

Welsh Government's response to the National Assembly's Finance Committee's consultation on the draft Public Services Ombudsman for Wales Bill.

Introduction

The Government welcomes the opportunity to respond to the Finance Committee's Draft Public Services Ombudsman for Wales Bill consultation. We have responded to individual questions we consider it is appropriate and helpful for us to answer.

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

The main barriers will be financial resources, organisational cultures, and a changing landscape. There is a need for a clear financial assessment and a case to demonstrate that the benefits outweigh the costs.

3. Are there any unintended consequences arising from the draft Bill?

The draft Bill proposes to repeal the entire Public Services Ombudsman (Wales) Act 2005. Section 35 and schedule 4 amend parts of the Local Government Act 2000 to give functions to the Public Services Ombudsman for Wales around the conduct of local government members, which were previously held by the Local Commissioner and Commission for Local Administration for Wales. It would be useful to make provisions in your draft Bill to clarify this issue.

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

The Assembly Committees receive reports and hold the Ombudsman to account, and can provide a forum, where the Ombudsman can relay any fears if he feels that his work is being hindered and needs reviewing. It is how this process began. In addition, the introduction of a complaint standards authority should provide the legislature with hard evidence of how complaints are being handled, and whether or not there is dissatisfaction from Welsh citizens.

Power to investigate on own initiative

5. Do you have any comments on the new power in section 4? (this answer also covers questions 9 and 10)

As we have stated before, we believe that the criteria for deciding what and when to investigate, should be written into legislation and include:

- a) Anomalies, such as illegal or corrupt practice, a wrong doing or a practice that is manifestly unfair, or evidence of arbitrariness or inconsistency in administering a public service becomes evident during an investigation, could trigger an Ombudsman inquiry:

- b) If there are a number (e.g. more than 10) of investigations indicating a pattern that points to a more widespread national or regional problem, and where this is not best taken forward by another body (subject to consultation with the appropriate listed bodies in (d) below) this could trigger an Ombudsman inquiry.
- c) Where citizens are vulnerable, and there is a concern they are afraid to complain for fear of reprisals, evidence either by a series of anonymous letters sent to the Ombudsman, a commissioner or a Minister or where matters are brought to the attention of the Ombudsman by a responsible body (such as those listed in (d) below), this could trigger an Ombudsman inquiry.
- d) Prior to any inquiry being commenced, the Ombudsman must satisfy himself that neither the Police, Health and Safety Executive, Coroners, professional regulators and non-devolved bodies, commissioners, regulators, the Auditor General for Wales, inspectorates and or the Welsh Ministers have plans, or have initiated their own work or are reviewing the subject content of the own initiative inquiry.
- e) In any event, the Ombudsman must first seek to allow for a local resolution prior to initiating an own initiative investigation, as is the practice now. The remit and terms of reference of any own initiative investigations needs to be clear and unambiguous.
- f) In cases where the Ombudsman is to conduct an own initiative investigation where the body complained of has a statutory complaint handling procedure, the Ombudsman will need to apply the appropriate test used by the body's statutory complaint handling procedures, for example the NHS uses the Bolan test; and the Ombudsman will need to specify the use of tariffs that are in line with the statutory provisions of the body concerned.

In addition, a key test for initiating own initiative investigations should be for the PSOW to set out the potential benefits to the public services people receive and to demonstrate that the costs are outweighed by the value added.

In the current draft, there is a significant delegated power for the Ombudsman to establish and publish the criteria to be used in determining whether to commence an investigation.

Taking this together with Section 16 and Section 6 of the Draft Bill, by which the Ombudsman can take action to resolve a matter through alternative means in private, this potentially gives the Ombudsman significant new scope. This is also true to some extent of Section 16, subsection 4 of the draft Bill, where the Ombudsman is given a duty to specify and publish procedural requirements for conducting an investigation, with only two of these requirements set out at subsection 5.

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

Yes. It could lead to a conflict between the Ombudsman and the role of other regulators, especially those that have been established by statute, such as Health Inspectorate Wales, the Care and Social Services Inspectorate, or the Housing regulator, all of whom have powers to conduct investigations. We might see duplicate investigations with different conclusions.

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

Prior to any inquiry, the Ombudsman should satisfy himself that no other body, Police, Health and Safety Executive, Coroners, professional regulators and non-devolved bodies, commissioners, regulators, the Auditor General for Wales, inspectorates and or the Welsh Ministers has work planned or underway on the same subject. There needs to be an appropriate duty to consult placed on the Ombudsman before an own initiative investigation is undertaken.

8. 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, should there be a cut-off point, beyond which the Ombudsman should not carry out an own initiative investigation?

No. It is unusual to introduce legislation that seeks to address concerns retrospectively and we do not believe a case has been made for powers to be extended to this extent.

Requirements for complaints made and referred to the Ombudsman

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

In respect of Section 8 (1) (c) the local resolution process can, experience has shown, take up to one year to resolve. Whilst this is not indicative of the Welsh public sector, there are cases in health and social care where accessing relevant experts to independently review complaints can stretch complaint close to a year. This also applies to Section 9 (1) (b). The Committee may want to review this provision.

The same section also mentions electronic media and the Committee should consider if this included social media.

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

The Ombudsman should ensure that the guidance is accessible, by taking advice from relevant bodies, for example RNIB, Disability Wales, and the Equality and Human Rights Commission. The Ombudsman is subject to the Welsh Equality

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measure and can rely on its provisions to ensure it is providing a service that is compatible with the responsibility the measure confers.

Matters which may be investigated

14. 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 by public and private health services providers (see sections 10(1)(d) and 10(2))?

We have previously stated that we support this as long as there is no additional cost to the public purse.

15. Does section 10(2) adequately cover anyone who has received a combination of public and private treatment?

Section 10 (2) needs to be make clear whether it covers Welsh patients receiving services in England and whether these were commissioned services or private treatment. It also needs to clarify whether / how it would apply to Welsh patients who undergo treatment across the border.

There should be an integrated report on all aspects of care and not a separate report on public and private aspects of the treatment. Sections 22 and 23 should be reviewed and it would be preferable to engage both parties to a report so that issues can be taken forward together.

17. 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?

The definition is narrow and should be broadened to encompass both medical treatment and nursing care.

19. Do you have any comments on the new definition of “family health service provider in Wales” in section 71, which is intended to capture, for example, a GP practice as a whole rather than just an individual GP?

We note the intention to capture the whole practice rather than an individual GP, but would suggest the Committee seeks legal clarification if this also includes commissioned services, especially those that may have a cross border impact.

Investigation procedure and evidence

20. Do you have any comments on the procedure set out in section 16, in so far as it relates to the procedure for conducting an own initiative investigation?

As a consequence of our answer to question 4, the provision allowing the Ombudsman to amend the criteria would need to be removed from the draft Bill.

21. Should the Ombudsman's power in relation to obtaining information, documents, evidence and facilities also apply to own initiative investigations and investigations into private health services (see section 17)?

Yes

Listed Authorities

22. Do you have any comments on the restrictions on power to amend Schedule 3 (see section 30(2) in particular), which are significantly narrower than the restrictions found in the 2005 Act?

We would prefer to stay with the original power from the 2005 act, as they provide more flexibility to the Ombudsman in exercising his powers.

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

It is noted that the list in schedule 3 is consistent with the list in the Public Services Ombudsman (Wales) Act 2005. As such, the list of bodies will need updating to include

- Qualifications Wales which was inserted into the schedule by the Qualifications (Wales) Act 2015.
- The two Boards of Conservators in Wales, the Coity Walia and Towyn Trewan Boards for Conservators.

Similarly, a number of bodies will need to be removed or changed, including;

- The Climate Change Commission for Wales, will end in its current format on 31 March 2016 and should be removed. Given the role of the Future Generations Commissioner outlined in the Well-being of Future Generations Act, our view is that the Future Generations Commissioner should be included under sections 62 (1b) and 63 (1).
- The Internal Drainage Boards should be removed as they are now part of Natural Resources Wales.
- The reference to 'A Community Health Council' should read 'individual Community Health Councils'.
- The Wales Centre for Health should be removed as it no longer exists.

- The Care Council for Wales are due to be renamed from April 2017 as Social Care Wales as part of the Regulation and Inspection of Social Care (Wales) Bill. Depending on the proposed timeline for the PSOW Bill, Social Care Wales may need to replace CCfW in the 'listed authorities' section in Schedule 3.
- The Regional Flood and Coastal Committee under the Flood and Water Management Act 2010 would become the Flood and Coastal Erosion Committee under the Environment Bill. Therefore depending on the timing of the Public Services Ombudsman (Wales) Bill that reference may have to change if the Environment (Wales) Bill becomes an Act.
- The Tax Collection and Management (Wales) Bill currently before the Assembly seeks to establish the Welsh Revenue Authority. Section 34 of the Bill provides for Schedule 3 to the Public Services Ombudsman (Wales) Act 2005 (c.10) (listed authorities), to include, after the entry relating to the National Assembly for Wales Commission to have inserted "Welsh Revenue Authority." The Committee will need to have regard to this when the Draft Ombudsman Bill is introduced.

Other bodies should be retained on the list including;

- The Natural Resources Body for Wales, as this is the legal name given to Natural Resources Wales (NRW) in the Establishment order. The Environment Agency as, although in Wales this is now a part of NRW, the actions of the English Environment Agency in a cross border situation i.e. in or on the rivers Dee, Wye and Severn could impact in Wales. We would like the Public Service Ombudsman to have the power to investigate these actions.
- The Forestry Commissioners, as again, there is potential cross-border activity and the Commissioners retain some function in relation to Wales.

Building Regulations Advisory Committee, as this was added to the current act via the Statutory Instrument that transferred building regulations functions to Welsh Ministers.

Complaints-Handling

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

The draft Bill is unclear on how the statement of principles would differ from the model complaints-handling procedure. If the intention is for the statement of principles to be akin to the current ombudsman publications, Principles of Good Administration and the Principles of Good Remedy; and the model complaint handling procedure to be akin to the current Model Complaints Policy, this should be clarified.

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The Government welcomes the provisions around model complaints-handling procedures (“model CHP”) for listed authorities. But we are concerned about the publication of different model CHPs for different purposes as this may lead to confusion. We believe that the scope of model CHP’s should be limited to listed authorities who are not required by statute to have a Complaint Handling Procedure. Where listed authorities are required to have statutory complaints handling procedures, the Ombudsman’s role should be to ensure that they are complying with their statutory role.

The draft Bill requires a relevant authority to provide a description of the CHP to the Ombudsman within 6 months of being specified. But, section 37 provides that, if the Ombudsman gives a direction under (1), the listed authority would have to submit a description of its procedure within 3 months (instead of 6). The committee needs to clarify its intention in this regard. There should also be a requirement for a listed body to publish and publicise its CHP.

The Bill provides the Ombudsman with discretion to determine who to consult on the principles and the model CHP, but it is silent on compliance and the sanction available to the Ombudsman were a listed authority fail to comply with a model CHP or a statutory CHP.

During the Finance Committee’s inquiry, reference was made to the PSOW collecting complaints data across the public sector in Wales, and learning from it. The Bill is silent on this issue.

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

Yes, but it should also include an exemption for those public bodies that have a statutory requirement to have complaint handling procedures from sections 32, 33, 34 and 35.

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

26. Should Part 4 remain a standalone Part? Or should such investigations be brought within the Part 3 investigations process?

We should have one investigating process.

Part 5: Investigations: supplementary

28. Do you have any comments on sections 62, 63 and 64, which provide for joint and collaborative working with specified Commissioners and the Auditor General for Wales?

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The reference to only the Commissioners and subsequently to the Auditor General for Wales needs to be extended to other bodies with whom the Ombudsman must consult as stated previously.

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

Yes. All Commissioners have an interest in promoting and improving public services. Each commissioner will bring their own specialism, knowledge and expertise to the table, and together with their insight in their areas, they will add real value to joined up working.

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

No

Appointment etc.

31. The provisions of paragraphs 5 to 8 of Schedule 1 (disqualification) reflect largely the current provisions in the 2005 Act. Do these provisions require updating?

No

32. Paragraph 7 of Schedule 1 provides that a person who has ceased to hold office as the Ombudsman or as an acting Ombudsman is disqualified from a list of roles (listed in paragraph 7(1)) for a period of two years. Is the two year period appropriate?

Yes

Financial implications

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

An important element of our evidence to date has been the pressure on public spending and the need to ensure that proposals do not impose new costs on the public purse. We note the explanatory material did not provide an assessment of costs and impacts of the draft legislation; especially in regard to costs that may be incurred by Health and Local Government.

Similarly there is no assessment of impacts either in terms of equalities and human rights, the Welsh language, the United Nations Convention on the Rights of the Child (UNCRC), or EU law.

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These are all important considerations for Assembly legislation and we encourage the committee to ensure these issues are fully considered.

In addition, the Committee may wish to consider whether there are impacts in terms of tackling poverty and the well-being of future generations.

Other comments

35. Do you have any other comments you wish to make about the draft Bill or any specific provision within it?

Given that this Bill repeals and replaces the PSOW Act 2005, there will need to be equivalence between the English and Welsh texts of a Bill.

The recent consultation on the Quality Green Paper, Our Health, Our Health Service, included proposals to review, streamline and strengthen the roles of inspectorates. The committee should be prepared to take into consideration the responses to that consultation and any Government proposals that may arise from it in respect of HIW and CSSIW.

The draft Bill being consulted on refers to the Care Standards Act 2000 (CSA). We anticipate the Regulation and Inspection of Social Care (Wales) Bill will shortly receive Royal Assent. References to the CSA will need to be amended and further amendments will be needed to take account of the changes that will be enacted by the Regulation and Inspection of Social Care (Wales) Bill.