Agenda – Equality, Local Government and Communities Committee

Meeting Venue:
Committee Room 3 – Senedd
Meeting date: 13 December 2017
Meeting time: 09.00

For further information contact:
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Pre-meeting (09.00 – 09.15)

1 Introductions, apologies, substitutions and declarations of interest

2 Public Services Ombudsman (Wales) Bill: evidence session 6

(09.15 – 10.00) (Pages 1 – 26)

Catrin Edwards, Policy and Advocacy Manager, Hospice UK

Jonathan Ellis, Director of Policy and Advocacy, Hospice UK

3 Public Services Ombudsman (Wales) Bill: evidence session 7

(10.00 – 11.00) (Pages 27 – 55)

Sally Taber, Director, Independent Healthcare Sector Complaints Adjudication Service

Gerry Evans, Deputy Chief Executive, Social Care Wales

David Francis, Assistant Chief Inspector, Care and Social Services Inspectorate Wales

Dr Kate Chamberlain, Chief Executive, Healthcare Inspectorate Wales

Break (11.00 – 11.10)

4 Public Services Ombudsman (Wales) Bill: evidence session 8

(11.10 – 11.55) (Pages 56 – 62)

Kevin Thomas, Director of Corporate Services, Wales Audit Office

Martin Peters, Head of Law and Ethics, Wales Audit Office

5 Paper(s) to note

5.1 Letter to the Llywydd in relation to the Supplementary Legislative Consent on the Financial Guidance and Claims Bill

(Pages 63 – 64)

6.1 Letter to the Minister for Housing and Regeneration in relation to the Supplementary Legislative Consent on the Financial Guidance and Claims Bill

(Pages 65 – 66)

7 Motion under Standing Order 17.42 (vi) to resolve to exclude the public from the remainder of the meeting

8 Public Services Ombudsman (Wales) Bill: consideration of evidence received under items 2, 3, and 4

(11.55 – 12.10)

9 Consideration of forward work programme

(12.10 – 12.30) (Pages 67 – 72)

Agenda Item 2

Document is Restricted

1. About Hospice UK

1.1 Hospice UK was founded in 1984 and is the leading charity supporting hospice and palliative care throughout the UK. Our vision is hospice care for every person in need and our mission is to enable hospice care to transform the way society cares for the dying and those around them.

2. About this response

2.1 Hospice UK welcomes the opportunity to provide evidence to the Equalities, Local Government and Communities Committee to support its scrutiny of the Public Services Ombudsman (Wales) Bill.

2.2 This response draws on the experience of hospices in Wales supporting and caring for people with terminal or lifeshortening conditions, and from the knowledge and experience of Hospice UK working at a national level for people with palliative care needs. We have limited our comments to those issues affecting people who need hospice and palliative care.

3. Context

3.1 The Social Services and Well-being (Wales) Act 2014 made amendments to the Public Services Ombudsman (Wales) Act 2005 to the effect that the Ombudsman's remit was extended to cover unresolved complaints about independent palliative care and social care.

3.2 Hospice UK and independent hospices in Wales welcomed this change, which provided additional channels of redress for patients and families in circumstances of heightened distress and vulnerability.

3.3 The Bill as currently drafted reinstates the 2014 changes. It further sets out the legal framework for complainants to make oral complaints and for the Ombudsman to conduct Own Initiative Investigations in relation to social care and independent palliative care, as per the proposed framework for listed authorities.

4. Part 5: Investigation of complaints relating to other persons: Social Care and Palliative Care

4.1 Patient pathways and integration

4.1.1 People receiving palliative care from Independent palliative care providers (hospices) are almost invariably referred to this service from the NHS following treatment for a lifeshorting or terminal condition.

4.1.2 A person accessing care from an independent palliative care provider is likely also to be accessing care and support from a range of services simultaneously, including: the NHS through GPs, District Nurses and specialists in secondary care; social care, including domiciliary care or within a care home.

4.1.3 The service pathway of a person cared for by an independent palliative care provider is very likely to include NHS, and possibly private health provider, input.

4.2 An equalities approach: regional service provider variation

4.2.1 Palliative care in Wales is provided by a mix of independent providers and NHS providers. With reference to inpatient facilities in particular, a local population will often be served *either* by an NHS provider *or* an independent hospice.

4.2.2 The Bill as drafted creates a standalone investigation regime for independent palliative care providers (and social care providers). This is separate from the mainstream investigation regime that applies to NHS palliative care providers.

4.2.3 Under the Bill as drafted, a complaint made to the Ombudsman by a person supported by an NHS palliative care provider will follow a different investigation regime from a patient receiving equivalent treatment from an independent palliative care provider.

4.3 Issues and inconsistencies requiring clarification

4.3.1 The proposed framework where independent palliative care (and social care) follows a standalone investigation regime from the mainstream investigation regime for NHS and private healthcare providers does not appear to follow the principle of "investigat[ing] a whole complaint" (50, Explanatory Memorandum) that has led to the preferred option (Option 2) in relation to "extend[ing] the Ombudsman's jurisdiction to allow investigation of complaints in a public/private health service pathway" (50). There may be occasions when a person's complaint about an independent palliative care provider can be best investigated in relation to their care pathway in its entirety, which may also include NHS care.

4.3.2 The Explanatory Memorandum sets out that the separate investigation regimes had been taken forward in the current drafting of the Bill in light of the Fourth Assembly's Finance Committee's recommendation, despite responses to the consultation on the draft Bill that strongly recommended one integrated system. It notes that

> This was because of the specific nature of social and palliative care and the fact that merging the two regimes would create one very complex and intricate regime. (26)

4.3.3 Given the already integrated nature of a service pathway for a person receiving palliative care from an independent provider, Hospice UK is unaware of any specific features of this service that makes it incompatible with a mainstream investigation process by the Ombudsman. We welcome any clarification in this area.

4.3.4 With respect to the complexities and intricacies of merging the two regimes, Hospice UK understands from evidence given by the Chair of the Finance Committee, Simon Thomas AM, to the ELGC Committee in Evidence Session 1 on 29 November 2017 that this would have involved complex and technical drafting of legislation. There was also a view that mainstreaming the investigatory regimes was inappropriate given that the Assembly had taken a decision to include independent palliative care and social care within the Ombudsman's remit as recently as 2014. We would welcome further information about the complexities and intricacies of integrating the investigatory regimes to enable us to comment further on this issue.

4.3.5 Failing to integrate the investigation process for all providers in this Bill could be seen as a missed opportunity to improve seamless, integrated provision for complainants. However, Hospice UK does not, in principle, object to a separate investigatory regime for independent palliative care providers (and social care) if the burden of bureaucracy is placed on the Ombudsman and its office rather than the complainant, providing that:

4.3.5.1 People escalating complaints to the Ombudsman in relation to independent palliative care providers have the same rights and access as people escalating complaints in relation to NHS providers.

4.3.5.2 Clear guidance is provided, both for people escalating complaints and for hospices who will direct persons to the Ombudsman, about how to present a complaint about a service pathway that may include the independent palliative care provider, NHS and social care provision.

5. Definition of "palliative care service" could exclude some users from Ombudsman's services

5.1 Hospice UK is concerned that there is the potential that some people cared for by hospices – those receiving palliative care services in their broadest sense, as well as carers supported prior to and during bereavement – could be excluded from access to the Ombudsman's services due to the narrow definition of palliative care as set out in the Bill.

5.2 Independent palliative care providers take a holistic approach to palliative care. This encompasses a range of person-centred services for both the patient and their carers. Hospice care places equal emphasis on someone's clinical, physical, emotional, social and spiritual needs and responds by offering diverse care services such as complementary therapies, bereavement support as well as expert clinical care.

5.3 In the Bill as currently drafted the Ombudsman may investigate a complaint that relates to an independent palliative care provider if "the independent palliative care provider has received public funding […] in respect of a palliative care service that it provides in Wales." (43(2))

5.4 Hospices receiving public funding are likely to receive this to deliver a palliative care service with a narrower definition than that adopted by the hospice movement, namely to provide clinical and physical care only.

5.5 63(2) states that a "'Palliative care service' means a service the main purpose of which is to provide palliative care", which provides little clarity on what falls within the remit of this definition.

5.6 A potential solution is to move away from the specific type of care to the type of provider, e.g. "a non statutory provider of health and care services who has received statutory funding in the last three years".

6. Own initiative investigations

6.1 People in receipt of palliative care, and their families, who are facing end of life are at their most vulnerable and should be afforded all protections to ensure that their care, or the care of a loved one, is not jeopardised, or seen to be jeopardised, by raising a concern. We therefore support the Bill's policy intention to "protect the most vulnerable" (EM, 16) through the introduction of new powers to the Ombudsman to investigate on own initiative, where criteria are met.

6.2 We welcome the inclusion of criteria 45(2)(a) (parallel to 5(2)(a)), which cites the case of "vulnerable or disadvantaged person[s]" who may feel unable to make a direct complaint either to the independent palliative care provider or Ombudsman for fear of "sustain[ing] injustice or hardship in consequence" of making that complaint.

6.3 Own initiative investigations must always work in favour of vulnerable and disadvantaged persons. We therefore agree that any changes to the criteria set out in

primary legislation should be subject to the Assembly's affirmative procedure, as per 45(5).

6.4 Again, should separate investigatory frameworks for independent palliative care and other listed authorities be retained, people in receipt of care from independent palliative care providers must have the same recourse to the Ombudsman as those receiving palliative care from the NHS.

6.5 Further clarification regarding the remit of the Ombudsman and the relevant inspectorate – whether Health Inspectorate Wales or Care and Social Services Inspectorate Wales – is required to ensure there is no duplication of efforts in investigating failures of services or care through "Own initiative investigations". Hospices registered as charities are also accountable to, and regulated by, the Charity Commission, which issues rules and guidance on delivering public services.

Y Pwyllgor Cydraddoldeb, Llywodraeth Leol a Chymunedau
Equality, Local Government and Communities Committee
ELGC(5)-36-17 Papur 2 / Paper 2

Introduction

1. The Independent Sector Complaints Adjudication Service (ISCAS) welcomes the opportunity to respond to the Committee's call for evidence on this Bill and Explanatory Memorandum. As per the Committee's request, ISCAS's response addresses the Bill's terms of reference namely:
    - Accept oral complaints
    - Undertake own initiative investigations
    - Investigate private medical treatment including nursing care in a public/private pathway
    - Undertake a role in relation to complaints handling standards and Procedures

2. ISCAS provides a complaints management framework for the independent healthcare sector incorporated in its Code of Practice in the four countries. Compliance with the Code maximises healthcare operators' ownership of complaints using local resolution procedures. The Code's Stage 3 adjudication affords dissatisfied complainants an independent review process with independent adjudication procedures. It gives providers closure of the complaints process, and a learning opportunity, at low cost.

3. ISCAS is managed by the Centre for Effective Dispute Resolution (Cedr) and is independent from the Trade Association AIHO which includes WIHA as part of its membership. WIHA members of AIHO are encouraged to be subscribers of ISCAS where they are treating private patients.

4. An Information Sharing Agreement is in place between ISCAS and Healthcare Inspectorate Wales (HIW). This is currently in the process of being updated.

5. Accompanying this consultation for reference are the suite of ISCAS documents that are available to all WIHA Subscribers. These are the ISCAS Code of Practice for Complaints Management (2017), the Patients' Guide to the ISCAS Code, ISCAS Position Statements on Complaints Management and Practising Privileges (in draft) , Complaints Management: Fees (in draft) and the Guidance for Managing Unacceptable Behaviour by Complainants. These documents are all displayed on the ISCAS website - www.iscas.org.uk

6. An annual report on ISCAS activities is also produced. The 2016 report is attached. This contains the overall Adjudicator costs from January 2016 to March 2017 together with the Goodwill payments that are afforded to complainants during that period.

7. A copy of the 2016 ISCAS training programme is also attached

8. ISCAS provided evidence for the National Assembly for Wales Finance Committee on the consideration of powers for the Public Services Ombudsman (PSO) for Wales in January 2015 and also on the 18 January 2016. ISCAS also gave evidence to the National Assembly for Wales Finance Committee.

Terms of Reference Comments

9. *The general principles of the Public Services Ombudsman (Wales) Bill and the need for legislation to deliver the stated policy intention.*
   ISCAS welcomes this Bill and believes it will be beneficial for patients who have a complaint spanning treatment across the NHS and independent healthcare sectors. It is right that the complaints process should follow the patient (citizen). The Ombudsman already has jurisdiction over complaints made about NHS-funded treatment provided by ISCAS subscribers in Wales.

10. *Provisions of the Bill which set out the new powers for the Ombudsman to: accept oral complaints;*
    ISCAS tabulates how complaints can be submitted in both its Code and Patients Guide. Oral complaints would be accepted under the ISCAS Code.

11. *Provisions of the Bill which set out the new powers for the Ombudsman to: undertake own initiative investigations;*
    ISCAS recognises the value of 'own initiative investigations' undertaken by Ombudsmen services to patients and hospital providers. All ISCAS subscribers are encouraged to recognise the Duty of Candour. ISCAS is in possession of leaflets on this subject from avma (Action against Medical Accidents). A session on this was provided during the 2016 ISCAS training session.

12. *Provisions of the Bill which set out the new powers for the Ombudsman to: undertake a role in relation to complaints handling standards and procedures*

    This seems a good initiative in reducing variation in effective complaints handling standards and procedures across public services in Wales. ISCAS's understanding is that this does not apply to the independent healthcare sector. ISCAS has liaised with both HIW and the Welsh Government during the process of updating the 2013 ISCAS Code. Excellent comments were received and incorporated into the 2017 ISCAS Code. ISCAS provides annual training for subscribers on complaints handling and will be

implementing a more formal monitoring and improvement quality assurance system in March 2018 when ISCAS subscribers are asked to renew their subscription. ISCAS will be introducing a sign off of self-declaration at provider level to support good governance in complaint management.

13. *Provisions of the Bill which set out the new powers for the Ombudsman to: investigate private medical treatment including nursing care in a public/private health pathway;*
    As per ISCAS's previous submission, we welcome this provision and believe it will be beneficial to patients in these circumstances. It is noted in the Explanatory memorandum para 3.44 the Ombudsman comments on a case that transgressed both the public and private sectors and the length of time it took for that case to come to Adjudication. In practice, the number of complaints against WIHA subscribers that reach an external review stage is very small. The number of complaints that involve combined NHS and private treatment is even smaller. ISCAS would be happy to establish an information sharing protocol with the Ombudsman as it does with Healthcare Inspectorate Wales in order to take this potential new power forward .

14. *The financial implications of the Bill (as set out in Part 2 of the Explanatory Memorandum).*
    ISCAS recognises that the inclusion of investigations of the private health service element in a public/private health service pathway will have a small, but direct, financial impact on the Ombudsman, costing £17,535 over 5 years (Table 4, page 56). WIHA who are also giving evidence has calculated the cost of including such cases will make up less than 0.1% of the Ombudsman's yearly budget (using figures from 2017-18 found within the Summary Table on Page 45). We also note in Paragraph 11.11 of the Explanatory Memorandum that the Ombudsman could accommodate the additional cost within existing resources.

15. ISCAS recognises the right of the Ombudsman to serve a costs recovery notice on a private health service provider as a means of recovering additional costs incurred by the Ombudsman where the provider **has obstructed** the Ombudsman or done something which would amount to contempt of court if the investigation were proceeding in the High Court.

16. **Sections 21 and 22: Publicising reports and Section 24: Action following receipt of a report: investigation of a private health services provider.** ISCAS management produce quarterly a summary of the Adjudications finalised with the outcome, recommended learning and actions required which is presented to the ISCAS Advisory Governance Board. From this the themes for taking forward learning are recorded and included in the annual report.

17. *Any potential barriers to the implementation of the Bill's provisions and whether the Bill takes account of them*
    ISCAS is not aware of any potential barriers to the implementation of the Bill's provision and notes that the Ombudsman is not seeking to extend to all private health service providers.

18. *Whether there are any unintended consequences arising from the Bill*
    ISCAS do not anticipate any unintended consequences for independent healthcare providers arising from the Bill.

Conclusion

In summary, ISCAS subscribers support the extension of the PSOW's remit to investigate complaints that include both an NHS and a private health element of care.

We are also pleased to note that there will be a review of the legislation after five years from the date of the Act receiving Royal Assent and further reviews thereafter as Welsh Ministers deem appropriate.

ISCAS looks forward to providing oral evidence to the committee and responding to any further questions on the terms of reference.

29 November 2017

Annexes:

ISCAS annual report 2016

ISCAS Code of Practice 2017

ISCAS Patients' Guide to the ISCAS Code

ISCAS Guidance for Managing Unacceptable Behaviour by Complainants

ISCAS Annual Training Conference

ISCAS Position Statement

Complaints Management: Fees

ISCAS Position Statement on Fees:

The ISCAS position is that subscribing Independent Healthcare Providers (IHPs) are required to be transparent regarding fees charged to service users and that includes those fees charged by those granted practising privileges.

Background to position statement:

The Independent Adjudicators (IAs), engaged by ISCAS to adjudicate on complainants at stage 3 of the independent sector complaints process, identify areas of learning from adjudications. The IAs have identified that a theme in the heads of complaints of adjudications involves a lack of transparency on the fees charged to service users. This includes ambiguity surrounding the fees levied by the IHP and those levied by those granted practising privileges.

ISCAS Code and Practising Privileges Principles:

The ISCAS Code states that the Code includes complaints about those healthcare professionals granted practising privileges working in subscribing IHPs. Practising privileges are a well-established system of checks and agreements whereby doctors can practise in hospitals and clinics without being directly employed by them. There is more information in the ISCAS position statement on practising privileges.

Accountability Framework subscribing IHPs:

The Registered Person (IHP) retains the responsibility for the management and monitoring of systems and processes that support continuous quality improvement and learning, including complaint management. In addition, the Registered Person is responsible for providing written statements to service users regarding the amount and method of payment of fees (see below – CQC Regulations in England).

The Registered Person in the IHP is responsible for supervising the service provision (for example, Regulated Activities or similar such as diagnosis, treatment or surgery). The Registered Person (for example the Nominated Individual who may be at

corporate level) is responsible for ensuring 'fit and proper' Registered Managers are engaged.

The Registered Manager is responsible for engaging 'fit and proper' staff, including those with practising privileges. The Registered Manager is responsible for ensuring that those engaged to deliver the Regulated Activity for which the IHP is registered, operate in accordance with the approved policies and procedures of the IHP, including information on fees.

The Registered Manager must ensure that where there are hosting, renting or sub-contracted arrangements in place with other registered providers, the contract or service level agreement clearly defines the boundaries of responsibilities for the activities taking place, including information on fees.

As from 31st December 2017 the Private Healthcare Market Investigation Order 2014 (as amended) requires operators of private healthcare facilities to ensure that consultants (as a condition of permitting a consultant to provide private healthcare services at that facility) supply private patients with information about fees in writing, prior to outpatient consultations (see 22.3 below for detail on the information). As from 28th February 2018 operators of private healthcare facilities are required to ensure that consultants are provided with an appropriate template (approved by CMA) in order to disclose to a patient, prior to further tests or treatment, the costs and rationale for treatment (see 22.4 below for detail).

Relevant regulations:

The Care Quality Commission (Registration) Regulations 2009 make it clear that the provider (Registered Person) must be transparent about the costs of care and treatment. Regulation 19 states:

> *(1) Where a service user will be responsible for paying the costs of their care or treatment (either in full or partially), the registered person must provide a statement to the service user, or to a person acting on the service user's behalf (a) specifying the terms and conditions in respect of the services to be provided to the service user, including as to the amount and method of payment of fees; and (b) including, where applicable, the form of contract for the provision of services by the service provider. (2) The statement referred to in paragraph (1) must be (a) in writing; and (b) as far as reasonably practicable, provided prior to the commencement of the services to which the statement relates.*

Extract on Fees Private Healthcare Market Investigation Order 2014 (as amended)

22. Information concerning consultants supplied to the information organisation and to private patients.

22.2 The operator of a private healthcare facility shall, as a condition of permitting a consultant to provide private healthcare services at that facility, require the relevant consultant to supply private patients with information in writing to be provided:

(a) as from 31 December 2017, prior to outpatient consultations, in accordance with article 22.3 and article 22.6; and

(b) as from 28 February 2018, prior to further tests or treatment, whether surgical, medical or otherwise, in accordance with article 22.4 and article 22.6; and shall provide the consultant with an appropriate template approved by the CMA for these purposes, in standard wording and in a clearly legible font.

22.3 Consultants must supply the following information to a patient prior to an outpatient consultation:

(a) the estimated cost of the outpatient consultation or consultations, which may be expressed as a range, so long as the factors which will determine the actual cost within the range are explained;

(b) details of financial interests of any kind, which the consultant has in the medical facilities and equipment used at the premises;

(c) a list of all insurers which recognise the consultant;

(d) a statement that insured patients should check with their insurer the terms of their policy, with particular reference to the level and type of outpatient cover they have; and

(e) the website address of the information organisation, and a statement in standard wording as agreed with the information organisation indicating that this website will give patients useful information on the quality of performance of hospitals and consultants.

22.4 The following information must be disclosed by a consultant to a patient prior to further tests or treatment:

(a) the reason for the relevant further tests or treatment;

(b) an estimate of the cumulative consultant cost of the treatment pathway which has been recommended. This should either include all consultant fees that will be charged separately from the hospital fee, or should include contact details for any other consultants whose fees are not included in the quote or, where applicable for self-pay patients, the total package price for treatment, where the consultant has agreed this with the operator of the relevant private healthcare facility;

(c) a statement of any services which have not been included in the estimate, such as those resulting from unforeseeable complications. Where alternative treatments are available but the appropriate treatment can only be decided during surgery, the estimate should set out the relevant options and associated fees; and

(d) the website address of the information organisation, and a statement in standard wording as agreed with the information organisation indicating that this website will give patients useful information on the quality of performance of hospitals and consultants.

22.5 For tests or treatment given on the same day as the consultation, the information specified in article 22.4 may be given orally rather than in writing.

22.6 Consultants shall supply patients with information in accordance with article 22.3 at the same time as the outpatient consultation appointment is confirmed with the patient, and other than in case of emergency shall supply patients with information in accordance with article 22.4 either within the two working days following the final (pre-treatment) outpatient consultation or prior to surgery, whichever is sooner.

22.7 Subject to Article 22.8, the operator of a private healthcare facility shall ask every privately-funded patient undergoing any inpatient, day-case or outpatient procedure, including diagnostic tests and scans at that facility, to sign a form confirming that the relevant consultant provided the information required by Article 22.4, and shall take appropriate action if there is evidence that a consultant has failed to do so. Alternatively, private hospital operators shall take equivalent measures, as approved by the information organisation and its members to monitor and enforce compliance with article 22.

22.8 The duties in Article 22.7 owed by the operator of a private healthcare facility do not apply in the case of a private patient who attends a consultation at premises which are not part of the relevant facility and who does not thereafter have treatment at the relevant facility pursuant to attending the consultation.

ISCAS Position Statement

Complaints Management and Practising Privileges

ISCAS Position Practising Privileges:

The **ISCAS position** is that subscribing Independent Healthcare Providers (IHPs) are required to provide a **single response** to a complaint. The response to complaints shall be based on an investigation that involves all relevant persons, whether those are staff who are engaged through an employment contract, agency / bank staff, or those who are granted of practising privileges. IHPs may need to obtain statements or feedback from those granted practising privileges, including on matters of the consent process, but this should be incorporated into a single response to the complainant from the IHP.

Background to position statement – poor practice:

The Independent Adjudicators (IAs), engaged by ISCAS to adjudicate on complainants at stage 3 of the independent sector complaints process, identify areas of learning from adjudications. The IAs have identified an increasing number of adjudications that show limited cooperation in the complaints process between the IHP and those medical practitioners that the IHP engages through practising privileges. Furthermore, the IAs have identified that poor documentation with regard to the consent process, as a theme in the complaints they are asked to adjudicate upon.

It is **not acceptable** for Consultants with practising privileges (or other persons engaged by the IHP) to write **separate responses** to complainants. IHPs that continue to permit multiple points of communication and responses to be forwarded the complainant will be deemed to be non-compliant with the ISCAS Code. As stated above the position of ISCAS is that the IHPs shall provide a single response to a complaint that incorporates feedback from all relevant clinicians including consultants with practising privileges.

ISCAS Code and Practising Privileges Principles:

The ISCAS Code states that the Code includes complaints about those healthcare professionals granted practising privileges working in subscribing IHPs. Practising privileges are a well-established system of checks and agreements whereby doctors can practise in hospitals and clinics without being directly employed by them. The

ISCAS Code also outlines the regulatory requirements and information about the system regulators with respect to complaint management.

The ISCAS Code does not provide details about how practising privileges operate in IHPs or information on the consent process. ISCAS and the IAs refer to the following documents published by the Association of Independent Healthcare Organisations (AIHO):

- Key Principles in Practising Privileges: https://aiho.org.uk/689-aiho-practising-privileges-principles/file
- Key Principles in Consent and Capacity: https://aiho.org.uk/707-aiho-consent-and-capacity-key-principles-july-2017/file

The Key Principles in Consent and Capacity states that *"it is important to have in mind that consent is a process which must be precisely documented".* ISCAS position is that subscribers shall ensure those with practising privileges can answer the key question: *"would this record help me remember what happened, what was said and most importantly the thinking behind my decision if I am not here to continue the patients care, if there is an audit or if the matter comes to court in years to come?"*

Accountability Framework subscribing IHPs:

The relevant regulations of the four home countries define specific roles and responsibilities, as well as the meaning of practising privileges (see below – IH regulations). The Registered Person (IHP) retains the responsibility for the management and monitoring of systems and processes that support continuous quality improvement and learning, including the consent process and complaint management.

The Registered Person is responsible for supervising the service provision (for example, Regulated Activities or similar, such as diagnosis, treatment or surgery). The Registered Person (for example the Nominated Individual who may be at corporate level) is responsible for ensuring 'fit and proper' Registered Managers are engaged.

The Registered Manager is responsible for engaging 'fit and proper' staff, including those with practising privileges. The Registered Manager is responsible for ensuring that those engaged to deliver the Regulated Activity for which the IHP is registered, operate in accordance with the approved policies and procedures of the IHP, including complaints management and consent.

The Registered Manager must ensure that where there are hosting, renting or sub-contracted arrangements in place with other registered providers, the contract or service level agreement clearly defines the boundaries of responsibilities for the activities taking place, including complaints management and consent.

Relevant regulations and guidance - England:

In 1999 the Fifth Report of the House of Commons Health Select Committee (on the Regulation of Private and Other Independent Healthcare), identified that the directing body should accept responsibility for compliance with relevant regulation by those to whom it grants practising privileges.

In April 2002 The Private and Voluntary Health Care (England) Regulations 2001 (PVH) came into force and the requirements of "Registered Providers" with respect to practising privileges, were defined in regulations and the National Minimum Standards. In 2010 in England the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010 came into force supported by the Essential Standards.

The current regulations in England (The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014) continue to include practising privileges within the employment definition, for the purposes of those regulations (that is, not with reference to any employment law). The current interpretation is that employment means:

- *employment under a contract of service, an apprenticeship, a contract for services or otherwise than under a contract, and*
- *the grant of practising privileges by a service provider to a medical practitioner, giving permission to practice as a medical practitioner in a hospital managed by the service provider,*
- *and "employed" and "employer" is to be construed accordingly;*

The Care Quality Commission guidance on the scope of registration states for practising privileges to apply:

- *…..it means that all aspects of the consultation must be carried out under the hospital's management and policies. For example, being subject to the hospital's requirements for clinical governance and audit, and the hospital's policies and systems for complaints and for records (with the hospital owning*

the records). It means that the hospital takes responsibility for ensuring that essential levels of quality and safety are met. In practice, this may be done quite readily through granting 'practising privileges'.

- *….doctors (or other health care professionals) sometimes practise in outpatient departments under their own arrangements, with the hospital only acting as landlord. In that case, where the doctor or other health care professional is carrying on regulated activities independently of the hospital, the doctor or other health care professional must register* [with CQC], *as this does not amount to the exercise of practising privileges.*

Relevant regulations and guidance - Scotland:

The regulations in Scotland (The Healthcare Improvement Scotland (Requirements as to Independent Health Care Services) Regulations 2011) also define employment within the context of those regulations:

- *In these Regulations, references to employing a person include employing a person whether or not for payment and whether under a contract of service, a contract for services or otherwise than under a contract, and allowing a person to work as a volunteer; and references to an employee or to a person being employed are to be construed accordingly and includes a registered medical practitioner or registered dentist having practising privileges who provides medical or dental care within the independent health care service.*

Relevant regulations and guidance - Wales:

The regulations in Wales (The Independent Health Care (Wales) Regulations 2011) define practising privileges and state how employee is to be construed:

- *"practising privileges", in relation to a medical practitioner, refers to the grant to a person who is not employed in an independent hospital of permission to practise in that hospital.*
- *In these Regulations, unless the contrary intention appears, references to employing a person include employing a person whether under a contract of service or a contract for services and references to an employee or to a person being employed is to be construed accordingly.*

Relevant regulations and guidance – Northern Ireland:

The regulations in Northern Ireland (The Independent Health Care Regulations

(Northern Ireland) 2005) define practising privileges and state what employing a person includes:

- *"practising privileges" in relation to a medical practitioner, refers to the grant to a person who is not employed in an independent hospital of permission to practise in that hospital.*
- *In these Regulations, references to employing a person include employing a person whether under a contract of service or a contract for services.*

Social Care Wales is a Welsh Government sponsored body established under the Regulation and Inspection of Social Care (Wales) Act, 2016 to protect, promote and maintain the safety and well-being of the public in Wales.

Our aims, as set out in our strategic plan, are to:

- Provide public confidence in the social care workforce
- Lead and support improvement in social care
- Develop the early years and social care workforce

In order to provide public confidence we make sure the social care workforce is fit to practise through our regulatory role by maintaining professional standards and assuring high-quality accredited training.

We are responsible for maintaining a register of social care workers which currently includes social workers, social care managers and children's residential care workers. By 2022 domiciliary care workers and adults' residential care workers will also be registered. We investigate complaints against registered care workers through our fitness to practise process.

Key points and matters requiring clarification

- **We welcome the inclusion of private health services, including nursing care within the Ombudsman's remit, but would seek further clarity on how investigations in these areas would relate to the work of other regulatory bodies with responsibilities in these areas, including Social Care Wales (par 1).**
- **We would seek clarification on how provisions in the Bill which allow the exercise of professional and clinical judgement in social care relate to the powers and responsibilities of Social Care Wales (par 2).**
- **We welcome the provisions in relation to joint working. However, we note the lack of detail about joint working with those referred to, including Social Care Wales (par 8).**

General comments

1. We welcome the extension of the Ombudsman's remit to include maladministration in private health services, including nursing care. This will provide for greater consistency. We believe that they will help to ensure that the complexity of healthcare arrangements does not stand in the way of important investigations about alleged service failures. The provisions will also promote equality and fairness by giving these complainants the same opportunities for redress. However we would seek further clarity on how investigations in these areas would relate to the work of other regulatory

bodies with responsibilities in these areas, including us.

2. Recently the National Assembly has introduced two major laws on the regulation of social care[1]. In this context, we would like a clear definition of clinical judgment as it relates to social care. We would also question whether the reference to social care in 14(2) should be removed. This is because in relation to section 14 of Part 3, the Explanatory Memorandum refers to *decisions taken in consequence of the exercise of clinical judgment.* 'Clinical judgement' could be interpreted as being related to the practise of an individual care worker, which is an area which is already covered in law through Social Care Wales' remit (see 5.1). Furthermore, clinical judgment usually relates to health care and it is not, therefore, clear why social care is expressly referred to in 14(2) alongside the reference to health care. Therefore, we would question how these provisions in the Bill relate to the existing powers and responsibilities of Social Care Wales.

3. We would like to know whether fitness to practise panels is to be regarded as relevant tribunals for the purposes of the Bill. We would also like to have clarity about whether a decision about whether to refer a matter to a fitness to practise panel under relevant fitness to practise rules would be regarded as part of an administrative or judicial function.

4. There is a lack of clarity about what is meant by the following reference in section 10 of Part 3: *discharge of any of its administrative functions.* We would welcome more information about this because it will help us to identify the areas of our work that will fall within the Ombudsman's remit and allow us to make an informed comment about the provision.

5. Section 10(1)(c) refers to alleged failure by a listed authority to provide a relevant service and we would like more information about the meaning of relevant service in the context of our work. As far as we can see, this information is not available in the Bill or the Explanatory Memorandum.

6. We feel that Part 3, Section 3 would be clearer if 3(8) were set out, rather than just referred to. If the Ombudsman requires the agreement of the complainant to use Section 3, it would be best if this was clearly stated in Section 3.

7. We welcome the provisions in section 65 of Part 6 in relation to joint working. However, we note the lack of detail about joint working with those referred to in section 65(2)(f) - any person exercising regulatory functions in Wales. We fall within this category and are one of the specified persons listed in Schedule 3. Therefore, we seek further clarification on this important point.

8. Section 65 requires the Ombudsman to inform and consult us about relevant matters where he considers it appropriate. However, we feel that we need a stronger guarantee than this, especially as we are moving towards registering

[1] The Social Services and Well-being (Wales) Act 2014 and the Regulation and Inspection of Social Care (Wales) Act 2016

domiciliary care workers and this group of workers is specifically mentioned in Part 5 of the Bill.

9. We would like to know whose complaint investigation will take priority where there are parallel investigations by Social Care Wales and the Ombudsman about the same or related issues. We would also question how the Ombudsman will ensure impartiality in investigations into our handling of a complaint (under our complaint or review processes) where the Ombudsman has already been investigating complaints about the same or related issues.

Oral complaints

10. We recognise that some complainants face difficulties when they are required to submit their complaints in writing. We therefore welcome and support the proposal to permit oral complaints to the Ombudsman. However, we would draw attention to the possibility of an increasing number of complainants choosing to submit oral complaints out of convenience rather than necessity and the drain on resources this might cause.

11. We note that the Ombudsman's website contains details of advocacy and advice organisations and would suggest that the Ombudsman continue to direct people to these valuable sources of support and work with these organisations to make it easier for them to support complainants. This could reduce the pressure on the Ombudsman's staff in the event of a rise in the number of people choosing to submit oral complaints.

12. We also feel that the oral complaint process will have to be carefully managed to prevent misuse by vexatious complainants and to avoid disputes about the accuracy of transcribed complaints and the extent to which these reflect the views and wishes of the complainant.

Ombudsman initiated investigations

13. We welcome and support the new power enabling the Ombudsman to initiate his own investigations. We believe that this will offer greater protection to vulnerable members of society who may be reluctant to make a complaint about public services. Where the new power leads to the identification of systemic problems and results in measures to eradicate them, the benefits will be even greater.

14. However, it is our view that there is a need for greater clarity about the Ombudsman's power to continue with an investigation where the complainant does not want the complaint to be regarded as duly made. Section 8(5) of Part 3 prevents the Ombudsman's from carrying out an investigation in these circumstances. However, it appears that the Ombudsman can proceed with an investigation under section 4 whether the complaint has been duly made or not. While we support the ability to do this but there may be practical difficulties where the main complainant would not wish to be involved. We would welcome further information about this provision.

Complaints handling standards and procedures

15. Social Care Wales has two complaints-handling procedures; one for complaints about social care workers and one about for complaints about our how we operate. The process for complaining about social care workers is largely set out in the Regulation and Inspection of Social Care (Wales) Act 2016 and it is likely that we will want to rely on section 41(1)(b) or section 37(4) of the Bill to justify a decision to deviate from (or use a modified version of) a model complaints-handling procedure.

16. We would welcome information about whether, under section 38(1), the Ombudsman will be able to draw attention to approved non-compliance, where an organisation has relied on sections 41(1)(b) or section 37(4) to obtain consent to deviate from the model complaints handling procedure. This could help the organisations involved avoid unnecessary challenges to their processes based on alleged non-compliance.

Care and Social Services Inspectorate Wales (CSSIW)

Written Submission in respect of the Public Services Ombudsman (Wales) Bill

General observations:

CSSIW has a positive and constructive relationship with the Public Services Ombudsman Wales (PSOW) based on a clear understanding and respect for each other's independent roles. We have a Memorandum of Understanding which is due for revision with the imminent introduction of the Regulation and Inspection of Social Care Wales Act 2016.

CSSIW registers and inspects a wide range of care services. CSSIW has no powers in relation to complaints about care services but is keen to follow up any concerns arising from complaints and where necessary will take enforcement action. Regulations expect care providers to have a clear complaints procedure. When people cannot get satisfaction from a care provider and the care is funded by a public authority they can take their complaint to the public authority.

In Wales, where the care is not funded, people can turn to the PSOW. Although the take up has been low we believe the PSOW provides a very important route for achieving resolution.

We are aware that there are some issues which are contractual (e.g. fees) and where CSSIW has no provenance. We also know that some providers give notice to residents and their relatives when complaints are made. The extent to which these matters are Trading Standards issues or matters for the PSOW is an area for determination. The importance of providing a safeguard in these matters will be highlighted in the imminent Competition and Markets Authority report on the care home market.

CSSIW also inspects Local Authorities. There are specific regulations setting out how complaints about Local Authorities must be handled with ultimate recourse to the PSOW. CSSIW has no powers in relation to complaints about Local Authorities but we do use the learning from complaints to inform our inspections and to require improvement.

CSSIW has also been the subject of a small number of complaints raised with the PSOW. We have found the PSOW to be clear when deciding which cases will and will not be investigated and to be fair and where necessary challenging in reaching its findings and making requirements of us.

The committee asked for comments on the following:

- *The general principles of the Public Services Ombudsman (Wales) Bill and the need for legislation to deliver the stated policy intention;*

These seem sound and build upon the arrangements currently in place.

- *the provisions of the Bill which set out the new powers for the Ombudsman to:*
- *accept oral complaints;*

We believe this is important for the reasons stated.

We note that people using care are services are more likely to be vulnerable and lack the ability and confidence to initiate a written complaint.

Promoting accessibility to the PSOW enables greater equality and is supportive of people's rights.

The inclusion of electronic communication is sensible going forward.

- *undertake own initiative investigations;*

As explained in the Bill, issues may surface for which no individual has locus, insight or the intention to make a complaint but where a failure in administration has resulted is poor outcomes. It will be important for the PSOW to have clear criteria so PSOW responsibilities do not overlap those of regulatory bodies. For example anonymous complaints about care services. The strength of the PSOW function is that it can look across public systems and at the interconnectivity and systems failures where as regulatory bodies are commonly concerned with constituent parts. This is also an issue considered in the White Paper*, Services Fit for the Future, Quality and Governance in Health and Care in Wales*

- *investigate private medical treatment including nursing care in a public/private health pathway;*

We do not have a particular view on this. Clearly co-ordination and working closely with Health Inspectorate Wales and the Community Health Councils would need to be considered.

- *undertake a role in relation to complaints handling standards and procedures;*

This would seem sensible. The PSOW has much to contribute from the learning reflected in the PSOW's "casebook". There is an "invest to save" argument here. The more the PSOW can to do to promote better complaint handling upstream the less the PSOW should need to do to investigate complaints at a later stage.

- *any potential barriers to the implementation of the Bill's provisions and whether the Bill takes account of them;*

We do not have a particular view on this.

- *the appropriateness of the powers in the Bill for Welsh Ministers to make subordinate legislation (as set out in Chapter 6 of Part 1 of the Explanatory Memorandum);*

These seem reasonable to enable future proofing of the Act and to provide a mechanism to respond to changes and learning from PSOW activity.

- *whether there are any unintended consequences arising from the Bill;*

We do not have identified any intended consequences.

- *the financial implications of the Bill (as set out in Part 2 of the Explanatory Memorandum);*

We do not have a particular view on this.

David Francis
Assistant Chief Inspector CSSIW

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Cardiff Bay
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CF99 1NA

Chloe.Davies@assembly.wales mailto:SeneddCommunities@Assembly.Wales

Date: 29 November 2017

Ein cyf / Our ref:

Dear Chloe

RE: Consultation Response on the Public Services Ombudsman (Wales) Bill

Please find attached, as requested, a letter providing written submission on the Public Services Ombudsman (Wales) Bill.

Yours sincerely

Dr Kate Chamberlain
Chief Executive
Healthcare Inspectorate Wales

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November 2017

Consultation on the Public Services Ombudsman (Wales) Bill

Contextual issues

1. Healthcare Inspectorate Wales (HIW) welcomes the opportunity to contribute to scrutiny of the Public Services Ombudsman (Wales) Bill. We have framed our response primarily in the context of the Ombudsman's responsibilities with regard to providers of health and social care, although we recognise that his powers extend more widely. Our role is set out at Annex 1.

2. The interim report of the Parliamentary Review of Health and Social Care in Wales states

   "There is a strong consensus amongst the stakeholders that we spoke to on the broad direction of travel towards the provision of seamless health and social care, focused on outcomes that matter to the individual."

3. This direction of travel lends weight to a number of the new powers.

   Oral complaints. The flexibility to accept complaints in a form which is most accessible and appropriate to the complainant is welcomed.

   Public/ private pathway. The ability to fully investigate the circumstances of an individual's care where that care crosses the boundary between listed bodies and private healthcare is to be welcomed.

   Complaints-handling standards: the introduction of consistent and joined up complaint-handling processes across service boundaries should provide simplification and clarity for the public.

4. It will be important to ensure that implementation of the powers in this Bill is cognisant of, and aligned to, related legislative developments such as potential legislation following the White Paper 'Services Fit for the Future' which also addresses the need for alignment of standards and complaints processes across health and social care.

Provision for the Ombudsman to accept oral complaints

5. We support the flexibility in the Bill which allows the Ombudsman to set out in guidance the form and content of complaints. This will ensure that, as people use technology in different ways (e.g. e-mail, text messaging, twitter), the Ombudsman is able to specify clearly what will be treated as a formal complaint.

6. We support provision that the Ombudsman should be able to receive oral complaints. Some people may find it difficult to express themselves adequately in writing and it would therefore assist with access to allow complaints to be submitted in a variety of formats.

7. It will, however, be important that the Ombudsman does capture for the record the information in a written format and does confirm with the complainant that the record accurately reflects the issues that they wished to raise. This should be done orally at the time of complaint regardless of whether the complainant wishes a written confirmation to be sent to them.

8. Clause 8 (9) is arguably too specific and does not go far enough for the purposes of monitoring access and outcome. It could possibly be re-phrased along the lines of "The Ombudsman must maintain a register of all complaints, the manner in which they are received and the outcome". This may help to monitor and evaluate whether oral complaints are more or less likely to proceed to formal investigation.

Provision to extend the Ombudsman's jurisdiction to allow investigation of complaints in a public/private health service pathway

9. The Social Care and Well-being (Wales) Act 2014 extended the jurisdiction of the Ombudsman to include care homes, domiciliary care and palliative care. In general we welcome provisions that, where appropriate, bring the arrangements around health and social care into alignment and avoid arbitrary sectoral distinctions.

10. We support the provision for the Ombudsman to look into care and treatment provided by a private health care provider where that care/ treatment has stemmed from the NHS, or has been a part of a person's health care pathway which has also involved the NHS. This appears reasonable and supports the principle of joined-up person-centred care.

Power to undertake a role in relation to complaints handling standards and procedures

11. The Bill allows for the Ombudsman to publish a statement of principles concerning complaints-handling, and publish model procedures for complaints- handling. It allows for the Ombudsman to declare a listed body non-compliant. It also requires the Ombudsman to take a role in oversight of the implementation of complaints-handling procedures including the promotion of best practice.

12. We consider that the standardisation of complaints procedures would be helpful to the public. This issue relates directly to the proposal for alignment of processes, and joint investigation of complaints, across health and social care as set out in the White Paper "Services Fit for the Future". We believe that where a citizen is receiving integrated care they should be able to complain only once, not separately to each of health

and social care. In these circumstances it will be important that there is a clear lead body for the investigation of the complaint which has the authority to lead on behalf of both bodies.

13. Further thought will be needed regarding how this will appear to citizens who may be receiving care from a combination of health services, social services and independent care providers, particularly given the extension of the Ombudsman's jurisdiction to investigation of a public/ private health service pathway.

14. Overall we consider that it will be in the best interests of the public to have a body with explicit responsibility for ensuring that complaints processes are operating consistently and seamlessly in the best interests of the public. We would also welcome the opportunity that this presents to ensure the gathering and reporting of consistent and comparable data across public services

Provision for the Ombudsman to undertake own initiative investigations

15. The Bill recognises that there are already a number of bodies that undertake this type of review and it will be important to ensure that there is no overlap with the roles of inspectorates and regulators, the Auditor General for Wales, and Commissioners.

16. Relationships between HIW and the Ombudsman have developed well in recent years and a Memorandum of Understanding has been agreed setting out how the two organisations will work together on matters of common interest. http://hiw.org.uk/docs/hiw/publications/160728psowmouen.pdf .

17. Although the Bill refers to "any person exercising regulatory functions in Wales" as a "specified person" for the purposes of consultation with the Ombudsman, it does not include the powers to co-operate, conduct joint investigations, and prepare joint reports with regulators in the same way that it does for Commissioners and the Auditor General for Wales. It would be disappointing if the legislation were to limit the ability of HIW and PSOW to work together in the interests of the public, efficiency and effectiveness.

Wider landscape

18. The new powers to act as a Complaint Standards Authority and to undertake own initiative investigations represent a significant development in the role of the Ombudsman. The current role is focussed at an individual level on looking into individual complaints about public services & independent care providers in Wales. The new powers will

mean that the Ombudsman will also be operating at a systems level ensuring that complaints systems overall are working effectively and examining patterns and trends to identify potential systemic issues for further investigation.

19. At an individual level there is no other body responsible for investigating complaints about services from listed bodies when a member of the public is unhappy with their response from the original service provider. This means that the role of the Ombudsman is relatively easy to communicate.

20. At a system level there are a wide variety of different bodies who also have responsibility for identifying and investigating systemic problems in the delivery of public services. These include the Auditor General for Wales, the Commissioners and a number of regulation and inspection bodies. Although this is recognised to a degree in the legislation it will pose challenges with implementation which will need to be carefully managed.

21. Wales is a small country with a relatively complex and crowded landscape of regulatory, scrutiny and oversight bodies. It is essential that all parties understand their part in the system and work collaboratively and effectively with others, if the system is to work effectively in the best interests of the public.

Healthcare Inspectorate Wales (HIW) is the independent inspectorate and regulator of healthcare in Wales

Our purpose

To check that people in Wales are receiving good care.

Our Priorities

Through our work we aim to:

Provide assurance:

Provide an independent view on the quality of care.

Promote improvement:

Encourage improvement through reporting and sharing of good practice.

Influence policy and standards:

Use what we find to influence policy, standards and practice.

Our Responsibilities

Our work delivers activities in three key areas:

- regulation of independent healthcare
- inspecting the NHS
- mental health.

<u>Regulation of independent healthcare</u>

Registration, inspection and enforcement action are the methods through which HIW regulates the independent health sector in Wales in accordance with the Care Standards Act 2000, the Independent Health Care (Wales) Regulations 2011; the Independent Health Care (Fees) (Wales) Regulations 2011 and other legislation (see Annex B).

We regulate and inspect a broad range of independent healthcare providers ranging from those who use lasers to full private hospitals. Our core activities are listed below.

- Registration and inspection of independent clinics, hospitals and medical agencies.

- Registration of independent mental health and learning disability establishments.
- Registration and inspection of premises using class 3B or 4 laser or intense pulse light machines.
- Pursuit of enforcement action when regulatory breaches are identified in a registered setting.
- Identifying and dealing with potential unregistered providers.

Inspecting the NHS

HIW inspects services provided by the NHS across Wales to test whether care is provided in accordance with the Health & Care Standards. Many of HIW inspections are unannounced although for practical reasons this is not always possible. We have published a statement setting out the rationale for whether our inspections are unannounced or announced. We also undertake a proportion of our visits outside of office hours.

Inspections test care against three specific domains:

- quality of patient experience.
- delivery of safe and effective care.
- quality of leadership and management.

Mental Health

The focus of this work area is to ensure the most vulnerable individuals in society are protected, cared for and treated appropriately in environments conducive to their recovery. HIW visits hospitals in both the NHS and the independent sector as part of our work programme. We also visit services provided in the community to review Community Treatment Orders.

Our core activities are listed below.

- Inspection of NHS and independent mental health and learning disability establishments with appropriate follow-up activity.
- Provision of the Mental Health Review Service and processing requests for Second Opinion Appointed Doctors (SOADs).
- Monitoring the implementation of the Mental Health Measure.
- Monitoring the implementation of the Deprivation of Liberty Safeguards (DOLS).
- Monitoring the use of the Mental Health Act.

Agenda Item 4

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Annwyl John,

Stage 1 Consideration of the Public Services Ombudsman (Wales) Bill

Thank you for your invitation to contribute to your consideration of the Public Services Ombudsman (Wales) Bill. I regret that I am unable to attend the Committee on 13 December 2017. I am, however, pleased to be able to arrange for Kevin Thomas (WAO Director of Corporate Services) and Martin Peters (WAO Head of Law & Ethics) to provide evidence for me. I also submit the following written evidence. Some of the material below reiterates the points that I have made in response to the Finance Committee of the Fourth Assembly's inquiry into the consideration of powers of the PSOW, the draft Bill prepared by the Finance Committee in late 2016 and, most recently, regarding the current Bill, in my letter of 16 October 2017 to the Chair of the present Assembly's Finance Committee.

The general principles of the Bill and the need for legislation to deliver the stated policy intention

1. As I understand it, the main general principle underlying the Bill is set out in paragraph 3.27 of the Explanatory Memorandum, i.e. it is to ensure that the PSOW's powers reflect best practice. I consider that that is a sound general principle.
2. Overall, the four main extensions of the Ombudsman's powers (as listed at paragraph 5.2 of the Explanatory Memorandum) seem to be in line with the best practice principle for the reasons set out in my submission to the Finance Committee of 19 February 2015. To summarise briefly, I consider that:

i. own initiative investigations should enable wider systemic problems to be addressed coherently;

ii. there may be real benefits to vulnerable people in making the submission of oral complaints easier;

iii. there is merit in considering healthcare coherently, where both privately obtained and publicly provided care is involved;

iv. there is scope for improvements in practice and efficiencies through model complaints-handling procedures and guidance across public bodies.

3. While I have some reservation as to the absolute necessity for legislative change in respect of oral complaints, I see the new provision as being conducive to the policy. With regard to the other three areas, it seems to me that legislation is necessary to meet to the policy objectives.

4. In addition to the four new areas of provision, the Bill also contains at section 67 a new requirement on the Ombudsman, where he or she considers it appropriate, to consult the Auditor General regarding proposed Ombudsman investigations. I think that this provision is appropriate, particularly as a means of ensuring that investigations do not unhelpfully overlap with the Auditor General's examinations, and vice versa.

5. I also think that the new powers at section 67 for the Ombudsman and the Auditor General to co-operate with each other and undertake joint investigations are generally appropriate. I do, however, consider that the Auditor General should be clearly protected from actions for defamation in respect of joint investigation communications and reports, and I think this could be addressed by amending section 70 so as to extend its protection to cover the Auditor General in respect of joint investigations.

6. I should perhaps note that paragraph 12.39 of the Explanatory Memorandum is not quite accurate in saying that the Bill *requires* the Ombudsman and the Auditor General to work collaboratively. While this is not a problem in terms of the Bill itself, it would be more accurate to say that the Bill empowers the Ombudsman and the Auditor General to undertake joint investigations—such empowerment is more appropriate than a requirement.

Potential barriers to the implementation of the Bill's provisions and whether the Bill takes account of them

7. Section 68 is a prohibition on disclosure of information that covers, among other things, information supplied by the Auditor General in the course of co-operation under section 67. I understand that the prohibition is in essence an extension of the existing prohibition contained in section 34X of the 2005 Act. Such an extension does not, however, adequately take account of the full range of the

Auditor General's functions, which are not limited to examinations. It would therefore be helpful if section 68 were amended to ensure that this is not a restriction on disclosure by the Auditor General of information supplied by the Auditor General under section 67 where such disclosure is part of the exercise of any of the Auditor General's functions.

8. I should perhaps mention that "investigation" is an exception to the prohibition at section 68(2)(b)), and under the Bill's interpretation provisions (section 76—see in particular lines 1 to 5 of page 51) this would seem to include an examination by the Auditor General. However, some Auditor General functions, such as the power to issue advisory notices under section 33 of the Public Audit (Wales) Act 2004, still appear to be caught by the prohibition. (Advisory notices are issued by the Auditor General where it appears to him that a local government body is embarking on unlawful expenditure. Such notices are not examinations and do not seem to fall within the definition of "investigation".) As currently drafted, section 68 may therefore discourage co-operation under section 67, and this is a potential barrier to successful implementation of the Bill.

The appropriateness of the powers in the Bill for Welsh Ministers to make subordinate legislation

9. I consider that the powers in the Bill for Welsh Ministers to make subordinate legislation are appropriate. With the appropriate exception of section 75 (commencement), all the powers are subject to the affirmative procedure, which should help ensure that the subordinate legislation is properly considered by the Assembly. Similarly, the requirement for the Welsh Ministers to consult the Ombudsman in respect of secondary legislation concerning, for example, criteria for own initiative investigations also seems appropriate.

The financial implications of the Bill

Costs and benefits

10. It is apparent that careful consideration has been given to the financial implications of the Bill, and I think the identification of costs in the Explanatory Memorandum is generally realistic. I do, however, think that the estimated volumes of oral complaints and investigations seem somewhat low (paragraph 11.36 of the Memorandum), depending on how well publicised the acceptance of oral complaints becomes.

11. While a summary table is provided on page 45, I think that the summarisation of the implications of the Bill could be clearer. As with many Bills, costs and savings (or cost avoidance) are summarised in a five-year total sum. The rationale for that is given in paragraph 11.24 of the Explanatory Memorandum: "[cost] estimates can be calculated for this period with reasonable certainty." Paragraph 11.24 also

says (not unreasonably in my view) that "the Ombudsman expects a 'steady state' will be reached on costs and benefits relating to the new powers after three years" and that "ongoing (or recurrent) costs will continue beyond the five year period." I think it would have been appropriate to make these key statements prominent in the summary on page 45.

12. I am not clear as to why the savings estimates are based on the higher caseload growth estimates (the savings accruing from a higher level of cost-avoidance), while the cost estimates are given as a range. I may have misinterpreted the presentation, but it strikes me that it would have been appropriate to have also given a cost avoidance figure based on the lower 5 per cent caseload growth forecast.

13. I also think that the Explanatory Memorandum should be more explicit about the level of uncertainty in relation to savings. The Memorandum refers to the Comptroller & Auditor General's report *Department of Work and Pensions: Handling Customer Complaints*, which indicates that substantial savings may be possible from improved complaints handling. However, I would suggest that forecasting such savings is subject to considerable uncertainty, and I do not think that such uncertainty is recognised sufficiently in the Memorandum.

Welsh Consolidated Fund

14. Annex B of the Explanatory Memorandum (see page 144) says that the Bill does not charge expenditure on the Welsh Consolidated Fund (WCF). That is not correct. In fact, paragraphs 9 and 10 of Schedule 1 to the Bill do contain provisions for direct charges on the WCF. Therefore, under Standing Order 26.6(xi), the Explanatory Memorandum should incorporate a report of the Auditor General setting out his or her views on whether those charges are appropriate.

15. As set out in my letter to the Chair of the Finance Committee of 16 October 2017, this omission appears to arise from a misinterpretation of my letter to the Chair of the Finance Committee of the Fourth Assembly, Jocelyn Davies AM, of 19 February 2015, which set out that the proposals put forward by the Ombudsman at that time did not seem likely to need direct charge provisions. Paragraph 7.3 of the Memorandum says that "in line with the advice, this Explanatory Memorandum does not include a report of the Auditor General".

16. The Memorandum rather misses the point. While I may have given a view that the Ombudsman's proposals (which predated the draft Bill) did not seem likely to need direct charge provisions, that is not the same as saying that no report was necessary on any direct provisions included in a Bill.

17. I am, however, happy to report that, having considered the Bill, I consider that the direct charge provisions of paragraphs 9 and 10 of Schedule 1 to the Bill are

appropriate. Paragraph 9 provides for salary and superannuation of the Ombudsman to be charged on the WCF. This continues the well-established safeguard of the independence of the office-holder by way of enabling the office-holder's remuneration to be charged on the WCF, rather than having it subject to annual approval through a budget motion of the Assembly. Paragraph 10 effectively indemnifies the Ombudsman and his or her staff and contractors in respect of breach of duty. This is a well-established, cost-effective and appropriate means of providing professional indemnity insurance.

18. I am happy for paragraph 17 above to be incorporated into a revised Explanatory Memorandum so as to enable the requirement of Standing Order 26.6(xi) to be met.

19. While the direct charge provisions of paragraph 9 of Schedule 1 to the Bill are appropriate, experience has shown that it would be helpful if those provisions were accompanied by a failsafe provision so as to prevent administrative oversight or errors in making remuneration arrangements leading to a technically unlawful charge on the WCF. Such a charge would lead to the qualification of the WCF accounts, which would result in significant amounts of work on the part of the Welsh Government and WAO staff for no benefit. I suggest that an additional provision in paragraph 9 along the lines of:

> *For the purposes of amounts being chargeable on, and paid out of, the Welsh Consolidated Fund, the validity of such charges is not affected by any defect in the terms of the Ombudsman's appointment.*

Audit provisions

20. Although they fall short of best practice, the provisions for the audit of the Ombudsman's accounts at paragraph 17 of Schedule 1 the Bill are generally workable. To meet best practice the Bill should be amended so that it requires the Auditor General, in the course of auditing the accounts, to be satisfied as to whether the Ombudsman has made arrangements for securing economy, efficiency and effectiveness. This would bring the provisions up to the standard of NHS and local government audit provisions (see section 17(2)(d) and section 61(3)(b) of the Public Audit (Wales) Act 2004).

21. It would also be helpful if the four month deadline in paragraph 17(2)(b) were omitted. Such a deadline serves no useful purpose and only risks causing confusion if there are substantive problems with the accounts. An example of the problems arising from such a deadline occurred with the accounts of Natural Resources Wales (NRW) for 2016-17, where, because of regularity issues, the deadline conflicted with the requirements of natural justice. As well as NRW itself, I needed to give a firm with contracts with NRW the opportunity to comment.

22. Such an amendment would also bring the accounting provisions closer into line with local government accounts and certain other bodies, such as the Higher Education Funding Council for Wales. Another option would be to make the deadline only applicable subject to meeting the requirements of the Code of Audit Practice issued under section 10 of the Public Audit (Wales) Act 2004 (the Code reflects the requirements of natural justice), or made readily amendable by order, though it is hard to see how that could be practical.

23. Another matter that relates to audit and which experience shows is somewhat problematic is the provision for annual reports in paragraph 14 of Schedule 1. The problem is that this provision is not joined up with the annual accounts provisions. It is normal and sensible practice for the Ombudsman, like most other public bodies, to produce one "annual report and accounts", rather an annual report on the discharge of functions and an annual report and accounts. The Treasury's Financial Reporting Manual (the "FReM") requires the Ombudsman (and other public bodies) to provide an annual report on their activities to accompany the accounts, and professional standards require the Auditor General (and other auditors) to consider whether the annual report is consistent with the accounts.

24. While it is normal and sensible practice to produce one annual report, both paragraph 14(3) and paragraph 17(2) of Schedule 1 require reports to be laid before the Assembly. However, in the case of paragraph 14(3), it is the Ombudsman who is required to lay the report, and in the case of paragraph 17(2), it is the Auditor General who is required to lay a certified copy of the accounts, together with the Auditor General's report on them (which includes consideration of the annual report). This effectively duplicate laying requirement is messy, and it would be helpful if paragraph 14 could provide that if the annual report on functions is contained in the annual report and accounts document, then that document may be laid by the Auditor General.

25. While paragraph 14 is a restatement of paragraph 14 of Schedule 1 to the 2005 Act, it would be appropriate to take the opportunity to address the problem.

26. Finally, in respect of audit provisions, I note that paragraph 14.18 of the Explanatory Memorandum mentions that the provision for the AGW's examinations into the economy, efficiency and effectiveness of the Ombudsman's use of resources may be used as part of the post-implementation review. While I consider that undertaking an examination so as to help inform the Assembly's post-implementation review (section 72) could be a very useful and interesting exercise, I should note that I cannot bind my successor to undertake such an examination.

Unintended consequences of the Bill

27. Schedule 3 to the Bill lists the "Wales Audit Office", so making it a body that may be subject to the Ombudsman's investigations. As I set out in my letter to the Presiding Officer of 8 June 2016, I had previously discussed and agreed with the Ombudsman that this risks creating time-consuming confusion and frustration, which I think would be an unintended consequence. Many people confuse the WAO with the Auditor General and erroneously regard the WAO as undertaking audits, whereas in fact its main functions are limited to providing resources to, and monitoring and advising, the Auditor General. Inclusion of the WAO in the Ombudsman's remit risks encouraging individuals who would like the Auditor General to come to different audit opinions to think that Ombudsman provides a means by which such opinions may be reviewed.

28. Indeed, as the WAO's functions do not entail providing services to individuals (other than the Auditor General), both the Ombudsman and I feel it is hard to see how the Ombudsman could ever be presented with a case that legitimately calls for review of the WAO's actions. It would therefore be helpful if an amendment could be brought forward to remove the WAO from Schedule 3. I understand that the Ombudsman will be writing in similar terms to the Committee.

I hope the above is helpful.

Yn gywir

HUW VAUGHAN THOMAS
AUDITOR GENERAL FOR WALES

cc: Nick Bennett, Public Services Ombudsman for Wales

8 December 2017

Dear Llywydd

Supplementary Legislative Consent Memorandum – The Financial Guidance and Claims Bill

Thank you for your letter dated 6 December in relation to the above LCM, which we discussed in our meeting on 7 December.

In reporting on the initial LCM in July 2017, we sought clarity from the Welsh Government on a number of issues including their analysis of how the provisions requiring the Assembly's consent related to devolved subject areas identified in its memorandum. In particular, how the provisions related to subject 4 Economic Development of Schedule 7 to the Government of Wales Act 2006. In replying (in a letter dated 23rd August 2017) the Government did not directly address this issue. In reporting on the LCM, we stated there was no reason why the Assembly should reject the LCM, but that Members may wish to seek clarity during the plenary debate on this outstanding issue. As the Plenary debate on the original LCM has not yet occurred, this clarification remains outstanding.

At our meeting on 7 December, we agreed to seek clarification from the Welsh Government on this outstanding issue as a matter of urgency. We will also schedule the LCM for consideration at our meeting next week, to ensure that if the LCM is referred to us for scrutiny, we are in a position to discuss it in more detail.

However, even taking this into account, as our first Committee meeting after the Christmas recess is 11 January, the current timetable would not allow us to report by 9 January. As your letter seems to indicate that it does not need to be considered by 9 January, we would suggest that the Plenary debate is moved back to 16 January, which would enable us to consider the supplementary LCM, seek

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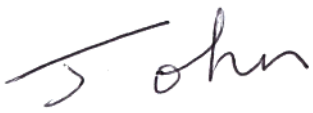
clarification from the Welsh Government and report. This would still ensure scrutiny was undertaken in less than six sitting weeks.

Yours sincerely



John Griffiths AM
Chair

Croesewir gohebiaeth yn Gymraeg neu Saesneg.

We welcome correspondence in Welsh or English.

Rebecca Evans AM
Minister for Housing and Regeneration

8 December 2017

Dear Rebecca

Supplementary Legislative Consent Memorandum on the Financial Guidance and Claims Bill

You will be aware that on 11 July 2017, the Business Committee referred the Legislative Consent Memorandum on the Financial Guidance and Claims Bill to the Children, Young People and Education Committee for consideration. As elements of the LCM fall within the Equality, Local Government and Communities Committee's remit, the LCM was also considered by our Committee.

We wrote to the Welsh Government seeking clarification on a number of issues including the extent to which the provisions identified in the LCM under Education and Training; Social Welfare; and Economic development were within the Assembly's legislative competence. The response did not cover this clarification. (Copies of both letters are enclosed).

In reporting on the LCM we stated there was no reason why the Assembly should reject the LCM, but that Members may wish to seek clarity during the debate on this issue. As the debate on the l LCM has not yet occurred, this clarification remains outstanding.

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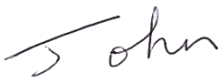
We received a letter from the Business Committee on 6 December asking if we could consider the supplementary LCM by 9 January. At our meeting on 7 December, we considered this request, and agreed to do our utmost to ensure swift consideration of the supplementary LCM. To this end, we will be tabling it for consideration at out meeting on 13 December, to ensure that if it is referred to us, we can consider it before Christmas. However because there is still an outstanding issue, we would ask that you could provide clarification on the outstanding matter in writing, as soon as possible, but no later than 2 January.

As the Llywydd's letter indicates that there will be time for committee scrutiny, we would suggest time is given to enable us to consider your response before reporting before the Plenary debate. We believe this could be done if the Plenary debate was moved back to 16 January. This would give us four sitting weeks to consider the LCM, which is still less than the six week period which the Welsh Government has previously committed to for scrutiny of LCMs.

Yours sincerely



John Griffiths AM
Chair

Croesewir gohebiaeth yn Gymraeg neu Saesneg.

We welcome correspondence in Welsh or English.

Agenda Item 9

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