

Response of the Public Services Ombudsman for Wales to the Assembly Finance Committee's consultation on the Draft Public Services Ombudsman (Wales) Bill
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1. As Public Services Ombudsman for Wales, I have two roles. The first is to investigate complaints made by members of the public who believe they have suffered hardship or injustice through maladministration or service failure on the part of a body in my jurisdiction. The second is to consider complaints alleging that members of local authorities have broken their Code of Conduct. The legislation to which I currently operate is the Public Services Ombudsman (Wales) Act 2005 and the Local Government Act 2000, Part III, and relevant Orders made by the Assembly under that Act.
2. The content of the proposed new Draft Public Services Ombudsman (Wales) Bill is therefore, of course, of key importance for the future work of the Ombudsman's office. It is against this background that I am responding to the Assembly Finance Committee's consultation. [Note: whilst I am responding to the majority of questions, there are some I have not addressed where I have no particular comment to offer.]

General

Questions 1 to 4: I would confirm that in general terms I very much welcome the proposals within the draft Bill. It is my view that they will enhance the effectiveness of the role of the Ombudsman. This is particularly so looking to the future and the picture of an ageing society, whether there will be the likelihood of greater levels of physical and emotional vulnerability amongst the population in Wales than is currently the case. The draft Bill is one that is citizen centred, will provide greater social justice and allow further scope for the Ombudsman to contribute to public service improvement through strengthening powers in relation to complaint handling standards among bodies within jurisdiction.

There are, however, some areas where I would suggest some amendments and I address these at various points in my response to other questions posed by the Committee in this consultation.

Powers to investigate own initiative

Question 5: Do you have any comments on the new power in section 4?

I strongly welcome the proposals to give the Ombudsman own initiative powers of investigation.

However, I would like to propose some amendments in respect of some of the own initiative investigation provisions. These revolve around the fact that there are various types of own initiative investigations that could be undertaken. I will address these in detail in my responses to the questions that follow this one. But for ease of reference, I restate here the various scenarios I outlined at a previous Assembly Finance Committee evidence session:

- (a) Extend the investigation of a complaint where during the course of an investigation issues have come to light where it is desirable, to extend the investigation to look into the actions of another body within jurisdiction. For example, an investigation into a health board may bring to light questions about the actions of a General Practitioner. It is currently unwieldy to have to ask a complainant then to make another complaint about the GP.
- (b) An issue may be brought to light where systemic failings have been identified whereby the Ombudsman may have concerns that those same systemic failing may exist in other bodies within that sector of the public service. Currently, the Ombudsman has to rely on publication of his recommendations under Section 16 of the PSOW Act and the 'voluntary self-examination' by public bodies as regards ensuring that the same system failings do not exist in their own authority. This new power would enable the Ombudsman to proactively look to see if this is the case or not.
- (c) The Ombudsman receives an anonymous complaint, providing evidence of likely maladministration/service failure on behalf of an authority. Under this new power the Ombudsman would be able to pursue the complaint, where at present he currently cannot.
- (d) The Ombudsman may be made aware of concerns about service delivery across the whole, or part, of a sector of the public service in Wales, but is not receiving direct complaints on this. The reason behind this could be because the recipients of the service were vulnerable people, who may be wary of making a complaint due to being worried about possible repercussions for them of doing so as regards the service provider. There would need to be a sound basis and rationale set out for undertaking any wide ranging own initiative investigation of this type. Reputational risk is a fundamental factor in the mind of any ombudsman; no ombudsman would want to put that reputation at risk by pursuing such a high profile investigation without some form of evidence that there were matters of concern that needed investigating.

Question 6. Does the inclusion of this power raise any unintended consequences in the rest of the draft Bill?

I cannot see that there are any unintended consequences arising from the power, in relation to any other of the elements of the draft Bill.

Question 7. With whom should the Ombudsman consult under section 4(2)?

I believe that it would be unhelpful for the legislation to be prescriptive as regards with whom the Ombudsman should consult. I believe there should be a general provision requiring the Ombudsman to give consideration as to whether there is a need consult anyone (and be able to demonstrate that they have done so), but then have discretion to decide with whom that should be (if anyone).

I would suggest that it would be inappropriate for the Ombudsman to consult in a scenario such as in scenario (c) at Question 5 above. I would envisage an anonymous complaint being conducted in the same way as a complaint made by an identified person as currently under the PSOW Act 2005. For example, I do not consider it appropriate for an Ombudsman to have to consult with the Auditor General for Wales if they intended to conduct an investigation into an anonymous complaint received about the nature of care being provided to an individual at a day care centre.

Question 8. Should the Ombudsman have the power to initiate an investigation based on action that took place prior to the draft Bill/Act receiving Royal Assent (see section 4(4))? If so, should there be a cut-off point, beyond which the Ombudsman should not carry out an own initiative investigation?

As currently drafted, the above provision would mean that it would be unlikely that the Ombudsman could instigate an investigation in a number of scenarios for some time after the proposed legislation received Royal Assent. In particular in relation to scenario (d) at question 5 above, the office would need a period of time to review office casework to identify if there were areas of concern. I would suggest that a better time frame would be to enable the Ombudsman to initiate an investigation based on action/lack of action that occurred two years prior to the date of Royal Assent. Such a time restriction would serve to ensure that any concerns about service delivery which are apparent from complaints to my office when the Act receives Royal Assent can be investigated whilst also recognising that the investigating of historical matters can be problematic for those who are the subject of an investigation.

Questions 9 and 10: What kind of issues should be included in the criteria for own initiative investigations under section 5? What kind of evidence should be available to the Ombudsman to justify an own initiative investigation (see section 5(2))?

I confirm that I am of the view that the way section 5 is currently drafted is appropriate.

Requirements for complaints made and referred to the Ombudsman

Question 13. How should the proposed guidance for making a complaint to the Ombudsman be published and what formats should be available?

In relation to the proposed guidance, I confirm that I believe that the provisions as drafted are suitable.

Matters which may be investigated

Question 14. Do you have any comments on the new provision enabling the Ombudsman to investigate the whole complaint when a combination of treatment has been received by public and private health services providers (see sections 10(1)(d) and 10(2))?

In relation to the provision in relation to private health service providers, I confirm that I believe that this is suitable as currently drafted.

Question 15. Does section 10(2) adequately cover anyone who has received a combination of public and private treatment?

I confirm that I believe that section 10(2) does adequately cover anyone who has received a combination of public and private treatment.

Question 16. Does the broadening of the matters which may be investigated in section 10(2) raise any unintended consequences in the rest of the draft Bill?

I am unable to identify any unintended consequences in the rest of the draft Bill

Question 17. Is the definition of “private health services” in section 71 broad enough to cover anyone who has received a combination of public and private treatment?

Yes, I believe that the definition of “private health services” in section 71 is broad enough to cover anyone who has received a combination of public and private treatment.

Question 19. Do you have any comments on the new definition of “family health service provider in Wales” in section 71, which is intended to capture, for example, a GP practice as a whole rather than just an individual GP?

I welcome any amendment which would resolve some of the problems that the office has had to deal with in the past under the existing arrangements.

Investigation procedure and evidence

Question 20. Do you have any comments on the procedure set out in section 16, in so far as it relates to the procedure for conducting an own initiative investigation?

I refer to my response to Question 5 of this consultation. Whilst I am content with the procedure in relation to the ‘systemic investigation’ outlined in my example at (d) above, I believe this to be somewhat onerous for the other types of own initiative investigations. It is my view that in instances such as (a) to (c) the Ombudsman should only need to notify the bodies concerned of his intention to commence an investigation (in a similar way as is currently the case under the PSOW Act).

Question 21. Should the Ombudsman’s power in relation to obtaining information, documents, evidence and facilities also apply to own initiative investigations and investigations into private health services (see section 17)?

Yes, this will be important to ensure the co-operation of bodies within jurisdiction, and to ensure that the Ombudsman has all the information necessary to arrive at sound and fair conclusions and findings.

The Ombudsman has strong powers to obtain information, but these are balanced by the requirement in section 16(6) that investigations must be conducted in private and the restrictions in section 65 that information obtained by the Ombudsman must not be disclosed except for the particular purposes which are outlined.

Part 4: Investigation of complaints relating to other persons: social care and palliative care

Questions 26 and 27. Should Part 4 remain a standalone Part? Or should such investigations be brought within the Part 3 investigations process? If Part 4 should be brought within Part 3, are there any specific elements of Part 4 that should survive? Or can a blanket approach be applied?

To ensure consistency in relation to the conduct of investigations, and that all of the proposed new powers apply equally in relation to health care and social care, I believe that Part 4 should be brought in to Part 3, with a blanket approach adopted.

Part 5: Investigations: supplementary

Whilst there is no question in the consultation on this part of the draft Bill in relation to **section 61**, I would like to draw attention to the fact that the Northern Ireland Ombudsman is omitted from those specified at section 61(7). For completeness, I believe that the Northern Ireland Ombudsman should be included. [Note: there is currently provision in the Northern Ireland Public Services Ombudsman Bill (NIPSO Bill) enabling the Ombudsman to co-operate with the Public Services Ombudsman for Wales.]

Question 29. Should sections 62 and 63 cover future Commissioners that may be created by the Assembly, including the Future Generations Commissioner for Wales?

Yes, it is my view that the legislation should provide for future Commissioners to be covered by sections 62 and 63.

Appointment etc

Question 32. Paragraph 7 of Schedule 1 provides that a person who has ceased to hold office as the Ombudsman or as an acting Ombudsman is disqualified from a list of roles (listed in paragraph 7(1)) for a period of two years. Is the two year period appropriate?

Paragraph 7 provides for two years disqualification from holding office once the office holder ceases to be Ombudsman. This is out of kilter with other ombudsmen schemes in the United Kingdom – for example, the Scottish Public Services Ombudsman and the provisions proposed for the Northern Ireland Ombudsman.

The position in the Northern Ireland Public Services Ombudsman Bill is the same as is currently in force in Scotland: that is that former ombudsmen are restricted from taking up certain employment without the consent of the Assembly Commissioner/Parliamentary Commission. This restriction expires at the end of the financial year following the financial year in which the person ceased to hold office.

I would suggest that Paragraph 7 of Schedule 1 be amended to reflect a similar position as that in Scotland and Northern Ireland. I believe that the current situation under the PSOW Act 2005 in respect of disqualification from roles is disproportionate, and particularly so for those taking on an acting Ombudsman role for a short period of time. It is my view that anything longer than the time restriction and arrangement as applied in Scotland and Northern Ireland has a de facto age discrimination impact. Thinking of future recruitment to the role of Ombudsman, I am sure this would deter a number of potential first class candidates from applying for the position.

Question 33. Do you have any comments on the matters which are included within “paid office” in paragraph 8 of Schedule 1?

I believe that in relation to both Ombudsmen and acting Ombudsmen, this is overly restrictive. In particular, to be unable to undertake a voluntary role when travelling and subsistence is offered (even if not accepted) is, I believe, too stringent a restriction.

**Public Services Ombudsman for Wales
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