

Our ref: NB/SMH

Ask for: Susan Hudson

Your ref:

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Date: 18 February 2015

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Ms Jocelyn Davies AM  
Chair of the Finance Committee  
National Assembly for Wales  
Cardiff Bay  
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Dear Jocelyn

### **Inquiry into the Consideration of Powers: Public Services Ombudsman for Wales**

Thank you for your letter dated 6 February 2015, which set out areas where you and the Committee would like further information.

In particular, you asked that I provide by 18 February further details and comments concerning:

- the proposals for extending the Ombudsman's jurisdiction to include private health services when a patient has received a combination of public healthcare and private health care (not commissioned by the NHS);
- evidence provided to the Committee on 4 February by the Independent Sector Complaints Adjudication Service (ISCAS), which operates a three-stage complaints code of practice across the UK independent healthcare sector.

Accordingly, I attach a paper addressing the above issues.

Yours sincerely



Nick Bennett  
Ombudsman

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**Inquiry into the Consideration of Powers: Public Services Ombudsman  
for Wales**

**Paper subsequent to evidence provided  
by the Public Services Ombudsman for Wales to  
the National Assembly for Wales's Finance Committee  
at its meeting on 21 January 2015**

**Private Healthcare**

**1. Types of Private Health Care Complaints**

- 1.1 Further to my appearance before the Finance Committee on 21 January 2015 and subsequent evidence the Committee has heard from other parties, I am happy to provide clarification on the extension to jurisdiction that I am seeking in relation to private health care.
- 1.2 I confirm that I am seeking powers for the Public Services Ombudsman for Wales to be able to look into care and treatment provided by a private health care provider where that care/treatment has stemmed from the NHS, or has been a part of a person's health care pathway which has also involved the NHS. I would anticipate that invariably the types of complaints that the PSOW would wish to look into would arise from hospital health care provision that has been provided as the result of an originating GP referral.
- 1.3 In this regard, I am seeking that the Public Services Ombudsman for Wales should be able to have the discretion to consider complaints from members of the public who have received treatment at an 'Independent Hospital' as defined by the Care Standards Act 2000, which is as follows:

"Independent Hospital" (except in the expression health service hospital) means—

- (a) an establishment —
  - (i) the main purpose of which is to provide medical or psychiatric treatment for illness or mental disorder or palliative care; or
  - (ii) in which (whether or not other services are also provided) any of the listed services<sup>1</sup> are provided;

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<sup>1</sup> As defined in s 2(7) of the Care Standards Act 2000 - medical treatment under anaesthesia or sedation; dental treatment under general anaesthesia; obstetric services and, in connection with childbirth, medical services; termination of pregnancies; cosmetic surgery and treatment using prescribed techniques or prescribed technology as defined in regulations.

- (b) any other establishment in which treatment or nursing (or both) are provided for persons liable to be detained under the Mental Health Act 1983.

For the avoidance of doubt, I am seeking that this should include the private practice of health professionals (including private units) conducted on the premises of NHS organisations, who invariably under contractual arrangements with the NHS have access to NHS staff and facilities.

- 1.4 I should perhaps also note that independent palliative care has, of course, already been brought into the Ombudsman's jurisdiction by virtue of the Social Care and Well-being (Wales) Act 2014.
- 1.5 I confirm that I am **not** seeking powers to look into complaints about other types of businesses also classified as private health care providers, such as beauty parlours, tattoo parlours etc.

## **2. Differences between the Public Services Ombudsman for Wales (PSOW) and Independent Healthcare Sector Complaints Adjudication Service (ISCAS)**

- 2.1 The possibility of sharing information between ISCAS and the PSOW was also raised during an evidence session of the Finance Committee. Whilst ISCAS could share information with the PSOW, the circumstances where the PSOW can share information obtained by the Ombudsman is restricted to the circumstances set out in section 34X of the Public Services Ombudsman (Wales) Act 2005 and because the Act specifies that all investigations shall be conducted in private. These restrictions are essential to ensure that the Ombudsman is able to obtain all information required to carry out his statutory function effectively. This includes the provision that information must not be disclosed except in the case of information to the effect that a person is likely to constitute a threat to the health and safety of one or more persons, to any person to whom the Ombudsman thinks it should be disclosed in the public interest. To this extent the possibility for information sharing is limited. I consider that the disclosure of information obtained by the Ombudsman, but for the purposes other than those listed in s26 of the PSOW Act will result in authorities and staff being less inclined to provide and discuss all relevant information in future.
- 2.2 The nature of the PSOW and ISCAS as entities is also very different. The Law Commission has recognised that public service ombudsmen form one of the four pillars of administrative justice.

- 2.3 Conversely, in 2011, following an application for Judicial Review of an ISCAS decision by a complainant, the Administrative Court's decision was that ISCAS provides a private service (and not a public service) for the benefit of complainants and its member organisations. [A complaint] is a private arrangement between ISCAS, the complainant and the member organisation. The Administrative Court concluded that as such ISCAS was not carrying out a "public function" and therefore the complainant could not seek a public law remedy in the Administrative Court. (Source: ISCAS Annual Report 2011/12)
- 2.4 There are also some additional differences that should be highlighted. Ombudsmen schemes have to meet certain criteria for membership of the British and Irish Ombudsman Association. Among a number of fundamental criteria is 'Independence' whereby the requirement is that: 'The Ombudsman must be visibly and demonstrably independent from those whom the Ombudsman has the power to investigate.'
- 2.5 ISCAS is a voluntary membership scheme. Independence is key to public confidence in the ombudsman system and it would be important not to undermine confidence in the PSOW's service by working closely with voluntary membership bodies.
- 2.6 Furthermore, there are a number of restrictions in relation to the ISCAS scheme. Amongst information set out in its guide for patients are the following:
- (a) Some cases will, because of the seriousness of the issues raised and their potential for legal compensation not be suitable for being managed under the ISCAS Code.
  - (b) It cannot deal with issues of causality and liability in relation to allegations of clinical negligence.
  - (c) If the complainant accepts any payment offered by the procedure, s/he must accept it in full and final settlement of the complaint.
- 2.7 A vignette from ISCAS's Annual Report 2012/13 may be helpful to illustrate differences between the service provided by ISCAS and the Ombudsman's powers in relation to points (a) and (b) above.

"... a complainant who underwent major surgery. Pre-operatively, the patient had been assessed as having three factors that increased her risk of Venous Thromboembolism (VTE) and identified her as needing anti-embolic (TED) stockings from admission until she was fully mobile. However, when she arrived at hospital, stockings in this patient's size were not available. Alternative mechanical prophylaxis was used to assist the prevention of VTE, but this was for only 24 hours and she was discharged from hospital without any support stockings. On two occasions after discharge home, the patient complained to hospital nursing staff about pain in her upper legs; these concerns were not escalated to her consultant. When she saw the consultant, he diagnosed bilateral deep vein thrombosis (DVT) and she later developed a pulmonary embolism (PE).

**It was beyond the scope of the complaints procedures to establish whether the absence of support stockings caused, or contributed, to the development of this patient's DVTs and, subsequently, the PE. The adjudicator instead focused on how the hospital responded to the issues raised by the complainant ....."** [PSOW's emphasis]

In the circumstances above, the PSOW would have obtained relevant clinical advice on this matter, and – if failings in the clinical treatment had been found – would have made recommendations in relation to appropriate redress. In fact there are examples of circumstances where the Ombudsman has investigated cases of DVT in NHS settings where, sadly, deaths were involved. Some relevant summaries can be found in 'The Ombudsman's Casebook', such as case 201101484 (Issue 11, January 2013 - extract also set out below); case 201305716 (Issue 19, January 2015) and case 201302513 (Issue 16, May 2014).

**Extract from PSOW public interest investigation report (case 201101484):**

"... The Ombudsman's investigation found that the test was viewed by a nurse before Mrs Y's discharge on 14 May. Mrs Y's blood result was positive. A positive result can indicate thrombosis. The test result does not appear to have been appropriately considered, if at all, by the doctor who made the decision to discharge Mrs Y or by the Consultant with overall responsibility for her care before her discharge.

The Ombudsman concluded that the failure to consider and act upon the positive blood test result before making the decision to send Mrs Y home fell below an acceptable standard of care. This failing gave rise to a missed opportunity to make the correct diagnosis and to treat Mrs Y appropriately. The treatment that should have been given might have prevented her death. The investigation also identified a number of additional failings on the part of the Health Board."

- 2.8 With regard to (c) above, ISCAS states that the maximum it will award as a good will payment is £5,000. Whilst the PSOW often does not go higher for consolatory payments, given that the Ombudsman's function is to remedy injustice caused to a person from service failure, he does have the ability to go higher than this if the circumstances warrant it.
- 2.9 Furthermore, there are no restrictions upon what a complainant may do following the outcome of an Ombudsman's investigations and conclusions. In fact, Ombudsman investigation reports often inform complainants of events and failings which may have occurred which have not come to light or been acknowledged in the body's initial complaint response. The Ombudsman does not attach any condition on any redress payment he recommends a person receives so they may pursue legal action against a body if they have grounds to do so when an investigation has been completed.

**3. Levy**

- 3.1 With regard to the issue of a potential levy, in view of the very limited powers being sought to be able to look at complaints about private health care, I would reiterate the point that I am of the view that the resource necessary to develop and operate a levy system would be disproportionate to the number of private health care complaints that I would anticipate considering. This could always be revisited again in the future based on experience of actual casework volumes in this area.

**Nick Bennett**  
**Public Services Ombudsman for Wales**  
**18 February 2015**

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