

John Griffiths  
Equality, Local Government and Communities  
Committee

10 January 2018

Dear John,

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

Thank you for your letter dated 12 December 2017 requesting further information on the Bill.

Please find attached my response to the questions you raised. Should you wish to explore these issues further, I would be happy to provide further clarity at my final evidence session before the Committee on Thursday 25 January 2018.

Yours sincerely



Simon Thomas AM

Chair

*Croesewir gohebiaeth yn Gymraeg neu Saesneg.*

*We welcome correspondence in Welsh or English.*



## Public Services Ombudsman for Wales

Questions for Simon Thomas AM, Member in Charge.

### **Section 5 [Criteria for own initiative investigations]**

**What is the meaning of ‘systemic failure’ in this context and why have you chosen not to define it for the purpose of the Bill?**

It will be for the Ombudsman to decide whether there is a systemic failure, based on his knowledge and expertise of failures in various public services (including his knowledge of complaints received, which explains the wording at the beginning of section 5(2)(b)).

Also, giving the Ombudsman some discretion is necessary because, the underlying reason for investigating has to be linked to people suffering injustice or hardship; the Bill should not hinder the Ombudsman from investigating situations where people suffer injustice or hardship.

If the Bill defined “systemic failure” as covering Circumstances A, B and C, then if the Ombudsman identified Circumstances X which may cause a person to suffer injustice or hardship, the Ombudsman would not be able to investigate. A failure in the system of a listed authority would be considered a serious matter and has the potential for many persons to suffer injustice or hardship, and therefore should be something that can be investigated.

The above reasons therefore make it appropriate for “systemic failure” not to be defined. The Public Services Ombudsman Act (Northern Ireland) 2016 also uses the word “systemic” without giving a definition.

It is also worth noting that the Ombudsman will not be able to push the meaning of “systemic failure” too far; he will be constrained by his duty to act reasonably and in the public interest etc.

### **Section 8 and 9 [Requirements: complaints made to the Ombudsman and Requirements: complaints referred to the Ombudsman]**

#### ***Guidance***

**Why doesn't the Bill contain any requirements relating to the development of the guidance for making complaints? [For example a requirement on the Ombudsman to consult before publication.]**

The Ombudsman is in the best position to develop guidance for making complaints, and the Ombudsman must be trusted to develop that guidance.

For example, the guidance will specify the form of a complaint and what information must be included in a complaint. It is the Ombudsman who has expertise in receiving thousands of complaints and it is he who understands how to get the most out of a complaint, so that he can investigate any injustice or hardship suffered by people.

This approach also help future-proof the guidance; it allows the Ombudsman to update the guidance as is necessary and to take account of changing circumstances.

[The question seems to be directed towards the **duty** of the Ombudsman to prepare guidance about the form of complaints. That duty is a new duty – there is no duty in the 2005 Act for the Ombudsman to prepare guidance about the form of complaints. (The Ombudsman does currently publish booklets about making complaints, but he does so using his general **discretionary** powers to do things that are supplemental to his main powers.)

So, the duty to prepare guidance has been added as a new layer in sections 8 and 9. But the fundamentals of sections 8 and 9 are very much based on sections 5 and 6 of the 2005 Act, and sections 5 and 6 of the Act do not require any form of consultation and have not required any form of consultation for over 12 years.]

### ***Time frame for complaints***

Like the 2005 Act, the Bill contains a discretionary power which would enable the Ombudsman to consider complaints outside of the 12 months statutory deadline. What consideration was given to increasing the statutory time limit from 12 months to a longer period or to providing the Ombudsman with a more specific power to vary the deadline for complaints?

The Bill does not seek to change this fundamental principle that has applied (and worked well) under the 2005 Act for 12 years. Since 2005,

the default position includes a 12 month limit, with a clear and reasonable discretionary power for the Ombudsman to accept older complaints. There has been no evidence that this fundamental principle needs to change.

### **Section 14 [Decisions taken without maladministration]**

**Why is social care expressly referred to in this section and how do the provisions in the Bill relate to the existing powers and responsibilities of Social Care Wales?**

The wording of section 14 of the Bill restates, word for word, section 12 of the 2005 Act. Therefore, social care has been included in this context since 2005 and the Bill does not change that in any way.

Subject to the own initiative power, Social Care Wales will be captured under Part 3 of the Bill in the exact same way as Social Care Wales (including its predecessor, the Care Council for Wales) is captured under Part 2 of the 2005 Act. This means that maladministration by Social Care Wales can be investigated, including when the maladministration relates to merits of a decision taken in consequence of professional judgment in the field of social care.

The Bill does not seek to change this fundamental principle that has applied (and worked well) under the 2005 Act for 12 years. There has been no evidence that this fundamental principle needs to change.

### **Sections 23 and 24 [Action following receipt of a report: investigation of a listed authority or a private health services provider]**

**What sanctions would be available to the PSOW if a listed authority or private health services provider did not address the issues or recommendations made in a report issued by Ombudsman?**

Where the Ombudsman prepares / publishes an initial report under section 20 or 26, the Ombudsman can then prepare / publish a special report under section 27. For example, if the Ombudsman is not satisfied with the action the listed authority has taken in response to the section 20 or 26 report, then the Ombudsman can prepare / publish a special report under section 27.

Again, this reflects the powers of sanction that have always been available to the Ombudsman under the 2005 Act and the Bill does not seek to change that fundamental principle.

In addition, section 33 of the Bill allows the Ombudsman to issue guidance to listed authorities, and listed authorities must have regard to that guidance (see section 33(3) of the Bill). Once again, this restates the fundamental principle which has always applied under section 31 of the 2005 Act.

It is worth noting that section 25 of the Bill restates section 20 of the 2005 Act. Section 20 of the 2005 Act has never been brought into force. Since drafting the Bill, we have become aware that section 20 was never intended to have been included in the 2005 Act, which explains why it has never been brought into force. Given that we now understand that section 20 of the 2005 Act does not work as an enforcement tool (which is why it has never been brought into force), it is accepted that section 25 of the Bill needs to be removed from the Bill. It appears that section 20 of the 2005 Act was an amendment which went to a vote in the UK Parliament and it was never expected that the amendment would be agreed, but it was. Our understanding is that one or more members did not vote as they had intended, which is how the amendment was passed.

Finally, the question refers to section 24 of the Bill. However, section 24 does not give the Ombudsman himself any powers of sanction. Section 24 imposes a duty on listed authorities (i.e. a duty to have regard to reports about private health services providers published under section 20(4) before entering into contracts with private health services providers.

#### **PART 4: LISTED AUTHORITIES: COMPLAINTS HANDLING PROCEDURES**

**What are the implications of Part 4 for those listed authorities who are already subject to statutory complaints procedures, for example, NHS bodies?**

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.

Unnecessary conflicts can be avoided because the Bill requires the Ombudsman to consult listed authorities before preparing his statement of principles and before publishing model complaints–handling procedures.

**Why doesn’t the Bill set out the timetable for the model complaints handling procedures to be consulted and published on?**

The Bill allows gives the Ombudsman flexibility to develop ideas and to consult widely before his new powers take effect.

The Bill replicates the complaints–handling provisions of the Scottish Public Services Ombudsman Act 2002, which have worked well.

**The Explanatory Memorandum emphasises that the provisions in relation to complaints–handling will mean that regular, reliable and comparable data on complaints across the public sector will be available. What consideration was given to including in the Bill a specific requirements in relation to data collection?**

Section 40 of the Bill envisages that, when the Ombudsman complies with the duty to monitor practice and identify trends in practice, this will lead to information and data being collected about complaints–handling.

Section 40 also says that listed authorities must co–operate with the Ombudsman when the Ombudsman is exercising his duty to monitor practice and identify trends in practice. This will ensure that the Ombudsman gets the information he needs, and that he gets regular,

reliable and comparable data on complaints–handling across the public sector.

**If there are different complaints procedures for different sectors (and organisations within sectors) how will any data available be used to compare and contrast?**

It is envisaged that the Ombudsman will factor this into his development of model complaints–handling procedures, i.e. if he does develop different complaints–handling procedures for different sectors, then they will still be developed in such a way as to allow him to compare and contrast the data he receives.

These issues could also be covered in the Ombudsman’s statement of principles, which the Assembly must approve.

The Ombudsman is required to consult widely before developing complaints–handling procedures and the statement of principles must be approved by the Assembly. These requirements can be used to help ensure that data can be used to compare and contrast across different sectors.

However, ultimately the Bill does not prescribe any more detail as to how the Ombudsman will develop model complaints–handling procedures.

Again, the Bill replicates the complaints–handling provisions of the Scottish Public Services Ombudsman Act 2002, which have worked well.

**What are the implications of Part 4 for those listed authorities who have already voluntarily adopted the existing model complaints policy?**

The statutory requirements of Part 4 will override any voluntary regime. But, again, the Ombudsman’s duty to consult means that any transition to a new regime can be made as smooth as possible.

## **PART 5 INVESTIGATION OF COMPLAINTS RELATING TO OTHER PERSONS: SOCIAL CARE AND PALLIATIVE CARE**

**Can you provide more detail of the complexities noted in oral evidence**

## of integrating the investigatory regimes in Part 3 and Part 5?

The starting point is that when the Welsh Government introduced Part 2A into the 2005 Act (via the Social Services and Well-being (Wales) Act 2014), the social and palliative care experts at the Welsh Government would have very carefully crafted the provisions of Part 2A so that they applied properly in the context of care home providers, domiciliary care providers and independent palliative care providers.

The Welsh Government made a conscious decision to include Part 2A as a standalone part of the 2005 Act and not to bring social and palliative care within Part 2 investigations. It is important that the Bill respects that separation.

If the specific nature of Part 2A of the Act was to be respected and preserved while also bringing Part 2A within Part 2, then Part 2 would have been particularly complex.

For example:

- Part 2 of the 2005 Act allows the Ombudsman to investigate listed authorities, subject to certain exceptions. Part 2A of the 2005 Act captures social and palliative care providers, with its own set of exceptions. Merging these into one would still require both sets of exceptions to be set out, creating a longer and more complex regime where it is not immediately clear what exceptions apply to which bodies.
- Part 2 of the 2005 Act is almost exclusively based on maladministration by a listed authority. However, under Part 2A, there is no requirement for maladministration by a social or palliative care provider. Therefore, if the sections around “matters which may be investigated” were merged into one, the maladministration requirements would apply to some bodies in Part 2 but not to others. In addition, the approach to “matters which may be investigated” is different in Part 2 and Part 2A (so much so that Part 2A does not refer to “matters which may be investigated”, instead it refers to “matters to which this Part

applies”, which has a very different structure to the equivalent section in Part 2).

- Merging Part 2 of the 2005 Act with Part 2A of the 2005 Act would have required a decision to be made as to whether social and palliative care providers should be captured as listed authorities. If they were captured as listed authorities, then further carve outs would have to apply to those listed authorities that were social and palliative care providers (because, to respect the specific nature of the social and palliative care provisions, the whole regime around listed authorities could not simply be applied *en bloc* to social and palliative care providers). If they were not captured as listed authorities, then the social and palliative care provision would just be copied and pasted into Part 2, creating one very long Part 2 which had two distinct regimes within it. This would not help people understand the Bill – it is far better and clearer if the regime for listed authorities and the regime for social and palliative providers are kept apart. This also continues the current separation in the 2005 Act with which people have become accustomed. Keeping the regimes separate would also make it much easier for each regime to be amended in future.
- Section 22 of the 2005 Act sets out the circumstances where the Ombudsman can prepare a special report under Part 2 of the 2005 Act. Section 34O of the 2005 Act sets out the circumstances where the Ombudsman can prepare a special report under Part 2A of the 2005 Act. The drafting approach taken by the Welsh Government in section 34O is different to the approach that was taken by the UK Government in section 22. To respect the specific nature of the drafting of both sections, a new section combining both section 22 and section 34O would have been lengthy and intricate.

Why doesn't Part 5 contain a similar provision to that of section 24 in Part 3?

Section 24 was considered by the Finance Committee to be a suitable way of getting private health service providers to take seriously Ombudsman investigations and reports.

Given the express link between: (a) the extent to which private health service providers are captured under the Bill, and (b) listed authorities (via section 10(2)(c) of the Bill), it was considered appropriate that any sanction imposed on the private health service provider should be linked to other listed authorities. That link is found in section 24, i.e. listed authorities must have regard to reports published in respect of private health services providers.

Part 5 is a distinct part of the Bill, dealing with different kinds of bodies – listed authorities are very different bodies compared to care home providers, domiciliary care providers and independent palliative care providers.

Part 5 was included in the 2005 Act by the Welsh Government (via the Social Services and Well-being (Wales) Act 2014) as a distinct part relating to the provision of private social and palliative care.

The Bill does not seek to change the sanctions that can arise under Part 5 of the Bill, as those sanctions were carefully chosen by the Welsh Government as being suitable in the context of care home providers, domiciliary care providers and independent palliative care providers.

## **PART 6 INVESTIGATIONS: SUPPLEMENTARY**

**Why have you chosen not to include the Northern Ireland Public Services Ombudsman and the Prison & Probation Ombudsman in the list of ombudsman set out in section 64?**

The Welsh Ministers have powers under the 2005 Act to add to the list of persons set out in section 34U of the 2005 Act (mirrored in section 64 of the Bill). Given that the Welsh Ministers have not used those powers to add the Northern Ireland Public Services Ombudsman or the Prisons and Probation Ombudsman, it was not considered appropriate to include them in the Bill.

However, if Stage 1 proceedings show that the list in section 64 of the Bill should change, then of course that should be taken into consideration at Stage 2.

What course of action could be taken by commissioners, statutory advisers and the Auditor General for Wales in the event that they dispute a decision by the Ombudsman on the relevance to their work of a matter which he/she is investigating?

Commissioners, statutory advisers, regulators and the Auditor General can simply disagree with the Ombudsman. The Bill does not force those bodies to work with the Ombudsman.

With regard to those bodies who are already captured in this context under the 2005 Act, this represents no change.

For example, under the 2005 Act, if there is disagreement between, say, the Ombudsman and the Welsh Language Commissioner then there is no duty on them to work together – they can simply go their own ways and investigate independently.

However, imposing a duty on the Ombudsman to inform and consult those bodies will help those bodies to work together. And the Bill broadens the scope for working together. For example, if the Ombudsman is currently considering whether to investigate a matter which may be something the Auditor General can investigate, the 2005 Act imposes no requirements at all on the Ombudsman to inform the Auditor General. However, the Bill addresses that by requiring the Ombudsman to inform and consult the Auditor General where it is appropriate. The same applies to the way the Bill broadens the requirements to inform and consult other commissioners, statutory advisers and regulators. By bringing more people together, the Bill reduces the scope for disagreements and overlapping investigations.

In addition, the Ombudsman has memorandums of understanding in place with various commissioners. Again, these arrangements are put in place in order to ensure efficient and effective working. And by requiring the Ombudsman to inform and consult more bodies, it is likely that the Ombudsman will enter into memorandums of understanding with more bodies; this can only help achieve more efficient and effective resolution of matters.

What consideration did you give to requiring the Ombudsman to consult

commissioners, statutory advisers, regulators and the Auditor General for Wales on all investigation proposals as a matter of course?

Requiring consultation as a matter of course could result in unnecessary work and delays in investigations. For example, if the Ombudsman is investigating a matter relating purely to health, it does not seem practical to consult every commissioner, statutory adviser, regulator and the Auditor General as a matter of course.

The Ombudsman's duty is to consult as he considers appropriate. It is right that the Ombudsman is given this discretion to consult when it is appropriate in the circumstances of each investigation. This also secures the Ombudsman's independence and does not unduly fetter his discretion to investigate matters when he is aware of a person suffering injustice or hardship.

This reflects the proportionate approach to the provisions in the 2005 Act around collaborative working, and the Bill does not seek to change that proportionate policy (as introduced by the Welsh Government via the Social Services and Well-being (Wales) Act 2014).

### **SCHEDULE 1**

What consideration was given to bringing the provisions for audit of the Ombudsman's accounts in line with the standards for NHS and local government audit provisions?

The Auditor General for Wales raised the issue of the consistency in audit legislation in his letter dated 6 October 2017 to which I responded on 7 November 2017. My letter notes that the Finance Committee is willing to revisit the issues raised by the Auditor General for Wales following publication of the Stage 1 report by the Committee.

### **SCHEDULE 3**

Both the AGW and the PSOW have raised concerns about including the Wales Audit Office as a listed body under Schedule 3. How do you respond to these concerns?

The Auditor General for Wales raised the issues in respect of inclusion, under

Schedule 3, of the Wales Audit Office in his letter dated 6 October 2017 to which I responded on 7 November 2017. My letter notes that the Finance Committee is willing to revisit the issues raised by the Auditor General for Wales following publication of the Stage 1 report by the Committee.

### **MISCELLANEOUS AREAS:**

Why have you chosen not to restate section 33 of the 2005 Act, which places requirements on listed authorities to publicise the procedure for making complaints to the Ombudsman?

Section 33 of the 2005 Act is no longer necessary because it is replaced by Part 4 of the Bill. While section 33 provided a narrow power for the Ombudsman to address complaints–handling, Part 4 of the Bill allows complaints–handling to be dealt with in a much more detailed and focused way.

Why did you choose not to restate section 35 and schedule 4 of the 2005 Act, which give functions to the Ombudsman around the conduct of local government members – this would provide a single consolidated piece of Welsh legislation on the role of PSOW?

Schedule 4 to the 2005 Act made consequential changes to the Local Government Act 2000 – those amendments have been achieved. It would be confusing and inappropriate for those amendments to be restated in the Bill.

With regard to section 35 of the 2005 Act, that section is saved by section 74(1)(b) of the Bill (meaning that the amendments made by Schedule 4 will automatically continue to have effect, and there is no need to restate the amendments all over again).

### **Regulatory Impact Assessment:**

The RIA notes that the Ombudsman has previously accommodated increases in caseload by reducing the unit cost per complaint by 65% between 2010–11 and 2015–16. What assurance do you have that he will be able to achieve further reductions with future increases in caseload, thus making the Bill affordable in the context of his overall budget?

As set out at paragraph 11.63 of the Explanatory Memorandum, the

Ombudsman has, to date, accommodated increase in caseload through reductions in the unit price per complaint rather than seek proportionate increases in funding.

The Explanatory Memorandum goes on to note that the Ombudsman advises that he will continue to review working practices and organisation structure to accommodate a growth in caseload. It is the Ombudsman's view that he would not be able to deal with the projected increase in caseload without additional resources. It is not possible to estimate exactly how much growth could be absorbed within existing resources through future efficiencies and innovations. The Ombudsman would have to include additional requests for resource through the future annual budgets submitted to the Finance Committee.

Can you clarify the difference between the unit cost per complaint of £501 for 2015–16 used to derive costs in the RIA and the unit cost of £613 for 2015–16 set out in the Ombudsman's most recent budget estimate? Have you made any assessment of the financial impact that using the figure of £613 would have on the additional costs of the Bill?

The unit cost of £501, used to derive the costs in the RIA, reflects expenditure incurred in 2015–16 by the Ombudsman's office for Aim 2, *to deliver a high quality complaints handling service, which considers and determines complaints thoroughly and proportionately, and conveys decisions clearly*. This was considered to be the most reasonable and appropriate figure for estimating the cost of the projected increase in caseload.

The Ombudsman's total expenditure, which is used to calculate the unit cost for the Annual Report and Estimate, includes the cost of other aspects of the Ombudsman's work. For example, total expenditure includes the costs incurred to improve the internal functions of the Ombudsman's office, such as governance, business processes and support functions. The cost of these activities was not deemed likely to vary with the projected increase in caseload. As such, they were not included in the calculation of the unit cost for the purpose of preparing the RIA.

Table 1 below sets out a summary of the estimated cost of the projected

increase in caseload using the unit cost in the RIA (£501) and the Ombudsman’s Annual Report (£613). It also sets out the corresponding figures for 2016–17. Further details, which presents the estimates using the same format as that used in the RIA, are set out at Annex A to this paper.

**Table 1: Cost of the projected increase in the Ombudsman’s caseload (£)**

|   | Unit cost per complaint (£)             |   |   |   |
|---|---|---|---|---|
|   | £501 <sup>a</sup><br>Total<br>(5 Years) | £613 <sup>b</sup><br>Total<br>(5 Years) | £455 <sup>c</sup><br>Total<br>(5 Years) | £526 <sup>d</sup><br>Total<br>(5 Years) |
| <b>2005 Act:</b>                                      |   |   |   |   |
| <b>Increase in caseload of 5 per cent per annum</b>   |   |   |   |   |
| Projected caseload (Number of cases)                  |   |   |   |   |
| Increase year-on-year (Number of cases)               |   |   |   |   |
| Estimated additional cost year-on-year (£)            | 988,974                                 | 1,210,062                               | 898,170                                 | 1,038,324                               |
| Estimated additional cumulative cost from 2018-19 (£) | 2,870,229                               | 3,511,877                               | 2,606,695                               | 3,013,454                               |
| <b>Increase in caseload of 12 per cent per annum</b>  |   |   |   |   |
| Projected caseload (Number of cases)                  |   |   |   |   |
| Increase year-on-year (Number of cases)               |   |   |   |   |
| Estimated additional cost year-on-year (£)            | 2,910,810                               | 3,561,530                               | 2,643,550                               | 3,056,060                               |
| Estimated additional cumulative cost from 2018-19 (£) | 8,076,621                               | 9,882,173                               | 7,335,055                               | 8,479,646                               |

Notes:

- a Unit cost per case as derived from expenditure incurred by the Ombudsman in 2015–16 for Aim 2, to *deliver a high quality complaints handling service which considers and determines complaints thoroughly but proportionately* [Expenditure (£3,008,000) divided by caseload (5,999). Source: Ombudsman’s Annual Accounts 2015–16]. This is the unit cost per case used for the cost estimates in the RIA.
- b Unit cost per case for 2015–16 as reported in the Ombudsman’s Annual Report and Accounts 2016–17 and Estimate 2018–19.
- c Unit cost per case as derived from expenditure incurred by the Ombudsman in 2016–17 for Aim 1, to *provide a complaints service that is of the highest quality, proportionate and effective* [Expenditure (£3,097,000), divided by caseload (6,804). Source: Ombudsman’s Annual Report and Accounts 2016–17].
- d Unit cost per case for 2016–17 as reported in the Ombudsman’s Annual Report and Accounts 2016–17 and Estimate 2018–19.

The Auditor General for Wales has said that it would have been appropriate to give figures in the RIA for cost avoidance as a result of the Bill based on mitigating a 5% increase in caseload (in addition to the mitigation of a 12%

increase that have been included in the RIA). For what reasons did you chose not to include these figures in the RIA, and are you able to provide the Committee with these figures?

The Ombudsman’s best estimate is that his caseload will increase by 12 per cent per annum. It is in that context that his office has estimated the mitigation or ‘cost avoidance’ arising from the provisions in the Bill (specifically the powers to conduct own initiative investigations and undertake a role in respect of complaints–handling).

In preparing the RIA, the Finance Committee noted the evidence given at its meeting on 5 October 2016 by the Ombudsman in respect of his caseload. The Ombudsman advised that, at that time, his caseload was expected to increase between 10 and 12 per cent in 2016–17 and between 5 and 6 per cent for and from 2017–18.

To reflect best practice and provide a sensitivity analysis, the estimated cost of an increase in caseload of 5 per cent per annum was also included in the RIA. As noted, the estimate of ‘cost avoidance’ was provided only in respect of the projected annual increase in caseload of 12 per cent.

Tables 2 sets out an estimate of the mitigation of the projected annual increase of 5 per cent anticipated from the provisions in the Bill. The related cost, at Table 3, is shown for each unit cost per case set out at Table 1.

**Table 2: The Ombudsman’s projected caseload under the 2005 Act and Bill**

|   | 2015-16 | 2016-17 | 2017-18 | 2018-19 | 2019-20 | 2020-21 | 2021-22 | 2022-23 |
|---|---------|---------|---------|---------|---------|---------|---------|---------|
| Projected caseload - 2005 Act <sup>a</sup>                | 5,999   | 6,804   | 7,144   | 7,501   | 7,876   | 8,270   | 8,684   | 9,118   |
| Projected Caseload - Bill <sup>b</sup>                    |         |         |         | 7,433   | 7,701   | 7,575   | 7,514   | 7,453   |
| <b>Increase/(Decrease) in caseload (number of cases):</b> |         |         |         | (68)    | (175)   | (695)   | (1,170) | (1,665) |
| Decrease arising from the proposed power to undertake:    |         |         |         |         |         |         |         |         |
| Own initiative investigations                             |         |         |         | (23)    | (58)    | (232)   | (390)   | (555)   |
| Complaints handling standards and procedures              |         |         |         | (45)    | (117)   | (463)   | (780)   | (1,110) |

Notes:

- a Ombudsman’s actual caseload 2015–16 and 2016–17 and projections for 2017–18 to 2022–23, which assume an annual increase in caseload of 5 per cent.

- b Caseload projections of the estimates impact of the provisions in the Bill.

**Table 3: Cost avoidance arising from the provisions in the Bill (£)**

|  | 2018-19 | 2019-20 | 2020-21 | 2021-22 | 2022-23 | Total     |           |
|--|---------|---------|---------|---------|---------|-----------|-----------|
| Decrease in caseload:  |         |         |         |         |         |           |           |
| Own initiative investigations and Complaints Standards Authority (Number of cases) | (68)    | (175)   | (695)   | (1,170) | (1,665) | (3,773)   |           |
| Estimated cost avoidance (£):  |         |         |         |         |         |           |           |
| Unit cost, RIA (2015-16, calculated) <sup>a</sup>                                  | £ 501   | 34,068  | 87,675  | 348,195 | 586,170 | 834,165   | 1,890,273 |
| Unit cost, RIA (2015-16, reported) <sup>b</sup>                                    | £ 613   | 41,684  | 107,275 | 426,035 | 717,210 | 1,020,645 | 2,312,849 |
| Unit cost (2016-17, calculated) <sup>c</sup>                                       | £ 455   | 30,940  | 79,625  | 316,225 | 532,350 | 757,575   | 1,716,715 |
| Unit cost (2016-17, reported) <sup>d</sup>   | £ 526   | 35,768  | 92,050  | 365,570 | 615,420 | 875,790   | 1,984,598 |

**Notes:**

- a Unit cost per case as derived from expenditure incurred by the Ombudsman in 2015–16 for Aim 2, to *deliver a high quality complaints handling service which considers and determines complaints thoroughly but proportionately* [Expenditure (£3,008,000) divided by caseload (5,999)]. Source: [Ombudsman’s Annual Accounts 2015–16](#). This is the unit cost per case used for the cost estimates in the RIA.
- b Unit cost per case for 2015–16 as reported in the Ombudsman’s [Annual Report and Accounts 2016–17](#) and Estimate 2018–19.
- c Unit cost per case as derived from expenditure incurred by the Ombudsman in 2016–17 for Aim 1, to *provide a complaints service that is of the highest quality, proportionate and effective* [Expenditure (£3,097,000), divided by caseload (6,804)]. Source: [Ombudsman’s Annual Report and Accounts 2016–17](#)].
- d Unit cost per case for 2016–17 as reported in the Ombudsman’s [Annual Report and Accounts 2016–17](#) and Estimate 2018–19.

The RIA notes that it is expected the Ombudsman will initiate 10–15 own-initiative investigations per year. Did you speak to the Northern Irish Ombudsman to find out how many own-initiative cases they undertake per year to inform whether this assumption, and therefore the costs set out for this section of the RIA, is likely to be accurate?

The Explanatory Memorandum notes the range of stakeholder engagement in the calculation of the costs and benefits of the Bill. This included:

- reviewing the results of research by the Northern Ireland Assembly's Research and Information Service (RaISe) into the cost implications of the Northern Ireland Public Services Ombudsman Bill.
- consulting other ombudsmen, including discussion at a good practice seminar jointly organised by the Ombudsmen Association, the International Ombudsman Institute and Aberystwyth University.
- reviewing the results of a web based survey of Ombudsman Schemes across Europe facilitated by the Office of the Ombudsman Ireland on behalf of the International Ombudsman Institute (IOI).

The results showed that the number, types and scale of own initiative investigations varied.

Evidence given by the Ombudsman to the Finance Committee in the Fourth Assembly noted that the power to conduct own initiative investigations is “a power normally used sparingly to investigate where there is an obvious problem but no complaint has come forward or, more usually, to extend an investigation into a complaint to other bodies where it appears that the maladministration or service failure identified is likely to be systemic and affecting people other than the complainant”. The Ombudsman also noted the evidence set out in a paper prepared by the Office of the Northern Ireland Ombudsman, *Power to Commence and Own Initiative Investigation*. This paper reported that the Ombudsman in the Republic of Ireland undertook five own initiative reviews between 2001 and 2010 on issues ranging from subventions in nursing home care, tax refunds to widows, refuse collection charges and the rights to nursing home care for elderly people.

As noted, the RIA sets out that the Ombudsman expects to carry out between 10 and 15 own initiative investigations each year. **Only one or two of these are expected to an investigation across all, or part, of a sector of service delivery in light of concerns (referred to in the RIA as ‘Scenario D’).** The remainder are expected to be undertaken in response to anonymous complaint or extend an investigation into an existing complaint. As noted at

paragraph 11.36 of the Explanatory Memorandum, the estimates reflect a number of assumptions informed by the experience of the Ombudsman's staff and his office's analysis of cases. As such, the number of own initiative investigations and the related cost of undertaking them are regarded as the best estimates.

It should be noted that the Public Services Ombudsman Act (Northern Ireland) was enacted in 2016, but own initiative powers do not commence until April 2018.

The Auditor General also highlights that the forecast savings from improved complaint handling are based on the Comptroller and Auditor General's report on handling complaints in the UK Government Department for Work and Pensions. How would you respond to his view that forecasting such savings is subject to considerable uncertainty, and that this should be reflected more strongly in the RIA?

The forecasting of savings is subject to considerable uncertainty and for this reason the RIA does not quantify them.

The summary of the estimate of costs and benefits, set out at Chapter 9 of the Explanatory Memorandum, states that "the Regulatory Impact Assessment has identified a range of potential benefits to members of the public and public bodies within jurisdiction arising from the provisions in the Bill. The unquantified benefits are set out in the Policy Options section of the RIA".

Paragraphs 11.21 to 11.58 of the Explanatory Memorandum set out information in respect of the assumptions and uncertainties relating to the costs and benefits of the Bill. This notes that it is not possible to predict in respect of which public bodies the increase in the future caseload will relate. Nor is it possible to know which will benefit most from improvements in complaints-handling and quicker and easier learning from complaints.

Paragraph 11.137 of the Explanatory Memorandum notes that there are potential savings to bodies within jurisdiction arising from complaints-handling. It also reports, for illustration purposes, the potential savings from improved complaints-handling by the Department for Work and

Pensions as reported by the NAO Comptroller and Auditor General. However, the RIA does not include an estimate of the value of the savings arising from this proposed provision in Wales.

Do you agree with the Auditor General's view that the paragraphs 9 and 10 of Schedule 1 to the Bill does charge expenditure on the Welsh Consolidated Fund, and for what reasons does the explanatory memorandum take a different view?

The Auditor General set out this view in his letter dated 6 October 2017 to which I responded on 7 November 2017. My letter notes that the Finance Committee is willing to revisit this issue again following publication of the Stage 1 report by the Committee.

Do you plan to amend the Explanatory Memorandum in a way that allows Standing Order 26.6 (xi) to be met, by including the Auditor General's views that the direct charge provisions from paragraphs 9 and 10 of Schedule 1 to in the Bill are appropriate and adding in the additional provision that he suggests?

As noted above, my letter to the Auditor General advises that the Finance Committee is willing to revisit this issue following publication of the Stage 1 report by the Committee.

In estimating the additional costs of the Bill to public bodies you have assumed that staff pay will annually increase by 1% to reflect the cost of living. How realistic do you consider these estimates are given the possibility that the public sector pay cap may be lifted in some organisations covered by the Bill?

We believe that the approach taken is reasonable given the continued austerity in UK public finances. Public sector pay was frozen for two years in 2010 (except for those earning less than £21,000 a year) and since 2013, increases have been capped at 1 per cent. While the cap has been lifted for some parts of the UK public sector (for the police and prison officers), we believe that it remains reasonable to assume that it will remain in place for the rest of the public sector.

You have also estimated that the Ombudsman's staff will receive a 1% annual

increase in pay to reflect the cost of living. What consideration have you given to the possibility that his staff will receive a greater increase than this at some points over the five years after the Bill comes into force, potentially resulting in costs to the Ombudsman over and above those set out in the RIA?

As noted above, we believe that it remains reasonable to assume that the public sector pay cap will remain in place for most of the public sector.

For information, Table 4 sets out the value of the annual 1 per cent increases for years 1 to 5, currently reflected in the estimates of direct and indirect costs in the RIA, which can be used for sensitivity analysis.

**Table 4: Cost of the annual one per cent increase in pay, Years 1–5 (£)**

|   | Direct Costs  | Indirect costs |                | Total         |                |
|---|---------------|----------------|----------------|---------------|----------------|
|   |               | Low unit cost  | High unit cost | Low unit cost | High unit cost |
| Accept oral complaints  | 3,534         | 1,632          | 2,209          | 5,166         | 5,743          |
| Enable own initiative investigations  | 11,617        | 1,748          | 3,268          | 13,365        | 14,885         |
| Extend jurisdiction to investigate the private health service element in a public/private health service pathway <sup>a</sup> | -             | -              | -              | -             | -              |
| Complaints design, implementation oversight and data collection role <sup>b</sup>   | 11,617        |                |                | 11,617        | 11,617         |
| <b>Total</b>  | <b>26,768</b> | <b>3,380</b>   | <b>5,477</b>   | <b>30,148</b> | <b>32,245</b>  |

#### Notes

- a As noted at paragraph 11.107 of the Explanatory Memorandum, the unit cost per case has been used to estimate the financial impact on the Ombudsman of investigating the private health service element in a public/private health service pathway. The impact of an increase in staff salary costs on the unit cost has not been estimated. The cost impact on private health providers (the ‘indirect cost’) is not known (paragraph 11.57, Explanatory Memorandum).
- b As noted at paragraph 11.128 of the Explanatory Memorandum, the financial impact on public bodies of the complaints design, implementation, oversight and data collection role is likely to relate to one off (or transition) costs to alter pre-existing data and IT systems. We have assumed that such costs will be incurred in the first year following enactment (paragraph 11.23, Explanatory Memorandum) and hence the cost estimates do not include a ‘cost of living’ increase.

The Welsh NHS Confederation expresses concern that there is no consistent financial framework for imposing financial penalties on organisations as a result of the Ombudsman's investigations. Would you consider using this Bill to introduce a consistent financial framework for this purpose?

The Ombudsman does not impose financial penalties. Therefore a financial framework is not applicable and is not required in the Bill. When the Ombudsman finds there has been maladministration or service failure on the part of a body which has caused injustice to an individual he recommends that the body takes action to remedy that injustice. This may include financial redress but this is done on a case by case basis.

Your estimates for the additional costs of the part of the Bill that allows the Ombudsman to look at cases with a private health care element are based on no change from the 1% of the Ombudsman's caseload that this currently represents. For what reasons do you not consider that the Ombudsman will need to investigate more than 7 cases per year relating to the private health care sector as a result of the Bill, given the possibility that with increased awareness of this provision there may be a greater caseload and additional associated costs?

The Bill defines the circumstances in which the Ombudsman can investigate private health services, restricting this to cases in a public/private health pathway and "where the relevant action cannot be investigated or completely without also investigating matters relating to the private health services".

The estimated number of cases reflects the narrow definition, as well as the assumptions informed by the experience of the Ombudsman's staff and his office's analysis of cases. This is seen as the best estimate.

The RIA notes that it has not been possible to estimate the additional costs to private healthcare providers as a result of the Bill. What discussions did you have with private providers or their representative bodies to try to establish the level of costs that they may incur?

As noted at paragraph 11.57 of the Explanatory Memorandum, the Ombudsman advises that that he does not have access, or a right to access, to details of the number and the associated cost of complaint made about

private health services. The Independent Healthcare Sector Complaints Adjudication Service (ISCAS) provides independent adjudication on patient complaints about ISCAS members but this does not cover all private healthcare providers.

Other published data on the number of complaints does not cover all private healthcare providers and does not show separately any costs relating to Wales. Given this, the RIA notes that it has not been able to estimate the value of direct costs and hence, the cost impact on private health service providers is not known. However, the number of cases is very low.

**In March 2017, a representative of OB3 told the Finance Committee that there are significant limitations to the information available to inform robust estimates of indirect costs and benefits of the Bill to other public and private sector organisations. To what extent does the further work undertaken since then provide you with assurance that the additional costs to these bodies set out in the RIA are robust and accurate estimates?**

The Finance Committee considered the early RIA at its meeting on 9 March 2017. Members recognised the challenges and limitations in terms of quantifying the costs of the new powers due to a lack of evidence and data available. They noted the Ombudsman's comments that the additional research required to obtain further data could be considered disproportionate. However, Members concluded that, since the primary role of the Finance Committee is to consider expenditure from the Welsh Consolidated Fund, it was essential that any Bill being introduced included detailed and measured costings. The Finance Committee therefore requested additional information from the Ombudsman to meet its own standards and also those required to comply with the Standing Orders of the National Assembly for Wales.

This information, along with responses to subsequent requests made by the Finance Committee, was provided by the Ombudsman. **As noted in the Explanatory Memorandum, the Ombudsman's staff and OB3 engaged with a range of stakeholders, including some public bodies affected by the provisions in the Bill, in the course of collating information for the preparation of the RIA. The additional information provided was used to**

prepare the cost estimates in the RIA. OB3 also reviewed the responses to the inquiry and consultation of the Finance Committee in the Fourth Assembly in respect of the consideration of the powers of the Ombudsman. On this basis, we conclude that they are the best estimates of the costs.

The Auditor General notes that he cannot bind his successor to undertake an examination into the Ombudsman's use of resources as part of the post-implementation review of the Bill. Do you consider that you will need to revisit your plans for post-implementation review as a result of this?

The intent was that the work of the Auditor General for Wales in respect of the Ombudsman – such as the audit opinions on the annual report and accounts and any other reports that may be relevant – would be considered as part of post implementation review. The intent was not that specific requests for additional reviews or audit work would be made for this purpose. The Finance Committee is willing to consider whether any amendments are required to the Explanatory Memorandum to make this clearer following publication of the Stage 1 report by the Committee.

Do you consider that the Finance Committee scrutinising the Ombudsman on the costs incurred in implementing the Bill's provisions as part of the post-implementation review is appropriate given the Finance Committee's role in introducing the Bill and overseeing its progress through the Assembly? Would this be better done by another Assembly Committee?

While the Finance Committee has introduced the Bill, it does not impact in any way on its ability to carry out the functions of the responsible committee set out in Standing Orders 18.10, 18.11, 19 and 20 of the National Assembly for Wales.

The Auditor General has suggested that it would be helpful if the four month deadline for laying the Ombudsman's annual accounts after they have been submitted to him could be removed. Would you be prepared to amend section 17 (2) (b) of Schedule 1 to the Bill to remove this requirement?

The Finance Committee's Report into the delay in the laying of Natural Resources Wales Annual Accounts 2015-16 by the Auditor General for Wales noted issues in respect of the four-month reporting provision to which the

Auditor General's written evidence refers.

The Finance Committee is willing to revisit this issue again following publication of the Stage 1 report by the Committee.

## Annex A – The Ombudsman’s unit cost per case

In this Annex, we replicate the tables set out in the RIA for the figures for the unit cost per case as set out in the main body of this paper.

**Table 7: Cost of the projected increase in the Ombudsman’s caseload (£)**

### UNIT COST PER COMPLAINT, £613

| Unit cost per complaint (£)                             | 613     |           |           |           |           |           |
|---|---------|-----------|-----------|-----------|-----------|-----------|
|   | 2018-19 | 2019-20   | 2020-21   | 2021-22   | 2022-23   | Total     |
| <b>2005 Act:</b>  |         |           |           |           |           |           |
| <b>Increase in caseload of 5 per cent per annum</b>     |         |           |           |           |           |           |
| Projected caseload (Number of cases) <sup>d</sup>       | 7,501   | 7,876     | 8,270     | 8,684     | 9,118     | 41,449    |
| Increase year-on-year (Number of cases)                 | 357     | 375       | 394       | 414       | 434       | 1,974     |
| Estimated additional cost year-on-year (£) <sup>e</sup> | 218,841 | 229,875   | 241,522   | 253,782   | 266,042   | 1,210,062 |
| Estimated additional cumulative cost from 2018-19 (£)   | 218,841 | 448,716   | 690,238   | 944,020   | 1,210,062 | 3,511,877 |
| <b>Increase in caseload of 12 per cent per annum</b>    |         |           |           |           |           |           |
| Projected caseload (Number of cases) <sup>f</sup>       | 8,535   | 9,559     | 10,706    | 11,991    | 13,430    | 54,221    |
| Increase year-on-year (Number of cases)                 | 915     | 1,024     | 1,147     | 1,285     | 1,439     | 5,810     |
| Estimated additional cost year-on-year (£) <sup>e</sup> | 560,895 | 627,712   | 703,111   | 787,705   | 882,107   | 3,561,530 |
| Estimated additional cumulative cost from 2018-19 (£)   | 560,895 | 1,188,607 | 1,891,718 | 2,679,423 | 3,561,530 | 9,882,173 |

### UNIT COST PER COMPLAINT, £455

| Unit cost per complaint (£)                           | 455     |         |           |           |           |           |
|---|---------|---------|-----------|-----------|-----------|-----------|
|   | 2018-19 | 2019-20 | 2020-21   | 2021-22   | 2022-23   | Total     |
| <b>2005 Act:</b>                                      |         |         |           |           |           |           |
| <b>Increase in caseload of 5 per cent per annum</b>   |         |         |           |           |           |           |
| Projected caseload (Number of cases)                  | 7,501   | 7,876   | 8,270     | 8,684     | 9,118     | 41,449    |
| Increase year-on-year (Number of cases)               | 357     | 375     | 394       | 414       | 434       | 1,974     |
| Estimated additional cost year-on-year (£)            | 162,435 | 170,625 | 179,270   | 188,370   | 197,470   | 898,170   |
| Estimated additional cumulative cost from 2018-19 (£) | 162,435 | 333,060 | 512,330   | 700,700   | 898,170   | 2,606,695 |
| <b>Increase in caseload of 12 per cent per annum</b>  |         |         |           |           |           |           |
| Projected caseload (Number of cases)                  | 8,535   | 9,559   | 10,706    | 11,991    | 13,430    | 54,221    |
| Increase year-on-year (Number of cases)               | 915     | 1,024   | 1,147     | 1,285     | 1,439     | 5,810     |
| Estimated additional cost year-on-year (£)            | 416,325 | 465,920 | 521,885   | 584,675   | 654,745   | 2,643,550 |
| Estimated additional cumulative cost from 2018-19 (£) | 416,325 | 882,245 | 1,404,130 | 1,988,805 | 2,643,550 | 7,335,055 |

### UNIT COST PER COMPLAINT, £526

| Unit cost per complaint (£)                             | 526     |           |           |           |           |           |
|---|---------|-----------|-----------|-----------|-----------|-----------|
|   | 2018-19 | 2019-20   | 2020-21   | 2021-22   | 2022-23   | Total     |
| <b>2005 Act:</b>  |         |           |           |           |           |           |
| <b>Increase in caseload of 5 per cent per annum</b>     |         |           |           |           |           |           |
| Projected caseload (Number of cases) <sup>d</sup>       | 7,501   | 7,876     | 8,270     | 8,684     | 9,118     | 41,449    |
| Increase year-on-year (Number of cases)                 | 357     | 375       | 394       | 414       | 434       | 1,974     |
| Estimated additional cost year-on-year (£) <sup>e</sup> | 187,782 | 197,250   | 207,244   | 217,764   | 228,284   | 1,038,324 |
| Estimated additional cumulative cost from 2018-19 (£)   | 187,782 | 385,032   | 592,276   | 810,040   | 1,038,324 | 3,013,454 |
| <b>Increase in caseload of 12 per cent per annum</b>    |         |           |           |           |           |           |
| Projected caseload (Number of cases) <sup>f</sup>       | 8,535   | 9,559     | 10,706    | 11,991    | 13,430    | 54,221    |
| Increase year-on-year (Number of cases)                 | 915     | 1,024     | 1,147     | 1,285     | 1,439     | 5,810     |
| Estimated additional cost year-on-year (£) <sup>e</sup> | 481,290 | 538,624   | 603,322   | 675,910   | 756,914   | 3,056,060 |
| Estimated additional cumulative cost from 2018-19 (£)   | 481,290 | 1,019,914 | 1,623,236 | 2,299,146 | 3,056,060 | 8,479,646 |