

Draft Public Services Ombudsman (Wales) Bill

Explanatory Notes

The Draft Public Services Ombudsman (Wales) Bill uses the Public Services Ombudsman (Wales) Act 2005 as its base, but adds new sections in places. These Explanatory Notes cover those ‘new’ sections only.

Section 4 – Power to investigate on own initiative

This power allows the Ombudsman to investigate a matter whether the Ombudsman has received a complaint or not, so it allows the Ombudsman to initiate an investigation.

This has a significant effect on the interpretation of the Bill – when the word “investigation” is used in Part 3, it can mean either an investigation under section 3 or an investigation under section 4. For example, section 17 applies “in relation to an investigation conducted under this Part”. Therefore, section 17 applies in relation to an investigation under section 3 and an investigation under section 4.

Like the power under section 3, the power in section 4 can only be used to investigate matters the Ombudsman is entitled to investigate. Sections 10 to 14 set out the matters which may be investigated.

However, a matter can only be investigated under section 4 if it relates to action taken after the Bill receives Royal Assent. If the action took place before Royal Assent, then the Ombudsman cannot use the power in section 4 to investigate.

Royal Assent is when the Queen formally agrees to make a Bill into an Act. The date of Royal Assent for every Act can be found at the start of the Act, after the long title.

Section 5 – Criteria for own initiative investigations

The Ombudsman must establish and publish criteria that have to be satisfied before the power in section 4 can be used to investigate a matter. When deciding whether to use the power in section 4, the Ombudsman must satisfy the criteria.

It is for the Ombudsman to decide what the criteria should include, but the criteria must set out the evidence that will be required before the power in section 4 can be used.

Section 7 – Who can complain

Only a “member of the public” can make a complaint to the Ombudsman. This section excludes two categories of persons from being “members of the public” – this means that persons acting in the capacity of a listed authority or a private health services provider cannot make a complaint to the Ombudsman.

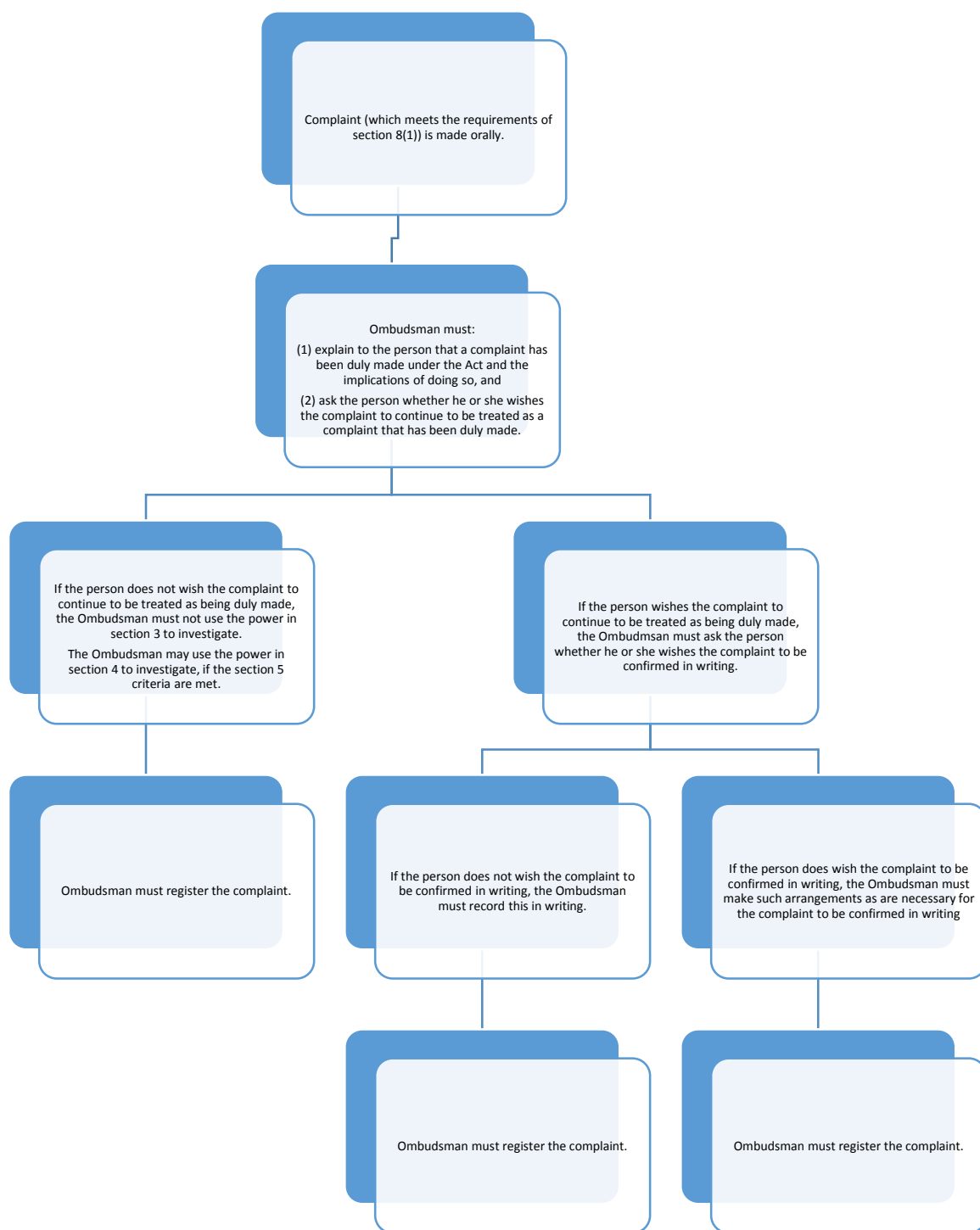
However, this does not prevent someone who is, for example, an employee of a listed authority from making a complaint, provided the person is making the complaint in his/her personal capacity.

Section 8 – Requirements: complaints made to the Ombudsman

If a person wishes to make a complaint to the Ombudsman, the complaint must satisfy the requirements of this section.

But section 8 does not specify the exact requirements of a complaint. The exact requirements will be set out in guidance published by the Ombudsman. Therefore, persons who wish to complain should read that guidance in order to help them make a complaint.

If the guidance specifies that a complaint may be made orally, section 8 sets out additional requirements. Those additional requirements can be illustrated as follows:



Section 10 – Matters which may be investigated

Sections 10(1)(d) and (2) allow the Ombudsman to investigate certain matters relating to private health services. This has a significant effect on the interpretation of the Bill – each time the word “investigation” is used in Part 3, it may include an investigation into private health services. For example, the duty to publish a report of investigations under section 19 would apply where the Ombudsman has investigated private health services.

“Private health services” is defined in section 71 to mean:

- (a) medical treatment provided in a private hospital, and
- (b) private medical treatment provided in an NHS hospital.

Section 10(2) defines the circumstances in which the Ombudsman can investigate private health services. The circumstances are:

- (a) the person must have received medical treatment in the form of relevant action by a listed authority (relevant action is defined in section 10(4) and all listed authorities are listed in Schedule 3),
- (b) the person must have also received private health services, and
- (c) the Ombudsman cannot effectively or completely investigate the relevant action without also investigating the private health services.

Therefore, section 10(2) acts as a check on the power to investigate private health services, because it limits the circumstances in which private health services can be investigated.

Sections 11 to 13 set out further restriction on matters which may be investigated. However, the matters set out in sections 10(1) and 10(2) have a significant effect on the interpretation of the Bill. Read with the powers in sections 3 and 4, the Ombudsman can:

- 1 – investigate a listed authority following a complaint (using section 3 or section 4)
- 2 – investigate private health services following a complaint (using section 3 or section 4)
- 3 – investigate a listed authority where there has been no complaint (using section 4)
- 4 – investigate private health services where there has been no complaint (using section 4).

(In each case, the section 4 power can only be used if the section 5 criteria are met.)

Section 16 – Investigation procedure

Section 16(2) sets out the procedure to be followed when the Ombudsman uses the power in section 4 to initiate an investigation. The procedure requires the Ombudsman to prepare an investigation proposal (i.e. a proposal which includes the reasons for the investigation and how the section 5 criteria have been met).

Under sections 16(4) and (5), the Ombudsman must specify further procedural requirements to be followed when the Ombudsman uses the power in section 4 to initiate an investigation. Such requirements must include procedures allowing those under investigation opportunity to comment.

Section 23 – Action following receipt of a report: investigation of private health services

If the Ombudsman concludes that a person has sustained injustice or hardship in consequence of private health services, and the Ombudsman’s conclusions are published under section 19(4), then the Ombudsman must give the private health services provider reasonable opportunity to notify the Ombudsman of:

- (a) the action the private health services provider has taken (or proposes to take), and
- (b) the time within which such action is to be taken (unless it has already been taken).

Section 23(3) provides an incentive for the private health services provider to take proper action in response to the Ombudsman's conclusions. This is because a listed authority must have regard to any action (good or bad) taken by the private health services provider when the listed authority is deciding whether to enter into a contract for services with the private health services provider.

The duty to have regard requires:

- (a) that the listed authority must be aware of its duty to have regard,
- (b) the duty to be fulfilled before and at the time the decision is taken; it involves a conscious approach and state of mind,
- (c) the duty must be exercised in substance, with rigour and with an open mind; it is not a question of ticking boxes,
- (d) the duty is non-delegable; the duty will always remain on the listed authority,
- (e) the duty is a continuing one,
- (f) it is good practice for a listed authority to keep an adequate record showing it has actually considered the duty and pondered relevant questions.

Section 30 – Restriction on power to amend Schedule 3

Section 30(2) provides that an order to amend Schedule 3 may add a person only if the person has functions dischargeable in relation to Wales or a part of Wales (even if those functions are also dischargeable otherwise than in relation to Wales).

But such an order can never remove the Welsh Ministers or the National Assembly for Wales from the list of listed authorities in Schedule 3.

Section 33 – Complaints-handling: statement of principles

This section requires the Ombudsman to publish a statement of principles concerning complaints-handling procedures of the listed authorities in Schedule 3. The Ombudsman must consult on the first such statement and any material changes and must obtain Assembly approval before publishing these.

Subsection (12) defines “complaints-handling procedures” to mean procedures of listed authorities which examine complaints or review decisions in respect of action taken by a listed authority where the matter in question is one in respect of which a complaint to the Ombudsman can be made and investigated under the Bill.

Subsection (2) requires every listed authority to have a complaints-handling procedure (or procedures) in respect of action taken by that listed authority, and these procedures must comply with the published statement of principles. Subsection (3) also requires a listed authority which has statutory responsibility for a complaints-handling procedure in relation to, or operated by, another listed authority, to ensure that these procedures comply with the statement of principles.

Section 34: Model complaints-handling procedure

This section enables the Ombudsman to publish model complaints-handling procedures (“model CHPs”) for listed authorities. Model CHPs must also comply with the statement of principles published by the Ombudsman. Subsection (6) ensures that listed authorities specified under section 35(1) must comply with any published changes to the relevant model CHP, but it is left to the Ombudsman to decide whether to direct the listed authority to resubmit a description of its complaints-handling procedure under section 37(1). If the Ombudsman withdraws a model CHP, any related specifications under section 35(1) cease to have effect.

Section 35 – Model complaints-handling procedures: specification of listed authorities

This section enables the Ombudsman to specify any listed authority to which a model CHP is relevant. A specified listed authority must have a complaints-handling procedure that complies with the relevant model CHP. On being specified, a listed authority must submit a description of its complaints-handling procedure which takes account of the model CHP within 6 months. The listed authority may, with the Ombudsman's consent, disapply aspects of the model CHP if this is necessary for its effective operation. Specifications can be revoked at any time.

Section 36 – Declarations of non-compliance

This section enables the Ombudsman to declare that a complaints-handling procedure of a specified listed authority does not comply with the relevant model CHP, and if not specified, that the procedure does not comply with the statement of principles. The Ombudsman must give reasons in writing and may also specify changes that would allow the declaration to be withdrawn. The listed authority must send a description of its complaints-handling procedure to the Ombudsman within 2 months of the declaration, having taken account of the reasons for non-compliance and any changes specified by the Ombudsman.

Section 37 – Submission of description of complaints-handling procedures: general

This section gives the Ombudsman a power to require a listed authority to submit a description of its complaints handling procedure within 3 months or such other period as the Ombudsman thinks fit. A shorter period has effect even if the period given in section 35(3) or 36(4) has not yet expired. A listed authority is also required to provide additional information on request. This enables the Ombudsman to get an adequate description of a listed authority's complaints-handling procedure.

Section 38 – Complaints-handling procedures: application to other enactments

This section provides that the duties in sections 33(2) and (3) and 35(2) do not apply to the extent that the relevant listed authority lacks the necessary powers to ensure compliance with the duties, for example, where another body is responsible for determining or approving the procedures to be followed. In addition, the duties in sections 33(2) and (3) and 35(2) do not apply to the extent that they are inconsistent with any other enactment. The latter applies to the extent, for example, that another piece of legislation expressly provides on the face of that legislation that the relevant procedures of a listed authority must apply in a way, or contain provision, that is inconsistent with these duties.

Section 39 – Complaints-handling procedures: promotion of best practice

This section imposes duties on the Ombudsman in relation to complaints-handling by listed authorities to (1) monitor practice, (2) promote best practice and (3) encourage co-operation and the sharing of best practice. Listed authorities must co-operate with the Ombudsman in the exercise of these duties except to the extent that they lack the necessary powers to ensure compliance with the duty, or the duty is inconsistent with any other enactment.

Section 62 – Working jointly with other Commissioners

This section allows the Ombudsman and other Commissioners to work jointly in relation to certain matters.

The other Commissioners are the Commissioner for Older People in Wales, the Welsh Language Commissioner and the Children's Commissioner for Wales.

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Section 64 – Working jointly with the Auditor General for Wales

This section allows the Ombudsman and the Auditor General for Wales to work jointly in relation to certain matters.

Section 68 – Investigations commenced before sections 3, 4 and 42 come into force

If the Ombudsman has already commenced an investigation under the 2005 Act when the powers in sections 3, 4 and 42 come into force, then the Ombudsman must continue with the investigation as if the 2005 Act remained in force.