

INQUIRY ON THE PUBLIC SERVICE OMBUDSMAN FOR WALES

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Some introductory comments

1. As well as writing extensively on the Ombudsman, I was a member of an independent evaluation panel for the Local Government Ombudsman in England in 2013 ([External Evaluation of the LGO](#)).
2. The administrative justice system, and indeed the civil justice system, in Wales and the UK is an evolving network of processes and institutions. It is also one in which less and less reliance can be placed on the courts and the structures and processes that support them to deliver universal 'justice'.
3. Ombudsman schemes, and ADR more generally, have been exposed to criticism, and some aspects of that criticism are justified. But, the potential benefits of this model of dispute resolution are significant and, as the EU Directive on ADR emphasises, the trend towards ADR looks set to continue.
4. The ombudsman enterprise remains relatively young and the processes employed are still being refined. In particular, there is still work to do to raise the profile and robustness of ombudsman schemes.
5. Finally, the landscape within which the ombudsman operates is changing rapidly due to developments in information technology, the merging of the public and private sectors and the pressures of austerity politics.
6. With all these factors in mind, this review and set of proposals is a model of good practice in helping to strengthen the potential of the ombudsman to both resolve complaints and increase administrative justice.

Q1

7. The current 2005 Act has facilitated a robust ombudsman scheme and within the UK there are a number of schemes that would benefit from using the Welsh model as a starting template.

Q2-4 & 17: Own initiative investigations (OII)

8. An ombudsman scheme should have powers of own-initiative investigation (OII) for the reasons outlined by the PSOW; note too the additional evidence provided by the PSOW of good use being made of OIIs elsewhere. In research conducted a few years ago in Australia and New Zealand, my colleagues and I found universal agreement amongst ombudsman schemes that the role could not be performed properly without the capacity for OII.
9. The OII power offers the potential for an ombudsman to investigate systemic maladministration before it becomes a long-lasting and large scale problem. In some circumstances, it provides the opportunity for the redress of grievances that in all probability would not lead to a complaint because of the nature of the aggrieved individual (eg they are young, vulnerable, in care).
10. The circumstances when an OII would be required would, I anticipate, be rare. Most forms of grievance come about as a result of highly individualised

fact patterns. But the history of ombudsman work provides much evidence of systemic maladministration in the provision of public services which goes beyond the individual complaint. Currently, legislation makes it difficult for the PSOW to investigate such wider maladministration, except in confined circumstances. By contrast, the OII power would create the framework within which the PSOW could provide a more powerful and relevant service.

11. There are potential risks in introducing such an OII power to Wales, but these can be managed through legislation and proper oversight. Eg:

Danger of overuse of the OII power to the detriment of complaint-handling

12. The power of OII could dominate the work of the PSOW to the detriment of its other roles, but it is highly unlikely. The EU Ombudsman, which is a relatively large scheme, and the Ontario Ombudsman in Canada have both made extensive use of the power. But these schemes are exceptions to the rule, for elsewhere the OII power is used sparingly.

13. The scrutiny of the Assembly for Wales is adequate for gauging whether or not a PSOW is overusing or inappropriately implementing the OII power. The Assembly should not have any power to intervene in an OII once an investigation has been commenced. But it should have a role in scrutinising the output of the PSOW. Given this, the PSOW will be wary of pursuing a strategy with regard to OIIs which it could not defend or gain the long-term support for from the Assembly. Should the process of scrutiny lead the Assembly to have concerns about the office's use of the power then it would be open to it to amend the PSOW's legislation in the future.

14. Further, the exercise of the OII power will come with financial and human resources/research costs. The PSOW has offered an initial costing of the resources to be employed in this capacity. Given current budget constraints (and the rising numbers of complaints that the PSOW receives), it is unlikely that a PSOW would choose to use this power other than as a reserve tool to be employed as and where necessary.

Might a PSOW inappropriately use the OII power?

15. The PSOW could take on inappropriate OIIs or be tempted into OIIs on the back of Government, political or media pressure, which in the long-term might raise a significant reputational risk. It might even lead to the loss of good will with the administration and/or the public and the Assembly. A linked concern is that the power of OII might lead to over-scrutiny or duplication of efforts with regulatory bodies, or that 'fishing expeditions' might be initiated without clear evidence of administrative wrongdoing.

16. These are risks, but they are risks that already exist for standard large scale investigations that ombudsman schemes sometimes put in place following a series of similar complaints. See for instance the work of the UK Parliamentary Ombudsman into *Occupational Pensions* and *Equitable Life* during the 2000-2010 period.

17. Such concerns are not, therefore, strong arguments against the OII power, but they are reasons for ensuring that the power is accompanied by a robust and transparent process ie:

- The PSOW should be required to consult before commencing (or closing) an OII and give reasons. For instance, legislation might express the power as one to be used 'where the PSOW is of the opinion that it is in the public interest to commence an OII having first consulted with relevant parties, including the Auditor-General for Wales and any relevant regulatory body'.
- On the conclusion of an OII, the PSOW should be required to submit a report direct to the Assembly, although it may also be required to send a copy to a Minister and any organisation impacted by the report.
- Within an appropriate time-frame, any relevant bodies the report has made recommendations about should be required to inform the PSOW of their response to the recommendations. Should the relevant bodies decline to implement the recommendations in whole or in part then they should be required to provide reasons.
- Should the relevant bodies decline to implement the recommendations then the PSOW should have a power to issue a further report.
- Finally, the Assembly should, as a matter of practice, dedicate a select committee (presumably the Finance Committee) to considering the report and, where necessary, hold an inquiry on the matter, including consideration of the effectiveness and appropriateness of the report.

Might the OII power interfere with the responsibility of providers?

18. In the past it has been argued that the OII power would curtail a public authority's lawful discretionary power, or may lead to a prescriptive set of recommendations as to how a particular administrative process is managed, including on the policy behind that process.

19. Such a concern though misunderstands the work of the PSOW. The authority of the PSOW rests on the quality and accuracy of its findings, the appropriateness of its recommendations and its ability to retain support amongst key stakeholders, including the Assembly and the Government. Within this process, the public authority does retain the right to exercise its full discretionary power, the only restriction is that it must do so according to standard administrative law grounds (which include responding rationally to the PSOW report) and the political need to be able to defend its actions.

20. To conclude, therefore, use of the OII power would increase the burdens on a public authority subject to an OII, but it would not remove the responsibility to act from the authority concerned. Given the importance of the issues that would no doubt underpin an OII, within a constitution committed to accountable government and continual improvement in administration, this is an appropriate balance.

21. The proposed extra financial costs appear realistic and indicate an intention not to overuse the OII Power in the short-term. In practice, I would

expect the PSOW to operate a flexible office within which staff would be shifted in and out of OII work as demand requires.

22. The benefits that may be gained through OIIs will be very hard to quantify, but will include: extended redress; improved access to administrative justice; more frequent systemic recommendations on improving administrative performance; and potential long-term financial savings from improved administrative performance.

Q5-7: Oral Complaints

23. The type/form of submission by which complaints are made should be left to the discretion of the PSOW, including whether to accept oral complaints. One of the key demands on ombudsman schemes today is to provide a better service to the complainant, with expectations increasing all the time in part because of technology advances. In order to allow the PSOW to improve the quality of its service it should be given the flexibility to innovate.

24. The EU has passed a Regulation on Online Dispute Resolution and it would be advisable for the Welsh legislation to be written widely to ensure that it remains in compliance with developments in this area.

25. So long as the legislation is not too prescriptive, the PSOW will be able to devise suitable filtering mechanisms to ensure that it is not overrun with complaints that require investigation. Ombudsman schemes already have sophisticated processes in place to protect the system from abuse.

Q8-9: Complaints handling across public services

26. There is a growing body of evidence (eg the Public Administration Select Committee's report into complaint handling in 2014) to suggest that the complaints system set up in the UK is excessively complex. The Welsh model pioneered by the PSOW offers a powerful potential solution and the powers of the Scottish Public Services Ombudsman would map very nicely onto the PSOW. I would also advocate making it a statutory duty of public authorities to have a complaints process in place; for that process to be advertised to service users; and for the throughput of the complaints process to be reported to the PSOW on an annual basis.

Q10-13: Ombudsman's jurisdiction

27. Wales is in a strong position in that it has just one ombudsman service for the public sector as a whole. As a matter of general policy, this unified model should be built upon. It is widely understood that a model of public service provision that involves increasingly integrated governance across the public/private boundary has become pervasive. This model should be reflected in a complaint process which is flexible enough to oversee complaints that cross over traditional public service boundaries.

28. I am in favour of the limited extension of the PSOW's jurisdiction to self-funded private healthcare. As a matter of good practice, private healthcare

providers should be linked to an independent complaints process as well as judicial scrutiny. The PSOW's proposal would appear an efficient solution.

29. As a matter of principle, I would consider charging on a case by case basis, with the potential for added costs for non-compliance to the PSOW's recommendations. But the PSOW himself has suggested that this would be disproportionate given the low number of such complaints anticipated.

Q14-16: Links with the courts

30. It is unclear to me that the statutory bar any longer serves a meaningful purpose and it possibly sends out the wrong message. Both the courts and the ombudsman have sufficient discretion and incentive to filter out claimants attempting to seek redress through both forums. I would support the Law Commission's 2011 proposals, but whether this is a major problem given the existing discretion of the PSOW to accept complaints is unclear.

31. The power to refer a legal question to court could be useful in certain, rare circumstances and I would support the proposals of the Law Commission in this area in its 2011 report. For instance, the court ruled in *Argyll and Bute Council, Re Judicial Review of a Decision of the Scottish Public Services Ombudsman* [2007] CSOH 168 that in producing her report the Ombudsman had misinterpreted the law. The law in question was vital to the Ombudsman's finding of maladministration. In similar instances, the ombudsman may be able to avoid the legal question altogether and find an alternative basis by which to establish maladministration, but this will not always be possible. Nor is it always possible for the ombudsman to identify the point of law that requires interpretation when the complaint is first submitted and so refuse to investigate (a point accepted in *R v Local Commissioner for Administration, ex parte Liverpool City Council* [2001] 1 All ER 462). Thus there will be occasions when during the course of an investigation the ombudsman is forced to address a difficult question of law.

32. But to implement this proposal just in Wales would impact on the practice of the courts in England and Wales, and may as a result be outside the jurisdiction of the Assembly.

Q18-24: Comments on the other issues

33. Regardless of the proposed new powers, on a regular basis the Assembly should be undertaking a rigorous evaluation of the PSOW, including its legislation. Such a review should go beyond the review of an Annual Report and might be based upon a commissioned independent study. Such broader Assembly evaluations of the PSOW might be planned to dovetail with the fixed terms of each office-holder (ie once every 7 years).

34. For a number of reasons, the recommendations of the Ombudsman to public bodies should not be binding. At present, most ombudsman schemes express satisfaction with the very high implementation rates of their recommendations and the common law has recently shifted to give strong legal force to their findings. However, as more complaints are received on public service matters which are provided by private sector organisations

this is an issue that may have to be reconsidered in the future for those bodies which are not subject to political accountability regimes.

35. The Assembly could be obliged to consult with the PSOW when creating new bodies, to avoid the title 'ombudsman' being used inappropriately.

36. The code of conduct complaints role is a difficult one for an ombudsman to perform given its potential to draw the PSOW into issues that lead to a local authority losing trust in the institution. One option might for the role to be transferred to the Commissioner for Standards which performs a similar role in regard to the Assembly.