

PSOW 25

Bil Ombwdsmon Gwasanaethau Cyhoeddus (Cymru)

Public Services Ombudsman (Wales) Bill

Ymateb gan: Ysgol y Gyfraith, Prifysgol Lerpwl

Response from: Liverpool Law School, University of Liverpool

Introduction

1. I welcome the opportunity to respond to the committee's consultation on the Public Services Ombudsman (Wales) Bill. I am responding in a personal capacity, drawing upon my research expertise on the ombudsman institution in the UK and Ireland, and in Australia and New Zealand. In addition to dealing with the questions posed in the consultation, I also raise the issue of the desirability of enacting clause 20 in the Bill.

Accepting oral complaints

2. I agree that the Ombudsman should be able to accept oral complaints. The committee may wish to consider the appropriateness of the degree of detail specified in clause 8 (4)-(9) which contrasts with the approach in section 26 of the 2016 Northern Ireland statute, and clause 4 of the draft (Westminster) Public Service Ombudsman Bill 2016 which deals with complaints about English and UK bodies.

Own initiative investigations

3. Allowing an Ombudsman to conduct an investigation on his or her initiative instead of only in response to a complaint, is a power which the vast majority of Ombudsmen have and in the UK Wales would follow Northern Ireland if it is enacted. I think the drafting in the Bill is to be preferred to that of the Northern Ireland statute. The Welsh Bill would allow this power to be exercised not only where it is thought that there is a systemic issue, but also where a complainant might have difficulties in making a complaint by reason of disadvantage or vulnerability.
4. The Bill is also much closer to the approach in the legislation in Australia, New Zealand and the Irish Republic where are no conditions attached to this power of investigation. I think that an appropriate balance is drawn in the proposals which allow Welsh Ministers to add to, remove or change the criteria for own initiative investigations by subordinate legislation but only if Welsh Ministers have consulted the Ombudsman and others, and that the Assembly must use the affirmative procedure to approve the draft regulation.

Private health care

5. It seems appropriate that a public services ombudsman may have a private health care provider within remit where the complainant had received services from both public and private health care providers and the complaint against the public provider cannot be properly considered without including the private provider.

Complaint handling standards and procedures

6. This role is modelled on that of the Complaints Standards Authority which was given to the Scottish Public Services Ombudsman. As with the 2016 Northern Ireland statute, which also confers this role and powers on the Northern Ireland Public Services Ombudsman, the provisions are, mostly, copied verbatim from the Scottish

legislation. In addition to paying attention to the legislative provisions, it is vital that the implementation by the Scottish Ombudsman of this role in relation to complaint handling standards and procedures is studied carefully in Wales by the ombudsman, policy officials, Welsh Ministers, AMs and the various sectors of public services providers. The objective is to improve complaints handling for everyone, complainants and complained about service providers alike. By creating common complaint handling procedures for the various sectors of public services it should be easier to complain, and to resolve complaints and also to identify, share and implement best practice so that ‘lessons are learned’ and service can be improved.

Potential barriers

7. The Bill contains a number of significant changes but their effectiveness will depend upon a fundamental change in the culture of the public service providers and change in their users. Making it easier for users to complain does not necessarily mean that more dissatisfied users will complain as research by the Parliamentary and Health Service Ombudsman indicates that a significant number of potential complainants feel that a complaint would not make any difference. If dissatisfied users are to think that complaining would not be a waste of time, then service providers must avoid a defensive reflex and instead welcome complaints with open arms and open minds. Thus they can identify what is not working well and along with providing effective redress for those users who have suffered injustice or hardship through poor service, they can also make changes which minimise or prevent repetition.
8. Usually legislation is part of the means by which a government seeks to implement its policy, however, this Bill is not an initiative from Welsh Ministers but from the Assembly’s Finance Committee. It is entirely appropriate that the Assembly should take the lead in action which is part of its role in holding public services to account, in this case through the provision of an improved complaints handling system. While the Ombudsman institution plays a central role as the final resolution stage in the complaints handling process and as the co-ordinator across the different sectors of public services facilitating identification and sharing of good practice in complaints handling and using the insight this produces to drive improvements in service, the Ombudsman cannot do this alone. What is required is a supportive environment in which the various stakeholders work together to conduct a joined-up approach across the range of public services and their providers to ensure that things are put right when they go wrong and then use that experience to strive to get things right first time. The Assembly and Ministers must signal the policy clearly to service providers, and both will have a role holding those providers to account. In some fields Welsh Ministers will be directly responsible for service delivery and in others they will be responsible for the policy and resources framework within which other bodies deliver services, such as councils and the NHS.
9. 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.

Ministers' rule making powers

10. I raise no issue about the Bill's conferral of rule-making powers upon Welsh Ministers.

Financial implications

11. I am unclear if the calculation of costs imposed by the legislation, in particular the role of the Ombudsman in complaint handling standards and procedures, includes those associated with the creation of complaint handler networks for each sector of the public service and its common complaint handling procedure. My understanding of practice in Scotland is that the creation of these networks is a crucial part of the arrangements, in that it facilitates the identification and sharing of best practice. Initially these networks play a vital role in adapting the Statement of Complaint Handling Principles to produce a Model Complaint Handling Procedure for each sector, for example local government. Once the common procedure is in place and complaints data has been collected and can be analysed, then the network can act as a forum allowing for the complaint handlers to compare their data and analyses and to identify and share ideas. The potential is for the network to be greater than the sum of its parts as each member can benefit from the exchange as this is likely to produce a greater number and range of insights than if they worked in isolation from each other.
12. I suspect that the cost calculations do include these complaint handler networks as they are an important part of the Scottish arrangements. This is not to say that the Scottish model should not be modified as there are likely to be some differences which ought to be taken into account.

Clause 25 unintended consequence

13. Clause 25 reads

Non-action following receipt of a report

- (1) If the Ombudsman is satisfied that the condition in subsection (2) is met in relation to a listed authority, the Ombudsman may issue a certificate to that effect to the High Court.
- (2) The condition is that the listed authority has wilfully disregarded the Ombudsman's report without lawful excuse.

It is a reproduction of section 20 of the current 2005 statute but it was specifically excluded from coming into force on 1 April 2006 by article 5(3)(a) of The Public Services Ombudsman (Wales) Act 2005 (Commencement No. 1 and Transitional Provisions and Savings) Order 2005.

14. Section 20 was not in the original Bill which was introduced first in the House of Lords in 2004. The Government opposed the amendment adding it, but this was approved by 91 to 86 votes. By the time it was introduced into the House of Commons there was speculation that an election would be called and when it was announced this dramatically curtailed the scrutiny which the Bill received in the House of Commons. I surmise that the Bill's promoters were prepared to accept the amendment and ensure that the Bill was enacted before the dissolution of Parliament.

15. The concern which motivated the supporters of this provision was that where the Ombudsman had upheld a complaint but the listed authority was seemingly not going to redress the injustice or hardship sustained, then there was no incentive to encourage the provision of any or adequate redress if the listed authority was not part of the Welsh Assembly Government or the Welsh Assembly Commission. This was because special reports in relation to those listed authorities only, could also be laid before the Assembly under section 24. It was felt other listed authorities could ignore the special reports which under section 22 authorised the Ombudsman to identify the failure of the listed authority to provide any notification of proposed redress or fail to provide any or adequate redress within the prescribed period, and then to recommend remedial steps to be taken. During the debates in the Lords the Minister said the Government did not want to change the status of the Ombudsman's proposal for remedy from a recommendation, and that since 1991 there had only been one complete refusal to provide redress recommended by a Welsh Ombudsman and none since 1996. Subsequently the Welsh Public Services Ombudsman has been satisfied with the redress provided by listed authorities.
16. In Scotland all special reports can be laid before the Scottish Parliament but this power has not needed to be exercised by the Scottish Public Services Ombudsman. In the fifty years of the Parliamentary Ombudsman, the similar power to lay a report before Parliament where the Ombudsman has not been satisfied about redress because none has been indicated or what was offered was inadequate, has been resorted to on seven occasions. In each case the consideration of the report by a select committee has led to redress being provided which satisfied the Parliamentary Ombudsman.
17. If it is felt that listed authorities' compliance with the Welsh Ombudsman's recommended remedies does not justify removing clause 25, then there is doubt that it would actually help the remedy-less complainant. The legislative provision does not create a procedure which would enable the High Court to do anything about the Ombudsman's certificate. The point about the Ombudsman's jurisdiction was that it created a new remedy and one which, through the wide definition of maladministration, would offer the possibility of redress unavailable from a court. To succeed in a claim for judicial review one must show that the listed authority had acted unlawfully.
18. A further complication is that a claim for judicial review has to be brought promptly and within 3 months of the action complained of, that is the poor service by the listed authority. Given that the time limit for making a complaint to the Ombudsman is 12 months which allows for the complainant to raise the issue first with the listed authority and, if dissatisfied with that, to complain to the Ombudsman, then it would seem that the court time limit would not be met. I do not know if the court would accept an argument on the time limit contending that as the case-law shows the court

will not permit a judicial review to proceed if there is an appropriate alternative, then unsuccessful resort to the Ombudsman should not count as delay in coming to court.

19. To sum up, I suspect that it is not widely known that the predecessor of clause 25, section 20 of the current 2005 statute has not been brought into force. If clause 25 was enacted and brought into force, I suggest there are serious doubts as to whether it would actually be of assistance in persuading those listed authorities to provide the redress recommended by the Ombudsman in a special report which would not also be laid before the Assembly. If in the future such a listed authority did not comply with the Ombudsman's recommendation in a special report, then it would be open to the Assembly to amend the legislation to expand the range of listed authorities whose special reports could be laid before the Assembly. As to whether this is an amendment which should be made to this Bill during its passage through the Assembly, I would suggest not. This is because there is no indication that there is a problem of non-compliance with the Ombudsman's recommendations for redress, to which it might be the solution, and because it was not something which was covered in the Finance Committee's consultations on legislation to reform the 2005 statute, and so could be regarded as unfair.