



Welsh Government
Consultation Document

Title: Alleged misconduct of local authority senior officers

Summary: We want to hear your views on proposed changes arising from the Oldham Review

Date of issue: 18 November 2020

Action required: Responses by 10 February 2021

Mae'r ddogfen yma hefyd ar gael yn Gymraeg.
This document is also available in Welsh.

Overview

In October 2019 the Minister for Housing and Local Government commissioned a review into the arrangements for dealing with alleged misconduct of senior officers within local government in Wales. The aim of the review was to consider whether the current arrangements in Wales remain fit for purpose.

Following receipt of the final report Welsh Government is consulting on recommendations including potential changes to the Local Government (Standing Orders) (Wales) Regulations 2006.

How to respond

You can respond to this consultation by completing the consultation response form in this document or completing the consultation response form on our website.

Forms can be returned to us before the 10 February 2021 by e-mail to:

LGD.DemocracyDiversityRemuneration@gov.wales

By post:

Welsh Government
Local Government and Democracy
Cathays Park
Cardiff
CF10 3NQ

Alternatively, if you wish to discuss your response please contact:

Lisa Weetman
Local Government and Democracy

Lisa.weetman@gov.wales
[03000 628081](tel:03000628081)

Further information and related documents

Large print, Braille and alternative language versions of this document are available on request.

Also available in
welsh at:

General Data Protection Regulation (GDPR)

Data provided

The Welsh Government will be data controller for any personal data you provide as part of your response to the consultation. Welsh Ministers have statutory powers they will rely on to process this personal data which will enable them to make informed decisions about how they exercise their public functions. Any response you send us will be seen in full by Welsh Government staff dealing with the issues which this consultation is about or planning future consultations. Where the Welsh Government undertakes further analysis of consultation responses then this work may be commissioned to be carried out by an accredited third party (e.g. a research organisation or a consultancy company). Any such work will only be undertaken under contract. Welsh Government's standard terms and conditions for such contracts set out strict requirements for the processing and safekeeping of personal data.

In order to show that the consultation was carried out properly, the Welsh Government intends to publish a summary of the responses to this document. We may also publish responses in full. Normally, the name and address (or part of the address) of the person or organisation who sent the response are published with the response. If you do not want your name or address published, please tell us this in writing when you send your response. We will then redact them before publishing.

You should also be aware of our responsibilities under Freedom of Information legislation.

Publication of personal details

If your details are published as part of the consultation response then these published reports will be retained indefinitely. Any of your data held otherwise by Welsh Government will be kept for no more than three years.

Your rights

Under the data protection legislation, you have the right:

- to be informed of the personal data held about you and to access it
- to require us to rectify inaccuracies in that data
- to (in certain circumstances) object to or restrict processing
- for (in certain circumstances) your data to be 'erased'
- to (in certain circumstances) data portability
- to lodge a complaint with the Information Commissioner's Office (ICO) who is our independent regulator for data protection.

Data protection

For further details about the information the Welsh Government holds and its use, or if you want to exercise your rights under the GDPR, please see contact details below:

Data Protection Officer:

Welsh Government

Cathays Park

CARDIFF

CF10 3NQ

e-mail address:

Data.ProtectionOfficer@gov.wales

The contact details for the Information Commissioner's Office are:

Wycliffe House

Water Lane

Wilmslow

Cheshire

SK9 5AF

Tel: 01625 545 745 or

0303 123 1113

The link to the website is: ico.org.uk/

Background

The most senior officers of a council i.e. the chief executive, the monitoring officer, and the chief finance officer, have statutory responsibilities to discharge to their councils. Since they work with and report to the elected members, they discharge these responsibilities in a political environment.

There are likely to be tensions where the interests of the political party and the interests of good governance collide. Under these circumstances senior officers should be protected against politically motivated, frivolous or vexatious disciplinary proceedings when acting in accordance with their statutory duties.

A legal framework was therefore introduced by the Local Government and Housing Act 1989 ("the 1989 Act") which contained provisions about the appointment and management of certain local authority staff and also the adoption of procedural standing orders.

Section 8 of the 1989 Act provides for Welsh Ministers to make regulations, including those dealing with disciplinary proceedings and dismissals.

The current regulations are the Local Authorities (Standing Orders) (Wales) Regulations 2006 (amended in 2014) ("the 2006 regulations").

They offer 'statutory protection' to certain chief officers of relevant authorities by requiring that no such chief officer can be disciplined except as a result of a recommendation from a Designated Independent Person (DIP) following an investigation into allegations of misconduct.

Current arrangements as set out in the 2006 Regulations

The process in place for investigating misconduct of senior officers is as follows:

- When allegations of misconduct which may lead to disciplinary action have been made, an investigating committee must be appointed by the council to decide within a month whether the allegation should be further investigated.
- If the committee decides the allegation of misconduct should be further investigated, the council must appoint a Designated Independent Person (DIP) to investigate the matter. Again, this should take place within a month and the person should be agreed between the council and the person under investigation.
- In the case of a failure to agree, the Welsh Ministers must nominate a person to be appointed as DIP.
- Once appointed, the DIP has a number of powers of direction, which include directing that the relevant authority terminate the suspension where one is in force. The DIP also has powers to inspect documents and require members of staff to answer questions.
- The DIP must investigate the allegation and make a report. A timetable for the investigation must be set at the outset. If the council and the officer are (having consulted the DIP) unable to agree a timetable, the timetable is set by the DIP.
- The DIP's report to the council must state an opinion as to whether (and if so, the extent to which) the evidence obtained supports any allegation of misconduct

against the officer and recommending any disciplinary action which appears appropriate for the relevant authority to take against the relevant officer.

- The council must consider the DIP's report within 1 month of its receipt.

The Independent Review of the Arrangements for Dealing with Alleged Misconduct of Senior Officers within Local Authorities

The Minister for Housing and Local Government commissioned an independent review of the arrangements in Wales. The aim of the review was to consider whether the current arrangements remain fit for purpose. The review included:

- a comparison of the arrangements in Wales with those in other parts of the UK and consideration of whether changes should be recommended for Wales;
- the extent to which the current arrangements achieve the right balance between protecting officers from summary dismissal - for being the bearers of unwelcome political news - and the speed with which processes are conducted and concluded;
- identification of improvements/alternatives - if any - to the current system which maintains the dual purpose of the current arrangements.

It was made clear that any recommendations would need to be accompanied by a robust justification for change. The full review is accessible using this link:

[Review of the arrangements for dealing with alleged misconduct of senior officers in local authorities in Wales](#)

Conclusions of the review

Whilst the review concluded the current arrangements remain broadly fit for purpose, there were some areas where it proposed changes aimed at improving a number of aspects of the current arrangements.

On 26 June 2020 the Minister for Housing and Local Government issued a written statement welcoming the review. The statement confirmed the Minister's intention to establish a small advisory group consisting of representatives of Society of Local Authority Chief Executives (SOLACE), the Association of Local Authority Chief Executives and Senior Managers (ALACE) and the Welsh Local Government Association (WLGA) to agree a way forward and develop an action plan for implementation.

The Oldham Review Implementation Advisory Group has considered the report and its recommendations and the remainder of this consultation paper sets out the Groups' views on the proposed areas for action.

1. Clarification of statutory language – meaning of misconduct

The review suggests the definition of “disciplinary action” in the 2006 Regulations should be clarified as it is currently unclear whether or not an officer may be dismissed based on allegations of the officer's lack of ability to undertake his or her role.

Regulation 2 (d) states:

“disciplinary action” (“*camau disgyblu*”) in relation to a member of staff of a relevant authority means any action occasioned by alleged misconduct which, if proved, would, according to the usual practice of the authority, be recorded on the member of staff’s personal file, and includes any proposal for dismissal of a member of staff for any reason other than redundancy, permanent ill-health or infirmity of mind or body, but does not include failure to renew a contract of employment for a fixed term unless the relevant authority has undertaken to renew such a contract;”

The purpose of these arrangements is to protect officers from allegations about misconduct which are motivated (consciously or otherwise) because the officer is the bearer of politically unwelcome news, or where the officer is insisting on the discharge of the authority’s functions in an appropriate and lawful manner.

This legislation is not intended as a shield to protect individuals from appropriate action in circumstances where that individuals’ conduct or capability would be considered to have fallen below normally accepted business standards. It is therefore important to have an agreed understanding of the difference between conduct and misconduct and capability.

The Advisory, Conciliation and Arbitration Service (ACAS) define misconduct as being when an employee's inappropriate behaviour or action breaks workplace rules. Examples of misconduct include:

- bullying
- harassment
- refusing to do work ('insubordination')
- being [absent without permission](#) (also called absent without leave or 'AWOL')

The definition of conduct is the manner in which a person behaves, especially in a particular place or situation.

This is a different issue to capability, which is about an individual’s ability to do the job. Like many organisations local government has separate performance management arrangements in place, which include regular performance appraisal and opportunities to address any areas where improvements are required through, for example, support and training.

In terms of conduct or misconduct, the Oldham Review Implementation Advisory Group felt the purpose of the regulations is to protect statutory officers when providing advice and guidance in relation to their statutory duties which can lead them into conflict with political positions. It should not be possible to make a case to dismiss an officer on the basis of misconduct for setting out advice which is appropriate but unwelcome.

The group also felt senior officers should have robust performance management arrangements in place. This is the partner to the statutory support provided by the 2006 regulations and the group felt that promotion of good practice about performance management of senior officers within authorities should be provided and led by local

government to complement any changes to the legislation in relation to alleged misconduct.

The Group agreed that the regulations and supporting explanatory documents should be clear that the regulations provide 'statutory protection' only in the case of alleged misconduct.

Welsh Ministers would welcome your views on whether further clarity would be helpful and if so, any suggested wording that could be considered.

2. Clarification of statutory language – meaning of the imposition of “sanctions” following the appointment of a DIP should be clarified.

The appointment of a designated independent person is made when the local authority investigating committee decides the allegation of misconduct should be further investigated. Part of the DIP's role is to recommend sanctions where appropriate following full investigation. The report concludes some local authorities consider they should be able to impose different sanctions from those recommended by the DIP. The regulation as it stands makes it clear that the only sanction which can be used is the one suggested by the DIP. This raises the question of whether there should be flexibility in the process to enable local decision making to take place.

Regulation 9 states:

“No disciplinary action (other than action to which paragraph 3 applies) in respect of the head of the authority's paid service (unless the head of the authority's paid service is also a council manager of the relevant authority), its monitoring officer or its chief finance officer, may be taken by the relevant authority, or by a committee, a sub-committee, a joint committee on which the relevant authority is represented or any other person acting on behalf of the relevant authority, other than in accordance with a recommendation in a report made by a designated independent person under regulation 9 of the Local Authorities (Standing Orders) (Wales) Regulations 2006 (investigation of alleged misconduct)”.

Discussions in the Oldham Review Implementation Advisory Group (ORIAG) felt there was little purpose in appointing a DIP if local authorities could then simply disregard their recommendations. Their view was that the appointment of the DIP is to maintain independence; picking and choosing disciplinary actions which have not been suggested by the independent person could undermine the independence of the process and result in inconsistencies across Wales. The Group therefore felt that there should be no local flexibility and the drafting of the current regulations in relation to the application of any sanction recommended by the DIP should remain unchanged.

Your views are welcomed about whether there should be more flexibility for decisions to be made locally to impose final sanctions.

3. Choosing a DIP and the Cost of appointment

The Oldham review raised two issues in relation to the DIP. The first was the cost associated with the appointment of a DIP. Individuals who gave evidence to the Oldham Review suggested the relatively high costs associated with the process arose from the fact that most DIPs appointed to date have been practising lawyers. The review

suggests that there may be occasions where the nature of the case would not warrant a practicing lawyer or indeed a person legally qualified.

The Oldham Review Implementation Advisory Group considered the option of undertaking an investigation as a non-legally qualified person. The group agreed it would be possible depending on the case itself for a non-legally qualified DIP to be appointed and to undertake an investigation. It was considered fundamental to the process that if that were the case, arrangements would have to be made to ensure the DIP had access to independent legal advice.

The second issue related to the method of appointing DIPs.

In terms of choosing a DIP concerns were expressed about the length of time taken to select an appropriate individual and the consequent delay in dealing with matters.

The report recommends there should be two panels or lists of DIPs held centrally (possibly by the Welsh Ministers or the Joint Negotiating Committee), and that, except in the case of a conflict of interest, DIPs should be appointed automatically on a “taxi rank basis”. The suggestion is that there be one list of individuals that are legally qualified and another list where individuals are not legally qualified.

The Oldham Review Implementation Advisory Group consider this to be a positive way forward and suggested the Investigating Committee take the decision in each case about which DIP list should be accessed for appointment based upon the complexity of the issues involved.

Welsh Ministers would welcome your view on whether a ‘taxi rank’ should be adopted, whether there should be two lists, and if this approach is adopted where the central list or lists should be held.

Welsh Ministers are also interested in your views about whether the investigating committee, in addition to deciding whether there is a case to answer should also determine which list should be used to appoint the DIP.

4. The role of the Investigating Committee (IC)

When allegations of misconduct which may lead to disciplinary action have been made, an investigating committee must be appointed by the council to decide whether the allegation should be further investigated.

Regulation 9 states:

“Subject to paragraph (11), where, after a relevant authority has incorporated provisions in standing orders pursuant to regulation 8, it appears to the relevant authority that an allegation of misconduct which may lead to disciplinary action has been made against–

(a) the head of the authority’s paid service;

(b) its monitoring officer; or

(c) its chief finance officer,

(“*the relevant officer*”), as the case may be, the relevant authority must appoint a committee (“*an investigation committee*”) to consider the alleged misconduct.”

This investigation is meant to be used as a preliminary look at the accusations and determine whether there is a case to answer. The report suggests in some instances the investigating committee becomes too involved in trying to address the issue rather than focussing solely on whether there is a case to answer. This can result in protracted investigations.

The review considered whether the procedure could be simplified by not having a preliminary stage undertaken by the IC. It concluded the preliminary stage is important as it serves to enable some allegations to be disposed of quickly where there are no matters which require further in-depth investigation.

The Oldham Review Implementation Advisory Group agree this preliminary stage is required. The Group was clear investigating committees are required only to investigate whether there is a case to answer or not. Any further involvement by the investigating committee would be in breach of the regulations.

Welsh Ministers would be interested in whether you consider further guidance in this area would be helpful to investigating committees.

5. Relationship of DIP and IC investigations

The review found that where an investigation committee determines a DIP should be appointed, the information the committee has considered is not routinely provided to the DIP for inclusion in their investigation. The report suggests this can lead to duplication and consequent delays in the process.

The Oldham Review Implementation Advisory Group considered this matter and agree the information used by investigating committees should be passed to the DIP as part of the initial brief for the investigation. The group consider the existing regulations should be amended to require this action. The group also consider it should be made clear there is no expectation the decision reached by the investigating committee should be reviewed. This does not preclude the DIP from doing so if they consider it appropriate, especially where the DIP considers it may have a bearing on their final decision

Welsh Ministers would welcome your views about whether the regulations should be amended in this way.

6. DIP's power of direction and sanction

Regulation 9(7) and (8) in the 2006 regulations provide that the DIP should agree a timetable for the investigation with the authority, and failing agreement, the DIP should set one. The 2006 Regulations however, give the DIP limited powers to take action to prevent delays in the investigation process.

There are many reasons for delays during the investigations, including not wanting to hear the case in the absence of the person being investigated.

The Oldham Review Implementation Advisory Group agreed the DIP should be able to manage the timetable and should be given powers to enable that to happen. They also considered whether the DIP should have the power to continue their investigation when the person being investigated does not make contact with them. The group felt there are circumstances where this would be appropriate and that the arrangements should be changed to accommodate this approach and commented that the practise is already used in other civil and criminal matters cases across Wales. The group also considered further guidance could be helpful.

Welsh Ministers would be interested in your views about whether the DIP should be given additional powers to manage the timetable and in particular to continue in the absence of the person being investigated.

7. Interaction with external investigations

External investigations into the issue being considered can sometimes give rise to a delay in action being taken by the DIP.

Evidence in the review showed that external investigations can delay DIP procedures. It is not possible for the 2006 Regulations to provide for the many different situations to which external investigations may give rise.

The Oldham Review Implementation Advisory Group felt that in some circumstances, the authority or DIP will have discretion to continue with their investigations even though other agencies might be involved. This will depend on particular facts e.g. if the police ask the DIP to stop their investigation, it would be unusual for the DIP procedure to continue. The Group also considered the need to take the views of the person being investigated into account if they provide reasons for not wanting the case to continue e.g. they may incriminate themselves in a criminal case.

Welsh Government would welcome your views on whether additional guidance about the circumstances in which investigations should / should not continue would be helpful.

8. Interaction with contractual terms/policies

As well as standing orders local authorities also have to consider contractual terms and policies. It appears that there are areas where these policies do not agree or are in conflict with each other.

During the review some evidence was heard about conflict between officers' contractual rights, authorities' standing orders and the 2006 Regulations which complicate matters and are likely to add delay and expense.

The Oldham Review Implementation Advisory Group felt that standing orders should not override contractual terms and conditions. Amending regulations to cover all eventualities in contractual terms and conditions was not considered feasible. The Group felt a key area for action would be to review the all Wales model constitution to establish whether there are changes required to ensure consistency of approach across Wales and the reduction of areas of conflict between standing orders and terms and conditions.

Welsh Ministers would welcome your views about whether there should be a review of the all Wales model constitution, and whether it should include a requirement that any future standing orders should not contradict other areas required by law.

9. Legal representation

At present senior officers and other parties are entitled to be represented during any part of the process.

The review considered whether Senior Officers and other parties should be prohibited from being legally represented at hearings or in other parts of the DIP procedure to minimise costs and delays.

The Oldham Review Implementation Advisory Group discussed this suggestion and agreed that legal representation is vital in the process as removing this right would lead to a breach of the Senior Officer's right to a fair hearing.

Welsh Ministers agree and do not intent to make any changes to this aspect of the current arrangements.

Consultation Response Form

Consultation on the review of the arrangements for dealing with alleged misconduct of senior officers in local authorities (Oldham Review)

Name:

Email:

Telephone number:

Your address:

Your postcode:

Organisation (if applicable):

Question 1: It is clear that “disciplinary action” should be used for issues of misconduct only. The regulations should only be concerned with the conduct of senior officers. Performance issues should be dealt with locally as agreed by performance related policies.

Question 2: Welsh Government believes local government should develop good practise guidance on performance management for senior officers. This would help reduce the confusion about what disciplinary action, using these regulations, can be used for.

Welsh Ministers would welcome your views on whether further clarity would be helpful and if so, any suggested wording that could be considered.

Question 3: The DIP recommended sanction should be followed – yes/no. If you answered no why not and should there be local flexibility

Question 4: Should none legally qualified person be appointed in some cases – yes/no. If yes should they have access to independent legal advice?

Question 5: Welsh Government wishes to amend the regulations to enable the Investigating Committee to decide whether a legally qualified or non-legally qualified DIP be appointed in their preliminary stage of investigation. Do you agree?

Question 6: Welsh Government wants to amend regulations so that the DIP appointment, regardless of being legally qualified or not, be appointed on a “taxi rank basis” to ensure fairness and openness in the process. Do you agree?

Question 7: The role of the Investigating Committee (IC) is to establish whether there is a case to answer and, if there is a case does it warrant further investigation. The role of the IC is not to investigate the case in more depth. Do you agree?

Question 8: Should work undertaken by the investigation committee be shared with the DIP to avoid duplication of effort.

Question 9: Welsh Government wishes to reiterate that the 2006 Regulations specifically provide the DIP with the power to take such steps as he/she thinks appropriate to keep the investigation progressing efficiently in the event of failure to comply with a timetable. Do you agree?

Question 10: The investigation should not be delayed indefinitely. There is a suggestion that if the process has been delayed for a length of time because the person being investigated has not replied or appears to be stalling the process the DIP should be able to continue with the hearing in the absence of the person being investigated. Do you agree?

Question 11: If representation is made by external investigations to halt the DIP process then this should be considered. Representations from the individual being investigated should also be considered. However, the DIP should have an opportunity to ask for the decision on deferring the process to be reviewed on a timescale which should be considered for each individual case. The rationale for not continuing should be documented whatever decision is reached. Do you agree?

Question 12 - Changes in the legislation are being looked at to ensure that local authority standing orders do not contradict other rules and regulations the local authority have to take into account. In the first instance the model constitution will be checked to see there is no conflict. Consideration of further guidance is also being looked at. Do you agree with this approach?

Question 13: We would like to know your views on the effects that consulting on the review of the arrangements for dealing with alleged misconduct of senior officers in local authorities (Oldham Review) would have on the Welsh language, specifically on opportunities for people to use Welsh and on treating the Welsh language no less favourably than English.

What effects do you think there would be? Could positive effects be increased, or negative effects be mitigated?

Question 14: Please also explain how you believe the proposed policy could be formulated or changed so as to have positive effects or increased positive effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favorably than the English language, and no adverse effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favourably than the English language.

Question 15: We have asked a number of specific questions. If you have any related issues which we have not specifically addressed, please use this space below to report them:

Responses to consultations are likely to be made public, on the intranet or in the report. If you would prefer your response to remain anonymous, please tick here: