

Mick Antoniw AM,  
Chair of the Constitutional and Legislative Affairs  
Committee

30 January 2018

Dear Mick,

## **PUBLIC SERVICES OMBUDSMAN (WALES) BILL**

Further to my evidence session before the Constitutional and Legislative Affairs Committee on 15 January 2018 in relation to the Public Services Ombudsman (Wales) Bill, I would like to provide some further clarity on issues that were raised by the Committee:

### **1. Retrospective element of own initiative investigations under section 4 and section 44**

Retrospectivity is not a test of legislative competence, but human rights are part of the test of legislative competence. Therefore, the drafting of sections 4 and 44 was considered in light of human rights in particular.

To the extent that there is any interference with human rights, it can be clearly justified given the way that section 5(2) and section 45(2) are drafted – there must still be a **current and ongoing** issue around injustice and hardship. For example, if something happened 12 months before Royal Assent that: (a) is still today likely to be causing a **vulnerable or disadvantaged person** to be suffering injustice or hardship, or (b) is still today likely to amount to a **systemic failure** (bearing in mind that a systemic failure is going to affect dozens, hundreds or even thousands of people), then it is only right that the Ombudsman can investigate.

If a cut-off point of, say, 24 months before Royal Assent was included and the Ombudsman became aware of a serious ongoing issue as a result of something that was done 24 months and 1 day before Royal Assent, then the Ombudsman would not be able to help people and help secure better public services. That was not considered the right thing to do.



The Bill gives the Ombudsman discretion to make the right judgment, depending on the circumstances of the case. The Ombudsman also has that discretion in relation to section 3 investigations. Section 3(4) gives the Ombudsman that discretion in respect of section 3 investigations, and that discretion has been copied from section 2(4) of the Public Services Ombudsman (Wales) Act 2005 (the 2005 Act). Again, the discretion given to the Ombudsman under the 2005 Act is designed to give him flexibility, depending on the circumstances of each case before him. There is **no time limit** to the discretion in the 2005 Act.

In any event, how much interference is there really with human rights? The ultimate sanction under the Bill is that a report is made in respect of a listed authority; there is no fine and there is no legal duty to implement any recommendations made by the Ombudsman in a report. Yes, the Ombudsman has the power to require documents as part of an investigation, but that is a limited and justifiable interference with human rights. When you balance a request for documents with, say, the public interest of preventing vulnerable people from suffering injustice or hardship (there must always be an element of injustice or hardship) then such limited interference can clearly be justified.

Further, ignoring issues that happened before Royal Assent could amount to breaching people's right to a remedy when they have suffered injustice or hardship. Such remedies can have a real impact on their Article 8 rights (under the European Convention on Human Rights), so allowing the Ombudsman to investigate matters before Royal Assent also helps protect the human rights of individuals who have suffered injustice or hardship (who are almost always the most vulnerable people in our society).

Adding all of the above together, I do not believe there is a breach of human rights.

## **2. Consulting with other commissioners, regulators and statutory advisers**

There has been much discussion around sections 65 and 66 of the Bill, which provide for the Ombudsman to work with other commissioners, regulators and statutory advisers.

With regard to sections 65 and 66, they take things forward significantly when compared to the 2005 Act as they make significantly greater provision for consultation and bringing various bodies together. As has been noted, the Ombudsman **must** consult and inform such bodies when he considers **appropriate**. Given that the Ombudsman is subject to the general principles of public law (including a duty to act reasonably, proportionately and to take relevant considerations into account), the Ombudsman does not have that great a discretion as to what is appropriate, so the duty to inform and consult under sections 65 and 66 is a very important duty.



In any event, the Ombudsman **must** consult all relevant persons when deciding whether to begin an own initiative investigation. This duty is clearly set out in section 4(3) of the Bill – there is no escaping this duty. The Ombudsman must consult appropriate persons when deciding whether to begin, continue or discontinue an own initiative investigation. So, for example, if the Ombudsman was deciding whether to carry out an own initiative investigation in respect of a health matter that was also relevant to the Health Inspectorate Wales (HIW), then the Ombudsman would have to consult HIW. If the Ombudsman failed to do so, he would not be acting within his powers and his decision not to consult HIW could be challenged in the courts.

With regard to own initiative investigations, the Ombudsman also has a duty to prepare an investigation proposal and send it to the listed authority under investigation. This is designed to help transparency and to get people talking to each other at an early stage.

The cumulative effect of the above is that the Bill contains significant provision for consultation.

### **3. Powers to work with the Children’s Commissioner for Wales**

I agree that there is a better way to deal with the issue of how the Ombudsman and the Children’s Commissioner in Wales work together and that setting out that detail on the face of the Bill is a better approach than leaving the detail to the Welsh Ministers to make subordinate legislation.

There was discussion and agreement between my officials and the Cabinet Secretary for Finance’s officials on this point.

### **4. Section 78 – no power to amend primary legislation**

Section 78 of the Bill is a narrower version of section 43 of the 2005 Act.

Section 43 of the 2005 Act includes a power to amend primary legislation that was passed before the end of the 2004/2005 Session of the UK Parliament. So the power in section 43 is limited in scope.

The power in section 43 has not been used for 12 years (11 years and 10 months).

An alternative approach to including a Henry VIII element in section 78 of the Bill would be to:



- make all consequential amendments to primary legislation on the face of the Bill, and
- broaden the scope of the transitional provision in section 78(3) of the Bill to capture in one sweep any amendments that may have been missed from the face of the Bill.

I am happy to explore further the consequential amendments that are needed to primary legislation (and that are not already achieved by section 78(3)) and to discuss with the Cabinet Secretary whether the above alternative approach might still leave gaps in consequential amendments, meaning that the Henry VIII power would need to be included in section 78 (and whether that should be limited to a power to amend primary legislation made before the Bill becomes an Act, along the lines of how section 43 of the 2005 Act was limited, as noted above).

## **5. Recovering other costs from private health services providers**

The only costs that may be recovered are those incurred as a result of the private health services provider obstructing the Ombudsman.

The Bill does not allow the Ombudsman to recover the full costs of investigation because of human rights issues. Investigating the listed authorities that are public bodies does not raise the same human rights concerns, but once you move towards private companies you have to consider human rights very carefully where you might be interfering with their possessions (as we learned from the Supreme Court judgment in the Asbestos Bill case).

If the Equality, Local Government and Communities Committee (ELGC) wishes to explore the possibility of recovering other costs from private health services providers then it should be based on evidence and it should be subject to thorough debate – that is how human rights issues should be dealt with in order to help avoid the risk of a legal challenge. If the ELGC Committee carries out that debate then we will of course listen and consider what amendments could be made to the Bill.

## **6. The meaning of “expedient” in section 78**

In addition to the points I made before the Committee, I would like to add some further principles that confine the meaning of “expedient” in the context of this Bill. I accept that “expedient” has a subjective element and it is not a hard-edged term. But there are two important limitations on the use of the “expedient” power:

- the Welsh Ministers must act proportionately and reasonably as a matter of public law. So, for example, the Welsh Ministers cannot use the “expedient” power in a disproportionate way or in an irrational way;



- the Welsh Ministers cannot use this expedient power (or any other power in the Bill) in such a way as to frustrate the purposes of the Bill. This is a well-established legal principle, called the Padfield principle, that the courts will enforce. One clear purpose of this Bill is to help people who have suffered injustice or hardship, and no matter how wide a power is in the Bill, the Welsh Ministers cannot use the power to frustrate that purpose – to do so would be acting illegally. So in the context of this particular Bill, that is a very important limitation on the use of powers.

And, of course, any inappropriate use of these powers would be brought to the attention of this Committee and the Committee would prepare a report criticising the inappropriate use before any vote is taken in Plenary.

I am copying this letter to the Chair of ELGC Committee which is currently undertaking Stage 1 scrutiny of the Bill. I very much look forward to considering the reports of the Constitutional and Legislative Affairs Committee and the ELGC Committee, with a view to bringing forward the necessary amendments at Stage 2 should evidence support your views.

Yours sincerely



Simon Thomas AM

Chair

*Croesewir gohebiaeth yn Gymraeg neu Saesneg.*

*We welcome correspondence in Welsh or English*



