

# Constitutional Affairs Committee

CA(3)-07-11

## CA564: The Equality Act 2010 (Specification of Relevant Welsh Authorities) Order 2011

### Procedure: Negative

This Order amends the list of authorities specified in Part 2 of Schedule 19 to the Equality Act 2010 ("the Act"). These authorities are subject to the public sector equality duty ("general duty") set out in section 149 of the Act, by virtue of section 150 of the Act, to have due regard, when exercising their functions, to the need to—

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

They will also be subject to the range of specific public sector equality duties for Wales (the specific duties) set out in the draft 'Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011'.

### Technical Scrutiny

No points are identified for reporting under Standing Order 15.2 in respect of this instrument.

### Merits Scrutiny

The Committee makes the following report to the Assembly under Standing Order 15.3(ii) that this draft Order is of political or legal importance and gives rise to issues of public policy likely to be of interest to the Assembly.

### Background

The draft Order specifies which Welsh public authorities should be subject to both the public sector equality duty and specific additional equality duties applicable only in Wales.

Among the bodies to be included as subject to both the general duty and the specific duties is the Public Service Ombudsman for Wales.

Consideration by the Constitutional Affairs Committee

The Ombudsman says he is fully committed to carrying out his functions in accord with the principles underpinning the Equality Act. However, he has requested an exemption from the specific duties and from the general duty in respect of his casework functions.

The Ombudsman's reasons for seeking this exemption are set out in a letter responding to the Welsh Government's consultation on the matter, the text of which is annexed to this report. Some of his main arguments for seeking exemption can be summarised as follows:

**Constitutional and in Principle** – Ombudsmen are independent of Government and it is inappropriate for Government to be able to direct him on his duties or the way in which he exercises them.

**Casework and Enforcement** – The way in which the Ombudsman carries out casework carries legal protections to safeguard the independence of his office. It is inappropriate for the Welsh Government (which falls within the Ombudsman's jurisdiction) to be able to direct him as to the extent of his duties or the way in which he should exercise them. Moreover, the protections that the Ombudsman enjoys would prevent the Equalities and Human Rights Commission from effectively enforcing the duties.

**Quasi-judicial nature of the Ombudsman's role** – His role is quasi-judicial and it would be anomalous to apply the duties to such a role. He has also pointed out that his counterparts in England are to be granted exemption. Apart from the different treatment accorded to offices carrying out essentially the same role, he believes this could lead to practical difficulties in the conduct of joint investigations.

The Explanatory Memorandum accompanying the Order says:

"Careful consideration has been given to the Ombudsman's case for exemption and appropriate weight has been accorded to his response. However, the Assembly Government is not convinced that the application of the general and specific duties to the work of the Ombudsman would be an obstacle to the work of the Ombudsman."

This appears to be a rather cursory response to what is a serious and well-argued case that makes a number of important constitutional and legal arguments. We consider that the Government should provide a fuller explanation of its reasoning.

The Committee believes that the Welsh Government needs to reconsider carefully the Ombudsman's request for exemption. If, on reflection, the Government concludes that an exemption would be appropriate, they should bring forward an amending Order at the earliest opportunity.

**Constitutional Affairs Committee**  
**March 2011**

**Annex**

Response of the Public Services Ombudsman for Wales

to the Welsh Assembly Government's consultation on the

Equality Act 2010: Performance of the Public Sector Equality Duties in Wales

1. As Public Services Ombudsman for Wales (PSOW), I investigate complaints made by members of the public who believe they have suffered hardship or injustice through maladministration or service failure on the part of a body in my jurisdiction. I also consider complaints that members of local authorities in Wales have breached their Code of Conduct.

2. I welcome the opportunity to respond formally to the Welsh Assembly Government's consultation on the draft Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011. In particular, I reaffirm that I am fully supportive of, and committed to, the principles underpinning the Equality Act 2010 and strongly endorse the proposition that the manner in which I carry out my functions should accord with those principles.

3. However, I have concerns regarding the proposal at the bottom of page 8 of the consultation document (i.e. that the office of the Public Services Ombudsman for Wales be added to Part 2 of Schedule 19 to the Act). In particular, I do not believe that the casework element of the Ombudsman's functions should be subject to either the general duty, nor to the specific duties which may be imposed by Welsh Ministers. This raises issues of both a constitutional and practical nature, which I set out below:

(a) Constitutional - In the constitutional context it is important not to lose sight of the need for Ombudsmen to be completely independent of the Executive, integral to which is the freedom from any interference with either the nature of their duties or the way in which they carry them out, in order that the public can be confident that the work of my office is impartial and objective.

(b) Casework and Enforcement - In relation to casework, the Public Services Ombudsman (Wales) Act 2005 (the Act) states that the procedure for conducting an investigation is "to be such as the Ombudsman thinks appropriate in the circumstances of the case" (S13(3) refers). The Act also sets out a range of mechanisms by which the Ombudsman has to account for the discharge of his statutory powers, responsibilities and duties. Insofar as challenging the way he exercises discretion in relation to the initial decision to investigate, the way in which it is conducted or the eventual outcome is concerned, the only avenue of challenge available is by an application for judicial review.

I believe that it is inappropriate for the Welsh Assembly Government (a body falling within the Ombudsman's jurisdiction) to be able (via regulations made under the Equality Act 2010) to direct him as to the extent of his duties or the way in which he should exercise them. The fact that the Welsh Assembly Government could direct the PSOW to act in a particular way could be seen by the citizens of Wales as compromising the independence of the Ombudsman's office.

Insofar as the imposition of the specific duties on PSOW is concerned, these duties are enforceable by the Equalities and Human Rights Commission (the Commission). The enforcement powers of the Commission are set out in the Equality Act 2006 and they include the power to require a body to produce information to the Commission. The procedures it is required to follow when conducting enforcement inquiries, investigations and assessments are set out in Schedule 2 of the 2006 Act.

Section 26 of the Act precludes PSOW from disclosing any information obtained either in deciding whether to investigate, during the course of an investigation or in resolving a complaint. The section also precludes the PSOW, any of his staff or advisers being called to give evidence in relation to such information. In addition section 13(2) of the Act stipulates that investigations must be conducted in private, as must any action taken to resolve complaints outside of an investigation. Similar legislative provisions apply to investigations of complaints of breaches of the Code of Conduct by elected members.

Furthermore the Commission would have no power to question the procedure adopted by the Ombudsman in relation to his consideration of cases because (as set out above) the Act provides the Ombudsman with discretion to decide on what procedures should apply. It is possible however that the Commission could seek to challenge the Ombudsman's exercise of discretion by judicial review (if it had the standing to do so).

Neither the Equality Act 2010, nor regulations made pursuant to it, override these statutory restrictions. In the light of this it is questionable what useful purpose would be served by making PSOW subject to the specific duties given the resulting limitations on the Commission's enforcement powers.

In this connection it should be noted that PSOW is exempt from having to disclose information in response to an FOI request if that request relates to information falling within the scope of section 26 of the Act (see above) by virtue of section 44 of the Freedom of Information Act 2000.

(c) Quasi-judicial nature of the Ombudsman's role - This is also significant, as is the position occupied by Ombudsmen in the judicial

landscape. In a consultation paper published in July 2008 [Consultation Paper 187] entitled: Administrative Redress: Public Bodies and the Citizen, the Law Commission referred to Ombudsmen (with particular reference to the Public Sector Ombudsmen) as one of the four pillars of administrative justice.

The Law Commission published its report in May 2010 [Law Com No 322] Part 5 of which looks at Ombudsmen. Paragraph 5.2 states: "In our consultation paper we stated that we considered the public sector ombudsmen to be a vital "pillar" of administrative justice. In coming to this conclusion, we asserted that internal complaint mechanisms resolve the vast majority of individual cases and should almost always be the initial mechanism that an aggrieved citizen turns to. We acknowledge that tribunals have an important role – one that has been made more effective by the reforms contained in the Tribunals, Courts and Enforcement Act 2007. There remains a distinct function for the courts, especially when considering the mechanisms available to the Administrative Court. However, alongside these mechanisms, we concluded that the public sector ombudsmen have developed into a vital part of the regime for public sector redress."

In September 2010 the Law Commission published a further consultation paper [Consultation Paper 192] focusing on the Public Services Ombudsmen and in this paper PSOW was described as "the most modern of the ombudsmen" and the Act as an exemplar of good practice.

The UK Government's Equalities Office accepts the significance of an ombudsman's quasi-judicial role in respect of the Parliamentary and Health Services Ombudsman and the Local Government Ombudsmen in England in that neither is going to be subject to the specific duties and the "case working functions" of both are to be excluded from the general duty. To fly in the face of what has been agreed in respect of public sector colleagues in England, with whom PSOW has a close working relationship, would be unjustifiable and inappropriate. This would be most unfortunate given the high esteem with which the Act governing PSOW's work is held. A further example of which is the fact that in the consultation paper issued in relation to the proposed reform of the Office of the Northern Ireland Ombudsman, the Welsh Act is relied on as the model to follow. The principle of the independence of the Public Sector Ombudsmen from government is internationally recognised as fundamental: any weakening of this position would result in Wales being seen as having a second class Ombudsman service.

Furthermore the inconsistency between Wales and England could result in practical difficulties in the context of the rights conferred on PSOW by section 25 of the Act to consult and co-operate with colleagues in England, given that such "consultation and co-operation" extends to conducting joint investigations and publishing joint reports.

4. To summarise, the principles espoused in the Equality Act 2010 are central to the values of the PSOW and to every aspect of the office's work. I welcome the proposal that the general equality duty should apply to the Ombudsman's role as an employer, to procurement functions and to other non-casework functions. However, for the reasons outlined above, I believe that it would be wholly inappropriate for the general duty to extend to the Ombudsman's casework functions and for the office to be subject to the specific duties.

**Public Services Ombudsman for Wales  
December 2010**