

National Assembly for Wales – Finance Committee – 21 January 2015

Amendments to the Public Services Ombudsman (Wales) Act 2005

1. Introduction

- 1.1 The legislation governing the Ombudsman's office is the Public Services Ombudsman (Wales) Act 2005. At the time it was enacted, it was considered to be at the cutting edge of ombudsman legislation and is still highly regarded in the UK and internationally¹.
- 1.2 In 2015 the Act will be ten years old. New legislation has been introduced in the Republic of Ireland and elsewhere since 2005, while new legislation, drawing on the Welsh experience but designed to further develop it, is being introduced in Northern Ireland.
- 1.3 In addition, the Law Commission reviewed the legislation governing public services ombudsmen in England and Wales.² It commented favourably on the existing Public Services Ombudsman (Wales) Act but did make a number of recommendations for change one of which is referred to in section 2.5.
- 1.4 I have been in post since August 2014; during that time I have now had the opportunity to discuss legislative issues with my peers in all jurisdictions of the UK.
- 1.5 This paper sets out five key areas for change which have been informed from the experience of the office, developments of best practice elsewhere as well as the recommendations of the Law Commission.
- 1.6 The paper focuses on these five discrete parts in the hope that the suggested changes will be uncontroversial and can enjoy broad support for review and enactment by the Assembly in 2015. The suggested changes reflect four underlying priorities:
 - **Future proofing:** the proposals are intended to ensure that the legislation continues to be fit for purpose, but that it also addresses future challenges which will affect service users in an ageing society where there are greater levels of physical and emotional vulnerability.

¹ Ombudsman Legislation – time for a review? Peter Tyndall March 2013

² Law Com No 329 14 July 2011 <http://lawcommission.justice.gov.uk/areas/public-services-ombudsmen.htm>

- **Social justice:** the proposals ensure that citizens from more deprived backgrounds, who may be more reliant on public services, will find it easier to make a complaint.
- **Citizen Centred:** proposals will strengthen the citizen's voice and ensure that wherever possible processes will follow the citizen rather than the sector or the silo.
- **Drive complaint handling and public service improvement:** these proposals will make a real contribution to public service improvement and reform whilst offering excellent value for money. The changes can be achieved whilst maintaining the Public Services Ombudsman for Wales (PSOW) budget at no more than 0.03% of the Welsh Budget block.

2. Five Areas for Change

2.1 Own initiative investigations

- (a) Virtually without exception, public services ombudsmen throughout Europe, and indeed, internationally, have the power to undertake investigations on their own initiative. The Ombudsman in the Republic of Ireland already has such a power and it will shortly be introduced in Northern Ireland also. Outside of the UK, only five members of the Council of Europe have ombudsmen who do not have own initiative powers: Belgium, Luxembourg, Azerbaijan, Kyrgyzstan and Liechtenstein.
- (b) This is a power normally used sparingly to investigate where there is an obvious problem but no complaint has come forward or, more usually, to extend an investigation into a complaint to other bodies where it appears that the maladministration or service failure identified is likely to be systemic and affecting people other than the complainant.
- (c) The Ombudsman in the Republic of Ireland undertook five own initiative reviews between 2001 and 2010 on issues ranging from subventions in nursing home care, tax refunds to widows, refuse collection charges and the rights to nursing home care for elderly people.³
- (d) It would be important to frame any changes in such a way as to ensure that the power would be used only where appropriate and cases could be referred to regulators or commissioners where this was a more suitable alternative.
- (e) This power is likely to become more important as we see the impact of an ageing society with citizens in vulnerable positions either unable or afraid to complain.

³ A Paper Prepared by the Office of the Northern Ireland Ombudsman on a Power to Commence and Own Initiative Investigation

2.2 Access – oral complaints

- (a) The current legislation is generally helpful in providing access to the office. The Ombudsman's service is free of charge and the requirement for bodies in jurisdiction to tell people about their right to complain has ensured that people can access the office as they need to. There is a requirement that all complaints should be in writing. Whilst the Ombudsman has discretion to accept a complaint in another form if appropriate, this has to be considered on a case by case basis.
- (b) However, in view of the changing nature of electronic communication, and the considerable equalities issues about potentially excluding people who cannot write, including, for example, people with learning disabilities, there is a case to be made for modernising this area of the legislation so that it is explicit in the legislation that complaints may be made orally with the Ombudsman being obliged to justify to a body being investigated why he has decided to set aside the requirement for a complaint to be made in writing in individual cases. At UK level 94% of the population attain literacy level 1 or above, in Wales it is only 87%. Access for people who cannot write should not be discretionary. They should have the same access as any other service user in Wales. In England legislation has recently been reformed for the Local Government Ombudsman. There is a danger that in Wales we have a greater need but are lagging behind in this regard.

2.3 Complaint Standards Authority

- (a) In Wales, we have developed the model complaints policy to help to achieve consistency across public service providers. Take up has been patchy, but is improving. Adoption is voluntary, but strongly encouraged. In theory, with the recent changes to the social services statutory complaints procedure, all public services devolved to Wales should be operating a streamline two stage complaints procedure. However, the problem lies with enforcement. I am conscious of the arrangement in Scotland where a few years ago, the Scottish Ombudsman was given the role of Complaints Standards Authority. I know that the Scottish Ombudsman has found this arrangement to be particularly effective in enabling him to tackle problems in the standards of complaint handling within the bodies in his jurisdiction. I believe that there is a case for adopting such an approach in Wales so that any guidance I give to bodies on complaints handling has statutory force so that I can help support improvement in public sector complaints handling.

2.4 Extension and reform of jurisdiction- Healthcare

- (a) With an ever ageing society the integration of health and social care is an important part of public policy. Recently my jurisdiction was extended to include self-funded social care and hospice care; however I cannot investigate private healthcare, unless it was commissioned by the NHS.

- (b) Recently there was a case that I could not resolve where a patient had been treated by the NHS, then privately (self funded) and then again in the NHS. The patient sadly died. I was unable to investigate the private funded healthcare. Clearly there is a need to reform legislation where a patient chooses to be treated in both public and private sectors that the complaints process follows the citizen not the sector⁴. It has been recommended that the remit of the Parliamentary Health Service Ombudsman should be extended to cover the whole private healthcare sector.⁵
- (c) The inclusion of private sector providers raises issues around funding of complaints handling and also compliance. Whilst the investigation of private social care complaints is currently resourced from the public funding that I receive through the National Assembly, there might be a view that a different arrangement should be considered if private healthcare providers also came into jurisdiction.
- (d) Private sector ombudsman schemes are normally funded by the bodies in their jurisdiction. This is usually underpinned by statute. The funding mechanism may be an annual levy, or based on case by case charging, or often on a combination of both.
- (e) This has the dual function of ensuring that the cost does not fall to the public purse while also engaging the “polluter pays” principle, giving providers an incentive to avoid error and resolve complaints as a means of not incurring the costs. There is again a strong case for ensuring this is the case for any private provider in the office’s jurisdiction. This hybrid funding model is already in place at the New South Wales Ombudsman’s office, for example.⁶ However, as Lesley Griffiths noted as Local Government Minister: “The suggestion of a levy, for example, would be very challenging to put into practice”.⁷ The introduction of such a system is clearly a policy choice for the Committee.
- (f) Where the bodies in jurisdiction are public bodies, the existing powers of recommendation work well and there is no evident need for change. Thus far, no public service provider has refused to implement a recommendation. However, where private bodies are in jurisdiction, as is now the case with social care providers, the democratic process cannot be engaged in the same way and compliance may be harder to secure. Private sector ombudsman schemes normally have binding powers and it would be helpful to consider including this provision in respect of private providers only in the future.

⁴ With the Wales Act 2014 having received Royal Assent I am also aware that an amendment may be required to Schedule 3 of the PSOW (Wales) Act 2005 to give me jurisdiction to consider complaints against the new Welsh Revenue Authority

⁵ DoH Review of the Regulation of Cosmetic Interventions

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/192028/Review_of_the_Regulation_of_Cosmetic_Interventions.pdf

⁶ Ombudsman Legislation – time for a review? Peter Tyndall March 2013

⁷ Letter from Lesley Griffiths AM to Christine Chapman Chair of Communities, Equalities and Local Government Committee

- (g) There is also an anomaly in the existing legislation whereby individual family health service providers (e.g. GPs or dentists, rather than surgeries or practices) are in jurisdiction. This has the unfortunate effect of personalising complaints in this sector whereas elsewhere, it is the public service provider, rather than an individual, who is in jurisdiction. Any change would have the effect of my naming the relevant practice or surgery in any report rather than an individual practitioner. This may also be unfair if the practitioner responsible for any service failure has since moved from the particular practice or surgery. However, I already have the power to name any person (other than the listed authority being investigated) if, having taken into account the interests of person aggrieved in any complaint or any other person I think it is appropriate and I consider it is in the public interest to do so.

2.5 Links with the courts

- (a) The Law Commission identified a number of areas where changes to legislation would be desirable. There is currently a statutory bar which prevents the PSOW from considering a complaint where the case could be considered by the courts. However, there is discretion to set this requirement aside. The Law Commission take the view that this bar should be set aside entirely, so that complainants can choose which is the more appropriate route for them.
- (b) In addition, there is currently no provision to allow the PSOW to consider a complaint when a judge determines that it would be the better means of resolution. Changing the law to allow the Administrative Court to “stay” cases and to refer them to the Ombudsman would address this issue, but the Law Commission recommend that the discretion as to whether to investigate or not should remain with the Ombudsman as at present.
- (c) Finally, the Law Commission have suggested that the PSOW should be able to refer a case to the court for determination of a point of law. They suggest that this will enable the PSOW to seek clarity on a legal point which might otherwise hinder or prevent an investigation as well as seeking clarity where there is doubt as to whether a matter is in jurisdiction.
- (d) This latter point clearly impact on the English and Welsh court system and advice is sought as to whether this latter change could fall within the purview of an amended PSOW Act.

3. The Cost of Change

3.1 Own initiative investigations

- Two full time investigation officers £80k-£100k, including on-costs.

3.2 Access – oral complaints

- No cost.

3.3 Complaint Standards Authority

- Two full time investigation officers – £80k-£100k, including on-costs.

3.4 Extension and reform of Jurisdiction- Healthcare

- Dependent on public or private funding method – £0k-£40k-£50k provision (dependent on policy choice re levy).

3.5 Links with the courts

- £20k Referrals from/to courts.

3.6 Total costs: £180k- £270k per annum.

4. The Case for Change

4.1 In considering the case of change, I have been keen to focus on:

- the need to future-proof the legislation and organisation
- improving social justice and making sure that voices of complainants from more disadvantaged backgrounds are heard
- making sure the Ombudsman’s work is Citizen Centred, rather than constrained to individual sectors or silos.
- driving improvement in public services and in complaint handling
- affordability and value for money.

4.2 I believe the suggested changes address these priorities, and hope that they will enjoy broad support.

Nick Bennett
Public Services Ombudsman for Wales
January 2015
