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

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Dear Jocelyn

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

Thank you for your invitation to provide evidence to the Finance Committee on the draft Public Services Ombudsman (Wales) Bill.

My responses to your questions are set out in the attached Annex. Some of my responses repeat views that I have previously expressed during the Committee's inquiry into the consideration of the powers of the Ombudsman, but I think it is appropriate that I include them in this response for completeness.

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: Responses to Annex Consultation Questions*

## RESPONSES TO ANNEX CONSULTATION QUESTIONS

### General

1. *Would the draft Bill improve the effectiveness of the role of the Ombudsman? If so how?*

I think the draft Bill is conducive to improving the effectiveness of the role of the Ombudsman. The provision for own initiative investigations should enable improvement in the effectiveness of the Ombudsman's role by allowing wider systemic problems to be addressed coherently. Removing the requirement for investigations into particular issues to be tied to specific complaints should allow for the Ombudsman to take a more logical and unified approach to investigations. It should also allow for matters that are evidently problematic to be investigated despite the absence of specific complaints, which could potentially benefit particular groups who tend to be reluctant or unable to raise complaints.

The extension of the Ombudsman's jurisdiction into the private healthcare sector in cases where people have received care from both the NHS and private sectors should be helpful in allowing investigations to build a more comprehensive and accurate picture of such a situation.

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

I have not identified any specific barriers to implementing the draft Bill's provisions.

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

As I understand it, section 4(4) is drafted in such a way that it requires own initiative investigations to relate to "action taken". This might have the unintended consequence of preventing the Ombudsman from conducting own initiative investigations in relation to relevant omissions, such as those set out in section 10(1)(b) and (c), even if such omissions occurred after the Bill received Royal Assent.

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

A baseline review before commencement should 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 should 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.

## Power to investigate on own initiative

5. *Do you have any comments on the new power in section 4?*

The new power should improve the effectiveness of the role of the Ombudsman as indicated in my answer to question 1.

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

I am not aware of any unintended consequences for the rest of the Bill, but section 4(4) seems to be drafted in a way that limits own initiative investigations to acts (as opposed to omissions), which may be unduly restrictive (see my answer to question 3 above).

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

It would be appropriate for the Ombudsman to consider consultation with the Commissioner for Older People in Wales, the Welsh Language Commissioner, the Children's Commissioner for Wales and the Auditor General for Wales in relation to investigations into matters that could be subject to investigation by those offices.

8. *Should the Ombudsman have the power to initiate an investigation based on action that took place prior to the draft Bill/Act receiving Royal Assent (see section 4(4))? If so, should there be a cut-off point, beyond which the Ombudsman should not carry out an own initiative investigation?*

It is not clear to me that the usual concern related to legislation with retrospective effect (ie that in relation to some act or omission a person becomes unfairly subject to legal obligations that were not law at the time of the act or omission) applies in respect of section 4(4), as it does not alter legal obligations. Indeed it may be unhelpful to place an artificial cut-off point on the power to conduct own initiative investigations.

9. *What kind of issues should be included in the criteria for own initiative investigations under section 5?*

I think issues that may appropriately be covered in the criteria for own initiate investigations may include:

- a) The possibility that maladministration or failure to provide service would cause significant distress or hardship;
- b) Services that by their nature are important to and chiefly used by service users who are generally not disposed towards raising complaints;
- c) Services and other areas of administration that are qualitatively important in terms of issues such as fairness, but for which low financial resource requirements mean examinations of economy, efficiency and effectiveness by the Auditor General would generally be regarded as not appropriate.

I am not sure that it would be helpful to have an approach in which each and every criterion must be met in order to justify an investigation.

10. *What kind of evidence should be available to the Ombudsman to justify an own initiative investigation (see section 5(2))?*

I think it could prove quite problematic if the criteria were too restrictive in setting what kind of evidence would be needed to justify an investigation. I would suggest that any information that reasonably indicated that one or more of the criteria mentioned above are met (plus any others that are identified) should be sufficient.

### **Who can complain**

11. *Do you have any comments on the new definition of “member of the public” in section 7(2)?*

Given the extension by the Bill of the Ombudsman’s jurisdiction to private health service providers, it appears to be appropriate to similarly extend the definition of “member of the public” to exclude private health service providers acting in their capacity as such.

### **Requirements for complaints made and referred to the Ombudsman**

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

Requiring complaints to be in the form and contain information specified by the Ombudsman in guidance should enable the Ombudsman to ensure that complaints are received in a form that can be dealt with efficiently and effectively. In theory perhaps there is a danger that the guidance specified by the Ombudsman might impose requirements on making complaints that are excessively onerous, which might have the effect of deterring those with valid complaints from making them. I imagine, however, that the Ombudsman would be both mindful of the need to avoid such a problem and well-placed to avoid it. On that basis, I do not think the provisions of section 8 are problematic.

Subsection 5 of section 8 prevents the Ombudsman using the power in section 3 to investigate the subject matter of an oral complaint if the person making it does not wish the complaint to be treated as duly made. The Ombudsman would however still be open to use the power in section 4 to conduct an own initiative investigation into the matter (provided it arose after the Bill received Royal Assent), which could perhaps be used to negate the effect of subsection 5.

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

Given the importance of the Ombudsman’s role and the right of all members of the public to make a complaint, the guidance should be published in such forms so that all members of the public, including those with impairments, can access it easily. It seems to me that the guidance should be available online and in hard copy by request. Given the existing duties under the Equality Act 2010 and related

regulations, I am not sure, however, that it is necessary to reflect this in the text of section 8.

### **Matters which may be investigated**

14. *Do you have any comments on the new provision enabling the Ombudsman to investigate the whole complaint when a combination of treatment has been received by public and private health services providers (see sections 10(1)(d) and 10(2))?*

The extension of the Ombudsman's jurisdiction should allow for investigations to build a more accurate and comprehensive picture of a particular matter where a patient has received private healthcare as well as NHS care.

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

It would appear to, yes.

16. *Does the broadening of the matters which may be investigated in section 10(2) raise any unintended consequences in the rest of the draft Bill?*

Not that I am aware of.

17. *Is the definition of "private health services" in section 71 broad enough to cover anyone who has received a combination of public and private treatment?*

It would appear so, yes.

18. *Should the ombudsman have powers to recover costs incurred in investigating private health services?*

I am not sure that it would be appropriate for me to answer the heart of this question, which is a matter of policy, ie whether a public sector entity should have a power to charge private sector entities so as to provide cost recovery. I do, however, think that the following issues need to be considered:

- a) any process of cost recovery should itself be economical and efficient—if a high proportion of the charges were accounted for by the administration of the charges, the system would come into disrepute;
- b) it would be undesirable if cost recovery were to act as a disincentive to private sector health provision in Wales;
- c) there is merit in charges reflecting any additional expense incurred because of unwarranted or unlawful obstruction of statutory access rights—such charges should help prevent wastage of public resources and be conducive to efficient and timely investigation;
- d) the Ombudsman's investigations should be of benefit to private health providers (as whole, if not as individual operators), as well as individuals and society as a whole.

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

I am not sure that the drafting has the intended effect. The drafting of the definition in terms of “person” and “individual” would seem to place the focus on individual GPs rather than the GP practice as a whole—particularly so for practices that operate under a partnership agreement where the practice does not have a distinct legal identity from that of the partner GPs.

### **Investigation procedure and evidence**

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

The requirements to prepare an investigation proposal and to share it with the body to be investigated appear to me to be reasonable, as does the requirement to allow those affected by the proposal an opportunity to comment. These requirements should ensure that investigations are planned effectively with the appropriate level of involvement from those affected. It is, however, not clear to me why section 16(5)(b) grants only those persons identified in a proposal “in a negative way” an opportunity to comment. This may be because the provision is intended to reflect a principle of natural justice, but there would appear to be scope for legal argument over whether a person is identified “in a negative way”, which may unhelpfully consume the Ombudsman’s resources. Persons identified in a positive or neutral way in a proposal may also be able to provide useful comments relating to the investigation, so it may be desirable to extend the requirement to cover all persons identified in the proposal.

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

The effective exercise of own initiative investigations would be significantly curtailed if the Ombudsman’s powers in relation to obtaining documents and information do not apply to such investigations. If an authority chose not to co-operate with an investigation, it would probably often not be possible to conduct it effectively. The same reasoning applies to investigations into private health services.

### **Listed Authorities**

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

It is not clear to me why the additional requirements of the 2005 Act have not been reproduced in the Bill, as they work to ensure that only public authorities can be added to Schedule 3. Removal of these requirements seems undesirable as it would allow for the extension of the Ombudsman’s jurisdiction further into the private sector without the need for primary legislation.

23. *Are there any other bodies that should be included in the list in Schedule 3 'Listed Authorities'?*

I am not aware of any omissions from the list in Schedule 3.

### **Complaints Handling**

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

Overall, the provisions appear to me to be appropriate to grant the Ombudsman sufficient powers to ensure that complaints are dealt with consistently and fairly across the Welsh public sector.

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

It would appear to be adequate, yes.

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

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

It may be beneficial in value for money terms for all investigations to be conducted under processes and legal framework that are as consistent as possible, so there may be merit in bringing the current Part 4 into the Part 3 general investigations provisions.

27. *If Part 4 should be brought within Part 3, are there any specific elements of Part 4 that should survive? Or can a blanket approach be applied?*

It would appear that a blanket approach would be effective, though I have not conducted a full review into the precise legal effects of bringing Part 4 within Part 3.

### **Part 5: Investigations: supplementary**

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

I welcome these sections, which make clear that joint working is permitted in appropriate situations.

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

It seems to me that it would be helpful if the sections 62 and 63 covered future Commissioners created by the Assembly; it seems likely that it would be unhelpful and inconsistent for the Ombudsman to be able to work jointly with some Commissioners but not others.



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

Not that I am aware of.

### **Appointment etc**

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

These provisions seem appropriate. The addition of private health service provider seems consistent.

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

Yes. It seems to be appropriate and is consistent with the provisions relating to former Auditors General.

33. *Do you have any comments on the matters which are included within “paid office” in paragraph 8 of Schedule 1?*

No.

### **Financial implications**

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

If the draft Bill’s provisions make it easier to submit complaints orally it is quite likely that more complaints will be submitted, which will increase costs. It is not clear, however, that the draft Bill’s provisions will change the current practice in relation to oral complaints to a noticeable degree.

The provisions of the draft Bill relating to promoting consistent complaints handling across the Welsh public sector should be conducive to improved economy by, among other things, saving bodies spending time and money on devising their policies.

The effective use of own initiative investigations could lead to reduced levels of maladministration in public services, which could lead to efficiency savings, but such benefits are very difficult to quantify, let alone predict.

### **Other Comments**

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

The audit provisions paragraph 17 of Schedule 1 reflect the provisions in the existing Public Services Ombudsman (Wales) Act 2005 and are standard for



entities of this type. It would, however, be helpful if the audit provisions followed those of local government and NHS entities (see section 17(2)(d) and section 61 of the Public Audit (Wales) Act 2004) by also providing a duty on the Auditor General to satisfy himself as to whether proper arrangements have been made for securing economy, efficiency and effectiveness in the use of resources. This would be a helpful move towards greater consistency in audit provisions across Welsh public bodies. It would also facilitate a better standard of annual audit in terms of assurance in respect of value for money.