

Response to Consultation on the Draft Public Services Ombudsman (Wales) Bill

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Introduction

I am an academic who has researched and written on the ombudsman institution for over ten years. In the past I have acted as a consultant for the Parliamentary Ombudsman in the drafting of the Parliamentary Paper *Withstanding the Test of Time*, HC421 (2006/07) and as a member of the team that wrote *An External Evaluation of the Local Government Ombudsman* (2013: LGO Website).

General

Does the Bill improve the effectiveness of the role of the Ombudsman?

1.1 Yes. The draft Bill: (i) smooths out the process for submitting complaints and (ii) upgrades the ombudsman scheme by creating some new powers (eg own-initiative investigation, standards authority, and limited jurisdiction over private health care providers).

1.2 This upgrade is the direction of travel that all ombudsman schemes need to take if they are to become an accountability institution more capable of contributing proactively towards the improvement of public service delivery for the benefit of the user. Complaint-handling requires a multi-layered initiative, with the ombudsman at the top of the system dealing with the most intransigent and complex disputes, testing to see that complaints intelligence is properly recorded and assimilated, and providing expert advice as and where appropriate.

1.3 Without more intelligent tools to work with, an ombudsman scheme's broader contribution will likely be sporadic and reactive, with the associated risk that gaps are left in the oversight of good complaint handling and systemic learning from complaints.

What, if any, are the potential barriers to implementing the provisions of the draft Bill? Does the draft Bill take sufficient account of them?

2. In terms of risk, the major barrier to success are that (a) an ombudsman uses the new powers unwisely; (b) the proposed new system does not create strong enough incentives to encourage investigated authorities to comply with directions of the Ombudsman; and (c) the process for calling the ombudsman to account is not robust enough. I believe that the draft Bill does take account of these risks but I have some comments at Q.35 below.

Are there any unintended consequences arising from the draft Bill?

3. Under the Bill, in the Health sector there will be a disparity in complaints provision between users whose care is solely self-funded and care which is partly publically funded. Unless the existing complaints system in the private healthcare sector is capable of raising its standards, then this disparity will lead to pressure for a new body (or possibly the Public Services Ombudsman for Wales) to take on responsibility for complaint-handling in this sector.

At what point should the impact of this legislation be evaluated?

4. I have argued elsewhere that most ombudsman schemes are not subject to sufficient/appropriate scrutiny. All ombudsman schemes should be fully evaluated (in addition to the standard annual Assembly cycle) on a cycle that matches the term of office of the office-holder. Therefore, presuming that the legislation was passed and then came into force within the next 18 months, an appropriate moment in time would be towards the end of the period of office of the current office-holder (ie 3-4 years after the new legislation came into force).

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Power to investigate on own initiative

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

5. See Q1 above. I see this as an important evolution of the ombudsman office which is in line with many schemes around the world. We need ombudsman schemes to be capable of raising the alarm early where systemic malpractice is occurring in the delivery of public services. Ombudsman schemes currently can do this, and sometimes with tremendous impact, but experience has shown that in the UK the reports of the ombudsman tend to have this impact only sporadically. Two major reasons for this are that: (a) they are required to wait for a complaint before they can investigate; and (b) they are not sufficiently geared up to assimilate the intelligence that can be obtained from complaints in the sector as a whole. The own-initiative power should operate to make it easier for the ombudsman to intervene early and to create added incentives for the ombudsman to ensure that complaints data is being properly mined for clues as to public service failings.

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

6. There are risks that an ombudsman might: embark on empire building, add to the regulatory burden on public service providers, undertake work which overlaps with other accountability institutions, add cost to its own operation, or reduce its focus on its core role of complaint-handling. Further, these are all concerns that come with no guarantee that an ombudsman can make a difference if it were given a broader role. I believe that the answer to these risks lies in accountability mechanisms to focus the mind of the ombudsman to ensure that the powers are used appropriately.

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

7. The approach contained in the Bill is a clever one. Rather than trying to work out all questions in advance, the onus is placed on the ombudsman to describe how the power will be exercised and the processes taken in decision-making. Once the decision is made the ombudsman will be politically and legally accountable for the exercise of this power. If the parties that should be consulted were to be named it should include: the investigated body, relevant user interest groups, the relevant regulator and the Assembly. I am not convinced this is necessary however.

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, ...

8. Probably not. The office will have much to do to assimilate its new powers under the draft Bill and it would be appropriate to have a first phase of assimilating those new powers (in particular the powers of Standards Authority). However, consideration should be given to including a provision to deal with scenarios in which the ombudsman is investigating a 'post-new Act' matter but upon which elements of that investigation originate from the 'pre-new Act' period. This should be written as a discretionary power to be exercised by the ombudsman. Eg 'The Ombudsman may investigate matters that arise before [implementation date] where it is necessary to complete an investigation into an ongoing matter post [implementation date] that the Ombudsman has decided to commence under s.4.'

What kind of issues should be included in the criteria for own initiative investigations?

9. As with Q7 above, I think that the approach contained in the Bill is the appropriate one. Rather than trying to work out all questions in advance, the onus should be placed on the ombudsman to describe how the power will be exercised and the processes taken. It is difficult to comprehend a short list of criteria for own initiative investigations, other than to require the ombudsman to exercise the power in the 'public interest'.

What kind of evidence should be available to the Ombudsman to justify an own initiative investigation (see section 5(2))?

10. The evidence required should be restricted to 'reasons'. The emphasis should then be on the new legislation to put in place suitable accountability arrangements.

Who can complain

Do you have any comments on the new definition of "member of the public"?

11. No.

Requirements for complaints made and referred to the Ombudsman

Do you have any comments on the new requirements for complaints made to the Ombudsman in section 8?

12. As with Q7 above, I think that the approach contained in the Bill is an appropriate one. Rather than trying to work out all questions in advance, the onus is placed on the ombudsman to issue guidance on how the power will be exercised and the processes taken. Once done the ombudsman will be politically and legally accountable for the exercise of this power. The minimum requirements of this new power are appropriate and leave sufficient flexibility for the ombudsman to adapt the process for receiving complaints as new technologies and means of communication evolve.

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

13. Apart from requiring that the guidance is published that sort of detail should not be in the Bill. The Ombudsman should be free to make that decision, subject to scrutiny by the Assembly.

Matters which may be investigated

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?

14. This is a sensible expansion of the ombudsman's jurisdiction. There is an overlap between the public and private sector, and a number of possible solutions for dealing with those overlaps. There is no axiomatic reason why a public services ombudsman scheme should not investigate private sector matters and some equivalent schemes elsewhere already investigate private sector matters precisely because of the greyness of the overlap between the public and private sectors. If there are unintended consequences of the new jurisdiction these should be dealt with through a fuller consideration of the generic issues which relate to complaint-handling in the private healthcare sector.

Does section 10(2) adequately cover anyone who has received combined treatment?

15. Yes.

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?

16. In the future there will be a disparity in complaints provision between users whose care is solely self-funded and care which is partly a result of public sector healthcare/funding. Unless the existing complaints system in the private healthcare sector is capable of raising its standards, then this disparity will lead to pressure for a new body (possibly the Public Services Ombudsman for Wales) to take on responsibility for complaint-handling in this sector as well.

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?

17. Yes.

Should the Ombudsman have powers to recover costs from private health services?

18. My understanding from the previous round of consultation on these proposals is that, in the short term at least, the scale of this new jurisdiction will be small. If correct, then introducing a new process for recovering costs will probably be disproportionate and antagonise private healthcare providers, who the Ombudsman will be working with in introducing this new complaint-handling jurisdiction. Therefore, at this stage I would propose not charging for complaint-handling. However, the Ombudsman and the Assembly will want to keep this issue under review and two scenarios might lead to the Assembly introducing amendments in the future. (i) If the turnover of complaints is significantly higher than anticipated and (ii) if the Ombudsman experiences problems in persuading private healthcare providers to implement the office's recommendations.

Do you have any comments on the new definition of "family health service provider?"

19. No.

Investigation procedure and evidence

Do you have any comments on the procedure set out in section 16?

20. No.

Should the Ombudsman's power in relation to obtaining information, documents, evidence and facilities also apply to own initiative investigations?

21. Yes.

Listed Authorities

Do you have any comments on the restrictions on power to amend Schedule 3?

22. No.

Are there any other bodies that should be included in the list in Schedule 3?

23. Not that I am aware of.

Complaints-Handling

Do you have any comments on sections 33 – 39 (which mirror sections 16A to 16G of the Scottish Public Services Ombudsman Act 2002)?

24. No. See Q1 above, I am in favour of this expansion of the Ombudsman's powers as experience has shown us that there is a shortfall in the overall system in terms of driving forward quality complaint-handling and data collection at the service provider level.

Is section 38(b) adequate to allow listed authorities to comply with their duties under other enactments, such as Freedom of Information duties?

25. No comment.

Part 4: Investigation of complaints relating to other persons

Should Part 4 remain a standalone Part?

26. It is unclear to me what the remaining justification is for retaining the separate Part. For the purposes of simplicity and clarity Part 4 should be brought within Part 3 otherwise users of care homes may be disadvantaged, albeit only in minor respects. There would also be room for unnecessary subsequent legal wrangling should a complaint overlap the two Parts of the Act.

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?

27. A blanket approach should be applied.

Part 5: Investigations: supplementary

Do you have any comments on sections 62, 63 and 64?

28. No.

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

29. Yes, although presumably an amendment could easily be made as and when a future Commissioner is introduced.

Are there any further technical changes required in Part 5 of the draft Bill, to reflect the broadening of matters which may be investigated?

30. No.

Appointment etc

As an aside, it is very unclear to me what para.3(4) means. I would recommend redrafting.

Do the provisions of paragraphs 5 to 8 of Schedule 1 require updating?

31. No.

Paragraph 7 of Schedule 1 provides that a person who has ceased to hold office is disqualified from a list of roles for a period of two years. Is the two year period appropriate?

32. Yes.

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

33. No.

Financial implications

Do you have a view on the financial implications of the new provisions set out in the Bill?

34. The new provisions will increase the costs of operating the Ombudsman office, but not substantially. Moreover, the potential benefits in financial terms, as well as service delivery terms, could be significant and should outweigh the upfront costs. Further, the extra work conducted by the upgraded Ombudsman should ease the existing burden on regulators operating across the public sector.

Other comments

Do you have any other comments you wish to make about the draft Bill?

35. Two areas that are not touched upon in the draft Bill to a great extent are networking and governance/accountability. Part 5 of the Bill refers to situations where an investigation is being conducted which requires shared working with another accountability agent. These are important provisions, but might there also be a requirement for the ombudsman to report on ongoing endeavours to liaise with other accountability agents to identify areas of mutual concern? The detail as to how this should be achieved need not be specified, but in order to reduce the potential for matters of concern falling between two accountability agents the Ombudsman should be required to provide evidence that they have combined their intelligence in some way.

36. Similarly, although the draft Bill provides for various reporting requirements for the Ombudsman, there is little in the Bill to detail how the scrutiny should take place. This may not be problematic so long as the Finance Committee retains its current commitment to scrutinising the Ombudsman, but can this be guaranteed into the future? Other schemes provide for embedded Boards to scrutinise the Ombudsman’s work on a more regular basis. Some schemes operate user panels, publish all their decisions and have established review processes to deal with complaints against the ombudsman. The EU Directive on Alternative Dispute Resolution requires all ADR providers to comply with certain performance standards. Might the Bill provide further detail on the processes of scrutiny that the Ombudsman should be exposed to and the minimum level of information that they should provide about the scheme within the scrutiny process?