

John Griffiths AM
Chair, Equality, Local Government and Communities
Committee

8 February 2018

Dear John,

PUBLIC SERVICES OMBUDSMAN (WALES) BILL

Further to correspondence from the Clerk on 26 January 2018, I attach my response to the report of the Equality, Local Government and Communities Committee's Expert Adviser.

As noted in my evidence on 25 January 2018, I welcome the Committee's decision to commission an expert adviser to report on the financial implications of the Bill since this represents best practice.

I am pleased to note that the Committee's Expert Adviser is "very supportive" of the extension to the powers of the Public Services Ombudsman for Wales (the Ombudsman) in the four main areas set out in the Bill and Explanatory Memorandum. I welcome the observation that the ability to undertake own initiative powers is important and has potential to secure significant benefits. Also that better complaint handling would lead to a better service for individuals, have the scope to improve services as a result of learning from complaints and ultimately reduce costs through fewer complaints being received by the Ombudsman.

As well as respond to the report of the Committee's Expert Adviser, I would like to provide some further information and clarity on some of the issues that were raised with, and by, the Committee. This is also attached to this letter.

Yours sincerely



Simon Thomas AM

Chair

Croesewir gohebiaeth yn Gymraeg neu Saesneg.

We welcome correspondence in Welsh or English.



Responses to the Expert Adviser's Report

Consideration of assumptions used in the RIA

1. Is the growth in caseload a structural increase or is it out of trend?

If it is not a structural increase then careful consideration would need to be given before using an assumption of 12% increase in caseload per annum over the next five years (paragraph 2.1).

As noted at paragraph 11.29 of the Explanatory Memorandum, the Finance Committee has calculated the cost estimates using the Ombudsman's projections for his caseload. This reflects the knowledge and experience of this office. The Finance Committee considered that this represented the best estimate for the purpose of the Regulatory Impact Assessment (RIA). However - for sensitivity analysis - the RIA also sets out the projections of caseload and the related cost of an increase of 5 per cent. More information is set out at Question 3 below.

2. **If further work is to be undertaken on the RIA then it may be worth considering using the costs of the three elements of the Ombudsman's caseload in a more nuanced analysis (paragraph 2.4)**

The Committee's Expert Adviser notes that the management of enquiries, assessment of complaints and investigations have significantly different costs. He notes that, "if further work is undertaken on the Regulatory Impact Assessment, it may be worth considering using the costs of all three in a more nuanced analysis".

The Finance Committee similarly noted this issue when considering the initial costings and assumptions provided by the Ombudsman. The Ombudsman advised that his office was not able to provide unit costs for the different elements of his caseload. Members concluded that using the expenditure incurred by the Ombudsman for his complaints handling service, as reported in his audited annual report and accounts, to derive the unit cost per case would provide the best estimate for the RIA.

The issue of differential costs was again explored by the Finance Committee during its scrutiny of the Ombudsman's Estimate 2018-19. The Ombudsman's office told the Finance Committee that it does not break down their costs in a way that would facilitate the reporting of the differential costs of the Ombudsman's workload. To do so would require the completion of detailed timesheets and staff were not sure of the cost/benefit of doing so.

The Finance Committee considers the issue of differential costs important in the context of the resources available to the Ombudsman's office. In its Report, [Scrutiny of Public Services Ombudsman for](#)

Wales's Estimate 2018-19, the Finance Committee recommended that, given the pressures on funds for public services, the Ombudsman demonstrates clearly the reasons for any additional resources to manage an increasing caseload, including the differential cost of elements of his work and the related financial pressures.

- 3. It is recommended that, in calculating the increase in the Ombudsman's caseload, a 6% or 8% model is used and that this be used in all relevant analyses (paragraph 2.5)**

As noted at paragraph 11.30 of the Explanatory Memorandum, the Ombudsman's projections for his caseload assume an annual increase of 12 per cent.

The Finance Committee considered this assumption, noting the annual changes in caseload over the period 2010-11 to 2015-16. Members also noted evidence given by the Ombudsman during the Committee's scrutiny of the Estimate 2017-18. This had indicated an increase between 5 and 6 per cent per annum. The Finance Committee opted also to set out the caseload numbers and related cost for an increase of 5 per cent per annum. While this was lower than the Ombudsman's projections, the Finance Committee set out the likely range of the cost of the increase in caseload given that it is considered best practice to do so.

Power to accept oral complaints

- 4. It would be prudent to undertake a sensitivity analysis of the estimate of 10 per cent of complaints will be made by telephone using a higher figure such as 40% (paragraph 3.2) and using an increase in complaint numbers of 10% and 20% (paragraph 3.3).**

As noted in my evidence to the Committee, under the 2005 Act, the Ombudsman currently has discretion to accept an oral complaint as duly made. When exercising this discretion, the complaints advice team in the Ombudsman's office transcribe the complaint and send it to the complainant to be signed and returned. The Ombudsman has provided evidence to the Finance Committee that approximately 50 per cent of those to whom his office has sent a written record do not return it. This means that for every person who does complain, there is another who does not.

In preparing the RIA, the Finance Committee sought to estimate the impact of the proposal on the Ombudsman's caseload, differentiating between the likely additional costs to his office (the 'direct costs') and those incurred by listed authorities (the 'indirect costs'). Under existing legislation, the Ombudsman has a discretionary power to accept oral complaints as being duly made. The Ombudsman exercises this

discretion on a case-by-case basis when deciding whether to accept an oral complaint as being duly made. In removing the requirement to make a complaint in writing, the Bill removes the need for the Ombudsman to exercise the discretionary power. We have sought to estimate the **impact of this change**. Given existing provisions, not all oral complaints will represent an additional workload for the Ombudsman's office and listed authorities. Accepting that it is difficult to predict and the related uncertainties with the resulting figures, the Ombudsman's office has used its knowledge and experience to estimate the impact of the change.

Direct costs

While this aspect of the Bill will not change the Ombudsman's role in this regard – complaints will first need to be made to the public body that provided the service – it is anticipated that it will give rise to additional contact with, and enquiries made to, the Ombudsman's office. The Ombudsman has advised that he would not be able to accommodate the increase in his workload without additional resources. The RIA sets out an estimate of these additional direct costs. More information is set out at Question 5 below in respect of the estimate of the related cost.

Indirect costs

As required, the RIA also sets out the best estimate of the likely costs on listed authorities as a result of the proposal and the move from the discretionary power. These will be incurred in respect of the likely **additional complaints and investigations** that will give rise to additional costs for the listed authorities i.e. those over and above the complaints received under the 2005 Act and accepted as duly made.

As noted at paragraphs 11.72 and 11.73 of the Explanatory Memorandum, a number of assumptions have been made for the calculation of the cost of the move from a discretionary power. We are looking here at the impact on the listed authorities only. Therefore, rather than reflect the Ombudsman's total **caseload**, we have used the number of **complaints** about public bodies received by the Ombudsman in 2015-16, which were the latest available at the time of the preparation of the RIA. We have assumed that **10 per cent or 227 complaints** each year would be made orally under the Bill. However, 202 of these complaints each year would have been made under the discretionary power and therefore **do not represent additional complaints to listed authorities under the new provision in the Bill**. The remaining 25 complaints would be additional complaints for the Ombudsman to pursue with listed authorities and 6 of these would be investigated each year.

I note the Committee's evidence in respect of the level of oral complaints received by other ombudsmen and trust that we have

provided sufficient and appropriate evidence as to why they may not be directly relevant:

- **Scottish Public Services Ombudsman** - The evidence given to the Committee by the Scottish Public Services Ombudsman (SPSO) referred to 72 per cent of complaints being made orally. We understand that this relates to the SPSO's Scottish Welfare Fund Review Function. The Ombudsman's office told us that this is entirely different to the work of his office.

The Scottish Welfare Fund is a national scheme that provides a safety net for vulnerable people on low income through the provision of Community Care Grants and Crises Grants. From April 2016, the SPSO took on a role as the independent reviewer. Not only are service-users of the Scottish Welfare Fund usually from a highly vulnerable group but these are people who need immediate help, hence the need to pick up the phone. While the Ombudsman would expect some calls from vulnerable groups, the view is that the comparison is not relevant.

- **Financial Ombudsman Service** - The Committee's Expert Adviser refers, at paragraph 3.2 of his report, to the Financial Ombudsman Service's latest Annual Report, which indicated that about 43 per cent of contacts are by telephone.

As noted above, the RIA refers to the assumptions in respect of the number of **complaints**, while the Annual Report of the Financial Ombudsman Service refers to **proportion of contacts** by telephone. I understand that there is a significant difference between how many contacts are by telephone to the proportion of complaints made the same way. These are different figures to measure.

5. **It is suggested that the case for additional staff at a higher pay grade within the RIA has not been made and further information should be obtained from the Ombudsman (paragraph 3.6)**

The response to Question 4 sets out an explanation of the basis for the estimates of direct and indirect costs arising from the proposal to move from the discretionary power in respect of oral complaints. Essentially, that the proposal will result in an increase to the Ombudsman's workload arising from additional contact with, or enquiries from, people who believe that they have suffered hardship or injustice through service failure by a public body. This will require additional resources for the Ombudsman's office.

The Ombudsman considered the impact on the skills set needed for relevant staff. Not all members of the public who contact the Ombudsman wish his office to accept the matters that they raise with

staff as a complaint. Some members of the public want only to share their experience but, for various reasons, do not make a complaint.

When a complaint is made orally, the Bill requires the Ombudsman to confirm whether the person wishes for it to continue to be treated as a complaint. The Ombudsman is also required to ask whether the person wishes the complaint to be confirmed in writing. In the event that it is the case, the Ombudsman must make arrangements to do so. However, where this is not the case, a transcription does not need to be sent but the Ombudsman is required to keep a written record.

The Finance Committee accepted the Ombudsman's assessment that the change meant that the onus was now on a member of his staff, rather than the complainant (or caller) to establish details, such as the context of the issue, its nature, what injustice has been caused and the outcome sought, including whether the member of public wishes the Ombudsman to treat the matters raised as a complaint that has been duly made.

The policy intent of this proposal is to improve social justice and equal opportunities by ensuring that the Ombudsman's services are accessible to all citizens, including the most vulnerable and deprived, such as people with learning difficulties and the homeless. The Finance Committee was persuaded by evidence that taking an oral complaint was not an administrative function; it is a complex role. Evidence provided to your Committee, such that given by Hospice UK, local health boards and Social Care Wales, support this. They have noted that it takes both skill and time to take the right details from people and work through what can be very complex arrangements, often when people are vulnerable, possibly grief stricken and having already gone through the complaints process at the public body that provided the service. The Ombudsman's service is their 'last resort'.

For these reasons, the Finance Committee accepted the Ombudsman's assessment that the proposal would require the additional resources set out in the RIA.

The Committee's Expert Adviser also notes, at paragraph 7.3 that, without a move to online sign posting and complaint forms, there is a real risk that the costs associated with this proposal will be greater than thought. I understand that the Ombudsman's office already uses online signposting and an online complaints forms. However, the policy intent for the proposal to accept oral complaints as being duly made is not about trying to move complaints from paper form to online but rather about ensuring the most vulnerable can access the Ombudsman's services. As noted at paragraph 3.11 of the report of the Committee's Expert Adviser, research evidence indicates that "many people with legitimate grounds for complaint do not do so and that they

can be deterred from making a complaint by even minor blocks in the process”.

6. Assuming that the number of additional complaints as a result of allowing oral complaints is correct, the Expert Adviser notes that the value of the costs to other public bodies has been overstated (paragraph 3.10).

The Committee’s Expert Adviser reports that total number of hours and the composition of staff involved in dealing with a complaint and investigation appear high. Hence, he concludes that the cost has been overstated.

Paragraphs 11.6 and 11.7 of the Explanatory Memorandum set out the stakeholder engagement undertaken by the Ombudsman and the independent company commissioned by his office to assist in the preparation of the RIA. This includes:

- seeking information from the 22 local authority complaints officers in Wales via the Chair of the Welsh Corporate Complaints Group;
- requesting information from NHS organisations via the NHS Wales Listening and Learning from Feedback Group; and
- seeking views as a meeting of the Welsh Corporate Complaints Group in respect of the best estimates of the indirect costs.

This engagement with stakeholders informed the estimate of the financial implications of the Bill for listed authorities (or ‘indirect cost’), which have been set out for low and high unit costs, thereby providing a range of the likely cost of the new provisions, which is considered good practice.

Own initiative investigations

7. A more realistic level for professional fees is £5,000 rather than £10,000 set out in the RIA (paragraph 4.5)

As noted in evidence I gave the Committee on 25 January 2018, the estimate of professional fees reflects the costs borne by the Ombudsman’s office. For the purpose of the estimate, the Ombudsman has assumed a requirement for 25 days of advice per year, which reflects the potential range, nature and complexity of cases.

8. Costs on public bodies (paragraph 4.6)

See response to Question 17 below.

9. Costs to public sector bodies are ‘nominal’ and should be able to be accommodated within the organisation’s existing resource (paragraph 4.10)

We note the Expert Adviser’s comment and have reflected this in our assumptions for the RIA (paragraph 11.47, Explanatory Memorandum refers). Whilst these figures are nominal and likely to be accommodated within existing resources, it is important that calculations are made to

quantify the impact of proposals in the legislation on other bodies and the Finance Committee is not in a position to recommend how these additional costs should be funded.

10. Caution must also be taken with respect to the hoped for 5% decrease in complaints arising from own initiative investigations (paragraph 4.12)

As noted at paragraph 11.34 of the Explanatory Memorandum, the Ombudsman's projections for his caseload assume that the increase will be mitigated by the power to undertake own initiative investigations, equating to 5 per cent of complaints made in 2015-16 by 2020-21 and the end of this Assembly term.

Evidence given to the Committee by witnesses, such as the Welsh Local Government Association, has acknowledged the difficulties in estimating the impact of the proposals, including the effect of legislative reform on behaviours.

The assumption in the RIA reflects the knowledge and experience of the Ombudsman's office. In the event that the Bill is enacted, the Ombudsman advises that his office is not expecting to achieve 'steady state' until three years after commencement of the new powers.

The assumptions also reflect the analysis undertaken in Northern Ireland for the preparation of new powers for the Northern Ireland Public Services Ombudsman to undertake own initiative investigations. The latter refers to achieving a reduction in caseload of 5 per cent **per annum** (or 40 complaints) as a result of own initiative investigations.

Investigating the private healthcare in public/private healthcare pathway

11. Will the number of complaints rise sharply following enactment (paragraph 5.2)

The estimate reflects an assumption that the power will result in 7 complaints per year involving care or treatment in a public/private pathway over the five years for which the RIA sets out costs and benefits.

The assumption was supported by evidence given to your Committee by witnesses, such as the Independent Healthcare Sector Complaints Adjudication Service (ISCAS) and the Welsh Independent Healthcare Association. The latter noted that, in its view, the provision would not create "an extra spike in the numbers of complaints".

In such cases, the Ombudsman will be investigating part of a complaint (rather than a whole complaint) and only where a matter cannot be

investigated effectively or completely without also investigating matters relating to the private health services.

The Ombudsman told the Finance Committee that he would not seek additional funding for this provision but would be able to absorb the related cost within existing resources (paragraph 11.119, Explanatory Memorandum). However, the Assembly's Standing Orders and best practice require costs to be quantified even when additional funding is not going to be allocated for changes to service delivery. The RIA adopts the Ombudsman's unit cost per case (£501) to estimate the cost; £3,507 per annum or £17,535 over 5 years.

12. The absence of indirect costs for private providers is a serious omission (paragraph 5.3)

This matter was explored by the Finance Committee with the Ombudsman in light of best practice, Standing Order requirements and its own considerations, including its inquiry into the costs of legislation.

As noted at paragraph 11.57 of the Explanatory Memorandum, the Ombudsman notes that he does not have access, or a right to access, to details of the number and the associated cost of complaints made about private health services. The Independent Healthcare Sector Complaints Adjudication Service (ISCAS) provides independent adjudication on patient complaints about ISCAS members but this does not cover all private healthcare providers. Other published data on the number of complaints does not cover all private healthcare providers.

Given this, the RIA notes that it has not been possible to estimate the value of indirect costs should legislation provide the Ombudsman with the power to consider complaints about all private health service providers. Therefore, the RIA notes that the cost impact on private health service providers is not known.

The Committee's Expert Adviser recommends that it would have been "reasonable to assume that the cost impact of the proposal would be similar to that on which will fall on the public sector". If this was assumed, using the low and high unit costs for a **full investigation** set out in Tables 15 and 16 of the RIA respectively would result in an estimate of costs between £12,117 and £15,099 per annum, or £60,585 and £75,495 to private health providers over five years (not including an annual cost of living increase in staff costs).

This was not an approach taken by the Finance Committee for two reasons. Firstly, the lack of evidence to support the assumption that the costs borne by private providers would be the same as those incurred by public sector bodies. Secondly, the low and high unit costs to public sector bodies set out an estimate for investigating the whole of a complaint. In these cases, the treatment or care from private health service providers would be an element in the public/private

pathway rather than the whole complaint. Therefore, the view was that it was not appropriate to use the same costs to estimate the financial impact on private providers. Tied in with the expectation that the expected number of complaints is seven a year, the omission of these unknown costs was not considered significant.

I also note evidence given to the Committee by ISCAS in respect of the availability of financial information set out in its reports. My understanding is that ISCAS reports the cost of adjudication and clinical experts. However, under the arrangements proposed in the Bill, these costs would not fall on private healthcare providers (other than in the exceptional circumstances set out in the Bill where providers have obstructed the work of the Ombudsman) where there is a complaint to the Ombudsman involving both public and privately commissioned healthcare. The cost to the private healthcare provider under the proposals in the Bill would be those arising from providing records, details of their investigation and their findings to the Ombudsman. ISCAS does not report the costs to private healthcare providers of providing information to ISCAS and cooperating with the ISCAS investigation/adjudication.

Complaints handling standards and procedures

- 13. While the RIA sets out the cost to public bodies of the development of complaint handling procedures but not related costs, such as time to be involved in their development, informing and training relevant staff on the new approach to complaint handling (paragraph 6.5)**

As noted in the response to Question 6, the Ombudsman and the independent company commissioned by his office to assist in the preparation of the RIA (OB3) engaged with stakeholders to prepare the best estimates of indirect costs. This suggested that the only additional costs to public bodies arising from the complaints standards authority role would be in respect of changes to systems, including IT systems. Public sector bodies would already be undertaking other activities under the existing provisions, such as training and dissemination of good practice. Also, the Ombudsman's office would use its current mechanisms of working with listed authorities, such as its sounding boards, regular liaison meetings with complaints handlers and the Welsh Local Government Association. As such, the cost of activities would not represent additional costs under the Bill.

- 14. The benefits identified in reduced complaints received by the ombudsman may be delayed (paragraph 6.2) but may be greater than estimated (paragraph 6.8)**

As noted at paragraph 11.34 of the Explanatory Memorandum, the Ombudsman's projections for his caseload assume that the increase will be mitigated by the complaints handling role, equating to 10 per cent of

complaints made in 2015-16 by 2020-21 and the end of this Assembly term. This assumption reflects the knowledge and experience of the Ombudsman's office, that 'steady state' will be achieved after three years but that the effect of the new power will continue to grow over the subsequent two years for which the costs/benefits of the Bill have been estimated in the RIA.

15. It is suggested that the Ombudsman be asked to provide details on the professional advice he believes is required (paragraph 6.3).

See response to Question 7 above.

Other matters

16. Additional costs would fall on different parts of the public sector

Paragraph 11.46 notes that it is not possible to predict in respect of which public bodies the increase in future caseload will relate. I understand that trends are not necessarily representative of future activity. For example, the Ombudsman set out the changes in the number of complaints within one sector, the NHS in Wales. This is noted in the Finance Committee's Report, [Scrutiny of Public Services Ombudsman for Wales's Estimate 2018-19](#):

The Ombudsman said that a large proportion of the increase in health complaints was due to a rise of 23 per cent in complaints received about Betsi Cadwaladr UHB and an increase in the volume of upheld complaints. Of the six public interest reports he had published, three related to that health board.

17. One-off transition costs and 'other staff costs' appear high. It is recommended that the Ombudsman provides details on the calculations used to arrive at these costs (paragraph 2.10)

In preparing the estimates, the Finance Committee sought not to understate the costs. The estimates reflect the costs borne by the Ombudsman and his office.

Transition costs

The transition costs include the estimate of the following for each additional member of staff:

- recruitment;
- desk and chair;
- file storage;
- telephone, computer and peripherals, monitors and stand;
- set up costs for the Ombudsman's ICT systems;
- basic office equipment;
- security pass;

- initial training/induction; and
- IT equipment for mobile working.

The Finance Committee considered that the estimate (£5,000 per member of staff) was reasonable.

Office costs

As noted in my evidence to the Committee, the Ombudsman advised the Finance Committee that his current office costs equate to around £13,000 per staff member. Not all costs increase with more staff. However, many costs do.

Ongoing costs included in the estimate are as follows:

- software licenses (including Microsoft, data encryption, virus protection and case management system);
- use of stationery;
- depreciation of office furniture and equipment;
- telephone usage and IT network usage and support costs; and
- communications costs and case-related costs such as professional specialist advice.

The Finance Committee considered that the figure of £5,000 per annum for each new member of staff was the best estimate, reflecting less than 40 per cent of current unit costs. It does not include costs that do not vary with changes in staff numbers, such as heating and lighting.

Training and travel

New staff will cover all of Wales and so will incur travel costs. A return train journey to, for example, Wrexham could cost £130. A typical training course could cost between £300 and £400 and the Ombudsman advises that the amount in the Explanatory Memorandum is in line with the training costs incurred by his office for existing relevant staff.

The Finance Committee recognised the need for training new staff for which the Ombudsman would incur additional costs and that staff would also not be wholly office based. Members sought not to understate the costs and concluded that the estimate at £1,000 per annum was reasonable.

No other benchmarking has been undertaken since the estimates reflect the actual costs borne by the Ombudsman's office. Also, it was not considered proportionate given the values involved.

Summary

I welcome the Committee's decision to commission the services of an expert adviser to report on the financial implications of the Bill. Obtaining an independent assessment is considered best practice and I hope that the Committee's approach is used, in future, as an exemplar for the development of estimates of the cost of legislation.

As recognised in evidence given to the Committee by some witnesses, such as the Northern Ireland Public Services Ombudsman, a significant amount of work has been undertaken to inform the estimate of the direct and indirect costs. This includes engagement with stakeholders by the Ombudsman and the independent company commissioned by his office to assist in the preparation of the RIA. A range of analyses has also been carried out to inform the assumptions on which the estimates are based.

The Finance Committee remains confident in its estimate of the overall costs and benefits. Members would consider any evidence that the Committee's Expert Adviser is able to provide that may improve the estimates and our understanding of the potential costs of the new provisions in the Bill. The Finance Committee would, however, need to balance any additional information against the evidence on which the assumptions and estimates have been based to ensure that the resulting costs continue to be calculated on a consistent basis. The Finance Committee will also seek to use the evidence provided by the Expert Adviser, such as that in respect of other staff costs and professional fees, in its future scrutiny of the Ombudsman's annual Estimate.

Other matters raised by the Committee

1. Criteria for own initiative investigations

The Committee sought my views on the Ombudsman's written evidence that the criteria for own initiative investigations, which are set out on the face of the Bill, may not necessarily cover all intended work in this area.

The Bill allows the Ombudsman to investigate each of the four scenarios the Ombudsman mentions in his evidence, provided always that where a scenario leads to an own initiative investigation:

- the criteria for own initiative investigations are met; and
- the procedures that apply to own investigations are followed (subject to the discretion the Ombudsman has in sections 16(3) and 16(4) in respect of preparing investigation proposals).

As noted in my evidence, the Finance Committee amended the draft Bill to include specific criteria that need to be met (and procedures that must apply) in respect of own initiative investigations. These have been drafted to ensure delivery of policy intent set out in the Explanatory Memorandum and RIA.

2. Sections 40 and 41

I responded to the Cabinet Secretary's observations in respect of Sections 40 and 41 of the Bill in evidence I gave on 25 January 2018 to the Committee.

3. **Section 8(5)**

The Cabinet Secretary's written submission to the Committee also sets out observations in respect of Section 8(5) of the Bill. This is a very important section of the Bill. If a person makes an oral complaint and then tells the Ombudsman that they do not wish the complaint to be treated as a formal complaint that has been duly made, then the Ombudsman should not use the power in section 3 to investigate that person's complaint. So, section 8(5) prevents the Ombudsman from continuing with the complaint via a section 3 investigation.

But the Ombudsman must still have the option of investigating using his own initiative under section 4 because there may be a serious issue which needs to be investigated. Under section 4, the Ombudsman can carry out an own initiative investigation without involving the person who made the oral complaint.

Therefore, I disagree with the Cabinet Secretary's assessment that the prohibition in section 8(5) is worthless.