



National Assembly for Wales
Cynulliad Cenedlaethol Cymru

Public Services Ombudsman (Wales) Bill [HL] 2004-05

Abstract

This paper provides background briefing on the Public Services Ombudsman (Wales) Bill [HL] 2004-05. The Bill creates a single Office for a Public Services Ombudsman for Wales to replace the current ombudsmen for Welsh Administration, Welsh Local Government, Social Housing and the Health Service.

It received its Second Reading in the House of Lords on 16 December 2004 and will be subject to joint scrutiny by the Local Government & Public Services Committee and the House of Commons Welsh Affairs Committee on the 13 and 17 January 2005.

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Public Services Ombudsman (Wales) Bill [HL] 2004-05

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Executive Summary

- ◆ The *Public Services Ombudsman (Wales) Bill* was published on 24 November 2004 following the Queen's Speech setting out the UK Government's legislative programme for the new parliamentary session.
- ◆ The aim of the Bill is to create a single office of Public Services Ombudsman for Wales to replace the current Welsh Administration Ombudsman, the Welsh Local Government Ombudsman, the Social Housing Ombudsman and the Health Service Ombudsman.
- ◆ The paper provides the background to the Bill from the original recommendation for streamlining ombudsman services in Wales, made by the National Assembly Advisory Group in 1998, to the UK Government's announcement of the Bill in the 2004 Queen's speech.
- ◆ The Ombudsman will have responsibility for investigating maladministration and service failure by the Assembly; Assembly sponsored public bodies (ASPBs) and a number of other publicly funded bodies; health service bodies, certain health service providers, local government bodies and social landlords.
- ◆ The paper outlines the three part structure of the Bill.
- ◆ The paper outlines key issues in the Bill with reference to the Second Reading debate in the Lords. These include appointment and tenure; costs; making a complaint; who and what may be investigated; enforcement; Assembly powers; consultation and co-operation with other ombudsmen; deputy ombudsmen and jurisdiction.
- ◆ The paper provides a comparative review of ombudsmen services Scotland, England and Northern Ireland

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Public Services Ombudsman (Wales) Bill [HL] 2004-05

1 Introduction

The *Public Services Ombudsman (Wales) Bill* was published on 24 November 2004 following the Queen's Speech setting out the UK Government's legislative programme for the new parliamentary session. The aim of the Bill is to create a single office of Public Services Ombudsman for Wales to replace the current ombudsmen for Welsh Administration, Welsh Local Government and Social Housing and the office of Health Service Commissioner for Wales. This paper explains the background to the Bill; comparative arrangements in other parts of the UK; summarises its provisions and highlights some key issues.

The Bill was introduced into the House of Lords on 24 November and received its second reading on 16 December 2004. Before proceeding to the House of Commons in February 2005 it will be subject to joint scrutiny by the Local Government and Public Services Committee and the House of Commons Welsh Affairs Select Committee in Cardiff on the 13 January and London on the 17 January.

2 Background

2.1 *The ombudsman role*

'Ombudsman' is a Swedish word and means representative or agent of the people. It is used for both men and women. Sweden had the first ombudsman in 1809 and other countries adopted the term when they appointed ombudsmen of their own. The first UK ombudsman was the Parliamentary Commissioner appointed under the *Parliamentary Commissioner Act 1967*.

The British and Irish Ombudsman Association's definition of the core role of ombudsmen is: 'to investigate and resolve, determine or make recommendations with regard to complaints against those whom the ombudsman is empowered to investigate'.¹

In the UK some ombudsmen are concerned with the public sector, while others deal with the private sector. Some are statutory, some non-statutory, some have compulsory membership, whilst others are voluntary. The term 'Ombudsman' has been occasionally used to describe bodies which are internal to the bodies which they adjudicate upon, and thus not wholly independent of them.

The key features common to all ombudsman schemes which make them attractive as mechanisms for complaints handling and dispute resolution and which distinguish them from, for example, arbitration and mediation, may be summarised as follows:²

¹ British and Irish Ombudsman Association website
<http://www.bioa.org.uk/BIOA-New/guide-dept/OMBUDSMAN%20SCHEMES.htm>

² Osmotherley, E; 'Ombudsmen', *The Adviser* No.100, November/December 2003. pp. 6-10
http://www.bioa.org.uk/BIOA-New/Adviser_Article_Ombudsmen_Osmotherly.pdf



- ◆ Ombudsmen offer access to justice which might not otherwise be available, offering redress not available from the Courts and in cases which might not be considered by the Courts.
- ◆ Ombudsmen are independent and impartial and conduct their investigations in private.
- ◆ Ombudsman schemes are free to complainants.
- ◆ Ombudsmen can usually take account of what is fair and reasonable in all the circumstances, and are not bound by a strict interpretation of the law or precedent.
- ◆ It is not necessary for the complainant to obtain professional advice in order to make a complaint to an Ombudsman.
- ◆ Ombudsmen do not name complainants but they all publish digests of their decided cases. Some publish reports in which they name organisations which are the subject of the complaint.
- ◆ Compliance with an Ombudsman's recommendations is secured by a variety of means - by law, by contract, by a regulator or by the moral force and the standing of the Ombudsman. Non-compliance is rare.
- ◆ Ombudsman schemes make extensive use of informal settlements and conciliation; some offer access to mediation.
- ◆ Ombudsmen level the playing field between the under-represented complainant and the large and powerful organisation which is the subject of the complaint.
- ◆ Ombudsmen are inquisitorial, not adversarial, and investigations are conducted in private. Ombudsmen can examine records, interview witnesses and use professional experts where appropriate. The procedure for investigations can be tailored to the circumstances of the case.

Other than with a small number of schemes, the ombudsman's decision is **not binding** on the complainant, who may take the matter to court if he or she wishes.

There is **no right of appeal** against the merits of the decisions of any of the ombudsmen. Decisions are, however, subject to judicial review.

Complainants have to complain to the body by whose actions they are aggrieved and give them a **reasonable opportunity to respond** before they come to the ombudsman. There are time limits for this, although ombudsmen have discretion to accept late complaints. They will also accept complaints made on behalf of others – provided the complainant has given consent – and so advisers can make complaints on behalf of their clients.

2.2 Maladministration

The Welsh Administration Ombudsman and Local Government Ombudsman for Wales are concerned with complaints that injustice has been caused by 'maladministration'. Essentially, ombudsmen can look at the way in which decisions are taken (or policies are implemented), but not at the merits of the decisions or policies themselves. There is no statutory definition of maladministration. However, in the 1993 Annual Report of the Parliamentary Commissioner for Administration, under the heading 'What is maladministration?', Sir William Reid, the then Ombudsman, wrote:

To define maladministration is to limit it. Such a limitation could work to the disadvantage of individual complainants with justified grievances which did not fit within a given definition. However I suggest an expanded list of examples going beyond those recounted in what has become known as the Crossman catalogue. When the Parliamentary Commissioner Bill was being taken through Parliament, the examples with Mr Crossman as Leader of the House of Commons then gave were bias, neglect,

inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness and so on. In the language of the 1990s I would add

- ◆ rudeness (though that is a matter of degree);
- ◆ unwillingness to treat the complainant as a person with rights;
- ◆ refusal to answer reasonable questions;
- ◆ neglecting to inform a complainant on request of his or her rights or entitlement; knowingly giving advice which is misleading or inadequate;
- ◆ ignoring valid advice or overruling considerations which would produce an uncomfortable result for the overruler;
- ◆ offering no redress or manifestly disproportionate redress;
- ◆ showing bias whether because of colour, sex, or any other grounds; omission to notify those who thereby lose a right of appeal;
- ◆ refusal to inform adequately of the right of appeal; faulty procedures;
- ◆ failure by management to monitor compliance with adequate procedures;
- ◆ cavalier disregard of guidance which is intended to be followed in the interest of equitable treatment of those who use a service;
- ◆ partiality; and
- ◆ failure to mitigate the effects of rigid adherence to the letter of the law where that produces manifestly inequitable treatment.³

The main test of whether there has been maladministration is whether the authority or body has acted reasonably in accordance with the law, its own policies and generally accepted standards of administration.

The *Public Services Ombudsman (Wales) Bill (HL)* is concerned with merging four ombudsman services: the Welsh Administration Ombudsman, the Local Government Ombudsman for Wales, the Health Service Ombudsman for Wales and the Social Housing Ombudsman. The UK Parliamentary Ombudsman will retain responsibility for investigating non-devolved functions such as Social Security and Pensions, Income Tax and Immigration.

2.3 Welsh Administration Ombudsman

The Welsh Administration Ombudsman (WAO) was created by the *Government of Wales Act 1998* (s111 and Schedule 9). The Ombudsman can consider complaints about the administrative actions of listed bodies, including the National Assembly for Wales.

It was originally intended that the Parliamentary Commissioner for Administration (PCA) would have jurisdiction over the National Assembly for Wales. However, during the parliamentary passage of the *Government of Wales Bill*, the UK Government agreed to the creation of a separate office. The defining framework of the Office followed that of the PCA but with some significant twists; firstly, the 'MP filter' whereby complaints had to be made through the Member was dispensed with so that the public can submit complaints directly to the WAO. Secondly, the Act contains special provisions relating to the ombudsman's use of further reports to deal with non-compliance. A requirement that the First Minister proposes a motion in plenary accepting the WAO's recommendations mean that 'publicity – and potential embarrassment – effectively substitutes for the Ombudsman's lack of enforcement powers.'⁴

³ Parliamentary and Health Service Ombudsman webpages, Background and History: Sir William Reid's definition of maladministration.

http://www.ombudsman.org.uk/foi/ps2b_iv_maladmin.htm

⁴ R Rawlings, *Delineating Wales*, University of Wales Press, 2003. pp.377-379

2.4 Health Service Ombudsman for Wales

The Health Service Ombudsman for Wales looks into complaints made by or on behalf of people who have suffered because of unsatisfactory treatment or service by, or provided on behalf of, the National Health Service (NHS). The Ombudsman can only look into complaints against private health providers if the treatment was funded by the NHS.

Until November 2003 the offices of Welsh Administration Ombudsman and Health Service Commissioner for Wales were held by same individual holding the office of Parliamentary Ombudsman, latterly Ann Abraham.

2.5 Local Government Ombudsman for Wales

The Local Government Ombudsman for Wales investigates complaints by members of the public that they have suffered injustice as a result of maladministration by local authorities in Wales. The Office acquired further powers in 2001 to investigate allegations that members of local authorities in Wales had failed to comply with the authority's code of conduct. A complaint may be made by any member of the public who has sustained injustice as a result of the administrative failures of an authority. Complaints may also be made by a group of individuals, or a company.

2.6 Social Housing Ombudsman for Wales

The *Housing Act 2004* created an office of the Social Housing Ombudsman for Wales to investigate complaints against Registered Social Landlords. *The Public Services Ombudsman (Wales) Bill [HL]* proposes that this should be also be unified with the other offices.

2.7 Transitional Arrangements to unified ombudsman services

A recommendation for streamlining ombudsman services in Wales was made by the National Assembly Advisory Group in its Report in 1998. In November 2002 the Welsh Assembly Government published a consultation paper, *Ombudsman's Services in Wales: Time for Change*, on a proposal to bring together the separate Offices of Welsh Administration Ombudsman, Health Service Commission Wales and the Commission for Local Administration in Wales to create a unified Ombudsman's jurisdiction for Wales, led by a single individual. A further consultation paper, *A Public Services Ombudsman for Wales, Powers and Jurisdiction*, was published in October 2003 was aimed at shaping a precise remit of the new office.

In the March 2004 annual plenary debate in the National Assembly for Wales on bids for primary legislation, a bill creating a Public Services Ombudsman for Wales was approved for proposal and the First Minister undertook to request that the Secretary of State for Wales make representations for its inclusion in the Queen's Speech.

Adam Peat, formerly Director of the Local Government and Culture Department in the Welsh Assembly Government, had been appointed Commissioner for Local Administration in Wales on 1 October 2003 and Health Service Commissioner for Wales on 4 November 2003 and designated as the non-statutory Public Services Ombudsman for Wales by the First Minister and the Secretary of State for Wales, the Rt. Hon. Peter Hain MP.

7. Furthermore, existing legislation concentrates almost exclusively on the Ombudsmen's investigation and reporting of complaints. In practice, however, the emphasis is increasingly moving towards complaints being resolved by whatever means are appropriate, requiring the Ombudsmen to use more modern and flexible working methods. Legislation needs to facilitate and reflect that development.⁷

The WAG stated the it favoured the appointment of a single ombudsman because:

- ◆ members of the public would get a better service from a unified "one stop shop" jurisdiction;
- ◆ the investigation and resolution of complaints that currently fall across the jurisdiction of more than one ombudsman would be easier;
- ◆ a unified office would command a higher public profile and greater public awareness of the ombudsman service and willingness to use it.

Issues consulted on were:

- ◆ appointments to a new Office: whether the ombudsman should be appointed for fixed term, the length of the appointment and whether her or she should be eligible for reappointment.
- ◆ funding and staffing a new Office: how funding can be arranged to ensure the independence of the Office and whether staff should be civil servants.
- ◆ establishing an advisory Board to support the Ombudsman in his or her work.
- ◆ the accountability of the Office to the Assembly and local authorities.

A second paper, *The Public Services Ombudsman for Wales: Powers and Jurisdiction*, was published in October 2003 and aimed at shaping a precise remit of the new office. The consultation focussed of these issues:

- ◆ scope of the new Ombudsman's jurisdiction in terms of the bodies which may be subject to investigation, and the matters which may (and may not) be the subject of investigation;
- ◆ pursuing a complaint – for example, whether the Ombudsman should accept oral complaints.
- ◆ resolving complaints and redress and whether the new Ombudsman should have additional powers either to enforce his or her recommendations through the courts or impose sanctions on public bodies which fail to act in accordance with them.

A summary of consultation responses can be seen in annex 1.

3 The Bill

3.1 Structure

The *Public Services Ombudsman (Wales) Bill [HL]* received its First Reading in the House of Lords on 24 November 2004. Its main provisions are:

- ◆ the establishment of the office of the Public Services Ombudsman for Wales;

⁷ Welsh Assembly Government, Consultation Paper, *Ombudsman's Services in Wales: Time for Change?*, November 2002

<http://www.wales.gov.uk/keypubconsultation/content/ombudsman/ombudsman-e.pdf>

- ◆ the abolition of the offices of the Welsh Administration Ombudsman, the Health Service Commissioner for Wales and the Social Housing Ombudsman for Wales;
- ◆ the abolition of the Commission for Local Administration in Wales (and the office of the Local Commissioner for Wales)
- ◆ provision for the Ombudsman to investigate those matters that currently are investigated by the existing ombudsmen/commissioners in Wales.
- ◆ the Ombudsman will have responsibility for investigating maladministration and service failure by the Assembly; Assembly sponsored public bodies (ASPBs) and a number of other publicly funded bodies; health service bodies, certain health service providers, local government bodies and social landlords.

These provisions will allow for the creation of a unified Ombudsman service in Wales.

The Bill is organised in 3 Parts.

Part 1 deals with establishing the office of the Ombudsman and making further provision in relation to that office. Schedule 1 of the Bill *Public Services Ombudsman for Wales: Appointment etc.* sets out details with relation to appointment, status, term of office and so forth.

Part 2 of the Bill deals with the Ombudsman's powers of investigation. This covers:

- ◆ which matters the Ombudsman can investigate;
- ◆ which authorities can be investigated ('listed authorities');
- ◆ a power for the Assembly to amend the list of listed authorities;
- ◆ who can complain to the Ombudsman and the manner of complaint;
- ◆ the provision of powers for the Ombudsman to obtain information, evidence and documents etc. in relation to the discharge of his/her functions;
- ◆ matters relating to the Ombudsman's reports and sets out his/her powers to consult, co-operate, work and report jointly with other specified ombudsmen and commissioners;
- ◆ restrictions imposed on the disclosure of information obtained for the purposes of discharging the Ombudsman's functions and
- ◆ miscellaneous matters such as the Ombudsman's power to issue guidance, a duty on listed authorities to publicise complaints procedures, protection from defamation claims and additional provision relating to the powers of listed authorities to pay compensation.

Part 3 makes provision about the Ombudsman's functions in relation to the conduct of local government members and employees and for the abolition of the offices of Welsh Administration Ombudsman, Health Service Commissioner for Wales, Social Housing Ombudsman for Wales and for the abolition of the Commission for Local Administration in Wales (including the office of the Local Commissioner for Wales). It also makes general provision relating to amendments and repeals, commencement, transitional provision and interpretation and so forth.⁸

3.2 Second Reading in the House of Lords

The Bill received its Second Reading in the House of Lords on 16 December 2004. Lord Evans of Temple-Guiting, opening for the UK Government stated:

⁸ HMSO, *Public Services Ombudsman (Wales) Bill* [HL], 2004-05, Explanatory Notes.
<http://www.publications.parliament.uk/pa/ld200405/ldbills/003/en/05003x--.htm>

We believe that the Bill's effect will be cost neutral; this is a Bill about creating a coherent jurisdiction, administered by a team which is already working increasingly effectively together, but which now needs the backing of a sound legislative framework. The Bill will provide a modern, flexible and accessible service for members of the public who wish to complain about most public service providers operating in relation to Wales.⁹

The Bill received support from all parties but concerns were raised about the need for the ombudsman service to be understood by the wider public and viewed as accessible. Furthermore, the public should not be deterred from complaining by fear of the future consequences when accessing public services. Other issues raised included the appointment and tenure of the Office; costs and staffing and enforcement powers. These issues are considered in more detail below.

3.3 Issues

3.3.1 Appointment and Tenure

As the Ombudsman will be appointed by the Monarch, the appointment will be made on the recommendation of the Secretary of State.¹⁰ The functions of the office are carried out on behalf of the Crown and the Ombudsman is a Crown servant but not part of the civil service.

In the Second Reading debate in the Lords Lord Roberts of Llandudno questioned whether, with 'increasing emphasis on devolution and democratic appointments, is this not an opportunity for the Government to allow the Assembly to make the appointment?'¹¹

Lord Evans responded that:

In practice, appointments procedures for recruiting the ombudsman will be run by Assembly officials on behalf of the Secretary of State. In the longer term, splitting the Assembly between its executive and legislative elements, as the Richard report recommends, would allow for the possibility of the National Assembly advising Her Majesty on the appointment.¹²

The Monarch may relieve the Ombudsman of office if he or she requests it or if the Secretary of State recommends it for reasons of a medical nature or misbehaviour. The Secretary of State may only make this recommendation after consulting the National Assembly.

Lord Rowlands noted that:

The Secretary of State has the right to appoint the ombudsman but he has to consult the National Assembly if the ombudsman is dismissed. In the Bill at present the Secretary of State does not have to consult the National Assembly on the appointment of the ombudsman. That is a rather curious anomaly. If one has to consult the National Assembly on dismissing the person concerned, surely there should be a provision for consulting the Assembly on the appointment itself.¹³

⁹ HL Debates, 16 December 2004, c.1430-1431.

¹⁰ As is the custom with Westminster legislation, the Bill refers only to the 'Secretary of State' and does not make specific reference to the portfolio.

¹¹ HL Debates, 16 December 2004, c.1436.

¹² HL Debates, 16 December 2004, c.1439

¹³ HL Debates, 16 December 2004, c.1438.

The new position of Auditor-General for Wales is also formally appointed by the Monarch on the recommendation of the Secretary of State. However, in practice an ad hoc agreement and protocol was drawn up between the Wales Office and the Assembly Parliamentary Service so that the Assembly conducted the selection process on behalf of the Crown.¹⁴

The Bill proposes that the Ombudsman be appointed for a period of 10 years but that he or she should not be eligible for reappointment after having served his or her term (unless as an Acting Ombudsman).

A number of Lords expressed disquiet about the ombudsman being appointed for 10 years. Lord Livsey expressed concern that 'the post should not be a type of sinecure. The person should be there for a reasonable but not excessive length of time' and gave notice that he and Baroness Finlay intend to table an amendment to limit the tenure of the ombudsman to seven years, rather than 10.¹⁵

Lord Evans responded:

A 10-year period will allow for stability of office, yet allow a regular injection of new blood to reinvigorate the office. Not having to seek renewable appointments protects the office from any perception that its independence could be compromised. That is the answer that I am giving today. I see from the expressions on various noble Lords' faces that that may not be wholly satisfactory; and I am sure that we will return to the matter in Committee.¹⁶

A person is disqualified from being the Ombudsman or Acting Ombudsman if he or she is:

- ◆ an MP;
- ◆ a 'listed authority' in Schedule 3 of the Bill;
- ◆ a member, co-opted member, officer or member of staff of a listed authority;
- ◆ is disqualified from being an Assembly Member.

Assembly Members are disqualified by virtue of the National Assembly for Wales itself being a 'listed authority'.

3.3.2 Costs

Schedule 1, paragraph 9 makes provision regarding remuneration of the Ombudsman by the Assembly and paragraph 10 makes provision for the expenses of the Ombudsman to be met by the Assembly. The budget is to be laid before the Assembly Cabinet for approval, meaning that the 'executive' supervises expenditure. In Scotland, however, the budget of the Public Services' Ombudsman is approved by the Scottish Parliamentary Corporate body and so comes from the Parliamentary Budget.

In the Second Reading debate Lord Evans stated:

The Assembly must fund the office, but, if it is minded not to agree an estimate of expenses, it must consult the Secretary of State and lay the estimate, as amended,

¹⁴ Agreement between Wales Office and Assembly Parliamentary Service on Appointment of the Auditor-General for Wales, September 2004.

¹⁵ HL Debates, 16 December 2004, c.1439-1440.

¹⁶ HL Debates, 16 December 2004, c.1441.

before the Assembly. That important control prevents the Assembly limiting investigations through underfunding.¹⁷

In a paper to its Co-ordinating Committee on Welsh Bills in the Queen's Speech the WLGA stated:

8.3. This new combined office should see improved efficiencies and pooled resources and expertise, the WLGA would therefore not expect to see additional costs incurred.

8.4. The funding of this new body should be proportionate to the cases made and work involved in each of the public bodies the new Ombudsman will oversee and as a result the WLGA would not expect to see a resultant growth in local government's contribution via the RSG¹⁸.

During the second reading in the Lords Lord Roberts of Conwy stated:

One would have thought that there would be immediate financial savings from such an amalgamation of functions, but paragraphs 113 and 114 of the Explanatory Notes suggest otherwise. They refer to initial set-up costs and funding being provided by the Assembly and,

"a modest increase in resources",

being required to deal with the manpower effects of the Bill's implementation. I am sure that noble Lords will wish to know in due course what those extra initial costs amount to and what savings are anticipated later.¹⁹

3.3.3 Making a complaint

Clause 5 of the Bill deals with the requirements of making a complaint to the ombudsman. It requires that complaints be submitted in writing although the Ombudsman is empowered to accept a complaint other than in written form if he or she considers it reasonable to do so.

In the second reading debate in the Lords, Lord Prys Davies stated:

Clause 5(1) clearly states that the complaint must be in writing. That assumes a degree of articulacy, but some people find it very difficult to put a complaint in writing.²⁰

Lord Evans responded:

Clause 5(1)(a) indeed requires complaints to be made in writing. That reflects existing law, but Clause 2(4) allows the ombudsman to investigate a complaint even if the requirements of Clause 5(1) have not been met, provided that the ombudsman thinks it reasonable to do so. For example, if a disabled person is unable to submit a written complaint, it will still be open to the ombudsman, if he thinks it reasonable in the circumstances, to dispense with the requirement and investigate the matter anyway.²¹

3.3.4 Who and what may be investigated

¹⁷ HL Debates, 16 December 2004, c.1442.

¹⁸ WLGA, Co-ordinating Committee Paper on Bills in the Queen's Speech, 17 December 2004. http://www.wlga.gov.uk/meetings/coord_comm/papers/041217/Item-3.pdf

¹⁹ HL Debates, 16 December 2004, c.1432.

²⁰ HL Debates, 16 December 2004, c.1435.

²¹ HL Debates, 16 December 2004, c.1442.

Clause 7 (l) states that the Ombudsman is entitled to investigate:

- ◆ maladministration by a listed authority in connection with 'relevant action';
- ◆ an alleged failure in a 'relevant service' provided by a listed authority; or
- ◆ an alleged failure by a listed authority to provide a 'relevant service'.

Definitions of 'relevant action' and 'relevant service' are covered by Clause 7 (3) and (4) of the Bill. The Explanatory Notes state that:

The definitions are designed to ensure that it is only the functions of listed authorities in, essentially, their public capacity that can be investigated.²²

This means that the Ombudsman is only entitled to investigate alleged maladministration in the discharge of a listed authority, falling under Clause 7 (3) (e), in respect of its administrative functions. In the case of the Assembly, itself a listed authority, this means that the Ombudsman would not be entitled to investigate its legislative, judicial or quasi-judicial functions.

3.3.5 Enforcement powers of the ombudsman

Clauses 17 to 23 deals with the requirements of listed authorities to publicise reports and action to be taken following the receipt of a Report. Clause 17(1) to (4) require listed authorities that receive a copy of a report to make specified arrangements for publicising them. The listed authority is required, within specified time-scales, to make copies of the report available at one or more of its offices and on its website. Members of the public have a right to inspect, make copies, require the listed authority to supply copies of the report and to view the report free of charge on the website. It is an offence for any person wilfully to obstruct a member of the public in the exercise of these rights.

Clause 19 provides that if, following an investigation where the Ombudsman reports that the aggrieved person has sustained injustice or hardship as a consequence of the action investigated, the listed authority concerned must consider the Ombudsman's report and notify him or her of the action that it has taken or proposes to take in response and also indicate a timescale for action.

In certain circumstances the Ombudsman may decide to report under an alternative procedure under clause 20 but only if he or she is satisfied that the public interest does not require him or her to report under the full reporting procedure set out in clauses 16 to 19.

Under clause 21, the Ombudsman may issue a special report if the listed authority has failed to take the steps required in response to a report. For example, a listed authority may fail to notify the Ombudsman, within one month of its receipt, of the action that it has taken or proposes to take in response to the report. In such cases, the Ombudsman may issue a special report. The Ombudsman may also, for example, issue a special report if a listed authority has given the notification under clause 19 within the time-scale set out there but the Ombudsman is not satisfied:

- ◆ with the action taken or proposed by the listed authority; or
 - ◆ with the period within which the listed authority has stated that it will take that action;
- or

²² *Public Services Ombudsman (Wales) Bill (HL)*, Explanatory Notes, HL Bill 3, 53/4. Paras.28-30

- ◆ that the listed authority has taken the action that it stated that it would take within the specified period.

The Ombudsman may make whatever recommendations he or she deems appropriate in a special report with respect to the action to be taken to remedy the injustice or hardship suffered by the person aggrieved and to prevent similar injustice or hardship being caused again.

Clause 23 relates specifically to the Assembly:

74. A special report relating to a complaint against the Assembly must be laid before the Assembly by the First Minister and, unless action to the satisfaction of the Ombudsman has been taken or proposed, then the First Minister must give the Assembly notice of his intention to table a motion asking the Assembly to approve the Ombudsman's recommendations as contained in the special report. The First Minister is able to delegate this function to, for example, another Assembly Minister, under section 62(5) GOWA.

75. Clause 23(3) requires that the Assembly's standing orders must include provision for any such motion to be moved as soon as reasonably practicable except in cases where action to the satisfaction of the Ombudsman is taken or proposed.²³

Currently, as noted above in paragraph 2.1, the decisions ombudsmen are not binding, However, in the Second Reading debate in the Lords, Lord Prys Davies stated:

I also found it surprising that the opportunity has not been taken to give power to the ombudsman to order the payment of damages by an offending authority where the aggrieved citizen has suffered an injustice or hardship as a consequence of maladministration. That point was made very powerfully by the noble Lord, Lord Carlile of Berriew, at the meeting in the Gladstone Room.

I understand from the Welsh Assembly officials that the public authorities that were consulted on this proposal were totally opposed to it. Well, they would be, but I venture to suggest that on this particular issue the Assembly Government were possibly too readily impressed by the response of the public authorities.²⁴

Lord Evans responded:

My noble friend also asked: why are there no enforcement powers for the ombudsman's recommendations? That follows from existing arrangements. The only ombudsman's recommendations that have been legally enforceable are in Northern Ireland, where different considerations apply. No doubt we will return to that matter, but your Lordships will be aware that legal enforcement of ombudsman's recommendations would be an extremely radical move.²⁵

3.3.6 Powers to the Assembly

In the Second Reading Debate in the House of Lords, Lord Rowlands, who had been a member of the Richard Commission, stated:

Therefore, I find myself applying what I call the Richard test: does the Bill before this House, or Parliament, containing Wales-only clauses, or a Welsh-only Bill, like this one, pass the Richard test? Is it framed in such a way as to maximise the legislative

²³ *Public Services Ombudsman (Wales) Bill (HL)*, Explanatory Notes, HL Bill 3, Paras.74/75

²⁴ HL Debates, 16 December 2004, c.1435.

²⁵ HL Debates, 16 December 2004, c.1442.

competence of the National Assembly? I find that this Bill passes the test. When looking at some of the provisions in the Bill, I see an attempt to allow the Assembly subsequent power to amend and to alter, in the light of experience, the provisions in the Bill.

Clause 10(2), for example, will allow the Assembly to add, to alter, or to remove matters that fall within the ombudsman's jurisdiction. It will enable the Assembly to alter Schedule 2 of the Bill, which makes provision for excluded matters. The Assembly will have that important area of legislative competence as a result of the passing of the Bill.

I find pleasure in Clause 27(2), which gives the Assembly powers by order to amend Schedule 3 by adding or removing the listed authorities. However, absolutely correctly, one restriction is placed on that competence in Clause 28(1), which provides that the Assembly cannot remove itself from the jurisdiction of the ombudsman. I am sure that we would all agree that that should not be a possibility.

However, he went on to say:

However, there is one aspect of the Bill which I hope my noble friend will look at. In bestowing these competencies for the Assembly to amend or alter the ombudsman's powers at some subsequent stage or to remove or add to the list of authorities that he can investigate, I think that the ombudsman's agreement should be obtained before exercising such a power. I do not see such a provision in the Bill.²⁶

Lord Evans responded:

Clause 27(4) provides that the Assembly,

"must consult such persons as it thinks appropriate"

before making such an order. The ombudsman would be an appropriate person, and the Assembly is therefore obliged to consult the ombudsman before making such an order.²⁷

3.3.7 Consultation and co-operation with other ombudsmen

Clause 24(1) and (2) requires the Ombudsman to consult other specified ombudsmen whenever it is considered that a complaint could be subject to investigation by another ombudsman. The ombudsmen are listed:

- ◆ the Parliamentary Commissioner for Administration;
- ◆ Health Service Commissioner for England;
- ◆ a Local Commissioner;
- ◆ the Scottish Public Services Ombudsman;
- ◆ a housing ombudsman appointed in accordance with a scheme approved under section 51 of the Housing Act 1996 (c.52);
- ◆ the Children's Commissioner for Wales.

The National Assembly for Wales is empowered to alter this list.

In its evidence submitted in advance of the joint scrutiny sessions by the Local Government and Public Services Committee and the House of Commons Welsh Affairs Committee, the Commission for Local Government Administration in England, expressed concern that 'well established arrangements' for the transfer of investigations between the Welsh and English ombudsmen (for example, in cases of a conflict of interest) would be

²⁶ HL Debates, 16 December 2004, c.1437-1438.

²⁷ HL Debates, 16 December 2004, c.1443.

threatened by the repeal of the relevant section (23(1) of the *Local Government Act 1974* and also that the Bill gives power to the Welsh ombudsman to identify cross-boundary issues but there are no 'two-way' powers for the English Local Government Ombudsman.²⁸

3.3.8 *Deputy Ombudsmen*

The *Scottish Public Services Ombudsman Act 2002* (1[2]) made by the Scottish Parliament makes specific references to 'Deputy Ombudsmen' who may be appointed by the Monarch 'on nomination of the Parliament'. The Welsh Bill makes no specific reference to deputies although clause 1(13) 'provides that the Ombudsman may authorise any person to discharge his/her functions on his/her behalf'.

3.3.9 *Jurisdiction*

Clause 8(1) of the Bill provides that the Ombudsman can only investigate a complaint relating to the functions of a listed authority in relation to Wales although Clause 8(2) makes it clear that the Ombudsman may investigate complaints where, for example, the Assembly has cross border functions specified in the *Government of Wales Act 1998*.

However, Clause 8(3) establishes that **any function** of a listed authority in relation to the **Welsh language** or any other **aspect of Welsh culture** is to be regarded as being discharged in relation to Wales and is, therefore, not excluded from the Ombudsman's jurisdiction by clause 8(1).

3.3.10 *Conduct of Local Government members and employees*

The Ombudsman is to take over the investigative functions of the Local Commissioner for Wales and Schedule 4 makes the necessary amendments to Part 3 of the *Local Government Act 2000* which requires the monitoring officer of relevant authorities, whether in Wales or in England, to send a copy of its register to the Standards Board in England, but not to the Local Commissioner for Wales. This was an unintended effect of the 2000 Act. The Bill corrects the anomaly. It requires that monitoring officers of all relevant authorities in Wales (including police authorities in Wales) will be required to make copies of the register available to the Ombudsman (but in the case of police authorities in Wales they will still be required, also, to make a copy available to the Standards Board in England).

4 **Ombudsmen services in other UK territories**

4.1 *England*

This section gives consideration to comparable ombudsman services for England. It should be noted that the UK Parliamentary Ombudsman has the equivalent responsibilities for England as the Welsh Administration Ombudsman has in Wales but continues to have responsibilities for non-devolved functions for both Wales and Scotland.

In October 1998 the Local Government Ombudsman for England and the Parliamentary Ombudsman and Health Service Commissioner submitted a paper to the UK Government

²⁸ Written evidence submitted by Commission for Local Administration in England to National Assembly for Wales Local Government and Public Services Committee and House of Commons Welsh Affairs Committee, January 2005.



proposing a comprehensive review of the public sector ombudsmen. The major proposal from the ombudsmen was the creation of a commission providing a single gateway for complaints. The intention of this proposal was to remove the potential conflicts of jurisdictions existing in the present structures with their plethora of bodies. In addition, uniting the various ombudsman bodies would provide savings through economies of scale and make the sharing of best practice more effective. These changes would enable the ombudsmen to provide a more efficient and effective service to the public.

In 1999 a review based upon the ombudsmen paper was initiated by the UK Government and carried out by the Cabinet Office. The consequent Report was published in April 2000 and was generally supportive of the ombudsmen's paper.²⁹ Subsequently, in June 2000 the Government published a consultation document based upon the Report findings.³⁰

In July 2001 the then Cabinet Office minister, Christopher Leslie, announced the Government's conclusions to the consultation through a written parliamentary question in which he signalled that the UK Government intended to 'replace the existing arrangements by a unified and flexible ombudsman body for central and local government and the national health service'. He also indicated that the UK Government wished to get rid of the MP 'filter'.

In 2003 the House of Commons PAC expressed its dissatisfaction at the lack of action by the UK Government in reforming Ombudsman services in England in its Third Report: *Ombudsman Issues*.³¹ To date, although Cabinet Office Guidance to Government departments states that:

The Government is committed to the creation of a new unified body to replace the existing offices in England of the Parliamentary Commissioner for Administration (the PCA), the Health Service Commissioner and the Commissioners for Local Administration as soon as parliamentary time allows.³²

In December 2004 the Parliamentary Ombudsman, Ann Abraham, expressed her 'impatience' in evidence to the PAC about the lack of progress on removing the 'MP filter'. She stated:

In very simple terms for me it is now at the point where if you want to go to the Local Government Ombudsman you do not need to see an MP or a councillor, if you want to go to the Health Service Ombudsman you do not need to see an MP, if you are in Scotland you do not need to see an MP, in Wales you do not, in any other part of the world, except France, you do not need to do this. We now have a joined survey which shows that two thirds of MPs are in favour of removal. For me the time has come to ask for the support of the Committee in moving this on.³³

²⁹ Cabinet Office, Report of the Review of the Public Service Ombudsmen in England, April 2000 .

http://www.cabinetoffice.gov.uk/propriety_and_ethics/publications/pdf/ombudsmenreview.pdf

³⁰ Cabinet Office, Review of the Public Service Ombudsmen in England: A Consultation Paper, June 2000.

http://www.cabinetoffice.gov.uk/propriety_and_ethics/publications/pdf/Consultation.pdf

³¹ House of Commons, Public Administration Select Committee

<http://www.publications.parliament.uk/pa/cm200203/cmselect/cmpublicadm/448/44803.htm#a3>

³² Cabinet Office, Guidance to Departments on Ombudsman Services, 2001.

<http://www.bioa.org.uk/BIOA-New/guide-dept/OMBUDSMAN%20SCHEMES.htm>

³³ Uncorrected oral evidence from Ann Abraham, Parliamentary Ombudsman to Public Administration Committee, 2 December 2004

<http://www.publications.parliament.uk/pa/cm200405/cmselect/cmpublicadm/uc50-i/uc5002.htm>

4.2 Scotland

In Scotland, the former ombudsmen's offices of the Scottish Parliamentary and Health Service Ombudsman, the Local Government Ombudsman for Scotland and the Housing Association Ombudsman for Scotland were merged into one in 2002, creating the Scottish Public Services Ombudsman (SPSO). The Ombudsman is appointed by the Monarch on the recommendation of the Parliament.

The Ombudsman is Professor Alice Brown. She has three part-time Deputies who support her in her work. Each deputy has experience in particular areas of public administration such as local government or health. However, each is able to consider complaints across the full range of the SPSO's jurisdiction, and is not confined to his or her particular area of expertise.

The *Scottish Public Services Ombudsman Act 2002* had cross party support in the Scottish Parliament. Key changes made by it included:

- ◆ removing the need for complaints to go through MSPs (the 'filter');
- ◆ greater accessibility to the Ombudsman including provision for a person to authorise a representative to complain on their behalf, and to allow oral complaints to be accepted in special circumstances;
- ◆ publication of all investigation reports;
- ◆ empowering the Ombudsman to publicise cases where an injustice has not been remedied;
- ◆ appointment of the Ombudsman and deputies by the Monarch on the nomination of the Parliament.³⁴

4.3 Northern Ireland

The title of Northern Ireland Ombudsman is a popular name for two offices:

- ◆ The Assembly Ombudsman for Northern Ireland; and
- ◆ The Northern Ireland Commissioner for Complaints.

This Office was originally established in 1969, but the current powers and responsibilities are laid down in the *Ombudsman (Northern Ireland) Order 1996* and the *Commissioner for Complaints (Northern Ireland) Order 1996*. On 1 December 1997 these were extended, by the *Commissioner for Complaints (Amendment) (Northern Ireland) Order 1997*, to include complaints about doctors, dentists, pharmacists and optometrists (ophthalmic opticians) providing family health services and by other health care professionals in Health and Personal Social Services.

The Northern Ireland Ombudsman investigates complaints from people who claim to have suffered injustice because of maladministration by the bodies which are specified in the legislation. This includes all local councils, education and library boards, health and social services boards and trusts, as well as all government departments and their agencies.

³⁴ SpiCe, Public Sector Ombudsmen, Research Note for Local Government and Health & Community Care Committees of the Scottish Parliament, RN00/108, 7 December 2000.
http://www.scottish.parliament.uk/business/research/pdf_res_notes/rn00-108.pdf



The Northern Ireland Ombudsman currently provides an investigatory service to the Committee on Standards and Privileges of the Northern Ireland Assembly in respect of cases of complaint against Members of the Assembly. This service is operated on a case by case basis and investigatory action is initiated by the Committee. Complaints about Members of the Assembly are directed to the Clerk of Standards in the Northern Ireland Assembly and not to the Northern Ireland Ombudsman.

The Northern Ireland Ombudsman is completely independent of the Northern Ireland Assembly and of the government departments and public bodies which can be investigated. The Northern Ireland Ombudsman is appointed by the Queen as head of state, and reports to the Northern Ireland Assembly.

A recent Parliamentary Question to the Secretary of State for Northern Ireland raised the issue of the right of Northern Irish MPs to make a complaint to the Ombudsman:

Mr. Beggs: To ask the Secretary of State for Northern Ireland if he will take steps to amend legislation to enable Northern Ireland Members of Parliament to submit complaints to the Northern Ireland Ombudsman. [183234]

Mr. Paul Murphy: The jurisdiction of the Northern Ireland Ombudsman relates to specified Northern Ireland bodies, which fall within the competence of the Northern Ireland Assembly. That is why the Ombudsman (NI) Order 1996 makes provision for complaints to be referred to the Ombudsman by Members of the Northern Ireland Assembly rather than Members of Parliament. There are no plans to amend the legislation in respect of referral of complaints to the Ombudsman. Meanwhile, the rights of the citizen to have effective access to the Ombudsman through any of the 108 Members of the Assembly remain in place.³⁵

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³⁵ HofC Debates, 12 July 2004 c.975w.

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Annex 1 Responses to the consultation papers.

The Welsh Assembly Government received 45 responses to its consultation which were unanimous in agreeing to the principle of a single ombudsman's office in Wales with powers to investigate public bodies. A majority favoured the suggested title of Public Services Ombudsman for Wales. Some respondents favoured the appointment of deputies, possibly with expertise with regard to health and local government. Others felt that if a new structure is to be created with the appointment of a single ombudsman, the appointment of one or more deputies would appear to contradict this ethos and potentially create a bureaucratic and impractical institution.

Most respondents favoured a fixed term appointment with an option for a second but views differed as to the length of a term of office from between five and ten years.

Most respondents agreed that existing funding arrangements should be retained and the overwhelming view, regardless of what, if any, new structures were put in place was that maintaining the independence of the new ombudsman's office should be paramount.

There was a mixed response as to whether staff should be civil servants but a consistent theme running through the responses was that staff should be consulted on any arrangements for the new office and that existing staff should have their existing terms of employment protected.

Opinion was divided on whether an Advisory Board should be appointed and views on suggested functions were very diverse. It was felt that if an advisory board were to be set up then it should be representative of all areas of the Ombudsman's office including individuals with specialist knowledge of the local government, health and the parliamentary arena as well and those with knowledge and experience of corporate, management and operational processes.

Most respondents agreed that the Ombudsman should be required to produce an annual report that should be laid before the National Assembly and that there should be statutory arrangements put in place for Welsh local authorities to consider the Ombudsman's annual report.

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