

Public Services Ombudsman (Wales) Bill

Stage 1 Committee Report

March 2018



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Equality, Local Government and Communities Committee
National Assembly for Wales
Cardiff Bay
CF99 1NA

Tel: **0300 200 6565**

Email: **SeneddCommunities@assembly.wales**

Twitter: **[@SeneddCommunities](https://twitter.com/SeneddCommunities)**

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Stage 1 Committee Report

March 2018



About the Committee

The Committee was established on 28 June 2016 to examine legislation and hold the Welsh Government to account by scrutinising expenditure, administration and policy matters encompassing (but not restricted to): local government; housing, community regeneration, cohesion and safety; tackling poverty; equality of opportunity and human rights.

Committee Chair:



John Griffiths AM

Welsh Labour
Newport East

Current Committee membership:



Gareth Bennett AM

UKIP Wales
South Wales Central



Janet Finch-Saunders AM

Welsh Conservatives
Aberconwy



Siân Gwenllïan AM

Plaid Cymru
Arfon



Rhianon Passmore AM

Welsh Labour
Islwyn



Jenny Rathbone AC

Welsh Labour
Cardiff Central



Jack Sargeant AM

Welsh Labour
Alyn and Deeside



Bethan Sayed AM

Plaid Cymru
South Wales West

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- Signposting to relevant advocacy services; and
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1. Introduction

The Public Services Ombudsman (Wales) Bill was introduced in October 2017. We have undertaken comprehensive scrutiny of the Bill's provisions and their financial implications.

1. The Public Services Ombudsman (Wales) Bill (the Bill)¹ was introduced to the Assembly by Simon Thomas, AM, Chair of the Finance Committee (the Member in Charge) on 2 October 2017.

2. On 19 September 2017, the Business Committee agreed to refer the Bill to the Equality, Local Government and Communities Committee to consider and report on the general principles. Business Committee agreed that we should report by 9 March 2018.

1.1. Terms of scrutiny

3. We agreed the following terms of reference for our inquiry on 5 October 2017:

To consider:

- The general principles of the Public Services Ombudsman (Wales) Bill and the need for legislation to deliver the stated policy intention;
- The provisions of the Bill which set out the new powers for the Ombudsman to:
 - Accept oral complaints;
 - Undertake own initiative investigations;
 - Investigate private medical treatment including nursing care in a public / private health pathway;
 - Undertake a role in relation to complaints handling standards and procedures.
- Any potential barriers to the implementation of the Bill's provisions and whether the Bill takes account of them;

¹ **Public Services Ombudsman (Wales) Bill as introduced**

- The appropriateness of the powers in the Bill for the Welsh Ministers to make subordinate legislation (as set out in Chapter 6 of Part 1 of the Explanatory Memorandum);
- Whether there are any unintended consequences arising from the Bill; and
- The financial implications of the Bill (as set out in Part 2 of the Explanatory Memorandum).

1. 2. Committee's approach

4. The Committee issued a public consultation on 11 October 2017, closing on 1 December 2017. We received 31 responses to this consultation, which helped inform our scrutiny of the Bill. A list of those who responded can be found on [our website](#). In addition, we held an online survey, enabling people to give their views in a more informal way.

5. We held 12 oral evidence sessions. Full details of the oral evidence sessions can be on [our website](#).

6. We also wrote to all Assembly Members and Welsh MPs asking them to highlight our work to any constituents who may have an interest in or experience of accessing the Ombudsman's services.

7. We would like to thank all of those who contributed to our scrutiny, either through written or oral evidence or by responding to our online survey.

8. Financial scrutiny of a Bill is usually undertaken by the Finance Committee. This would not have been appropriate for this Bill as it has been developed and introduced by the Finance Committee. We therefore considered the financial implications of the Bill, alongside our scrutiny of the general principles.

9. To help assist with our scrutiny of the financial implications of the Bill, we appointed an expert adviser. The terms of reference for this work were:

- To obtain an external, independent analysis in understanding whether the costs outlined in the Regulatory Impact Assessment (RIA) are realistic and proportionate in terms of their completeness, timing and scale.
- To obtain an opinion as to whether the additional powers and associated expenditure arising from the Bill will provide value for money.

- To inform the Committee's views on the presentation of costings within the RIA and do they allow the Committee to have a full understanding of the additional costs and benefits.

10. We were pleased to secure the time of Dr Gavin McBurnie from the **Consumer Dispute Resolution Centre** at Queen Margaret University. We would like to thank him for his valuable contribution to our scrutiny. A copy of his report is available on our **website**.

1. 3. Consideration by another Committee

11. The Constitutional and Legislative Affairs Committee took oral evidence from the Cabinet Secretary for Finance, and the Member in Charge on 15 January 2018. They are due to report by 9 March 2018.

2. Background

The Public Services Ombudsman for Wales was established in 2005, with what was considered a model piece of legislation. However, since then a number of different groups have called for changes to the powers of the Ombudsman. The Finance Committee has introduced a Bill which expands the Ombudsman's powers.

12. The role of Public Services Ombudsman for Wales (the Ombudsman) was established by the **Public Services Ombudsman Wales (Act) 2005** (the 2005 Act). The 2005 Act transferred the role and remit of the Local Government Ombudsman; the Health Services Commissioner for Wales; the Welsh Administration Ombudsman; and the Social Housing Ombudsman for Wales to the newly created Ombudsman's functions.

13. Since 2005, there have been changes to the Ombudsman's role, the most significant followed the passing of the **Social Services and Well-being (Wales) Act 2014**. This Act expanded the Ombudsman's powers to investigate complaints in relation to social care and palliative care in the private health sector. (A matter we will cover in Chapter 8).

2.1. Calls for increased powers

14. While the 2005 Act was considered, at the time, to be a "model piece of ombudsman legislation",² there have been calls since 2013 for the Ombudsman's powers to be extended. The Explanatory Memorandum accompanying the Bill highlights that best practice and international standards have "moved on" and that there has been a strengthening of powers for the Scottish and Northern Ireland Ombudsmen.³

15. During the fourth Assembly, there were discussions and correspondence, between committees, the previous Ombudsman and the Welsh Government about opportunities to extend the powers of the Ombudsman.

16. The potential extension of the Ombudsman's powers was also discussed with the current Ombudsman, when the Finance Committee scrutinised the

² **Explanatory Memorandum**, paragraph 3.9

³ **Explanatory Memorandum**, paragraph 3.26

Ombudsman's 2015-16 Estimates. As a result, the Finance Committee recommended that the Ombudsman and the Welsh Government worked together on a timetable for amending the Act.⁴

17. The Welsh Government in responding to this recommendation said that it would be more appropriate for the Assembly to lead on any legislative change as the Welsh Government is subject to the scrutiny of the Ombudsman.⁵

18. The Finance Committee in the Fourth Assembly undertook an inquiry into the Ombudsman's powers, and published a report which recommended that a Bill extending the Ombudsman's powers be introduced into the Assembly.⁶

19. The Finance Committee developed and consulted on a draft Bill. They subsequently recommended that a future Assembly committee should introduce a Public Services Ombudsman Bill as a soon as possible in the next Assembly.⁷

20. The Explanatory Memorandum highlights the changes that were made to the Bill, following the consultation on the draft Bill.⁸

2. 2. The Bill

21. The Bill is divided into seven parts. In the main, it restates the provisions within the 2005 Act. However, it also introduces some substantial legislative changes. These include:

- Powers to design guidance to deal with complaints;
- Powers to enable the Ombudsman to undertake own initiative investigations;
- Establishing a complaints handling process across the public sector;
- Powers to enable the Ombudsman to investigate the private healthcare element of a public / private healthcare pathway;

⁴ Finance Committee, **Scrutiny of the Public Services Ombudsman for Wales' Draft Estimates 2015-16**, November 2014, paragraph 24

⁵ **Letter from Minister for Finance and Government Business to Chair of Finance Committee**, 18 December 2014

⁶ Finance Committee, **Consideration of Powers: Public Services Ombudsman for Wales**, May 2015

⁷ Finance Committee, **Consideration of the consultation on the Draft Public Services Ombudsman (Wales) Bill**, March 2016

⁸ **Explanatory Memorandum**, paragraph 3.22

- Powers to work jointly with other commissioners, statutory advisers, regulators and the Auditor General in Wales;
- Placing a duty on the Ombudsman to prepare a Welsh language strategy;
- Placing a duty on the National Assembly to review the implementation of the Act; and
- Bringing more organisations within the Ombudsman's jurisdiction.

3. General principles and the need for legislation

The Bill sets out to improve access to justice and enable the Ombudsman to be more responsive to the citizen. We believe the case has been made for the Bill. However we make a number of recommendations which we believe will improve the legislation.

22. The Explanatory Memorandum outlines the main policy intentions of the Bill:

- Improving social justice and equal opportunities;
- Protecting the most vulnerable;
- Being more responsive to the citizen;
- Driving improvement in public services and complaint-handling; and
- Contributing towards the achievement of well-being goals.⁹

23. The policy intention was supported by the current Ombudsman. He outlined that the Bill reflected his four underlying priorities:

- Future-proofing;
- Social Justice;
- Citizen Centred; and
- Drive complaint handling and public service improvement.¹⁰

24. The Member in Charge also emphasised the importance of future proofing the legislation and the Ombudsman's office.¹¹

⁹ **Explanatory Memorandum**, paragraphs 3.28 – 3.55

¹⁰ **PSOW 9, Public Services Ombudsman for Wales**, paragraph 1.3

¹¹ ELGC Committee, Record of Proceedings [RoP], 29 November 2017, [10]

3. 1. Evidence from stakeholders

25. The majority of stakeholders including WLGA, Welsh NHS Confederation, Cardiff Council and Citizen’s Advice¹² were supportive of the general principles of the Bill.

26. The Northern Ireland Public Services Ombudsman told us:

“I commend the [Finance] Committee for its innovative approach to ensure that the reform of the proposed Ombudsman legislation in Wales should mirror similar reforms that have already been implemented in Northern Ireland and Scotland. This is important given our broad remits and the challenges which we face but also to ensure commonality in access to justice for Welsh citizens when compared with Scotland and Northern Ireland. The proposed Bill is welcome and I believe will deliver benefit in delivering a modern Ombudsman service that fairly and independently investigates citizen’s complaints.”¹³

27. Stakeholders supported the suggestion that the current legislative framework was due a refresh to take account of developments within the sector both in the UK and internationally.

28. In contrast, Cymdeithas yr Iaith Gymraeg believe that the Ombudsman is not subject to sufficient accountability and scrutiny, and therefore care should be taken in extending the Ombudsman’s powers.¹⁴

29. Despite support for the general principles of the Bill, respondents highlighted concerns about individual elements. In particular we heard how some of the provisions may work in practice and the financial impact of the Bill. We will turn to each of those within the coming chapters.

30. Some of the clear themes in the evidence related to concerns around:

- duplication of roles, and further crowding an already complex regulatory landscape;
- concerns about the cost burden of some of the provisions falling on public bodies already making difficult financial choices; and

¹² **PSOW30 WLGA**, paragraph 6; **PSOW13 Welsh NHS Confederation**, paragraph 8. **PSOW21 Cardiff Council**, **PSOW31 Citizen’s Advice Cymru**, paragraph 25

¹³ **PSOW 10, Northern Ireland Public Services Ombudsman**, paragraph 2.3

¹⁴ **PSOW28 Cymdeithas yr Iaith Gymraeg**, paragraph 4.1

- concerns about how some of the provisions would work in practice.

31. Healthcare Inspectorate Wales stated that the Bill was in line with the “direction of travel” in public services. However, they highlighted that implementation, would need to be aligned with other legislative developments in the sectors that fall within the Ombudsman’s remit.¹⁵ This was also emphasised by other respondents.¹⁶

32. A key theme was that the success of the legislation depended upon effective implementation, as Brian Thompson from the University of Liverpool wrote:

“To sum up the legislation is not a magic bullet. It is the product of a policy which it seeks to implement by providing tools and powers. To achieve its goals cultural change is required, those providing public services must be aware of, and be supported in, achieving the delivery of better public services. This will also require the opportunity for challenge to resolve and learn from problems, so that dissatisfied users can feel confident when they wish to complain that this will be simple to do, and will be taken seriously leading to an appropriate remedy and action to improve service.”¹⁷

3. 2. Evidence from the Welsh Government

33. The Cabinet Secretary for Finance (“the Cabinet Secretary”) told us that the Welsh Government were happy to support two elements of the Bill: provisions relating to the referral and making of complaints; and extending the Ombudsman’s powers to enable them to investigate private / public healthcare complaints. He went on to state that the Welsh Government “reserved their position” on the other two main new powers, and that he would reflect on our conclusions and deliberations.¹⁸

3. 3. Evidence from the Member in Charge

34. The Member in Charge emphasised that this Bill was important, and that times had moved on since the 2005 Act:

¹⁵ **PSOW17 Healthcare Inspectorate Wales**, paragraph 3-5.

¹⁶ **PSOW13 NHS Confederation**, paragraph 7

¹⁷ **PSOW 25, Brian Thompson, Liverpool Law School, University of Liverpool**, paragraph 9

¹⁸ **Letter from the Cabinet Secretary to ELCG Committee in relation to the PSOW Bill**, 20 December 2017

“...there are a number of areas where we feel that we need to strengthen the ombudsman’s role to ensure that we do offer redress to the citizens – citizens who have experienced an injustice – and ensure that we offer redress to those who are seeking justice in dealing with public bodies and that they are therefore compensated, at least morally, for their experiences.

And it tries to promote, specifically, the rights of citizens with regard to public services. We’re trying to ensure that it’s secure for the future and that it’s sufficiently flexible as legislation for future development.”¹⁹

35. He said that the Bill did not fundamentally change the Ombudsman’s office or role. He also emphasised that the changes proposed by the Bill would help ensure that complaints could be better harnessed to bring about improvements in public services as well as enhancing access to justice for the citizen.²⁰

3. 4. Our view

36. We support the general principles of the Bill. This support encompasses each of the new elements introduced by the Bill. We believe that the Bill in broad terms will deliver the policy intentions set out in the Explanatory Memorandum.

37. This support is qualified however, and there are a number of areas where we would like to see amendments brought forward at Stage 2. Critically, we believe that additional work is required on aspects of the Regulatory Impact Assessment (RIA), but we believe that when this work is done, the Welsh Government should lay the necessary financial resolution.

Recommendation 1. We recommend that the Assembly agrees to the general principles of the Bill.

¹⁹ ELGC Committee, Record of Proceedings, [9-10], 29 November 2017

²⁰ ELGC Committee, RoP, [205-206], 25 January 2018

4. Part 3 – Investigations – Own initiative

The own initiative provisions will enable the Ombudsman to undertake investigations without receiving a complaint provided certain criteria are met. While we believe the provisions need some amending, we support the extension of the Ombudsman's powers.

38. Sections 4 and 5 of the Bill introduce the powers for the Ombudsman to undertake own initiative investigations. These sections have been derived from sections 8 and 9 of the **Public Services Ombudsman Act (Northern Ireland) 2016**.

39. Section 4 enables the Ombudsman to investigate a matter regardless of whether they have received a complaint. However, they can only investigate a matter under this power that the Ombudsman is entitled to investigate. Sections 10-14 detail the matters which may be investigated.

40. Section 5 sets out the criteria for own initiative investigations. The Ombudsman must be satisfied that such an investigation is in the public interest. Additionally, one of these criteria must also be met:

- That a vulnerable or disadvantaged person is likely to suffer injustice or hardship; or
- The investigation must be about systematic failure that may cause someone to suffer injustice or hardship (in deciding on this criterion, the Ombudsman must have regard to any complaints they have received).

41. The Bill provides the Welsh Ministers with the power to amend the criteria by regulation, subject to the Assembly's affirmative procedure.²¹

42. The Explanatory Memorandum outlines the four different scenarios where it is likely this power would be used:

²¹ The affirmative procedure provides that Welsh Ministers cannot exercise their power to make subordinate legislation unless the Assembly has passed a resolution approving a draft of the subordinate legislation. The subordinate legislation is therefore laid before the Assembly in draft form, and cannot have effect unless the draft is approved by the Assembly.

- Extending an investigation into a complaint to include another public body without needing a new complaint from the complainant (Scenario A);
- Findings from a complaint investigation prompts an investigation into other bodies to establish whether similar failings exist elsewhere (Scenario B);
- Investigation of an anonymous complaint (Scenario C); and
- Investigation across all, or part, of a sector of service delivery in light of concerns (Scenario D).²²

43. Section 16 of the Bill sets out the investigation procedure (this covers investigations arising from complaints submitted as well as own initiative investigations). This section includes requirements on the Ombudsman to prepare an investigation proposal, and submit it to the listed authority being investigated. (“Listed authorities” are those public bodies which are within the Ombudsman’s remit. They are listed in Schedule 3 to the Bill).

44. Sections 64-67 of the Bill makes provision for the Ombudsman to consult and co-operate with other Ombudsmen, commissioners, regulators and statutory advisers. These provisions would cover any own initiative investigations.

45. The decision on whether to proceed with an own initiative investigation is solely that of the Ombudsman to make, subject to the investigation meeting the criteria set out in section 5.

4. 1. Evidence from stakeholders

46. In the main, stakeholders supported the proposals, although we heard a number of suggestions about how the Bill should be amended. We also explored how the own initiative powers may work. If the Bill receives Royal Assent, we would expect the Ombudsman to give consideration to some of the operational issues highlighted in the written and oral evidence.

47. While most of the evidence was supportive of these proposals, this support was qualified by some of the stakeholders. This included:

- The British Medical Association (BMA), who said that some of their members had “expressed a degree of unhappiness” about the power.

²² **Explanatory Memorandum**, paragraphs 10.9

(This was the result of concerns about how the Ombudsman currently operates.)²³

- Cymdeithas yr Iaith Gymraeg. As with the BMA, their concerns related to how the Ombudsman has been operating in practice.²⁴
- The NHS Confederation indicated that they support the proposals in relation to scenarios A and C (see paragraph 42) but had reservations about their use in scenarios B and D.²⁵

48. We received some comments opposing own initiative powers from the online survey. One respondent highlighted concerns that own initiative investigations could negatively affect the Ombudsman dealing with complaints submitted. However some comments from the public supported this provision, highlighting that it would enable issues to be considered when people are too scared to complain.

49. We heard from the Ombudsman and his counterparts in Northern Ireland and Scotland that own initiative powers are common place throughout Europe, and are considered to be an integral part of a modern and progressive Ombudsman's service.²⁶ The Ombudsman told us that the number of own initiative investigations annually was likely to be low. He gave the example of the Irish Ombudsman who has only conducted five own initiative investigations between 2001 and 2010.²⁷ The Ombudsman believed any own initiative investigations would be very targeted, and would encompass one or two studies a year.²⁸

50. The Explanatory Memorandum places significant emphasis upon the potential for these powers to help protect the most vulnerable, as well as helping the Ombudsman be more responsive to the citizen.²⁹ This was echoed by witnesses in evidence to us.

51. In particular, stakeholders highlighted that these powers would enable the Ombudsman to:

²³ **PSOW27 British Medical Association**, page 3

²⁴ **PSOW 28, Cymdeithas yr Iaith Gymraeg**, paragraph 2.1 and 2.3

²⁵ **PSOW 13, Welsh NHS Confederation**, paragraph 23

²⁶ ELGC Committee, RoP, [290], 7 December 2017

²⁷ **PSOW 9 Public Services Ombudsman for Wales**, paragraph 2.1 (b)

²⁸ ELGC Committee, RoP, [9], 7 December 2017

²⁹ **Explanatory Memorandum**, paragraphs 3.36-3.43

- Investigate areas where formal complaints are not being submitted because people are too frightened to complain. In particular, we heard concerns about the low numbers of complaints in the social care sector;³⁰
- Continue to investigate an abandoned complaint or if a complainant stops responding to contact from the Ombudsman’s office, which can often be the case for particularly vulnerable people;³¹
- Look at matters cross-sector.³²

Tests for own initiative investigations

52. The foundation of the own initiative investigations is the public interest test. As set out in paragraph 40, the Ombudsman must be satisfied that an investigation is in the public interest. This is not defined in the legislation, and the Northern Ireland Ombudsman told us that “it is very important” that this is left to the Ombudsman to decide what the public interest is.³³

53. Stakeholders, including the WLGA, welcomed the changes made since the draft Bill was published, including the introduction of the “dual test” (paragraph 40) to ensure that the own initiative powers are exercised appropriately and proportionately.³⁴ We explored with a number of witnesses whether the levels of safeguards placed on the face of the Bill were sufficient.

54. The Northern Ireland Ombudsman emphasised that as well as the safeguards within the Bill, there is a “fundamental” safeguard in the office of the Ombudsman itself, who is a “responsible person, a trusted official”. She highlighted that ultimately the Ombudsman would be subject to a judicial review.³⁵

55. The Scottish Ombudsman highlighted that another layer of safeguards is transparency, with a presumption (but not a requirement) for reports to be published about own initiative investigations.³⁶

³⁰ Stakeholders who raised this issue include the Ombudsman, Northern Ireland Public Service Ombudsman, Citizen’s Advice and Social Care Wales.

³¹ ELGC Committee, RoP [293] 7 December 2017

³² ELGC Committee, RoP [294] 7 December 2017

³³ ELGC Committee, RoP [263], 7 December 2017

³⁴ **PSOW 30, WLGA**, paragraph 18

³⁵ ELGC Committee, RoP [267], 7 December 2017

³⁶ ELGC Committee, RoP [296], 7 December 2017

56. The Ombudsman emphasised that as he was ultimately answerable to the National Assembly, if there were concerns about the decisions, they could be scrutinised by Assembly committees, and that the Ombudsman could be removed from the office by the Assembly.³⁷

57. The Bill provides for the Welsh Ministers to bring forward regulations to change the criteria for own initiative investigations. This is an issue that we cover in paragraphs 73-74.

Duplication and relationships with other regulators and Commissioners

58. The most common concern raised about the own initiative provisions was the risk of duplication of work, regulatory burden and confusion over who would undertake pieces of work. The NHS Confederation said:

“Where there are concerns about significant service failure, which is a matter of public interest, then investigations should be carried out. In deciding whether such investigations should be conducted by the Ombudsman or another organisation, such as HIW or CSSIW, our concern would be to avoid any duplication with other regulatory bodies who already have a remit to undertake investigations.”³⁸

59. They also raised concerns about the impact such duplication could have:

“... one of the issues around that [Mid Staffordshire] was, actually, you had lots of regulators and investigatory bodies, but it’s that sharing of information that’s really, really important....it is about connectivity that would really need to happen, so that you’ve got the right people undertaking an investigation, with the right terms of reference, and the right questions to actually confirm what the issues really are.”³⁹

60. The Ombudsman told us that there is already a “danger for that type of duplication now” because he has thematic powers. He explained that to minimise the risk of duplication he meets regularly with other regulators and commissioners.⁴⁰

61. The Member in Charge also highlighted this in his evidence, stating that the working relationship between the Ombudsman and regulators/commissioners

³⁷ ELGC Committee, RoP [25], 7 December 2017

³⁸ **PSOW 13 Welsh NHS Confederation**, paragraph 13

³⁹ ELGC Committee, RoP [144], 7 December 2017

⁴⁰ ELGC Committee, RoP [13], 7 December 2017

was established and is effective.⁴¹ These relationships are managed either through informal working practice or in a number of cases formalised memoranda of understanding.⁴² This was confirmed by the regulators including Healthcare Inspectorate Wales⁴³ and Care and Social Services Inspectorate Wales.⁴⁴

62. It was clear in oral evidence from regulators (Healthcare Inspectorate Wales, Care and Social Services Inspectorate Wales, Social Care Wales and the Independent Healthcare Sector Complaints Adjudication Service) that while the regulatory landscape is "crowded", the provisions in the Bill could work, as long as there is clear co-operation and communication between public bodies.⁴⁵ These relationships would need to be "navigated very carefully by all of the parties that are involved in it".⁴⁶

63. Healthcare Inspectorate Wales pointed out that while the Bill provides specific provisions within Part 6 for joint working with Commissioners and the Auditor General for Wales there are not similar provisions for the regulators.

64. One of the issues we considered was whether there was the risk of dispute between the various parties about who should investigate a particular matter.

65. Social Care Wales highlighted concerns about who would take priority if both the Ombudsman and a regulator was undertaking work in a similar field:

"We would like to know whose complaint investigation will take priority where there are parallel investigations by Social Care Wales and the Ombudsman about the same or related issues. We would also question how the Ombudsman will ensure impartiality in investigations into our handling of a complaint (under our complaint or review processes) where the Ombudsman has already been investigating complaints about the same or related issues."⁴⁷

⁴¹ ELGC Committee, RoP [339], 25 January 2018

⁴² The Ombudsman has MoU with: Community Health Councils in Wales; General Dental Council; Healthcare Inspectorate Wales; the Children's Commissioner for Wales; the Older People's Commissioner for Wales; the Welsh Language Commissioner and the Care and Social Services Inspectorate Wales. Further details are available on Ombudsman's [website](#).

⁴³ ELGC Committee, RoP [88], 13 December 2017

⁴⁴ ELGC Committee, RoP [102], 13 December 2017

⁴⁵ ELGC Committee, RoP [105], 13 December 2017

⁴⁶ ELGC Committee, RoP [91], 13 December 2017

⁴⁷ [PSOW16 Social Care Wales](#), paragraph 9

66. In relation to health complaints, the Welsh NHS Confederation highlighted the importance of early dialogue between the Ombudsman, the NHS, the Welsh Government and Healthcare Inspectorate Wales before the Ombudsman embarked on an own initiative investigation. They suggested that when the Ombudsman identifies an issue they should link up with the “existing bodies who are resourced and experienced in undertaking such investigations”. The Welsh NHS Confederation argued that this would reduce the risk of duplication, be the most effective use of resources and prevent undue pressures being placed on the health service.⁴⁸

67. The WLGA acknowledged that the Ombudsman’s role is different to that of a regulator. The WLGA stated that there is a need for greater clarity in the Bill about how disputes will be resolved.

68. They suggested that the Bill is amended to include a “read across” from section 4 to section 65 to make it clearer that the Ombudsman should consult with other regulators:

“I thought that it would cross-reference with section 65 as well, which talks about consultation with specified people. But I think, given that section 4 is specifically around power to investigate own initiative, it would help, then, if that was the case, if there was a cross-reference through on that. But I think you're right, it does leave too much scope for openness and interpretation in terms of an absence of specified bodies for him to consult with in that section.”⁴⁹

Whistleblowing

69. The current Ombudsman highlighted that the own initiative powers would enable him to act on concerns raised by whistleblowing. He said he cannot currently act on concerns raised by a member of staff.⁵⁰

70. The WLGA highlighted that whistleblowing had not been a specific issue considered in any of the previous consultations on the possible extension of powers for the Ombudsman.⁵¹ They reported that the Ombudsman is already a “prescribed person” under the **Public Interest Disclosure (Prescribed Persons) Order 2014**, but that the broadening of own initiative powers would enable the

⁴⁸ **PSOW13 The Welsh NHS Confederation**, paragraphs 15 and 17

⁴⁹ ELGC Committee, RoP [16-17], 11 January 2018

⁵⁰ ELGC Committee, RoP [9], 7 December 2017

⁵¹ ELGC Committee, RoP [47], 11 January 2018

Ombudsman to consider issues raised by a whistle-blower which they supported.⁵²

4. 2. Evidence from the Welsh Government

71. The Welsh Government stated that they were reserving their position on these provisions.⁵³ The Cabinet Secretary stated that they wanted to be assured that the process the Ombudsman followed was “proportionate” and that consideration had been given to “some of the potential unintended consequences if it isn’t done in the right way”.⁵⁴

72. The Cabinet Secretary acknowledged that there were safeguards in the Bill, and that the Welsh Government believed they were sufficient as they stood, but Ministers wished to see how the provisions worked in practice. This could be done in full knowledge that the Welsh Ministers could make regulations to change the criteria for own initiative investigations, if they were not working as intended.

73. We explored whether it was appropriate for the Welsh Government to have the power to change the criteria for own initiative investigations, when they themselves are a listed authority. This was raised by the Ombudsman who said:

“I can live with the provisions in the Bill. There might be some who perhaps have a more purist view that actually my accountability is to the Assembly and only to the Assembly, and might feel slightly uncomfortable with the fact that the provisions give the right to Ministers to set the criteria. But I don't have a problem with this. I think that anyone who has own-initiative has to exercise that with responsibility, with measurement and restraint. So, some might feel it's too prescriptive currently, but I understand why those provisions are in the Bill and I could live with them.”⁵⁵

74. The Cabinet Secretary stated that while he could understand the concerns, it would be for the Assembly to make the final decision, because any changes to the criteria would be subject to the affirmative procedure.

75. The Cabinet Secretary echoed concerns of stakeholders about the risk that these provisions could create further complexity or duplication. He said he would

⁵² [Letter from the WLGA to ELGC Committee additional information](#), 23 January 2018

⁵³ [Letter from the Cabinet Secretary to ELGC Committee in relation to the PSOW Bill](#), 20 December 2017

⁵⁴ ELGC Committee, RoP [140], 15 January 2018,

⁵⁵ ELGC Committee, RoP [11], 7 December 2017

not want the Ombudsman to be “vulnerable to the accusation that the ombudsman is somehow being created as a super-regulator”.⁵⁶ He also shared the concerns voiced by the NHS Confederation (paragraph 59) about avoiding a repeat of the problems at Mid-Staffordshire.⁵⁷

76. However when reflecting on the powers, the Cabinet Secretary did observe that the Ombudsman has oversight across a range of policy areas that no other regulator has. He also said that the current powers prevented the Ombudsman from investigating in some circumstances:

“And in a relatively confined set of circumstances, I don’t think it’s unfair to say that the ombudsman should be able to act on behalf of the citizen in that way.”⁵⁸

77. The Cabinet Secretary made clear that disputes between regulators and commissioners would be a matter for the Ombudsman to decide upon, highlighting that the duty on the Ombudsman is solely to consult.⁵⁹

4. 3. Evidence from the Member in Charge

78. The Member in Charge argued that these new provisions would “bring the current legislation up to the best international standards”.⁶⁰ In his view, it was a natural extension to the Ombudsman’s current powers, and would help strengthen the robustness of complaints handling, and ultimately lead to public services improvements.

79. He also reiterated that the Ombudsman’s role is rooted in the complaints received by the public and that these powers were “additional” to that core element of his role.⁶¹ He stated that including the criteria for own initiative investigations on the face of the Bill provide assurances that these powers would not be a “blank cheque” to change the fundamental role of the Ombudsman.⁶²

80. In relation to concerns raised about the risk of duplication, the Member in Charge provided a robust and clear defence of the provisions:

⁵⁶ ELGC Committee, RoP [160], 11 January 2018

⁵⁷ ELGC Committee, RoP [161], 11 January 2018

⁵⁸ ELGC Committee, RoP [163], 11 January 2018

⁵⁹ ELGC Committee, RoP [149], 11 January 2018

⁶⁰ ELGC Committee, RoP [12], 29 November 2017

⁶¹ ELGC Committee, RoP [20], 29 November 2017

⁶² ELGC Committee, RoP [23], 29 November 2017

“It’s really important to bear in mind that regulators established by Government to regulate Government services is a different process than an independent public services ombudsman. It is conceivable, of course, that a regulator and the ombudsman might look at the same broad range of issues....That is not duplication; they are looking at it from two completely different perspectives. One is a regulator looking at legislation, looking at what the Government objectives are, looking at Government statutory guidance and all the rest, and looking to see that’s been followed. The other is the voice of the citizen-the voice of the citizen brought in, sometimes in place of a vulnerable person who might have perceived some kind of harm or injustice arising from that, and I think the two are very discrete and very different. I think it’s very dangerous to think that because a regulator is looking at something, the ombudsman shouldn’t go there. I think the ombudsman has to be independent, has to be able to respond to a citizen’s concerns or concerns brought to the ombudsman by other citizens, and I don’t regard that as encroachment. I regard that as a part of the complex but necessary range of provisions that the Assembly has made in order to ensure citizen’s rights in Wales.”⁶³

81. He also argued that by strengthening the Ombudsman’s powers, the Assembly would be strengthening an Assembly appointment, as opposed to a Government appointment.⁶⁴

82. In relation to concerns raised about the potential risk of dispute between regulators and the Ombudsman, the Member in Charge told us that he hoped that we would never be in a position where they could not come to a mutually acceptable outcome. He explained that the arrangements within the Bill mirror those in the current 2005 Act and actually go further to enable more joint working.⁶⁵ We were also told that the Bill does not enhance the range of matters that can be investigated, so it doesn’t create “a sudden extra overlap with these other commissioners”.⁶⁶

4. 4. Our view

83. It is clear that, with a few exceptions, most stakeholders are in favour of the broadening of powers for the Ombudsman in this field. We believe that there are

⁶³ ELGC Committee, RoP [248], 25 January 2018

⁶⁴ ELGC Committee, RoP [41], 29 November 2017

⁶⁵ ELGC Committee, RoP [35-36], 29 November 2017

⁶⁶ ELGC Committee, RoP [43], 29 November 2017

benefits for both individual citizens facing injustice, and for the wider public service improvement agenda, in giving the Ombudsman powers to initiate own investigations.

84. We felt that the way the Member in Charge outlined the different roles and purpose between the Ombudsman and the regulators was very helpful. It provided us with reassurance about the nature of their roles, and the risks of duplication.

85. However, we believe that amendments can be made to the Bill, to minimise the risks of duplication. We believe that the powers in relation to consultation should be strengthened, and that this requirement should be made mandatory rather than left to the Ombudsman's discretion.

Recommendation 2. We recommend that the Member in Charge brings forward amendments at Stage 2 to place a requirement on the Ombudsman to consult with regulators before embarking on an own initiative investigation.

86. While we acknowledge the complex legal provisions around whistleblowing, we believe that any publicity relating to the Ombudsman's powers, should make clear that the own initiative investigations would enable the Ombudsman to undertake investigations sparked by whistle-blowers. (Although we acknowledge that this must be done in a way that does not place unrealistic demands or expectations on the Ombudsman's office).

5. Part 3 Investigations: Requirements of complaints made or referred to the Ombudsman

The Ombudsman currently has the power to accept oral complaints, although this power is discretionary. The provisions in the Bill seek to improve access to the Ombudsman's services, which the Committee welcomes.

87. Under the 2005 Act, there are two requirements for complaints to be submitted to the Ombudsman:

- It must be made in writing [although the Ombudsman does have discretionary powers to accept a complaint in a format other than writing if they consider it reasonable to do so]; and
- It must not be made more than 12 months after the complainant first became aware of the issues being raised in the complaint.

88. Sections 8 and 9 of the Bill cover the requirements on complaints made or referred to the Ombudsman. While the provisions are derived from the similar provisions within the 2005 Act, there are substantial changes.

89. Section 8 retains the time-limit for making a complaint, but removes the requirement for a complaint to be made in writing. It also sets out additional requirements for the acceptance of oral complaints, which include that the Ombudsman must maintain a register of all oral complaints.

90. Section 8 sets out that any other requirements for complaints to be made, other than those set out in section 8, must be provided for in guidance published by the Ombudsman.

91. The Explanatory Memorandum suggests that widening the Ombudsman's powers to enable them to prescribe guidance on how complaints could be made will improve opportunities for the most vulnerable and deprived in Wales to be able to access the Ombudsman's services.⁶⁷

⁶⁷ **Explanatory Memorandum**, paragraphs 3.32

5. 1. Evidence from stakeholders

92. There was broad support from stakeholders for these provisions. Notwithstanding this, respondents highlighted some of the possible barriers to effective implementation of these provisions, and how they could be addressed.

93. The Ombudsman was very clear to us about the need for this change:

“I found it positively feudal in terms of the way in which the current legislation is drafted. I can currently consider an oral complaint should I consider it appropriate using my discretion. I'm sorry; people who might have literacy issues have rights too. They shouldn't be dependent upon what mood I or anybody else doing my job happen to be in as to whether or not you're going to exercise that discretion.”⁶⁸

94. He also said that he was not seeking to change the Ombudsman's office into a “call centre”, but that he would have flexibility to enable the most disadvantaged to access his services, if needed.⁶⁹

95. We received a lot of evidence noting that removing the requirement for a complaint to be made in writing and enabling the Ombudsman to set out how complaints could be received would be a positive step, and would help remove barriers to the most disadvantaged to access justice. This was highlighted to us by Blaenau Gwent Council,⁷⁰ the GMC,⁷¹ the WLGA,⁷² Care and Social Services Inspectorate Wales⁷³ and the Board of Community Health Councils in Wales.⁷⁴

96. In supporting this provision, witnesses cited similar evidence to that in the Explanatory Memorandum around levels of literacy in Wales, and the impact that this can have on the ability of someone to submit a complaint in writing.

97. Most stakeholders who responded to our consultation and themselves accept complaints said that they accept oral complaints.

⁶⁸ ELGC Committee, RoP [47], 7 December 2017

⁶⁹ ELGC Committee, RoP [50], 7 December 2017

⁷⁰ **PSOW07 Blaenau Gwent Council**, paragraph 1.1

⁷¹ **PSOW24 General Medical Council**, paragraph 1

⁷² **PSOW30 WLGA**, paragraph 15

⁷³ **PSOW15 CSSIW**

⁷⁴ **PSOW20 Board of Community Health Councils Wales**

98. The main issue raised was the risk people would choose the oral complaint route out of “convenience rather than necessity”.⁷⁵ However, most people involved in complaints handling see complaints as a key driver for service improvements.

Advocacy

99. The Bill does not cover any matters of advocacy, which a number of stakeholders, including Citizen’s Advice,⁷⁶ Welsh NHS Confederation,⁷⁷ and Local Democracy and Boundary Commission Wales⁷⁸ felt was an omission.

100. Care and Social Services Inspectorate Wales highlighted that other legislation, including the **Social Services and Well-Being (Wales) Act 2014** and the **Regulation and Inspection of Social Care (Wales) Act 2016**, places a lot of emphasis on advocacy. They felt that this Bill was another opportunity to strengthen advocacy support, in particular for those who are complaining about social care, as they can be very vulnerable and very dependent on what is an “emotional, relationship based service”.⁷⁹

101. One of the respondents to the public survey felt that an advocacy facility to support people who cannot submit a written complaint was preferable to enabling oral complaints to be submitted.

102. We explored the need for advocacy provisions within the Bill with the Ombudsman, but we heard from the Ombudsman’s Director of Policy, Legal and Governance that they didn’t feel it was a “necessary step”.⁸⁰ This view was supported by the Member in Charge (paragraph 114).

103. The Scottish Ombudsman was also unconvinced of the need to include more detail on the face of the Bill about advocacy. She believed that placing a requirement could “detract from actually giving a good service because it is a good service”.⁸¹ The Northern Ireland Ombudsman was of a similar view, observing that there is already flexibility in the legislation to enable anyone to act on behalf of the aggrieved person, and that it should be left “up to the individual”.⁸²

⁷⁵ **PSOW16 Social Care Wales**, paragraph 10

⁷⁶ **PSOW 31 Citizen’s Advice**, paragraph 11

⁷⁷ **PSOW13. Welsh NHS Confederation**, paragraph 12

⁷⁸ **PSOW03 Local Democracy and Boundary Commission**

⁷⁹ ELGC Committee, RoP [138-139] 13 December 2017

⁸⁰ ELGC Committee, RoP [42], 7 December 2017

⁸¹ ELGC Committee, RoP [320], 7 December 2017

⁸² ELGC Committee, RoP [321], 7 December 2017

Verification of complaints

104. We received a lot of evidence about the handling of oral complaints, in particular how to verify them and ensure that the complaint best reflects the issues the complainant is raising.

105. Social Care Wales said that the process would need to be “carefully managed” in order to avoid disputes about the accuracy of oral complaints⁸³, a concern also raised by the Local Democracy and Boundary Commission.⁸⁴ The NHS Confederation also called for clear guidance for the process of verifying complaints.⁸⁵

106. Healthcare Inspectorate Wales raised concerns about the specificity of section 8(9):

“Clause 8 (9) is arguably too specific and does not go far enough for the purposes of monitoring access and outcome. It could possibly be re-phrased along the lines of “The Ombudsman must maintain a register of all complaints, the manner in which they are received and the outcome”. This may help to monitor and evaluate whether oral complaints are more or less likely to proceed to formal investigation.”⁸⁶

107. They expanded on this, stating that such a register should also cover how the complaint was handled. They felt this would provide assurances that the Ombudsman was dealing with complaints equitably and “not building perverse outcomes into the system depending on how the complaint was received”.⁸⁷

108. Liverpool School of Law noted that the Bill in sections 8(4) – (9) provide a level of detail on the handling of complaints received, which is not included in similar legislation in Northern Ireland or Westminster.⁸⁸

5. 2. Evidence from the Welsh Government

109. The Cabinet Secretary stated that the Welsh Government was “happy” to support these elements of the Bill. He expanded on this support:

⁸³ **PSOW16 Social Care Wales**, paragraph 12

⁸⁴ **PSOW03 The Local Democracy and Boundary Commission**

⁸⁵ **PSOW13 Welsh NHS Confederation**, paragraph 10

⁸⁶ **PSOW17 Healthcare Inspectorate Wales**, paragraph 8

⁸⁷ ELCG Committee, RoP, [134], 13 December 2017

⁸⁸ **PSOW25 Liverpool School of Law**, paragraph 2

“...the prize is to make sure that people who might otherwise struggle to have their voices heard can do it this way, and I think this is something we would want to see happen.”⁸⁹

110. We explored with the Cabinet Secretary some of the issues that had been raised by the witnesses about the implementation of these provisions, including minimising the risk of oral complaints becoming the choice of convenience rather than need. The Cabinet Secretary indicated he felt that there were sufficient safeguards in the Bill.⁹⁰

111. The Cabinet Secretary highlighted “technical issues with the drafting of section 8(5)” which prohibits the Ombudsman from investigating a complaint if the complainant does not wish the complaint to continue. He stated that the ability of the Ombudsman to use own initiative powers “appears to render the prohibition worthless”.⁹¹

5. 3. Evidence from the Member in Charge

112. We questioned the Member in Charge on verification and some of the operational matters that the evidence has touched upon. The Member in Charge was clear that the Bill is a place for “principles and power” and that the decisions about process and administration are best left to the Ombudsman’s office.⁹² He noted that there are requirements within the Bill for verification, and for the Ombudsman to produce procedures for handling complaints, so it is clear what the process is.⁹³

113. However, he gave a commitment to revisit section 8(9) to ensure that all complaints received are recorded.⁹⁴

114. When we explored the issue of advocacy with the Member in Charge he said:

“...the point of advocacy should be at the point of the first complaint. So, it is for the public bodies to whom the complaint is being made initially to provide that advocacy. I'm very clear about that. ...So, I don't think it would be appropriate to put advocacy on the face of the Bill as regards the ombudsman.

⁸⁹ ELGC Committee, RoP. 196, 15 January 2018

⁹⁰ ELGC Committee, RoP, 201, 15 January 2018

⁹¹ **Letter from the Cabinet Secretary to ELGC Committee**, 15 January 2018

⁹² ELGC Committee, RoP [357], 25 January 2018

⁹³ ELGC Committee, RoP [48], 29 November 2017

⁹⁴ ELGC Committee, RoP [372], 25 January 2018

...there was a slight suggestion in some of the evidence that somehow you get to the ombudsman and then the full advocacy comes—it's much too late to do it, it should happen much earlier in the process.”⁹⁵

115. We asked the Member in Charge about support for people making oral complaints in languages other than Welsh or English. He said that the Equality Impact Assessment outlines that this section of the Bill will “enhance equalities”, as the ability to submit oral complaints removes a potential barrier to those who are not fluent Welsh or English speakers. He added that he would expect the Ombudsman to have a policy setting out how to deal with such complaints, and this might be an issue the Committee would wish to return to in annual scrutiny of the Ombudsman.⁹⁶

5. 4. Our view

116. We note that the Ombudsman already has the power to accept oral complaints, but as this is currently at the office-holder’s discretion, we do not think that it is sufficient. We support the widening of the Ombudsman’s powers to accept oral complaints and believe these provisions are an important step forward in widening access to justice. It is important that the public can access the Ombudsman’s services in the way that best suits their needs. We also note that these provisions are not just about oral complaints, but will enable the Ombudsman to accept complaints in other formats as technology and society changes. We welcome this future-proofing.

117. While we acknowledge that an increase in the number of complaints could have resource implications (which we look at in Chapter 11), we do not believe that more complaints coming to the Ombudsman’s attention is an inherently bad thing. We are also aware that the Ombudsman has highlighted concerns to us, during scrutiny of his annual report, about the low number of complaints in social care. This concern was also shared by others (paragraph 51).

118. While supporting the provisions in general we believe there are opportunities to further tighten the provisions. As we noted in paragraph 106, Healthcare Inspectorate Wales raised the issue of section 8(9), and we are persuaded by their suggestion that this provision needs to be amended to cover all complaints. We welcome the commitment by the Member in Charge to revisit the provisions in section 8(9). We also note the comments made by Healthcare Inspectorate Wales

⁹⁵ ELGC Committee, RoP [378-379] 25 January 2018

⁹⁶ ELGC Committee, RoP [502-503] 25 January 2018

where they provided further details of what such a register could contain (paragraph 107).

Recommendation 3. We recommend that the Member in Charge brings forward amendments at Stage 2 so that section 8(9) places a requirement on the Ombudsman to maintain a register of all complaints received, not just oral complaints.

119. We note that a number of issues we considered during our work touched on matters that were operational, and if the Bill is passed, we expect that the Ombudsman reflects on the evidence we received in drawing up the guidance on the making and referral of oral complaints.

Recommendation 4. We recommend that the Ombudsman reflects on the evidence we have received in relation to operational matters about the making and referral of complaints and takes this into account when developing guidance on making complaints. Areas we believe this should cover includes:

- Verification of oral complaints;
- Signposting to relevant advocacy services; and
- Minimising the cost of making a complaint.

6. Part 3 Investigations: Matters which may be investigated

We support the provisions which would enable the Ombudsman to investigate complaints which have a public / private healthcare pathway.

120. Section 10 sets out what the Ombudsman is entitled to investigate (subject to the exceptions provided for in sections 11-14). The most significant change compared with the 2005 Act is that this provision allows for the Ombudsman to investigate certain matters as they relate to private health services, namely where a patient has received private healthcare as part of a public / private care pathway. The private treatment can occur at any stage of the care pathway.

121. Under the 2005 Act, the Ombudsman could only investigate treatment where the NHS commissioned private healthcare. The changes provided for in the Bill would allow a complaint to be considered if the individual had commissioned their own private healthcare, but that the care had encompassed both private and public healthcare. The Bill does not provide the power to investigate purely private care this remains outside of the jurisdiction of the Ombudsman.

122. The Explanatory Memorandum sets out that these provisions will mean the Ombudsman can be more responsive to the citizen, as his powers will not be constrained by sector or silo.⁹⁷

123. Section 19 makes provision for the Ombudsman to demand costs from private healthcare providers, in cases where the private healthcare provider has in the opinion of the Ombudsman obstructed the Ombudsman in the discharge of their duties. We consider this provision under Chapter 11.

124. Section 24 provides that listed authorities must have regard to an Ombudsman's report and any action subsequently taken by the private healthcare provider when authorities are deciding whether to enter into a contract for services with that provider.

⁹⁷ **Explanatory Memorandum**, paragraphs 10.9

6. 1. Evidence from stakeholders

125. This extension of the Ombudsman’s powers to consider the private element of a public / private healthcare pathway was supported by all those who provided evidence on this issue, which included the Welsh Independent Healthcare Association, the representative association of independent healthcare providers and the Independent Healthcare Sector Complaints Adjudication Service (ISCAS).

126. One of the main reasons given in support of this provision was the ever-changing nature of public service provision, which is becoming more and more integrated. Citizen’s Advice told us that “ensuring a complaint can be resolved seamlessly, even when it involves different sectors is crucial for the individual concerned”.⁹⁸ This is of particular significance as the social and healthcare services become more integrated. This view was also highlighted by GMC,⁹⁹ Healthcare Inspectorate Wales,¹⁰⁰ the Welsh NHS Confederation¹⁰¹ and the Royal College of Nursing.¹⁰²

127. WIHA told us that patients “don’t understand that they’ve crossed various boundaries”.¹⁰³

128. The Ombudsman told us that the current system follows the sector rather than the citizen, and that there have been examples of cases he had not been able to investigate.¹⁰⁴ He described a case where a complainant had to wait five and half years for a response to complaints regarding the care of her deceased husband. He stated that the delays had been the result of “ping-pong” between a public and private investigation. He felt this reform would ensure that in the future, such unacceptable delays would not happen.¹⁰⁵

129. Other than the provision around recovery of costs, which we deal with in Chapter 11, the only other issue raised in relation to these provisions was the sanctions available to the Ombudsman in the event a private healthcare provider

⁹⁸ **PSOW31 Citizen’s Advice**, paragraph 19

⁹⁹ **PSOW24 GMC**, paragraphs 6-7

¹⁰⁰ **PSOW17 Healthcare Inspectorate Wales**, paragraphs 9-10

¹⁰¹ **PSOW 13 Welsh NHS Confederation**, paragraph 24

¹⁰² **PSOW 22 Royal College of Nursing**, paragraph 3

¹⁰³ ELGC Committee, RoP [444], 7 December 2017

¹⁰⁴ The current legislative position is that the Ombudsman can investigate private health sector care that has been commissioned by the NHS, but not care that has been commissioned by an individual. The Bill would remove this restriction, provided the care pathway included a public element.

¹⁰⁵ ELGC Committee, RoP [56], 7 December 2017

does not act on recommendations arising from an investigation. This was raised by the Welsh NHS Confederation in their written evidence¹⁰⁶ and was an issue we considered in our oral evidence sessions. WIHA told us that:

“I can’t see how the ombudsman could require a sanction that doesn’t align with something with Healthcare Inspectorate Wales, because they are the regulator of the hospital....So, as long as it was in line with the regulator, I think that would be reasonable.”¹⁰⁷

130. WIHA told us that they would be content with provisions which were in line with those for the NHS. They were also confident that their member organisations would take actions required by an Ombudsman report.¹⁰⁸

6. 2. Evidence from the Welsh Government

131. In correspondence the Welsh Government stated that they were content with these provisions.¹⁰⁹ We explore the Government’s proposals around the recovery of costs in Chapter 11.

6. 3. Evidence from the Member in Charge

132. The Member in Charge explained that these powers were “very tightly drawn”, and would only cover a “limited number of cases”, but would allow the complaint to be “understood as a whole”.¹¹⁰ He told us that this was about closing a “clear loophole” rather than a significant extension of the Ombudsman’s powers.¹¹¹

133. When we explored the issue of compelling a private healthcare provider to implement recommendations made by the Ombudsman, the Member in Charge was clear that the Ombudsman cannot require a private provider to take a specific action. However, he told us that any such report would:

¹⁰⁶ **PSOW 13 Welsh NHS Confederation**, paragraph 26

¹⁰⁷ ELGC Committee, RoP [483], 7 December 2017

¹⁰⁸ ELGC Committee, RoP [485-488], 7 December 2017

¹⁰⁹ **Letter from the Cabinet Secretary to ELGC Committee in relation to the PSOW Bill**, 20 December 2017

¹¹⁰ ELGC Committee, RoP [55-57] 29 November 2017

¹¹¹ ELGC Committee, RoP [93], 29 November 2017

“...have a potential reputational risk for the private healthcare provider, but also, of course, it would be information of great use to anyone considering commissioning that private healthcare provider.”¹¹²

134. He said that a vital incentive for private healthcare providers will be the ongoing relationship with the public sector body commissioning their services. He described it as a “name and shame regime”.¹¹³

6. 4. Our views

135. We support the provisions relating to the extension of the Ombudsman’s power to investigate the private element of a public / private healthcare pathway. We agree with the stakeholders, and the Member in Charge, that this will enable the Ombudsman to consider all parts of a complaint, reducing the likelihood of future complainants waiting for long periods of time, in some cases years, for answers and justice.

136. We accept that the sanctioning regime as outlined in the Bill is the most practical way of trying to ensure that private healthcare providers take actions recommended by the Ombudsman.

¹¹² ELGC Committee, RoP [76], 29 November 2018

¹¹³ ELGC Committee, RoP [431] 25 January 2018

7. Part 4 Listed authorities: Complaints Handling Procedures

The Bill provides new powers for the Ombudsman to set standards and promote good practice in complaint handling. While acknowledging that amendments are necessary, we support the policy intent behind these provisions.

137. Part 4 of the Bill introduces powers for the Ombudsman to set complaints-handling procedures for listed authorities. The Explanatory Memorandum notes that a model complaints policy already exists in Wales “to help achieve consistency across public services”.¹¹⁴ However, adoption of the model is voluntary and the Explanatory Memorandum states that this is inconsistent across the public sector.¹¹⁵

138. The Bill seeks to introduce new powers and duties for the Ombudsman in relation to complaints-handling including:

- publishing a statement of principles in relation to complaints-handling procedures;
- publishing model complaints-handling procedures for listed authorities;
- setting requirements on listed authorities in relation to complaints-handling, including specifying which authorities are relevant, which must comply and requests for information from the authorities.

139. Part 4 also places duties on the Ombudsman to promote, monitor and share best practice in relation to complaints-handling.

140. Section 41 allows flexibility to listed authorities so that they do not need to comply with a new model complaints handling procedure if it is found to be incompatible with any existing enactment.

141. There were varying levels of support in evidence for Part 4 of the Bill. The majority of respondents supported the provisions for the Ombudsman to have the power to set complaints-handling procedures. Some respondents broadly agreed

¹¹⁴ [Explanatory Memorandum, paragraph 3.47](#)

¹¹⁵ [Explanatory Memorandum, paragraph 3.47](#)

with the provisions but specified concerns that they would like to see addressed or clarified.

142. The NHS Confederation disagreed with the provisions in Part 4, noting that the health sector already has an existing internal complaints-handling procedure Putting Things Right which has been embedded into the NHS in Wales for several years.

7. 1. Operation in other devolved nations

Evidence from stakeholders

143. The Explanatory Memorandum states that the provisions in relation to complaints-handling are similar to the approach already in place in Scotland.¹¹⁶ The Scottish Ombudsman acts as a Complaints Standards Authority, with a model complaints-handling procedure in operation. The Northern Ireland Ombudsman has the powers to set complaints-handling standards across public services, although these powers will not commence until the restoration of the Northern Ireland Executive and Assembly.

144. Both the Scottish Ombudsman and the Northern Ireland Ombudsman supported the Bill's provisions in relation to complaints-handling procedures. The Northern Ireland Ombudsman told us that the absence of statutory complaints-handling procedures can lead to public confusion:

“The health and social care procedure is the only statutory complaints-handling procedure in Northern Ireland, and it is a single-stage procedure... there are three-stage complaints in relation to planning... there are multiple stages in the housing executive and the housing associations' complaint processes. What did our research tell us? That the public were confused.”¹¹⁷

145. The Scottish Ombudsman noted the positive changes since the powers were introduced in Scotland. They have seen evidence of greater consistency¹¹⁸ and improved dialogue¹¹⁹ across public services, as well as “a very rich source of data”

¹¹⁶ **Explanatory Memorandum, paragraph 3.50**

¹¹⁷ ELGC Committee, RoP [355], 7 December 2017

¹¹⁸ ELGC Committee, RoP [363], 7 December 2017

¹¹⁹ ELGC Committee, RoP [374], 7 December 2017

which will “add so much greater value...to public sector improvement and improvement for individuals”.¹²⁰

146. The evidence from the Scottish Ombudsman noted that in practice, the CSA:

- “aim[s] to drive improvement through improved complaints handling
- work[s] closely with public bodies to standardise and simplify complaints handling procedures
- promote[s] greater consistency, and resolution at the first point of contact, wherever possible.”¹²¹

147. The Scottish model is based on extensive consultation with the sectors within the CSA’s jurisdiction. The Scottish Ombudsman told us that the basic model is adapted for each sector, and that they worked very closely with local government and health bodies in its development.¹²²

148. The General Medical Council (GMC) noted that it has recently been involved in consultations on a new standard NHS Complaints Handling Procedure. The GMC also told us that it hopes “to ensure that this input is also present in any move by the Ombudsman in the future”.¹²³

149. The Scottish approach appears to allow a degree of flexibility, as there are six model procedures operating for:

- local authorities;
- registered social landlords;
- Scottish government, Scottish parliament and associated public authorities;
- further and higher education;
- social work; and

¹²⁰ ELGC Committee, RoP [375], 7 December 2017

¹²¹ **PSOW08 Scottish Public Services Ombudsman**, paragraphs 5-7

¹²² ELGC Committee, RoP [363], 7 December 2017

¹²³ **PSOW24 General Medical Council**, paragraph 10

- the NHS.¹²⁴

150. In his evidence, the Ombudsman regularly referred to the existing complaints-handling model in Scotland and its positive evaluation, and that in his view:

“...this is an opportunity to make sure that the next area that would have a complaints standards authority would be Wales, and that we could do something really good here south of Hadrian's Wall.”¹²⁵

Evidence from the Welsh Government

151. We did not take any evidence from the Welsh Government on the operation of similar provisions in other devolved nations.

Evidence from the Member in Charge

152. The Member in Charge told us that the Bill “replicates the complaints-handling provisions of the Scottish Public Services Ombudsman Act 2002, which have worked well”.¹²⁶

Our view

153. The evidence we heard from the Scottish Public Services Ombudsman and the Northern Ireland Public Services Ombudsman on the complaints-handling proposals was compelling. We would like to see the Ombudsman following the model that has been successful in Scotland, ensuring collaborative working and consultation with the sector.

154. We therefore support the proposals in the Bill for the Ombudsman to set complaints-handling procedures and standards.

7. 2. How the existing complaints-handling model could be improved

155. The Bill’s Explanatory Memorandum¹²⁷ notes that as the current model complaints policy is voluntary, while “adoption across the public sector is not consistent”.¹²⁸ The Bill aims to “achieve consistency across public services”¹²⁹ as well

¹²⁴ **PSOW08 Scottish Public Services Ombudsman**, paragraph 15

¹²⁵ ELGC Committee, RoP [89], 7 December 2017

¹²⁶ **Letter from Member in Charge to ELGC Committee**, 10 January 2018

¹²⁷ **Explanatory Memorandum**

¹²⁸ **Explanatory Memorandum**, paragraph 3.47

as make available “regular, reliable and comparable data on complaints across the public sector; in order to “drive accountability” and “transparency in reporting”.¹³⁰

Evidence from stakeholders

156. The current Ombudsman said that the proposals aim to enable the role to achieve “openness”, “transparency”,¹³¹ and the “driving up [of] standards”.¹³²

157. As previously mentioned, the majority of respondents were in favour of the proposal to change the way in which complaints-handling procedures work in public services. Several respondents gave evidence on the current ways of working including the voluntary complaints model.

158. Health and social care inspectorates including Care and Social Services Inspectorate Wales (CSSIW),¹³³ Healthcare Inspectorate Wales (HIW)¹³⁴ and other organisations in the healthcare sector including the Royal College of Nursing (RCN)¹³⁵ and the General Medical Council (GMC)¹³⁶ all supported the provisions.

159. Other stakeholders who were fully supportive of the provisions include Newtown and Llanllwchaiarn Town Council, the Wales Audit Office and Citizens Advice Bureau. The RCN highlighted in their evidence that 38% of complaints about public services are health-related, and therefore welcomed the opportunity to improve responses and processes.¹³⁷ The GMC noted that the current voluntary model for complaints-handling is not sufficient:

“The current situation in Wales of voluntary adoption of the model complaints across the public sector has failed to achieve consistency across the public sector, and addressing this would increase the potential for learning and improvements in complaints handling.”¹³⁸

160. Several stakeholders saw it as an opportunity to improve the complaints route for members of the public through improved consistency of complaints-

¹²⁹ **Explanatory Memorandum**, paragraph 3.47

¹³⁰ **Explanatory Memorandum**, paragraph 3.50

¹³¹ ELGC Committee, RoP [78], 7 December 2017

¹³² ELGC Committee, RoP [80], 7 December 2017

¹³³ **PSOW15, Care and Social Services Inspectorate Wales**

¹³⁴ **PSOW17 Healthcare Inspectorate Wales**, paragraph 12

¹³⁵ **PSOW 22 Royal College of Nursing**

¹³⁶ **PSOW 24 General Medical Council**, paragraph 8

¹³⁷ **PSOW 22 Royal College of Nursing**

¹³⁸ **PSOW24 General Medical Council**, paragraph 9

handling across public services. HIW told us giving a role in oversight of complaints-handling to the Ombudsman, as proposed in the Bill, would be “in the best interests of the public”,¹³⁹ to ensure consistency.

161. The WLGA were broadly supportive of the provisions, but told us of some reservations they had. They commented that the voluntary model has improved consistency and reduced bureaucracy, and combined with the work of the Ombudsman’s office, has encouraged early resolution.¹⁴⁰ They also stated, like the GMC, that it would be beneficial to revise the current, voluntary model, due to developments in complaints-handling in recent years, including the increased use of social media.¹⁴¹

162. Citizens Advice Bureau also saw the provisions as an opportunity to improve the customer experience. They noted that it is important to consider the complaints journey from the point of view of the complainant, to ensure that the process is as straightforward as possible.¹⁴² Stakeholders from the health and social care sectors told us that due to the different complaints procedures between bodies, one complaint could be handled using different procedures if it included both health and social care pathways, which could lead to frustration for the complainant. HIW said:

“... we need to think about this from the perspective of the individual who wants to make the complaint...They shouldn't have to think before they complain, 'Exactly who is it I'm complaining about?' or 'Which body is providing which bit of the care? I'm simply dissatisfied'.”¹⁴³

163. The current Ombudsman argued that a major aim of the provisions is to:

“... improve complaints handling to ensure that complaints are handled more simply, more effectively and more consistently, and are resolved at the first point of contact, wherever possible.”¹⁴⁴

164. HIW agreed that it would be beneficial for complaints to be resolved at the first point of contact, rather than being escalated to the Ombudsman’s office due to a failure to achieve a resolution. They told us that if an individual feels they have to take their complaint to the Ombudsman, they are likely to become more

¹³⁹ **PSOW17 Healthcare Inspectorate Wales**, paragraph 14

¹⁴⁰ ELGC Committee, RoP [97], 11 January 2018

¹⁴¹ ELGC Committee, RoP [133], 11 January 2018

¹⁴² ELGC Committee, RoP [79], 11 January 2018

¹⁴³ ELGC Committee, RoP [186], 13 December 2017

¹⁴⁴ **PSOW09 Public Services Ombudsman for Wales**, paragraph 2.3(a)

frustrated and dissatisfied at the failure of the initial service to resolve their complaint.¹⁴⁵

165. The stakeholders who supported the provisions also welcomed the opportunity to improve their data and evidence base to help increase standards of complaints handling across public services. The Scottish Ombudsman noted that since establishing the CSA, they are able to better understand the “complaints landscape”¹⁴⁶ as a result of the data gathering requirements on public services.

166. The WLGA noted that the proposals for data collection aim to “drive good practice”,¹⁴⁷ and would enable analysis of complaints trends on a national basis.

167. Although the proposals for complaints-handling in the Bill apply to listed authorities only, we heard evidence in support from bodies in the private healthcare sector, including the Welsh Independent Healthcare Association (WIHA) and the ISCAS. WIHA told us that complaints handling itself is often complained about in the private sector, and so they view the provisions as a “good initiative”.¹⁴⁸ ISCAS echoed this view.¹⁴⁹

Evidence from the Welsh Government

168. The Cabinet Secretary told us that the Welsh Government is “open minded”¹⁵⁰ about the provisions on model complaints-handling. He noted that current models enable listed authorities to establish their own complaints-handling procedures, as long as they comply with the Regulations set by the legislature:

...it is for the health bodies and local authorities themselves to establish the complaints procedures. In the social care sector, each local authority can make its own scheme, but it must comply with the Regulations.¹⁵¹

¹⁴⁵ ELGC Committee, RoP [186], 13 December 2017

¹⁴⁶ ELGC Committee, RoP [363], 7 December 2017

¹⁴⁷ ELGC Committee, RoP [83], 11 January 2018

¹⁴⁸ ELGC Committee, RoP [490], 13 December 2017

¹⁴⁹ **PSOW 23 ISCAS**, paragraph 12

¹⁵⁰ ELGC Committee, RoP [175], 11 January 2018

¹⁵¹ **Letter from Cabinet Secretary to ELGC Committee**, 15 January 2018

Evidence from the Member in Charge

169. The Member in Charge, told us that ensuring “consistency across the public sector in Wales”¹⁵² is one of the key reasons for the provisions in relation to the complaints-handling model. He said that:

“...there are standards for the way that complaints are dealt with and responded to within public services—so [the Bill aims to] raising awareness of the regime with regard to dealing with complaints.”¹⁵³

Our view

170. We feel that the additional requirements on listed authorities in the Bill to act in accordance with the model complaints-handling procedures are proportionate to the perceived benefits. The evidence showed the level of inconsistency of complaints handling by listed authorities and the negative impact on individuals making complaints.

171. We therefore support the proposals in the Bill and the overall objective to provide greater consistency of complaints-handling between listed authorities. In our view, this will lead to better justice and earlier resolution for complainants, and as a result, fewer complaints submitted to listed authorities and to the Ombudsman’s office overall.

7. 3. The impact of the Bill on existing complaints-handling procedures

Evidence from stakeholders

172. As previously mentioned, not all stakeholders were supportive of the provisions in relation to complaints-handling procedures.

173. As noted by the RCN in paragraph 159, a large proportion of complaints about public services are in relation to healthcare. The NHS has a complaints-handling procedure, Putting Things Right, which has been in place since 2011. The procedure derives from the principles of the **National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011**, to which all NHS bodies must adhere. The Welsh Government and the relevant healthcare inspectorates monitor compliance with the regulations.

¹⁵² ELGC Committee, RoP [10], 29 November 2017

¹⁵³ ELGC Committee, RoP [10], 29 November 2017

174. Although the Welsh NHS Confederation acknowledged that the Ombudsman “would wish to share expertise”¹⁵⁴ for complaints handling standards, they told us that “it is difficult to see the benefit of having additional requirements from the Ombudsman in this area”.¹⁵⁵ They expressed concern that the Bill does not reference Putting Things Right¹⁵⁶ and there is potential for a conflict with any model complaints-handling procedure that the Ombudsman establishes. To overcome this they recommended:

“...an impact assessment on the new Bill and the current Putting Things Right Regulations, including the financial and staff resources which could affect Health Boards and Trusts, to ensure that any unintended consequences or conflict between the Regulations are addressed before the Bill becomes an Act.”¹⁵⁷

175. They suggested that a complaints-handling model deriving from the Bill’s provisions “...could enhance PTR...but certainly not replacing that, because it’s embedded into everything we do”.¹⁵⁸

176. The NHS highlighted the successes of “Putting Things Right”. This includes data that will enable staff to compare and draw themes from complaints made.¹⁵⁹ The creation of consistent data sets is one of the key arguments being made in favour of these provisions.

177. They told us that “Putting Things Right” has resulted in “saving a lot of public money”¹⁶⁰ as complainants are dealt with under the redress regulations. They highlighted that a minority of complaints are escalated beyond the relevant public service to the Ombudsman’s office.¹⁶¹

178. Finally, the Welsh NHS Confederation felt that any leadership on standardisation of complaints procedures should come from the Welsh Government rather than the Ombudsman.¹⁶²

¹⁵⁴ **PSOW13 NHS Confederation**, paragraph 28

¹⁵⁵ **PSOW13 NHS Confederation**, paragraph 29

¹⁵⁶ **PSOW13 NHS Confederation**, paragraph 28

¹⁵⁷ **PSOW13 NHS Confederation**, paragraph 36

¹⁵⁸ ELGC Committee, RoP [207], 7 December 2017

¹⁵⁹ ELGC Committee, RoP [205], 7 December 2017

¹⁶⁰ ELGC Committee, RoP [227], 7 December 2017

¹⁶¹ ELGC Committee, RoP [206], 7 December 2017

¹⁶² **PSOW13 NHS Confederation**, paragraph 28

179. In contrast to the above, the Board of Community Health Councils Wales told us that they:

“...support the promotion of best practice in complaints handing and agree that the Ombudsman is best placed to take this role.”¹⁶³

180. However, the Board of Community Health Councils Wales did say that it could be problematic if “Putting Things Right” remained as the complaints-handling model for NHS bodies, but other healthcare bodies were required to follow a new model set by the Ombudsman.

181. The Ombudsman responded to the Welsh NHS Confederation’s view and said that a model complaints-handling procedure:

“...isn't about overriding the 'Putting Things Right' regulation. I don't know if some of this is a fear factor, really, coming from the NHS...we've had instances...where the 'Putting Things Right' regulations are not the problem—compliance with those regulations is the problem.”¹⁶⁴

182. Cardiff Council also raised concerns about the provisions highlighting the risk of the Ombudsman’s guidance being “too prescriptive” and not allowing for “a degree of flexibility for local authorities to handle and investigate complaints in a manner that suits their size and structures”.¹⁶⁵

183. They told us that, unlike other local authorities in Wales, Cardiff has a one-tier complaints process and therefore they had reservations about a “one size fits all” approach as a result of the Bill. They argued that this could result in additional costs and resource requirements.¹⁶⁶

184. Whilst they appeared to support the proposals overall, the WLGA held a similar view to Cardiff Council, and told us that they were cautious about a “risk of prescription and bureaucracy”.¹⁶⁷ However, they did note that the proposals in relation to data collection did not appear too problematic as there is already data available which is reported by authorities and other bodies.¹⁶⁸

¹⁶³ **PSOW 20 Board of Community Health Councils**

¹⁶⁴ ELGC Committee, RoP [84], 7 December 2017

¹⁶⁵ **PSOW 21 Cardiff Council**

¹⁶⁶ ELGC Committee, RoP [86], 11 January 2018

¹⁶⁷ ELGC Committee, RoP [82], 11 January 2018

¹⁶⁸ ELGC Committee, RoP [83], 11 January 2018

185. Despite being supportive of the provisions overall, Social Care Wales sought clarity about section 38(1) and compliance with the complaints-handling procedure:

“We would welcome information about whether, under section 38(1), the Ombudsman will be able to draw attention to approved non-compliance, where an organisation has relied on sections 41(1)(b) or section 37(4) to obtain consent to deviate from the model complaints handling procedure.”¹⁶⁹

186. They commented that providing clarity on these provisions could help organisations to avoid allegations of non-compliance.

Evidence from the Welsh Government

187. As mentioned in paragraph 168, the Cabinet Secretary for Finance told us that he was open minded on these provisions and that he would welcome our view.

188. However, he told us that the way in which the Bill is currently drafted causes concern due to the potential that the provisions enable the Ombudsman to contradict principles that the legislature has set.¹⁷⁰

189. The Cabinet Secretary also told us that he had specific concerns about the way in which the Bill’s provisions are drafted, in relation to existing complaints-handling procedures such as “Putting Things Right”:

“I think you could read the Bill as allowing the ombudsman to set out a set of principles that contradicted the principles that the National Assembly for Wales had legislated for, and then, having set out the principles, the Bill allows the ombudsman to turn those principles into a complaints-handling procedure for, in this case, the health service, and then to require the health service to adopt the complaints-handling procedure that he has developed.”¹⁷¹

190. Furthermore the Cabinet Secretary highlighted that section 40 of the Bill puts the onus on the listed authority to establish whether their existing procedures are inconsistent with the legislation. He said that the Welsh

¹⁶⁹ **PSOW16 Social Care Wales**, paragraph 16

¹⁷⁰ ELGC Committee, RoP [178], 11 January 2018

¹⁷¹ ELGC Committee, RoP [176-177], 11 January 2018

Government's preference would be that it "wasn't inconsistent in the first place".¹⁷² A similar view was expressed by Social Care Wales (paragraph 184).

Evidence from the Member in Charge

191. The Member in Charge commented that:

"Section 41(1)(b) of the Bill clarifies that if a listed authority is subject to a statutory complaints-handling regime, then the listed authority does not have to comply with Ombudsman's model complaints-handling procedures and does not have to comply with the Ombudsman's statement of principles, to the extent that those duties to comply are inconsistent with the statutory regime. Therefore, listed authorities will have to consider any statutory regime that applies to them and compare it with the Ombudsman's model complaints-handling procedure, and then make a judgment about inconsistencies."¹⁷³

192. This appears consistent with the Cabinet Secretary's interpretation of the provisions i.e. that the onus is on the listed authority to identify any inconsistencies with other enactments. However, the Member in Charge stated that such conflicts should be avoided due to the requirement in the Bill on the Ombudsman to consult with listed authorities ahead of establishing the statement of principles and publishing the model complaints-handling procedure.¹⁷⁴

193. Furthermore, the Member in Charge told us that:

"Our interpretation of that section of the Bill is, as we state clearly that it is impossible for the ombudsman to operate in a way that is not in keeping with other legislation, that, in turn, includes any statutory guidance that emanates from that legislation... our legal interpretation of the Bill is: as we say clearly that the ombudsman can't conflict with other legislation, that includes the statutory guidance."¹⁷⁵

194. The Member therefore appeared to clarify that it is not the Bill's intention to override existing models that derive from legislation, such as "Putting Things Right".

¹⁷² ELGC Committee, RoP [219], 11 January 2018

¹⁷³ **Letter from Member in Charge to ELGC Committee**, 10 January 2018

¹⁷⁴ **Letter from Member in Charge to ELGC Committee**, 10 January 2018

¹⁷⁵ ELGC Committee, ROP [440], 25 January 2018

195. The Member in Charge then told us that he would be happy to accept our recommendations in order to clarify this part of the Bill.¹⁷⁶

Our view

196. We understand the concerns of stakeholders and the Cabinet Secretary in relation to statutory and non-statutory guidance which is already in place in some public services. The particular example cited in evidence to us was Putting Things Right, within the NHS. We welcome the provisions in Part 4 of the Bill and think it is appropriate for the Ombudsman to identify where changes to complaints processes and procedures should be made. When the Ombudsman proposes any changes to such guidance, these should be considered seriously by the relevant organisations, (and they should be willing to adapt to making potential changes to current policy should this be appropriate). However, we think the Bill could be clearer as to how the Ombudsman will take account of complaints procedures which have some statutory under-pinning, but that do not meet the definition of enactments' in the Bill. We welcome the comments from the Member in Charge that it is not the Bill's intention to over-ride such guidance, and that he would be willing to amend the wording of the provisions, for clarity.

Recommendation 5. We recommend that the Member in Charge brings forward amendments at Stage 2 to ensure that due allowance is made for existing non-statutory guidance in relation to complaints-handling procedures.

7. 4. Risk of challenging the independence of the Public Services Ombudsman for Wales

Evidence from stakeholders

197. A further concern that stakeholders, including the Welsh NHS Confederation, had about the provisions on complaints-handling was that it would compromise the Ombudsman's independent, investigatory role. They told us:

"The more operational and involved the Ombudsman role becomes, there is a risk that it may be seen as less objective when reviewing how a body has implemented that procedure."¹⁷⁷

198. In their view, the public would prefer the Ombudsman's role to remain separate from any involvement with setting procedures for public services, in order to retain trust in the Ombudsman's investigations.¹⁷⁸

¹⁷⁶ ELGC Committee, ROP [440], 25 January 2018

¹⁷⁷ **PSOW 13 NHS Confederation**, paragraph 27

199. The three Ombudsmen (the Public Services Ombudsman for Wales, the Scottish Ombudsman and the Northern Ireland Ombudsman) disagreed with this view. The Scottish Ombudsman, told us:

“...it's the opposite. In practice, it hasn't compromised our independence, partly because the first stage is based on parliamentary-set principles. But what it has done is it has given us a way of opening up a much better dialogue across the public sector, and when you open up a dialogue and you are transparent about what you are doing and why you are doing it, and you have an understanding that, actually, we're all trying to achieve the same things, what it gives us is a good core of a framework around which to work...”¹⁷⁹

200. The Ombudsman's evidence echoed this, noting that there have been “no assertions of lack of independence” or challenge to the system in Scotland.¹⁸⁰ It will be the Ombudsman's responsibility to manage any conflicts of interest that may arise to avoid their independence being challenged. We note that the Ombudsman already has “improvement officers” in place working with several public bodies. During our annual scrutiny of the Ombudsman's work he noted that it is important for the “improvement officers”:

“...to make sure that that line doesn't get blurred... Don't go native, and don't get sucked in either, so that you're dealing disproportionately with them and with their complaints. I think we've walked that line pretty well, but we're aware of the fact that it's a risk you've got to manage.”¹⁸¹

Evidence from the Welsh Government

201. We did not take any evidence from the Welsh Government on issues around the Ombudsman's independence.

Evidence from the Member in Charge

202. We did not take any evidence from the Member in Charge on this aspect of the provisions.

¹⁷⁸ ELGC Committee, RoP [222], 7 December 2017

¹⁷⁹ ELGC Committee, RoP [368], 7 December 2017

¹⁸⁰ ELGC Committee, RoP [83], 7 December 2017

¹⁸¹ ELGC Committee, RoP [238], 29 November 2017

Our view

203. We understand the concerns raised by stakeholders about a potential risk of compromising the Ombudsman’s independence. We will therefore monitor this issue if the Bill is enacted, including as part of our annual scrutiny of the Ombudsman’s work.

7. 5. Challenges to implementing the proposed complaints-handling procedures

Evidence from stakeholders

204. Some stakeholders highlighted potential challenges for public bodies, particularly smaller bodies implementing a new, statutory complaints-handling procedure. The Local Democracy and Boundary Commission for Wales were concerned about the impact the provisions may have “on small organisations such as the Commission”.¹⁸²

205. A similar view was held by Blaenau Gwent Council, who told us that:

“...some smaller Councils do not have sufficient resources to have complaints officers whose sole task is to take and log complaints...There will be an indirect staffing cost to public bodies in providing additional data to the Ombudsman and updating software systems. This is an added financial and staffing requirement at a time when Council budgets are under severe pressure.”¹⁸³

206. Despite supporting the provisions, Social Care Wales highlighted this too. They noted that several organisations have little understanding of managing complaints, and may not have the appropriate infrastructure to put a complaints-handling model into practice.¹⁸⁴

207. However the Wales Audit Office held a different view, telling us that they would:

“...be surprised if there are any public authorities in Wales, other than maybe the odd small community council, that don't have a complaints procedure. Whether they adhere to it or not is another matter.”¹⁸⁵

¹⁸² **PSOW 03 Local Democracy and Boundary Commission**

¹⁸³ **PSOW 07 Blaenau Gwent County Borough Council**

¹⁸⁴ ELGC Committee ROP [183], 13 December 2017

¹⁸⁵ ELGC Committee ROP [303], 13 December 2017

Evidence from the Welsh Government

208. We did not take any evidence from the Welsh Government on the challenges of implementing the provisions.

Evidence from the Member in Charge

209. In response to concerns from stakeholders about the implications of a statutory complaints-handling procedure on smaller listed authorities. The Member in Charge told us:

“...it's very important that we don't let any public authority, whatever its size, say, 'We're too small to deal with this.' These are requirements that the Assembly has set out. They have to do data collection for regulatory purposes, as well. We're not asking for things that are significantly in advance of that.¹⁸⁶”

210. This was supported in the evidence from the WLGA (paragraph 184), which stated that data collection is an existing requirement for local authorities. The Member in Charge said that the new duties on listed authorities are in relation to complaints-handling. He explained that the safeguards in the Bill ensure that the Ombudsman will publish and consult on the complaints-handling procedure, and so listed authorities will have the opportunity to give views on its operation.¹⁸⁷

Our view

211. We heard evidence on the potential operational challenges for listed authorities in implementing complaints-handling procedures. We would urge the Ombudsman to reflect on the evidence outlined in this report, including acknowledging the challenges for smaller public bodies, when developing their complaints-handling procedures. We also urge the Ombudsman to learn from the good practice apparent from the Scottish Public Services Ombudsman's evidence.

¹⁸⁶ ELGC Committee, ROP [305], 25 January 2018

¹⁸⁷ ELGC Committee, ROP [305], 25 January 2018

8. Part 5 Investigation of complaints relating to other persons: Social care and palliative care

These provisions provide the Ombudsman with powers to investigate social and palliative care. We support these provisions, but explored some technical issues around their drafting.

212. The 2005 Act provides a standalone regime for investigation of complaints relating to social and palliative care. The Ombudsman’s jurisdiction in this field was extended by amendments inserted by the **Social Services and Well-being (Wales) Act 2014**.

213. Part 5 of the Bill mainly restates the provisions of the 2005 Act, although it does reflect modifications made to the investigation regime in Part 3, to ensure the two regimes are broadly aligned.

8. 1. Evidence from stakeholders

214. Stakeholders told us that it was not clear why the social and palliative care regime had not been merged with the general investigation regime set out in Part 2 of the Act.¹⁸⁸

215. Hospice UK said that it could:

“...be seen as a missed opportunity to improve seamless, integrated provision for complainants. However, Hospice UK, does not, in principle, object to a separate investigatory regime for independent palliative care providers (and social care) if the burden of bureaucracy is placed on the Ombudsman and its officer rather than the complainant.....”¹⁸⁹

216. A similar view was expressed by WIHA, saying that as long as there were no practical differences as to how a complainant was dealt with, they would not be overly concerned about keeping the regimes separate.¹⁹⁰

¹⁸⁸ **PSOW18 Hospice UK**, paragraphs 4.3.2 – 4.3.4

¹⁸⁹ **PSOW18 Hospice UK**, paragraphs 4.3.5

¹⁹⁰ ELGC Committee, RoP [492], 7 December 2017

217. The Ombudsman assured us that currently there is no difference in terms of the service provided for those complaints investigated under the provisions in the **Social Services and Well-being (Wales) Act 2014**.

“But as far as the service user is concerned, when they come to us, the investigation process is the same, the reporting outcomes are the same, and so outcomes for the complainant are the same. So, I don’t think it makes any practical difference for the complainant.”¹⁹¹

218. Hospice UK raised concerns that the definition of palliative care on the face of the Bill was too narrow. They questioned whether the definition would capture all hospices regardless of whether they receive public funds. They acknowledged that it was important that part of the definition encompassed the relevant organisation having been in receipt of public funds but argued that this could mean some hospices would not be covered.

“We want to make sure that everyone who uses independent palliative care provider services can take their concern to the ombudsman, should they need to.”¹⁹²

219. She added that the definitions used in the Explanatory Memorandum, which come from the World Health Organisation, and NICE, were broader and encompassed a more holistic approach to palliative care.¹⁹³

8. 2. Evidence from the Welsh Government

220. The Welsh Government supported the provisions relating to this Part of the Bill.¹⁹⁴ However, the Cabinet Secretary told us that the Government felt it was a “missed opportunity” to create a single investigatory regime.¹⁹⁵

8. 3. Evidence from the Member in Charge

221. The Member in Charge outlined why the two investigatory regimes had not been merged:

- A reluctance to change a decision recently made by the National Assembly. He said that in 2014, the Assembly had decided to add these

¹⁹¹ ELGC Committee, RoP [92], 7 December 2017

¹⁹² ELGC Committee, RoP [53], 13 December 2017

¹⁹³ ELGC Committee, RoP [53-54] 13 December 2017

¹⁹⁴ **Letter from the Cabinet Secretary to ELGC Committee in relation to the PSOW Bill**, 20 December 2017

¹⁹⁵ ELGC Committee, RoP, [210], 15 January 2018

provisions in a specific way, and it was felt better to preserve such a recent decision; and

- Issues with the drafting to incorporate the two regimes into one regime would have led to a technically complex piece of legislation.¹⁹⁶

222. The Member in Charge outlined in detail some of the specific complexities that would have arisen from an attempt to merge the two investigatory regimes.¹⁹⁷

223. The Member in Charge pointed out that the Welsh Government had not taken the opportunity to merge the two regimes when drafting the Social Services and Well-Being (Wales) Act 2014. He added:

“...in drawing up this Bill, we specifically approached the Government’s lawyers asking them whether they wanted us to take this part of the 2014 Act and to write it into the Bill in the way that has been suggested as being a missed opportunity. At that point, the advice given by the Government’s legal advisers was not to do that.”¹⁹⁸

8. 4. Our view

224. We share the views of stakeholders and the Cabinet Secretary that this was a “missed opportunity” to merge the two investigatory regimes. We note the Member in Charge’s evidence that the Welsh Government did not merged the two regimes in 2014 (paragraph 222). We are not calling for them to be merged because we have been reassured that the legislative drafting will not have any practical impact on how people access the Ombudsman’s services.

¹⁹⁶ ELGC Committee, RoP [109-110], 29 November 2017

¹⁹⁷ **Letter from Simon Thomas AM in relation to the Public Services Ombudsman (Wales) Bill**, 10 January 2018

¹⁹⁸ ELGC Committee, RoP [449] 25 January 2018

9. Part 7 Miscellaneous and General

Part 7 places a statutory duty on the Ombudsman to prepare and publish a Welsh language strategy. The evidence we have taken suggests this duty needs strengthening.

225. Under the 2005 Act, the Ombudsman does not have a statutory duty to provide services in Welsh to the public. However, the Ombudsman does have a non-statutory Welsh Language Policy which states that they recognise the principle established by the **Welsh Language Act 1993** and the **Welsh Language (Wales) Measure 2011**.

226. Section 71 of the Bill provides for the preparation and publication of a Welsh language strategy. The Ombudsman would be required to carry out an assessment of the need for functions of the Ombudsman to be carried out in Welsh and action required to meet those needs.

9. 1. Evidence from stakeholders

227. Both the Welsh Language Commissioner and Cymdeithas yr Iaith Gymraeg felt that the provisions relating to the Welsh language should be strengthened. Cymdeithas told us that more duties should be placed on the face of the Bill, including consulting with the Welsh Language Commissioner; having due regard for the Commissioner’s comments and having due regard to the **Welsh Language Standards (No. 1)**.¹⁹⁹ Going further, they stated that the Ombudsman “should be subject to the Welsh Language Standards”.²⁰⁰

228. The Welsh Language Commissioner shared some of the concerns voiced by Cymdeithas, in that the Bill left too much to the discretion of the Ombudsman. As a result she said that the Bill should be amended to place more specific requirements on the Ombudsman. The Commissioner suggested two possible routes to do this:

- State that the requirements should reflect the **Welsh Language Standards (No. 2) Regulations 2016**; or

¹⁹⁹ **PSOW28 Cymdeithas yr Iaith Gymraeg**, paragraph 3.5

²⁰⁰ **PSOW28 Cymdeithas yr Iaith Gymraeg**, paragraph 3.7

- Make the Ombudsman subject to the Welsh Language Standards. The Commissioner stated that this was a practical approach to achieving the aspiration of the objectives of section 71.²⁰¹

229. In responding to the consultation on the draft Bill, the Welsh Language Commissioner had stated:

“Although the Ombudsman is not subject to the Standards based on the Ombudsman's constitutional status, the Ombudsman does have a role in providing services to the public. Rather than reserving it as a matter of discretion, there should be an expectation that a public post holder uses the Welsh language in exercise of their functions.”²⁰²

9. 2. Evidence from the Welsh Government

230. We did not take any evidence from the Welsh Government on the provisions within this part of the Bill.

9. 3. Evidence from the Member in Charge

231. We raised these issues with the Member in Charge and he told us:

“...I do think that there is a point, perhaps-and I'm very willing to review this section – in making it entirely clear on the face of the Bill that the language strategy does follow best practice, and we may need to consult with people on that.....if we can strengthen this just to provide clarity, I would be more than happy to do that.”²⁰³

9. 4. Our views

232. While we welcome provisions within the Bill placing a requirement on the Ombudsman to develop a Welsh language strategy, we believe that these need to be strengthened to ensure that the Ombudsman has a robust Welsh language strategy.

233. We do not believe it is appropriate that it is left to the Ombudsman's discretion to decide when a review of the required strategy is undertaken, and when changes should be made. We believe this needs strengthened in the Bill.

²⁰¹ [PSOW19 Welsh Language Commissioner](#)

²⁰² [DB PSOW 07 Welsh Language Commissioner response to the consultation on the Draft PSOW Bill](#)

²⁰³ ELGC Committee, RoP [479], 25 January 2018

234. We acknowledge that it would be inappropriate for the Ombudsman to be subject to the Welsh Language Standards, because of the Ombudsman’s “constitutional status” (paragraph 229). As the Ombudsman provides a service to the public it is important that they deliver comparable bilingual services to other public bodies. We expect the Ombudsman’s Welsh Language Strategy to adhere to the principles of the Welsh Language Standards.

235. We will monitor this issue through our annual scrutiny of the Ombudsman.

Recommendation 6. We recommend that the Member in Charge brings forward amendments at Stage 2 to strengthen the Welsh language duties and responsibilities.

10. Technical issues

We considered a number of technical issues during our scrutiny.

236. A number of technical issues were highlighted during our scrutiny of the Bill.

Section 68 – Disclosure of evidence

237. Section 68 provides that information obtained in the course of investigations or from other specified persons in relation to, or in connection with an investigation are to be kept confidential except in limited circumstance.

238. The Auditor General for Wales had concerns about the practical implications of the drafting of these provisions. He told us that the section was a “prohibition on disclosure of information that covers, among other things, information supplied by the Auditor General in the course of co-operation under section 67”. He was concerned that the prohibition did not “adequately take account of the full range of the Auditor General’s functions” which are not limited to examinations, and that this section should be amended so that it does not act as a restriction on disclosure by the Auditor General.²⁰⁴ Officials from the Wales Audit Office expanded on this. They felt one interpretation of this section was that prohibition only applied to information held by the Ombudsman, but that they didn’t think this was a “safe interpretation”.²⁰⁵

239. They proposed that the section could be redrafted to make it more explicit that this is about restricting disclosure by the Ombudsman or their office.

240. As we understand it, such an amendment means that it would restrict the Ombudsman from referring to this provision when sharing draft reports to prevent leaking. However, we feel that the Member in Charge should explore if there is a way of balancing the concerns raised by the Auditor General with providing sufficient protection from reports being leaked.

Recommendation 7. We recommend that the Member in Charge considers the evidence we have received in relation to section 68 and seeks to find a balance between protection against leaking of draft reports, and protection for

²⁰⁴ [PSOW29 Auditor General for Wales](#), paragraph 7

²⁰⁵ ELGC Committee, RoP [330], 13 December 2017

the Auditor General for Wales so that they will not be discouraged from engaging with the Ombudsman.

Section 70 Protection from defamation claims

241. The Auditor General stated that section 70 which provides protection from defamation claims should be amended to ensure that Auditor General is “clearly protected”.²⁰⁶ Officials from the Wales Audit Office confirmed that in the past the Wales Audit Office has received threats of actions of defamation, but that they are protected if they lay the reports before the National Assembly. They were concerned that the protection is not clearly provided in the case of joint reports.

“...it’s a lack of clarity that the AGW’s joint report with the ombudsman would protect the AGM from an action for defamation because we don’t see joint working as necessarily assisting the ombudsman in a strict legal sense.”²⁰⁷

242. We note that the Ombudsman has explicit protection for the purposes of defamation in the Bill. Others including the Welsh Language Commissioner and Older People’s Commissioner for Wales who have powers and duties to collaborate with the Ombudsman, also have express protection in the **Welsh Language Measure (Wales) 2011** and the **Commissioner for Older People (Wales) Act 2006** respectively.

243. In light of this, we believe that there is merit in amending the Bill to give the same protection to the Auditor General for Wales.

Recommendation 8. We recommend that the Member in Charge brings forward amendments at Stage 2 to provide protection to the Auditor General for Wales from defamation claims when working jointly with the Ombudsman.

Schedule 1

244. The Auditor General also highlighted some minor issues with Schedule 1:

- To meet best practice, paragraph 17 of Schedule 1 should be amended so that it requires the Auditor General to be satisfied as to whether the Ombudsman has made arrangements for securing economy, efficiency and effectiveness.

²⁰⁶ **PSOW29 Auditor General for Wales**, paragraph 5

²⁰⁷ ELGC Committee, RoP [315] 13 January 2018

- The four month deadline for the Auditor General to lay a certified copy of the Ombudsman’s accounts should be removed.²⁰⁸

245. We asked the Member in Charge whether he would consider amending the Bill in relation to the four month deadline. He said it was good practice to have audited accounts within four months, but admitted that the “missing tool” was the ability to vary it in particular circumstances. However, he was not sure if it would be appropriate to change it with regard to one body, when the Auditor General audits a range of bodies across Wales.

Recommendation 9. We recommend that the Member in Charge considers bringing forward amendments at Stage 2 to take into account the issues raised in relation to the audit provisions within Schedule 1 by the Auditor General for Wales.

²⁰⁸ **PSOW29 Auditor General for Wales**, paragraph 20-21

11. Financial implications

While we are broadly content with the general principles of the Bill, we believe that more work needs to be done on the Regulatory Impact Assessment (RIA).

246. The Ombudsman's estimate for his expenditure in 2017-2018 was £4,248,000, which is funded from the Welsh block.²⁰⁹ The Finance Committee is responsible for scrutinising the Ombudsman's estimate, and approving whether the proposed expenditure is reasonable.

247. The Explanatory Memorandum includes a RIA which sets out the costs and benefits of two options across five years, including the following information:

- Do nothing (Potential impact on the Ombudsman of the cost of the project future increase in caseload for next five years);
- Cost avoidance (Potential savings to the Ombudsman relating to the mitigation of the increase in caseload from provisions of the Bill (compared with the powers in the 2005 Act); and
- Additional costs (Costs associated with the new powers in the Bill).

248. As mentioned in paragraphs 8-10, we sought the input of an expert adviser. The report by Dr Gavin McBurnie has helped us with our work and consideration of the financial implications of the Bill.

249. It is worth highlighting that while the expert adviser highlights some areas where he feels that further detail is needed, or where he believes there are under or over estimations, he is supportive of the extension of the powers within the Bill.

250. A number of witnesses including the Member in Charge highlighted that it is difficult to make assumptions about the degree to which new powers introduced by the Bill may lead to behaviour change. The Welsh NHS Confederation acknowledged the comprehensive nature of the RIA, but said that:

²⁰⁹ HM Treasury controls the overall level of public expenditure in the UK each year. A portion of the total funds raised throughout the UK and earmarked for public expenditure is allocated to Wales and this portion, known as the "Welsh block", is the basis of the annual budgets agreed by the National Assembly for Wales.

“Overall the financial implications within the Explanatory Memorandum are comprehensive, however estimating costs for the management and investigation of concerns raised via the Ombudsman’s office is difficult due to the variable nature of the work needed.”²¹⁰

251. We welcome the Member in Charge’s commitment in oral evidence that the Finance Committee wants to produce the best possible RIA, and that they are open to the evidence and information they could use to help with this.

252. The three tables below summarise the key financial information set out in the RIA to the Bill. Table 1 sets out the additional costs the Ombudsman will face under the “do nothing” option, which also compromise the baseline cost increase under the preferred option before the additional costs and cost avoidance from the Bill are taken into account. Table 2 sets out the additional costs of the Bill to the Ombudsman and public sector organisations, and table 3 sets out the cost avoidance savings to the Ombudsman resulting from the Bill.

Table 1: Costs from the increase in the Ombudsman’s caseload from the “do nothing” option

| | 2018-19 | 2019-20 | 2020-21 | 2021-22 | 2022-23 | Total |
|--|----------|----------|------------|------------|------------|------------|
| Estimated additional cost per year based on 5% increase in caseload | £178,857 | £187,875 | £197,394 | £207,414 | £217,434 | £988,974 |
| Estimated additional cumulative cost based on 5% caseload increase | £178,857 | £366,732 | £564,126 | £771,540 | £988,974 | £2,870,229 |
| Estimated additional cost per year based on 12% increase in caseload | £458,415 | £513,024 | £574,647 | £643,785 | £720,939 | £2,910,810 |
| Estimated additional cumulative cost based on 12% caseload increase | £458,815 | £971,439 | £1,546,086 | £2,189,871 | £2,910,810 | £8,076,621 |

²¹⁰ [PSOW13 Welsh NHS Confederation](#), paragraph 37

Table 2: Additional Costs from Bill

| | 2018-19 | 2019-20 | 2020-21 | 2021-22 | 2022-23 | Total |
|---|----------|----------|----------|----------|----------|------------|
| Estimated additional cost per year based on low unit cost for indirect costs | £387,340 | £354,963 | £357,978 | £361,023 | £364,098 | £1,825,400 |
| Estimated additional cumulative cost based on high unit cost for indirect costs | £428,749 | £375,922 | £379,146 | £382,402 | £385,692 | £1,951,910 |

Table 3: Cost avoidance savings resulting from the Bill

| | 2018-19 | 2019-20 | 2020-21 | 2021-22 | 2022-23 | Total |
|---|---------|----------|----------|----------|------------|------------|
| Estimated cost avoidance per year based on 12% increase in caseload | £38,577 | £106,212 | £450,900 | £809,616 | £1,228,953 | £2,634,258 |

11.1. General issues

Evidence from stakeholders

253. The Ombudsman described the costs associated with the Bill, as a “bargain” while acknowledging that any public spending needs to be carefully considered during ongoing austerity. However, he highlighted that the costs in the Bill would only bring the Ombudsman’s expenditure back up to 2010 levels, and it would remain under 0.03% of the Welsh block. He felt it was good “value for money”.²¹¹

254. Healthcare Inspectorate Wales indicated that it was not “unreasonable” if more is asked of the Ombudsman that there are going to be increased costs. They added that it was difficult to see where the efficiencies from the Bill would come, although they suggested that the learning from complaints could reduce the number of complaints considered by the Ombudsman. However, there was not any indication to date of this happening.²¹²

255. The WLGA also highlighted that the difficulties of assessing the impact of the legislation. They highlighted that the Bill goes further than changing complaints processes and is about changing organisational culture and possibly the

²¹¹ ELGC Committee, RoP [122], 7 December 2017

²¹² ELGC Committee, RoP [205-209] 7 December 2017

behaviour of public. They acknowledge that there are a “lot of uncertainties” in the RIA.²¹³

256. Cymdeithas yr Iaith Gymraeg questioned whether the Ombudsman should receive additional resources when others, such as the Welsh Language Commissioner had seen their budget reduced.²¹⁴

257. We heard concerns about the wider financial pressures on the public sector, and the impact that this Bill could have on already stretched public services. We are also aware that the Ombudsman has been subject to a significant increase in contact from the public over the past few years. We wanted to be assured that these two factors would not lead to the Bill being too costly, we therefore explored this with all stakeholders.

258. It was broadly accepted that complaints can, and should be, used to drive forward service improvements, a matter which we have explored in Chapter 7 on Part 4 of the Bill.

259. We heard evidence from the Northern Ireland Ombudsman that they had a significant increase in the number of enquiries and complaints in 2016-17. We wanted to know if this was a direct result of removing the restrictions on oral complaints, but she said that she felt it was other changes that had a more significant impact²¹⁵ including an expansion of her remit.²¹⁶

260. The Ombudsman told us that the money spent as a result of the Bill would be on an invest to save basis, and that the additional costs for his office were not substantial. He also highlighted that costs arising from the Bill were long term strategic costs, and compared to the costs of complaints to the NHS, were “very small”.²¹⁷ He also highlighted that there were substantial costs associated with doing nothing, and that spending more to ensure world class public services was “worth doing”.²¹⁸

261. We were interested whether this was the most appropriate time to be giving additional powers to the Ombudsman. We are aware that the Ombudsman is in the process of implementing efficiencies, including a review of IT. However, the

²¹³ ELGC Committee, RoP [102-103] 11 January 2018

²¹⁴ **PSOW28 Cymdeithas yr Iaith Gymraeg**, paragraph 4.3

²¹⁵ Previously, complaints in Northern Ireland which were about central government and agencies had to be sponsored by a Member of the Northern Ireland Assembly.

²¹⁶ ELGC Committee, RoP [326-327], 7 December 2017

²¹⁷ ELGC Committee, RoP [110-112] 7 December 2017

²¹⁸ ELGC Committee, RoP [112], 7 December 2017

Ombudsman and his staff felt that the two strands fitted together well. They said that they can integrate the expansion of powers into the development of their systems.²¹⁹

262. The RIA was described as “very comprehensive” by the Northern Ireland Public Services Ombudsman. She said that her experience of expanding her office’s remit is that “you can never anticipate what the level of complaints is going to be”. She also said that there was no way of legislating for untapped demand, but she said that the RIA contained sufficient sensitivity analysis to take this into account.²²⁰

263. The RCN highlighted that some public awareness work would need to be undertaken so that people were aware of the new powers.²²¹

264. The Auditor General for Wales raised a number of points about the presentation of individual details within the RIA which included:

- A clearer summary of the implications of the Bill;
- Placing the assumptions and uncertainties in paragraph 11.24 up front in the RIA, as part of the summary table;
- Dealing with the discrepancy between the savings estimates being based on the higher caseload growth estimates, while the cost estimates are presented as a range;
- Making the RIA more explicit about the levels of uncertainty around the savings.²²² This was a view also supported in oral evidence from Wales Audit Office officials.²²³

²¹⁹ ELGC Committee, RoP [118, 120], 7 December 2017

²²⁰ ELGC Committee, RoP [393-395], 7 December 2017

²²¹ **PSOW22 Royal College of Nursing**, paragraph 6

²²² **PSOW29 Auditor General for Wales**, paragraphs 11-13

²²³ ELGC Committee, RoP [363] 13 December 2017

Cost avoidance

265. Not all the stakeholders were convinced by the narrative around benefits and costs of the Bill. On this point, the WLGA told us:

“The figure of £2.6m cost avoidance over 5 years therefore could be viewed as ambitious as it is not immediately apparent across which public services this cost avoidance will be achieved, whether it will be across all 66 specified bodies equally or whether it is anticipated to be within particular bodies, where the biggest improvements and therefore ‘cost avoidance’ could be made?”²²⁴

266. They noted that cost avoidance for the Ombudsman’s office often means a shift of costs on to other public sector bodies. The NHS Confederation highlighted that while the RIA assumes some cost avoidance, there is “no clear evidence” that this will be realised.²²⁵

267. The Wales Audit Office told us:

“I think the arguments for cost avoidance in the explanatory memorandum are respectable... But I would be very wary about the figures. If you were to say, 'Is it unlikely that any savings would be achieved?' I'd say, 'No, it shouldn't be unlikely'. 'Is it unlikely that 10 per cent savings will be achieved?' 'It probably won't be 10 per cent, but 10 per cent is probably the best estimate that's available.' It's a case of not being too precise about the figures.”²²⁶

268. The WLGA felt that there was an opportunity for greater clarity in the RIA on the financial impact on public bodies. They highlighted along with others in the health sector²²⁷ that it was unlikely that the costs would be split equally across the 66 listed authorities. They felt more work could be done to understand the “differential impacts, financially” on different sectors.²²⁸ They were concerned that these indirect costs could be significant, if they ultimately fall on only a small number of organisations.

²²⁴ **PSOW30 WLGA**, paragraph 31

²²⁵ **PSOW13 Welsh NHS Confederation**, paragraph 38

²²⁶ ELGC Committee, RoP [365], 13 December 2017

²²⁷ **PSOW13 Welsh NHS Confederation**, paragraph 38

²²⁸ ELGC Committee, RoP [105], 11 January 2018

Expert Adviser's conclusions

269. The Expert Adviser was supportive of the extension of the powers, but felt there was a need for further work on some issues.²²⁹ We will turn to them under each relevant section.

270. He concluded that:

“...it is believed by the author that the direct costs associated with the proposals are overestimated, that the level of cost avoidance within the timescale covered by the RIA is also overestimated but may ultimately be greater than envisaged, and that the financial impact on bodies is seriously overestimated.”²³⁰

271. The Expert Adviser raised concerns about the costs associated with transition, staff and professional fees. He felt that they were all overestimated. He shared the concerns of the Welsh Government that the transition costs were “rather high”, both in relation to the costs of new staff, and the recurring other staff costs. He recommended that further detail should be provided.

Evidence from the Welsh Government

272. The Cabinet Secretary told us that his main concern about the Bill was that the costs and savings arising from the Bill are “interrogated and assessed for accuracy and reliability”.²³¹ We believe that we have played a role in doing this and hope that this report helps both the Finance Committee and the Welsh Government assess what further work is needed.

273. The Cabinet Secretary also raised concerns about some of the cost assumptions used within the RIA, which chimed with some of the concerns of the Expert Adviser, in particular on transitional costs such as an additional £5,000 in office costs for each new staff member.²³²

274. The Cabinet Secretary highlighted that while additional costs of the Bill have been calculated on an assumption that complaints will increase at the highest level of the possible estimate (12%), costs avoided have been calculated based on a caseload reduction of 18% due to the powers to undertake own initiative investigations and develop complaints handling standards and procedures. He

²²⁹ **Expert Adviser Report**, January 2018

²³⁰ **Expert Adviser Report**, January 2018

²³¹ ELGC Committee, RoP [229], 11 January 2018

²³² ELGC Committee, RoP [231], 11 January 2018

said that if you take the worst assumption about how costs may increase, and the best assumption of cost avoidance, then you are not comparing like with like.

275. He said that due to confusion in these areas, he could not be confident that the costs of the Bill could be fully relied upon:

“...when I read it I couldn't come away completely confidently that the worst scenario in one instance and the best scenario in the other was being assumed, and that, as a result, you've got costs that are relatively modest: £200,000 over five years. Even that is money not available for public services. But if you took a different set of assumptions, and the costs of the Bill turned out to be significantly more than that then I think the committee would obviously be taking that into account in coming to your overall assessment of whether the Bill is one you would wish to support.”²³³

276. He added that he was happier with a Bill that would cost at the end of the spectrum that is calculated in the RIA (e.g around £200,000), than one that was “at the other of the spectrum”.²³⁴

277. The Cabinet Secretary told us that the Government would not be tabling the financial resolution immediately after the Stage 1 debate on the general principles of the Bill.²³⁵

Evidence from the Member in Charge

278. The Member in Charge was clear that while this Bill gives the Ombudsman additional powers, it is also seeking to make the Ombudsman's work more efficient. While acknowledging there will be a cost associated with the additional powers, he said the Ombudsman will have to bring down the unit cost of dealing with complaints.²³⁶

279. He reminded us that the Finance Committee has a firm view on organisations funded by the Welsh block:

²³³ ELGC Committee, RoP [233], 11 January 2018

²³⁴ ELGC Committee, RoP [240], 11 January 2018

²³⁵ A financial resolution must be moved and the motion agreed to by the Assembly, following agreement of general principles by the Assembly. The motion can only be moved by a member of the Government. If a motion is not tabled and agreed within six months of the completion of Stage 1, a Bill falls.

²³⁶ ELGC Committee, RoP, [136-139], 29 November 2017

“The context of that is where the Finance Committee has made it very clear that for every body funded from the Welsh block grant recently, we don't expect a significant increase greater than the increase in the block grant. We've said that to the ombudsman, to the auditor general, and to the Assembly Commission itself.”²³⁷

280. In later evidence, he said:

“We would also bear in mind the guidance. It's not statutory, but it has been consistent that the ombudsman hasn't used more than 0.03 per cent of the block.”²³⁸

281. He emphasised that the Finance Committee believe that the costs of the Bill would demonstrate a clear benefit to the Welsh public. He stated that the role of the Ombudsman is to respond when a member of the public has had difficulties with a Welsh public service, and is seeking justice. In addition:

“The second part-and this is where, perhaps, if the first part doesn't justify the expenditure, then the second does-is that you do bring about an improvement in public services through a process of dealing with complaints and dealing with problems within public services by meeting the needs of individuals.”²³⁹

282. When we put to the Member in Charge the balance between spending on services against oversight, which the Cabinet Secretary raised with us, he told us that this was an argument that could be taken to an “absurd point”. He added that while it was important to strike the right balance, the purpose of the Bill was ultimately about equality.²⁴⁰

283. One of the issues that we were particularly interested in was being confident that the figures within the RIA were as accurate as possible. This was an issue that had been raised by both stakeholders and the Cabinet Secretary. The Member in Charge described to us how the figures in the RIA had been calculated:

- Experiences of the Ombudsman office
- Current costs for the Ombudsman in dealing with complaints and other organisations

²³⁷ ELGC Committee, RoP [138], 29 November 2017

²³⁸ ELGC Committee, RoP [243], 25 January 2018

²³⁹ ELGC Committee, RoP [206], 25 January 2018

²⁴⁰ ELGC Committee, RoP [209-211], 25 January 2018

- Ombudsman liaising with public bodies to test the costs in the RIA.²⁴¹

284. Representatives of the Welsh NHS Confederation confirmed that they had been involved in working with the Ombudsman to look at the costs of an investigation within an organisation.²⁴²

285. In relation to concerns about the potential cost of promoting the new powers, the Member in Charge said he had discussions with the Ombudsman, who felt that these costs could be paid from the general funds available to him, and that no additional money would be needed.²⁴³

286. The Member in Charge accepted that there has been an increasing caseload for the Ombudsman, in particular from the health sector. He also highlighted evidence he had heard from an international ombudsman that when public funding decreases, there is likely to be an increase in complaints.²⁴⁴

287. When we probed on the issues around additional costs to the public bodies within the Ombudsman's remit, he told us that the RIA does not set out the savings to public bodies because it would be "impossible to estimate"²⁴⁵ He highlighted that the estimation made in the RIA is that there would be a reduction of around 40 cases per annum, but that this was across all the public sector. When we suggested that further analysis might be made about where the reduction in complaints would fall he told us that:

"We would have to be convinced that we aren't chasing details that wouldn't necessarily enhance the information that's in the RIA."²⁴⁶

Our view

288. We note the Welsh Government's position that it will not be tabling the financial resolution motion until further work is done on the RIA. We urge the Finance Committee and Welsh Government to work together to ensure that this is done within the six-month limit.

289. We believe the case has been made for the policy intent of the Bill, but, we share some of the stakeholders' concerns and reservations about the financial

²⁴¹ ELGC Committee, RoP [212], 25 January 2018

²⁴² ELGC Committee, RoP [234] 7 December 2017

²⁴³ ELGC Committee, RoP [146], 29 November 2017

²⁴⁴ ELGC Committee, RoP [235], 25 January 2018

²⁴⁵ ELGC Committee, RoP [316], 25 January 2018

²⁴⁶ ELGC Committee, RoP [315], 25 January 2018

implications of the Bill. We would therefore like to see some further work done on some of the detail of the RIA. We have made recommendations in this chapter on where further work is needed.

290. The Member in Charge responded to the report of the Expert Adviser on 8 February.²⁴⁷ We are disappointed that he did not accept any of the recommendations and conclusions. The response did provide some greater clarity and detail which we welcome. However, we believe that the report of the Expert Adviser was useful in interrogating the RIA, and makes a number of suggestions where more information would be useful. We have made recommendations to give effect to some of the Expert Adviser's findings, and we urge the Member in Charge to accept those recommendations.

Recommendation 10. We recommend that the Member in Charge publishes a revised Explanatory Memorandum and Regulatory Impact Assessment before Stage 2 taking account of the Committee's recommendations.

291. We are aware that the additional workload arising from the Bill's provisions, will mean that the Ombudsman will need to generate greater efficiencies in dealing with incoming complaints. It would not be acceptable to us for the Ombudsman to seek to demand substantial increases in funding as a result of the own initiative powers. We therefore welcome the commitment made by the Ombudsman, and supported by the Member in Charge, that the Ombudsman will not seek funding above 0.03% of the Welsh block. We believe this is a prudent approach, and provides reassurances that the Ombudsman will not seek unreasonable increases in his budget if this legislation is enacted.

292. We agree with the views of stakeholders that more work should be done to identify where the burden of cost will fall on listed authorities.

Recommendation 11. We recommend that the Member in Charge undertakes further analysis and updates the RIA with more details in relation to which sectors and listed authorities are most likely to bear the burden of costs associated with the Bill. .

293. We take on board the views and comments made by the Expert Adviser and the Cabinet Secretary about the costs associated with staff. We believe that further work is needed so that the Assembly can be reassured the estimates are as accurate as possible.

²⁴⁷ Letter from Simon Thomas to ELGC Committee 8 February 2018

Recommendation 12. We recommend that the Member in Charge reconsiders the levels of costs for new staff and recurring staff costs are reconsidered in the RIA.

11. 2. Own initiative investigations

Evidence from stakeholders

294. The issues around duplication of functions in giving the Ombudsman powers to conduct own initiative investigations are discussed in Chapter 4 of our report. However, we have set out the evidence received regarding the potential financial implications of joint working and duplicated resource below.

295. Care and Social Services Inspectorate Wales told us that while joint working could result in a stronger and better outcome, it was often more resource intensive.²⁴⁸

296. The NHS Confederation raised concerns about the financial impact of duplication, in particular if a public body was subject to multiple investigations on similar matters, which would have an impact on the organisation been investigated to support this work.²⁴⁹

297. We were interested in the different approach being taken in Scotland to the funding of own initiative investigations (the Scottish Ombudsman does not yet have these powers, but preparatory work is being undertaken). This would involve budgeting each own initiative investigation, and if further budget was necessary to cover the costs, the Scottish Parliament would consider requests to draw down on a contingency budget.²⁵⁰ We explored this idea with the Member in Charge (paragraph 304).

Expert Adviser's conclusions

298. The Expert Adviser concluded that the direct costs associated with this proposal were reasonable, but that there is unlikely to be additional costs for listed authorities. This is because any additional work is likely to be small and manageable within existing resources.

²⁴⁸ ELGC Committee, RoP [211], 7 December 2017

²⁴⁹ **PSOW13 Welsh NHS Confederation**, paragraph 16

²⁵⁰ ELGC Committee, RoP [398], 7 December 2017

299. He said:

“Own initiative investigations are not likely to bring about significant reductions in individual complaints, but rather, their value lies in the fact that potential thousands of people can benefit from a single investigation, representing excellent value for money.”²⁵¹

300. He highlighted that £10,000 on professional fees seems rather high, and he suggested a more reasonable figure of £5,000.²⁵²

Evidence from the Welsh Government

301. When he gave evidence to the Committee, the Cabinet Secretary gave figures on the cost of an own initiative investigation as being “between £9,100 and £13,700”. These were figures that the Member in Charge would go on to dispute (paragraph 303). The Cabinet Secretary was concerned that the potential range was so broad.²⁵³

Evidence from the Member in Charge

302. We have already explored the policy implications of these provisions, and part of the financial scrutiny included exploration about the issue of duplication between the Ombudsman and regulators (Chapter 4). When pressed on the issue, the Member in Charge stated that he felt the Finance Committee had got the balance right in terms of ensuring that public money is used efficiently.²⁵⁴

303. The Member in Charge did not accept the figures the Cabinet Secretary used in relation to the costs for own initiative investigations (paragraph 301). He did not think it was an appropriate way of looking at the costs and working out a per investigation cost. He highlighted that the number of investigations may vary on a yearly basis.²⁵⁵

304. We also put the suggestion of following the model being considered in Scotland (paragraph 297) , but the Member in Charge didn’t feel this was appropriate, as there was a risk of a “political mire” and that:

“You either trust the ombudsman with those powers or you don’t. I would suggest that, if you’re not happy with those powers, you remove

²⁵¹ **Expert Adviser Report**, January 2018

²⁵² **Expert Adviser Report**, paragraph 4.5, January 2018

²⁵³ ELGC Committee, RoP [230], 11 January 2018

²⁵⁴ ELGC Committee, RoP [258], 25 January 2018

²⁵⁵ ELGC Committee, RoP [288], 25 January 2018

them from the face of the Bill, rather than try to manage them through a supplementary budget approach.”²⁵⁶

Our view

305. We are broadly reassured by the costs of the own initiative proposal. However we believe the RIA would be strengthened if greater clarity was provided on the possible range of costs for own initiative investigations. We believe that this would help address the disagreement between the Cabinet Secretary and Member in Charge around the unit cost of investigations.

Recommendation 13. We recommend that the Member in Charge updates the RIA to provide greater clarity on the possible unit costs for own initiative investigations.

11. 3. Method of complaints received and referred

Evidence from stakeholders

306. A number of stakeholders indicated there may be more oral complaints than is suggested in the RIA, especially if the change is well promoted. This included the Auditor General for Wales²⁵⁷ and the WLGA.²⁵⁸ The WLGA cited local authorities’ experience of receiving oral complaints which tended to be a “significant proportion” of complaints.²⁵⁹

307. Officials from the WAO said that while the estimates of additional oral complaints were low, they had concerns about the sensitivity of the analysis. They told us that if 25 additional complaints actually became 50, while the numbers are still small the increase is significant and could therefore have an impact on the costs estimate. They also said:

“It’s probably something that’s really rather hard to estimate, because if there is a body of unmet need then I think it’s going to be quite difficult to estimate that. I don’t think the estimate is unreasonable, but I would just be rather cautious in thinking it’s a firm figure because I think it could lead to disappointment.”²⁶⁰

²⁵⁶ ELGC Committee, RoP [290], 25 January 2018

²⁵⁷ **PSOW29 Auditor General for Wales**, paragraph 10

²⁵⁸ **PSOW30 WLGA**, paragraph 10

²⁵⁹ ELGC Committee, RoP [118], 11 January 2018

²⁶⁰ ELGC Committee, RoP [359], 29 January 2018

Expert Adviser's conclusions

308. The Expert Adviser shared the views of a number of stakeholders that the number of 25 additional complaints seemed “modest in their scale”. He said that it is likely that by allowing oral complaints, there are likely to be an increase in the number currently received.²⁶¹

309. In relation to oral complaints, the Expert Adviser made a number of suggestions to possible changes to the RIA:

- A sensitivity analysis should be undertaken on a higher percentage of complaints made orally using a higher figure such as 40% based on UK and international evidence;
- A sensitivity analysis should be made looking at an overall increase of complaints at 10% and 20%;
- Further information should be provided as to whether an additional staff member is needed at a higher pay grade.

310. The Expert Adviser's conclusions about the potential for the percentage of complainants that wish to make their complaint orally are based on a range of UK and international evidence. He noted that within the UK in 2016-17 Ombudsman Services (the private sector ombudsman scheme) took 37% of complaints orally. Internationally, figures show that the Ontario Ombudsman received 61% of complaints orally in 2016-17, while in Australia energy ombudsmen receive 70%-85% of complaints orally.

311. He also indicated that if the number of complaints received is significantly greater than suggested in the RIA, there may need to be further work on the impact on listed authorities.

312. The analysis and detail behind these can be found in the Expert Adviser's report.

Evidence from the Welsh Government

313. The Cabinet Secretary said he was not “immediately clear” as to why there was a disparity between the costs of written (£501) and oral complaints (£1,640).²⁶²

²⁶¹ **Expert Adviser Report**, paragraph 3.1, January 2018

²⁶² ELGC Committee, RoP [230] 11 January 2018

Evidence from the Member in Charge

314. In light of concerns raised about the number of additional complaints arising from these provisions, it was helpful to hear the Member in Charge clarify that the figure of 25 additional complaints arising from these provisions were “truly additional oral complaints-and that’s additional to the current process”.²⁶³ His officials supported this, and also told us that the 25 additional complaints detailed in the Explanatory Memorandum are those which will bear an increase in workload to listed authorities.²⁶⁴

315. He also reminded us that the Ombudsman does currently have discretion to accept oral complaints, so it is not an opening of the floodgates.²⁶⁵

316. The Member in Charge also noted that if oral complaints were to increase, it is likely that this would be partnered by a reduction in written complaints. He cited examples of politicians who have seen a significant increase in email correspondence, but with a resulting decline in handwritten letters, saying the “totality” of correspondence has not changed that much.²⁶⁶

317. He accepted that there will be additional costs attached to oral complaints, and that the system may be “possibly more expensive”, but that the policy intent of the Bill is to make public services more efficient, and that will ultimately lead to a reduction in complaints. He was also very clear that the financial implications had to be looked at in their totality,²⁶⁷ and that the additional costs relating to these provisions were reasonable, especially in the broader context of the Bill.²⁶⁸

Our view

318. While we agree that the additional power to accept oral complaints is justified, we are of the view that there is considerable uncertainty around the accuracy of the costs set out in the RIA in three areas.

319. Our Expert Adviser has provided considerable evidence from the UK and abroad that shows the RIA’s estimate that 10% of complaints will be taken orally is subject to uncertainty, and suggests that a sensitivity analysis using a higher figure such as 40% is undertaken. This is particularly important as paragraph 11.74 of the

²⁶³ ELGC Committee, RoP [216], 29 January 2018

²⁶⁴ ELGC Committee, RoP [266] 29 January 2018

²⁶⁵ ELGC Committee, RoP [216], 29 January 2018

²⁶⁶ ELGC Committee, RoP [224], 29 January 2018

²⁶⁷ ELGC Committee, RoP [224, 226] 25 January 2018

²⁶⁸ ELGC Committee, RoP [275] 25 January 2018

RIA states that there is an additional time commitment needed to take an oral complaint, and that taking an oral complaint is a more complex task. Therefore, the information in the RIA implies that there would be additional costs from this part of the Bill if oral complaints make up a greater proportion of complaints than estimated.

320. We also note that the RIA estimates that there will be 25 additional oral complaints per year as a result of the legislation, and that this will remain constant throughout the five years. Given the increases in overall caseload are projected to be 5% or 12% per year, we find it surprising that these projections suggest that the number of additional oral complaints will remain at the same level for each year over a five-year period.

321. However, we are aware that our Expert Adviser has also suggested that the justification in paragraph 11.74 of the RIA is not sufficient to make the case for additional staff, as the Ombudsman will need to establish the context of complaints, establish what injustice has been suffered, and the outcome the complainant is looking for regardless of the method of complaint. In our view this highlights the uncertainty around these costs, and the need for additional work on this part of the RIA.

Recommendation 14. We recommend that the Member in Charge undertakes a sensitivity analysis based on 40% of complaints to the Ombudsman being received orally, and presents information on the financial impact that changing the percentage of complaints received orally will have on the costs associated with this part of the Bill.

Recommendation 15. We recommend that the Member in Charge presents further information in the RIA to justify the additional staff costs resulting from the power to accept oral complaints.

322. We are also persuaded by the evidence from our Expert Adviser, Social Care Wales, the WLGA, the Auditor General for Wales, and WAO officials that the total number of additional complaints resulting from the power to accept oral complaints may rise by a greater number than expected. We agree with the WAO's evidence that there may be an "untapped well" of unmet need in relation to additional complaints resulting from this power, and that the figures set out in the RIA are therefore subject to uncertainty. While we accept the Member in Charge's point that the 25 additional complaints only include those that will require additional work for listed authorities, we take the view that the weight of evidence received from our Expert Adviser and stakeholders on this point is

sufficient to conclude that there is uncertainty around the additional costs in this area.

Recommendation 16. We recommend that the Member in Charge undertake sensitivity analysis around an overall increase in all complaints of 10% and 20%. (not just oral complaints).

11. 4. Investigating public / private care pathway

Evidence from stakeholders

323. WIHA felt that the estimated number of cases expected as a result of these provisions given in the RIA (7 cases a year) was “probably that as well” so they did not have any concerns about the financial impact on the sector.

324. ISCAS told us that they were “kind of disappointed” that there was not any indication of private sector costs. They said that their costs are published annually.²⁶⁹ They added that they felt the provisions would lead to a more efficient handling of complaints which traverse the private and public sectors, and may lead to cost savings.²⁷⁰

325. One of the issues we explored with witnesses, was the issue of the public purse being used to investigate potential service failures within the private sector. The Bill provides provision for costs to be recovered in instances where the private organisation has caused an obstruction. In oral evidence, WIHA told us:

“I think it’s fair to say that we almost certainly would never obstruct any of the process.”²⁷¹

326. Organisations including the WLGA²⁷² supported the proposition that the private sector should bear some of the costs of such investigations.

Expert Adviser’s conclusions

327. While highlighting that the estimated number of complaints may be an underestimate, he noted that the estimation would have to be “significantly wrong” to have an impact.

²⁶⁹ ELGC Committee, RoP [217] 13 December 2017

²⁷⁰ ELGC Committee, RoP [219] 13 December 2017

²⁷¹ ELGC Committee, RoP [451] 7 December 2017

²⁷² ELGC Committee, RoP [123] 11 January 2018

328. He shared the concerns of others that the RIA is missing an estimate on the impact on the private sector, describing this as a significant omission. He did acknowledge, however that if the estimate of seven complaints is accurate, the costs would be “nominal rather than real”.²⁷³

Evidence from the Welsh Government

329. The Cabinet Secretary echoed some of the other evidence we heard, stating that in his view, the way the costs and benefits to private healthcare providers was covered in the RIA was not “adequately done”.²⁷⁴

330. In oral evidence, the Cabinet Secretary stated that while agreeing to the provisions, he had concerns in relation to the recovery of costs from private health care providers. He felt that the bar for recovering costs was placed “pretty high” and that the public purse would have to pick up the costs to investigate possible failures within the private sector. He felt that bar was:

”right at the top....and I’m not certain that the case is fully made as to why the public should always be picking up the full costs of investigating a difficulty that may have occurred by a private provider.”²⁷⁵

Evidence from the Member in Charge

331. We explored the omission of costs to the private sector in more detail with the Member in Charge. While accepting it was an omission, he told us it was “kind of deliberate” because they were unable to access the figures.²⁷⁶ He did not feel that it was appropriate to use public sector costs, and he did not believe that the figures ISCAS published (paragraph 324) would be appropriate, as you would be comparing “apples and pears”.²⁷⁷

332. He emphasised that the figures involved were “de minimis” as there were likely to be only seven cases a year. He also said that there was a question of reasonableness i.e whether it is worth chasing after small figures when it does not change the overall financial picture. He was also confident that the number of predicted complaints would stay low, and that they would only impact on the RIA

²⁷³ **Expert Advisor Report**, paragraph 5.3, January 2018

²⁷⁴ ELGC Committee, RoP [227] 11 January 2018

²⁷⁵ ELGC Committee, RoP [207] 11 January 2018

²⁷⁶ ELGC Committee, RoP [297], 25 January 2018

²⁷⁷ ELGC Committee, RoP [296], 25 January 2018

if there was to be a change in policy around the use of the private sector in the NHS in Wales.²⁷⁸

“...the Finance Committee wasn’t convinced that this was a big enough sum to have some kind of complex levy system or some other way of raising costs, but that this was a small enough sum to be dealt with in the overall work of the ombudsman’s envelope, if you like. So, we have not been persuaded, at this stage, that there needs to be a separate cost recovery regime for this narrow and tightly-drawn aspect of public health provision.”²⁷⁹

Our views

333. Although this is a relatively minor issue, we believe that that the RIA should be updated to include a more detailed analysis of the likely costs would be borne by the private sector. In light of the comments made by ISCAS, we believe this could be done in discussion with the private sector to help identify these costs.

Recommendation 17. We recommend that the Member in Charge seeks to provide more detail in the RIA of the cost to the private sector, this should be done in consultation with ISCAS and private sector providers.

334. While we acknowledge the Cabinet Secretary’s concerns about the high bar for recovery of costs, we accept the provision as drafted. We are aware that any changes to the provisions would potentially engage Article 1 of Protocol 1 to the European Convention on Human Rights, and that any changes could be deemed as disproportionate to the public interest aim, non-compliant with human rights law and therefore outside the National Assembly’s legislative competence.

11. 5. Complaints handling procedures

Evidence from stakeholders

335. One of the key concerns from listed authorities was whether the introduction of model complaints procedures will lead to changes in data collection, and the potential costs of changing IT software packages, as well as any necessary staff training resulting from changes. This was raised by the WLGA.²⁸⁰

²⁷⁸ ELGC Committee, RoP [297, 299], 25 January 2018

²⁷⁹ ELGC Committee, RoP [65], 29 November 2017

²⁸⁰ **PSOW30 WLGA**, paragraph 34

336. The WLGA highlighted that the estimated transition costs for these provisions were given as between £10k and £31k, which they calculated as “only £157 - £470 per organisation”.²⁸¹ They also noted that costs would likely vary between listed authorities, depending on the work required to meet the standards set for complaints-handling procedures. They suggested that the RIA could be “strengthened” in this area.²⁸²

337. The Ombudsman told us that if the proposals are embraced there are “significant savings” that could accrue to the public bodies covered by the model schemes.²⁸³

338. The Liverpool Law School told us that clarity is needed as to whether the costs outlined in the Explanatory Memorandum include the cost of establishing complaint handler networks for each sector of listed authorities, as is the practice in Scotland.²⁸⁴

339. The Scottish Public Services Ombudsman told us, however, that the financial implications of implementing complaints standards are “actually quite formulaic in a sense” as calculations are based on “how many public bodies are out there, how many sectors and what it's going to take and how long each will take”.²⁸⁵

Expert adviser’s conclusions

340. The Expert Adviser cited the Scottish Public Services Ombudsman as a “model of good practice” in this area. However, he said that learning from their experience suggests that implementation may be slower than the RIA suggests and the benefits identified may be delayed.²⁸⁶

341. The Expert Adviser reported that the model used in Scotland is one of good practice as it has ensured that complaints-handling procedures are appropriate for the designated sector. They advised that it would be appropriate to follow the Scottish model in light of the Welsh NHS Confederation’s concerns.²⁸⁷

342. The Expert Adviser commented that the provisions would likely incur costs to listed authorities, “although these are not likely to result in significant additional

²⁸¹ **PSOW30 WLGA**, paragraph 33

²⁸² ELGC Committee, ROP [105], 11 January 2018

²⁸³ ELGC Committee, RoP [114], 29 January 2018

²⁸⁴ **Liverpool Law School, University of Liverpool**, paragraphs 11-12

²⁸⁵ ELGC Committee, ROP [397], 7 December 2017

²⁸⁶ **Expert Adviser Report**, paragraph 6.2, January 2018

²⁸⁷ **Expert Adviser Report**, paragraph 6.2, January 2018

expenditure for bodies”.²⁸⁸ The additional costs primarily included staff training, as suggested by the WLGA. However the Expert Adviser argued that these costs:

“...should be able to be subsumed in the normal training, development and update processes that exist in well managed organisations, in line with the normal approach to updating staff of revisions in other policies, with the remaining costs likely to be able to be provided from within existing resources.”²⁸⁹

343. The Expert Adviser also observed that improved complaints-handling should reduce costs overall, as fewer complaints would be escalated to the Ombudsman’s office.²⁹⁰

Evidence from the Welsh Government

344. We did not explore this element of the provisions with the Welsh Government.

Evidence from the Member in Charge

345. The Member in Charge told us that the job of the Ombudsman is to take complaints and use them to help improve services.²⁹¹ This would lead to long-term reduced costs to the Ombudsman’s office.²⁹²

346. When we raised the views of our Expert Adviser that there may be additional minor costs to public bodies arising from these provisions, he noted that while they were open to re-examining the RIA that this was “marginal to the overall balance of the cost”.²⁹³

347. The Member in Charge told us that the costs relating to the provisions for complaints standards are primarily related to staffing within the Ombudsman’s office, as well as indirect costs for the listed authorities.²⁹⁴

²⁸⁸ **Expert Adviser Report**, paragraph 6.5, January 2018

²⁸⁹ **Expert Adviser Report**, paragraph 6.5, January 2018

²⁹⁰ **Expert Adviser Report**, paragraph 6.6, January 2018

²⁹¹ ELGC Committee, RoP [240], 25 January 2018

²⁹² ELGC Committee, RoP [312], 25 January 2018

²⁹³ ELGC Committee, RoP [303], 25 January 2018

²⁹⁴ ELGC Committee, ROP [152], 29 November 2017

Our view

348. We are content with the costs as outlined in the RIA in relation to Part 4 provisions. While we acknowledge the concerns raised by stakeholders, including the WLGA, about the burden of costs on individual listed authorities, we believe that it will not be a significant cost, and could be subsumed within existing budgets.

11. 6. Technical issues

349. We considered the following technical issues relating to the financial scrutiny:

- Revising the Explanatory Memorandum to reflect that charges will be made to the Welsh Consolidated Fund; and
- Making changes to the RIA to bring it in line with the Treasury Green Book.

Charges on the Welsh Consolidated Fund

350. The Explanatory Memorandum states that it does not include a statement from the Auditor General on the appropriateness of charges to the Welsh Consolidated Fund, because in responding to the consultation on the expansion of powers, the Auditor General did not feel that there would be any direct charges.²⁹⁵

351. However, in his response to our consultation, the Auditor General said that having reviewed the Bill as introduced there will provisions which will result in direct charges on the Welsh Consolidated Fund, and therefore there should be a report in the Explanatory Memorandum. He went on to say that having considered the Bill:

“I consider that the direct charge provisions of paragraphs 9 and 10 of Schedule 1 to the Bill are appropriate.”²⁹⁶

352. He confirmed that this extract could be incorporated into a revised Explanatory Memorandum to ensure that Standing Order requirements were met.²⁹⁷

²⁹⁵ **Explanatory Memorandum**, paragraphs 7.1-7.3

²⁹⁶ **PSOW29 Auditor General for Wales**, paragraph 17

²⁹⁷ **PSOW29 Auditor General for Wales**, paragraph 18

Recommendation 18. We recommend that the Member in Charge revises the Explanatory Memorandum to include the statement from the Auditor General for Wales on charges to the Welsh Consolidated Fund.

Consistency with the Treasury Green Book

353. In oral evidence, the Cabinet Secretary raised a technical point about inconsistencies with the Treasury Green Book²⁹⁸ that he felt needed amending in the RIA. He told us that the Green Book is clear in that costs should be presented in real terms and in constant prices. He added:

“In the RIA, general inflation has not been included in the calculations, but in paragraphs 11.29 and 11.30, staff costs have been increased by 1 per cent per annum to reflect rises in the cost of living. That must, therefore, be rooted in an assumption that salary increases will be 1 per cent higher than general price inflation. That would not have been true for a number of years past, and therefore we think that the treatment of that matter in the RIA isn't consistent with Green Book principles, and it would be better if it were to be put right.”²⁹⁹

354. When we explored this with the Member in Charge, he told us that it wouldn't change the costs significantly, and that it would actually reduce them slightly, but that they were open to looking at using the Green Book figures.

355. The Finance Committee have endeavoured in drawing up this Bill to follow best practice, and we believe that for the sake of completeness in this instance, the Green Book guidance should be followed.

Recommendation 19. We recommend that the Member in Charge revises the Regulatory Impact Assessment to ensure it adheres to the guidance in the HM Treasury Green Book.

²⁹⁸ **The Green Book** is guidance produced by HM Treasury setting out how public sector bodies should appraise proposals before committing funds to a policy, programme or project.

²⁹⁹ ELGC Committee, RoP [228], 11 January 2018
