

Finance Committee

Meeting Venue:

Committee Room 2 – Senedd

Meeting date:

Wednesday, 11 March 2015

Meeting time:

09.30

Cynulliad
Cenedlaethol
Cymru

National
Assembly for
Wales



For further information please contact:

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Agenda

1 Introductions, apologies and substitutions (09:30)

2 Papers to note (09:30–09:35) (Pages 1 – 3)

3 Consideration of powers: Public Services Ombudsman for Wales:

Evidence session 7 (09:35–10:15) (Pages 4 – 17)

Huw Vaughan Thomas, Auditor General for Wales

(Break: 10.15 – 10.30)

4 Consideration of powers: Public Services Ombudsman for Wales:

Evidence session 8 (10:30–11:30) (Pages 18 – 39)

Ruth Marks, Chief Executive, WCVA

Liz Withers, Head of Policy and Campaigns Wales, Citizens Advice Bureau

5 Consideration of powers: Public Services Ombudsman for Wales:

Evidence session 9 (11:30–12:15) (Pages 40 – 49)

Dr Nick O'Brien

6 Motion under Standing Order 17.42 to resolve to exclude the public from the meeting for the following business: (12:15)

Item 7

**7 Consideration of powers: Public Services Ombudsman for Wales:
Consideration of evidence (12:15–12:30) (Page 50)**

Finance Committee

Meeting Venue: **Committee Room 2 – Senedd**

Meeting date: **Thursday, 5 March 2015**

Meeting time: **09.00 – 12.26**

Cynulliad
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National
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Wales



This meeting can be viewed on [Senedd TV](http://senedd.tv/en/2683) at:
<http://senedd.tv/en/2683>

Concise Minutes:

Assembly Members:

Jocelyn Davies AM (Chair)
Christine Chapman AM
Mike Hedges AM
Ann Jones AM
Julie Morgan AM
Nick Ramsay AM
William Powell AM

Witnesses:

Andrew Jeffreys, Welsh Government
Andrew Hewitt, Welsh Government
Nicholas Paines, Law Commission
David Connolly, Law Commission
Tom Frawley, Northern Ireland Ombudsman

Committee Staff:

Bethan Davies (Clerk)
Leanne Hatcher (Second Clerk)
Tanwen Summers (Deputy Clerk)
Martin Jennings (Researcher)
Richard Bettley (Researcher)
Joanest Varney-Jackson (Legal Adviser)

1 Introductions, apologies and substitutions

1.1 The Chair welcomed Members to the meeting.

1.2 Apologies were received from Peter Black AM and Alun Ffred Jones AM.

1.3 The Chair welcomed William Powell AM who was substitute for Peter Black AM.

2 Papers to note

2.1 The papers were noted.

(In accordance with Standing Order 17.42, the Committee resolves to meet in private for items 3, 4, 5 and 6)

3 Initial Consideration of Local Government (Wales) Bill

3.1 The Committee considered the financial implications of the Local Government (Wales) Bill.

3.2 The Committee agreed to invite the Minister for Public Services to provide evidence on the Local Government (Wales) Bill and write to all local authorities who expressed an interest in voluntary merger for information on the costs of putting together the business cases.

4 Consideration of the Auditor General for Wales and the Wales Audit Office Annual Plan 2015–2016

4.1 The Committee considered correspondence regarding the proposals to incorporate the Auditor General for Wales and the Wales Audit Office Annual Plan 2015–2016 into a three year business plan. The Committee agreed to respond in writing requesting an annual plan continue to be completed as required by the Public Audit (Wales) Act 2013.

5 Assembly Commission Corporate Performance – April–December 2014

5.1 The Committee considered the Assembly Commissions Corporate Performance report for April to December 2014.

5.2 The Committee noted the report and agreed to write to Claire Clancy for further information.

6 Land Transaction Tax: Factual Briefing from Welsh Government

6.1 The Welsh Government briefed the Committee on Land Transaction Tax.

7 Consideration of powers: Public Services Ombudsman for Wales:

Evidence session 5

7.1 The Committee took evidence from the Law Commission on its inquiry into the Consideration of Powers: Public Services Ombudsman for Wales.

8 Consideration of powers: Public Services Ombudsman for Wales:

Evidence session 6

8.1 The Committee took evidence from the Northern Ireland Ombudsman on its inquiry into the Consideration of Powers: Public Services Ombudsman for Wales.

9 Motion under Standing Order 17.42 to resolve to exclude the public from the meeting for the following business:

9.1 The motion was agreed.

10 Consideration of powers: Public Services Ombudsman for Wales:

Discussion of Evidence

10.1 The Committee considered the evidence received.

Agenda Item 3

Archwilydd Cyffredinol Cymru
Auditor General for Wales

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Ms Jocelyn Davies AM
Chair, Finance Committee
National Assembly for Wales
Cardiff Bay
CF99 1NA

Date: 19 February 2015
Our ref: HVT/2271/fgb
Page: 1 of 2

Dear Jocelyn

INQUIRY INTO THE CONSIDERATION OF POWERS: PUBLIC SERVICES OMBUDSMAN FOR WALES

Thank you for your letter of 26 January 2015.

My views on the particular issues you raise are as follows. My answers to your general (Annex A) consultation questions are attached in the Annex.

- (i) *Whether given my role in overseeing the Welsh Consolidated Fund there would be any significant financial issues arising from the Ombudsman's proposals should a Bill be introduced, particularly in relation to Standing Order 26.6 (viii)?*

In terms of Standing Order 26.6 (viii), I do not think it should be necessary or likely for the proposals put forward by the Ombudsman to require provision to be made for charging directly on the Fund. As you know, direct charge provisions enable funds to be paid without further Assembly approval (in the form of budget motions), and are appropriate for enabling certainty of payment, such as for indemnities and salaries of constitutionally significant offices (such as that of the Presiding Officer). The Ombudsman's proposals do not seem to relate to that kind of matter. One of the five areas put forward is termed "Complaints Standards Authority", but I understand that this is intended to be a brand for the proposed model complaints policy work, rather than a proposal for a new public body that might require provision for direct charges.

My further views on the wider financial implications of the Ombudsman's proposals are in my answers to your Annex A consultation questions (please see Annex to this letter).

- (ii) *Whether I have any concerns that 'own-initiative' investigations by the Ombudsman could conflict with the Auditor General's value for money investigations. How could this risk be managed?*

I think that there is a possibility of overlap with my value for money studies, but I do not think it would be a great risk. Furthermore, I think that risk could be managed effectively fairly easily. I am sure that both the Ombudsman and I would in any case continue to confer with one another regarding our respective forward programmes. To put the matter

beyond doubt, however, it would be appropriate to include provision in legislation requiring the Ombudsman and the Auditor General each to take account of the other's views before exercising the relevant functions and to co-operate with one another in so far as they consider is necessary for the effective exercise of those functions.

(iii) *Is there a need for a co-ordination role between the Auditor General for Wales, the Ombudsman and independent commissioners to help their investigations and recommendations to improve public services?*

I think the requirements that I suggest in response to question (ii) would provide appropriate co-ordination. I do not think that further co-ordination provision, such as specific co-ordination role to be held by any particular person should be necessary.

(iv) *Would the proposed reforms of the Ombudsman's role be better carried out in advance of wider public sector reforms, or after?*

For the most part, I do not think that there are strong timing issues either way. However, I do think that it would be somewhat more economical and efficient to introduce a requirement on public bodies to adopt model complaints policies at the same time as establishing complaints policies for merged bodies than either introducing such requirements before or after mergers. Such timing should help bodies to avoid having to make two sets of changes to their complaints procedures.

I should be happy to provide further explanation if the Committee would find that helpful.

Yours sincerely



HUW VAUGHAN THOMAS
AUDITOR GENERAL FOR WALES

Enc: Annex A: Responses to Annex Consultation Questions

RESPONSES TO ANNEX CONSULTATION QUESTIONS

1. *What are your views on the effectiveness of the current Public Services Ombudsman (Wales) Act 2005?*

On the basis of our monitoring of issues arising from the audit of accounts and wider monitoring for the purposes of planning value for money studies, I have no particular concerns regarding lack of effectiveness of the current legislation.

Own initiative investigations

2. *Currently, the Ombudsman may only investigate a matter that is the subject of a complaint made to him/her. What are your views on 'own initiative' investigations powers, which would enable the Ombudsman to initiate his/her own investigations without having first received a complaint about an issue. Please explain your answer.*

I consider that own initiative investigations would enable wider systemic problems to be addressed coherently. I also think that such a power should enable evidently problematic matters to be investigated despite the absence of complaints, which might, for example, be the case with systemic problems that affect particular groups who tend to be reluctant or unable to raise complaints.

I consider that such a power to undertake such investigations should be used sparingly, but I think it is very likely that resource constraints and oversight of resourcing by the Assembly will ensure that the power is not used excessively.

3. *Do you have any concerns that own-initiative investigation powers could result in the Ombudsman's responsibilities overlapping with the responsibilities of other bodies? How could this be managed?*

I think that there is a possibility of overlap with my value for money studies, and perhaps with inspections by the Welsh Ministers (HIW and CSSIW) and Estyn. But I think the risk could be managed effectively fairly easily. As I say in my covering letter, I am sure that both the Ombudsman and I would in any case continue to confer with one another regarding our respective forward programmes. To put the matter beyond doubt, however, it would be appropriate to include provision in legislation requiring the Ombudsman and the Auditor General each to take account of the other's views before exercising the relevant functions and to co-operate with one another in so far as they consider is necessary for the effective exercise of those functions.

4. *Do you have a view on the likely financial costs and benefits of the Ombudsman having own-initiative powers?*

The cost estimate provided in the Ombudsman's proposal paper are realistic in respect of sparing use of own-initiative investigation powers—say one or two investigations each year. In terms of benefits, it is not possible to predict the likely monetary benefits of such powers. I would hope that good use of such powers would lead to reduced levels of

maladministration leading to efficiency savings as well as increased public satisfaction (and reduced harm and distress to individuals), but such benefits are very difficult to quantify, let alone predict.

Oral complaints

5. *At present, the Ombudsman can only accept complaints in writing. What are your views on the Ombudsman being able to accept complaints made orally? Please explain your answer.*

As I understand it, it is not actually the case that the Ombudsman can only accept complaints in writing. Section 2(4) of the Public Services Ombudsman (Wales) Act 2005 provides the Ombudsman with discretion to investigate oral complaints, and I gather that the Ombudsman does indeed investigate such complaints. I do, however, also understand that Ombudsman's office time is taken up in writing up oral complaints and seeking confirmation that the complainant wishes the Ombudsman to proceed with investigation. I am not sure what the most appropriate solution to that problem is; I am not sure that removing the requirement in section 5 of the 2005 Act for complaints to be made in writing would, on its own, make much difference, given the discretion to investigate complaints that do not meet section 5. I do suspect, however, that new provision for own-initiative investigations should help the Ombudsman address serious issues that have been raised orally but not confirmed.

6. *What other type/form of submission should be acceptable (eg email, website form, text messages)*

As I understand it, email, webform and text message submissions would be held by the courts to be written submissions. I do not see it should necessary for a submission to be made by letter on paper.

7. *Do you have a view on the financial costs and benefits of this provision?*

As I not sure how specific provision for oral complaints would operate, I cannot give a view on financial costs and benefits. If a solution can be found to the problem of staff time being spent on recording oral complaints that are not confirmed, then there may be some financial saving in the sense of avoiding what can be regarded as nugatory work. But I think any solution that makes it easier to submit complaints orally will also lead to more complaints, which will increase costs. I do, however, see that there may be real benefit to vulnerable people in making the submission and investigation of oral complaints easier.

Complaints handling across public services

8. *At present there is no consistency in the way public bodies deal with complaints. Adoption of the model complaints policy issued by the Welsh government is voluntary. What are your views on the Ombudsman preparing a model complaints policy which public bodies would be obliged to adopt. Please explain your answer.*

I think this proposed development would be likely to be beneficial overall. I think there is a strong parallel with the Information Commissioner providing clear guidance to

public bodies on review procedures for FOI, which helped eliminate some very unhelpful practices in some bodies. The required adoption of model policies should enable good and efficient complaints handling practice to be embedded across public bodies. This should be conducive to improved effectiveness (better handling).

It may helpful to provide for the Ombudsman to be able to approve deviation from a model policy, such as where the requirements of a body's operations do not fit well with the model policy. There may also be a need to exempt certain matters from the model policy, such as FOI review procedures, as those are subject to other regulation.

9. *Do you have a view on the financial costs and benefits of this provision?*

While the overall net savings are not likely to be great and will be hard to quantify, particularly where complaint handling staff do not work with a time recording system, I think the required adoption of model policies should be conducive to improved economy by, among other things, saving bodies spending time and money on devising their own policies. Similarly some savings might be achieved where public bodies are operating poorly designed policies.

Ombudsman's jurisdiction

10. *What are your general views on the Ombudsman's current jurisdiction?*

Generally, I think the Ombudsman's current jurisdiction is appropriate.

11. *At present the Ombudsman can investigate private health care that has been commissioned by the NHS. The Ombudsman would like the jurisdiction to be extended to enable him/her to investigate when a patient has received private healthcare (self-funded not commissioned by the NHS) in conjunction with public healthcare. This would enable the complaints process to follow the citizen rather than the sector. What are your views on extending the Ombudsman's jurisdiction in this way?*

I can see merit in a "follow the citizen" approach, where private healthcare is received in conjunction with public healthcare. I do, however, see defining linkages in care histories as possibly quite challenging in some cases. And there may be other issues in defining the scope of healthcare to be covered by the Ombudsman's jurisdiction. There are, however, also wider public policy issues on which I do not think it is appropriate for me to comment.

12. *How do you think the investigation of private health care complaints should be funded? (Possibilities include a levy, charging on a case by case basis or no charge.)*

These are public policy issues on which it is probably not appropriate for me to comment.

13. *Do you have a view on the financial costs and benefits of this provision?*

Again, I am not in a position to comment.

Links with the courts

14. *What are your views on the removal of the statutory bar to allow the Ombudsman to consider a case which has or had the possibility of recourse to a court, tribunal or other mechanism for review? (ie this would give complainants the opportunity to decide which route is most appropriate for them.)*

Given the potential additional cost to the public purse, I would be concerned if the removal of the statutory bar meant that complainants had not just a choice of remedy (ie one or the other) but two remedies to pursue. Furthermore, as the statutory bar does not apply if the Ombudsman is satisfied that in the particular circumstances it is not reasonable to expect the person to resort to the right remedy, I am not sure that there is a pressing case for the removal of the statutory bar in terms of removing impediments to remedy for vulnerable people.

15. *What are your views on the Ombudsman being able to refer cases to the Courts for a determination on a point of law?*

In principle, referral of cases to the Courts for the determination of points of law seems sensible, but there is need for consideration of who should bear the cost of such referrals.

16. *Do you have a view on the financial costs and benefits of this provision?*

My answers to questions 14 and 15 indicate my concerns as to the costs of such changes.

Other issues

17. *Do you have any specific examples where the Ombudsman having the additional powers proposed could have been useful in securing a successful conclusion to an issue?*

No, but that is not to say that I do not see an own initiative investigation and model complaints policy functions as not having benefits.

18. *Schedule 3 of the current 2005 Act, provides a list of authorities that are within the Ombudsman's jurisdiction to investigate complaints. Please provide details of any other bodies/organisations that should be included in this list?*

I am not aware of any significant omissions from the list.

19. *If extended powers were given to the Ombudsman in a new Bill/Act, at what point should the impact of this legislation be evaluated?*

A baseline review before commencement would be helpful. Thereafter, given the timescales for undertaking and allowing the effects of own-initiative investigations and model complaints policy work, evaluation at least three to five years after commencement would be appropriate if the evaluation is to address effectiveness. However, if the evaluation were confined to assessing whether the provisions were fit for purpose in terms of enabling the processes to commence (which is quite a narrow focus), then it could be undertaken one to two years after commencement.

20. *What unintended consequences could arise as a result of these provisions becoming legislation and what steps could be taken to deal with these consequences?*

While mentioned above, I would say again that there may be unintended cost consequences of specific provision for oral complaints. Similarly, there may be unintended cost consequences of removal of the statutory bar on matters that could be considered by the Courts.

21. *What factors should be measured to determine the cost-benefit analysis of this legislation being brought forward?*

I would need to undertake some extended research in order to answer this properly.

22. *Do you have any comments on the following issues:*

- *areas coming into jurisdiction over time, should consideration be given to other bodies being included in the Ombudsman's jurisdiction;*

Such consideration would be appropriate for any new service-delivery organisations, but probably not for new review bodies (eg the forthcoming Future Generations Commissioner).

- *recommendations and findings - should the recommendations of the Ombudsman to public bodies be binding. This would mean that bodies cannot decide to reject the findings;*

In my view, binding recommendations could be problematic. They may confuse or reduce the accountability of the executives of public bodies. The existing provisions in the Act for reporting and certifying non-action seem appropriate.

- *protecting the title - there has been a proliferation of schemes calling themselves ombudsmen, often without satisfying the key criteria of the concept such as independence from those in jurisdiction and being free to the complainant. Should anyone intending to use the title ombudsman gain approval from the Ombudsman;*

This seems to me to be a sensible precaution against misuse. Regulations already exist to provide such protection for titles such as "government" and "auditor general" (it may be appropriate to ask for an insertion into Schedule 4 of the *Company, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015*).

- *code of conduct complaints – the Ombudsman would prefer to focus on the element of his work that deals with service users and service delivery, rather than local authority and town and community councils' resolutions. Whilst a local resolution procedures exists and has been adopted by 22 local authorities, variance exists in practice.*

I can see the merits of that preference, but I consider that there is a need for investigation of serious code of conduct complaints.

23. *Do you have any views on any aspects of future planned or proposed public sector reforms that would impact on the role of the Ombudsman?*

I think it is likely that the proposed public sector reforms and continuing austerity will increase the volume of the Ombudsman's casework, at least in the short to medium term—separating the effect of the proposed reforms and the effect of austerity may be difficult. Similarly, the proposed public sector reforms and continuing austerity will increase the volume of complaints to public bodies. This latter point may reinforce the case for Ombudsman having model complaints policy functions.

24. *Do you have any other issues or concerns about the current Act and are there any other areas that need reform or updating?*

Not at present.

19 February 2015

Document is Restricted

Agenda Item 4

Policy Response



Consideration of powers: Public Services Ombudsman for Wales

A response from WCVA

24 February 2015

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Wales Council for Voluntary Action

A response to the consultation: Consideration of powers: Public Services Ombudsman for Wales

Background

Wales Council for Voluntary Action (WCVA) is a registered charity and umbrella body working to support, develop and represent Wales' third sector at UK and national level. We have over 3,350 organisations in direct membership, and are in touch with many more organisations through a wide range of national and local networks. WCVA's mission is to provide excellent support, leadership and an influential voice for the third sector and volunteering in Wales.

WCVA is committed to a strong and active third sector building resilient, cohesive and inclusive communities, giving people a stake in their future through their own actions and services, creating a strong, healthy and fair society and demonstrating the value of volunteering and community engagement.

We believe that there is an urgent need to transform public services in Wales by treating people and communities as assets and equals in design and delivery; building services around the person and community; unlocking potential resources of time, money and expertise to combine with state funding; using existing state resources to enable and maximise citizen and community action, capital and care. We are calling for a different public service: one which places the citizen and community at the centre, with the state as the enabler and facilitator. Our policy position statement [Putting People at the Centre](#), is available via this link and on our website.

We welcome the opportunity to respond to the Finance Committee's inquiry into the Consideration of Powers of the Public Services Ombudsman for Wales.

Introduction

The Welsh Government and public bodies take decisions on a daily basis which affect important aspects of people's lives such as family incomes, employment and training, health and social care, housing, and education.

So, it is vital that people know what they are entitled to when officials make decisions, and where they can turn to when things go wrong. The Public Services Ombudsman for Wales (PSOW) provides access to justice, standing between the relatively weak individual citizen and powerful state organisations, giving them the right to have their complaints investigated and putting things right when they have received a poor service by finding an appropriate remedy. In addition, the PSOW seeks to prevent further harm or injustice to other citizens or service users by identifying lessons learned through the course of investigations and recommending improvements in service delivery.

We believe granting the Ombudsman additional powers will better protect and promote the interests of all citizens.

1. *Own-initiative powers - this would enable the Ombudsman to initiate his own investigations without having first received a complaint about an issue*

In recent decades Ombudsman schemes throughout the world have been evolving in order to provide better services to their citizens. One of the most important innovations is the acquisition of own initiative powers and there is considerable evidence from Australia, New Zealand, Canada and the majority of European countries that they are highly beneficial to the work of Ombudsmen. Recently, these

powers have been acquired by the Ombudsman in Northern Ireland and the Parliamentary and Health Service Ombudsman in England is in the process of seeking them. The direction of travel for modern Ombudsmen is to move away from being largely reactive to individual complaints to being much more proactive, seeking to influence stakeholders including public services, regulators and government as all share a common goal of wanting to deliver the best possible public services.

Ann Abraham suggests that Ombudsmen should have their own initiative powers in order to extend their "reach to all citizens and to adopt a genuinely inquisitorial approach and be able to respond to public outcry on behalf of the most vulnerable"; "in the absence of a specific individual complaint, the Ombudsman should not stand idly by." They should have the ability "to seize the initiative, to catch the whiff of scandal and run with it, especially if social justice is to reach some of the most vulnerable and marginalised people in society". (Ann Abraham, the Parliamentary Ombudsman and Administrative Justice: shaping the next 50 years, Tom Sargent Annual Memorial lecture 2011, Justice).

At present, the limitation of only having the power to investigate and remedy an individual complaint about the service of a sole public service provider prevents the PSOW from playing a preventative role: the PSOW is not able to investigate suspected widespread, systemic maladministration or service failure across Wales. The PSOW cannot carry out a thematic review to prevent all citizens from suffering the same poor service wherever they live. Own initiative powers would allow the PSOW to investigate the area of concern as a whole and recommend actions to be taken by all relevant public providers across Wales in order to improve the quality of services.

For example, the PSOW could undertake a thematic review of a specific service where information or intelligence suggests a worrying theme in terms of inadequate service or failure. Importantly, it would give the Ombudsman the ability to carry out an investigation in the early stages of suspected serious systemic failure. In the absence of a specific complaint, the PSOW could respond to public concerns about the treatment of the most vulnerable in our society: information or intelligence could be obtained from the media, the Complaints Wales Signposting Service, Citizens Advice Cymru, Age Cymru, Wales Audit Office, Healthcare Inspectorate Wales, CSSIW and Estyn amongst others.

It is possible that if the Parliamentary and Health Service Ombudsman in England had been able to use own initiative powers, action could have been taken at an early stage to tackle the serious shortcomings at Mid Staffordshire Hospital and many avoidable deaths prevented.

Both the Ombudsmen in Wales and in England are constrained in protecting the public as they can only investigate an individual complaint once the patient or service user has exhausted the internal complaints procedures of the public body - where their complaints are handled poorly this may take several years. In the meantime other service users remain at risk.

Andre Marin the Ombudsman for Ontario has a long track record of using own initiative powers and undertaking thematic reviews of services and suggest that the "primary function of an Ombudsman is to make robust enquiries designed to improve organisations and institutions so that future mishaps can be avoided."

They should do much more than only focusing their efforts on obtaining reparation case-by-case, carrying out thematic investigations can raise the quality of services for everyone who uses them. By conducting robust and deeper investigations into complaints to unearth the root causes of the problem, identifying national and

international benchmarks of good practice and making recommendations in special reports, the Ombudsman can become "the architect of better governance arrangements capable of eradicating the causes of the difficulties"; and systemic investigations are the "jewel in the crown of Ombudsman annual reports". (Marin, address to the IXth International Ombudsman Institute World Conference, Swedish Parliamentary Ombudsman Bicentennial, Stockholm, Sweden, 10th June 2009).

The possession of own initiative powers would enable the PSOW to contribute to the transformation and innovation of public services which is one of the primary recommendations of the Williams Commission. And by not only helping individual complainant's achieve redress, but also helping public agencies improve services, the PSOW can play a vital role in increasing trust in public services and government.

2. Oral complaints - at present, the Ombudsman can only accept complaints in writing

Ombudsmen across the UK want to increase access to services for underrepresented groups such as BME communities, children and young people, the unemployed and people with mental health problems. The power which limits the PSOW to only accept complaints in writing is a barrier for people who are socially excluded and marginalised. These barriers include limited literacy skills, English not being the citizen's first language, lack of experience of dealing with bureaucratic processes, and a lack of capacity to think and express oneself logically and clearly - for example, caused by dementia or mental health problems.

Also, although complainants have had their issues explored through the internal complaints processes of public providers, if their complaint has been handled inadequately through a failure to share information, a lack of support and poor decision-making they may be confused and lack sufficient clarity about the exact nature of their complaint. And they may be angry and distressed suffering from "complaints exhaustion", therefore they would greatly benefit from receiving support from PSOW staff to make an oral complaint to the office: it is vital that the complainant and complaints handler have a full understanding and are able to agree precisely the nature of the complaint. The provision of advocacy and communication support for example sign language is fundamental.

The ability to receive complaints orally, either face-to-face or by telephone, by smart phone or online as well as in writing promotes equal access for all citizens and should cover all public services not just the PSOW.

In order to further embed equality and diversity it would be helpful if all organisations gathered data and analysed their complaints to identify which social groups are underrepresented and then developed an access strategy and action plan.

3. Complaints handling across public services - this would enable the Ombudsman to have a role in advising on complaints handling across public services

The PSOW's Model Complaints Policy applies to all public services in Wales (the complaints policy for the NHS, Putting Things Right follows the same principles).

This policy sets an excellent standard for the way complaints should be handled, how they can be resolved and contribute to improving service quality. Currently public agencies adopt the policy on a voluntary basis, however, if it became statutory guidance, the results would include quicker implementation across the public sector as well as normalising a positive complaints culture across Wales. It would transform negative attitudes where they exist and promote a learning culture where complaints are seen as a gift and an opportunity to deliver better services. So

citizens, and people who use services could expect more responsive and higher quality services from the various public organisations they come into contact with.

Also, the PSOW should be given powers which would allow the PSOW to consider and adapt the Scottish Ombudsman's approach to complaints handling for Wales.

There is a similar Model Complaints Policy in Scotland and there the Ombudsman has created a specialist unit within the office (the Complaints Handling Authority) whose role is to develop excellent complaints handling across the whole of the public sector.

Key aims include:

- To simplify and standardise the design and operation of complaints handling procedures across the public sector in line with the overarching model complaints policy.
- To promote good complaints handling by providing tailored advice for each public provider on how they can improve their complaints handling processes and culture.
- To facilitate the sharing of best practice between public providers.
- To monitor the complaints handling performance of public providers.

The Ombudsman has used their powers to bring together key institutions and lead the creation of sector specific complaints handling processes for the NHS, local government, the Scottish Government, and Registered Social Landlords.

Also, the Ombudsman has created a Training Unit, which provides training courses on model complaints handling for each sector and classroom training is supported by e-learning courses.

The model followed in the NHS has been replicated in all sectors. The Ombudsman has established and coordinates a nationwide network of complaints handlers working in the NHS, a website has been created, and there is a programme of face-to-face training events as well as the availability of online training tools.

Of particular interest are online training tools which can be accessed by frontline staff in the NHS, focused on enhancing their abilities to deliver customer-centred care *i.e.*, listening to patients and responding positively to their concerns and complaints.

The benefits of this approach include raising the status and skills of internal complaint handlers enabling them to deliver a better service to patients and service users. In Wales, a network of complaints handlers exists, but to date it has not progressed as far as the Scottish model.

Also in Scotland, each sector has developed a standardised performance reporting framework, identifying key data and information which must be gathered and these are benchmarked against indicators set by the Ombudsman.

With adequate powers and resources the Scottish approach adapted for Wales suggests a range of possibilities for the PSOW:

- The Model Complaints Policy to become statutory guidance and implemented at the earliest opportunity by all public services and authorities.
- The Ombudsman to work in partnership with service providers, regulators and other stakeholders to develop sector specific complaints handling processes in line with the Model Complaints Policy. This would result in the creation of learning exchanges or networks of complaints handlers in the NHS, local government, Registered Social Landlords, further and higher education, the Welsh Government and other public authorities.

- Standardised performance management frameworks enabling each public organisation's complaints activities to be evaluated against benchmarked standards. Each public body to produce an annual report summarising all complaints received, what lessons have been learned, and how services have been improved as a result.
- The establishment of a training unit to offer face-to-face and online training courses.
- The PSOW to provide a dedicated website for complaint handlers across Wales. It would be a central information point for complaint handlers and allow them to share best practice. The website could provide information on the model complaints handling process for each sector; stipulation of the requirement to implement the model; good practice guidance on complaints handling; links to sources of information and best practice in complaints handling; an online community forum enabling the sharing of best practice in the complaints handling community, both within and between sectors; the Ombudsman's e-learning resources on complaints handling; and information on training courses offered by the training unit.

It is worth outlining the Scottish Ombudsman's generic e-learning training course which is the starting point for all public sector staff as it is a quick and cost-effective way of disseminating good practice information. Particularly useful is that it is interactive, allowing learners to practice new skills or knowledge in a complaints scenario and they are given feedback on their performance and areas for improvement are identified. It includes eight modules:

1. Understanding the model complaints procedure.
2. What is a complaint?
3. What customers want when they complain.
4. Getting it right from the start.
5. Active listening.
6. Finding the right solution.
7. Learning from complaints.
8. Managing difficult behaviour.

In Wales, this generic course could be made available and built upon for each sector - in the first instance, top priority could be given to the development of an e-learning module on complaints handling for NHS staff.

In conclusion, giving the PSOW new powers to improve complaints handling across public services could help address existing problems and result in a significant reduction in the number of unnecessary complaints the PSOW has to deal with.

Since the Ombudsman's service became available, the number of complaints has increased year on year.

For example, health service complaints have increased by 257% since 2006 and now comprise 37% of the caseload.

The Ombudsman's casebook and special investigation reports show that for many years that resources could have been used elsewhere if public service organisations had handled complaints better. When they fail to resolve complaints at the local level, they have escalated to the Ombudsman.

As suggested, the new powers would enable the Ombudsman to develop a range of initiatives to help public service providers to "get it right first time" *i.e.*, deliver excellent services, better customer care, accept complaints as a gift resolving them quickly at the local level and using them to drive the improvement and innovation of services.

4. *The Ombudsman's jurisdiction (to include private health services) - this would extend the Ombudsman's jurisdiction to include private health services where patients had accessed public and private health care*

The PSOW should be given the powers and the responsibility to investigate complaints where patients have access to public and private healthcare. The foundation principle is that the Ombudsman should be able to follow the public sector pound: private sector or third sector organisations commissioned to deliver services by state bodies, the NHS or local government should fall within the PSOW's jurisdiction. People should have access to independent redress or remedy of their complaint across all sectors. Therefore, when services are outsourced to a private provider complaint handling processes should be specified in the contract and the provider should be required to follow either the Ombudsman's Model Complaints Policy or NHS arrangements as appropriate.

However there may be an issue of proportionality for local voluntary and community groups. Consideration should be given to where the line should be drawn regarding the inclusion and exclusion of organisations subject to investigation. It would be sensible to include organisations which are substantially funded by public bodies and in formal contract relationships, but it may be inappropriate to include some voluntary and community groups which receive only small revenue grants from local authorities. Our view is that this could place an undue burden on relatively small organisations.

Complaints processes should be citizen centred rather than sector centred. Contracts to deliver public services should require providers to have an appropriate complaints handling processes in place, in line with the PSOW Model Complaints Policy.

At present, the PSOW cannot deal with matters or complaints which are the responsibility of UK Government Departments *eg*, benefits, pensions, child support and immigration matters. Currently, they are the responsibility of the UK Parliamentary and Health Services Ombudsman who recently identified concerns that complaints about these services from Wales, Scotland and Northern Ireland are very low (*Public Administration Committee, House of Commons, 16 December 2013*).

There is much consensus amongst Ombudsmen that the administrative justice landscape is complex and too fragmented and many people find it confusing when they wish to make a complaint. They hold that the ideal complaints system should be simple and accessible. The previous PSOW and the Scottish Ombudsman recently suggested that they should be able to provide a "one-stop shop" being responsible for complaints about all public services, both devolved and non-devolved. (House of Commons, Public Administration Committee 10 December 2013). It would be useful to explore the possible benefits of this approach with the non-statutory advisory body, namely the Committee for Administrative Justice and Tribunals Wales. For example, there is the potential to agree Memoranda of Understanding between the UK and Welsh Governments.

And in the light of the possible devolution of more powers to Wales it will be important for the PSOW and the Committee to look at how administrative justice processes should be adapted to ensure that citizens have a right to complain and achieve proper redress when things go wrong.

5. *Links with the courts - the removal of the statutory bar to allow the Ombudsman to consider a case which has or had the possibility of recourse to a court, tribunal or other mechanism for review (this would give complainants the opportunity to decide which route is most appropriate for them)*

At times, the Ombudsman can be an effective alternative to the court system, offering an easier and cheaper means of resolving disputes between citizens and public service providers. The majority of complainants, especially people who are vulnerable and marginalised do not have the financial resources to take their grievances to court, therefore there should more opportunities to take advantage of the free services provided by the PSOW.

It is often inappropriate for courts to expend scarce and expensive resources on resolving disputes which can be better dealt with by the PSOW. Unlike the judiciary which must strictly apply objective legal standards and disputes, the Ombudsman is guided by a set of principles, not rules, for example the Principles of Good Administration, Principles for Remedy and Model Complaints Policy. Therefore, the PSOW's judgements are based on what is fair and reasonable rather than a strict test of legality.

Another aspect relating to the removal of the statutory bar is that it should increase choice and access for complainants. Provided that good information and advice is available to the public, including independent advocacy, WCVA supports this as a useful development.

Conclusion

This submission provides evidence supporting all of the new powers requested by the Public Services Ombudsman for Wales as it will enable the PSOW to deliver a better service for all citizens: not just individual complainants, but also where necessary, making a significant contribution to the improvement and transformation of public services.

Without own initiative powers the strategic role and impact of the PSOW is weakened.

Allowing a wider means of submitting complaints including oral complaints will increase access.

Advising across public services improves consistency and quality.

The public have a right to independent redress regardless of the service provider.

WCVA is keen to further develop its links and work with the PSOW in the spirit of putting people at the centre of the design, development and delivery of public services. WCVA can not only bring access to the expertise of the third sector in Wales regarding working with particular groups of people, and notes in particular, the expertise of [Participation Cymru](#) on best practice in engagement and scrutiny.

RM
WCVA
February 2015



Response to Finance Committee Inquiry: Consideration of powers: Public Services Ombudsman for Wales

March 2015

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www.citizensadvice.org.uk

About Citizens Advice Cymru

- 1.1. Citizens Advice is an independent charity covering England and Wales operating as Citizens Advice Cymru in Wales with offices in Cardiff and Rhyl. There are 20 member Citizen Advice Bureaux in Wales, all of whom are members of Citizens Advice Cymru, delivering services from over 375 locations.
The twin aims of the Citizens Advice service are:
 - to provide the advice people need for the problems they face
 - to improve the policies and practices that affect people's lives.
- 1.2. The advice provided by the Citizens Advice service is free, independent, confidential and impartial, and available to everyone regardless of race, gender, disability, sexual orientation, religion, age or nationality.
- 1.3. The majority of Citizens Advice services staff are trained volunteers. All advice staff, whether paid or volunteer, are trained in advice giving skills and have regular updates on topic-specific training and access to topic-based specialist support.
- 1.4. Local Bureaux, under the terms of membership of Citizens Advice provide core advice based on a certificate of quality standards on welfare benefits/tax credits, debt, housing, financial products and services, consumer issues, employment, health, immigration and asylum, legal issues, and relationships and family matters.
- 1.5. The Citizens Advice Service now has responsibilities for consumer representation in Wales as a result of the UK Government's changes to the consumer landscape¹. From 1st April 2014 this includes statutory functions and responsibilities to represent post and energy consumers.

Our response

- 2.1 From April to December 2014, in Wales, Citizens Advice Cymru helped 89,858 clients with 274,090 problems. A significant proportion of these related in some form to the administration of public services, both those that are under the jurisdiction of the Public Services Ombudsman (PSOW) and those that are non-devolved.
- 2.2 The PSOW plays a vital role in supporting people to have their concerns heard by an independent body. We strongly support the principles behind why the PSOW has made these suggested changes. In particular, we believe that it is key that any proposals strengthen the voice of people in Wales, their ability for redress and are based around how people access and use services. We believe it is important that public authorities value complaints and use them to make improvements to public services.

¹ On 1st April 2013 responsibility for consumer representation was transferred from Consumer Focus to the Citizens Advice Service (including Citizens Advice Cymru) following the UK Government's review of the consumer landscape.

Own initiative powers

- 3.1 Citizens Advice Cymru strongly support this proposal. Whilst the PSOW has seen an increase in the numbers of cases being referred over recent years, we know for every person that decides to make a complaint, there are many more that do not. Whilst the PSOW's role in individual cases is vital to support the principles of citizen redress, we believe it would be of substantial benefit for the PSOW to have the power to undertake investigations on their own initiative. This would be of particular value when looking across cases and seeing the connections between a range of issues and being able to undertake a strategic review of a whole service or sector.
- 3.2 From our own experience, we are often able to draw comparisons and trends from the cases which clients seek advice from us about. We use these to inform change to policies and practices. Therefore there is potential for the PSOW to drive service improvements in this way.
- 3.3 We believe that there is potential for much greater engagement with the PSOW if his powers were extended to enable own initiative investigations. Citizens Advice Cymru could play a role in sharing relevant strategic information with the PSOW about the types of issues that clients are facing, as well as raising specific issues within and across sectors that would benefit from investigation². We would be in a position to do so, given our ability to not only look across our client evidence for Wales, but also draw insight from individual bureaux in terms of the trends they are seeing. We would also welcome the opportunity to be able to refer issues to the PSOW for review where we think there are/have been systematic failures, or have the potential to be.
- 3.4 In order to do so, it will be important, if the PSOW is given this power, that there are clear eligibility criteria and referral routes to do so, for ourselves and other stakeholders. We would also note that it is important that decision making about how investigations are chosen is open and transparent in order that advice agencies and others who may wish to make referrals have confidence in, and understanding of the parameters to engage in this process. Likewise it may be of value to consider where calls for evidence around such investigations would be useful to help inform these.
- 3.5 We also believe that it is vital that any investigations include an element of gathering views from the user perspective to ensure that this is central to any consideration of the issues and what might need to change.
- 3.6 This is would also be of benefit when considering areas of public services that people might not complain about.
- 3.7 We do feel consideration needs to be given to what the outcome of such an investigation would be and whether the PSOW's current powers go far enough in terms of enforcement of any decision. The aim should be tangible service improvements for both citizens and public services themselves. Therefore we would suggest that providers should have an action plan which includes time specific activities they must undertake and outcomes to achieve. The PSOW should also monitor and return to review whether the expected activities and outcomes have been

² Whilst of course retaining client confidentiality

achieved within the timescales agreed. As part of any further review, the user perspective will be important in terms of improvement in service and also user experience.

- 3.8 Raising awareness of sector failures may also raise greater awareness amongst the wider public of the ability to make individual complaints to the PSOW on such issues. Whilst we feel this is a positive, it is also worth being aware of the potential for an increase in caseload relating to this.

Oral complaints

- 4.1 Whilst the PSOW currently has discretion to accept a complaint in a form other than writing, if appropriate, considered on a case by case basis, we support the proposal that the PSOW be able to receive complaints orally as a matter of course. A discussion document commissioned by Consumer Focus looking at effective complaint handling³ notes that evidence about how consumers contact companies and external redress schemes is that, at the moment, the vast majority of them use the phone, rather than email or post. This can also allow people to ask questions and explore options. Extending the ability to make a complaint would therefore extend access to people and may encourage them to explore the option of the PSOW, before making a formal complaint. We would note however that if this proposal is accepted that consideration should be given to the cost of calling, in particular for people on a mobile phone.
- 4.2 We also think that as part of the extension of the scope of how the PSOW receives complaints there should be specific consideration given to how people's communication preferences are changing in a digital age and that the PSOW can effectively respond to this. For instance, we know from our own research that more BSL users are now using Skype to communicate instead of typetalk.
- 4.3 In addition, we believe that it would be helpful to make clear in legislation that where people may be vulnerable, or do not feel confident to make a complaint themselves, that trusted intermediaries such as an advice agency are able to support people to bring a complaint to the PSOW on their behalf. We believe that individuals should have absolute discretion over who represents them.

Complaints handling across public services

- 5.1 We note that the PSOW has outlined in his written paper that take up of the Model Concerns and Complaints policy (the Policy) to date has been patchy. Without detailed analysis of which agencies have adopted the policy and extent to which the two stage complaints procedure has been implemented by all authorities, it is difficult to talk in detail about the specifics around the action public authorities need to undertake to improve their individual complaints procedures. However Citizens Advice Cymru does believe that a consistent complaints policy across public authorities in Wales would help people have a clear understanding about what to expect when making a complaint about a service or seeking redress.

³ Consumer Focus (2013) Effective Complaint Handling- a discussion document: Written for Consumer Focus by Cosmo Graham, Professor of Law at the School of Law, University of Leicester and Director of the Centre for Consumers and Essential Services

- 5.2 In our view, the aim should be for public services to resolve any complaints quickly, effectively and in a satisfactory way for the citizen, first time. A part of this, is the authority recognising and acknowledging where there has been an error and making an apology as appropriate. It is fundamental however that the authority concerned is able to learn from the complaint to inform and improve service delivery and design. The Policy sets a comprehensive and clear template for public authorities to deliver against these expectations.
- 5.3 We would want to see all public authorities in Wales working along the lines of the principles outlined in the Policy. However as part of a move towards making the Policy mandatory, we feel it would be helpful to gather evidence as to why some authorities are not using this, as well as how those authorities who have adopted the Policy are finding this to date. This would enable any amendments to be made to the Policy based on feedback received and also specifically if any sector specific approaches need to be put in place to make it as practically applicable as possible and ensure that it can be used across sectors. As part of this, we also believe it is vital that feedback is sought from citizens who have complained to public authorities using the Policy to understand how the process worked from their perspective and if anything should be changed. This review process should also be repeated at regular intervals to ensure that the Policy remains current and responsive to the needs of both citizens and public authorities. Evaluation of the Policy will be essential to identify areas that require improvement and to learn from public services who demonstrate best practice in complaints handling.
- 5.4 One area that could be emphasized more strongly within the Policy would be the publication of outcomes of complaints. We believe that public services should demonstrate how complaints made to them resulted in improvements to the services being provided to users. We know from research by Consumer Focus Scotland that people want to know that other users did not have to experience similar problems and this would provide greater transparency on this issue⁴.

A Complaints Handling Authority?

- 6.1 We also believe that the PSOW should be given powers to consider and adapt the Scottish PSOW's approach to complaints handling.
- 6.2 We believe that the establishment of a unit within the PSOW would enable a focus on driving up standards on complaints within public authorities and address the points made above regarding on mandatory Policy for all public authorities in Wales.
- 6.3 We believe as part of this the PSOW could also work in partnership with service providers, regulators and other stakeholders to develop sector specific complaints handling processes as appropriate (and identified through the above review).
- 6.4 Analysis and monitoring of complaints data across the public sector will also be important. We would like to see the PSOW taking a lead on the publication of complaints data by individual authorities, as noted above. We also believe that public service providers should be required to report, for instance through their annual

⁴ Consumer Focus Scotland (2010) response to the Scottish Public Services PSOW consultation on "a statement of Complaints Handling Procedures and Guidance on a Model Complaints Handling Procedure"., page 5

reports and online, how many complaints were resolved at frontline stage, investigation stage and by the PSOW. This would provide citizens with greater transparency in terms of complaint handling and provide opportunities to explore where the balance may need to be changed. For instance, if it was found that very few complaints were resolved at the first level, understanding why this might be the case. By undertaking this work in Scotland, the Scottish Public Services PSOW has been able to develop a 'performance culture' in complaints handling⁵.

- 6.5 To inform the development of the Model Complaints Handling procedure in Scotland, Consumer Focus Scotland worked with the Scottish Public Services PSOW to explore consumers' views of complaints handling procedures in public services. This informed the resulting procedure and provides useful insight into the benefits to the public of adopting such a procedure in Wales.
- 6.6 We would also argue that similar research should be undertaken with citizens in Wales as this model is rolled out.
- 6.7 It would also be useful to undertake research with the public to better understand complainant's experiences and the extent to which they are aware of the PSOW service. This should include seeking feedback from complainants, both those who have had their complaints accepted for consideration and those who have not, about what could have been done differently.
- 6.8 In the private sector, research conducted by Consumer Focus found that 65% of consumers were not told they could take their complaint to an independent body. We are not aware of any similar research to understand consumer experiences in the public sector in Wales but we suggest gathering such evidence directly from citizens would be beneficial to highlight any issues from a citizen perspective to inform any new responsibilities the PSOW receives in this area.
- 6.9 Complaints handling will vary across sectors so being more informed about citizens views and experiences would be helpful in helping to shape what the service looks like in future and ensure that those who have cause to access an independent body to investigate their complaint are aware of the PSOW and can easily access it.

The PSOW's jurisdiction

- 7.1 We support the proposal to extend the PSOW's remit to cover the private health sector. We believe people should have access to complaints and redress no matter what the service they access is. People's journeys through the health system can involve a range of funders and suppliers therefore their access to redress should be as joined up as possible. On the issue of funding, Citizens Advice Cymru receives funding to discharge its functions to represent energy and postal consumers from levies on those industries. This does not prevent us from providing challenge and also working alongside operators within those industries to raise issues and improve services for consumers.
- 7.2 We note that the PSOW written evidence suggests that it would be helpful in respect of private healthcare, to give him binding powers to implement a recommendation. We

⁵ Scottish Public Services PSOW Annual Report (2013- 2014) Transforming Scotland's Complaints Culture, page 8.

would support this, but we believe that as outlined in the Law Commission's review⁶ such binding powers should also be extended across his remit. We believe this will be key to go alongside new powers (if taken forward) to allow own initiative investigations as these may be more challenging in nature, given the potential for systematic review. We believe enabling binding powers across the PSOW's remit at this stage links with the principle of future proofing.

Links with the Courts

- 8.1 Citizens Advice Cymru agree with the proposal to remove the statutory bar to allow the PSOW to consider a case that has or had the possibility of recourse to a court, tribunal or other mechanism for review. We support the perspective that this would give complainants the opportunity to decide which route is most appropriate for them. In fact we believe given the financial and other barriers of access to the courts, this would give people greater access to redress. This would also have the benefit of enabling people to more easily access advice and advocacy to support them with their complaint.
- 8.2 We would support the Law Commission's recommendation around the issue that 'the Public Services PSOW publish guidance detailing where it is appropriate to make a complaint to them and where it would be more appropriate to make sure of a court of other mechanism of administrative justice'⁷.
- 8.3 We also note the related issue of where the courts may consider the PSOW as a more appropriate route for claimants, namely stay provisions. We feel that it is therefore appropriate to mention this issue in our response. We believe that if the court believes that the PSOW is a more appropriate channel then it should have the power to stay an action before it, in order for the PSOW to choose to investigate the matter. Whilst the PSOW should not have an obligation to investigate, if he does not, we believe the complainant should be able to go back to the court for a decision on their initial complaint and further action by the court relating to this, as discussed by the Law Commission in their 2011 report⁸.

Other

- 9.1 We believe that consideration should be given to including the Residential Property Tribunal within the scope of the PSOW.

Collaboration across and between Ombudsmen

- 10.1 We know from our own experiences that people do not live their lives in silos. Whilst they often come to bureaux about a specific issue, when discussing the problem with them we often find that they will have on average two or three different problems that might interrelate. This is also likely to be the case in respect of complaints, where more than one public sector agency may be involved. It is also possible therefore that there may be involvement from both devolved bodies e.g. local authorities and those who are not devolved, for instance the Department for Work and Pensions. Therefore there might also be value in giving specific consideration, given some of the discussions about closer working between Ombudsmen within the Law Commission

⁶ The Law Commission (2011) Public Services Ombudsmen, LAW COM No 329, page 68

⁷ Ibid, page 25

⁸ Ibid, 30

review, to how the PSOW could collaborate or undertake joint investigations or reviews with other Ombudsmen and regulators in the future.

Time restrictions on making a complaint the PSOW

11.1 We would also highlight the issue of time restrictions within which someone can refer an issue to the PSOW, currently one year. We would suggest that particularly within the health service, this may make it difficult for people to make a complaint to the PSOW if they are not satisfied with the outcome through the internal complaints procedure of the health body in question. This is because whilst an individual has 12 months within which to make a complaint to a Local Health Board for instance, if an in-depth investigation has to be undertaken, it can take up to six months to complete this. This may mean (where an individual has waited some time before choosing to complain) by the time an in-depth investigation has been completed, they will be outside of the time limits to take a complaint to the PSOW. We would argue that it can take people time to make a decision to complain, particularly thinking about people who may have experienced an issue with their health and may be coming to terms with this. An individual in this situation may also have needed to take some time to focus on improving their condition. We would suggest therefore that consideration is given to extending the time limit within which a complaint may be made to the PSOW about health services, to a year from the date of the outcome of the internal decision on their initial complaint to the health authority (such as a Local Health Board), in question.

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Document is Restricted

FINANCE COMMITTEE OF THE NATIONAL ASSEMBLY FOR WALES

INQUIRY INTO THE POWERS OF THE PUBLIC SERVICES OMBUDSMAN FOR WALES

CONSULTATION RESPONSE

DR NICK O'BRIEN

BACKGROUND

1. The views expressed below are mine alone. I have limited my comments to those issues on which I am competent to express an informed view.
2. In 2013-14 I served as Specialist Adviser to the House of Commons Public Administration Select Committee (PASC) inquiries into complaints about public services and into the future of the UK Parliamentary Ombudsman and Health Service Ombudsman for England (PHSO).
3. I had previously held posts as Director of Policy and Public Affairs, and Legal Policy Adviser, at the office of the PHSO (2007-2012); as Legal Director at the GB Disability Rights Commission (2000-2007); and as Legal Adviser, and then Deputy Ombudsman, at the Office of the Legal Services Ombudsman for England and Wales (1991-2000). I am an honorary research fellow in the Law School at Liverpool University and have written widely about ombudsmen, as well as about disability rights and human rights more generally.

GENERAL COMMENTS

4. I support without reservation the proposed changes in respect of own initiative investigations, oral complaints, complaints handling across public services, and links with the courts. I have reservations (explained below) about the proposed extension of the Ombudsman's jurisdiction to self-funded private healthcare but nevertheless support it. Although the PSOW Act is already among the more developed examples of public-sector ombudsman legislation, the reforms suggested would otherwise strengthen the Ombudsman's role and improve access and impact.
5. In respect of the other issues referred to in the Consultation Paper, I support the inclusion of other bodies within the Ombudsman's jurisdiction, the exclusion from jurisdiction of code of conduct complaints and the protection of the title of Ombudsman, but I have reservations about making the Ombudsman's recommendations (as opposed to the Ombudsman's findings) binding.
6. More generally, I am mindful of the potential, albeit indirect, impact on the Ombudsman of the EU ADR Directive, of the changing landscape for the delivery of

public services within the UK, and of the increasingly uncertain boundaries between the public and private sector. These factors make the consideration of legislative reform especially timely and necessary.

EFFECTIVENESS OF THE CURRENT PSOW ACT 2005

7. The 2005 Act has proved to be broadly effective, enabling the PSOW to establish itself as a modern public services ombudsman, with the ability to provide good access to the public, to resolve disputes swiftly and effectively, and to provide remedies that deliver both individual redress and systemic reform in the public sector.

8. As a result the PSOW commands the respect of citizens and public bodies in Wales, and in the ombudsman community throughout the UK.

9. The ADR and public-service delivery environment is, however, in flux. In common with other public sector ombudsmen, the PSOW faces new challenges as a result. The review and reform of the statutory remit is therefore an essential condition of meeting that challenge successfully.

OWN INITIATIVE INVESTIGATIONS

10. The vast majority of national ombudsman institutions throughout Europe, and indeed throughout the world, have own initiative powers. Such powers enable an ombudsman to investigate in the public interest even if an individual complaint has not been made. As such they have the potential to extend the reach and strategic impact of the ombudsman.

11. More than any other available innovation, the introduction of own initiative powers would enable the Ombudsman to hold the Executive to account, to address the real concerns of citizens, especially the most marginalised, and to provide systemic remedy that might beneficially transform the delivery of public services and the discharge of public functions in Wales.

12. In particular, own initiative powers can be used in situations where there is widespread and reasonable grounds for suspecting significant injustice but where credible individual complaints are not forthcoming, for example because those experiencing such injustice are especially marginalised, or because the scale of the injustice perpetrated is not apparent to any one individual but is more easily detected from a wider collective perspective.

13. Such powers have been widely and effectively used in Europe, for example by the ombudsmen in Austria, Sweden and Finland, and further afield by the ombudsmen in Australia and Canada at both national and state level.

14. In Northern Ireland the Ombudsman is in the process of acquiring an own initiative power as a result of legislative reform, and in the Republic of Ireland the Ombudsman already has such a power, which has been used sparingly.

15. Last year, PASC recommended that PHSO should acquire an own initiative power of this sort.

16. Similar powers have been used successfully by other non-ombudsman institutions in the UK for a long time, for example from the 1970s by the various equality commissions (CRE, EOC and DRC) and now by the EHRC.

17. There is in principle a danger that with such powers the Ombudsman might encroach on the territory of other regulators or inspectorates, whose remit already entails proactive scrutiny. The Ombudsman would, however, be seeking to use its proactive power in a different way: it would be conducting its investigation in response to identifiable evidence of prima facie injustice, caused by maladministration, and remediable by ombudsman-style recommendation. To that extent its role would remain distinctive.

18. Careful legislative drafting, supported by memoranda of understanding between the Ombudsman and other regulators and inspectorates, would adequately manage any such encroachment that still existed, or that was perceived to exist.

19. Furthermore, the exercise of such powers would enable the Ombudsman to prevent the escalation of injustice and to investigate in a more focussed manner. To that extent, the benefits, financial and otherwise, afforded by such investigations would be compounded.

ORAL COMPLAINTS

20. The need to put complaints in writing is unnecessarily restrictive and a potential barrier to access, not least for those who are disabled or who have restricted literacy. The desire to have a record of a complaint can be met by allowing access by email, website form or text, as well as by telephone if calls are recorded or their content otherwise transcribed.

21. It is in any event arguable that failure to permit access by these alternative means would constitute a breach of equality legislation.

COMPLAINTS HANDLING ACROSS PUBLIC SERVICES

22. The Ombudsman is in a privileged position to prescribe standards for complaint handling across the public services, drawing upon the empirical experience of handling complaints in large numbers.

23. This ‘design authority’ function already exists in Scotland, where it has been used successfully, and was recommended by PASC for the UK Parliamentary Ombudsman.

OMBUDSMAN’S JURISDICTION

24. The distinction between public and private domain is becoming increasingly difficult to maintain. It is nevertheless a distinction that is fundamental to the function and identity of a ‘public services’ ombudsman. The Ombudsman’s remit should therefore be limited, so far as is practicable, to the exercise of functions by those acting in the public domain and in accordance with the public interest that warrant protection other than merely by the operation of the market.

25. The ability of the Ombudsman to investigate private healthcare commissioned by the NHS could on that account be supplemented, in accordance with that notion of the public domain, by extension to self-commissioned private healthcare, at least to the extent that this is delivered in conjunction with public healthcare. Indeed, the absence of such a power can create a distinction between ombudsman coverage which is likely to make little sense to patients, so long as the Ombudsman’s function is conceived (albeit mistakenly) as nothing more than that of dispute resolution for consumer complaints about quality of service.

26. Notwithstanding the pragmatic attraction of such a concession in this instance, the public-interest aspect of the Ombudsman’s role is otherwise worth preserving emphatically, as a matter of principle. The democratic accountability function of the Ombudsman is fundamental to the role and should not be diluted into a form of private dispute resolution or a device for holding to account institutions whose public-interest remit is marginal and whose ethos is primarily market-oriented.

LINKS WITH THE COURTS

27. I support the removal of the statutory bar since this would increase the Ombudsman's discretion to investigate appropriately and in a manner proportionate to the issues at stake.

28. With the erosion of publicly funded legal advice and representation, theoretical access to the civil courts should no longer constitute a special category of grounds for an ombudsman to be barred from investigation. There will nevertheless be cases where the Ombudsman is not the appropriate forum and a complainant will need to be directed to seek remedy elsewhere, including through the civil justice system if so advised.

29. I do not see any objection to the Ombudsman having the power to refer cases to a court for a determination on a point of law. However, the occasions when the use of such a power is needed would be rare, since disputes that turn on a point of law are not likely to be suitable for investigation by the Ombudsman in the first place.

OTHER ISSUES

Recommendations and findings

30. I do not think the Ombudsman's recommendations should be binding. It is of the essence of the distinctive approach of an ombudsman that its mandate is one of influence rather than sanction. From this constraint flows much that is attractive about the ombudsman approach, including its relative freedom of discretion, flexibility of process and deliberative style of decision-making. Whilst there is a case for saying that a public authority is bound to accept the ombudsman's 'findings' (even in cases of ultimate disagreement) the requirement that a public authority comply with a recommendation contingent upon those findings would be seriously at odds with the authentic ombudsman ethos.

Code of conduct complaints

31. I agree that code of conduct complaints should not be within the Ombudsman's jurisdiction. The Ombudsman's chief function is the democratic holding to account of public authorities for their exercise of public functions, including (but not limited to) the provision of services to the public. That function should not be diluted by inclusion within jurisdiction of a quite distinct 'policing' function.

DR NICK O'BRIEN

20 FEBRUARY 2015

By virtue of paragraph(s) vi of Standing Order 17.42

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Agenda Item 7

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