

PSOW 29

Bil Ombwdsmon Gwasanaethau Cyhoeddus (Cymru) Public Services Ombudsman (Wales) Bill

Ymateb gan: Archwilydd Cyffredinol Cymru

Response from: Wales Audit Office

Thank you for your invitation to contribute to your consideration of the Public Services Ombudsman (Wales) Bill. I regret that I am unable to attend the Committee on 13 December 2017. I am, however, pleased to be able to arrange for Kevin Thomas (WAO Director of Corporate Services) and Martin Peters (WAO Head of Law & Ethics) to provide evidence for me. I also submit the following written evidence. Some of the material below reiterates the points that I have made in response to the Finance Committee of the Fourth Assembly's inquiry into the consideration of powers of the PSOW, the draft Bill prepared by the Finance Committee in late 2016 and, most recently, regarding the current Bill, in my letter of 16 October 2017 to the Chair of the present Assembly's Finance Committee.

The general principles of the Bill and the need for legislation to deliver the stated policy intention

1. As I understand it, the main general principle underlying the Bill is set out in paragraph 3.27 of the Explanatory Memorandum, i.e. it is to ensure that the PSOW's powers reflect best practice. I consider that that is a sound general principle.
2. Overall, the four main extensions of the Ombudsman's powers (as listed at paragraph 5.2 of the Explanatory Memorandum) seem to be in line with the best practice principle for the reasons set out in my submission to the Finance Committee of 19 February 2015. To summarise briefly, I consider that:
 - i. own initiative investigations should enable wider systemic problems to be addressed coherently;
 - ii. there may be real benefits to vulnerable people in making the submission of oral complaints easier;
 - iii. there is merit in considering healthcare coherently,

where both privately obtained and publicly provided care is involved;

- iv. there is scope for improvements in practice and efficiencies through model complaints–handling procedures and guidance across public bodies.
3. While I have some reservation as to the absolute necessity for legislative change in respect of oral complaints, I see the new provision as being conducive to the policy. With regard to the other three areas, it seems to me that legislation is necessary to meet to the policy objectives.
 4. In addition to the four new areas of provision, the Bill also contains at section 67 a new requirement on the Ombudsman, where he or she considers it appropriate, to consult the Auditor General regarding proposed Ombudsman investigations. I think that this provision is appropriate, particularly as a means of ensuring that investigations do not unhelpfully overlap with the Auditor General’s examinations, and vice versa.
 5. I also think that the new powers at section 67 for the Ombudsman and the Auditor General to co–operate with each other and undertake joint investigations are generally appropriate. I do, however, consider that the Auditor General should be clearly protected from actions for defamation in respect of joint investigation communications and reports, and I think this could be addressed by amending section 70 so as to extend its protection to cover the Auditor General in respect of joint investigations.
 6. I should perhaps note that paragraph 12.39 of the Explanatory Memorandum is not quite accurate in saying that the Bill *requires* the Ombudsman and the Auditor General to work collaboratively. While this is not a problem in terms of the Bill itself, it would be more accurate to say that the Bill empowers the Ombudsman and the Auditor General to undertake joint investigations—such empowerment is more appropriate than a requirement.

Potential barriers to the implementation of the Bill’s provisions and whether the Bill takes account of them

7. Section 68 is 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. I understand that the prohibition is in essence an extension of the existing prohibition contained in section 34X of the 2005 Act. Such an extension does not, however, adequately take account of the full range of the Auditor General's functions, which are not limited to examinations. It would therefore be helpful if section 68 were amended to ensure that this is not a restriction on disclosure by the Auditor General of information supplied by the Auditor General under section 67 where such disclosure is part of the exercise of any of the Auditor General's functions.
8. I should perhaps mention that "investigation" is an exception to the prohibition at section 68(2)(b), and under the Bill's interpretation provisions (section 76—see in particular lines 1 to 5 of page 51) this would seem to include an examination by the Auditor General. However, some Auditor General functions, such as the power to issue advisory notices under section 33 of the Public Audit (Wales) Act 2004, still appear to be caught by the prohibition. (Advisory notices are issued by the Auditor General where it appears to him that a local government body is embarking on unlawful expenditure. Such notices are not examinations and do not seem to fall within the definition of "investigation".) As currently drafted, section 68 may therefore discourage co-operation under section 67, and this is a potential barrier to successful implementation of the Bill.

The appropriateness of the powers in the Bill for Welsh Ministers to make subordinate legislation

9. I consider that the powers in the Bill for Welsh Ministers to make subordinate legislation are appropriate. With the appropriate exception of section 75 (commencement), all the powers are subject to the affirmative procedure, which should help ensure that the subordinate legislation is properly considered by the Assembly. Similarly, the requirement for the Welsh Ministers to consult the Ombudsman in respect of secondary legislation concerning, for example, criteria for own initiative investigations

also seems appropriate.

The financial implications of the Bill Costs and benefits

10. It is apparent that careful consideration has been given to the financial implications of the Bill, and I think the identification of costs in the Explanatory Memorandum is generally realistic. I do, however, think that the estimated volumes of oral complaints and investigations seem somewhat low (paragraph 11.36 of the Memorandum), depending on how well publicised the acceptance of oral complaints becomes.
11. While a summary table is provided on page 45, I think that the summarisation of the implications of the Bill could be clearer. As with many Bills, costs and savings (or cost avoidance) are summarised in a five-year total sum. The rationale for that is given in paragraph 11.24 of the Explanatory Memorandum: “[cost] estimates can be calculated for this period with reasonable certainty.” Paragraph 11.24 also says (not unreasonably in my view) that “the Ombudsman expects a ‘steady state’ will be reached on costs and benefits relating to the new powers after three years” and that “ongoing (or recurrent) costs will continue beyond the five year period.” I think it would have been appropriate to make these key statements prominent in the summary on page 45.
12. I am not clear as to why the savings estimates are based on the higher caseload growth estimates (the savings accruing from a higher level of cost-avoidance), while the cost estimates are given as a range. I may have misinterpreted the presentation, but it strikes me that it would have been appropriate to have also given a cost avoidance figure based on the lower 5 per cent caseload growth forecast.
13. I also think that the Explanatory Memorandum should be more explicit about the level of uncertainty in relation to savings. The Memorandum refers to the Comptroller & Auditor General’s report *Department of Work and Pensions: Handling Customer Complaints*, which indicates that substantial savings may be possible from improved complaints handling. However, I would

suggest that forecasting such savings is subject to considerable uncertainty, and I do not think that such uncertainty is recognised sufficiently in the Memorandum.

Welsh Consolidated Fund

14. Annex B of the Explanatory Memorandum (see page 144) says that the Bill does not charge expenditure on the Welsh Consolidated Fund (WCF). That is not correct. In fact, paragraphs 9 and 10 of Schedule 1 to the Bill do contain provisions for direct charges on the WCF. Therefore, under Standing Order 26.6(xi), the Explanatory Memorandum should incorporate a report of the Auditor General setting out his or her views on whether those charges are appropriate.
15. As set out in my letter to the Chair of the Finance Committee of 16 October 2017, this omission appears to arise from a misinterpretation of my letter to the Chair of the Finance Committee of the Fourth Assembly, Jocelyn Davies AM, of 19 February 2015, which set out that the proposals put forward by the Ombudsman at that time did not seem likely to need direct charge provisions. Paragraph 7.3 of the Memorandum says that “in line with the advice, this Explanatory Memorandum does not include a report of the Auditor General”.
16. The Memorandum rather misses the point. While I may have given a view that the Ombudsman’s proposals (which predated the draft Bill) did not seem likely to need direct charge provisions, that is not the same as saying that no report was necessary on any direct provisions included in a Bill.
17. I am, however, happy to report 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. Paragraph 9 provides for salary and superannuation of the Ombudsman to be charged on the WCF. This continues the well-established safeguard of the independence of the office-holder by way of enabling the office-holder’s remuneration to be charged on the WCF, rather than having it subject to annual approval through a budget motion of the Assembly. Paragraph 10 effectively indemnifies the Ombudsman and his or her staff and contractors in respect of

breach of duty. This is a well-established, cost-effective and appropriate means of providing professional indemnity insurance.

18. I am happy for paragraph 17 above to be incorporated into a revised Explanatory Memorandum so as to enable the requirement of Standing Order 26.6(xi) to be met.
19. While the direct charge provisions of paragraph 9 of Schedule 1 to the Bill are appropriate, experience has shown that it would be helpful if those provisions were accompanied by a failsafe provision so as to prevent administrative oversight or errors in making remuneration arrangements leading to a technically unlawful charge on the WCF. Such a charge would lead to the qualification of the WCF accounts, which would result in significant amounts of work on the part of the Welsh Government and WAO staff for no benefit. I suggest that an additional provision in paragraph 9 along the lines of:

For the purposes of amounts being chargeable on, and paid out of, the Welsh Consolidated Fund, the validity of such charges is not affected by any defect in the terms of the Ombudsman's appointment.

Audit provisions

20. Although they fall short of best practice, the provisions for the audit of the Ombudsman's accounts at paragraph 17 of Schedule 1 the Bill are generally workable. To meet best practice the Bill should be amended so that it requires the Auditor General, in the course of auditing the accounts, to be satisfied as to whether the Ombudsman has made arrangements for securing economy, efficiency and effectiveness. This would bring the provisions up to the standard of NHS and local government audit provisions (see section 17(2)(d) and section 61(3)(b) of the Public Audit (Wales) Act 2004).
21. It would also be helpful if the four month deadline in paragraph 17(2)(b) were omitted. Such a deadline serves no useful purpose and only risks causing confusion if there are substantive problems with the accounts. An example of the problems arising from such a deadline occurred with the accounts of Natural

Resources Wales (NRW) for 2016–17, where, because of regularity issues, the deadline conflicted with the requirements of natural justice. As well as NRW itself, I needed to give a firm with contracts with NRW the opportunity to comment.

22. Such an amendment would also bring the accounting provisions closer into line with local government accounts and certain other bodies, such as the Higher Education Funding Council for Wales. Another option would be to make the deadline only applicable subject to meeting the requirements of the Code of Audit Practice issued under section 10 of the Public Audit (Wales) Act 2004 (the Code reflects the requirements of natural justice), or made readily amendable by order, though it is hard to see how that could be practical.
23. Another matter that relates to audit and which experience shows is somewhat problematic is the provision for annual reports in paragraph 14 of Schedule 1. The problem is that this provision is not joined up with the annual accounts provisions. It is normal and sensible practice for the Ombudsman, like most other public bodies, to produce one “annual report and accounts”, rather than an annual report on the discharge of functions and an annual report and accounts. The Treasury’s Financial Reporting Manual (the “FReM”) requires the Ombudsman (and other public bodies) to provide an annual report on their activities to accompany the accounts, and professional standards require the Auditor General (and other auditors) to consider whether the annual report is consistent with the accounts.
24. While it is normal and sensible practice to produce one annual report, both paragraph 14(3) and paragraph 17(2) of Schedule 1 require reports to be laid before the Assembly. However, in the case of paragraph 14(3), it is the Ombudsman who is required to lay the report, and in the case of paragraph 17(2), it is the Auditor General who is required to lay a certified copy of the accounts, together with the Auditor General’s report on them (which includes consideration of the annual report). This effectively duplicate laying requirement is messy, and it would be helpful if paragraph 14 could provide that if the annual report on functions is contained in the annual report

and accounts document, then that document may be laid by the Auditor General.

25. While paragraph 14 is a restatement of paragraph 14 of Schedule 1 to the 2005 Act, it would be appropriate to take the opportunity to address the problem.
26. Finally, in respect of audit provisions, I note that paragraph 14.18 of the Explanatory Memorandum mentions that the provision for the AGW's examinations into the economy, efficiency and effectiveness of the Ombudsman's use of resources may be used as part of the post-implementation review. While I consider that undertaking an examination so as to help inform the Assembly's post-implementation review (section 72) could be a very useful and interesting exercise, I should note that I cannot bind my successor to undertake such an examination.

Unintended consequences of the Bill

27. Schedule 3 to the Bill lists the "Wales Audit Office", so making it a body that may be subject to the Ombudsman's investigations. As I set out in my letter to the Presiding Officer of 8 June 2016, I had previously discussed and agreed with the Ombudsman that this risks creating time-consuming confusion and frustration, which I think would be an unintended consequence. Many people confuse the WAO with the Auditor General and erroneously regard the WAO as undertaking audits, whereas in fact its main functions are limited to providing resources to, and monitoring and advising, the Auditor General. Inclusion of the WAO in the Ombudsman's remit risks encouraging individuals who would like the Auditor General to come to different audit opinions to think that Ombudsman provides a means by which such opinions may be reviewed.
28. Indeed, as the WAO's functions do not entail providing services to individuals (other than the Auditor General), both the Ombudsman and I feel it is hard to see how the Ombudsman could ever be presented with a case that legitimately calls for review of the WAO's actions. It would therefore be helpful if an amendment could be brought forward to remove the WAO from Schedule 3. I understand that the Ombudsman will be writing in similar terms to the Committee.