

National Assembly for Wales – Finance Committee – 25 March 2015

Further evidence in support of proposal to amend the Public Services Ombudsman (Wales) Act 2005

1. Introduction

1.1 The Committee has previously received written evidence from me in relation to the proposals to amend the Public Services Ombudsman (Wales) Act 2005 (PSOW Act) in relation to:

- Own initiative investigations
- Oral complaints
- Private healthcare
- Complaints standards authority
- Links to the courts.

1.2 In this paper I seek to reinforce the case for the original proposals that I put forward, in addition to addressing some of the issues arising from the evidence heard by the Finance Committee to date.

2. Own Initiative Investigations

2.1 I have previously indicated the benefits that could derive from the power to conduct own initiative investigations and provided international examples of the significant impact that such investigations can have. From improvements to public body procedures and systems (such as the case in Malta), to the potential difference it can make to the lives of individuals (as illustrated by the case studies from Ontario).

2.2 Evidence that the Committee has heard during its inquiry has indicated widespread support for such a proposal, together with messages reinforcing the impact that investigations of this type may have. The only major key concern that seems to have been expressed, revolves around potential duplication of work, particularly in relation to the work of the Auditor General for Wales, but also other relevant bodies, such as the various Commissioners in Wales.

2.3 I believe that it would be helpful to emphasise that the own initiative powers could be used in a variety of scenarios:

- (a) It would enable the Ombudsman to extend the investigation of a complaint made to him 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 (GP). 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 failings 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 have discretion 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 that he was 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 firm evidence that there were matters of concern that needed investigating.

2.4 In relation to the above, I am happy to clarify in this paper, that I believe it would only be right for the Ombudsman to consider whether it would be more efficient or effective to either co-operate with, or refer a matter to, another relevant public body before undertaking a large scale own initiative investigation.

- 2.5 I have reservations about the effect of a statutory duty to consult before undertaking an own initiative investigation because I fear that this could lead to legal challenges on the interpretation of the legislation which would have the impact of being process-driven rather than citizen-centred. Complainants would be very frustrated if investigations were delayed or hampered by challenges which could be tactical in nature by those bodies who are the subject of an investigation. Further, the suggestion of a statutory duty to consult would be disproportionate in most of the types of cases outlined above.
- 2.6 The benefits and impact from own initiative powers have been previously described by myself and others (such as Dr Nick O'Brien in his evidence session on 12 March 2015).
- 2.7 The PSOW Act already makes provision for the Ombudsman to be able to co-operate with the Older Person's Commissioner and the Welsh Language Commissioner and, in fact the PSOW already has Memoranda of Understanding with the existing three Commissioners. I would propose that it would be opportune to extend the existing provision within the Act to include a similar provision to co-operate with the Auditor General for Wales and the Children's Commissioner. This would also then lend itself to allow the Ombudsman to produce joint reports etc with such bodies if this was deemed appropriate in the circumstances. For example, it may be that an own initiative investigation could have both Service Delivery (the Ombudsman) and Value for Money (the Auditor General for Wales) elements to it. Furthermore, during his evidence session to the Committee, the Auditor General for Wales stated that he did not see this potential of duplication as a matter of concern as he was confident that arrangements could be put in place to ensure that such a circumstance did not occur and that the two offices could co-operate as appropriate.
- 2.8 My paper to Committee outlined the staffing associated costs I envisage should this power be granted. Below is further information to that previously provided in relation to revenue costs in this regard:

	£'000
Two full time investigation officers, including NI & Pensions	80
Professional fees, including specialist advice	10
Office costs, including printing, stationery and IT	8
Other – training, travel and subsistence	<u>2</u>
Total Costs	<u>100</u>

- 2.9 I do not foresee that there will be any significant costs for bodies in the PSOW's jurisdiction beyond the staff time required to respond to my investigators' questions and requests for information. Further, countering any costs to the public bodies concerned (and depending on if systemic problems are found) I would expect this to result in improved service delivery, together with the possibility of associated efficiencies.

3. Oral Complaints

- 3.1 I believe that I have formerly clearly articulated the rationale behind the need for removing the requirement from the PSOW Act for complaints to be made in writing. Again, almost without exception, witnesses presenting evidence to the Committee have supported this proposal.
- 3.2 A key point that has been reinforced by several people, is that it could be argued that the current requirement within the Act is at odds with Equality legislation. It is certainly a barrier in relation to the first of the key stated 'Values' of my office of being 'Accessible'.
- 3.3 Increasingly, Ombudsmen the world over are taking a human rights based approach to the way they consider and investigate complaints. Whilst implicit in the way we work, we have already planned to give more detailed consideration to the way we work from this perspective during 2015/16. Surely, fundamental to a human rights approach is provision for the right of speech (or other communication methods) as a means to convey a grievance.
- 3.4 The benefits from this proposal are clear. An improved 'customer friendly' service for complainants would result. Further, there would be no ambiguity as regards the requirement for 'written complaints'. A complaint made over the phone could be recorded (with permission) and stored as an audio file, with the new arrangements negating the unnecessary to-ing and fro-ing that currently takes place from capturing a complaint over the phone, putting this in writing, sending it off to the complainant and requiring this to be signed and returned. I have previously made the point that this effort is frequently 'wasted' with a significant number of complainants never returning their complaint as written down for them by PSOW staff. I should clarify that there would be no disadvantage to those complained about as regards the audio recording, since all those complaints progressed to formal investigation set out the context of the complaint and the areas to be investigated (which the complainant has an opportunity to comment upon).
- 3.5 There would be no staff or other revenue costs to the office in relation to this proposal. For example, we already have the means to record telephone calls and hold the audio files on our complaints handling database.

4. Complaints Standards Authority (CSA)

- 4.1 With regard to the complaints handling authority, the Committee has heard the powerful arguments put forward by Jim Martin, the Scottish Public Services Ombudsman in relation to the benefits of the Complaints Standards Authority role (at his evidence session on 4 February 2015).

- 4.2 Together, county/county borough councils and health boards account for 85% of the complaints that arrive at my office. My office has recently met informally with local authority officers responsible for complaint handling, where the proposals for revisions to the PSOW Act were outlined. It is pleasing that the proposal that the Ombudsman in Wales should have an equivalent CSA role as that held by the Scottish Ombudsman met with a positive response from amongst those present.
- 4.3 It was also established that although all these local authorities have now adopted the Model Concerns and Complaints Policy as regards the two stage process, the actual approaches to dealing with the complaints themselves varies significantly. Furthermore, data collection and the reporting on complaints to management/ Cabinet/scrutiny also varied widely. Not all IT systems in local authorities were fit for purpose in relation to data collection, and in some cases manual recordings/adjustments were being made. The approaches to data collection and what was actually being captured also varied amongst them. It has to be said that since no-one actually collects this data at an all-Wales level, there is no real motivation (or indeed external pressure) to encourage change/improve in this regard.
- 4.4 The ability to be able to have a statutory power to address these issues would address this 'patchy' approach in relation to the way complaints are handled and reported upon. Consistency would then enable comparisons at an all-Wales level and contribute to an understanding of areas where service delivery in Wales may not be what it should be, and allow for these to be explored by relevant parties, such as the sector itself and the Welsh Government.
- 4.5 During the Assembly's Finance Committee evidence sessions, the question has been asked whether the timing of the proposal for revising the PSOW Act is the right one, in view of the envisaged public sector reforms in Wales. It could be argued that now is the perfect time. It is recognised that the White Paper 'Reforming Local Government: Power to Local People' calls for a requirement for local authorities to have a complaints process in place. With his CSA powers, the Scottish Ombudsman worked with the local government sector in this regard, together with addressing the issue of appropriate data collection and reporting.
- 4.6 Furthermore, if there is to be a rationalisation of local authorities, there can be no doubt that IT strategies will be key considerations within service delivery plans. What better opportunity could there be than this for ensuring that IT systems for the new authorities properly support the complaint handling arrangements, including suitable data capture and reporting tools. In this regard, one could argue that since for the most part new, or adapted, IT systems are in any event going to have to be developed, there would be little or no additional cost to local authorities from the PSOW's proposals.

4.7 As regards health boards, the experience of my office is that the culture in respect of complaints handling, and also practical handling of complaints, also varies. However, all health boards have complaints recording systems in place, in line with the requirements of the National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) Regulations. Whilst I would envisage working with Health Boards in relation to securing improvements in the nature of the data capture, I do not anticipate any major IT development work being required as a result of this. Consequently there should be no significant cost implications for health boards in relation to this proposal.

4.8 It is envisaged that the costs to the PSOW in relation to this arrangement would be:

	£'000
Two full time senior investigation officers, including NI & Pensions	110
Professional fees, including specialist advice	10
Office costs, including printing, stationery and IT	8
Other – training, travel and subsistence	<u>2</u>
Total Costs	<u>130</u>

4.9 I would also at this juncture point out, that in view of my projections as regards the increase in the number of enquiries and complaints to my office to 2018, 'doing nothing' in relation to trying to improve complaints handling in bodies in jurisdiction will also have associated costs. The office will simply not be able to deal with the level of increase projected without additional resource to deal with it. So, for example, if the trends continue along similar lines to those experienced since 2008/09, I foresee that there could well be a need for at least three additional officers by 2018/19 to deal with caseload volumes.

5. Private Healthcare

5.1 This proposal has perhaps generated the greatest variance of opinion during the evidence sessions heard by the National Assembly for Wales. However, on the whole there appears to be an acceptance of the logic behind the limited power being sought in respect of private healthcare. I recognise that if it is agreed that this is a power that should be granted to the PSOW, then the legislation will need careful drafting. For example, by ensuring that the power to investigate is available only when the Ombudsman is of the opinion that NHS health care cannot be investigated effectively or completely without also investigating matters relating to private health care.

- 5.2 To develop on the evidence previously presented to Committee as regards the interplay between private and public health care, I believe the circumstances where I would want the discretion to be able to consider complaints about private health care would be in circumstances whereby treatment or care has been delivered by both an NHS body (a GP or clinician) together with either an 'independent hospital', or the private practice of health professionals (including private units) conducted on the premises of NHS organisations.
- 5.3 The Finance Committee has already been made aware of the anomaly that exists in relation to private patient units within the NHS in Wales. The Committee may be interested to learn that the Independent Healthcare Sector Complaints Adjudication Service (ISCAS) has drawn my attention to a complaint that they have received since giving their evidence to the Committee. The unit in question describes itself as: "a dedicated private health-care unit on a District General Hospital site, offering a unique partnership with the NHS with medical and support facilities on site 24 hours a day". ISCAS have of course had to explain to the complainant there is currently no avenue for them to make a complaint to an external body.
- 5.4 I remain of the view that there is a public interest in being able to investigate 'the whole of a complaint' made to me, with regard to treatment that has involved both public and private health care, not least to follow a pathway which may enable identification of what point something may have gone wrong for a complainant (or in respect of treatment received by a member of a complainant's family).
- 5.5 I am also of the view that there is a public interest whereby I (and my successors) could ensure that failings in any area of health care provision by private providers would be highlighted so that health boards etc would have to give serious consideration before commissioning these organisations to undertake treatments on behalf of the NHS in Wales.
- 5.6 The issue of making the Ombudsman's recommendations binding in relation to the private sector element of an investigation has arisen. I am of the view that this is not necessary under the limited circumstances I have outlined above. I believe that although the same democratic accountability argument cannot be applied here, there remains the incentive for private healthcare providers to comply with those recommendations. Furthermore, from a reputational point of view, it would be in the private health care provider's interests to demonstrate to the public that they are addressing the failings identified, particularly should there be any suggestion of 'unsafe practice'. Furthermore, I am sure that this would be a matter that Healthcare Inspectorate Wales, the regulator for private healthcare in Wales, would want to pursue.

- 5.7 A matter which has been raised too is the issue of whether a levy should be introduced in relation to investigation of the private health care element of a complaint. Whilst I consider the power being sought in relation to private health care to be an important power, as I have outlined, it would only be used in limited circumstances. Against that background, I believe that introducing a levy system to recoup what in the scheme of things would be a low level of cost to the Ombudsman's office, would be unnecessarily bureaucratic. However, if the Assembly has concerns in this regard, it is my view that a charge on a case by case basis would be a better means to address the situation rather than a complex levy system.
- 5.8 With regard to the costs to private healthcare providers, as the Committee heard from a private health care representative during its evidence session on 4 February 2015, it is unlikely there would be a significant impact on this sector from a resources point of view due to the clinical governance and complaints processes that they already have in place.

6. Links with the Courts

- 6.1 The Committee has of course already received my evidence in relation to this aspect. It is recognised that this is a complex area. In general, terms however, the proposals in relation to the links with the courts seem to have been welcomed. I would reinforce the comments of others who have given evidence in this regard. If a complainant has 'chosen the wrong path' then there should be a means for them to be set on the right path by the court, with the citizen/service user's needs being put first. Further, whilst there will be complaints that are more appropriate for the court to consider, there will be others where a more informal, inquisitorial, approach would better suited in the circumstances.
- 6.2 Further, as stated, with the lack of legal aid available, there are those people who are not in a position to take a grievance to court. However, to address a matter of concern raised about the potential of a dual track approach, we would in any event ascertain before commencing an investigation whether the complainant was already pursuing a route through the courts. That said, currently a complainant is still able to take their grievance to the court after having complained to the Ombudsman. However, equally important – and a saving to the public purse – is the ability for the court to refer a matter to the ombudsman. The Law Commission has identified that the courts cannot refer a matter to the ombudsman in circumstances where it believes the issue at hand is one that would be better addressed by an ombudsman. (The Law Commission however also proposed that the decision as to whether to investigate or not should still remain at the Ombudsman's discretion.) Also, some people may be daunted by the prospect of appearing in court. To be clear, however, anyone seeking compensation would still need to take the matter to the courts in this regard.

6.3 In relation to the costs to this office in this regard, in view of the fact that I already receive complaints which are matters that complainants may take to the courts, I believe that any increase in the number taken into investigation could be dealt with within the existing resource of the office. However, the resources for the interaction between the PSOW and the courts, whilst difficult to gauge, is roughly estimated to be between £20K and £50K, to cover the costs of formally referring points of law to the courts.

7. Other Matters in relation to the Ombudsman's powers under consideration by the Finance Committee

7.1 **Jurisdiction:** I would be happy to explore further proposals as regards any anomalies in relation to bodies the Assembly believes should be within the PSOW's jurisdiction, which are currently not. Clearly, I would need to identify whether any such proposals would have any significant resource implications for my office.

7.2 **Binding recommendations:** As I have alluded to elsewhere in this paper, I believe that the democratic accountability argument as regards public service providers complying with the Ombudsman's recommendations is a strong one. I have also set out an argument as to why I believe that it is also in the interests of private providers to also comply with Ombudsman recommendations. I am not, therefore, seeking such a power for the PSOW. There would be no resource implications for the Ombudsman regardless of whether recommendations became binding or not.

7.3 **Protecting the title:** The role of an ombudsman is unique. In particular, the in-depth, systemic nature of investigations into complaints that an ombudsman undertakes sets him or her apart from mere complaint handling. Whilst I personally, have not sought the protection of the title, I do see merit in it. I also see it as a legitimate and proper role of a legislature to decide whether any 'complaint handling scheme' merits and meets the criteria to hold the title of 'Ombudsman'. There would, of course, be no resource implication to the PSOW; although there could be one for the National Assembly for Wales if a situation arose where it has to consider proposals for another 'ombudsman institution' in Wales.

7.4 Code of Conduct:

(a) Members will be aware of my concerns at having to give resource to dealing with low level Member against Member complaints, when these could, at least in the first instance, be dealt with by councils at local level. I would welcome what is currently a voluntary arrangement being made a formal requirement in legislation. There would certainly be a resource benefit to my office in this regard, in that my office would be able to target its resource to 'serious' complaints.

- (b) I must also add that the position in relation to the provisions of the Local Government Act 2000 which apply in Wales is unsatisfactory and inaccessible for anyone wishing to identify the relevant statutory provisions which apply in Wales. Whilst many of the provisions of the Local Government 2000 were brought into effect in Wales by statutory instrument issued under s70 of the 2000 Act (The Public Services Ombudsman for Wales (Standards Investigations) Order 2006/949) as many of the provisions have been repealed in England they no longer appear on the face of the 2000 Act on any of the legal databases which are available. In view of this whilst I see no reason to amend my powers in this area should the Committee decided there is a need for legislation I would wish to see the Ombudsman's powers to investigate code of conduct complaints being incorporated within the PSOW Act 2005 so that the law is accessible for all.

Nick Bennett
Public Services Ombudsman for Wales
19 March 2015
