

## **FINANCE COMMITTEE OF THE NATIONAL ASSEMBLY FOR WALES**

### **INQUIRY INTO THE POWERS OF THE PUBLIC SERVICES OMBUDSMAN FOR WALES**

#### **CONSULTATION RESPONSE**

**DR NICK O’BRIEN**

#### **BACKGROUND**

1. The views expressed below are mine alone. I have limited my comments to those issues on which I am competent to express an informed view.
2. In 2013-14 I served as Specialist Adviser to the House of Commons Public Administration Select Committee (PASC) inquiries into complaints about public services and into the future of the UK Parliamentary Ombudsman and Health Service Ombudsman for England (PHSO).
3. I had previously held posts as Director of Policy and Public Affairs, and Legal Policy Adviser, at the office of the PHSO (2007-2012); as Legal Director at the GB Disability Rights Commission (2000-2007); and as Legal Adviser, and then Deputy Ombudsman, at the Office of the Legal Services Ombudsman for England and Wales (1991-2000). I am an honorary research fellow in the Law School at Liverpool University and have written widely about ombudsmen, as well as about disability rights and human rights more generally.

#### **GENERAL COMMENTS**

4. I support without reservation the proposed changes in respect of own initiative investigations, oral complaints, complaints handling across public services, and links with the courts. I have reservations (explained below) about the proposed extension of the Ombudsman’s jurisdiction to self-funded private healthcare but nevertheless support it. Although the PSOW Act is already among the more developed examples of public-sector ombudsman legislation, the reforms suggested would otherwise strengthen the Ombudsman’s role and improve access and impact.
5. In respect of the other issues referred to in the Consultation Paper, I support the inclusion of other bodies within the Ombudsman’s jurisdiction, the exclusion from jurisdiction of code of conduct complaints and the protection of the title of Ombudsman, but I have reservations about making the Ombudsman’s recommendations (as opposed to the Ombudsman’s findings) binding.
6. More generally, I am mindful of the potential, albeit indirect, impact on the Ombudsman of the EU ADR Directive, of the changing landscape for the delivery of

public services within the UK, and of the increasingly uncertain boundaries between the public and private sector. These factors make the consideration of legislative reform especially timely and necessary.

## **EFFECTIVENESS OF THE CURRENT PSOW ACT 2005**

7. The 2005 Act has proved to be broadly effective, enabling the PSOW to establish itself as a modern public services ombudsman, with the ability to provide good access to the public, to resolve disputes swiftly and effectively, and to provide remedies that deliver both individual redress and systemic reform in the public sector.

8. As a result the PSOW commands the respect of citizens and public bodies in Wales, and in the ombudsman community throughout the UK.

9. The ADR and public-service delivery environment is, however, in flux. In common with other public sector ombudsmen, the PSOW faces new challenges as a result. The review and reform of the statutory remit is therefore an essential condition of meeting that challenge successfully.

## **OWN INITIATIVE INVESTIGATIONS**

10. The vast majority of national ombudsman institutions throughout Europe, and indeed throughout the world, have own initiative powers. Such powers enable an ombudsman to investigate in the public interest even if an individual complaint has not been made. As such they have the potential to extend the reach and strategic impact of the ombudsman.

11. More than any other available innovation, the introduction of own initiative powers would enable the Ombudsman to hold the Executive to account, to address the real concerns of citizens, especially the most marginalised, and to provide systemic remedy that might beneficially transform the delivery of public services and the discharge of public functions in Wales.

12. In particular, own initiative powers can be used in situations where there is widespread and reasonable grounds for suspecting significant injustice but where credible individual complaints are not forthcoming, for example because those experiencing such injustice are especially marginalised, or because the scale of the injustice perpetrated is not apparent to any one individual but is more easily detected from a wider collective perspective.

13. Such powers have been widely and effectively used in Europe, for example by the ombudsmen in Austria, Sweden and Finland, and further afield by the ombudsmen in Australia and Canada at both national and state level.
14. In Northern Ireland the Ombudsman is in the process of acquiring an own initiative power as a result of legislative reform, and in the Republic of Ireland the Ombudsman already has such a power, which has been used sparingly.
15. Last year, PASC recommended that PHSO should acquire an own initiative power of this sort.
16. Similar powers have been used successfully by other non-ombudsman institutions in the UK for a long time, for example from the 1970s by the various equality commissions (CRE, EOC and DRC) and now by the EHRC.
17. There is in principle a danger that with such powers the Ombudsman might encroach on the territory of other regulators or inspectorates, whose remit already entails proactive scrutiny. The Ombudsman would, however, be seeking to use its proactive power in a different way: it would be conducting its investigation in response to identifiable evidence of prima facie injustice, caused by maladministration, and remediable by ombudsman-style recommendation. To that extent its role would remain distinctive.
18. Careful legislative drafting, supported by memoranda of understanding between the Ombudsman and other regulators and inspectorates, would adequately manage any such encroachment that still existed, or that was perceived to exist.
19. Furthermore, the exercise of such powers would enable the Ombudsman to prevent the escalation of injustice and to investigate in a more focussed manner. To that extent, the benefits, financial and otherwise, afforded by such investigations would be compounded.

## **ORAL COMPLAINTS**

20. The need to put complaints in writing is unnecessarily restrictive and a potential barrier to access, not least for those who are disabled or who have restricted literacy. The desire to have a record of a complaint can be met by allowing access by email, website form or text, as well as by telephone if calls are recorded or their content otherwise transcribed.
21. It is in any event arguable that failure to permit access by these alternative means would constitute a breach of equality legislation.

## **COMPLAINTS HANDLING ACROSS PUBLIC SERVICES**

22. The Ombudsman is in a privileged position to prescribe standards for complaint handling across the public services, drawing upon the empirical experience of handling complaints in large numbers.

23. This ‘design authority’ function already exists in Scotland, where it has been used successfully, and was recommended by PASC for the UK Parliamentary Ombudsman.

## **OMBUDSMAN’S JURISDICTION**

24. The distinction between public and private domain is becoming increasingly difficult to maintain. It is nevertheless a distinction that is fundamental to the function and identity of a ‘public services’ ombudsman. The Ombudsman’s remit should therefore be limited, so far as is practicable, to the exercise of functions by those acting in the public domain and in accordance with the public interest that warrant protection other than merely by the operation of the market.

25. The ability of the Ombudsman to investigate private healthcare commissioned by the NHS could on that account be supplemented, in accordance with that notion of the public domain, by extension to self-commissioned private healthcare, at least to the extent that this is delivered in conjunction with public healthcare. Indeed, the absence of such a power can create a distinction between ombudsman coverage which is likely to make little sense to patients, so long as the Ombudsman’s function is conceived (albeit mistakenly) as nothing more than that of dispute resolution for consumer complaints about quality of service.

26. Notwithstanding the pragmatic attraction of such a concession in this instance, the public-interest aspect of the Ombudsman’s role is otherwise worth preserving emphatically, as a matter of principle. The democratic accountability function of the Ombudsman is fundamental to the role and should not be diluted into a form of private dispute resolution or a device for holding to account institutions whose public-interest remit is marginal and whose ethos is primarily market-oriented.

## **LINKS WITH THE COURTS**

27. I support the removal of the statutory bar since this would increase the Ombudsman’s discretion to investigate appropriately and in a manner proportionate to the issues at stake.

28. With the erosion of publicly funded legal advice and representation, theoretical access to the civil courts should no longer constitute a special category of grounds for an ombudsman to be barred from investigation. There will nevertheless be cases where the Ombudsman is not the appropriate forum and a complainant will need to be directed to seek remedy elsewhere, including through the civil justice system if so advised.

29. I do not see any objection to the Ombudsman having the power to refer cases to a court for a determination on a point of law. However, the occasions when the use of such a power is needed would be rare, since disputes that turn on a point of law are not likely to be suitable for investigation by the Ombudsman in the first place.

## **OTHER ISSUES**

### **Recommendations and findings**

30. I do not think the Ombudsman’s recommendations should be binding. It is of the essence of the distinctive approach of an ombudsman that its mandate is one of influence rather than sanction. From this constraint flows much that is attractive about the ombudsman approach, including its relative freedom of discretion, flexibility of process and deliberative style of decision-making. Whilst there is a case for saying that a public authority is bound to accept the ombudsman’s ‘findings’ (even in cases of ultimate disagreement) the requirement that a public authority comply with a recommendation contingent upon those findings would be seriously at odds with the authentic ombudsman ethos.

### **Code of conduct complaints**

31. I agree that code of conduct complaints should not be within the Ombudsman’s jurisdiction. The Ombudsman’s chief function is the democratic holding to account of public authorities for their exercise of public functions, including (but not limited to) the provision of services to the public. That function should not be diluted by inclusion within jurisdiction of a quite distinct ‘policing’ function.

**DR NICK O’BRIEN**

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