*Response to the* Consultation on an Inquiry into the Consideration of Powers of the Public Services Ombudsman for Wales,
*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 this initiative by the Finance Committee and am pleased to respond to the request to offer my views. My major area of research is in Administrative Justice and I was a member of the Administrative Justice and Tribunals Council, am a member of the Tribunal Procedure Committee and act as an adviser to the Northern Ireland Ombudsman. 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). I draw on this and subsequent research in responding to the consultation questions.

2. Before getting into the specific questions raised in the consultation, I wish to make some introductory remarks about context.

3. The ombudsman institution is a pivotal figure in administrative justice because of the twin objectives of providing effective redress and seeking to improve services. Complaints are not the only way in which people can try to resolve their disputes about the delivery of public services. In some cases they will have the right to appeal a decision to an independent tribunal and they may have a possible remedy in going to court. The distinction between a complaint and an appeal is not well understood by the public, and there is further complexity arising out of the evolving devolution settlement with some public services devolved to Wales such as the NHS, and others reserved to Westminster and Whitehall such as social security. In addition some services are delivered by private not public bodies.

4. Those, including me, who advocate viewing administrative justice as a system, argue that the need to adopt a citizens' or user's perspective leads to a holistic approach which not only guides and supports people through the maze of the different institutions and mechanisms of redress for the different services, but also seeks to ensure that lessons are learned so that services can be improved with a view to getting things right first time.

5. There is a tension between fragmentation and integration. The Administrative Justice and Tribunals Council and its Scottish and Welsh Committees provided a way in which advice could be given to Ministers in London, Cardiff and Edinburgh about administrative justice within and across the national boundaries but this has been lost with the abolition of those bodies. The Committee on Administrative Justice and Tribunals Wales is a temporary non-statutory body which provides advice to Welsh Ministers This body has a limited remit and there is a need for collaboration between the different levels of governments in their delivery of services to ensure that people

can be advised, supported and guided through the redress labyrinth. Just as it is proposed that the Ombudsman be given jurisdiction over private health care, might also the remit in Complaints Wales be extended to cover not only devolved tribunals such as the Special Educational Needs Tribunal for Wales but also non-devolved tribunals such as social security?

Effectiveness of the Ombudsman

6. The 2005 statute provided a benchmark for some aspects of ombudsman practice reflected in its inclusion in a consultation on reform of the Northern Ireland Ombudsman by the Northern Ireland Assembly and the Law Commission's *Public Services Ombudsmen* report. As the Ombudsman's proposals suggest, there are points that could be improved, not least in changing the culture so that lessons are not simply identified and disseminated but also acted upon to get things right first time.

Own Initiative Investigations

7. One of the recommendations for reform of Ombudsmen in the UK which my colleagues and I made in our book was that the power of own initiative investigations should be granted. We were very struck by the view of the Australian ombudsmen who we interviewed, that they could not conceive of doing the job without this power.

8. I suggest that they are needed because not everyone who has suffered through poor service will complain about it, particularly those who are amongst the most vulnerable, the elderly, the young and those with physical and learning disabilities.

9. Australian experience of this power tends to show that in states with a comparable population to Wales, the power is exercised carefully with between 2 to 4 such investigations being conducted each year. They are carefully planned and they require significant resources, and so there are constraints upon them.

10. I would suggest that concerns about their use leading to 'mission drift' or 'fishing expeditions' or being an unwarranted intrusion upon public bodies are misplaced. The remit of the Ombudsman is dealing with injustice or hardship arising from maladministration or service failure. The Australian legislation does not require consultation but it would be a foolish Ombudsman who would not consult and co-ordinate with others. The closest analogous power which any UK officer has would be the power to conduct Value for Money Audits by the UK's Auditors-General.

11. Nonetheless it would be prudent to require consultation, particularly with the Wales Audit Office, as well as other interested parties. Criteria and guidance will have to be devised to manage the various stages of an own initiative investigation from the identification of topic and commissioning of the investigation, through to its conduct, publication of the report and subsequent review of the exercise and its outcomes.

Oral Complaints

12. I support the Law Commission's analysis and proposals simply to require the Ombudsman to publish guidance on how complaints should be made. This flexible approach allows for responding to developments in technology and for the development of norms and expectations. For example there are confidentiality and privacy issues which arise out of the use of social media but not with email or forms on websites.

Complaints Handling Across Public Services

13. It might have been hoped that the size of Wales' population and public services would have led to greater voluntary adoption of the Model Concerns and Complaints Policy. It therefore seems that legislative underpinning might be required and this could be part of a Welsh development of the role of the Complaints Standards Authority which was conferred on the Scottish Public Services Ombudsman. (I shall say more about this function later.) The sectoral approach followed in Scotland means that there is a common core for a complaints procedure which can be tuned to the particularities of different sectors, local councils, health, Welsh Government departments and bodies, housing. This makes it easier for public bodies, the public and their advisors alike to use the complaints procedure, and is likely to reduce the cost of training in, and publicity, advice and guidance about, the procedures.

Ombudsman's Jurisdiction

14. At the 2012 International Ombudsman Institute Conference in Wellington, Peter Tyndall the previous Ombudsman and I gave papers in which we differed on whether public services ombudsmen should retain jurisdiction if a service is privatised. I am content for a Public Services Ombudsman to relinquish jurisdiction so long as the arrangements for dealing with complaints meet certain criteria:
    - Putting It Right (on complaint handling and remedies);
    - Getting It Right (on offering guidance and feedback) and
    - Setting It Right (the accountability and independence arrangements).

15. These criteria are met by the UK's Public Services Ombudsmen and by most of the Private Ombudsman schemes. I think that the EU Directive on Alternative Dispute Resolution for Consumer Disputes (2013/11/EU) would meet those criteria but we have to see how the UK will implement its responsibilities under the directive and the arrangements which the various sectors of consumer services establish.

16. In relation to whether or not private health care should be brought within the Ombudsman's jurisdiction, as he requests, there are various factors to consider. One is that private social and palliative care have been brought within jurisdiction and given the policy which seeks to integrate health and social care, it might be thought sensible that a review stage in both health and social complaint processes be carried out by the same body. While some complaints will be about one type of care, there will be some in which both types of care are the subject of complaint. If combined complaints outnumber single complaints which escalate to a review stage, then the case for a common review stage body is strengthened.

17. If jurisdiction is extended then the private health care sector will have to bear the cost of handling private health care cases by the ombudsman and there are various models in private ombudsman schemes which can be considered.

18. I would suggest that careful thought be given when extending the jurisdiction of a Public Services Ombudsman to the private sector. It can be justified for principled and pragmatic reasons but perhaps there is a greater burden of proof when it is an extension rather than seeking to retain arrangements upon the privatisation of a public service. Concern has been expressed about the possibility of a power of own initiative investigation leading to mission drift, but I would suggest that it is more likely that it will be government and legislatures that contribute to mission drift by extending a public services ombudsman's jurisdiction.

Links With The Courts

19. It is very unfortunate that there has not yet been a full response to the Law Commission's 2011 report *Public Services Ombudsmen*. The Ministry of Justice is required to respond to Law Commission reports no later than 12 months after publication. The Cabinet Office takes the lead on ombudsman policy and it seems that work which the Minister for Government Policy and the Chancellor of the Duchy of Lancaster, the Rt. Hon. Oliver Letwin MP is overseeing, may soon be published. We do not know the extent to which this will deal with UK wide aspects of ombudsmen and aspects relating to England and Wales and just England. It is likely to address the issue of unifying the public ombudsman service in England and thus catching up with Wales and Scotland. This would have implications for the Parliamentary Ombudsman whose complicated jurisdiction covers England; England and Wales; England, Wales and Scotland; and England, Wales, Scotland and Northern Ireland.

20. The trouble is that the set of recommendations which the Law Commission made on the links with courts apply to England and Wales and therefore involve the Ministry of Justice as well as the judges responsible for the Administrative Court and the Civil Procedure Rules.

21. Bearing in mind that the Finance Committee is considering reforms which can be legislated for in the life of the current National Assembly for Wales, I would suggest that there is only one of the Law Commission's proposals on links with the courts for which the Assembly has legislative competence and this is the statutory bar. This is the provision which stipulates that if there is another remedy available to a complainant then the Ombudsman should not accept the case unless, in the exercise of discretion, it is thought that it would not be reasonable to expect the complainant to have, or have had, recourse to that alternative.

22. The Law Commission proposed modifying this, so the position would be that even if a complainant had an alternative remedy, it would be within the ombudsman's jurisdiction, but the case could be declined on the basis of the ombudsman's view that there was a better alternative for the complainant.

23. I would support this proposal as it should make things slightly easier for complainants if the default position is within jurisdiction unless the ombudsman declines. It would need to be accompanied by information produced by the ombudsman giving examples of cases in which there might be a better alternative remedy.

Other Matters

24. I wish to address the following points; Enhancing the Learning of Lessons to Improve Service; Ombudsman as a Complaints Standards Authority; Findings and Recommendations; and Protecting the Ombudsman Name.

25. While ombudsman identify and disseminate proposals for improving service, we do not have much evidence to show if this is effective. The proposal to confer an own initiative power of investigation should lead to more lessons being learned but will they be implemented? It is suggested that what is required is cultural change which will require various actions taken by various bodies. Agencies with audit, regulatory and inspection functions could incorporate into their work consideration of complaints *and* review of action taken by bodies in response to complaints. An approach which simply calls for a body to report annually on the number of complaints made to the ombudsman about it and the number of those upheld, is useful information but what is needed is 'narratives as well as numbers'. If the body gives details about the complaints and remedial action, this enables it and auditors, regulators and inspectors' elected representatives and the public to review the effectiveness of the response.

26. I think the necessary cultural change can be promoted by the Scottish Complaint Standards Authority role. As I understand it, the Scottish Public Services Ombudsman having worked with the public service sectors to produce the model complaints processes, then expects those sectors to take ownership and to review the processes and their outcomes and to share best practice. Best complaints handling practice includes actively seeking out and using insight from complaints and comments to improve service. If bodies welcome complaints as a gift, they will make it easier to complain, and will provide effective redress and make it more likely that lessons will be learned and service consequently improved. This can be reinforced by oversight bodies if they have the 'narratives as well as numbers'.

27. Public bodies have various requirements imposed upon them and they may feel that adding to them will impede rather than assist them in doing their job. The most successful bodies know that handling complaints well not only fulfils the end of fixing problems but of enabling them to carry out their tasks effectively.

28. It would be helpful if there was collaboration and co-ordination between the UK central government and the devolved institutions over the Law Commission's proposal to make ombudsmen findings of injustice caused by maladministration or hardship caused by service failure binding. The ombudsmen's suggested remedies would remain recommendations. My initial reaction was not to support this proposal but my opposition is waning. I think it desirable that the position should be the same for the Parliamentary Ombudsman and the Public Services Ombudsmen in the rest of the UK. It had been thought in England the Local Government Ombudsmen's

findings were not binding until a Court of Appeal decision. This distinction having resulted from judicial interpretation of legislation it is desirable that clear legislation standardises the position. While I think there is scope for innovation in the UK's different jurisdictions, there are some things which should be common and in addition to findings this should also include deciding if the UK should follow New Zealand.in requiring that permission be required to use the term ombudsman and to make it a criminal offence to use the term ombudsman without such permission.