

**National Assembly for Wales**  
Finance Committee

**Consideration of Powers:  
Public Services Ombudsman for  
Wales**

May 2015

Cynulliad  
Cenedlaethol  
Cymru

National  
Assembly for  
Wales



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Finance Committee  
National Assembly for Wales  
Cardiff Bay  
CF99 1NA

Tel: 0300 200 6565  
Email: [SeneddFinance@assembly.wales](mailto:SeneddFinance@assembly.wales)  
Twitter: @SeneddFinance

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# Finance Committee

The Committee was established on 22 June 2011. The Finance Committee's role is to carry out the functions set out in Standing Order 19. This includes consideration of the use of resources by the Assembly Commission or Welsh Ministers, and in particular reporting during the annual budget round. The Committee may also consider any other matter relating to expenditure from the Welsh Consolidated Fund.

Their remit also includes specific statutory powers under the Public Audit Act 2013 relating to new responsibilities for governance oversight of the Wales Audit Office.

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## Current Committee membership:



**Jocelyn Davies (Chair)**  
Plaid Cymru  
South Wales East



**Peter Black**  
Welsh Liberal Democrats  
South Wales West



**Christine Chapman**  
Welsh Labour  
Cynon Valley



**Mike Hedges**  
Welsh Labour  
Swansea East



**Alun Ffred Jones**  
Plaid Cymru  
Arfon



**Ann Jones**  
Welsh Labour  
Vale of Clwyd



**Julie Morgan**  
Welsh Labour  
Cardiff North



**Nick Ramsey**  
Welsh Conservatives  
Monmouth

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## Chair's Foreword

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The Public Services Ombudsman for Wales has a vital role in ensuring that any member of the public who believes they have suffered injustice through maladministration or service failure by a public body, are able to make a complaint with the reassurance that their complaint will be dealt with fairly and independently by the Ombudsman.

During this inquiry, the Committee considered extending the powers of the Ombudsman. We heard from the Ombudsman that whilst the current Act governing his role had been effective over the past 10 years, there is a need to future-proof legislation and ensure it is citizen-centred.

The Ombudsman had five particular areas that he believed would improve the current Act. These included own initiative investigation powers, oral complaints, complaints handling across public services, extending the Ombudsman's jurisdiction to include the private healthcare providers (in certain circumstances) and links with the courts. These issues and others are explored in detail in this report.

The Committee agrees that changes are required to strengthened the Ombudsman's role and to ensure the most vulnerable individuals, who are often most reliant on our public services feel confident in complaining to the Ombudsman and have the right to a fair response to their complaint.

Throughout this inquiry we heard a great deal of evidence, much of which has shown how important the Ombudsman's role is. Undoubtedly we would all like to see a future in Wales that provides excellent public services but should that service fall short of an individual's expectations, they need to have the confidence in the Ombudsman to investigate. We hope that should our recommendations be implemented this will enhance the role of the Ombudsman in Wales and increase public confidence.

I would like to thank everyone who has contributed to this inquiry; your input has been incredibly valuable in developing the views and recommendations of the Committee.

A handwritten signature in black ink that reads "Jocelyn Davies". The signature is written in a cursive, flowing style.

**Committee Chair, Jocelyn Davies AM**



## Summary of Recommendations

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The Committee's recommendations are listed below in the order that they appear in this report. Please refer to the relevant pages of the report to see the supporting evidence and conclusions.

**Recommendation 1.** The Committee is persuaded by the evidence that there should be a revision to the powers of the Ombudsman. The Committee recommends that a bill is introduced into the Assembly to extend the role of the Ombudsman. (Page 20)

**Recommendation 2.** The Committee recommends that if a bill is introduced, consultation on a draft bill should be undertaken to ensure engagement with public bodies and the general public affected by the legislation and policy intentions. (Page 20)

**Recommendation 3.** The Committee recommends that should a bill be introduced, provisions should be included which provide the Ombudsman with powers to initiate own investigations. (Page 31)

**Recommendation 4.** The Committee recommends that when the Ombudsman exercises this power there must be:

- sufficient evidence to support an investigation; and
- consultation with Commissioners, relevant stakeholders and any other person the Ombudsman considers appropriate. (Page 31)

**Recommendation 5.** The Committee recommends that should a bill be introduced, it should include a provision requiring the Ombudsman and the Auditor General to take account of each other's views before exercising the relevant functions and to co-operate with one another in so far as they consider is necessary for the effective exercise of those functions. (page 31)

**Recommendation 6.** The Committee recommends that should a bill should include provision for joint and collaborative working with the Children's Commissioner (along similar lines to those currently applicable to the Older People's Commissioner for Wales and the Welsh Language Commissioner). (page 32)

**Recommendation 7.** The Committee recommends that should a bill be introduced, the Ombudsman should have full discretion to decide how complaints can be made and must issue guidance specifying the accepted methods. This should allow the Ombudsman flexibility to react to changing methods of communication in future. (Page 38)

**Recommendation 8.** The Committee recommends there should be a mechanism to ensure that if a complaint is made orally, the complainant is made fully aware that a formal complaint has been instigated and understands the implications of this. (Page 39)

**Recommendation 9.** The Committee recommends should a bill be introduced, the Ombudsman should have a statutory complaints handling role. This complaints role should include provisions to:

- publish a model complaints handling policy for listed authorities;
- require regular consultation with relevant stakeholders;
- require public bodies to collect and analyse data on complaints; and
- ensure a standardised language is used by public bodies when collecting data to ensure comparisons can be made. (Page 47)

**Recommendation 10.** The Committee recommends that any model complaints handling policy should be supported by a training programme and promotional materials for staff in public bodies. (Page 47)

**Recommendation 11.** The Committee recommends that should a bill be introduced, the Ombudsman's jurisdiction should be extended to enable him/her to investigate the whole complaint when a combination of treatment has been received by public and private healthcare providers and when that treatment has been initiated in the NHS. (Page 57)

**Recommendation 12.** The Committee is concerned that patients using services provided in Private Patient Units have no ability to complain to any external body about their treatment The Committee recommends that the Welsh Government work with the Health Inspectorate Wales to resolve this apparent anomaly and report back to the Committee. (Page 57)

**Recommendation 13.** The Committee recommends that the Welsh Government liaises with the UK Government on the European Directive on Alternative Dispute Resolution and how it will affect the Ombudsman's role. (Page 57)

**Recommendation 14.** The Committee recommends the Welsh Government should respond to the Law Commission's 2011 Report. (Page 68)

**Recommendation 15.** Due to the legal complexities and the issue of the competence of the Assembly, the Committee concludes that changes should not be made in relation to the statutory bar, stay provisions and referral of a point of law at this time. However, the Committee recommends the Welsh Government explore these issues with the UK Government as part of future devolution discussions. (Page 68)

**Recommendation 16.** In relation to jurisdiction the Committee recommends should a bill be introduced, it should encompass all public authorities that provide services within Wales and that the inclusion of non-devolved bodies providing public services in Wales should be explored (including Boards of Conservators in Wales). (Page 71)

**Recommendation 17.** The Committee acknowledges the Ombudsman's commitment to raise the issue of protecting the title 'Ombudsman' with his counterparts when he meets with the Ombudsman Association and the Committee would be interested to hear the outcome of this discussion. The Committee suggests the Ombudsman liaises with the Welsh Government on this issue. (Page 75)

**Recommendation 18.** The Committee recommends the Welsh Government considers mandatory training for elected members as part of their consideration of forthcoming legislation on Local Government reform. (Page 77)

# 1. Introduction

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## Background

1. The role of the Public Services Ombudsman for Wales (“the Ombudsman”) was established by the [Public Services Ombudsman \(Wales\) Act 2005](#) (“2005 Act”). This Act brought together the previous functions and powers of the Local Government Ombudsman, the Health Service Commissioner for Wales, the Welsh Administration Ombudsman and Social Housing Ombudsman for Wales.
2. The 2005 Act was intended to:
  - make the Ombudsman service in Wales more accessible to the public, as people were either unaware of the service or confused about which Ombudsman to approach;
  - enable the Ombudsman to develop a comprehensive and coherent system for investigating complaints across a wide range of public bodies; and
  - establish clear accountability by requiring the Ombudsman to produce an annual report to the National Assembly for Wales (“the Assembly”) on the discharge of his/her functions;<sup>1</sup>
3. The Ombudsman’s role is split into two distinct parts:
  - to consider complaints by members of the public about maladministration or failure by public bodies in the provision of services; and
  - to consider complaints that local authority members or employees may have breached a relevant code of conduct.

## Calls for changes to the 2005 Act

4. Since 2013, there have been calls to extend the powers of the Ombudsman’s role, by the previous Ombudsman, Peter Tyndall and the current Ombudsman, Nick Bennett. The Communities, Equality and Local Government Committee (“CELG Committee”) and the Finance Committee scrutinise the work of the Ombudsman and the financial considerations of the Ombudsman’s office. Both Committees have been involved in consideration of extending the role the Ombudsman.

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<sup>1</sup> Memorandum to the Welsh Affairs Committee: post-legislative assessment of Public Services Ombudsman (Wales) Act 2005

In addition discussions had taken place with the Welsh Government about the issue during this time.

5. In May 2013, the then Ombudsman (Peter Tyndall) wrote to the Chair of the CELG Committee setting out his views for changes to the 2005 Act. These included:

- **own initiative powers** to enable the Ombudsman to initiate an investigations without having first received a complaint about an issue;
- **access** to the Ombudsman including allowing **oral complaints** to be accepted;
- to provide the Ombudsman with a role in **complaints handling across** public services;
- to extend the Ombudsman's **jurisdiction** to ensure there is access to independent redress for all public services, even when these services have been provided by the private sector, (such as **private healthcare sector**).
- **links with the courts** to remove the statutory bar that prevents the Ombudsman from investigation a complaint that may have recourse in the courts;
- to ensure the Ombudsman's **findings are binding**, so that bodies could not reject the findings, unless through the courts;
- to ensure the Ombudsman's **recommendations are binding** and bodies could not decide to reject or disregard them (this is not an issue with public bodies but when/if private bodies are within jurisdiction the democratic process cannot be engaged in the same way and compliance may be harder to secure);
- **protecting the title "Ombudsman"** so that any private bodies intending to use the title, would have to satisfy the key criteria of the concept such as independence from those in jurisdiction and be approved by the Ombudsman;
- **funding mechanisms** for private providers that are within the Ombudsman's jurisdiction to ensure the taxpayer does not bear the cost. Private sector ombudsmen schemes are normally funded by the bodies in their jurisdiction, by an annual levy, on a case-by-case basis or a combination of both to ensure the "polluter pays". In this context, the principle of the polluter pays

is that it gives providers an incentive to avoid error and resolve complaints as a means of not incurring costs;

- **links with the Assembly** to give the Ombudsman the power to formally lay a case before the Assembly, where the subject matter is such as to justify formally bringing it to their attention.

6. On 6 November 2013, the then Ombudsman (Peter Tyndall) (whose term of office was coming to an end) attended a meeting of the CELG Committee to discuss his annual report. As part of this meeting, the Committee heard that:

“the legislation in Wales [2005 Act] was groundbreaking when it was introduced, and it remains close to the forefront, but 2015 will be the tenth anniversary of that legislation and things have moved on.”<sup>2</sup>

7. Following the meeting, the CELG Committee wrote to the then Minister for Local Government and Government Business, Lesley Griffiths AM, asking for her views on amending the Act. In the Minister’s reply she said the Ombudsman raised worthwhile points. However, she believed more detailed consideration and discussion was needed around the issues, which should include discussions with the new permanent Ombudsman when they were appointed.

8. On 6 November 2014, as part of the Finance Committee’s consideration of the Ombudsman’s Estimate for 2015- 16, they heard from the new Ombudsman (Nick Bennett) that he believed there was an appetite to update the 2005 Act. The Committee’s report recommended the Ombudsman and the Welsh Government work together on a timetable for amending this.

9. In [response](#) to the recommendation, the Minister for Finance and Government Business, Jane Hutt AM, noted that as the Welsh Government is a public body subject to scrutiny by the Ombudsman, it would be more appropriate for the Assembly to lead on any legislative change given the Assembly’s responsibility for appointing and funding the Ombudsman. The Minister said that the Welsh Government would feed their views into any considerations of the Ombudsman’s powers

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<sup>2</sup> CELG Committee RoP, paragraph 109, 6 November 2013

but those views should be considered alongside those of other bodies subject to the Ombudsman's scrutiny.<sup>3</sup>

10. On [11 December 2014](#), as part of discussion of the Ombudsman's annual report, the CELG Committee heard from the current Ombudsman that whilst the 2005 Act had been an effective piece of legislation, there were areas that needed strengthening. He said:

“I would hope that there are four or five critical areas where we could make a real difference with a revising Act.”<sup>4</sup>

11. All five changes the Ombudsman proposed had been previously suggested by his predecessor. Including:

- own initiative powers;
- oral complaints;
- complaints handling;
- inclusion of private health within his jurisdiction; and
- links with the courts.

12. Subsequently, the CELG Committee wrote to the Finance Committee saying there was merit in reviewing the legislation but it would be difficult for them to devote the necessary time to it and as the Finance Committee had previously indicated an interest in this area of work, it may be something this Finance Committee would wish to pursue.

13. On 21 January 2015, the Ombudsman attended the Finance Committee to discuss his five proposal and submitted a [background paper](#)<sup>5</sup> which provided further detailed information on these proposals.

14. Following this session the Finance Committee agreed to undertake an inquiry into the additional powers suggested by the Ombudsman and other potential the areas of change that had been suggested by the previous Ombudsman. The Committee agreed that should the evidence support an extension of the Ombudsman's

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<sup>3</sup> Letter from the Minister for Finance and Government Business, 18 December 2014

<sup>4</sup> CELG Committee RoP, paragraph 67, 11 December 2014

<sup>5</sup> FIN(4)-01-15 Paper 1 - Amendments to the Public Services Ombudsman (Wales) Act 2005, 21 January 2015

powers the Finance Committee may consider the introduction of a Committee Bill under Standing Order 26.80.

### **Terms of scrutiny**

15. The Committee agreed to consider the following proposals as part of its inquiry:

- **own initiative powers** to enable the Ombudsman to initiate an investigations without having first received a complaint about an issue (page 21);
- to allow the Ombudsman to accept **oral complaints** (page 33);
- to enable the Ombudsman to have a role in **complaints handling across public services** (page 40);
- to **extend the Ombudsman's jurisdiction to include private health services** when a combination of treatment has been received by public and private healthcare providers and when that treatment has been initiated by the NHS (page 48); and
- **links with the courts**, including the removal of the statutory bar, stayed provisions and a referral on a point of law (page 58).

16. In addition, the Committee agreed to also consider the following:

- extending the Ombudsman's jurisdiction (page 69);
- whether recommendations of the Ombudsman to public bodies should be binding (page 71);
- protecting the title "Ombudsman" (page 73);
- the Ombudsman's role in dealing with code of conduct complaints (page 75); and
- any aspects of future planned or proposed public sector reforms that would impact on the role of the Ombudsman and the 2005 Act.

### **The Committee's approach**

17. Between 26 January 2015 and 20 March 2015, the Committee undertook a public consultation to inform its work. [43 responses](#) were received.

18. As the role of the Ombudsman cuts across ministerial portfolios, the Committee also wrote to all Welsh Ministers asking for their views



on the how the Ombudsman's proposals would impact on specific sectors within the Welsh Government's remit.<sup>6</sup>

19. In addition, the Committee held oral evidence sessions with a number of witnesses. Details are available at Annex A.

20. The following report details the Committee's conclusions and recommendations based on the evidence received during the course of its inquiry. The Committee would like to thank all those who contributed.

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<sup>6</sup> Letter from the Chair to Welsh Ministers, 15 January 2015

## 2. General issues and the need for change

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### Background

21. Whilst the majority of this report looks specifically at the Ombudsman's five proposals, this section considers the wider implications of a wholesale change to the legislation governing the Ombudsman.

22. The Committee considered the need for change, the scrutiny procedure followed for a Committee bill and the appropriateness of extending the Ombudsman's role at the current time given the expected public sector reforms in Wales.

### *Evidence from respondents*

#### Public sector reform

23. Following publication of the William's Commission Report,<sup>7</sup> which was tasked with examining governance and delivery of the public sector in Wales, a substantial part of the public sector in Wales is currently preparing for major change, with the expected legislation relating to local government reform.

24. The Committee was interested to hear respondents' views on whether changes to the 2005 Act would be better considered after any future planned or proposed public sector reforms.

25. The Older People's Commissioner for Wales ("Older People's Commissioner") believed any reforms to the Ombudsman's role should be "carried out in advance of wide public sector reforms so there is no delays in investigating concerns raised by individuals".<sup>8</sup>

26. The Auditor General was not concerned there was a "strong timing issue" for when the proposed changes to the Ombudsman's role should take place.<sup>9</sup>

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<sup>7</sup> Commission on Public Service Governance and Delivery Report, January 2014

<sup>8</sup> Written Evidence, PSOW 04

<sup>9</sup> Written Evidence, PSOW 07

## **The need for change**

27. There was consensus amongst respondents that the Ombudsman's current role was working effectively and the 2005 Act was generally considered as a model piece of Ombudsman legislation.

28. Dr Nick O' Brien,<sup>10</sup> a fellow at the Law School at the University of Liverpool said:

“the PSOW Act is already among the more developed examples of public-sector ombudsman legislation.”<sup>11</sup>

29. Other Ombudsmen referred to the increase in their workload over recent years. Dr Tom Frawley, the Northern Ireland Ombudsman<sup>12</sup> said there was now a much greater willingness by people to complain than in more recent years. He said “we're seeing a very significant expansion of complaints, which is reflected, I think in our workload”.<sup>13</sup>

30. Jim Martin, the Scottish Public Service Ombudsman (“the Scottish Ombudsman”) echoed this view saying he had “seen year-on-year increases in the number of complaints across sectors” and that “the largest single sector is local authority”.<sup>14</sup>

## **Scrutiny of a potential new bill**

31. The Welsh Local Government Association (“WLGA”) raised concerns that if the inquiry potentially led to new legislation, it could result in curtailed scrutiny given that a Committee Bill is not required to undertake Stage 1 scrutiny<sup>15</sup> and requested:

“...that should the Committee decide to move to legislation, that a Draft Bill is published to encourage the widest

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<sup>10</sup> Dr Nick O'Brien served as Specialist Adviser to the House of Commons Public Administration Select Committee (PASC) inquiries into complaints about public services and into the future of the UK Parliamentary Ombudsman and Health Service Ombudsman for England (PHSO), 2013 - 2014

<sup>11</sup> Written Evidence, PSOW 09

<sup>12</sup> The Northern Ireland Ombudsman combines two public offices, the Assembly Ombudsman for Northern Ireland and the Northern Ireland Commissioner for Complaints

<sup>13</sup> RoP, paragraph 137, 3 March 2015

<sup>14</sup> RoP, paragraph 120, 4 February 2015

<sup>15</sup> Standing Order 26.82

opportunity for consultation before the formal introduction of the Bill.”<sup>16</sup>

### ***Evidence from the Minister***

32. In response to the Committee’s letter to Welsh Minister’s seeking views on the Ombudsman’s proposals, the Minister for Public Services, Leighton Andrews AM (“the Minister”) responded on behalf of the Welsh Government. He said:

“These are important proposals and every member of the Cabinet values the role the Ombudsman plays in Wales”.<sup>17</sup>

33. The Minister also noted that on two previous occasions the Welsh Government had commented and broadly supported the proposals.<sup>18</sup>

34. The Minister understood the “desire of the ombudsman to expand some of the powers”.<sup>19</sup> However, he was concerned there are “a whole series of questions that arises from what he’s proposing”<sup>20</sup> and felt “it may benefit the Ombudsman’s office to make the case for new powers after these public service reforms embed and take effect”.<sup>21</sup>

35. In relation to the scrutiny process, the Minister was concerned about the “the pace of introduction of a piece of legislation...and whether there is sufficient opportunity to explore all of the issues” in the time remaining in the Fourth Assembly.<sup>22</sup>

36. The Minister was also concerned that the proposals could change the nature of the Ombudsman service, “moving away from the role of independent adjudicator championing citizens’ concerns” to “an enforcer issuing statutory guidance in their own right”.<sup>23</sup>

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<sup>16</sup> Written Evidence, PSOW 08

<sup>17</sup> FIN(4)-06-15 Paper 2 – Letter from the Minister for Public Services (on behalf of the Cabinet), 19 March 2015

<sup>18</sup> Responses from the then Minister for Local Government and Government Business 12 February 2014; and from the Minister for Finance and Government Business, 18 December 2015

<sup>19</sup> RoP, paragraph 213, 19 March 2015

<sup>20</sup> RoP, paragraph 216, 19 March 2015

<sup>21</sup> FIN(4)-06-15 Paper 2 – Letter from the Minister for Public Services (on behalf of the Cabinet), 19 March 2015

<sup>22</sup> RoP, paragraph 226, 19 March 2015

<sup>23</sup> Letter from the Chair to Welsh Ministers, 15 January 2015

### ***Evidence from the Ombudsman***

37. The Ombudsman said that in considering the case for change, he had focused 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.”<sup>24</sup>

38. The Ombudsman told the Committee that the 2005 Act had “stood the test of time well for the past 10 years”<sup>25</sup> and that:

“the Act, going forward, is fit for purpose and allows people to get the best out of our office and to make sure that we do have genuinely citizen-centred services in Wales.”<sup>26</sup>

39. In relation to public sector reform, the Ombudsman said:

“...I certainly feel that, to go through a reorganisation of complaints handling or new investment in IT or anything else following a reorganisation of local government in Wales would be a huge mistake.”<sup>27</sup>

### ***Our view***

40. The Committee is of the view that the 2005 Act is an important piece of legislation which has:

- enabled and facilitated public access to the Ombudsman’s services;

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<sup>24</sup> FIN(4)-01-15 Paper 1 - Amendments to the Public Services Ombudsman (Wales) Act 2005, 21 January 2015

<sup>25</sup> RoP, paragraph 10, 21 January 2015

<sup>26</sup> *ibid*

<sup>27</sup> RoP, paragraph 148, 25 March 2015

- enabled the resolution of disputes and provided redress for individuals; and
- in its focus on complaints handling in the public sector has stimulated improvement in the delivery of public services.

41. The Committee was disappointed with the Minister's lack of support at this time for a bill. The Committee notes that the Welsh Government's White Paper on reforming local government calls for citizen-centred services,<sup>28</sup> which could be delivered by the suggested amendments to the 2005 Act.

42. The Committee does not share the Minister's concerns that it would be more appropriate to consider legislation following the proposed local government reforms. The Committee believes there should be no delay in improving individuals' ability to raise concerns about services received by public bodies.

43. In relation to scrutiny of a bill, the Committee notes that in accordance with Standing Order 26.82, a Committee bill is not required to undertake Stage 1 scrutiny, the consideration of the general principles of the bill.

**The Committee is persuaded by the evidence that there should be a revision to the powers of the Ombudsman. The Committee recommends that a bill is introduced into the Assembly to extend the role of the Ombudsman.**

**The Committee recommends that if a bill is introduced, consultation on a draft bill should be undertaken to ensure engagement with public bodies and the general public affected by the legislation and policy intentions.**

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<sup>28</sup> Devolution, Democracy and Delivery White Paper – Reforming Local Government: Power to Local People

### 3. Own initiative investigations

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#### Background

44. The Ombudsman's powers to investigate complaints are contained in Part 2 of the 2005 Act. The Ombudsman is currently only able to investigate if a complaint has been made or referred to him/her.

45. The Ombudsman has called for 'own initiative investigation' powers, to enable him/her to initiate investigations without having first received a complaint about an issue. Investigations would be undertaken once the significance of the issue had been fully considered.<sup>29</sup>

46. In the Ombudsman's background paper he stated:

"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."<sup>30</sup>

47. The Ombudsman provided a list of scenarios where own initiative powers could be used. These included:

- enabling the investigation of broader or associated issues emerging from the investigation a specific complaint;
- an identification of systemic failings in one public service body which raise concerns that those same systemic failings may exist in other bodies within the same (or other) sector/s of the public service;
- the Ombudsman has received an anonymous complaint, providing evidence of likely maladministration/service failure on the part of an authority; and

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<sup>29</sup> FIN(4)-01-15 Paper 1 - Amendments to the Public Services Ombudsman (Wales) Act 2005, 21 January 2015

<sup>30</sup> *ibid*

- the Ombudsman may be made aware of concerns about service delivery across the whole, or part, of a sector of the public service in Wales, without receiving direct complaints.<sup>31</sup>

48. The Ombudsman estimated the cost of own initiative investigations at £80k-£100k, including on-costs, which would include two full time investigation officers.<sup>32</sup>

### ***Evidence from respondents***

49. A number of respondents, including One Voice Wales<sup>33</sup>, Citizens Advice Cymru<sup>34</sup> and the Wales Council for Voluntary Action (“WCVA”)<sup>35</sup>, were strongly in favour of the proposal to allow the Ombudsman to be more proactive, especially where there was evidence to suggest from individual cases that there could be a wider public interest issue. Most respondents felt this would enable widespread systemic maladministration or service failure to be addressed coherently, especially as vulnerable groups may be reluctant or unable to make a complaint.

50. Citizens Advice Cymru said:

“This would be of particular value when looking across cases and seeing the connections between a range of issues and being able to undertake a strategic review of a whole service or sector.”<sup>36</sup>

51. The WCVA noted that around the world the powers of ombudsmen have been evolving, with own initiative investigation powers being a key innovation, allowing ombudsmen to move from being largely reactive to influencing stakeholders.<sup>37</sup>

52. Dr O’Brien agreed and cited Canada and Australia as some of the best examples of ombudsmen from around the world. He said that

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<sup>31</sup> FIN(4)-06-15 Paper 3 – Further evidence from the Public Services Ombudsman for Wales, 25 March 2015

<sup>32</sup> FIN(4)-01-15 Paper 1 - Amendments to the Public Services Ombudsman (Wales) Act 2005, 21 January 2015

<sup>33</sup> Written Evidence, PSOW 06

<sup>34</sup> Written Evidence, PSOW 14

<sup>35</sup> Written Evidence, PSOW 12

<sup>36</sup> Written Evidence, PSOW 14

<sup>37</sup> Written Evidence, PSOW 12



own initiative investigations are “quite a different activity” and there “tend to be specialist units that pick up these complaints”.<sup>38</sup>

53. Citizens Advice Cymru said that a large number of people are reluctant to complain for a variety of reasons, including on-going relationships with public bodies and concerns about the implications of complaining and how it may adversely affect services they receive in future, particularly in the health and housing sectors.<sup>39</sup>

54. The Northern Ireland Ombudsman confirmed that currently legislation to modernise his role was before the Northern Ireland Assembly and one of the changes included own initiative investigation powers. He said it was a “huge development”<sup>40</sup> that he had “pursued and advocated for a number of years”<sup>41</sup> and felt it was “an integral part of the toolkit of an ombudsman”<sup>42</sup>.

55. The Northern Ireland Ombudsman provided an example of an own initiative investigation that had been undertaken by the Republic of Ireland Ombudsman, where the power is available under section 4(3) (b) of the [Ombudsman Act 1980](#).<sup>43</sup> He said:

“...The ombudsman became conscious that he’d had three or four complaints over a short time around what you might call subventions for the care of elderly people in nursing homes... The complaints from their relatives were that, actually, the money wasn’t being given to them, and the health boards were actually taking the money as part of a contribution to their care costs...if you look at the refund that was calculated as a result of that decision: €1.5 billion, when they went back over 25 years and they worked out how much money had not been given to very vulnerable, very fragile elderly people. So, that’s the most significant one...”<sup>44</sup>

56. One Voice Wales said that if intelligence is received which highlights concerns, the Ombudsman should have the power to

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<sup>38</sup> RoP, paragraph 309, 11 March 2015

<sup>39</sup> RoP, paragraph 157, 11 March 2015

<sup>40</sup> RoP, paragraph 149, 3 March 2015

<sup>41</sup> *ibid*

<sup>42</sup> RoP, paragraph 153, 3 March 2015

<sup>43</sup> Ombudsman Act 1980 (number 26 of 1980)

<sup>44</sup> RoP, paragraph 153, 3 March 2015

investigate to ensure that those individuals who are “unduly restricted for whatever reason from raising the alarm” are protected.<sup>45</sup>

57. The Auditor General was generally supportive but felt that the power should be used “sparingly”. He said that the Assembly’s scrutiny of the Ombudsman would “ensure that the power is not used excessively”.<sup>46</sup>

58. Concerns were raised by some respondents about the overlapping responsibilities of the Ombudsman with other independent commissioners and the Auditor General’s role. However, most respondents were satisfied that if proper mechanisms were in place for effective communication, the proposal could work effectively to minimise duplication of effort and resources.

59. The WLGA said its main concern was around managing the burden and avoiding duplication with other bodies. However, it thought “it could well lead to service improvements...it just needs to be managed with other partners and bodies that have similar functions as well”.<sup>47</sup>

60. The Children’s Commissioner for Wales (“the Children’s Commissioner”), the Older People’s Commissioner for Wales (“the Older People’s Commissioner”) and the Welsh Language Commissioner supported the proposal in principal, providing it didn’t “adversely impact on the scope and remit”<sup>48</sup> of their roles. They confirmed they currently have arrangements in place with the Ombudsman to ensure effective communication and collaboration of work, including [Memoranda of Understandings](#).<sup>49</sup>

61. The Children’s Commissioner for Wales (“Children’s Commissioner”) and the Older People’s Commissioner reinforced the need for the Ombudsman to consult with them on cases affecting their remit, to ensure they were able to contribute towards the investigation. They suggested this could be an “opportunity to firm up arrangements between ourselves and the Ombudsman in legislation”.<sup>50</sup>

62. On this point, the Auditor General agreed and said:

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<sup>45</sup> Written Evidence, PSOW 06

<sup>46</sup> Written Evidence, PSOW 07

<sup>47</sup> RoP, paragraph 231, 25 February 2015

<sup>48</sup> Written Evidence, PSOW 10

<sup>49</sup> Written Evidence, PSOW 04, 07, 10, 11

<sup>50</sup> Written Evidence, PSOW 10

“...it would be appropriate to include provision in legislation requiring the Ombudsman and the Auditor General each to take account of the other’s views before exercising the relevant functions and to co-operate with one another.”<sup>51</sup>

63. The Northern Ireland Ombudsman confirmed “it is built into the proposed legislation in Northern Ireland that the ombudsman will, in fact, engage with the comptroller and auditor general once a year to look at what the programme of scrutiny is going to be that year” to ensure a co-ordinated approach.

64. A number of respondents including Care Council Wales, WCVA and Citizens Advice Cymru highlighted the need for the Ombudsman to consult with stakeholders before deciding to initiate an investigation. Care Council Wales said:

“We would suggest that if this power is provided to the Ombudsman, it will be essential that bodies such as ourselves work closely with him/her and that consequently consideration is given to the establishment of information-sharing protocols which would set out each organisation’s responsibilities and which organisation should lead during an investigation, even though we are a listed authority in the Ombudsman Act. There is a good precedent for this as we have an information-sharing protocol in place with the Older People’s Commissioner for Wales.”<sup>52</sup>

65. Citizens Advice Cymru commented:

“We believe that there is potential for much greater engagement with the PSOW if his powers were extended to enable own initiative investigations. Citizens Advice Cymru could play a role in sharing relevant strategic information with the PSOW about the types of issues that clients are facing, as well as raising specific issues within and across sectors that would benefit from investigation.”<sup>53</sup>

66. The Scottish Ombudsman and the Northern Ireland Ombudsman both highlighted “the difference of function” of the Ombudsman and

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<sup>51</sup> Written Evidence, PSOW 07

<sup>52</sup> Written Evidence, PSOW 15

<sup>53</sup> Written Evidence, PSOW 14

the Auditor General.<sup>54</sup> The Northern Ireland Ombudsman said that an Auditor General “is focused primarily on probity and value for money”.<sup>55</sup>

67. One Voice Wales suggested a forum of key players could be established to consider the possible involvement of the Ombudsman in appropriate cases.

68. Whilst much of the evidence supported own initiative powers, respondents emphasised that there must be a clear evidence base in order for an investigation to be initiated.

69. The Northern Ireland Ombudsman agreed that “it must be evidence based and that there has to be a rationale for it”.<sup>56</sup> He said it could be possible to develop a set of criteria to be tested before an Ombudsman embarked on an investigation.

70. The Welsh NHS Confederation supported the Ombudsman being able to “undertake “own initiative” investigations where there is firm evidence of widespread maladministration or service failure affecting the population”.<sup>57</sup>

71. The Committee asked the Northern Ireland Ombudsman how he would identify when to carry out an investigation. He said the “first source of insight would be your own complaints analysis and profile”.<sup>58</sup> He said he would also be looking for patterns in trends, engaging with relevant sectors and he wouldn’t be “limited from looking at what the media is talking about in terms of major issues and concerns, because that’s what concerns the public”.<sup>59</sup>

72. A written response was received from a care worker in a local authority care home. The respondent highlighted the fact that the Ombudsman was unable to consider complaints from whistleblowers. The respondent felt that own initiative powers should be extended to ensure the Ombudsman is able to consider issues raised by whistleblowers.<sup>60</sup>

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<sup>54</sup> RoP, paragraph 213, 4 February 2015

<sup>55</sup> RoP, paragraph 158, 3 March 2015

<sup>56</sup> RoP, paragraph 156, 3 March 2015

<sup>57</sup> Written Evidence, PSOW 24

<sup>58</sup> RoP, paragraph 165, 3 March 2015

<sup>59</sup> *ibid*

<sup>60</sup> Written Evidence, PSOW 27

73. There were only a small number of respondents that did not support the proposal of own initiative investigations. Carmarthenshire County Council said an “investigation should be complainant led”.<sup>61</sup>

74. Abertawe Bro Morgannwg University Local Health Board said the power had the potential to be “confusing, both to the public and health bodies”. It referred to the number of inspectorates, regulators and commissioners and said it was difficult to see “where the gaps would be that would mean that the ombudsman...would need to undertake this and not be able to refer on to one of the bodies that are already in existence”.<sup>62</sup>

75. Wrexham County Borough Council remained:

“unclear as to what action or incident could cause the Ombudsman to begin an investigation if this were not prompted by a complaint.”<sup>63</sup>

### ***Financial Implications of Own Initiative Investigations***

76. In commenting on the financial resources, the Northern Ireland Ombudsman said his initial calculation would be approximately £180,000 a year which would allow for two or three major investigations each year. This would likely include a team of a director and two other officials who would need sufficient authority to carry out detailed interviews and investigative processes.<sup>64</sup>

77. He said that other officials with experience and knowledge of a particular subject may need to join the team on an ad hoc basis, “but the core investigator capacity needs to be invested in in terms of training and development”.<sup>65</sup> However, he felt the resource should be flexible to ensure that if the workload demanded this money could be used elsewhere.

78. The Auditor General agreed with the cost estimate provided in the Ombudsman’s proposal paper of “two full time investigation officers £80k-£100k” and thought this was “realistic in respect of sparing use

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<sup>61</sup> Written evidence, PSOW34

<sup>62</sup> RoP, paragraph 69, 19 March 2015

<sup>63</sup> Written evidence, PSOW23

<sup>64</sup> RoP, paragraph 168, 3 March 2015

<sup>65</sup> *ibid*

of own-initiative investigation powers—say one or two investigations each year”.<sup>66</sup>

79. The Auditor General said he was unable to predict the likely financial benefits of such powers but he hoped “that good use of such powers would lead to reduced levels of maladministration leading to efficiency savings as well as increased public satisfaction (and reduced harm and distress to individuals), but such benefits are very difficult to quantify, let alone predict”.<sup>67</sup>

80. Respondents including Citizens Advice Cymru and One Voice Wales agreed that “proper investigation of own initiative investigations could save time and money in the longer term but more importantly could prevent the continuation of poor practices which have adverse effects on individuals”.<sup>68</sup>

### ***Evidence from the Minister***

81. Prior to the inquiry, in [correspondence](#) the CELG Committee was told by the then Minister for Local Government and Government Business, that own initiative investigation powers would be beneficial in some circumstances, but could only be justified in exceptional and specific cases. The then Minister raised concern that the Ombudsman could be drawn into conducting whole-system critiques of sectors, which is more appropriate by the Auditor General rather than focusing on championing individual service users.<sup>69</sup>

82. The Minister was concerned that own initiative powers could interfere with the investigatory powers of existing bodies. In the Minister’s letter to the Committee,<sup>70</sup> he drew attention to the [Well-being of Future Generations \(Wales\) Bill](#) which at the time, was being considered by the Assembly<sup>71</sup>. He said this Bill would require specified public bodies to improve the economic, social and environmental well-being of Wales. He said:

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<sup>66</sup> Written Evidence, PSOW 07

<sup>67</sup> *ibid*

<sup>68</sup> Written Evidence, PSOW 06

<sup>69</sup> Letter from the Chair of the Communities, Equality and Local Government Committee, 17 December 2014 ([a copy of the Minister’s reply is annexed to this letter](#))

<sup>70</sup> Letter from the Minister for Public Services, on behalf of the Welsh Government, 17 February 2015

<sup>71</sup> This Bill subsequently received Royal Assent and became an Act on 29 April 2015

“The responsibility for ensuring these duties are adhered to will be vested in a Future Generations Commissioner for Wales who will be able to conduct reviews into how a public body is taking account of the long-term impact of what the body does under a well-being duty.”<sup>72</sup>

83. The Minister remained unconvinced by some of the arguments put forward by the Ombudsman. In relation to an ageing society who are unwilling or afraid to pursue complaints, he said:

“I’m not sure I buy that in the context of own-initiative inquiries; I buy that in the context of a need for advocates or others to take up issues. I think there may be a role there for the older people’s commissioner, for example, in that context.”<sup>73</sup>

84. The Minister did not feel that the Ombudsman had sufficiently justified the need for own initiative investigation powers. However, he said he was open to being persuaded on the issue.<sup>74</sup>

### ***Evidence from the Ombudsman***

85. The Ombudsman felt it was important that any changes to legislation should ensure the power would only be used in appropriate circumstances and he would “either co-operate with, or refer a matter to, another relevant public body” where necessary.<sup>75</sup>

86. He said that the need to initiate an investigation would be evidence based<sup>76</sup> and he wouldn’t be in a “position to take any significant resources away from...responding to day-to-day complaints from the public”.<sup>77</sup>

87. The Ombudsman believed that scrutiny by the Assembly would provide a mechanism for ensuring that he was performing in terms of his annual targets and he would therefore have to justify any use of

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<sup>72</sup> Letter from the Minister for Public Services, on behalf of the Welsh Government, 17 February 2015

<sup>73</sup> RoP, paragraph 243, 19 March 2015

<sup>74</sup> RoP, paragraph 244, 19 March 2015

<sup>75</sup> FIN(4)-06-15 Paper 3 – Further evidence from the Public Services Ombudsman for Wales, 25 March 2015

<sup>76</sup> RoP, paragraph 48, 21 January 2015

<sup>77</sup> RoP, paragraph 52, 21 January 2015

resources on own initiative investigations that had been diverted away from dealing with public complaints.<sup>78</sup>

88. On the issue of overlapping or conflict with other bodies, the Ombudsman said the Auditor General is “looking at the whole system, fundamentally, he’s tasked to ensure that there’s value for money. There is a difference between value for money and service failure and maladministration”.<sup>79</sup>

89. The Ombudsman confirmed the “PSOW Act already makes provision for the Ombudsman to be able to co-operate with the Older Person’s Commissioner and the Welsh Language Commissioner”.<sup>80</sup> He continued:

“I would propose that it would be opportune to extend the existing provision within the Act to include a similar provision to co-operate with the Auditor General for Wales and the Children’s Commissioner. This would also then lend itself to allow the Ombudsman to produce joint reports etc with such bodies if this was deemed appropriate in the circumstances.”<sup>81</sup>

90. He noted that the Children’s Commissioner is referred to in the 2005 Act, however, “it’s not in the same section as some of the other commissioners, so I think we could tidy that up”.<sup>82</sup> In response to the suggestion that a statutory duty should be placed on the Ombudsman to consult before initiating an investigation, he was concerned it “could lead to legal challenges on the interpretation of the legislation” and “complainants would be very frustrated if investigations were delayed or hampered by challenges which could be tactical in nature by those bodies who are the subject of an investigation”.<sup>83</sup>

91. The Ombudsman said own initiative powers would make it possible for him to consider issues brought to his attention through whistle-blowing. Currently, he is unable to do this as he must be “driven by the individual complainant”.<sup>84</sup> However, he said it was

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<sup>78</sup> RoP, paragraph 52, 21 January 2015

<sup>79</sup> *ibid*

<sup>80</sup> FIN(4)-06-15 Paper 3 – Further evidence from the Public Services Ombudsman for Wales, 25 March 2015

<sup>81</sup> *ibid*

<sup>82</sup> RoP, paragraph 174, 25 March 2015

<sup>83</sup> FIN(4)-06-15 Paper 3 – Further evidence from the Public Services Ombudsman for Wales, 25 March 2015

<sup>84</sup> RoP, paragraph 186, 25 March 2015



important to have a safeguard in place to test the evidence as he would be concerned about “vindictive and anonymous” aspersions that could be made.<sup>85</sup>

### *Our view*

92. The Committee acknowledges the broad support for own initiative investigation powers and believes this could be beneficial to the wider public, given that vulnerable groups are often unable or reluctant to complain. The Committee, whilst recognising the valuable advocacy roles of the Welsh Commissioners, believes there is scope for the Ombudsman to support some vulnerable groups that are not within the remit of the Commissioners.

93. In relation to the costs of own initiative powers, the Committee feels that £80k-£100k, including on-costs, is a realistic figure based on the Ombudsman undertaking one or two investigations each year.

94. The Committee notes the 2005 Act already makes provision for the Ombudsman to be able to co-operate with the Older Person’s Commissioner and the Welsh Language Commissioner, but the Children’s Commissioner is referred to in a different section.

**The Committee recommends that should a bill be introduced, provisions should be included which provide the Ombudsman with powers to initiate own investigations.**

**The Committee recommends that when the Ombudsman exercises this power there must be:**

- sufficient evidence to support an investigation; and
- consultation with Commissioners, relevant stakeholders and any other person the Ombudsman considers appropriate.

**The Committee recommends that should a bill be introduced, it should include a provision requiring the Ombudsman and the Auditor General to take account of each other’s views before exercising the relevant functions and to co-operate with one another in so far as they consider is necessary for the effective exercise of those functions.**

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<sup>85</sup> RoP, paragraph 186, 25 March 2015

**The Committee recommends that should a bill should include provision for joint and collaborative working with the Children's Commissioner (along similar lines to those currently applicable to the Older People's Commissioner for Wales and the Welsh Language Commissioner).**

## 4. Access and oral complaints

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### Background

95. Section 5 of the 2005 Act states that all complaints to the Ombudsman must be made or referred in writing. However, there is a discretionary power under section 2(4) which allows the Ombudsman to accept a complaint other than in writing if appropriate on a case-by-case basis.

96. Within the Ombudsman's office, there is a complaints advice team which will transcribe a complaint that has been made orally; this is then sent to the complainant to be signed and returned.

97. The Ombudsman stated in his background paper there was "no cost" in relation to this provision.

### *Evidence from respondents*

98. There was overwhelming support from respondents to the proposal to accept oral complaints. Most respondents agreed that requiring complaints to be submitted in writing could be a barrier to the service. Some respondents went further and suggested other forms of communication should be considered including email, text or social media given the changing nature of electronic and digital communication.

99. The Older People's Commissioner noted the importance of a written record to support a complaint but said that insisting a complaint is made in writing before any action could be taken could "create a barrier to some older people and others with protected characteristics".<sup>86</sup> She said:

"I would hope that in accordance with the principles and requirements of the [Equality Act 2010](#), that reasonable adjustments could be made to allow people to make complaints by email, in person or by telephone that could later be confirmed in writing or through alternative means e.g. with support from an advocate or where relevant an interpreter."<sup>87</sup>

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<sup>86</sup> Written Evidence, PSOW 04

<sup>87</sup> *ibid*

100. Healthcare Inspectorate Wales agreed that “it’s important that there is a record of what the complainant has said”<sup>88</sup> and raised the importance of signposting people to advocates, to ensure they receive appropriate support to make a complaint.<sup>89</sup>

101. Similarly, Citizens Advice Cymru said that the Ombudsman should be able to accept complaints through intermediaries such as advice agency acting on behalf of a complaint, which would be particularly beneficial for vulnerable individuals or those who do not feel confident to make a complaint themselves.<sup>90</sup>

102. The Welsh Language Commissioner said that the Ombudsman should be able to receive written complaints in Welsh and English and where reasonable, the right to receive verbal complaints should be extended to both languages.<sup>91</sup>

103. The Northern Ireland Ombudsman confirmed that legislation underpinning his role is similar to that in Wales. He has discretionary powers to accept oral complaints which his office record. However, receiving a complaint in writing has been extended to include online forms in a printed format or electronically.<sup>92</sup>

104. The Northern Ireland Ombudsman said that the Ombudsman should be able to accept oral complaints and that legislation needs to be more user-friendly and move beyond discretion. He felt it was discriminatory to rely on his discretion and the current situation was “patronising and condescending”.<sup>93</sup>

105. The WLGA said that local government bodies accept complaints orally via telephone or face-to-face through contact centres and some local government polices “encourages a more informal approach”.<sup>94</sup>

106. One Voice Wales agreed in principle but was concerned that it could increase the number of vexatious complaints as it could “open the floodgates to people just picking the phone up”.<sup>95</sup>

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<sup>88</sup> RoP, paragraph 139, 19 March 2015

<sup>89</sup> *ibid*

<sup>90</sup> RoP, paragraph 186 & 187, 11 March 2015

<sup>91</sup> Written Evidence, PSOW 11

<sup>92</sup> RoP, paragraph 189, 3 March 2015

<sup>93</sup> RoP, paragraph 195, 3 March 2015

<sup>94</sup> RoP, paragraph 238, 25 February 2015

<sup>95</sup> RoP, paragraph 241, 25 February 2015

107. The Auditor General was not convinced and stressed that the Ombudsman already had discretionary powers to accept oral complaints and suggested the advice the Ombudsman currently gives as to how complaints should be accepted could be set out in a model complaints procedure. However, he did suggest that the provision for own initiative investigations could help the Ombudsman address serious issues that have been raised orally but not confirmed in writing.<sup>96</sup>

108. During evidence, the Auditor General's official said that it could be seen as "nugatory work" if time is spent by the Ombudsman's office recording oral complaints, that aren't confirmed by the complainants. He continued:

"It is difficult to see how specifically providing for oral complaints actually gets around that problem, because at some stage there has to be some sort of check that what's transcribed is accurate, and, if someone doesn't want to proceed, they won't sign it off."

109. In 2010, the Law Commission undertook a review into the powers of Ombudsmen.<sup>97</sup> At the time of embarking upon its consultation it did not consider there to be any reason to alter the current position. However,

"...following receipt of all consultation responses, we concluded that there was **no need for any statutory requirements** (*emphasis added*) as to the form in which complaints to ombudsmen were made. We thought that removing these would allow public services ombudsmen to react to technological developments and changing preferences of service users without the need either for reform of the governing legislation or routine exercises of discretion to waive the requirement of a complaint in writing so as to keep pace with such developments or other changes."<sup>98</sup>

110. The Law Commission recommended that the Ombudsman "publish and regularly update guidance as to how complaints can be

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<sup>96</sup> Written Evidence, PSOW 07

<sup>97</sup> Law Commission's 2010 consultation focused on the Parliamentary Commissioner for Administration; the Health Service Ombudsman; the Local Government Ombudsman; the Housing Ombudsman and the Public Service Ombudsman for Wales

<sup>98</sup> Written Evidence, PSOW 13

made”. They felt that this “might have a particularly beneficial impact on individuals who have physical problems writing, who are illiterate or have reduced literacy, or who are not first language English or Welsh speakers”.<sup>99</sup>

111. The Law Commission continued:

“If a complaint reaches the ombudsman that’s within the ombudsman’s jurisdiction, the mere fact that it’s come on the telephone and not in writing should not be an obstacle to putting it to the public body in question and investigating it as necessary.”<sup>100</sup>

112. Some respondents felt whilst it was important to recognise the way people are communicating has changed, confidentiality must be maintained. The Independent Sector Complaints Adjudication Service (“ISCAS”)<sup>101</sup> commented:

“...it’s important that we don’t allow patients’ confidential details to be shared inadvertently.”<sup>102</sup>

113. The Northern Ireland Ombudsman shared this view on privacy and confidentiality and said that in relation to accepting complaints via social media his office was “certainly not ready yet to move in that direction”.<sup>103</sup>

### ***Financial implications relating to access and oral complaints***

114. ISCAS challenged the Ombudsman’s evidence that accepting oral complaints would have no associated costs. They said:

“...there would surely be an associated staff and time cost. Accepting telephonic complaints would require skilled staff to capture the complaint correctly, particularly as complaints referred to the Ombudsman tend to be of a complex nature. Furthermore, opening up the option of oral complaints will

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<sup>99</sup> Written Evidence, PSOW 13

<sup>100</sup> RoP, paragraph 32, 3 March 2015

<sup>101</sup> ISCAS deals with complaints across the UK independent healthcare sector

<sup>102</sup> RoP, paragraph 394, 4 February 2015

<sup>103</sup> RoP, paragraph 189, 3 March 2015

increase the number of complaints being self-referred to the Ombudsman.”<sup>104</sup>

115. The Auditor General agreed that making it easier to submit complaints orally could lead to more complaints, which would increase costs. However, he said “there may be real benefit to vulnerable people in making the submission and investigation of oral complaints easier”.<sup>105</sup>

### ***Evidence from Ombudsman***

116. In his background paper, the Ombudsman said the 2005 Act was generally helpful in providing access to the Ombudsman. However, he felt there was “a case to be made for modernising this area of the legislation” to ensure social inclusivity, given the changing nature of electronic communication and the considerable equalities issues which could potentially exclude people who are illiterate from complaining.<sup>106</sup>

117. The Committee also heard from the Ombudsman that the literacy levels in Wales are lower than the rest of the UK, with 94% of the population attaining literacy level 1 in the UK and only 87% in Wales. He said that “access for people who cannot write should not be discretionary. They should have the same access as any other service user in Wales”.<sup>107</sup>

118. Whilst the Ombudsman accepted that allowing oral complaints could increase the volume of complaints made, he noted that often time is spent by his staff, transcribing complaints that are not signed and returned by complainants. He said:

“...in terms of assisting those citizens in Wales who cannot, for whatever reason, provide us with a written complaint, that can take staff within our complaints advice team three or four hours. That’s in terms of going through all the issues that a particular complainant has, recording it, making sure that it’s as accurate as possible, then sending it to the complainant’s address, and 50 per cent of that activity currently is wasted.”<sup>108</sup>

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<sup>104</sup> Written Evidence, PSOW 01

<sup>105</sup> Written Evidence, PSOW 07

<sup>106</sup> FIN(4)-01-15 Paper 1 - Amendments to the Public Services Ombudsman (Wales) Act 2005, 21 January 2015

<sup>107</sup> *ibid*

<sup>108</sup> RoP, paragraph 205, 25 March 2015

119. On the issue of accepting complaints via alternative methods, the Ombudsman said his office was trying “to be more in tune with social media”,<sup>109</sup> but measures are needed to ensure there is control over whether a complaint is officially being made. He highlighted the benefit for some individuals making a complaint electronically for example:

“in terms of the homeless, for those people who don’t have a fixed abode they might still be able to do something electronically.”<sup>110</sup>

120. The Ombudsman’s official confirmed they have a system for directing individuals to advocacy services “we have links so we can signpost them [complainants] in that direction so that those bodies can help them to present their complaint”.<sup>111</sup>

### ***Our view***

121. The Committee considers the overwhelming evidence received suggests there should be no restrictions on how complaints are made to the Ombudsman and that restricting the available methods for making complaints could be a barrier, particularly for the most vulnerable groups.

122. In relation to costs, the Committee disagrees that there would be no associated costs as outlined in the Ombudsman’s background paper. However, the Committee acknowledges that it could lead to a reduction of time spent by the Ombudsman’s office transcribing complaints, which are then not formally submitted.

123. The Committee recognises there are practical concerns with extending how complaints can be made. The Committee strongly believes that provisions should be considered to ensure potential complainants are able to reflect on the consequences of informally raising an issue with the Ombudsman, before a complaint is formalised.

**The Committee recommends that should a bill be introduced, the Ombudsman should have full discretion to decide how complaints can be made and must issue guidance specifying the accepted**

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<sup>109</sup> RoP, paragraph 197, 25 March 2015

<sup>110</sup> RoP, paragraph 199, 25 March 2015

<sup>111</sup> RoP, paragraph 65, 21 January 2015



**methods. This should allow the Ombudsman flexibility to react to changing methods of communication in future.**

**The Committee recommends there should be a mechanism to ensure that if a complaint is made orally, the complainant is made fully aware that a formal complaint has been instigated and understands the implications of this.**

## 5. Complaints handling across public services

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### Background

124. To improve consistency in how public service providers deal with complaints, a group chaired by the Ombudsman developed [a Model Concerns and Complaints Policy and Guidance](#), which was subsequently issued by the Welsh Government.

125. Whilst the policy is adopted by local authorities on a voluntary basis, it is strongly encouraged by the Ombudsman. However the Ombudsman has said that “take up has been patchy, but is improving”.<sup>112</sup>

126. The Ombudsman would like steps to be taken to ensure organisations are obliged to adopt a standard approach in dealing with complaints. This new complaints handling role would involve collecting data on complaints and require public bodies to adopt consistent complaints policies. In his background paper, the Ombudsman said:

“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.”<sup>113</sup>

127. Under the [Scottish Public Services Ombudsman Act 2002](#), the Scottish Ombudsman may publish a model complaints handling procedure for listed authorities and specify any listed authority to which the model is to apply. The Scottish Ombudsman operates a [Complaints Standards Authority](#). The Ombudsman has proposed a similar approach in Wales with the aim to achieving speedier and simpler complaints handling with early resolution.

128. The Ombudsman estimated the cost of this provision as “two full time investigation officers – £80k-£100k, including on-costs”.

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<sup>112</sup> FIN(4)-01-15 Paper 1 - Amendments to the Public Services Ombudsman (Wales) Act 2005

<sup>113</sup> *ibid*

### *Evidence from respondents*

129. Most respondents were in favour of a streamlined, consistent approach to complaints handling to enable efficient practice to be embedded across public service bodies.

130. The Committee heard that the Scottish Complaints Standards Authority appeared well-regarded and encouraged ownership of policy and complaints management by public bodies. The Scottish Ombudsman said:

“...in the year and a half, two years, that we’ve been operating the Complaints Standards Authority standardised procedures, the number of premature complaints coming to my office, and that is people who are coming to me who should have gone to a local authority, or to a health board, or to a university or wherever, has fallen from 54% to 31%.”<sup>114</sup>

131. A number of other respondents, including One Voice Wales and WCVA were supportive of the proposal and felt that a mandatory complaints policy could lead to a quicker implementation of a positive complaints culture across Wales. One Voice Wales commented:

“the complaints model needs to be mandatory, a bit like the Information Commissioner’s Office have got a scheme around freedom of information, but you would introduce it sectorally, and that is then managed through PSOW.”<sup>115</sup>

132. Citizens Advice Wales said it was important to make the process as clear and straightforward as possible to “encourage more people to complain”<sup>116</sup> and where possible users should be involved in the “co-design”<sup>117</sup> of these forms.

133. Citizens Advice Cymru also said that in developing a mandatory policy the current policy should be reviewed and evaluated by public bodies and complainants to gain an understand of the process from their perspective. They suggested this type of review should be

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<sup>114</sup> RoP, paragraph 121, 4 February 2015

<sup>115</sup> RoP, paragraph 122, 25 February 2015

<sup>116</sup> RoP, paragraph 201, 11 March 2015

<sup>117</sup> RoP, paragraph 225, 11 March 2015

undertaken at regular intervals to ensure the policy remains current and responsive to the needs of both citizens and public authorities.<sup>118</sup>

134. The Auditor General was supportive of the proposal. He said often people want an apology and by improving the way complaints are handled it could diffuse the situation. He said “poor complaints procedures actually end up more expensive”.<sup>119</sup>

135. The Auditor General made the point that it would be helpful for the Ombudsman to be able to approve deviation from a model policy, such as where the requirements of a body’s operations do not fit well with the model policy. He said there may also be a need to exempt certain matters from the model policy, such as Freedom of Information (“FOI”) review procedures, which are subject to other regulations.<sup>120</sup>

136. The Scottish Ombudsman referred to the statutory nature of the Complaints Standards Authority operating in Scotland and said it was “absolutely vital”.<sup>121</sup> He explained that when setting it up his office consulted widely across public services to ensure “the principles that underpin a Complaints Standards Authority would be commonly what people would expect them to be”.<sup>122</sup> He continued:

“We decided that the best way to do that was not to set the ombudsman up as a regulator, but to set the ombudsman up as an enabler.”<sup>123</sup>

137. He confirmed that he did not wish to compromise his role as an Ombudsman and therefore asked Audit Scotland (the equivalent of the Wales Audit Office) to include the complaints handling processes as part of its regular audits of public bodies.<sup>124</sup>

138. On this point, the Auditor General agreed that as part of the work his office undertakes, he could check how bodies were complying with guidance.<sup>125</sup>

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<sup>118</sup> RoP, paragraph 146, 11 March 2015

<sup>119</sup> RoP, paragraph 49, 11 March 2015

<sup>120</sup> Written Evidence, PSOW 07

<sup>121</sup> RoP, paragraph 152, 4 February 2015

<sup>122</sup> RoP, paragraph 141, 4 February 2015

<sup>123</sup> RoP, paragraph 142, 4 February 2015

<sup>124</sup> RoP, paragraph 143, 4 February 2015

<sup>125</sup> RoP, paragraph 46, 11 March 2015

139. The Committee heard from a number of respondents, including the Northern Ireland Ombudsman, WCVA and Citizens Advice Cymru about the importance of data collection. Citizens Advice Cymru commented that publication and analysis of the outcomes of complaints was missing from the current complaints policy and it wanted “more transparency for people” to see the “outcome and the resolution” of complaints.<sup>126</sup>

140. The Scottish Ombudsman told the Committee that data collection had been more efficient as a result of the Complaints Standards Authority and that public bodies should be “collecting data using the same language” to ensure a standard consistency when making comparisons between bodies. He said:

“...for the first time, we have data across all of the sectors in Scotland about the number of complaints...We will know what these complaints were about; we will know whether there are trends. We know how many have been satisfactorily resolved in the first stage or may have been resolved in the second stage and so on and so on.”<sup>127</sup>

141. The WCVA said that training for public bodies could improve complaint handling. They suggested:

“online learning tools, e-learning...and the opportunity for people to have secondments across organisations, to be mentored by others and also to maybe have that experience...in terms of listening directly to people who have gone through the complaints process and come out the other side and who may be satisfied or may not.”<sup>128</sup>

142. The WLGA did not support the proposal and believed the existing policy had already introduced consistency. They said:

“the model was introduced in 2011 and since then there’s been more consistency and a better approach. Models and processes are part of it, and a two-stage process is optimum, but it is

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<sup>126</sup> RoP, paragraph 208, 11 March 2015

<sup>127</sup> RoP, paragraph 147, 4 February 2015

<sup>128</sup> RoP, paragraph 215, 11 March 2015

about culture; it is around whether the organisation actually receives complaints in a constructive way...<sup>129</sup>

143. Abertawe Bro Morgannwg University Local Health Board raised concerns over duplication of work as NHS Wales already has a role in overseeing complaints handling and data collection. The Board questioned how the Ombudsman's proposal "would fit in with the current mechanisms that are in place".<sup>130</sup>

### ***Financial Implications of complaints handling across public services***

144. The Scottish Ombudsman confirmed that the initial set-up costs of the Complaints Standards Authority were approximately £120,000, which comprised two members of his team and accounted for 3% of his financial resource. He said:

"the first year running costs, because there was lots of training and stuff, went to £200,000, but we will run that now, going forward, at around £105,000 to £110,000 a year."<sup>131</sup>

145. The Northern Ireland Ombudsman agreed that the initial start-up costs could be in the region of £150,000 and that the Scottish model consisting of two staff members would be adequate. He said despite his view that it would be a "very helpful intervention"<sup>132</sup> the Northern Ireland Committee considering the proposed legislation "were not satisfied or convinced that the money should be spent on that".<sup>133</sup>

146. The Scottish Ombudsman and the Northern Ireland Ombudsman agreed that there would be a cost on organisations complying with a mandatory complaints process. However, they noted that larger bodies are already likely to have management systems and complaints officers in place, therefore it would just be a case of existing arrangement being "harnessed in a particular way".<sup>134</sup>

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<sup>129</sup> RoP, paragraph 128, 25 February 2015

<sup>130</sup> RoP, paragraph 106, 19 March 2015

<sup>131</sup> RoP, paragraph 148, 4 February 2015

<sup>132</sup> RoP, paragraph 173, 3 March 2015

<sup>133</sup> *ibid*

<sup>134</sup> RoP, paragraph 186, 3 March 2015

147. The Auditor General said that initially there might be a cost as bodies “adjust their existing practices” but overall the cost would be “marginal as opposed to significant”.<sup>135</sup> He said:

“I think the required adoption of model policies should be conducive to improved economy by...saving bodies spending time and money on devising their own policies. Similarly some savings might be achieved where public bodies are operating poorly designed policies.”<sup>136</sup>

### ***Evidence from the Minister***

148. Prior to the inquiry, the then Minister for Local Government and Government Business told the CELG Committee in correspondence:

“We do agree with the Ombudsman there is more value to be gained from better analysis at an all-Wales level of complaints made in the different sectors of Wales, including the opportunity to make better comparison between public bodies. However, we should not under-estimate the difficulties involved in assimilating reliable data which can properly be used for such purposes. If the Ombudsman were to pursue this exercise, we would certainly support the work, subject to reassurances about the additional burden of data collection and verification, which might be added to the public service in Wales.”

149. The Minister agreed that there should be more consistency in the way complaints are managed and recorded by public bodies. However, he was “not absolutely convinced to what extent you can legislate for consistency”.<sup>137</sup> He continued:

“...it’s about embedding behaviour, it’s embedding practice, and it’s about provision of guidance, I guess, and training. So, I think the ombudsman clearly has a role in all of those things, but I’m not certain that legislation on its own is the way to do that.”

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<sup>135</sup> RoP, paragraph 46, 11 March 2015

<sup>136</sup> Written Evidence, PSOW 07

<sup>137</sup> RoP, paragraph 268, 19 March 2015

## ***Evidence from the Ombudsman***

150. The Ombudsman noted the improvements in terms of the adoption of better complaints handling. He felt more still needed to be done and there was a need to enshrine best practice in legislation.<sup>138</sup> He said:

“I don’t think there’s any scope for complacency in this regard either. We’re talking about a public service economy of some £15 billion or £16 billion, to invest a very, very small amount of time and money and legislation to make sure that we’re absolutely top of our game.”<sup>139</sup>

151. The Ombudsman was supportive of the Scottish model and the importance of the statutory nature of the Complaints Standards Authority. He said that in Scotland, so far no public body had refused to adopt the complaints system.<sup>140</sup>

152. He continued to say:

“... if scrutiny’s going to be one of the drivers of public service improvement, I can’t currently give you as detailed a picture across the whole of the public service in terms of the way in which people are dealing with a two-stage complaints system, and the absolute level or percentage who are dealt with at either stage 1 or 2...in quite the same way as they can do in Scotland. Certainly, we try and capture data on a local authority and on a health board basis, and so forth, but this would give us more granularity and it would give that to you as well. So, to some extent, it’s about extending your powers of scrutiny by capturing more data...”<sup>141</sup>

153. The Ombudsman believed there was a need for a model policy to insist on certain aspects such as “a two-stage approach, of five days and 20 days” but with scope “to allow certain flexibilities” for different sectors.<sup>142</sup>

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<sup>138</sup> RoP, paragraph 219, 25 March 2015

<sup>139</sup> *ibid*

<sup>140</sup> RoP, paragraph 72, 21 January 2015

<sup>141</sup> RoP, paragraph 73, 21 January 2015

<sup>142</sup> RoP, paragraph 225, 25 March 2015



### *Our view*

154. The Committee acknowledges there has been an improvement in the adoption of better complaints handling procedures by public authorities.

155. The Committee believes that any model complaints handling policy should be flexible enough to allow for the needs of different sectors and not conflict with existing initiatives (e.g. in the NHS).

156. The Committee notes the Ombudsman estimate of £80 - £100k and considers this to be a realistic estimate based on the Scottish model and size variation between countries.

**The Committee recommends should a bill be introduced, the Ombudsman should have a statutory complaints handling role. This complaints role should include provisions to:**

- publish a model complaints handling policy for listed authorities;**
- require regular consultation with relevant stakeholders;**
- require public bodies to collect and analyse data on complaints; and**
- ensure a standardised language is used by public bodies when collecting data to ensure comparisons can be made.**

**The Committee recommends that any model complaints handling policy should be supported by a training programme and promotional materials for staff in public bodies.**

## 6. The Ombudsman's jurisdiction to include private health services

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### Background

157. The listed authorities that the Ombudsman can investigate are set out in Schedule 3 to the 2005 Act. The Ombudsman's jurisdiction in this respect extends to most devolved public services in Wales, including the NHS. Since November 2014, this jurisdiction has been extended to include private care services<sup>143</sup> by amendments to the 2005 Act inserted by the [Social Services and Well-being Act 2014](#). However, private healthcare<sup>144</sup> remains outside the Ombudsman's jurisdiction.

158. The Ombudsman is currently able to consider complaints against private health care providers if the treatment has been commissioned and paid for by the NHS. The Ombudsman would like this jurisdiction extended to include private health services when a patient has received private healthcare which has been self-funded, rather than being commissioned by the NHS, in conjunction with public healthcare.

159. In additional written evidence to the Committee, the Ombudsman provided clarity on who would be covered by the proposal. He said:

“I am seeking that the Public Services Ombudsman for Wales should be able to have the discretion to consider complaints from members of the public who have received treatment at an ‘Independent Hospital’ as defined by the [Care Standards Act 2000](#)...

“For the avoidance of doubt, I am seeking that this should include the private practice of health professionals (including private units) conducted on the premises of NHS organisations, who invariably under contractual arrangements with the NHS have access to NHS staff and facilities...

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<sup>143</sup> Private care services - social care services such as residential care or home care, which are privately arranged and self-funded by the individual for their own care (without involving social services)

<sup>144</sup> Private healthcare - healthcare services which are not funded by the NHS, but are paid for by the patients themselves or through private healthcare insurance. Such services could be provided on a private basis by an NHS body or by the independent sector

“I confirm that I am not seeking powers to look into complaints about other types of businesses also classified as private health care providers, such as beauty parlours, tattoo parlours etc.”<sup>145</sup>

160. The Ombudsman confirmed that he was seeking jurisdiction:

“to be able to look into care and treatment provided by a private health care provider where that care/treatment has stemmed from the NHS, or has been a part of a person’s health care pathway which has also involved the NHS.”<sup>146</sup>

161. In the Ombudsman’s estimated the cost of this provision:

“Dependent on public or private funding method – £0k-£40k-£50k provision (dependent on policy choice re levy).”<sup>147</sup>

### ***Evidence from the respondents***

162. There were mixed views amongst respondents to the proposal to extend the Ombudsman’s remit to cover private health care. Whilst most respondents agreed in principle and felt the service provided by the Ombudsman should be citizen-led rather than service-led, concerns were raised about the additional cost to the tax-payer.

163. The Older People’s Commissioner said that the “pathway followed by the individual” should form the “basis of the pathway of the complaint investigation and not be limited to just the public bodies along that pathway”.<sup>148</sup> In written evidence, she said:

“As the future model of public service delivery is likely to become more diverse and extend to social enterprises and other innovative public/private partnership arrangements then this pathway approach needs further consideration.”<sup>149</sup>

164. The Welsh NHS Confederation agreed with extending the Ombudsman’s jurisdiction in this way. They said:

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<sup>145</sup> FIN(4)-03-15 PTN2 - Additional Information from PSOW (evidence requested by Chair)

<sup>146</sup> FIN(4)-06-15 Paper 3 - Further evidence from the Public Services Ombudsman for Wales, 25 March 2015

<sup>147</sup> FIN(4)-01-15 Paper 1 - Amendments to the Public Services Ombudsman (Wales) Act 2005, 21 January 2015

<sup>148</sup> Written Evidence, PSOW 04

<sup>149</sup> *ibid*

“It would be beneficial if the PSOW is able to reflect the population’s whole journey across public services, which may include private healthcare. Without this, the effectiveness of some public service investigations may be limited because the PSOW’s inability to investigate private care as part of an NHS patient’s journey/ pathway does mean 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 could suffer the same detriment and the same degree of maladministration as within the NHS.”<sup>150</sup>

165. However, the Welsh NHS Confederation felt further clarity was required, including what the sanctions would be for failing to comply with the Ombudsman’s report and recommendations and how these sanctions would be enforced.<sup>151</sup>

166. The Auditor General could also see merit in a “follow the citizen”<sup>152</sup> approach, but was concerned that defining linkages in care history could be challenging in some cases. He was also concerned that “once you start looking at one part of the private healthcare market” there might be the risk of “opening up the ombudsman to being able to deal with any matters in private healthcare” and therefore the proposal needed careful consideration.<sup>153</sup>

167. The Northern Ireland Ombudsman said the inability for the Ombudsman to investigate where a patient had received a combination of public and private health care could leave both services “wondering where did this go wrong” and that “both parties need their vindication”.<sup>154</sup>

168. Health Inspectorate Wales were also in support and felt that where appropriate arrangements for health and social care should be brought into alignment. It confirmed the number of independent private bodies that would be included within the proposal was “not excessive”.<sup>155</sup> They said:

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<sup>150</sup> Written Evidence, PSOW 24

<sup>151</sup> *ibid*

<sup>152</sup> Written Evidence, PSOW 07

<sup>153</sup> RoP, paragraph 99, 11 March 2015

<sup>154</sup> RoP, paragraph 207, 3 March 2015

<sup>155</sup> RoP, paragraph 166, 19 March 2015

“I would anticipate that the Ombudsman’s role would be to intervene where existing mechanisms have failed to reach a satisfactory conclusion. It would therefore be important to map how the existing complaints processes for NHS and private healthcare worked in relation to the Ombudsman in order to provide clear and simple guidance for complainants as to the route they should follow.”

169. In principle, the Scottish Ombudsman thought the proposal had merit but had not fully been thought through. He said his office “was established to look at public services”<sup>156</sup> and felt that “if a provision to look at private healthcare were to come in then that should be funded by the private sector”<sup>157</sup>.

170. The Northern Ireland Ombudsman welcomed the extension of the Ombudsman’s jurisdiction to include private care service but remained unconvinced about private health care. He said that as care services are means-tested, if an individual is told they have to pay for their care they should have access to the Ombudsman to examine concerns or complaints. Whereas an individual that has made a decision to use private health care has recourse via other routes.<sup>158</sup>

171. ISCAS did not support the proposal on the basis that “a mechanism for independent review of independent sector complaints already exists at no cost to the taxpayer”.<sup>159</sup> ISCAS said they had been operating a Complaints Code of Practice across the UK independent healthcare sector for over 13 years, with a three-stage complaints process, which reinforced local resolution.<sup>160</sup>

172. ISCAS confirmed that if a patient had been receiving treatment paid for by the NHS, but subsequently had treatment delivered by a private healthcare that individual “would go through the first and second stages, but then, as the third stage, they can go to the ombudsman”.<sup>161</sup>

173. The Committee were concerned that as membership to ISCAS is voluntary, patients who receive treatment by a healthcare provider that

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<sup>156</sup> RoP, paragraph 237, 4 February 2015

<sup>157</sup> *ibid*

<sup>158</sup> RoP, paragraph 206, 3 March 2015

<sup>159</sup> Written Evidence, PSOW 01

<sup>160</sup> *ibid*

<sup>161</sup> RoP, paragraph 281, 4 February 2015

was not a member of ISCAS, would only have the mechanism to take their case to court.<sup>162</sup> On this point, ISCAS said:

“...we need to point out that there will be people who are not part of ISCAS that have their own organisational complaints processes...You would hope that they would follow a code of good practice, but we just don’t know.”<sup>163</sup>

174. ISCAS confirmed that the amount of complaints in the private sector in Wales were “quite small”.<sup>164</sup> They also noted there were no costs to the complainants of using the ISCAS complaints process and that their decision to engage in the adjudication process would not preclude the complainant from pursuing litigation at a later stage (this issue is raised further in Chapter 7).

175. ISCAS drew the Committee’s attention to the predicament of private patients using services within an NHS Trust such as Private Patient Units (“PPUs”)/private beds who have no ability to complain to any external body about their treatment.<sup>165</sup> They said:

“In these services patients have no access to an independent review as the Ombudsman does not include these complainants and NHS-run PPUs cannot subscribe to ISCAS.”<sup>166</sup>

176. In further evidence provide by HIW they confirmed there is currently only one private patient unit operating in Wales, the Bridgend Clinic<sup>167</sup> which comprises nine beds and an out-patient suite containing five consultation rooms. They said:

“The Bridgend Clinic (PPU) does not need to register with HIW since it is owned and operated by the Health Board...

“For the purposes of complaint processes and the role of HIW, the Bridgend Clinic is treated as an NHS site and it is HIW understanding that if a complainant were not happy with the

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<sup>162</sup> RoP, paragraphs 302 & 304, 4 February 2015

<sup>163</sup> RoP, paragraph 306, 4 February 2015

<sup>164</sup> RoP, paragraph 321, 4 February 2015

<sup>165</sup> Written Evidence, PSOW 1

<sup>166</sup> *ibid*

<sup>167</sup> The Bridgend Clinic is located in the Princess of Wales Hospital grounds and operated by Abertawe Bro Morgannwg University Health Board

Health Board's response to their complaint they would have access to Public Service Ombudsman for Wales."<sup>168</sup>

177. Furthermore, ISCAS said that it would welcome the opportunity to enter into an information sharing agreement with the Ombudsman to jointly address the type of complaint that cross between the NHS and independent healthcare sector. ISCAS said this would be similar to its current operating protocol with the Health Inspectorate Wales ("HIW") and the Care Quality Commission ("CQC") in England and that patients would have to consent that their information was being shared.<sup>169</sup>

### **European Directive on Alternative Dispute Resolution**

178. The Northern Ireland Ombudsman and Dr O'Brien mentioned the impact that the [European Directive on Alternative Dispute Resolution](#) ("ADR") would have on Ombudsmen. Article 1 of the Directive states that its purpose is:

"to contribute to the proper functioning of the internal market by ensuring that consumers can, on a voluntary basis, submit complaints against traders to entities offering independent, impartial, transparent, effective, fast and fair alternative dispute resolution procedures."<sup>170</sup>

179. The Directive applies to disputes between consumers and traders concerning contractual obligations stemming from sales and services contracts in all economic sectors other than those specifically exempted. Article 2(h) of the Directive excludes "health services provided by health professionals to patients to assess, maintain or restore their state of health, including the prescription, dispensation and provision of medicinal products and medical devices".<sup>171</sup> However, this does not exclude social care.

180. The House of Commons' [European Scrutiny Committee](#) has considered the wider impact of this Directive on UK law. The Department for Business, Innovation and Skills also held a [consultation in 2014](#) on applying the ADR Directive. During this consultation, the Ombudsman's Association and the Scottish Public Services

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<sup>168</sup> FIN(4)-07-15 PTN2 - Additional Information from Health Inspectorate Wales, 23 April 2015

<sup>169</sup> RoP, paragraphs 285 & 323, 4 February 2015

<sup>170</sup> European Directive on Alternative Dispute Resolution

<sup>171</sup> *ibid*

Ombudsman raised concerns about the boundaries between public and private delivery of service and the extent of the Directive.

181. On this issue, Dr O'Brien said that whilst ADR is limited to the private sector, there was a feeling that "once the expectations of the directive are absorbed into the private sector ombudsmen, it will be difficult for the public sector ombudsmen to resist them and they'll become associated almost exclusively with that sort of fairly low-level, mass dispute resolution function to the exclusion of all else".<sup>172</sup>

***Financial Implications of extending the Ombudsman's jurisdiction to include private health services***

182. In correspondence the previous Ombudsman told the CELG Committee, taxpayers should not have to bear the costs of establishing the complaints process in this area.

183. In this correspondence, the previous Ombudsman said that private sector ombudsman schemes are normally funded by the bodies in their jurisdiction and this is usually underpinned by statute. He said the funding mechanism could be an annual levy, or based on case-by-case charging, or a combination of both. As such, if the Ombudsman's jurisdiction was extended to include private health, he suggested options such as annual levies, on the basis that the "polluter pays". In this context, the principle of the polluter pays is that it gives providers an incentive to avoid error and resolve complaints as a means of not incurring costs.

184. ISCAS confirmed that its members pay an annual subscription to cover the management resource, which is proportionate to their turnover. They said that if a levy or payment was introduced to cover the Ombudsman's proposal, "it would have to be a levy on everybody" and not just on the organisations that the Ombudsman's was investigating, in order to have sufficient resource to deal with the process.<sup>173</sup>

185. ISCAS said to reduce the impact on resources the Ombudsman could be a "final point of appeal". With the ISCAS three-stage process, followed by the Ombudsman as this would "very rarely happen...But it

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<sup>172</sup> RoP, paragraph 294, 11 March 2015

<sup>173</sup> RoP, paragraph 358, 4 February 2015



might give you a safety-belt kind of assurance from a public body point of view”.<sup>174</sup>

186. The Northern Ireland Ombudsman was unconvinced that a levy should be placed on the private sector. He said that the private sector may challenge why the same requirement was not being placed on the public sector. He said there “could be an argument to say that every polluter pays” but this might only work in “a very limited arena”.<sup>175</sup>

### ***Evidence from the Minister***

187. The Minister said “the ombudsman currently has no power to investigate private healthcare complaints...I think we’re open to looking at that”.<sup>176</sup> However, the Minister wanted to ensure there would be no cost to the “public purse”.<sup>177</sup>

### ***Evidence from the Ombudsman***

188. The Ombudsman’s said he would like to be “citizen-centred” not “sector-focused” to ensure he can consider the whole complaint and not just the parts delivered by the NHS. He said:

“we think that it’s possible to frame legislation to keep that definition sufficiently tight so that we can follow the interests of the citizen rather than be defined by the sector.”<sup>178</sup>

189. The Ombudsman did not believe that ISCAS could provide a suitable alternative to that of the Ombudsman as they were carrying out a different, private function. He said:

“ISCAS is a voluntary membership scheme. Independence is key to public confidence in the ombudsman system and it would be important not to undermine confidence in the PSOW’s service by working closely with voluntary membership bodies.”

190. In response to ISCAS’ suggestion of entering into an information sharing agreement, the Ombudsman believed that under the current legislation it would be difficult to share personal information.<sup>179</sup>

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<sup>174</sup> RoP, paragraph 363, 4 February 2015

<sup>175</sup> RoP, paragraph 212, 3 March 2015

<sup>176</sup> RoP, paragraph 298, 19 March 2015

<sup>177</sup> RoP, paragraph 300, 19 March 2015

<sup>178</sup> RoP, paragraph 257, 25 March 2015

191. The Ombudsman was concerned that an ADR Directive entity could be established and certified to look at complaints in the area of private social care and this could potentially impact on the independence of his office and cause confusion for complainants.<sup>180</sup> The Ombudsman's official said:

“The dilemma is: would it create confusion if we don't apply for certification for complainants and consumers? Because if we don't apply, then somebody else will be nominated as the ADR provider in that [private social care] sector.”<sup>181</sup>

192. The Ombudsman was also concerned about the additional cost that might be put on his office:

“I think there's a registration fee for becoming an ADR provider. There is a revenue potential if you're actually handling complaints as an ADR provider. But, again, we need to look at those figures in terms of cost and benefit. Is the cost of becoming a provider equal or greater to the revenue that could be generated from having that status? So, again, it's still unclear at the moment.”<sup>182</sup>

193. On the issue of Private Patient Units, the Ombudsman said this was not an issue he had put forward in his original proposal, however, if there was scope to address this issue in legislation “that would be very welcome”.<sup>183</sup>

194. The Ombudsman felt that a levy may not be the most practical solution and instead the cost should be considered on a case by case basis. He said that whilst the number of cases would be rare “they are very serious to the individuals who are involved”.<sup>184</sup> He continued

“I think we could make sure that any cost to the public purse was recovered from the private provider without having a one-

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<sup>179</sup> FIN(4)-03-15 PTN1 - Additional Information from PSOW (from evidence session 21 Jan 2015), 25 February 2015

<sup>180</sup> RoP, paragraph 152, 25 March 2015

<sup>181</sup> RoP, paragraph 153, 25 March 2015

<sup>182</sup> RoP, paragraph 172, 25 March 2015

<sup>183</sup> RoP, paragraph 257, 25 March 2015

<sup>184</sup> RoP, paragraph 259, 25 March 2015

size-fits-all levy system, particularly given the small volume of complaints that mix the public and private.”<sup>185</sup>

195. In additional written evidence to the Committee, he said that the costs of complaints “could always be revisited again in the future based on experience of actual casework volumes in this area”.<sup>186</sup>

### *Our view*

196. The Committee considers the Ombudsman’s jurisdiction should be extended to include private health care in limited circumstances and notes that the number of cases are likely to be small. Therefore any costs should be recovered from the private provider on a case by case basis.

197. The Committee is concerned about the European Directive on Alternative Dispute Resolution and how this will affect the Ombudsman’s role, in particular in relation to private social care.

**The Committee recommends that should a bill be introduced, the Ombudsman’s jurisdiction should be extended to enable him/her to investigate the whole complaint when a combination of treatment has been received by public and private healthcare providers and when that treatment has been initiated in the NHS.**

**The Committee is concerned that patients using services provided in Private Patient Units have no ability to complain to any external body about their treatment The Committee recommends that the Welsh Government work with the Health Inspectorate Wales to resolve this apparent anomaly and report back to the Committee.**

**The Committee recommends that the Welsh Government liaises with the UK Government on the European Directive on Alternative Dispute Resolution and how it will affect the Ombudsman’s role.**

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<sup>185</sup> RoP, paragraph 259, 25 March 2015

<sup>186</sup> FIN(4)-03-15 PTN2 - Additional Information from PSOW (evidence requested by Chair), 25 February 2015

## 7. Links with the courts

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### Background

198. Section 9 of the 2005 Act restricts the Ombudsman from considering a complaint if the matter could be considered by the courts, tribunal or the Welsh Ministers (or a Minister of the Crown). Therefore, where a complainant has a right or remedy to go to court, the presumption is in favour of the complainant taking that route. However, the Ombudsman does have discretion to set aside that requirement, on a case-by-case basis.

199. In July 2011, the Law Commission<sup>187</sup> published a report [The Public Services Ombudsmen report](#) that reviewed the legislation governing public services ombudsmen in England and Wales.

200. On the whole, this report commented favourably on the existing 2005 Act but did make general recommendations relevant to the Ombudsman's role, including:

- that access to the Ombudsman could be improved by modifying the “statutory bar” which restricts the ability of citizens to choose the institution for administrative redress they prefer (i.e. the Ombudsman or the courts);
- the creation of a specific power to “stay” an application for judicial review, so that suitable matters could be handled by the Ombudsman rather than the courts - currently there is no provision to allow the Ombudsman 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; and
- a power for the Ombudsman to refer a point of law to the courts - this would enable the Ombudsman to seek clarity on a legal point which might otherwise hinder or prevent an investigation

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<sup>187</sup> The Law Commission is the statutory independent body that was created by the Law Commission Act 1965, to keep the law under review and to recommend reform where it is needed.

as well as seeking clarity where there is doubt as to whether a matter is within jurisdiction.<sup>188</sup>

201. The Law Commission's report was primarily addressed to the UK Parliament, although the recommendations relating to the Ombudsman also relate to the Assembly. The Law Commission are awaiting a response by the UK Government to its recommendations.

202. The Ombudsman would like to see changes made to the 2005 Act to address these issues. However, in his background paper he noted some of these issues "clearly impact on the English and Welsh court system".<sup>189</sup>

## **Statutory Bar**

### ***Evidence from respondents***

203. There were mixed views from respondents on the removal of the statutory bar. Some respondents were supportive of the removal to allow more people to seek redress through the Ombudsman, given that access to the courts is now more limited and costly which could be a barrier to many individuals.

204. The Law Commission noted this issue may require changes to UK legislation and would be best addressed at a UK-level. However, it was supportive of the removal of the statutory bar and said:

"Our proposal in our report was that the law should be neutral on the matter of whether the ombudsman takes up the complaint or sends the complainant off to court. Our view was that neutrality at the level of the statute was far more satisfactory than the creation of this hurdle by which the ombudsman has to persuade himself or satisfy himself or herself that the statutory bar should be removed in a particular case."<sup>190</sup>

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<sup>188</sup> Law Commission: Public Services Ombudsmen Report, July 2011

<sup>189</sup> FIN(4)-01-15 Paper 1 - Amendments to the Public Services Ombudsman (Wales) Act 2005, 21 January 2015

<sup>190</sup> RoP, paragraph 56, 5 March 2015

205. The WCVA supported the proposal and felt “it would offer an effective alternative to the courts system and would also lend itself to the equality of access point”.<sup>191</sup>

206. Citizens Advice Cymru agreed and raised the complexities of an individual going to court and the implications of access to legal advice, particularly in terms of cuts to legal aid. They said:

“We were in receipt of £22 million-worth of legal aid across England and Wales. We had a £19 million cut to that. So, that has had implications on the extent to which we can provide specialist advice and support on a range of different issues to clients.”<sup>192</sup>

207. The WLGA said that Ombudsman could offer a “more informal and quicker, speedier resolution to their complaint, where a court process may take longer” but this could potentially have a significant impact on the workload and resources of the Ombudsman.<sup>193</sup>

208. The Administrative Court Office for Wales (“Administrative Court”) suggested that judicial review is often the last resort. They said:

“If there are other methods of challenge available to the claimant, and any of those methods of challenge provide an adequate remedy, the alternative remedy should be exhausted before applying for judicial review. This is a longstanding principle in judicial review and permission to apply for judicial review will generally be refused if the Court considers that there is an adequate alternative remedy.”<sup>194</sup>

209. However, the Administrative Court continued to say that the Ombudsman may not always be an adequate alternative. They explained:

“The question as to whether an adequate alternative remedy may exist in a complaint to an Ombudsman has been discussed in a number of cases, most notably *R. v Lambeth London Borough Council Ex parte Crookes and R. (Umo) v Commissioner for Local Administration in England*. Those cases

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<sup>191</sup> RoP, paragraph 245, 11 March 2015

<sup>192</sup> RoP, paragraph 256, 11 March 2015

<sup>193</sup> Written Evidence, PSOW 08

<sup>194</sup> Written Evidence, PSOW 41

suggest that a complaint to an Ombudsman can be but will not always be an adequate alternative remedy, it will depend on the circumstances of the case. However, as Mr. Justice Coulson noted in *R. (Gifford) v Governor of Bure Prison*; “*For many reasons, and in many cases, the... ombudsman would be the more effective and more efficient remedy than an application for judicial review.*”

“Therefore, the Court may refuse permission to apply for judicial review or dismiss a substantive application for judicial review if it considers that an investigation by the Ombudsman would represent an adequate alternative remedy.”

210. The Scottish Ombudsman believed the intention of the Scottish Act “was to make sure that we are an alternative to the court system and not another court system”. Although, he noted in Scotland they have a separate legal system and that he was unsure whether it would be an issue in Wales.<sup>195</sup>

211. Some respondents were concerned that the taxpayer may be expected to cover the cost of seeking redress by both the Ombudsman and by the courts.

212. The Auditor General was concerned the removal of the statutory bar would allow complainants to pursue both mechanism, giving potentially an additional cost to the taxpayer. He said “there needs to be an agreement or a decision on a UK level rather than just in Wales”.<sup>196</sup>

213. The Auditor General’s official explained:

“I think the concern is double jurisdiction, if you like, in that if someone pursues a twin-track approach that will, inevitably, lead to greater public expenditure than would be the case if they could only pursue one or the other. And it’s very hard to see how legislation could be framed that would curtail the jurisdiction of the courts.”<sup>197</sup>

214. On this issue, Citizens Advice Cymru reiterated their view that people are reticent about complaining and therefore it was unlikely

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<sup>195</sup> RoP, paragraph 253, 4 February 2015

<sup>196</sup> RoP, paragraph 89, 11 March 2015

<sup>197</sup> RoP, paragraph 91, 11 March 2015

that a large proportion of people would be “looking to go down both routes”.<sup>198</sup>

215. The Northern Ireland Ombudsman said there had to be separation between the courts and the Ombudsman as they offer two different routes to justice. He believed if an individual had a remedy in the courts, then that would be the most appropriate route to take.<sup>199</sup>

216. However, the Northern Ireland Ombudsman acknowledged that some individuals for financial reasons would be unable to access the courts and in these circumstances an Ombudsman should exercise “discretion in ensuring that we look at their issues”. He confirmed the removal of the statutory bar had been considered in Northern Ireland but the Committee considering the legislation felt that the time was not right for such a development.<sup>200</sup>

217. Citizens Advice Cymru supported the Law Commission’s recommendation that the Ombudsman should publish guidance about when it is appropriate to make a complaint to the Ombudsman and when it is more appropriate to be considered by the courts or other mechanism of administrative justice.<sup>201</sup>

## **Stayed Provisions**

### ***Evidence from respondents***

218. On the issue of the ‘stay’ provision the Law Commission said that it was possible for a matter to come before the Administrative Court, at permission stage, where there was a sufficiently arguable case on administrative law illegality for permission to be granted, but where it was apparent to the court that the true nature of the matter concerned maladministration, in this situation the most appropriate institution to deal with the matter would be the Ombudsman.

219. The Law Commission said the stay provision offered flexibility as a stayed case would be “temporarily halted” and there would be the option to refer it back to the court in a number of circumstances, including:

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<sup>198</sup> RoP, paragraph 258, 11 March 2015

<sup>199</sup> RoP, paragraph 215, 3 March 2015

<sup>200</sup> *ibid*

<sup>201</sup> Written Evidence, PSOW 14



-if the Ombudsman had resolved the issue and the case could be withdrawn;

-if the Ombudsman had refused to investigate; or

-if the Ombudsman had investigated and there was strong evidence of illegality and the court might wish to take the case further.<sup>202</sup>

220. The Law Commission had previously thought that if a case had been stayed it should be “transferred to the ombudsmen from the Administrative Court” and the Ombudsman should be obliged to investigate.<sup>203</sup> However, they said:

“We moved away from the idea that, if the court does this, that should oblige the ombudsman to start an investigation. We concluded after consultation that that should remain a matter for the ombudsman’s discretion...”<sup>204</sup>

221. The Law Commission also felt that whilst a stay should normally be used at the permission stage, it could also be used after permission had been granted. They commented:

“...the court already has a power to stay its proceedings—it’s one of its general powers. What we’re talking about would be a specific application of that power, and I’d have thought myself that, even without a change to court rules, a party to litigation could say, ‘I’m asking you to use your general power to stay, and I’m asking it in the context of what the Law Commission recommended, and here’s a record of what the Law Commission recommended; judge, please stay in these circumstances’. I personally don’t see any obstacle to that being done under the present rules.”<sup>205</sup>

222. In relation to stayed provisions the Administrative Court confirmed they:

“...hold a discretionary power to stay any proceedings before it. The power to stay arises out of the Court’s inherent jurisdiction to control its own proceedings and thus the Administrative

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<sup>202</sup> RoP, paragraph 61, 3 March 2015

<sup>203</sup> Written Evidence, PSOW 13

<sup>204</sup> RoP, paragraph 61, 3 March 2015

<sup>205</sup> RoP, paragraph 73, 3 March 2015

Court may order proceedings be stayed at any stage of the proceedings. This inherent power to stay proceedings is expressly noted in Civil Procedure Rule (“CPR”) 3.1(2)(f). Thus, were the Court minded to exercise its discretion, it could stay proceedings to await an Ombudsman’s decision.”<sup>206</sup>

## **Reference on a point of law**

### ***Evidence from respondents***

223. The Law Commission said there could be situations where an Ombudsman could be forced to abandon an investigation which otherwise they would have been able to conclude due to a technical legal question that they were not equipped to resolve. By allowing the Ombudsman “the ability to pose a question of law to the Administrative Court would provide them with a useful tool which could facilitate their work” and could also be used to resolve occasional questions about the jurisdiction of the Ombudsman.<sup>207</sup> They said the number of occasions upon which this power would be used “was going to be very small in number”.<sup>208</sup>

224. The Law Commission saw the key benefits as being the improvement of the quality of the Ombudsman’s reports “by increasing the ombudsmen’s ability to report on technical legal matters, and preventing them from having to discontinue an investigation where a difficult legal issue arose”.<sup>209</sup>

225. The Auditor General agreed that it is important “for the ombudsman to turn to the courts if there is a need to sort out what a specific point of law is”.<sup>210</sup>

226. However, the Welsh NHS Confederation said consideration should be given to the role of legal advice to clarify a point of law rather than proceeding directly to the courts and sought clarity over “who funds any legal requests”.<sup>211</sup> The Committee asked the Law Commission if this proposal would require a legislative change. They said:

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<sup>206</sup> Written Evidence, PSOW 41

<sup>207</sup> Written Evidence, PSOW 13

<sup>208</sup> RoP, paragraph 76, 3 March 2015

<sup>209</sup> Written Evidence, PSOW 13

<sup>210</sup> RoP, paragraph 89, 11 March 2015

<sup>211</sup> Written Evidence, PSOW 24

“References are a slightly more tricky matter, because a reference to the administrative court is not something known to the current rules. It might be possible for the ombudsman to use the current rules; for example, bringing proceedings against the public body in question for a declaration as to the law, which is something that the rules already permit individual claimants to do. It might be possible without change to the rules for the ombudsman simply to avail himself of that procedure, but I can’t claim to have studied the rules specifically with that in mind, and of course I must stress, to protect my colleagues, that the Law Commission as a body does not have any remit to give people advice as to what the current law means, but rather to make recommendations for its reform. So, what I’ve just said is an entirely personal view, and not, I’m afraid, very well researched.”<sup>212</sup>

227. The Administrative Court said it was not aware of any provisions that would allow the Ombudsman to make a reference to the Administrative Court. They said:

“There are analogous provisions where a point of law is referred to Administrative Court for the opinion of the Court. Two examples are:

“Determination of a devolution issue after a reference from a Magistrates’ Court under part 2 of schedule 9 of the Government of Wales Act 2006;

“An appeal by way of case stated from a Magistrates’ Court under s111 Magistrates’ Courts Act 1980 or the Crown Court under s28 Senior Courts Act 1981.

“There has never been a reference under schedule 9 of the Government of Wales Act 2006 and, as such, I am unable to illustrate how a reference procedure to the Administrative Court for Wales would practically work. To my knowledge a reference under schedule 9 of the Government of Wales Act 2006 is the only existing reference procedure in the Administrative Court that relates solely to devolved matters as they affect Wales.

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<sup>212</sup> RoP, paragraph 74, 3 March 2015

“The case stated procedure is a fairly frequently used procedure and it is analogous as it allows the Magistrates’ Court or Crown Court to ‘state a case’, that is to say refer a question on a point of law to the Administrative Court, which the Administrative Court will determine. The procedure applies across England and Wales.”<sup>213</sup>

228. The Administrative Court also said that in order to create a procedure for allowing the Ombudsman to make a reference to the Administrative Court the procedure would require primary legislation as “a simple change of the relevant rules of Court (the CPR) would not be sufficient”.<sup>214</sup>

229. The Administrative Court confirmed the Ombudsman can only receive guidance from the Court by bringing proceedings in the Court and even in this situation the “extent to which the Court gives guidance is entirely within the discretion of the Court”.<sup>215</sup>

### ***Financial Implications of links with the Courts***

230. The Law Commission said that the cost of the Ombudsman processing the additional complaints that might arise if the statutory bar was removed would be “set off against the cost to the public purse of judges hearing the case if they proceed by the judicial route instead”.<sup>216</sup> They continued:

“We did some work in our impact assessment on the costs to the public sector of a day in court or a day in a tribunal, and as I recall, four years ago, we costed a day in court at around £1,000—slightly more—and a day in a tribunal at around £600. That’s the cost to the public purse, of course.”<sup>217</sup>

### ***Evidence from the Minister***

231. The Minister said it was his understanding that the statutory bar provisions was only an issue in a very small proportion of the overall number of complaints currently received by the Ombudsman. He said:

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<sup>213</sup> Written Evidence, PSOW 41

<sup>214</sup> *ibid*

<sup>215</sup> *ibid*

<sup>216</sup> RoP, paragraph 63, 3 March 2015

<sup>217</sup> RoP, paragraph 70, 3 March 2015

“... we believe there is complexity in this area, and, on balance, we believe it’s better to have a line of demarcation between the ombudsman and the court. I think there’s an additional area, which is about the competence of the Assembly and therefore the competence of the ombudsman in respect of certain cases as well.”<sup>218</sup>

### ***Evidence from the Ombudsman***

232. The Ombudsman said he would welcome reform in this area, but was concerned about the whether the proposal would be within the Assembly’s legislative competence, particularly with regard to the interplay between the English and Welsh legal jurisdictions and matters that are devolved and non-devolved to Wales.<sup>219</sup>

233. The Ombudsman’s official said that the proposal would offer a choice of avenues to pursue which “would be a good thing for complainants, given that the access to the courts is, probably, more limited these days than when the Act was initially set up”.<sup>220</sup>

234. The Ombudsman acknowledged that removal of the statutory bar could lead to more individuals choosing the route of the Ombudsman which would increase his workload.<sup>221</sup>

235. The Ombudsman’s official said they had also explored other issues raised by the Law Commission where the Ombudsman could be able to refer a case to the court for determination of a point of law. She said:

“...if we were in the middle of an investigation, and there was a point of law that was at the heart of an issue, and we felt that we couldn’t resolve an investigation, for that reason, perhaps, the ombudsman would have the power to, likewise, refer matters back to the court.”<sup>222</sup>

### ***Our view***

236. The Committee is disappointed that the UK Government has not responded to the Law Commission’s 2011 Report, especially given that

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<sup>218</sup> RoP, paragraph 304, 19 March 2015

<sup>219</sup> RoP, paragraph 9, 21 January 2015

<sup>220</sup> RoP, paragraph 106, 21 January 2015

<sup>221</sup> RoP, paragraph 113, 21 January 2015

<sup>222</sup> RoP, paragraph 107, 21 January 2015

this proposal to change the court system would require changes at a UK level.

237. As some of the recommendations in the Law Commission's 2011 Report refer to Wales, it is important to have the Welsh Government's view on these issues.

**The Committee recommends the Welsh Government should respond to the Law Commission's 2011 Report.**

**Due to the legal complexities and the issue of the competence of the Assembly, the Committee concludes that changes should not be made in relation to the statutory bar, stay provisions and referral of a point of law at this time. However, the Committee recommends the Welsh Government explore these issues with the UK Government as part of future devolution discussions.**

## 8. Other proposals for change

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### Background

238. In addition to the Ombudsman's five main proposals, the Committee consulted on other issues that were originally raised by the Ombudsman's predecessor.

239. The Committee received limited evidence in respect of these additional proposals.

### Jurisdiction

240. The listed authorities that the Ombudsman can investigate are set out in Schedule 3 to the 2005 Act. The Ombudsman's jurisdiction in this respect extends to most devolved public services in Wales.

241. Over recent years, changes have been made to the devolution settlement in Wales which has led to new areas coming into the Ombudsman's jurisdiction. The Committee considered whether other bodies should be included within the Ombudsman's jurisdiction.

### *Evidence from respondents*

242. The WCVA said there was much consensus amongst Ombudsmen that the administrative justice landscape is complex and fragmented, which makes it confusing when an individual wishes to make a complaint. They continued:

“The previous PSOW and the Scottish Ombudsman recently suggested that they should be able to provide a "one-stop shop" being responsible for complaints about all public services, both devolved and non-devolved.”<sup>223</sup>

243. The Older People's Commissioner highlighted the importance of being able to review the Ombudsman's jurisdiction as the devolution settlement changes “to ensure wherever possible the impact on the individual does not get lost between systems and processes”.<sup>224</sup>

244. This view was echoed by Dr O'Brien, he said:

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<sup>223</sup> Written Evidence, PSOW 12

<sup>224</sup> Written Evidence, PSOW 04

“The distinction between public and private domain is becoming increasingly difficult to maintain. It is nevertheless a distinction that is fundamental to the function and identity of a ‘public services’ ombudsman.”<sup>225</sup>

245. Dr O’Brien suggested that legislation could encompass all public authorities and exclude bodies by exception as this may be easier for the public to understand. He said otherwise “you can end up with several pages of listed authorities”.<sup>226</sup>

246. The Committee was concerned about some bodies that are outside of the Ombudsman’s jurisdiction, in particular two boards of conservators in Wales that were set up by Acts of Parliament to manage common land.

247. The Auditor General confirmed that:

“There’s one particular one that I have no jurisdiction over, because it was set up by Act of Parliament and, indeed, that Act doesn’t actually have any provision in it as regards audit of accounts. So, I have no jurisdiction over that one.”<sup>227</sup>

248. The Auditor General’s official said:

“The only caveat I would mention is that, if that body is in receipt of public money from a body audited by the auditor general, then, there will be access rights insofar as that’s a material payment.”<sup>228</sup>

249. Other bodies that were suggested included Natural Resources Wales<sup>229</sup> as well as non-devolved tribunals.<sup>230</sup>

250. The Northern Ireland Ombudsman said he would like his jurisdiction extended to cover prisoners as they should have the same rights as anyone else. He said that in Northern Ireland the healthcare system in prisons is delivered through local trusts and it was therefore appropriate that he had authority over this area.

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<sup>225</sup> Written Evidence, PSOW 09

<sup>226</sup> RoP, paragraph 344, 11 March 2015

<sup>227</sup> RoP, paragraph 127, 11 March 2015

<sup>228</sup> RoP, paragraph 131, 11 March 2015

<sup>229</sup> Written Evidence PSOW 5 & PSOW 17

<sup>230</sup> Written Evidence, PSOW 21



## ***Evidence from the Ombudsman***

251. The Ombudsman said:

“I would be happy to explore further proposals as regards any anomalies in relation to bodies the Assembly believes should be within the PSOW’s jurisdiction, which are currently not. Clearly, I would need to identify whether any such proposals would have any significant resource implications for my office.”<sup>231</sup>

252. The Ombudsman said he would be happy to consider a review of listed authorities (Schedule 3) and in addition Schedule 2 of excluded matters to ascertain whether amendments were required.<sup>232</sup>

253. The Ombudsman’s official confirmed that the administrative functions of devolved tribunals are currently within jurisdiction. However, there are some tribunals that are not completely devolved and therefore are outside of the Ombudsman’s jurisdiction. She said that in relation to those kind of tribunals, because they are delivering decisions in Wales, she believed there was scope for them to be included.<sup>233</sup>

## ***Our view***

**In relation to jurisdiction the Committee recommends should a bill be introduced, it should encompass all public authorities that provide services within Wales and that the inclusion of non-devolved bodies providing public services in Wales should be explored (including Boards of Conservators in Wales).**

## **Binding Recommendations**

### ***Evidence from respondents***

254. This proposal would ensure that the recommendations of the Ombudsman to public bodies would be binding, therefore bodies could not decide to reject or disregard the Ombudsman’s recommendations.

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<sup>231</sup> FIN(4)-06-15 Paper 3 – Further evidence from the Public Services Ombudsman for Wales, 25 March 2015

<sup>232</sup> RoP, paragraph 267, 25 March 2015

<sup>233</sup> RoP, paragraph 271, 25 March 2015

255. The general consensus was for the Ombudsman's recommendations to remain non-binding to allow local democratic processes to deal with implementation. The Law Commission said:

“As far as the recommendations are concerned, we saw merit in the bodies having a degree of flexibility as to whether they agreed that the solution hit upon by the ombudsman was precisely the right one. But the legislation does, once again, give considerable powers to the ombudsman for Wales as regards the various different types of report that he...can publish... If the public authority disregards the report without lawful excuse, the ombudsman can send a certificate to the High Court. If the report concludes that the citizen has suffered special hardship, there can be recommendations made about that also. And so, there are various ways in which the ombudsman can ensure that his recommendations are not wholly disregarded.”<sup>234</sup>

256. The Auditor General agreed and said the proposal could be problematic and the existing provisions in the 2005 Act for reporting and certifying non-action seemed appropriate. He said:

“I think, at present, the ombudsman works in terms of very firm recommendation, but it would, I think, be foolhardy for a public body to reject the ombudsman's conclusions. I think that if you start putting binding recommendations...I do think it confuses the accountability of the public bodies themselves.”<sup>235</sup>

257. Dr O'Brien agreed and said “it is of the essence of the distinctive approach of an ombudsman that its mandate is one of influence rather than sanction”.<sup>236</sup>

258. However, the Older People's Commissioner was supportive of the Ombudsman's recommendations being “binding so that the impact of failure by public bodies is felt by those bodies and not just by individuals who have been failed by them”.<sup>237</sup>

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<sup>234</sup> RoP, paragraph 87, 3 March 2015

<sup>235</sup> RoP, paragraph 103, 11 March 2015

<sup>236</sup> Written Evidence, PSOW 09

<sup>237</sup> Written Evidence, PSOW 04

### ***Evidence from the Minister***

259. The Minister believed that “any public body that ignores a decision of the ombudsman is going to be leaving itself open to considerable public criticism”.<sup>238</sup> He argued that if recommendations from the Ombudsman were to be binding, there would be a need for powers of sanctions and further consideration on this issue would be required.<sup>239</sup>

### ***Evidence from the Ombudsman***

260. The Ombudsman’s felt the democratic accountability argument with regards to public bodies complying with the Ombudsman’s recommendations was a strong argument and therefore he was not seeking such a power.<sup>240</sup>

### ***Our view***

261. Whilst there are clear advantages in having binding recommendations the Committee is persuaded that whilst recommendations are non-binding there is a clear obligation on public bodies to abide by the Ombudsman’s decision. The Committee remains unconvinced that this change should be made.

### **Protecting the title of the Ombudsman**

262. This proposal would ensure that any scheme intending to use the title would have to gain the approval from the Ombudsman. This would ensure private bodies intending to use the title ombudsman, would have to satisfy the key criteria of the concept such as independence from those in jurisdiction and being free to the complainant.

### ***Evidence from respondents***

263. Most respondents agreed that the term “Ombudsman” gives the citizen the impression they are dealing with an impartial and possibly publicly appointed official who will handle a case thoroughly and fairly.

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<sup>238</sup> RoP, paragraph 316, 19 March 2015

<sup>239</sup> *ibid*

<sup>240</sup> FIN(4)-06-15 Paper 3 – Further evidence from the Public Services Ombudsman for Wales, 25 March 2015

264. The Northern Ireland Ombudsman said “it’s very important” to protect the title. He suggested that the legislature should approve requests to use the term ombudsman is not misrepresented to the public.<sup>241</sup>

265. The Auditor General supported the proposal and said that regulations already exist to provide protection for other titles such as “government” and “auditor general” and suggested an insertion into Schedule 4 of the [Company, Limited Liability Partnership and Business \(Names and Trading Disclosures\) Regulations 2015](#).

### ***Evidence from the Minister***

266. The Minister said protection of the title was an interesting issue but he did have concerns around the Assembly’s legislative competence. He said:

“...there could be UK-wide organisations that might decide, for example, to create a post of ombudsman. We might not like that, but we might not have the power to regulate it.”<sup>242</sup>

### ***Evidence from the Ombudsman***

267. The Ombudsman confirmed that whilst he had not personally sought protection of the title (this proposal was originally suggested by the previous Ombudsman), he did see its merit. He said:

“The role of an ombudsman is unique. In particular, the in-depth, systemic nature of investigations into complaints that an ombudsman undertakes sets him or her apart from mere complaint handling.”<sup>243</sup>

268. The Ombudsman gave a commitment to the Committee to raise the issue of protecting the title with his counterparts when he meets with the Association of British Ombudsmen.

### ***Our view***

269. The Committee recognises this is an important issue and that individuals should have confidence in a person appointed to

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<sup>241</sup> RoP, paragraph 233, 3 March 2015

<sup>242</sup> RoP, paragraph 312, 19 March 2015

<sup>243</sup> FIN(4)-06-15 Paper 3 – Further evidence from the Public Services Ombudsman for Wales, 25 March 2015

investigate their case and be assured that it will be dealt with fairly and impartially. However, the Committee appreciates that this potentially raises issues in relation to the Assembly's legislative competence as raised by the Minister and believes this proposal requires further consideration at a UK level.

**The Committee acknowledges the Ombudsman's commitment to raise the issue of protecting the title 'Ombudsman' with his counterparts when he meets with the Ombudsman Association and the Committee would be interested to hear the outcome of this discussion. The Committee suggests the Ombudsman liaises with the Welsh Government on this issue.**

### **Code of Conduct Complaints**

270. The Ombudsman's currently has a role to consider complaints that local authority members have failed to comply with a relevant code of conduct.

271. The [Local Government Act 2000](#) created a new ethical framework for local government in Wales. It created a power for the Assembly to issue a model code of conduct to apply to members and co-opted members of all relevant authorities in Wales. This power was transferred to the Welsh Ministers by the [Government of Wales Act 2006](#). In 2008, Welsh Ministers issued the current Model Code of Conduct which all relevant authorities are required to adopt.

272. A local resolution procedure for Code of Conduct complaints has been introduced, whereby cases are dealt with internally by local authorities. Although this policy has been adopted by the 22 local authorities, the Ombudsman has said that implementation is variable.

273. The Ombudsman has indicated he would prefer to focus on the element of his work that deals with service users and service delivery, rather than local authority and town and community councils' resolutions.

### ***Evidence from respondents***

274. Respondents had mixed views on this proposal. Some suggested the Ombudsman should not be drawn into ethical issues, whilst others felt the Ombudsman should provide an important deterrent for serious code of conduct complaints.

275. Respondents including the WLGA, One Voice Wales and the Auditor General felt it was important that the Ombudsman still dealt with most serious complaints relating to breaches of a code of conduct. The WLGA said:

“It is not possible to meaningfully enforce a code of conduct for councillors without an independent statutorily empowered investigative and adjudicator framework.”<sup>244</sup>

276. The WLGA and One Voice Wales agreed that training on the code of conduct should be mandatory as this could lead to a reduction in the number of code of conduct and vexatious complaints as councillors would “have a sound, basic knowledge and understanding of their responsibilities in terms of public service”.<sup>245</sup>

277. In contrast, Dr O’Brien did not believe that code of conduct complaints should be within the Ombudsman’s remit. He said:

“The Ombudsman’s chief function is the democratic holding to account of public authorities for their exercise of public functions, including (but not limited to) the provision of services to the public. That function should not be diluted by inclusion within jurisdiction of a quite distinct ‘policing’ function.”<sup>246</sup>

### ***Evidence from the Minister***

278. On this issue the Minister said the Welsh Government was currently consulting on the issue of code of conduct and the way it is managed as part of its White Paper on Local Government. He said that one of the issues he wanted to address was “vexatious complaints, often generated from within councils, by councillors about each other”.<sup>247</sup> However, he felt this “probably can be resolved in other ways”.<sup>248</sup>

279. The Minister was content for the Ombudsman to continue to have a role in dealing with code of conduct complaints.<sup>249</sup>

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<sup>244</sup> Written Evidence, PSOW 08

<sup>245</sup> RoP, paragraph 181, 25 February 2015

<sup>246</sup> Written Evidence, PSOW 09

<sup>247</sup> RoP, paragraph 289, 19 March 2015

<sup>248</sup> *ibid*

<sup>249</sup> RoP, paragraph 295, 19 March 2015

### *Evidence from the Ombudsman*

280. The Ombudsman was generally content to retain this function, but only for the most serious cases. He had concerns with the resource implications of dealing with “low level Member against Member complaints”.<sup>250</sup> He felt these type of complaints should be dealt with by councils at local level in the first instance and this should be reflected in legislation.<sup>251</sup>

281. The Ombudsman’s official confirmed that they have been working with monitoring officers of councils over the last couple of years. She said the Ombudsman was:

“...introducing and launching his new revised guidance, bringing in a public interest test to ensure that the cases that we pursue to investigation and referral for adjudication, either by local standards committees or the adjudication panel, are the really serious ones that do tick that public interest box.”<sup>252</sup>

282. The Ombudsman felt there should be a requirement on councillors to attend training on the code of conduct. His official said “I think there is scope for possible change to make it an actual requirement in the code for training to be undertaken” ideally within the first six months of being elected.<sup>253</sup>

### *Our view*

283. The Committee believes that training for elected members and guidance could see a reduction in the number of trivial complaints in the future. The Committee acknowledges the work undertaken by the Ombudsman so far and believes he should continue to encourage local authorities to deal with complaints locally.

**The Committee recommends the Welsh Government considers mandatory training for elected members as part of their consideration of forthcoming legislation on Local Government reform.**

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<sup>250</sup> FIN(4)-06-15 Paper 3 – Further evidence from the Public Services Ombudsman for Wales, 25 March 2015

<sup>251</sup> *ibid*

<sup>252</sup> RoP, paragraph 240, 25 March 2015

<sup>253</sup> RoP, paragraph 248, 25 March 2015

## Annex A: Witnesses

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The following witnesses provided oral evidence to the Committee on the dates noted below. Transcripts of all oral evidence sessions can be viewed in full at:

[www.senedd.assembly.wales/mgIssueHistoryHome.aspx?Ild=1243](http://www.senedd.assembly.wales/mgIssueHistoryHome.aspx?Ild=1243)

<b>21 January 2015</b>	<b>Organisation</b>
Nick Bennett, Public Services Ombudsman for Wales Susan Hudson, Policy and Communications Manager Katrin Shaw, Investigations Manager and Legal Adviser	Public Service Ombudsman for Wales
<b>4 February 2015</b>	
Jim Martin, Scottish Public Services Ombudsman	Scottish Public Services Ombudsman
Sally Taber, Director Simon Rogers Welsh Independent Healthcare Association	Independent Sector Complaints Adjudication Service (ISCAS)
<b>25 February 2015</b>	
Lyn Cadwallader, Chief Executive	One Voice Wales
Daniel Hurford, Head of Policy	Welsh Local Government Association
<b>5 March 2015</b>	
Nicholas Paines, Law Commissioner with responsibility for Public Law David Connolly, Manager, Public Law Department	Law Commission
Dr Tom Frawley, Northern Ireland Ombudsman	Northern Ireland Ombudsman



<b>11 March 2015</b>	
Huw Vaughan Thomas, Auditor General for Wales Martin Peters, Compliance Manager	Wales Audit Office
Ruth Marks, Chief Executive	Wales Council for Voluntary Action
Liz Withers, Head of Policy and Campaigns Wales	Citizens Advice Bureau
Dr Nick O'Brien	Ombudsmen Specialist
<b>19 March 2015</b>	
Dr Kate Chamberlain, Chief Executive	Healthcare Inspectorate Wales
Nicola Williams, Assistant Director of Nursing	Abertawe Bro Morgannwg University Local Health Board
Leighton Andrews AM, Minister for Public Services Caroline Turner Deputy Director, Permanent Secretary's Department Sanjiv Vedi, Deputy Director and Head of Central Complaints Unit	Welsh Government
<b>25 March 2015</b>	
Nick Bennett, Public Services Ombudsman for Wales Susan Hudson, Policy and Communications Manager Katrin Shaw, Investigations Manager and Legal Adviser	Public Service Ombudsman for Wales

## Annex B: List of written evidence

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The following people and organisations provided written evidence to the Committee. All written evidence can be viewed in full at:

[www.senedd.assembly.wales/mgConsultationDisplay.aspx?ID=166](http://www.senedd.assembly.wales/mgConsultationDisplay.aspx?ID=166)

Organisations	Ref
Independent Sector Complaints Adjudication Service	PSOW 01
Welsh Independent Healthcare Association Credentials 2013-2014	PSOW 01a
Connah's Quay Town Council	PSOW 02
Mochdre with Penstrowed Community Council	PSOW 03
Older People's Commissioner for Wales	PSOW 04
Abergele Town Council	PSOW 05
One Voice Wales	PSOW 06
Auditor General for Wales	PSOW 07
Welsh Local Government Association	PSOW 08
Dr Nick O'Brien	PSOW 09
Children's Commissioner for Wales	PSOW 10
Welsh Language Commissioner	PSOW 11
Wales Council for Voluntary Action	PSOW 12
Law Commission	PSOW 13
Citizens Advice Bureau	PSOW 14
Care Council for Wales	PSOW 15
Northern Ireland Ombudsman (Briefing Note)	PSOW 16
Penarth Town Council	PSOW 17
Pontaradawe Town Council	PSOW 18
Healthcare Inspectorate Wales	PSOW 19
Marshfield Community Council	PSOW 20
Brian Thompson, Liverpool Law School, University of Liverpool	PSOW 21

Local Democracy and Boundary Commission for Wales	PSOW 22
Wrexham County Borough Council	PSOW 23
Welsh NHS Confederation	PSOW 24
Care Forum Wales	PSOW 25
City of Cardiff Council	PSOW 26
Jennifer Brown, Individual Response	PSOW 27
Mold Town Council	PSOW 28
Holywell Town Council	PSOW 29
Conwy County Borough Council	PSOW 30
Joint response from the Brecon Beacons and Pembrokeshire Coast National Park Authorities	PSOW 31
Standards and Ethics Committee, City of Cardiff Council	PSOW 32
Dr Richard Kirkham, School of Law, University of Sheffield	PSOW 33
Carmarthenshire County Council	PSOW 34
Cardiff and Vale University Health Board	PSOW 35
Vale of Glamorgan Council's Standards Committee	PSOW 36
Isle of Anglesey County Council	PSOW 37
Community Housing Cymru Group	PSOW 38
Anne Carys Jones, Individual Response	PSOW 39
Deputy Children's Commissioner for Wales Acting as Children's Commissioner for Wales	PSOW 40
HM Courts and Tribunals Service	PSOW 41
Brynmawr Town Council	PSOW 42
Mr and Mrs Chesters	PSOW 43