

PSOW 13

Bil Ombwdsmon Gwasanaethau Cyhoeddus (Cymru)

Public Services Ombudsman (Wales) Bill

Ymateb gan: Conffederasiwn GIG Cymru

Response from: Welsh NHS Confederation

Introduction

1. The Welsh NHS Confederation welcomes the opportunity to respond to the Equality, Local Government and Communities Committee inquiry into the general principles of the Public Services Ombudsman (Wales) Bill.
2. The Welsh NHS Confederation represents the seven Health Boards and three NHS Trusts in Wales. The Welsh NHS Confederation supports our members to improve health and well-being by working with them to deliver high standards of care for patients and best value for taxpayers' money. We act as a driving force for positive change through strong representation and our policy, influencing and engagement work.

Summary

3. Patients' expectations of the NHS are growing. It is not only about whether their treatment worked or how long they had to wait, but how they were cared for by staff, how they were spoken to and how comfortable they were made to feel. In an age of rising expectations among the public, it is a critical issue for healthcare providers and something that the NHS must get right.
4. Patients in Wales come into contact with the NHS Wales more than 22 million times each year, with 80% of contacts taking place outside of hospital. Every year there are approximately 17 million GP contacts, 3 million in outpatient clinics, around 460,000 ambulance calls, over 330,000 elective admissions to hospitals, around 360,000 emergency admissions and over 1 million A&E attendances.ⁱ A recent survey showed that 91% of patients were satisfied with the overall care they received and 96% of patients in Wales say they were treated with dignity and respect when using hospital services.ⁱⁱ However, as Keith Evans' reviewⁱⁱⁱ into NHS complaints in 2014 highlighted, there is always room for improvement and there is no doubt that there are areas where more can be done. Local Health Boards and NHS Trusts are doing more and more to encourage feedback from patients, their families and their carers to make sure they are getting these things right, as well as treating patients and their families in the way they expect. This is evidenced in the annual reports prepared by each Health Board and Trusts in Wales, based on the four-quadrant approach.
5. Effective investigative processes, feedback and complaints systems are an integral part of an open and transparent culture in the NHS. The complaints process within the NHS has become more accessible and complaints should be, and generally are, seen by the NHS in

Wales as an opportunity to improve services. The Public Services Ombudsman Wales (PSOW) is a key part of this, and provides an effective escalating route for complaints. It is independent of the service which is important to ensure public confidence in the NHS.

6. The role of the PSOW, as an independent arbitrator, cannot be understated and should not be compromised by the extension of its role. In 2016/17, health accounted for 38% of all complaints to the PSOW, and social services a further 9% (during 2016/17 PSOW received 2,056 complaints about public sector providers). Overall the Welsh NHS Confederation believes that the current jurisdiction of the PSOW is appropriate and sufficiently extensive considering the role of other organisations, including Health Inspectorate Wales (HIW), Care and Social Services Inspectorate Wales (CSSIW) and Community Health Councils (CHCs), to consider complaints and carry out investigations. It is key that if the role of the PSOW is extended that there is no duplication in roles and the access routes available to each organisation should not become blurred or difficult to navigate for the patient/ the public if there are multiple avenues available.
7. Finally, as the Bill develops there should be awareness around the responses to the Welsh Government White Paper, *“Services Fit for the Future, Quality and Governance in Health and Care in Wales”*, which considered: the joint investigation of health and social care complaints, a duty of candour, standards across health and social care and the role of HIW and CSSIW. As health, local government and other public service partners are increasingly working together to define and deliver against agreed aims and objectives through Public Service Boards, the current governance and management models operated by the NHS and local government in Wales will require further change which this Bill should consider.

Terms of Reference

The general principles of the Public Services Ombudsman (Wales) Bill and the need for legislation to deliver the stated policy intention

8. The Welsh NHS Confederation support the general principles of the PSO (Wales) Bill to deliver the stated policy intention. However, it is important that the role and the capacity of the PSOW is not compromised and does not duplicate the statutory functions of other organisations. It is essential that there is transparency in the roles and functions of the PSOW and other bodies.
9. While the Public Services Ombudsman (Wales) Act 2005 has facilitated public access to the Ombudsman’s services and enabled the resolution of disputes, best practice and international standards have moved on since then. Such developments include the strengthening of the powers of the Ombudsman in Scotland and Northern Ireland. The Bill will develop the PSOW power and should better align the functions with others across the UK.

The provisions of the Bill which set out the new powers for the Ombudsman to:

a. accept oral complaints;

10. We support the new powers for the Ombudsman to accept oral complaints because this is in line with the National Health Service (Concerns, Complaints and Redress

Arrangements) (Wales) Regulations 2011, collectively known as Putting Things Right. However, there would need to be clear guidance on the verification process of the information received.

11. From April 2011, the Putting Things Right Guidance on dealing with concerns about the NHS, allows people (patients, families and carers) to raise concerns to any member of NHS staff in writing (by letter, on a concern form), electronically (by email, fax or text), or verbally (by telephone or in person). The adoption of option 2 within the Explanatory Memorandum, allowing acceptance of oral complaints, would be consistent with the Putting Things Right Guidance and therefore provide consistency in approach for people wishing to complain. Through the introduction of these new powers it will make the process consistent across all public bodies in Wales, which is a clear advantage for members of the public wishing to access the PSOW services.
12. Health Boards and Trusts are actively supportive of assisting people to attain a position of being satisfied when raising a concern, and recognise that escalating their concern to the PSOW, whilst unfortunate, can be an important step for people to gain satisfaction. While we support the new powers, there is the potential for an increase in complaints and there needs to be clear guidance in relation to the process for verifying complaints. We seek reassurance regarding the process for verifying complaints raised verbally to ensure that they are screened for all relevant aspects, for example screening for safeguarding, and that those requiring advocacy support to make a complaint receive it because this is not outlined in the Bill. In addition, further information regarding the timescales and process of investigation would be useful and there needs to be consistency in the grading of concerns in relation to oral concerns and a recognition of the use of a proportionate investigation conversant with the grading.

b. Undertake own initiative investigations;

13. Where there are concerns about significant service failure, which is a matter of public interest, then investigations should be carried out. In deciding whether such investigations should be conducted by the PSOW or another organisation, such as HIW or CSSIW, our concern would be to avoid any duplication with other regulatory bodies who already have a remit to undertake investigations. In order to respond fully to this question there would need to be further explanation of this additional power for the PSOW.
14. NHS bodies across Wales are accountable to the Healthcare Quality Division in relation to service failing and subsequent Serious Adverse Incidents investigations. In addition, HIW provides assurances on the quality, safety and effectiveness of healthcare services and they can also make recommendations to healthcare organisations to promote improvements.
15. For this power within the Bill to be fully effective, the relationship between other regulators should be clearly defined, for example, HIW and their power to initiate investigations. There also needs to be clear criteria for situations whereby the PSOW can initiate their own investigation and the framework for the PSOW undertaking such

investigation alongside the roles of HIW and the Welsh Government Delivery Unit. The Welsh NHS Confederation recommends if any “*own initiative*” investigations were being considered by the PSOW, there would need to be an early dialogue between the PSOW office, the NHS service, Welsh Government and HIW.

16. From a financial perspective, these organisations, such as HIW, are already funded to undertake such initiatives and there is a risk that NHS bodies, and other public bodies, will be subject to multiple investigations on similar themes, which will have an impact on the resources within NHS organisations/ public bodies to support this work. There will need to be explicit pathways in place to ensure that where relevant intelligence is passed to an alternative body for investigation the PSOW is made aware of this.
17. The Welsh NHS Confederation believes it would be more appropriate that where the PSOW identify generic issues which require investigation, following the provision of clear evidence and a rationale to why there should be such an investigation, they should link into the existing bodies who are resourced and experienced in undertaking such investigations. This approach would avoid duplication of activities, prevent placing unreasonable burdens on NHS bodies, and improve the utilisation of limited resources. It would ensure that any investigation being undertaken would reflect and consider the intelligence and main issues of the relevant NHS body.
18. The Explanatory Memorandum (section 10.7) proposes two options for implementation of the Bill in relation to the undertaking of own initiative investigations. Option 1 purposes do nothing and option 2 explores four scenarios whereby amended legislation would be agreed to allow PSOWs own initiative investigations.

Extending an investigation into a complaint to include another public body without needing a new complaint from the complainant (Scenario A);

19. We recognise the need for people to gain satisfaction when raising a concern. This equally applies when they approach the PSOW. Health care provision can be confusing with the public not always clear on which organisations provide which services, including confusion between health and social care providers.
20. The ability of the PSOW to include other public bodies as required to provide a complete response to an individual’s complaint is to be welcomed. However, there would be a caveat of ensuring relevant consent is in place with the complainant happy for other public bodies to be approached regarding their complaint, or those they represent. Consideration of other bodies such as CSSIW will be key when engaging with wider organisations too.

Findings from a complaint investigation prompts an investigation into other bodies to establish whether similar failings exist elsewhere (Scenario B);

21. Sharing learning within an organisation and across organisations is important. Highlighting issues of concern raised by one organisation with another is always useful and is currently achieved by the PSOW publishing the ‘Ombudsman Casebook’. There are a number of

issues in relation this scenario that impact on both the Ombudsman Office and the public bodies.

22. The impact on the Health Boards and Trusts of implementing such action is twofold. Firstly, the NHS has agreed mechanisms for being inspected and regulated. As highlighted previously, there are a significant number of organisation whose primary role is to inspect the NHS and investigations instigated under Scenario B would potentially cross over with those of other Regulators. Secondly, instigating investigation under this scenario would require significant work for the NHS body to provide sufficient information to satisfy the PSOW that an identified issue in another body is not an issue for a different NHS organisation. As identified by the Explanatory Memorandum, there would be additional financial costs to this work as well as staff time being taken away from undertaking their key roles to provide patient care. Where the PSOW identifies an issue, which may be similar in other public bodies, it would be more effective and efficient if this information/evidence was provided to the relevant NHS regulator/Inspector for them to ascertain whether further work is required and agree this with the NHS organisation.

Investigation of an anonymous complaint (Scenario C);

23. The NHS is wanting to improve services and patient safety and to respond to feedback where appropriate. Should an issue be raised with the PSOW that meets the criteria for investigation, the fact that the source is anonymous should not preclude investigation of the issues raised. However, there may be limitations in the depth of the investigation by not having details of an individual or where consent may be an issue. The intent of the investigation would be for the purposes of learning and improving as no response to an individual would be possible.

Investigation across all, or part, of a sector of service delivery in light of concerns (Scenario D);

Please see comments for the above scenarios especially those relate to scenario B.

Overall we support scenarios A and C but have reservations in relation to scenarios B and D.

c. Investigate private medical treatment including nursing care in a public/private health pathway;

24. We support the PSOW having the power to investigate private medical treatment. These additional powers reflect today's society and the nature of modern public services in Wales.
25. These additional powers will enable the PSOW to reflect the population's whole journey across public services. Without this, the effectiveness of some public service investigations may be limited because of the PSOW's inability to investigate private care as part of an NHS patient's journey/ pathway means that the PSOW cannot give the complainant a full response and this could be deemed unsatisfactory. Private care provision should be investigated with the same rigor and to the same standards as NHS services as patients can suffer the same detriment and the same degree of

maladministration as the NHS. Any findings with regard to maladministration or service failings should have the same principles applied as NHS health care to ensure consistency.

26. While supported, there is uncertainty in relation to whether a private care provider can be compelled to act accordance with the advice offered in a PSOW expert report. Further information is required in relation to what sanctions would there be against private companies if they failed to comply with a report and its recommendations.

d. Undertake a role in relation to complaints handling standards and procedures.

27. We do not agree with these additional powers because undertaking an operational role in setting standards and complaint handling procedures within NHS bodies, we believe, may be in conflict with the PSOW's independent investigation role. The more operational and involved the PSOW role becomes, there is a risk that it may be seen as less objective when reviewing how a body has implemented that procedure.
28. The PSOW currently has a key role in commenting on the effectiveness of the NHS complaints handling procedures. While we acknowledge that the PSOW would wish to share expertise in managing complaints and improve standards in complaint handling, the Bill does not make any reference to the Putting Things Right Regulations and the processes that NHS organisations must adhere to in relation to a complaint handling.
29. Each health body complies with the principles of the National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011 and their complaints policies are based on their strategic intent of complaint handling. All NHS responsible bodies must manage their concerns in line with these Regulations. The Welsh Government, and the appropriate regulatory and inspection bodies, monitor compliance of NHS organisations with these Regulations. Work is ongoing within the NHS, led by the Welsh Government, to standardise the collection of data across NHS Wales, therefore it is difficult to see the benefit of having additional requirements from the PSOW in this area. While there may be a benefit nationally to public bodies having some standardisation, this should be the role of the Welsh Government to lead and implement to ensure it is in line with national priorities and monitoring, especially considering the recent Welsh Government White Paper, *"Services Fit for the Future, Quality and Governance in Health and Care in Wales"*.
30. We are aware that the Bill is in line with similar legislation in Scotland and other European countries, however these countries do not have Putting Things Right Regulations and, as highlighted, the bulk of complaints investigated by the PSOW is around healthcare.

Any potential barriers to the implementation of the Bill's provisions and whether the Bill takes account of them

31. As highlighted previously, there are some potential barriers to the implementation of the Bill. Firstly, the NHS processes are determined by Regulations and clarity is required regarding the PSOW relationship with these Regulations because we note that the

language used in the Bill does not reflect the language used in the Putting Things Right Regulations.

32. In relation to oral complaints, while supported, the question should be around the type and level of information that would be required prior to starting an investigation. This should be clarified as there is a risk that work could be commenced on very little information or evidence.
33. Finally, further information is required around the clarification on the governance arrangements for the handling of complaints/ concerns and redress, especially due to the role of HIW, CSSIW and CHCs.

The appropriateness of the powers in the Bill for Welsh Ministers to make subordinate legislation (as set out in Chapter 6 of Part 1 of the Explanatory Memorandum)

34. We would support the powers in the Bill for Welsh Ministers to make subordinate legislation. The powers are suitable to be delegated because it allows the Act to come into force at the right time, which is important given the new powers that are included in the Bill. This will allow Welsh Ministers to make any transitional arrangements that are needed when moving to from the 2005 Act regime to this new regime. Delegation of powers will also allow the Welsh Ministers to make appropriate changes to the criteria, where required, to protect the citizens of Wales.

Whether there are any unintended consequences arising from the Bill

35. The Explanatory Memorandum identifies the potential for additional work for all bodies impacted by this Bill. Additional work is in itself not inappropriate, if it improves services to the public. However, as outlined previously, there are significant reservations as to the benefits versus the costs, especially in relation to the own initiative investigations and the role in relation to complaints handling and standards.
36. The main barriers will be financial resources, organisational cultures and a changing landscape. As highlighted there are possible conflict with the Putting Things Right Regulations and a risk of a two-tier process for complaints management. We recommend that there is an impact assessment on the new Bill and the current Putting Things Right Regulations, including the financial and staff resources which could affect Health Boards and Trusts, to ensure that any unintended consequences or conflict between the Regulations are addressed before the Bill becomes an Act.

The financial implications of the Bill (as set out in Part 2 of the Explanatory Memorandum)

37. Overall the financial implications within the Explanatory Memorandum are comprehensive, however estimating costs for the management and investigation of concerns raised via the PSOWs office is difficult due to the variable nature of the work needed. There will be ongoing and transition costs relating to setting up relevant systems and processes to enable this to happen, additional staffing costs as the complaints will be taken orally and ensuring the complaints have been recorded correctly will take additional

time. As this will also enable more people to raise complaints more easily to the PSOW it will invariably also result in more complaints being raised, which will increase costs to both PSOW office and the body being investigated. However, as highlighted, the benefits are that all members of the public with difficulties in writing or communicating will have the same opportunity to raise as concern as others.

38. The Explanatory Memorandum for the Bill indicates that there will be an increase in cases and some costings have been given for the NHS. We are aware that the implications of the Bill is not cost neutral and without activity analysis the actual financial costs borne by health bodies through implementation of the Bill is unknown. The Explanatory Memorandum assumes cost avoidance as a result of the additional work under the Bill; whilst the theory of this maybe possible, there is no clear evidence that the reality will be realised. The Evans^{iv} report has been clear in the recommendations that concerns teams need to have the necessary resources in terms of appropriate staffing levels. Whilst the PSOW office would have additional resource of £270,000 per annum these proposed changes will have a domino effect upon NHS concerns teams and this should also be resourced appropriately. A clear funding formula will be required so this does not impact on the public finances and there will need to be a comprehensive plan agreed with private healthcare providers.

39. The other element of costs to health bodies, as a result of both the existing and potential additional work as a result of the Bill, is the cost of financial penalties made by the PSOW, either as a recommendation in a final investigation report or increasingly as an early resolution settlement prior to investigation. Whilst the NHS does of course recognise that learning from cases can minimise penalties incurred, where the PSOW does make a penalty there is no financial framework in place and the amount levied is, it seems, dependent on the individual investigator; this leads to inequity for complainants.

Conclusion

40. In conclusion, the patient/ the public must be at the centre of the new Bill. There needs to be confidence that this Bill will enable the NHS and other public bodies to use its existing governance mechanisms, systems and processes to put things right to gain public confidence and to learn from any investigations and recommendations.

ⁱ Information received directly from Welsh Government Health & Social Services Group

ⁱⁱ Welsh Government <http://gov.wales/docs/statistics/2017/170628-national-survey-2016-17-infographic-en.pdf>

ⁱⁱⁱ Keith Evans, June 2014. Review of concerns (complaints) handling within NHS Wales – 'Using the gift of complaints'

^{iv} Keith Evans, June 2014. Review of concerns (complaints) handling within NHS Wales – 'Using the gift of complaints'