

[1] **Mick Antoniw:** I welcome everyone. In accordance with procedure, this is a bilingual meeting, so participants are welcome to speak in Welsh or English. Headsets are available—channel 0 is for amplification, and channel 1 is for the verbatim translation. It is important to switch off mobile phones. If there is a fire alarm, the ushers will tell everyone what to do and, if necessary, direct us to the fire exits. We have received one apology, which is from Llyr Huws Gruffydd.

9.33 a.m.

Adolygu'r Cod Ymddygiad a'r Weithdrefn Gwyno: Gweithdrefn Gwyno
Ddiwygiedig Ddrafft
Review of the Code of Conduct and Complaints Procedure: Draft Revised
Complaints Procedure

[2] **Mick Antoniw:** Everyone knows that this is a matter on which there has been consultation and so on, so, given that you have seen the papers, the best way of dealing with this is to invite the Commissioner for Standards to introduce his paper and his recommendations. We can then go through those recommendations section by section and discuss anything that arises from that.

[3] **Mr Elias:** The background paper sets out what I wanted to say, which I will now summarise. As you will remember, this is the first stage of producing a new procedure for

dealing with complaints. I have consulted the First Minister, all party leaders, the Presiding Officer and the Chief Executive and Clerk of the Assembly. I was pleased to meet with 12 Assembly Members on separate occasions who sought one-to-one discussion sessions with me on the original proposals to make changes to the standards procedures. I have conducted informal consultations with my counterparts in other legislatures, notably the UK Parliament, the Scottish Parliament, the Northern Ireland Assembly and the Parliament of Ireland, to identify best practice procedures and, where appropriate, lessons learned. I am also grateful to the Assembly's legal advisers and other officials who have contributed in no small part to the draft that I put before the committee today.

[4] The aim of the proposals is to streamline and speed up the process with the benefit of hindsight over the years, without compromising the need for openness and natural justice to prevail. I stress that the amendments are not intended to reduce the protection of Members from vexatious complaints, but to make the procedure less complex and easier to understand for Members and the general public. It remains essential, and I have a clear eye on this, that public confidence in the system is not eroded and that real complaints are dealt with appropriately and handled in a timely fashion.

[5] Therefore, Chair, I have set out in the paper the reasons for some of the changes. Some are cosmetic and some take account of changes to Standing Orders, but there are some material changes, which, as I say, I hope will streamline and simplify the system. The area of criminal offences has been heavily amended—I hope for the better. The area of appeals has been heavily amended in order to produce a speedier and more just solution. I am happy to go through the proposals in whatever way the committee would find most helpful.

[6] **Mick Antoniw:** It may be helpful to go through the main changes. I know that Members have had an opportunity to read the papers and so on. However, as it is an important matter and as this is on the record, we should at least identify the main changes that you think are the most pertinent to the committee.

[7] **Mr Elias:** I would be glad to do that. I will use the page numbers at the foot of the documents. Therefore, my page 5 is the first page of the draft. There is nothing on that page to note in particular.

[8] Page 6 notes that the use of 'must' has replaced 'shall', for clarity and to indicate the requirement that certain steps would be taken by the commissioner and/or the committee. In section 1.3, two paragraphs are now redundant, because there is machinery for appointing an acting commissioner in the Measure. Therefore, the paragraphs in 1.3 are deleted. There is nothing of principle on page 7.

[9] In section 1.8 on page 8, I simply indicate that consideration has been given here to the position of complaints against former Members. It is right to say that, in the case of the UK Parliament, if a Member is not re-elected, the complaint against him or her dies. However, as has been raised in this committee by Mark Isherwood and others on previous occasions, that is not necessarily fair to the outgoing Member, who may have a complete answer to a particular allegation that has been made. Therefore, section 1.8 proposes that

[10] 'consideration of a complaint against a Member who is re-elected will be concluded in accordance with this procedure. In the case of a Member who is not re-elected the sanctions which can be applied in the case of a finding of a breach are restricted and the Committee may take that into account when considering what action to take in relation to any report by the Commissioner on the complaint.'

[11] It will be for this committee, ultimately, to determine whether the complaint is serious enough to justify it being taken forward where the Member has not been re-elected, or

whether it is a situation in which the former Member, if he or she so wished, should be given an opportunity to respond.

[12] Section 2.1 on page 9 is about the question of contact. I would contact a Member if I believed it necessary to do so in order to decide whether the complaint is admissible. That power is specifically given to the commissioner, and it seems to me to be a sensible one.

[13] Regarding section 2.2, it has been necessary on two occasions to report to the committee under the old procedure, and we are suggesting an amendment here—being told that the matter has gone to formal investigation with some detail and then being told what the formal investigation produces. This is part of the streamlining, as I am calling it, whereby there will be only one reporting of the formal investigation when the evidence is to hand. I would suggest that that is a sensible amendment.

[14] Turning to pages 10 and 11, there are some amendments for new Standing Orders to take account of those facts. On page 12, point 4.2.v precludes the commissioner from making any comment or recommendation about sanction, because that is what the Measure requires. The wording has, therefore, been adapted to reflect that. Under 4.2.vi, we have retained and enlarged the requirement on the commissioner to report certain matters to the clerk, again, as required by the Measure.

[15] I point out only, Chair, that at point 4.6 on page 13, the code of conduct would need to be strengthened to say specifically that the contents of the commissioner's report should not be disclosed until it has been published. This comes down to issues of confidentiality, which arise in a number of areas here. As you see, I am suggesting that these are really matters that are now going to be looked at in relation to stage two of this process, when we look at the codes and what can be, or should be, enforced in this area. Again, it is a matter on which there has been considerable consultation with my colleagues in other Parliaments, and practice varies considerably. However, it seems to me that here—not only in my shortish experience here, but in that of my predecessor, too—keeping complaints confidential, if and in so far as it can be done, is the best way to process them. It is a matter for the committee, ultimately, but I have flagged that up as something that will need to be looked at in due course.

[16] Point 5 on page 14, under 'Co-operation of Members', is part of the same issue, in a way, which we will look at in the next phase.

[17] On 'Criminal Offences', under the current procedures, very detailed steps need to be taken in respect of criminal offences, and we suggest wholesale changes, not least to relieve the commissioner of the duty to inform a Member that there may be police inquiries in relation to him or her. There may be circumstances in which it may be very difficult for the commissioner to carry out such a task in accordance with the law of the land. I think that we have debated this on previous occasions, but it is for that reason, among others, that it is now to be left to the commissioner's discretion as to what information will be given where criminal offences or matters of an allegation have to be referred to the police with regard to who is to be told about it and who is not.

[18] Point 6.2 states that

[19] 'consideration of the complaint under this procedure will be suspended until such time as the final outcome of any investigation of the matter by the Police, Crown Prosecution Service or the Courts is known'.

[20] That is, if there is no prosecution, we proceed again, but if there is to be a prosecution, then we await the outcome of that and then the matter would come back to the

commissioner, who would then investigate in the usual way and, ultimately, report in the usual way to this committee. So, the details, as set out in 6.3, 6.4, 6.5 and 6.6, appear to be otiose, and we recommend deletion of those matters, because they do not add to the system. We have simplified that system now such that, essentially, where there is a criminal investigation, it goes over to the prosecuting authorities, and as soon as that has been completed, the complaint will proceed and the commissioner will report to you, the committee, in the usual way.

9.45 a.m.

[21] Turning to page 17, consideration by the Standards Committee, it is stated that:

[22] ‘The committee will meet first in private and will make no findings of substance on the complaints.’

[23] There are issues, but, if you will forgive me for putting it this way, they are not for me, but for the committee ultimately to determine, with, no doubt, the appropriate advice, as to when and where you might sit in public as opposed to in private, but provision is made for that. At the foot of 7.5, on page 19, on the oral hearing, it is stated that:

[24] ‘The Commissioner may be invited to give evidence at the meeting at the discretion of the Chair.’

[25] This is an addition. As you can see from the right-hand column, there is no explicit reference to the commissioner being at the hearing or what role he would play. You, sir, would chair the proceedings and govern procedures, but this specifically gives you the opportunity to invite the commissioner to give evidence at the oral hearing if you and the committee think that is appropriate. Paragraph 7.7 is an amendment for clarity. On 7.10 on page 20, you are a small committee of four and those groups that have had an input into this document did consider the question of a casting vote, but, as you can see, the last words in the right-hand column against 7.10 encapsulates our view that the current arrangements should stand, which is that there has to be a clear majority in favour of whatever your recommendation may be. It has to carry at the Assembly, and, of course, it is not a debated motion as things currently stand.

[26] I move on to 8.1 on page 21 on the provision to the Member, following the committee’s decision, of a copy of the report. We have clarified the position in the second paragraph on page 22 in bold type to refer to the Member being provided with the committee’s report rather than the report being sent to the Member, to ensure that the Member has it before the 10 days for appeal purposes starts to run.

[27] Moving on to 8.7, and the appeal procedure, you will recall that the current appeal procedure involves the establishment of an independent legal person, together with a panel. On the one occasion that it has been done in the recent past, the forming of a panel has been found to be difficult, because of allegiances and matters of that kind, but we have gone, if you like, a stage further here. The appeal can only be against what I would call procedural irregularity of one sort or another: significant factual inaccuracies at 8.4, or procedural irregularities. With respect, we would suggest that that is best determined by a lawyer sitting on his or her own, by way of a judicial review procedure. It would also, of course, be a much shorter procedure, with greater clarity, I think, at the end of the day, and so what we are suggesting in 8.2 is that the Presiding Officer, who receives notification of appeal, shall, on each occasion of such an appeal, appoint an independent, legally qualified person to decide the appeal. The person appointed may not be an Assembly Member, or a Member of the Assembly’s staff, and must have been nominated—page 23, paragraph 8.2—at the request of the Presiding Officer by the senior presiding judge of the Wales circuit.

[28] As you know, a protocol has been in place, but I happen to know that that protocol has not been well regarded by those who have held the office of presiding judge here over the time. However, I understand clearly that the presiding judge of the Wales circuit at any given time would be perfectly happy to nominate an individual capable of dealing with this task, so that the Presiding Officer could appoint that person from time to time.

[29] Paragraph 8.2, which will now follow on from paragraph 7.12, does not make a great deal of sense if one seeks to read it straight through. I therefore suggest that the wording of paragraph 8.2 should be amended to something along the lines of, ‘When the Presiding Officer receives an appeal, he or she must on each occasion appoint an independent legally qualified person to decide the appeal.’ That does not change the meaning of it. The protocol agreed in 2006 would go, and this would simplify the situation, with the establishment of a single individual. Paragraph 8.3 refers to the grounds that would be considered for the appeal, and 8.5 refers to what the independent legally qualified person appointed to decide the appeal will consider, that is, the reports of the commissioner and the committee and any additional written representations made by the appellant. That person will not conduct oral hearings or consider representations from any other source.

[30] Paragraph 8.6 states that:

[31] ‘The person appointed to decide the appeal must prepare, and provide to the Member and to the Committee, a report of his or her consideration of the appeal’

[32] and that they must, if the grounds of the appeal are established—that is, that there is some irregularity—uphold the appeal and refer the complaint back to the committee for further consideration. What is envisaged there, as you will appreciate, is that it will then be for the committee to say that this is a technical matter and that it can correct it now by allowing this evidence to be given or that witness to be called, or, on the other hand, to say that it is so fundamental that matters cannot be taken further and it will dismiss the complaint. It would then be a matter for the committee to determine. It is now encapsulated into two options, and will not include the third option to which the comment in the right-hand column refers. We do not think that that is necessary now, because, if the grounds of appeal are established, the appeal will be upheld, but the report that will go back to the committee will explain why and will allow the committee to take whatever steps, in common sense and law, that it thinks it needs to take, or, under 8.5(ii), that individual will dismiss the appeal if there is no irregularity of the kind indicated.

[33] **Mick Antoniwi:** It is very similar to a judicial review process, is it not?

[34] **Mr Elias:** It is, sir. That is why we think that it is better that is done by a single lawyer and that there are no factual matters to be determined.

[35] Paragraph 8.6 is a new paragraph that clarifies what then happens in relation to reporting by the individual. Paragraph 9 refers to consideration by the Assembly. We have changed the word ‘recommend’, because the committee does not recommend, to ‘decide’. As indicated in the right-hand column, it is not a recommendation, but a decision.

[36] Paragraph 10.1 is an alteration, which may have some significance over time. Currently, it is only during a preliminary investigation, where the facts are not disputed, that the Member can rectify. This simply gives the power, at any stage, if the Chair agrees, for that procedure to be followed through. Obviously, it is going to depend upon the seriousness of the allegation and the complaint. Finally—forgive me, I have taken a bit of time—there is the deletion of paragraph 11, on the annual report. It never seemed to me that that really played a part in the procedure for investigating complaints, anyway, but since that is now part of the

requirement set out in the Measure—that the commissioner shall produce a report—it is suggested that that is deleted from this particular document.

[37] **Mick Antoniw:** Thank you for that comprehensive and thorough report. Does anyone have any questions or views?

[38] **Mark Isherwood:** I would like to pick up on three points. First, building on something that we discussed privately, I would just like confirmation on the record that, in the event of a complaint being referred to the commissioner, when the commissioner will determine whether or not the Member should then be notified, prior to determining whether or not to investigate, that the commissioner would consider whether that complaint might be vexatious or have come from, for example, a stalker or someone with an ulterior motive, as opposed to being a potentially genuine complaint from a person who has no other vested interest in the matter.

[39] Secondly, in terms of the establishment of an independent person to consider an appeal, it is probable that most Members will know, through the course of their work, or even privately, some of those persons who might be appointed to such a position. How, therefore, would we ensure that we avoided any conflict of interest?

[40] Finally, in terms of referral on criminal matters, my understanding is that the 2006 Act would include, for example, a Member's failure to declare that an 18-year-old child still in education had a job. So, for example, if that Member's child moved from six hours a week washing up in a pub to 10 hours a week working in a local shop on a Saturday or Sunday, and they forgot to declare that, must that matter be referred to police, or would it still be at the discretion of the commissioner to encourage the Member to rectify the omission?

[41] **Mr Elias:** On your first point, about a vexatious complaint or stalker, under the provisions, the commissioner retains a power to notify a Member of a complaint. What first triggered this thought was that quite a number of complaints are complaints that, if I can put it this way, would never get off the ground in terms of admissibility. It does not seem to me sensible to trouble the Member by notifying the Member of something that they are never going to hear anything more about. The complaint may itself have been made through a misunderstanding on the part of the complainant as to what was or was not required, and, if they are then satisfied ultimately by what I as the commissioner tell them, it does not seem to me that there is a lot of mileage in notifying Members. However, it is a matter of applying common sense to the circumstances, and, certainly, if I had any inkling that there was more behind the complaint than a genuine concern about an aspect of a Member's behaviour, then I would be certainly likely to take the matter up with him or her or with the chair of the party, or, where the circumstances warranted, with the party leader.

[42] It is very difficult for us to legislate for all circumstances, and, yes, you have to rely upon your commissioner having the common sense to take the right decision. There are some cases that have come across my desk where I believe there may be something beyond what I would call a simple complaint, where I certainly have gone to the Member and told the Member what is going on and what is behind it, as I see it, although I was not going to find the complaint admissible, as part of the protection of the Member in the stalker-type situation that you mentioned, but also because sometimes the Member simply needs to know that there is someone out there who is liable to be making allegations that are vexatious, or to be repeated, but which have no credence or credibility or possibility of being taken seriously at all. It is a difficult one; I cannot give an absolute cast-iron assurance that I would always do the right thing, but I hope that I would.

[43] That was No. 1; forgive me, what was your second point?

[44] **Mark Isherwood:** It was on the appointment of an independent person to consider an appeal and that the person appointed may be personally known by or may personally know the Member.

[45] **Mr Elias:** The fact that the person knows the Member may or may not be a bar. I do not suppose any of us could go into a variety of courts in south Wales and not necessarily know the judge who may be trying a particular case. We may be a witness in the case, and the fact that the judge knows a witness is not a bar to it. However, if I may say so, I take your point entirely, and I think that we must ensure—and I will look to these procedures during the next weeks—that, so far as the Presiding Office is concerned, when he or she is making the appointment at the nomination stage, where the individual has been nominated by the presiding judge, the Member is made aware at that stage of who is to be appointed so that he or she will have the opportunity to say, ‘For these reasons, it would not be appropriate for that individual to be appointed’, because, as you rightly say, those may be facts that would not be known to the presiding judge or the Presiding Officer at the time of nomination and appointment.

10.00 a.m.

[46] So, I will look at that, because it is a safeguard that we may not need to build in, but we need to ensure that there is scope for that to be dealt with.

[47] **Mick Antoniw:** You raise an important point, and, of course, there is a specific duty on the individual who is appointed to identify any particular conflict or reason why they should not be appointed. So, that is an additional safeguard. However, it is one that we will have to have confidence in. Can you comment on the third point?

[48] **Mr Elias:** The third point is on criminal offences. I will not rush to take to the police, without being too flippant about it, convictions of driving without due care and attention or matters that plainly can be resolved in a sensible and constructive way. However, again, I take the point that you make, Chair, in that we must ensure that the wording, which requires me to inform the authorities of criminal offences, is not so tightly drawn as to not give me the discretion to act with common sense where the sort of situation that you described does arise.

[49] The wording of 6.1, as it stands currently reads, ‘the Commissioner must inform the Clerk’, Will I be criticised if I do not follow that in a particular case? Time will tell. However, it may be that we will need to look at that during the next few weeks with a view to coping with the sort of situation that you envisage.

[50] **Kirsty Williams:** I thank the commissioner for the paper. May I move that the committee agrees these changes in principle? I am sure that the commissioner will want to look at some of the exact wording, and I propose that the commissioner brings forward a final version for consideration by the committee at its next meeting. However, in principle, I would like to accept the recommendations made today.

[51] **Mick Antoniw:** I think that the next meeting is on 24 April 2012. Are we in favour of that? I see that we are. Therefore, we can put that on the record formally.

[52] That concludes that item. In relation to what happens now, that will come forward to our next meeting on Tuesday 24 April. There is nothing else that we need to discuss now, is there?

[53] **Ms Date:** I think that there is an intention at that meeting for the committee to look at the timetable for the next phase beyond that.

[54] **Mick Antoniw:** Okay. Is everyone happy with that? I see that you are. I thank Members and the commissioner.

Daeth y cyfarfod i ben am 10.03 a.m.
The meeting ended at 10.03 a.m.