

Finance Committee
Draft Public Services Ombudsman (Wales) Bill
DB PSOW 17 University of Liverpool

Response to consultation on the draft Public Services Ombudsman (Wales) Bill,
conducted by the Finance Committee of the National Assembly for Wales,
from Brian Thompson, Liverpool Law School, The University of Liverpool.

Introduction

1. I welcome the opportunity to respond to the Finance Committee's consultation on a draft Public Services Ombudsman (Wales) Bill. I am responding on my own behalf and only to some of the consultation questions. The ombudsman institution is part of administrative justice which is my major field of research. With my colleagues I conducted comparative research on the public services ombudsmen in the UK and Ireland, Australia and New Zealand (*The Ombudsman Enterprise and Administrative Justice*, T. Buck, R. Kirkham and B. Thompson, Ashgate, 2011). In responding to the consultation questions I draw on that research and my experience in advising the Northern Ireland Ombudsman on new legislation. A Bill is currently before the Northern Ireland Assembly.

General

2. I think the Bill is likely to enhance the effectiveness of the Ombudsman, particularly the new powers relating to own initiative investigations and complaint-handling.(Q.1)
3. The committee is to be congratulated for keeping up the momentum on this issue as there is always competition for slots in a legislative programme and no doubt after the Assembly elections, a new administration will have a set of manifesto promises which it will want to implement. All being well, the committee's reports will help secure agreement for an early timetable for the making and implementation of new public services ombudsman legislation. (Q.2)
4. I would suggest that the legislation should not be reviewed sooner than three years, nor later than seven years after its coming into effect. (Q.4)

Power to investigate on own initiative

5. I think the version in the draft Bill is to be preferred to that in the Northern Ireland Public Services Ombudsman (NIPSO) Bill, which is more prescriptive (Q.5)
6. There is some similarity between an Ombudsman own initiative investigation and a value for money (or performance) audit conducted by the Auditor General for Wales. Both it is hoped will result in recommendations for improving performance and it seems sensible that the Auditor General for Wales be consulted. The offices should co-ordinate to try to avoid subjecting a body to simultaneous or very closely scheduled investigations and audits. (Q.7)
7. It is possible that information might come to light about action taken before legislation received Royal Assent, in which the ombudsman could be permitted a

discretionary power to override that cut-off condition, with a new cut-off of, perhaps, 5 years before Royal Assent. (Q.8).

8. In Australia and New Zealand the power to conduct an own initiative investigation (or own motion as they call it) confers a very wide discretion. The debate in the UK has tended to focus on concentrating such a power on matters which it is thought have systemic importance, and that was the thinking of the Northern Ireland Assembly's Committee of the First Minister and Deputy First Minister which is promoting the NIPSO Bill currently before the Northern Ireland Assembly. I would suggest that a worthy candidate for such an investigation might not have systemic issues but, nonetheless, be sufficiently important in terms of its particular impact. A consideration which caused Ann Abraham, a former Parliamentary Ombudsman, to change her mind to seek such a power, was the fact at some people, would be very unlikely to be able to make a complaint. Examples of such people are the elderly, the young, those with disability and those in institutions exercising a high degree of control or supervision. Therefore in producing criteria, they will have to have a broad reach. Thus factors such as public interest, practical outcome, proportionality would be specified. Alongside those points will be consideration of the possible systemic nature of the alleged maladministration or service failure, and the extent of the injustice or hardship caused.
9. In Australia some of the ombudsmen offices in their planning documents will specify a number of own initiative investigations which they expect to conduct, and allocate resources for them. Some of them will seek to ensure that they have the flexibility to react to an event which it is thought merits an own initiative investigation. It is likely that in Northern Ireland and Wales, if such powers were conferred that that they would be used very sparingly, allowing the ombudsmen and others to become accustomed to the new power and the possible benefits. (Q 9)
10. It is likely that the material which would trigger such an investigation would be derived from ordinary reports, analysis of a range of reports, contacts made during an investigation, or information passed on by other inspectors, regulators, listed bodies, media reports or 'whistle-blowers. (Q.10)

Private Health Care

11. Specialist advice should be sought on this. It is not within my expertise. (Q14-19)

Investigation procedure and evidence

12. It looks as if the drafter has considered the equivalent provisions in the NISPO Bill currently before the Northern Ireland Assembly. (Q.20)
13. So far as own initiative investigations are concerned, reference might be made to the NIPSO Bill and specialist advice should be sought in relation to private health services. (Q 21)

Complaints-Handling

14. The Scottish legislation is also the source for the NIPSO Bill. The Scottish experience looks promising but the test will be the extent to which the public services in Wales eschew a 'box ticking' compliance attitude and embrace the arrangements positively, using them to develop a culture of developing and sharing good practice in handling, resolving and learning from complaints. (Q.24)

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

15. I am not sure I see any compelling reason to separate the complaints in Part 4 from those in Part 3 of the draft Bill.

Part 5: Investigations: supplementary

16. The Ombudsman should be given the power to consult and work with other Commissioners in Wales and particularly the Auditor General for Wales. (Q.28)
17. It would be essential for newly created commissioners in Wales to be added to the list of those with whom the Ombudsman can consult and co-operate. (Q.29)
18. It is interesting that clause 51 of the NIPSO Bill extends the power to co-operate beyond other officers and bodies in Northern Ireland to ombudsmen outside Northern Ireland including the Parliamentary Ombudsman, and the Public Services Ombudsmen in Scotland and Wales, and the Ombudsman for the Republic of Ireland. In the Scottish Public Services Ombudsman Act 2002, section 21 provides for consultation and co-operation between the Scottish Ombudsman and the Welsh, and English Local, Housing and Health Service Ombudsmen as well as the Parliamentary Ombudsman, but not any of the Ombudsmen in any part of Ireland. Reciprocity would seem to be a matter to consider in relation to any issues in which the Ombudsman in Wales has the right to investigate and so does one (or possibly more) of these other Ombudsmen. (Q. 30)

Other comments

19. Given that it is proposed to give the Ombudsman a wider remit and powers, the arrangements for accountability should be considered. There must be an appropriate balance struck between accountability and independence. It is not often that Parliamentary committees will be specified in legislation, as it is generally accepted that parliamentary bodies should be able to decide for themselves their committees and their responsibilities. The issue with the Ombudsman and the Auditor is that these officers should be working with parliamentary bodies as partners in holding executive bodies to account but must also they be subject to an accountability framework. At Westminster, the House of Commons the committee to which the Parliamentary Ombudsman reports, has expressed concern about mixing the roles of working with the Ombudsman and holding the office-holder to account. It noted that its sister committee the Public Accounts Committee works with the Comptroller and Auditor General but another body the Public Accounts Commission is part of the

accountability arrangements. The Assembly, it is suggested, will want to consider this issue not only in relation to the Ombudsman, but also with respect to the other Commissioners. While it might be useful to have common arrangements, there may be particular points which are such that special separate provisions should apply.