



Committee Clerk
Finance Committee
National Assembly for Wales
Cardiff Bay
CF99 1NA

18 January 2016

Dear Sir/Madam

RESPONSE TO CONSULTATION ON THE DRAFT PUBLIC SERVICES OMBUDSMAN (WALES) BILL

Thank you for the invitation to provide comments on the draft public services Ombudsman (Wales) Bill.

As you are aware, the Northern Ireland Assembly is currently reforming and modernising the Office of the Northern Ireland Ombudsman through the Northern Ireland Public Services Ombudsman Bill (the Bill). The Bill proposes the merger of the two existing statutory offices of the Assembly Ombudsman for Northern Ireland and the Northern Ireland Commissioner for Complaints. The Bill will modernise the legislation that underpins the work of the Northern Ireland Ombudsman; it also extends the jurisdiction of the Office to include schools, colleges of further education; it removes the bar on investigating commercial and contractual matters, introduces an own initiative power and includes universal access to the Ombudsman to legal advice held by bodies in jurisdiction; and includes a number of other reforms such as that of a complaints standards authority for Northern Ireland.

The consultation on the draft public services Ombudsman (Wales) Bill therefore, from a Northern Ireland perspective, is timely given my Office's recent experience with the reform of our own legislation.

Please find attached my response to the consultation questions. If I can be of any further assistance please do not hesitate to contact me.

Yours faithfully

TOM FRAWLEY
Ombudsman



NORTHERN IRELAND OMBUDSMAN'S
RESPONSE TO A CONSULTATION ON
THE DRAFT PUBLIC SERVICES
OMBUDSMAN (WALES) BILL

January 2016

Introduction

THE ROLE OF THE NORTHERN IRELAND OMBUDSMAN

In my role as Northern Ireland Ombudsman, I hold two statutory offices; Assembly Ombudsman for Northern Ireland and Northern Ireland Commissioner for Complaints. In the former role, I investigate complaints of maladministration about Northern Ireland Departments and their statutory agencies. In the latter role I can investigate complaints of maladministration about local government, health and social care, housing and education. My remit in health permits me to investigate complaints relating to the clinical judgement of health professionals in health and social care trusts, general health service and independent health services providers. In May 2014, I was given powers to investigate complaints about alleged breaches of the Local Government Code of Conduct for Councillors (the Code); and I have power to adjudicate or sanction where the Code has been breached. I have a statutory bar in both pieces of legislation underpinning my Office Article 10(3) of the Ombudsman (NI) Order 1996 and article 9(3) of the Commissioner for Complaints (NI) Act 1996. Currently, I can only investigate a complaint made to me in writing and I currently have no power to commence an own initiative investigation.

However, under new legislation proposed for Northern Ireland and sponsored by the OFMdFM committee of the Northern Ireland Assembly, the offices of Assembly Ombudsman and Commissioner for complaints will be merged in a single new office of Northern Ireland Public Services Ombudsman (NIPSO) with extended powers and remit. The legislative process for the NIPSO Bill is at an advanced stage and I attach a link to the Bill for the Welsh Assembly's consideration. Of significance to the proposals for the PSOW draft Bill is the NI Assembly's proposal for own initiative powers for the NIPSO and the role of complaints standards authority as well as increased access to information and information sharing powers with other ombudsmen, commissioners and oversight bodies.

I will be happy to provide further information or evidence to the Welsh Assembly in addition to my written submissions as this important piece of Welsh Assembly legislation progresses.

Response to Questions 1-4

1. I consider it important that proper structures are put in place so that the Office of the Public Services Ombudsman for Wales (PSOW) can deliver its work effectively and in a co-ordinated way, and provide a strong focus on improving public services for the people of Wales going forward. In order to do so, it is therefore necessary to update and renew the legislation which provides the legal framework within which the Ombudsman can address the complaints he receives.
2. Complaints to the Office of the PSOW relate to events that impacts the quality of the lives of the people of Wales and to refresh this important legislation would enhance the Office's ability to provide redress and remedy for individuals when that is appropriate as a result of failures in administration and professional judgment in health and social care.
3. As you are aware, the legislation under which my Office operates is also currently undergoing significant reform. This process has raised issues of potential barriers to redress for injustice experienced by the citizen in relation to their experiences of public services, which I would be happy to provide further information on if required.

Response to Question 5

4. I welcome the power of the Ombudsman to investigate on his own initiative. The provision in the draft Bill mirrors the equivalent provision in the Northern Ireland Public Services Ombudsman (NIPSO) Bill, which I believe provides an effective framework for the NIPSO to introduce this new investigative tool.
5. The power to investigate on own initiative is not an authority that has been available to date to UK ombudsmen. However, it has nevertheless traditionally been part of the toolkit available to what has come to be known as the 'classic' model of ombudsman with most International ombudsmen having this authority. For instance, ombudsmen in Austria, Malta and the Republic of Ireland have

own initiative powers which enable issues of systemic maladministration to be addressed.

6. Historically Public Services Ombudsmen within the UK have been constrained, by underpinning legislation, to respond only where a complaint is received from an aggrieved individual. I envisage that the authority to initiate an own initiative investigation would be used sparingly, as has been the experience in other jurisdictions, and anticipate that I and any other ombudsman with this authority would be circumspect in invoking this authority. In particular the use of the authority could be judged appropriate where concerns of unfairness arise across a number of individual complaints even though the public authorities involved have been adhering to the prescribed policies and procedures. The own 'motion' power for PSOW will also address a particular gap in the current recourse available to an ombudsman where he/she is required to receive a complaint before initiating investigation. This presents real problems for the most vulnerable in our society, the frail elderly, the mentally ill and people with learning difficulties, who are unable or inhibited from properly framing their concerns or experience in a complaint; or indeed who's families fear reprisal on foot of a complaint if they are cared for in an institutional setting. These groups often experience systemic failure and therefore crucially an own initiative authority will enable the Ombudsman to much more effectively examine these potential failures when they present.
7. There is the potential for the authority to investigate on own initiative to be used to investigate issues across a broader spectrum of Departments or Public Service bodies delivering the same or a comparable service. In this respect I would envisage prior discussion and consultation with the Comptroller and Auditor General and relevant sectoral regulators to ensure that a duplicate use of resources was avoided.

Response to Question 6

8. I do not consider that the power to investigate on own initiative has any unintended consequences for the other matters included in the draft Bill.

Response to Question 7

9. It is for the Ombudsman to decide who to consult in relation to own initiative investigations. This will depend on the 'listed authority' under investigation and the sector in which that listed authority is located. For example, if the Ombudsman considers investigating on own initiative in relation to a health complaint, it would seem appropriate that he consults with the relevant health regulator in the first instance.
10. As outlined at question 5 above, the power to investigate on own initiative can be used to investigate the issues across a broad spectrum of Departments or Public Bodies delivering the same or a comparable service. In this respect the Ombudsman would envisage prior discussion with the Comptroller and Auditor General to ensure that a duplication of effort and resources was avoided.

Response to Question 8

11. Yes, the Ombudsman should have the power to initiate an investigation based on action that took place prior to the draft Bill/Act receiving Royal Assent. I do not consider that there should be a cut off point beyond which the Ombudsman should not carry out an own initiative investigation. A similar provision for retrospective applications is included in the NIPSO Bill at section 8(6).

Response to Question 9

12. I can confirm that in Northern Ireland the NIPSO will produce his/her own criteria for conducting own initiative investigations and I consider it important that a similar approach is adopted in Wales. This discretion to set his/her own criteria for investigation is an important facet of the ombudsman model, underscoring their independence from the bodies they investigate.

Response to Question 10

13. It is for the Welsh Ombudsman to decide whether or not to conduct an own initiative investigation and it is for him to determine whether the evidential requirements have been satisfied. There is a danger in being prescriptive in terms of the evidential requirements and every investigation must be decided on its own merits.
14. In Northern Ireland the Assembly has provided that the new NIPSO, where he/she chooses to initiate a systemic investigation, would be subject to the usual provisions relating to investigations of individual complaints. Thus, the provisions relating to bodies within jurisdiction, matters within jurisdiction, purposes of an investigation, procedure in respect of investigations, evidence, obstruction and contempt, reports on investigations etc would all still apply. Potentially, there are many sources which could prompt an 'own initiative' investigation by the Ombudsman. These include evidence gathered through their own casework/research, evidence gathered by another agency or regulator, by the legislature, or prompted by a specific public concern. Despite the limitless discretion implied by the term 'Own Initiative' in reality the decision to initiate an investigation, on this basis, would require to be evidence based, adequately reasoned and constitute a proportionate and prudent use of public resources. Ultimately, it is a matter for the Welsh Ombudsman to decide but my research has identified a number of potential triggers for an own initiative investigation. These include:
- (i) A complaint or series of complaints on an issue having been received
 - (ii) The Ombudsman's perception of public concern about an issue
 - (iii) A result of the Ombudsman's research on the issue
 - (iv) An organisation's own internal governance arrangements and external audit
 - (v) Political oversight and commentary
 - (vi) Regulation and oversight of a body within jurisdiction by another organisation
 - (vii) Evidence brought to the Ombudsman by advocacy groups identifying patterns and trends of systemic maladministration

(viii) Research provided by the relevant listed authority

15. A draft 'Decision Framework' is currently being developed for the NIPSO to provide guidance in relation to the relevant evidential considerations. I would be happy to share this framework with the Committee in due course.

Response to Question 11

16. The definition of 'member of the public' is as defined in section 5(5) of the NIPSO Bill which is a provision similar to that provided in the draft PSOW Bill. I do consider it appropriate to include section 7(3) which also provides for the Welsh Ombudsman to determine any question of whether a person is entitled to bring a complaint. It is important that the Welsh Ombudsman retains discretion to decide who can complain to him. This broad discretion is an important aspect of the ombudsman model.

Response to Questions 12 and 13

17. It is, in my view, a matter for the discretion of the Welsh Ombudsman to determine in any case whether the requirements are met in respect of complaints made to his Office. It is important to ensure that the Welsh Ombudsman, like all other Public Services Ombudsmen, is the 'master' of his own procedures.
18. I should point out that currently the time limit for bringing complaints to my office is twelve months. In the NIPSO Bill, the time limit for submitting a complaint to the NIPSO has been reduced from twelve months to six months. In that legislation, where the procedure for the administration of complaints handling by the listed authority has been exhausted, the authority must within two weeks of the complaints handling procedure being exhausted, give the person aggrieved a written notice stating that the complaints handling procedure is exhausted and that the person aggrieved if dissatisfied, can refer the complaint to the Ombudsman. The complaint must be made to the NIPSO within six months of that notice being sent. It is important that members of the

public are aware of the route to redress from an ombudsman as an office of last resort and a statutory duty to signpost to an ombudsman is significant progress.

Response to Questions 14-19

19. I currently have no remit over private healthcare and this extension of jurisdiction is not envisaged for NIPSO. In our experience to date, the public/private health care overlap has not been an issue and I have no views on this matter. As a result, I am not in a position to offer an informed comment on these questions.

Response to Question 20

20. The investigation procedure set out in section 16, insofar as it relates to the procedure for conducting own initiative investigations, is broadly similar to the procedure in the NIPSO Bill and I welcome this.

Response to Question 21

21. I do consider it essential for the effective operation of an own motion investigation that the Ombudsman has the same wide information gathering powers in relation to own initiative investigations as in his role relating to complaint led investigation. The role of an ombudsman is inquisitorial in nature, it is not adversarial, therefore the Ombudsman must have access to all relevant information to properly establish the facts. I should point out that in the NIPSO Bill the NIPSO has the power to seek access to all legal advice in relation to all listed authorities that are the subject of the investigation. This can be important as in my experience many bodies rely on legal advice as an explanation for their actions and the ombudsman should therefore be in a position to test this issue.

Response Question 22

22. I have no comment to make on the issues raised by this question.

Response to Question 23

23. From my experience, it is important that any public service provider that is funded by public money from the Welsh Assembly should be included within the Welsh Ombudsman's jurisdiction.

Response to Question 24

24. I welcome these provisions which are similar to those in the draft NIPSO Bill.
25. I note and welcome that the proposed amendments to the PSOW Act reflect the Scottish model which has been followed in the proposed NIPSO Bill. The relevant provisions of the Scottish Public Services Ombudsman Act 2002 gave the Scottish Ombudsman enforcement powers to compel bodies to adopt the model complaints handling policy. This mandatory element has been an important power to ensure uniformity of complaints handling process across the public sector in Scotland. This uniformity of approach to complaints handling across all public service providers is important as the public are aware of this simple and streamlined approach and their right to complain to the Welsh Ombudsman if having exhausted the internal process, of the listed authority, they remain dissatisfied. I fully support these provisions and consider the complaints standards authority role will be an important tool for the Welsh Ombudsman to improve complaints handling across the public sector which will, in my view, benefit the bodies complained of, the citizen; and the Welsh government in its oversight of that sector.

Response to Question 25

26. Please note that in Northern Ireland the NIPSO Bill has a similar provision. I do consider section 38(b) to be adequate to allow Welsh listed authorities to comply with their duties under other enactments, such as Freedom of Information duties.

Response to Questions 26 and 27

27. Having considered the proposed amendments, I concur that Part 4 of the draft Bill should be brought within Part 3 in its entirety.

Response to Question 28

28. There are similar information sharing provisions proposed in the NIPSO Bill and I welcome the inclusion of the Welsh Ombudsman's ability to work collaboratively with Commissioners and the Auditor General for Wales. This will be important as stated previously in relation to own initiative investigations. I note however that the proposed provisions do not include the new NIPSO and I suggest that consideration is given to extending this provision to include the NIPSO which would enable the Welsh and Northern Irish Ombudsmen to share information and operate more effectively in relation to systemic maladministration that may impact on both Northern Irish and Welsh citizens.

Response to Question 29

29. If there is the potential for duplication of roles between the Ombudsman and future Commissioners, then in my view sections 62 and 63 in the draft Bill should be extended to apply to those new Commissioners.

Response to Question 30

30. I do not consider there to be a need for any further technical changes in Part 5 of the draft Bill to reflect the broadening of matters which may be investigated.

Response to Question 31

31. I have no comment to make in response to this question.

Response to Question 32

32. I am strongly of the view that the two year period of disqualification for both the Ombudsman and Acting Ombudsman is excessive, disproportionate and unnecessary. This limitation is outwith other jurisdictions. In the NIPSO Bill, it is proposed that the restriction on subsequent employment of the outgoing NIPSO ends on the expiry of the financial year following the financial year in which the person ceased to be the Ombudsman. I consider this time period to be more appropriate and proportionate to the Ombudsman and Acting Ombudsman. This is particularly relevant when, as is provided for by in both the NIPSO Bill and PSOW, the Ombudsman's appointment is for a single term of seven years. I accept that if the Assembly Commission consents to the former Ombudsman or former Acting Ombudsman taking up one of the roles specified in the Bill and there is no conflict of interest, there should be no reason why the time limit of two years disqualification should remain. I am of the view that fairness requires that such decisions are considered on a case by case basis.

Response to Question 33

33. As above, I consider this proposed provision to be excessive and disproportionate. References to a 'paid office' should not include an office holder who is entitled only to the reimbursement of expenses.

Response to Question 34

34. I have no comment to make in response to this question.

Response to Question 35

35. I have no further comments other than to record my welcoming the opportunity to provide my insights on the proposed draft Bill and am happy to provide clarification or any further information that the Committee would consider helpful in order to allow for the adoption of this significant legislation.