



Cynulliad Cenedlaethol Cymru **The National Assembly for Wales**

Y Pwyllgor Cyllid **The Finance Committee**

Dydd Iau, 5 Mawrth 2015
Thursday, 5 March 2015

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Consideration of Powers: Public Services Ombudsman for Wales: Evidence Session 6

Cynnig o dan Reol Sefydlog 17.42 i Benderfynu Gwahardd y Cyhoedd or Cyfarfod
Motion under Standing Order 17.42 to Resolve to Exclude the Public from the Meeting

Cofnodir y trafodion yn yr iaith y llefarwyd hwy ynddi yn y pwyllgor. Yn ogystal, cynhwysir
trawsgrifiad o'r cyfieithu ar y pryd.

The proceedings are reported in the language in which they were spoken in the committee. In
addition, a transcription of the simultaneous interpretation is included.

Aelodau'r pwyllgor yn bresennol **Committee members in attendance**

Christine Chapman	Llafur Labour
Jocelyn Davies	Plaid Cymru (Cadeirydd y Pwyllgor) The Party of Wales (Committee Chair)
Mike Hedges	Llafur Labour

Ann Jones	Llafur Labour
Julie Morgan	Llafur Labour
William Powell	Democratiaid Rhyddfrydol Cymru (yn dirprwyo ar ran Peter Black) Welsh Liberal Democrats (substitute for Peter Black)
Nick Ramsay	Ceidwadwyr Cymreig Welsh Conservatives

Eraill yn bresennol
Others in attendance

David Connolly	Comisiwn y Gyfraith Law Commission
Dr Tom Frawley	Ombwdsmon Gogledd Iwerddon Northern Ireland Ombudsman
Nicholas Paines	Comisiynydd y Gyfraith sydd â chyfrifoldeb dros Cyfraith Gyhoeddus Law Commissioner with responsibility for Public Law

Swyddogion Cynulliad Cenedlaethol Cymru yn bresennol
National Assembly for Wales officials in attendance

Richard Bettley	Y Gwasanaeth Ymchwil Research Service
Bethan Davies	Clerc Clerk
Leanne Hatcher	Ail Glerc Second Clerk
Martin Jennings	Y Gwasanaeth Ymchwil Research Service
Tanwen Summers	Dirprwy Glerc Deputy Clerk
Joanest Varney-Jackson	Uwch-gynghorydd Cyfreithiol Legal Adviser

Ailymgynullodd y pwyllgor yn gyhoeddus am 10:32.
The committee reconvened in public at 10:32.

Ystyried Pwerau: Ombwdsmon Gwasanaethau Cyhoeddus Cymru: Sesiwn
Dystiolaeth 5
Consideration of Powers: Public Services Ombudsman for Wales: Evidence
Session 5

[1] **Jocelyn Davies:** Welcome back, everybody, to a meeting of the Finance Committee. We are now on agenda item 7, which is consideration of the powers of the Public Services Ombudsman for Wales, and this is our fifth evidence session on this particular topic. We have with us this morning the Law Commission. Would you like to introduce yourselves for the record and then, if it's okay with you, we'll go straight into questions?

[2] **Mr Paines:** Yes, my name is Nicholas Paines. I am one of the five law commissioners who constitute the Law Commission for England and Wales. David Connolly is the manager of the public law department of the Law Commission, for which I have

internal responsibility at commissioner level.

[3] **Jocelyn Davies:** Lovely. Would you like to explain briefly the role of the Law Commission so that we have it on the record?

[4] **Mr Paines:** Certainly, with pleasure. We're a statutory body. We were set up by an Act of Parliament in 1965. The Act's been amended on a number of occasions, most recently by the Wales Act 2014. As I was saying a moment ago, the Law Commission consists, in legal terms, of five commissioners. Our chairman is always a senior judge, who is seconded to the Law Commission for a period, and currently our chairman is Lord Justice Lloyd Jones. There are four other commissioners, appointed by the Lord Chancellor, usually drawn from practising lawyers and legal academic life. I'm a former practising barrister, for example, one of my colleagues is a former practising solicitor, and the two others are professors of law. We have the statutory remit of keeping the law of England and Wales under review and making proposals for its simplification and modernisation. This is a task that we are doing bit by bit. We take on projects from time to time and I shall say a bit more about that in a moment.

[5] We divide internal responsibility for projects amongst ourselves. I have internal responsibility for our projects in the field of public law, but *vis-à-vis* the outside world, we operate as a board and all of our reports and consultation papers are debated by the commissioners in a formal meeting and their reports go out under the signatures of all five of us.

[6] The public law team, which David skilfully manages for me, consists currently of five teams conducting five separate projects. It's within the public law department of the Law Commission that the project on ombudsmen was conducted three or four years ago, though I ought to explain that I was appointed to the Law Commission in November 2013 and it happens that none of the staff who worked on that project are currently still at the Law Commission. So, what David and I have done is to familiarise ourselves with the project on the basis of the Law Commission's published and other documents, but I'm sure you'll understand that I can't speak on behalf of the Law Commission outside the four corners of what we have published, although, I'm very happy to assist the committee so far as I am able.

[7] **Jocelyn Davies:** Okay. So, just for clarification, is it up to you which projects you look at, or does somebody request it? Why was this work done, particularly, on ombudsmen back in 2011?

[8] **Mr Paines:** It's a matter of agreement between us and the Government what projects we undertake. We're independent of the Government in the sense that Government cannot require us to take on a project and they can't dictate to us what conclusions we form. There are two main ways in which we take on projects. One is that, periodically, we devise programmes of work, having consulted the public, and those programmes have to be approved by the Lord Chancellor, but once they're approved, we go on and work through them. The other way is that we have projects referred to us either by the United Kingdom Government or, pursuant to the recent amendments in the Wales Act, by the Welsh Government.

[9] **Jocelyn Davies:** And the ombudsmen project, was that something that was in your programme, or was that a request from the Government?

[10] **Mr Paines:** It was a programme project.

[11] **Jocelyn Davies:** Right, okay.

[12] **Mr Paines:** I can tell you a little bit about its history now or later on, if you'd like me

to.

[13] **Jocelyn Davies:** Well, if you'd like to lay it out now and then that'll set the scene for Mike Hedges's first question.

[14] **Mr Paines:** Certainly. The ombudsmen project originated in a wider project, which dates back to the first decade of this century, which was entitled 'Administrative Redress', and was concerned, in quite a wide fashion, with relations between the citizen and public bodies, in particular in the context of obtaining redress for illegal administrative action or maladministration.

[15] Initially, it included consideration of legal remedies, either judicial review in public law or private law remedies, and the consideration of ombudsmen was, if you like, the third pillar of a three-pillared project. In 2010, the commission decided not to take its work on court proceedings any further, I think for the pragmatic reason that we realised that there was no realistic prospect of any recommendations we made in that field being legislated. You'll understand that we can't dictate to the UK or Welsh Governments that they should legislate our recommendations; we have to persuade rather than insist. For those reasons, we ceased work on the court proceedings aspect of the project, but continued work on ombudsmen, our initial proposals having received support in consultation and there having arisen some further matters that we thought we could usefully give further consideration to.

[16] So, what we did in 2010 was to publish a further consultation paper. We rely very heavily on the consultation of stakeholders and the general public to inform our recommendations and we published a further consultation paper, held a consultation and, in July 2011, we published the report specifically on public services ombudsmen. It concerned four ombudsmen: the Parliamentary Commissioner for Administration, who's UK wide, two other English ombudsmen and the Public Services Ombudsman for Wales.

[17] **Jocelyn Davies:** Mike, shall we come to your question?

[18] **Mike Hedges:** I've got two questions; one leads very much on from what you've said. The commission's website notes that you're awaiting a response to your report from the UK Government. Is the website out of date or are you still awaiting a response? Did you ask the Welsh Government for a response?

[19] **Mr Paines:** We are still awaiting a formal response from the United Kingdom Government. Obviously, the publication of this report antedates the recent amendments to legislation effected by the Wales Act. We have a protocol in place with the Lord Chancellor on behalf of the United Kingdom Government, pursuant to which he undertakes to respond to our proposals. We now have power to agree a similar protocol with the Welsh Government. We've only had that power for a few weeks, since the Wales Act reached the statute book. The protocol is in the course of negotiation. But we have already maintained close consultation arrangements with the Welsh Government, even before the statutory powers came into existence.

[20] We haven't had a formal consultation response from Westminster. We put some information in our written evidence to you, based on a conversation that David had with the Cabinet Office. As you will see, what we were informed of was that our first recommendation, that the Government commission a wider review of ombudsmen, was implemented. They've conducted that wider review. They're apparently about to publish the report. We haven't seen it yet. But our understanding is that they will consider our recommendations from 2011, along with their consideration of this further report.

[21] **Mike Hedges:** Thank you. That leads on to my next question very neatly. In general,

how does the Public Services Ombudsman for Wales's operating model compare with that of the other ombudsmen?

[22] **Mr Paines:** It's better. It's more modern.

[23] **Mike Hedges:** That's what we like to hear.

[24] **Mr Paines:** And it's better.

[25] **Mike Hedges:** That's the sort of answer we like. [*Laughter.*]

[26] **Mr Paines:** What we may be talking about this morning is a part only of our wider recommendations, many of which were involved with bringing the other ombudsmen's statutory powers up to speed with those in the Public Services Ombudsman (Wales) Act 2005.

[27] **Jocelyn Davies:** Chris, shall we come to your questions?

[28] **Christine Chapman:** Thank you. I just wanted to understand how complaints should be received. I mean, this is one of the aspects of this work that we are doing. In your report, you said that it can be difficult to define in statute how complaints should be made to ombudsmen. I just wonder if you could tell us how you reached that conclusion.

[29] **Mr Paines:** As I understand what we wrote in the report, we felt that it would be pointless to try and define more closely what amounted to a complaint. Obviously, we made some recommendations about the requirement of a written complaint, which I'm happy to discuss further. I have not got the sense, reading our documents, that there were great problems, apart from the written complaint requirement, in the ombudsman knowing whether what he'd got amounted to a complaint or not.

[30] **Christine Chapman:** Okay. And, obviously, your report recommends that the statutory requirements for written complaints, as we have in Wales, should be repealed and replaced by published guidance. Do you think this would be more effective than adding further powers to the current Act?

[31] **Mr Paines:** That's the conclusion we've reached, yes. The Public Services Ombudsman for Wales already has discretion to waive the requirement of a written complaint. When we started the consultation, we thought that was a sufficient arrangement, but by the time we'd finished the consultation, we concluded that it was actually better to strike down the requirement of a written complaint across the board. That reflected a view that had been expressed to us by Mr Tyndall, when he was the Public Services Ombudsman for Wales, to the effect that, really, the requirement for a written complaint could be dispensed with completely, so that where the ombudsman has received a complaint falling within his jurisdiction—. I'll say 'his', if I may, since the two incumbents have been male, with, I think, an acting ombudsman in between them.

10:45

[32] If a complaint reaches the ombudsman that's within the ombudsman's jurisdiction, the mere fact that it's come on the telephone and not in writing should not be an obstacle to putting it to the public body in question and investigating it as necessary. I think that's a view that's been echoed by Mr Bennett in his evidence to you, when he questioned why the citizen should have to depend on his exercise of discretion in the citizen's favour to waive the requirement of a written complaint. If I may say so, I was also struck by the bit of his evidence where he told you about his office's practice, where an oral complaint is received, of putting it in writing and asking the complainant to sign it; 50% of them don't, which does, I

think, point out to those of us who spend our lives in a sea of paperwork the difficulties that some people in society have in handling written procedures. Of course, one's talking about the most disadvantaged people who perhaps particularly need assistance from something like an ombudsman's office.

[33] **Jocelyn Davies:** Just to explore that with you, at least if somebody's asked to submit a written complaint or a formal complaint, they know that they're making a complaint. People tell us things all the time that they're unhappy with, but if I say, 'Do you want to make a complaint?', they don't want to make a complaint; they want it put right. Is there a danger, without it being absolutely clear that somebody is actually now entering the formal complaints procedure, that people won't realise that they're actually part of it? They just want their problem put right.

[34] **Mr Paines:** I would have thought—and this is me speaking personally—that it's possible for an ombudsman's staff to say to the person at the end of the phone, in sufficiently clear language, 'Are you asking me to take this up and investigate it with the public body?', and for the person to be able to say 'yes' or 'no' to that question.

[35] **Jocelyn Davies:** But as long as it's quite clear that that person's asked, 'Do you want to make a complaint?', there shouldn't be any difficulty then.

[36] **Mr Paines:** I would have thought not.

[37] **Jocelyn Davies:** Okay. Chris, shall we go back to you?

[38] **Christine Chapman:** No, that's fine.

[39] **Jocelyn Davies:** Okay. Julie, shall we come to yours?

[40] **Julie Morgan:** Yes. Thank you very much. You say in your reports that the Public Services Ombudsman for Wales is unique amongst ombudsmen, basically, in being able to deal with councillor code of conduct complaints. I know that, since this was written, the Northern Ireland Ombudsman has also been given the power to do that. Do you think that it's a good thing that the Welsh ombudsman is able to do that?

[41] **Mr Paines:** The Welsh ombudsman, obviously, has a broad, if you like, or a general jurisdiction, which is one of the things that distinguishes him from the ombudsman in England, where jurisdiction is parcelled up. One of the things that we suggested should be dealt with in the wider review, which we recommended, was the creation of a sort of unified joined-up ombudsman service with a single entry portal. Was your question about the procedures for lodging a complaint?

[42] **Julie Morgan:** No, about the fact that the ombudsman is able to deal with ethical sort of conduct issues.

[43] **Mr Paines:** Yes. That's not a matter that we dealt with in our report. I think that it fell within the area of the wider review, which we suggested should be conducted by others.

[44] **Julie Morgan:** Do you have any views on it?

[45] **Mr Paines:** If I express views, obviously they'll be my own personal views.

[46] **Julie Morgan:** Yes, but it would be interesting to know.

[47] **Mr Paines:** They wouldn't—I have to confess—have any particular value. It would

just be Nicholas Paines' thinking. [*Laughter.*] I would say, by way of health warning, that it's not a topic that I have particularly had occasion to reflect upon very deeply. There are, obviously, difficulties about ombudsmen straying from looking at maladministration to second guessing professional judgments. On the other hand, of course, professional judgment can be something behind which people try to conceal or avoid the repercussions of maladministration. I hope this isn't a weak answer. It's obviously something that your committee will need to think very carefully about. Without wishing to be unhelpful, I don't think it is something on which, as presently instructed, I can be a great amount of help with, I'm sorry.

[48] **Julie Morgan:** That's fine.

[49] **Jocelyn Davies:** David, you've had little bit more time to think about it. Is there anything—

[50] **Mr Connolly:** No, I wouldn't have anything to add.

[51] **Jocelyn Davies:** I mean, obviously, it's important that the public have an ability to make complaints, but we have found some vexatious complaints that are a waste of time of the ombudsman when people in public office complain about each other over trivial matters. I guess you'd say that you wouldn't expect trivial matters to be dealt with by somebody like the ombudsman.

[52] **Mr Paines:** No. Well, the ombudsman has wide discretion as to what he or she takes up and what he or she leaves aside, and we make no suggestion that that should be interfered with. Indeed, in the area of the so-called statutory bar, we recommended that the ombudsman be freed up by the removal of the statutory bias in favour of court proceedings.

[53] **Jocelyn Davies:** I was going to—. Have you finished yet? Shall I go on?

[54] **Julie Morgan:** Yes, thank you.

[55] **Jocelyn Davies:** I was going to ask you about the statutory bar. Can you just, for our benefit, explain what it is and what stay provisions are?

[56] **Mr Paines:** Yes, certainly. The statutory bar, as it's been called, is in section 9 of the Public Services Ombudsman (Wales) Act 2005. It basically says that the ombudsman may not investigate a complaint if the complainant has or had a remedy in a court or tribunal or the right of appeal to the Minister, unless the ombudsman is satisfied that it is not reasonable to expect the complainant to pursue that route. In our thinking, we called it a 'statutory bar'. It might be slightly more accurate to think of it as a statutory bias in favour of court proceedings in those areas where the ombudsman's jurisdiction overlaps with the jurisdiction of the court. I call it a bias because it says that the preferred route is the court: 'Ombudsman, keep your hands off this case of maladministration, unless you can satisfy yourself it would be unreasonable to require the complainant to go by that other route'. Our proposal in our report was that the law should be neutral on the matter of whether the ombudsman takes up the complaint or sends the complainant off to court. Our view was that neutrality at the level of the statute was far more satisfactory than the creation of this hurdle by which the ombudsman has to persuade himself or satisfy himself or herself that the statutory bar should be removed in a particular case.

[57] **Jocelyn Davies:** So, instead of the actual words that assume that court action is the preferred option, it should be neutral.

[58] **Mr Paines:** The law should be neutral, and the ombudsman should have a general

discretion to ask themselves, 'This complaint, is it so much about legality that I shouldn't take it and I should tell the complainant to go to court instead?' That should be a matter for the unfettered discretion of the ombudsman.

[59] **Jocelyn Davies:** And the stay provisions?

[60] **Mr Paines:** They sort of follow on from the view we took about the statutory bar or bias. Obviously, the occasion for a stay arises where the claimant has begun court proceedings—and we specifically had in mind judicial review—and then one or other of two situations arises. One is where the defendant in the case, the public body, thinks the case is more suitable for consideration by the ombudsman, because it essentially concerns maladministration or service failure. There may be a whole host of reasons why it's more suitable for the less formal procedures of the ombudsman, particularly if one is dealing with a complainant who is not in a position to instruct lawyers and who would be more comfortable in the less formal arena of the ombudsman than in a court of law, and, of course, an ombudsman investigation is less costly than litigation. So, the defendant to the action may think that it would be more sensible from everybody's point of view for it to be before the ombudsman than before the judge. Or, the claimant may have started the judicial review to protect their position, but they might prefer it to be before the ombudsman, though you can't guarantee, of course, that an ombudsman will agree to take forward a case.

[61] What we proposed was that either party, if a judicial review claim is started, could apply to the court for a stay of that litigation with a view to enabling the ombudsman to consider launching their own investigation. We moved away from the idea that, if the court does this, that should oblige the ombudsman to start an investigation. We concluded after consultation that that should remain a matter for the ombudsman's discretion, just as it generally is, but we thought it would be beneficial to enable parties not to get dragged down the slippery slope into litigation where it appeared to everybody that the ombudsman was the better person to deal with the matter. Of course, because the action would only be stayed—that is to say, temporarily halted—it would be possible to go back to the court and either say, 'Well, the ombudsman's resolved everything; the action can be withdrawn now', or, if the ombudsman had for some reason refused to investigate, or had investigated and found maladministration, and possibly said there's strong evidence of illegality, the court might wish to take the case further. But there'd be flexibility.

[62] **Jocelyn Davies:** Have you any idea of the potential number of complaints that this could possibly generate for the ombudsman?

[63] **Mr Paines:** We did some work on this in the impact assessment that accompanied our report, and it's one of the things on our website. Obviously, our calculations were done four years ago now. They were done across the four ombudsmen that we were considering. I noticed that, in his written evidence to you, Mr Bennett has put forward his own estimate as far as he is concerned—I think that it's of about £20,000, in terms of, if I remember correctly, the cost of processing the additional complaints that might be generated in this way. Though that, of course, in the wider scheme of things, is to be set off against the cost to the public purse of judges hearing the case if they proceed by the judicial route instead.

[64] **Jocelyn Davies:** Yes, so overall there might very well be a saving. If an individual who would currently be told 'no' by the ombudsman, because they have a judicial review route—. What's the cost, normally, of your average judicial review, for an individual to bear? Have you any idea? We are probably talking about many thousands, are we? Are we talking about £5,000, or £10,000 or £50,000? Nick and I know of a case that was £140,000; in your constituency, Nick.

[65] **Mr Connolly:** We don't have that information, I'm afraid.

[66] **Jocelyn Davies:** So you don't know. But it's probably a significant cost.

[67] **Mr Paines:** Yes.

[68] **Mr Connolly:** That would seem a reasonable assumption, yes.

[69] **Jocelyn Davies:** It's a significant cost.

[70] **Mr Paines:** We did some work in our impact assessment on the costs to the public sector of a day in court or a day in a tribunal, and as I recall, four years ago, we costed a day in court at around £1,000—slightly more—and a day in a tribunal at around £600. That's the cost to the public purse, of course.

[71] **Jocelyn Davies:** That's without the cost to the individuals. Okay. Julie, I think you've got another question.

[72] **Julie Morgan:** Yes. Your recommendations say that ombudsmen should have the power to refer questions on a point of law to the courts. Would it require changes in legislation, for that to happen, or in regulations?

[73] **Mr Paines:** I'm personally not persuaded it absolutely would require changes to legislation. It would be natural for the court rules to be changed, to make explicit reference both to these references, if they are introduced, or, for that matter, to the specific power to stay that we were talking about a moment ago. Speaking individually at this point, I'm not convinced that change to the court rules is absolutely necessary. Going back to stays for a moment, the court already has a power to stay its proceedings—it's one of its general powers. What we're talking about would be a specific application of that power, and I'd have thought myself that, even without a change to court rules, a party to litigation could say, 'I'm asking you to use your general power to stay, and I'm asking it in the context of what the Law Commission recommended, and here's a record of what the Law Commission recommended; judge, please stay in these circumstances'. I personally don't see any obstacle to that being done under the present rules.

11:00

[74] References are a slightly more tricky matter, because a reference to the administrative court is not something known to the current rules. It might be possible for the ombudsman to use the current rules; for example, bringing proceedings against the public body in question for a declaration as to the law, which is something that the rules already permit individual claimants to do. It might be possible without change to the rules for the ombudsman simply to avail himself of that procedure, but I can't claim to have studied the rules specifically with that in mind, and of course I must stress, to protect my colleagues, that the Law Commission as a body does not have any remit to give people advice as to what the current law means, but rather to make recommendations for its reform. So, what I've just said is an entirely personal view, and not, I'm afraid, very well researched.

[75] **Julie Morgan:** Thank you. Would you have any idea of any additional costs that would arise from this happening?

[76] **Mr Paines:** Again, we did some work on that in the impact assessment. We thought that the number of occasions upon which this power to refer would be used—and this was, of course, the four ombudsmen we were considering—was going to be very small in number. On the cost per occasion, again, we did workings on the costs of running the court for the number of court days in question. We weren't able to do such detailed work on the cost to the

ombudsman of instructing the lawyers, for example, but we conceived it very much as a power that would be useful on particular occasions, such as—. If you want me to go on and explain, I'll just say that the possible occasions could be, first of all, where there's an issue as to the extent of the ombudsman's jurisdiction to investigate a particular complaint; say, the public body saying, 'You don't have jurisdiction to investigate', and on a reference the court could sort that out. Another case might be where the ombudsman is saying to the public body, 'You should have done such and such for the complaining citizen; you didn't do it; that was maladministration'. The public body might say, 'Well, I'm sorry, ombudsman, but we didn't have power to do that; it might have been a good thing, but we had no power to do it'. The ombudsman might not be satisfied with that answer; he might think there was a power and the court could be asked to resolve that. That would be another example of where the reference procedure could be useful.

[77] **Julie Morgan:** Thank you.

[78] **Jocelyn Davies:** Nick, shall we come to your questions?

[79] **Nick Ramsay:** Thank you, Chair. Morning. The Public Services Ombudsman for Wales commission report recommended that the ombudsman for Wales should publish reports on all investigations. Can you explain why this is necessary and what steps are required?

[80] **Mr Paines:** The ombudsman already has—

[81] **Nick Ramsay:** I'm sorry; I should say 'The Law Commission' not the—. It wasn't the public services ombudsman reporting—it was the Law Commission's report.

[82] **Mr Paines:** Yes. I think that part of our report was more concerned with bringing the other ombudsmen up to the level of powers that the Welsh ombudsman already has, more than giving additional powers to him. He already has—I think it's in section 16 of the Act—powers in his discretion to publish his reports and to send his—. There are some people he must send them to—the obvious people. Then there's a wider discretionary power to send them to other people, and, indeed, to publish them to the world at large. We were mainly, I think, concerned with saying the other ombudsmen should have similarly extensive powers.

[83] **Nick Ramsay:** So, that's already being done to a certain extent, anyway.

[84] **Mr Paines:** Well, the ombudsman for Wales has all the powers that we thought were necessary.

[85] **Nick Ramsay:** Okay. Your report recommends that ombudsman findings should be binding on public bodies, but that recommendations should not. Can you explain the thinking behind that?

[86] **Mr Paines:** 'Findings' here means findings of fact, so his conclusion that you did or didn't do such and such, and his conclusion that your doing it or your not doing it amounted to maladministration. We said that in order for the position to be certain, those findings should bind the body unless the body could get them upset by a court on a judicial review. The bodies didn't like that. They said we should be able to disregard the findings if we think we've got cogent reasons for doing that. The Law Commission didn't like that idea; we thought it would be too easy for bodies to put together so-called cogent reasons for saying that they were wrongly convicted by the ombudsman if you like, and so we said, as a matter of keeping the record straight, those findings should bind you unless the court sets them aside as being reached unlawfully by the ombudsman.

[87] As far as the recommendations are concerned, we saw merit in the bodies having a degree of flexibility as to whether they agreed that the solution hit upon by the ombudsman was precisely the right one. But the legislation does, once again, give considerable powers to the ombudsman for Wales as regards the various different types of report that he can enter into—that he can publish, forgive me. If the public authority disregards the report without lawful excuse, the ombudsman can send a certificate to the High Court. If the report concludes that the citizen has suffered special hardship, there can be recommendations made about that also. And so, there are various ways in which the ombudsman can ensure that his recommendations are not wholly disregarded.

[88] **Nick Ramsay:** Okay. And would you agree with the Public Services Ombudsman for Wales who has suggested that his findings should be binding on private business under his remit as well? What do you think of that?

[89] **Mr Paines:** Once again, that's outside the scope of what we as a commission recommended. As I understand—

[90] **Nick Ramsay:** I think he's clearly pushing the boundaries there to get as much under his remit, as you can understand, as possible.

[91] **Mr Paines:** Yes. As I understand the position currently, where there are private ombudsman schemes in certain service sectors and the like, they exist as a matter of contract between the participants in the industry in question who have set up the ombudsman service, and of course, because it's contractual, it's up to them to agree how far they will be bound by the decisions of the ombudsman that they themselves set up. What I understand Mr Bennett to be asking for is a statutory power to investigate private health service providers in particular circumstances.

[92] **Jocelyn Davies:** Well, he can now under specific circumstances. If that service has been paid for by the public purse, he can now.

[93] **Mr Paines:** Indeed, if it appears it was sub-contracted to the private sector, as we know has happened a lot in the health service nationally in recent years, and he's asking for an extension to cover private treatment that wasn't sub-contracted, but was part of a larger course of treatment.

[94] **Nick Ramsay:** I think he's had cases where some people have been treated by both sectors. That was the reason behind that. That's fine. Thanks.

[95] **Ann Jones:** Chair, can I just do that bit about the healthcare as somebody's touched on it?

[96] **Jocelyn Davies:** Yes. Why not then, and then we'll finish with those questions.

[97] **Ann Jones:** If I could just touch on the healthcare because part of that discussion is where the public services ombudsman now wants to have the powers. Again, he's looking for new powers to investigate private healthcare, where an individual may have started off in the NHS and then decided to go private, so the whole of the treatment is private. Should he be allowed to have that?

[98] **Mr Paines:** That's not a point on which there is any Law Commission view. I'm not sure I ought to stray, even as an individual, into it. It's obviously a complicated issue, on which you'll already be far better informed than I am.

[99] **Jocelyn Davies:** David, are you of the same view that you'd rather not—

[100] **Mr Connolly:** I am indeed.

[101] **Jocelyn Davies:** You could speak to a lawyer before you tell us.

[102] **Mr Paines:** He's a lawyer as well.

[103] **Ann Jones:** I'm just wondering whether you could see any legal implications should that proposal go ahead. So, if we were to recommend that he had that power, would there be a lot of legal interpretations that would, really, I suppose, end up with the fact that it'll get caught up in a legal process and perhaps it could have been sorted out without?

[104] **Mr Paines:** I'm really not qualified to say anything that's worth you listening to, I'm sorry.

[105] **Ann Jones:** No, okay. I've had two goes.

[106] **Jocelyn Davies:** Fair play, fair play. Will, shall we come to your questions?

[107] **William Powell:** Thank you, Chair, and good morning, both. It has been proposed in some quarters that the Public Services Ombudsman (Wales) Act 2005 should be amended so as to allow investigations across public services even where no specific complaint has been received. Do you believe that such an amendment would be beneficial to the conduct of public life and public services in Wales?

[108] **Mr Paines:** The usual health warning: it's not a matter on which the Law Commission reached a view and I think, again, I'd probably better not rush heavy booting into this one. Having read the evidence that's been given to you in your previous sessions, I can see that there are powerful arguments both ways, in particular in relation to the relationship between the ombudsman, as traditionally a handler of private complaints, and the other bodies that regulate service sectors on a wider basis.

[109] **Jocelyn Davies:** Mike, did you want to come in on this specific point and then we'll go back to Will?

[110] **Mike Hedges:** I think the point that the ombudsman's making and, I think, one that I have a certain sympathy with is that if an organisation, let's say, has five healthcare homes in a local authority and he'd had complaints from three of them and he'd investigated the three complaints and had found that there's problems in those three, whether he should have the ability to look at the other two as well. Because if a problem exists in the organisation with 60% of what they're running, rather than wait until somebody eventually complains in the other two, should he have the ability to go and look at the other two as well without a complaint?

[111] **Mr Paines:** I think the policy decision that the Assembly will be taking, if it decides this issue, will be as to whether the ombudsman's remit should be confined to handling complaints he's received as opposed to arguably duplicating the work of, possibly in the case that you mentioned, the Care Quality Commission or some other regulatory body.

[112] **Mike Hedges:** I just said that—. But with any organisation where three parts of it out of five he'd had complaints from, actually you'd want to look at the other two, because if it is in 60% of the organisation, there's a possibility that it's going to exist in the other 40%—rather than wait for those complaints to come over the next few years from those two as well.

[113] **Jocelyn Davies:** I don't think that we're persuading Nicholas to give more than he's

prepared to give. However persuasive your argument, I think he's saying that the commission didn't look at this, didn't have information on it, haven't explored it, haven't discussed it with others and doesn't have a view and that you're not experienced enough yourself, Nicholas, in terms of wanting to offer your own personal view to us, and David is definitely keeping tight-lipped on this one. So, shall we come back to your other question, William?

[114] **William Powell:** The legislation governing the Scottish public services ombudsman gives him or her the statutory role over complaints policies and also the right to collect complaints data from public bodies in Scotland. Do you believe that legislative amendments are the most appropriate vehicle for implementing that power in Wales?

[115] **Mr Paines:** If a policy decision is taken to give that additional power to the Welsh ombudsman, I imagine that statutory amendment would be required in order to confer upon them the powers to knock people's complaints handling procedures into shape, which are powers that the statute doesn't currently give.

[116] **William Powell:** That's useful, thank you.

[117] **Jocelyn Davies:** Ann, you've got a question.

[118] **Ann Jones:** Yes; it's on new powers. It's been proposed that the Public Services Ombudsman for Wales should have the statutory power to approve the use of the title of ombudsman by any other organisation. Is that power necessary?

11:15

[119] **Jocelyn Davies:** I think there was some concern expressed to us that you come across various people who might use the term 'ombudsman' and about where it should be protected.

[120] **Ann Jones:** And I think he wants to protect it in the way that he sees how his organisation operates, so that people would be aware of what an ombudsman was, and it's not just another title for a desk job.

[121] **Mr Paines:** Well, again speaking off-script, one can see that there is a potential problem if the word 'ombudsman' gives confidence to the citizen that the citizen is dealing with an impartial, probably publicly appointed, official who will handle the citizen's case thoroughly and fairly, et cetera, and, obviously, there is an argument that people should not be able to use that title unless they offer those guarantees. But I'm not sure I can usefully say more than that.

[122] **Jocelyn Davies:** But you can see that there is some merit in ensuring that the public are not confused about the status that somebody might have.

[123] **Mr Paines:** Yes. I mean, there are all sorts of ways it could be dealt with. For example, kite-marking, as it were, of ombudsman schemes that conform to certain requirements. I daresay other methods could be devised, but I'm not able to speak with authority on whether any of them are necessary or particularly desirable.

[124] **Jocelyn Davies:** Okay. We've run out of questions here. Is the commission likely to look at this particular area again in the future?

[125] **Mr Paines:** I don't think it's very likely in the immediate future. As I was saying at the beginning, what we understand, or infer, is going to happen is that the Government's wider review report will be published, it will generate debate, and we hope that, in that debate, our own 2011 recommendations—the remainder of them—will be considered. It

would obviously be possible, following the reference procedures that I mentioned to you earlier, for the UK, or Welsh Government for that matter, to ask us to undertake further work. It's not obvious to me that there are areas in which we might be asked usefully to do that, but we're always, subject to resources, prepared to help.

[126] **Jocelyn Davies:** Is there anything you want to add, before we close this session, that you'd intended saying to us but you haven't?

[127] **Mr Paines:** I don't think there is. I'd just say that it's been a great honour for David and me to have an opportunity to address you. We are the Law Commission for England and Wales, a position that has achieved greater statutory recognition in the recent amendments to our founding legislation, and we are determined to be the law commission not only of England but also of Wales, and it's always a pleasure to come to Cardiff, which I've done a number of times since my appointment, and I look forward to coming again.

[128] **Jocelyn Davies:** Lovely. Well, I know that some of us also serve on the communities committee, so we're dealing with the Renting Homes (Wales) Bill, and we know that the law commission did a great deal of work—many years ago, I think, now; it's something like nearly 10 years ago, I suppose—as the foundation for that, so sometimes it takes a little while for it to pay off, but it certainly has in that case, and we look forward to seeing you again in the future.

[129] **Mr Paines:** Thank you.

[130] **Mr Connolly:** Thank you very much.

[131] **Jocelyn Davies:** Shall we go into private session now, then? Everybody content with that? Yes?

*Gohiriwyd y cyfarfod rhwng 11:19 ac 11:31.
The meeting adjourned between 11:19 and 11:31.*

**Ystyried Pwerau: Ombwdsmon Gwasanaethau Cyhoeddus Cymru: Sesiwn
Dystiolaeth 6
Consideration of Powers: Public Services Ombudsman for Wales: Evidence
Session 6**

[132] **Jocelyn Davies:** Welcome, everyone, back to a meeting of the Finance Committee. We are on item 8, which is the consideration of powers of the Public Services Ombudsman for Wales. This is our evidence session No. 6. I'm delighted to have with us the Northern Ireland Ombudsman.

[133] You have sent us a number of papers, which we have benefitted from. Would you like to introduce yourself for the record, and then we will go straight into questions?

[134] **Dr Frawley:** Thank you, Chairman, and thank you for inviting me. I'm very pleased to be here. My name is Tom Frawley. I'm the Assembly Ombudsman for Northern Ireland and Northern Ireland Commissioner for Complaints. I was appointed in 2000, so I'm now long in the tooth, as they might say. I want to also acknowledge that, as far as I'm concerned, by being here, I'm reciprocating the support that Peter Tyndall gave us in developing our legislation in Northern Ireland. So, I'm delighted to be here on that basis. Just interestingly, I think it would be said that our legislation—which, as you know, is about to go onto the floor of the Northern Ireland Assembly—mirrors your own situation, because our Bill is also the first Bill a committee has sponsored in the Northern Ireland Assembly, and I know the

significance of that and the work involved in that.

[135] I also, of course, have been watching carefully what's happened to our other Celtic brother in Scotland, who I know has been here already with you. Hopefully, I can offer some views on that. I should declare that I am a member of the audit committee of the Scottish Public Services Ombudsman's office; again, that has been a huge advantage to me. Finally, I would want to acknowledge, in preparing my evidence, the support and help I was given by Emily O'Reilly, who's the European Ombudsman, but who was the predecessor to Peter Tyndall in Dublin and who has very wide-ranging experience, for example, of own initiative, which I think is maybe an issue you are particularly interested in. So, with that, Chairman, I'm happy to begin.

[136] **Jocelyn Davies:** Lovely. Thank you. So, you have been doing this since 2000. How has the role of the Northern Ireland Ombudsman evolved over that time?

[137] **Dr Frawley:** Well, I think that probably what has happened are two things. I mean, when I was appointed, it was in a direct rule before the Assembly—before the full settlement, if you like, of the situation in Northern Ireland. In that circumstance, obviously, I had no-one to report to. But they would create facilities every three or four years for the ombudsman to go to Westminster and to give an account. I think that's a huge gap that has now clearly been addressed in terms of, again, the Government or the Executive in Northern Ireland. So, there is now our own Executive and our own Assembly, which, of course, I think changes and transforms the circumstance, as far as I'm concerned. I think, as a result, we have the whole infrastructure of Government, which makes my task in one sense, I think, much more relevant and significant, and also, I think, challenging because at the distance of direct rule, you know, there wasn't that level of engagement. Inevitably, Ministers were flying in and flying out of Northern Ireland, whereas now they're very much emerging from the Executive with a particular interest, as the civil service clearly is engaged in a different way as well. So, it's a very different world. I think, in more recent years, what we have seen is a transformation of the public attitude to public service. I think there's a much greater willingness to complain and to be critical. I think they have very clear expectations, whereas I think generations before tended, for example in healthcare, to accept that we were very lucky to have a health service because they could remember a time when there wasn't a healthcare system. And I think they were, if you like, in some senses, in awe of professionals. I don't think that is any longer the case. I think they all feel very comfortable reflecting where things have not been as they would have expected, and I think therefore we're seeing a very significant expansion of complaints, which is reflected, I think, in our workload.

[138] **Jocelyn Davies:** Okay. Will, shall we come to your questions?

[139] **William Powell:** Thank you, Chair. Good morning, Mr Frawley. How similar is your role and remit to those of the other UK ombudsmen?

[140] **Dr Frawley:** Well, again, as my title in introducing myself might indicate, Northern Ireland is a little bit different in that I occupy two offices. One is the Assembly Ombudsman for Northern Ireland, which is focused on the oversight of Government departments and their Executive agencies. Then, I also fulfil the role of Northern Ireland Commissioner for Complaints, which is focused on public services of all the public bodies. I think it's important that the committee might note that, in looking at your evidence, for example, one of the big issues is local government. Well, of course, part of the overall changes in Northern Ireland at the time of the proroguing of Stormont was that local government was stripped of all its functions, really. Therefore, they created arm's-length bodies and other bodies to carry out those tasks. So, therefore, education is carried out through boards. We have, obviously, social care, which is now delivered on an integrated basis and has been since 1971 with health, which, again, have their own independent boards. So, a lot of the core activities that you

would assume are part of the local government arrangement are not here.

[141] Interestingly, under the new dispensation, we have just reformed local government; we currently have 26 local authorities, and that will reduce to 11 local authorities on 1 April. We will then have a number of services going back into local government with, if you like, the public confidence and trust having been built up again. But still, social care will remain with health and services like education will not yet come under—and housing—local government.

[142] **William Powell:** Okay, that's very interesting.

[143] **Jocelyn Davies:** Just before we move on, where does housing lie?

[144] **Dr Frawley:** Housing now is under one big public agency, which, at one point, was the largest housing agency in Europe, the Northern Ireland Housing Executive, but there's been again a shift, I think, in Government emphasis towards housing associations, and that's been an emerging issue, but housing associations are also in my jurisdiction.

[145] **Jocelyn Davies:** Okay. Sorry.

[146] **William Powell:** No problem. You referred earlier to the increase in the volume of complaints over recent years and people's readiness to bring forward complaints. Are there any identifiable trends over these recent years in the types of complaints you've been dealing with?

[147] **Dr Frawley:** I think probably the most significant change is health. We reshaped, or the Department of Health reshaped, the complaints process back in 2009. It moved to a one-tier complaints system. In that year alone, we saw an increase of 120% in the number of health complaints. That increase, while not at that level, has continued year on year. This year, we have seen a 41% increase in the number of health complaints. We would have seen a lot more complaints against Government departments in the past, the Executive departments, but that has reduced in the current year by 51%, for example. So, I suppose there is an adjustment going on. Whereas most of the public engagement, most of the, if you like, citizens' transactions are with public services, there is less direct engagement between Government departments and citizens. Therefore, I suppose, it's part of a significant shift in terms of the delivery mechanisms for public services. So, services like planning would have had a lot of complaints about them. Also, housing would have been a major issue for me. As I say, health and then the whole panoply of all the other public services would have had smaller numbers of complaints, but all would have had complaints made. For example, the Arts Council of Northern Ireland would have had complaints made about it. So, I suppose that part of the enjoyment of the job and the satisfaction is just the range of issues that cross my desk.

[148] **William Powell:** Thank you. Finally from me, Chair, if I may, what has been the outcome of the Northern Ireland Assembly's review of the role of the ombudsman?

[149] **Dr Frawley:** Well, I suppose that I should say—and people talk about legacy issues—I'm near the end of this journey and, as I say, it's been enjoyable. I'm sure that some people will be glad to see the back of me. I saw the modernisation of the office as very important. On the outcome, interestingly we will merge the two offices, so, we will have a single ombudsman's office—no longer the Northern Ireland Commissioner for Complaints and the Assembly Ombudsman for Northern Ireland. That will be one of the big changes. Other changes that are now going to go before the Assembly will be an own-initiative authority, which I think is a huge development that we have pursued and advocated for for a number of years. We have a much broader jurisdiction going forward. We will have universities brought into our jurisdiction and colleges of further education. Also, schools will

come back into our jurisdiction. They had been outside our jurisdiction under the local management of schools initiative introduced during the Thatcher period, but they are now coming back in again. Then, a number of justice bodies are also being brought in, as part of the devolution settlement, back into our jurisdiction. There still are some areas that I would've aspired to have. I think one of the key areas for me would be prisoners. I think that prisoners should have the same rights as anyone else, and indeed, you know, now that the healthcare system in prisons, for example, is delivered through local trusts—I'm not sure what the model in Wales is—I believe that it's appropriate and I have that authority, but then so many issues that are outside health, but are related to health, are outside my jurisdiction. So, I again would look to Scotland where prisoner complaints have become part of the jurisdiction of Jim Martin. I would like to see that model developed. So, while I think we've made a huge and significant adjustment and improvement, and a consolidation of our authority and jurisdiction, I think there are still other things that one would have liked to have seen, but they haven't been included in the legislation.

[150] **William Powell:** Thank you very much.

[151] **Jocelyn Davies:** Okay. Mike, shall come to your question?

[152] **Mike Hedges:** It moves neatly on to own-initiative investigations there. You may receive powers over own-initiative investigations. Do you want those powers? Would you support those powers in Wales? What are the arguments against you having those powers?

[153] **Dr Frawley:** As far as I'm concerned, through you, Chairman, I have been looking for these powers for about 10 years because I was conscious that it's an integral part of the toolkit of an ombudsman, for example, across the European countries. I've been looking with some envy across the border in the Republic of Ireland, and I think that yesterday I sent you a paper that I submitted to the Northern Ireland Assembly, which has in it, I think, an interesting—. If I could, and I don't want to sort of divert to it, but I think that it's worth looking at the table in it. If you go to page 6 of that paper, you will see just some of the key own-initiative investigations undertaken. Again, I think, you know, one of the striking ones, which is the one in 2001, is quite an interesting one. The ombudsman became conscious that he'd had three or four complaints over a short time around what you might call subventions for the care of elderly people in nursing homes. These subventions were intended to be given to individual elderly people in order that they could get comforts, as we might call them—things like newspapers, tobacco or whatever. The complaints from their relatives were that, actually, the money wasn't being given to them, and the health boards were actually taking the money as part of a contribution to their care costs.

[154] **Jocelyn Davies:** So, this is sort of pocket money, really.

[155] **Dr Frawley:** Literally. Literally. I just think what's really powerful is if you look at the refund that was calculated as a result of that decision: €1.5 billion, when they went back over 25 years and they worked out how much money had not been given to very vulnerable, very fragile elderly people. So, that's the most significant one, but if you then look across them all, I think there are, really, a fairly diverse and wide range of areas that have been looked at. Equally in that paper, I've referred to the Swedish experience and to Malta where, again, it's a recent development in the Maltese arrangements, but, again, they've used it very successfully.

11:45

[156] What are the arguments against? I always remember that my colleagues in England and in the United Kingdom ombudsmen's office would have said, 'We would never want own initiative', when I would raise the issue, and I would say, 'Why not?' I think it is an

interesting issue for the committee. They would say to me, ‘It’s because you will become a political football’. I would say, ‘Why?’, and they would say, ‘Well, the first issue that comes up, the opposition will demand the ombudsman does an own-initiative examination of that issue, or the local newspaper will run a campaign demanding it, and because they know you have that authority they will put that pressure on you’. That’s why I think there is a real issue for the ombudsman to be very clear that it must be evidence based and that there has to be a rationale for it—a very clear rationale for it. Again, I think it is possible to develop criteria that you might want to test before you would embark on it.

[157] I think, very importantly—and a point that’s been highlighted, I think, in your own documentation—there needs to be consultation with other offices that might have a similar responsibility and, for that reason, it is built into the proposed legislation in Northern Ireland that the ombudsman will, in fact, engage with the comptroller and auditor general once a year to look at what the programme of scrutiny is going to be that year. These are the sort of themes and ideas that I’m thinking. So, they would look at building—which I think is a very powerful thing—if you like, a much wider oversight, rather than duplicating each other. It would bring co-ordination to it.

[158] I also would make the point to the committee that, in my opinion, the two roles of the ombudsman and the comptroller and auditor general are very complementary. The comptroller and auditor general is focused primarily on probity and value for money. What the ombudsman is interested in is the experience of the individual citizen of these services. Are they delivering what you, as a legislature, are expecting of them? Where are they succeeding? I think it’s important to acknowledge that, and not always to be focused on failure, but on where they are succeeding. Also, where do we want to focus our scrutiny, because that particular service, or that particular geography, is not having the experience it should have? I believe own initiative is hugely important in that. Finally, and probably most powerfully, I believe it allows us to speak to and engage with those who I would call the voiceless, the marginalised, the most vulnerable.

[159] I had the experience of working in health and social care for the 30 years before I came to this post, and the most vulnerable people are actually quite often not in acute hospitals. They are in hospitals for the learning disabled. I remember, for example—and most of the Members around this table may be too young to remember—Cefn Coed, and the awful circumstance in the late 1960s, early 1970s, and the awful things that happened in those closed environments. Now, we’ve moved on hugely from that, but to any way assume that that type of thing can’t continue to happen is worrying.

[160] One of the things I often see as an ombudsman—. I know we’re preoccupied with the number of complaints we get, but you should also be deeply concerned if there are no complaints. Why is it we don’t hear any commentary from that particular arena? And, increasingly, as the final part of that, I think it’s clear now that the most vulnerable in our populations are, in fact, the elderly, who are both living alone, in some instances, and also in communities of frail people, which, again, are very closed institutions. I think the ombudsman could well shine his light in that arena, routinely, for different reasons and with a good rationale. I think that would be very reassuring to many relatives and carers, and a positive thing.

[161] So, I think there are arguments against, of course, as with everything, but the arguments for are very powerful indeed.

[162] **Jocelyn Davies:** Well, you’ve had 10 years to think about what you’re going to do. *[Laughter.]*

[163] **Dr Frawley:** Sorry for taking so long to say it, but it took 10 years to prepare it. I’m

sorry.

[164] **Jocelyn Davies:** You've had 10 years now to think about whether you wanted these powers and so on, so have you given any thought now to how you would identify where you would use this power and how you would carry out an investigation?

[165] **Dr Frawley:** Well, I think the first source of insight would be your own complaints analysis and profile. Again, I think you'd be looking for patterns in trends there that might point to particular issues that need particular attention of an own-initiative. I think you would, as I've said, maybe take the advice of others. You know, I wouldn't be in any way limited from looking at what the media is talking about in terms of major issues and concerns, because that's what concerns the public. But I think that I then would want to engage with the sectors and I think there is a sectoral nature to this; I think you have local government, clearly you have health, and I think you don't want to be constantly in the same space, I think you want to try and bring as balanced an approach as you can. I think you do look at those vulnerable groups as particularly important.

[166] One of the areas I think, and again I am speaking to Northern Ireland and my experience there—. We have done remarkable things with education for people with learning disabilities and I think the whole mainstream development there is a hugely positive thing. But suddenly, at 18 in Northern Ireland or 21, what happens to our learning disabled people? Certainly, in our experience, they're in day care with their day settings or training units with 65 and 60-year-olds. Would that be acceptable for others? And what sort of constructive life and leisure do they have? So, there are dynamics and dimensions to that type of care that I think are well worth looking at, because some people do it extremely well and others don't. It shouldn't be a postcode lottery whether someone with a learning disability has a positive life experience or a disappointing life experience.

[167] **Jocelyn Davies:** Do you know how much it would cost for you to carry out one of—.

[168] **Dr Frawley:** Well, again, in the paper we sent you, I did set up—again, my own committee was very anxious to get some insights into that—. I'm not sure what the equivalent grades would be in Wales, but we're talking about probably a team of a director and two others. The two others would be relatively senior, because I think they do need to be sufficiently authoritative to have and run both detailed interviews and investigative processes, and, in a sense, also have credibility in terms of experience and knowledge. So, I think it is a narrow area—own-initiative—that will need, maybe, some people who can join the team on an ad-hoc basis with expertise and knowledge of a particular subject, but the core investigator capacity needs to be invested in in terms of training and development. So, I would say our initial calculation was about £180,000 a year. Now, that would allow us, probably, to do two or three major investigations a year and that would be our output that we'd be looking to.

[169] We wouldn't necessarily dedicate and lock that resource down. Certainly, we would want that resource also to be flexible so we could target it elsewhere if the workload demanded it. I think, while on one level you need expertise, on another level I think you also need to bring people into that arena on a limited basis. They don't want to spend their lives doing own-initiative investigations, so I think you need the flexibility to move people around and a certain amount of expertise and training. I think you'd need one director, which in our terms would be around, say, £55,000 to £60,000, and then some, what we would call, senior investigators, which might run at around—in gross terms—probably £50,000 to £55,000. So, around £150,000 to £160,000.

[170] **Jocelyn Davies:** Okay. Nick, shall we come to your questions?

[171] **Nick Ramsay:** Thanks, Chair. Good morning. With regards to the complaints

handling across public services and the model complaints policy that's been developed here, what role do you have in issuing guidance about complaints policies to public bodies?

[172] **Dr Frawley:** Again, I have brought a paper with me where we've developed some guidance in terms of a framework for effective complaints handling. I do want to acknowledge that I've made plagiarism part of my life's work. [*Laughter.*] So, I don't think there's anything new or reinventing wheels here, but I think you try and take best practice and helpful analysis from elsewhere, and you integrate it into the local circumstance. We have given that advice, and we continue to be asked to train people in complaints handling. I think we're very committed to that.

[173] However, I think, and, clearly, from the evidence Mr Martin gave, in Scotland, they've moved it on from just advice, support and training into a much more formal and statutorily supported role in terms of the Complaints Standards Authority, as it's called in Scotland. We looked at that in Northern Ireland, but, despite my view that it would've been a very helpful intervention, I think the committee were not satisfied or convinced that the money should be spent on that. I have some sympathy with that, I suppose because I think that, sometimes, we get greater ownership of the complaints process, because, actually, it's taken on, and the leadership and the senior people say, 'We want to do complaints well, because complaints are opportunities.' I think if you're compulsorily requiring people to do things, they're less willing to take that level of ownership. The real key in Scotland is, of course, I think, the very skilful way in which they've built that ownership into the process that they've followed. As Mr Martin explained, you get individual sectors to agree principles, then buy in to the principles and then develop a structure around that, then they've signed up for it. When you go back to investigate how they're performing, you know, it's what they said they believed in, it's what they said they wanted to do, and I think that gives a lot of authority to it. Again, I think, skilfully, as was pointed out by Mr Martin, he didn't want to become a regulator, so he looks to others to monitor whether that complaints process is working. So, I definitely think the Scottish model is well worth emulating. I haven't been successful—

[174] **Nick Ramsay:** You've anticipated my next question.

[175] **Dr Frawley:** I haven't been successful, but I will continue to, hopefully—well, I won't but my successor may—press for the statutory standing.

[176] **Nick Ramsay:** So, we should be plagiarising the Scottish model.

[177] **Dr Frawley:** Well, knowing the Welsh, I'm sure they'll find their own way of doing it, so I would never say 'plagiarising', but I've no doubt Mr Martin will say, 'You plagiarised the Scottish model.' [*Laughter.*]

[178] **Nick Ramsay:** You've been quite clear on that. Would additional activities and costs be required by the Public Services Ombudsman for Wales to ensure greater consistency?

[179] **Dr Frawley:** Well, again, I don't want to be, in a sense, just repeating things that others have said before to you. I think the initial start-up costs are going to be maybe in the region of £150,000, looking at how we were looking at how we would do it. Once it settles down and once the buy-in is there and the systems are developed and agreed, then I think, probably, as Mr Martin said to you, the two staff are more than adequate to continue to both, in a sense, engage and refresh. That's the key thing: you can't let this thing stop. You need to keep going back to it, I think, as you see the complaints performance—. One of the things that is very powerful is the numbers he could share with you. For example, I couldn't tell you what the total number of complaints to public bodies in Northern Ireland was, and I think that's a huge thing.

[180] I think the second thing that, again, you need the people to be looking at is this whole idea of the conventions of how we define and describe things. You know, for example, Mr Martin has a level of determination, assessment, investigation and so on. Determination could be, literally, a phone call. Now, we don't have a similar definition in Northern Ireland, so there are two things I would say. One is that we need to get the bodies to agree what the language is going to be, so it's a common language and a common currency. Critical to your own committee's business, for example, will be when we compare one local authority with another, we want to be satisfied we're comparing apples with apples, and we're not comparing apples with pears. As you know, when you bring people before you, sometimes, they'll say, 'Ah, but they don't do it the same way as we do it. You couldn't possibly make that assumption about us.'

12:00

[181] So, those are the ground rules that need very much to be locked in, and then you have a really robust system where you can begin to benchmark, when you can begin to set standards, and you can begin to demonstrate people are either exceeding your standards, hopefully, or falling below those standards, and that's where you focus your interventions then. I think that's the dynamic—so it's not just, 'We have a standard'; it's how we use that information.

[182] **Nick Ramsay:** And is it worth it? Would the costs that you mentioned earlier—the £150,000 initially—be value for money?

[183] **Dr Frawley:** I would argue, once you get to that point in the process, it is, because of what I think people want to know. For example, and I've always said that, in the health service, when someone is treated, they should not leave hospital without a statement of cost. Not a bill, just 'This is what your care cost', because I think people continue to assume it didn't cost anything. Equally, I believe, in local government, people are entitled to see how many complaints were received, and how that compares with the best-performing authorities, how it compares with other authorities, and where do we need to focus. I think it brings another dimension to accountability.

[184] Most of this information is already in place, but it needs to be organised and it needs to be extracted, and you need processes to do that. When you look at the overall expenditures in these arenas, I think £100,000 is not a huge sum of money to get a really important insight from the citizen's perspective as to what value they are getting compared to others around the principality, for example.

[185] **Jocelyn Davies:** Of course, that figure's what it would cost in terms of the office and employing more staff, but there would be a cost on others. Have you any idea what that cost would be?

[186] **Dr Frawley:** Well, I take the view that every local authority has complaints managers and complaints officers. Most of them now have very sophisticated corporate services department, who have technology—I mean, you're talking to a flat-earther now, so I couldn't possibly understand most of it, but there is huge investment in information systems, and all we're asking is that's harnessed in a particular way. So, a lot of the cost is already there. It's about a resource now to extract that part of that information in a way that gives value to citizens, to express it in a way that they can understand and that makes sense to them about the performance of their local services.

[187] **Jocelyn Davies:** Chris, shall we come to your question?

[188] **Christine Chapman:** I know, Tom, on your website, you say that this is about

complaints and how people can complain. On your website, it says that complaints can be made using an online form, by downloading the form by e-mail or phone. I just want to clarify: are you allowed to receive complaints in forms other than in writing?

[189] **Dr Frawley:** We're not at this time. We have to receive the complaint in writing, although we have, in a sense, expanded that to include people complaining online in a printed format, and by e-mail. We think that needs to be formalised now in terms of our authority. There is, I suppose, as part of that, the whole issue about social media and how that might now be, in a sense, harnessed. The challenges there, I think, are around privacy and confidentiality of those particular mediums, which are really quite big issues, I think—for us at any rate. So, we're certainly not ready yet to move in that direction, but I think, fundamentally, one of our concerns will be the number of people who are not literate, who find the idea of writing down, you know, even the language you use to explain how this injustice has impacted you—you know, this sort of thing. I think we really do need to simplify that. I think we have to move beyond. We have to accept that some people just are unable to write, and we can't have a barrier to access to justice and fairness, because it seems to me to be a double-whammy: because you can't write, now you can't actually pursue that issue with anybody. So, we realised that we need to have discretion at least, but I would go a lot further than that: we need to be able to accept the spoken word, and to recognise the risks in that in terms of someone at some point having to commit that to paper in order to, one, record it and, two, pursue it.

[190] **Christine Chapman:** Have you got the discretion at the moment?

[191] **Dr Frawley:** I do.

[192] **Christine Chapman:** You have, so you could—

[193] **Dr Frawley:** I could do it.

[194] **Christine Chapman:** You could talk to somebody over the phone and somebody could record that.

[195] **Dr Frawley:** It seems to me, again, to be very sort of patronising and condescending to say to people, 'I have the discretion to do that' and then the language, 'I'll exercise that discretion in your favour' sort of thing. I just think it is just not of our time anymore.

[196] **Jocelyn Davies:** Do organisations that have been complained about challenge that discretion? Do they say, 'That complaint wasn't in writing'?

[197] **Dr Frawley:** Well, we haven't had that. We certainly get lots of organisations who challenge the office. [*Laughter.*]

[198] **Jocelyn Davies:** But not on the—

[199] **Dr Frawley:** Not on that specific issue, no. That has not been an issue for us.

[200] **Jocelyn Davies:** Okay.

[201] **Christine Chapman:** So, I think what you're saying there is that there are barriers, but it hasn't been addressed as yet.

[202] **Dr Frawley:** Well, we've negotiated our way around them, but I think, again, legislation, particularly in our devolved legislatures, should be much more user-friendly and citizen-friendly. I think we need to move beyond discretion.

[203] **Christine Chapman:** Okay, thanks. That's great.

[204] **Jocelyn Davies:** Okay. Ann?

[205] **Ann Jones:** Thanks, Chair. Would you explain under what circumstances you're able to consider complaints against private sector service providers in Northern Ireland?

[206] **Dr Frawley:** We're very limited in this. We can only look at private sector providers in a circumstance where the public purse has paid for the service. So, if the public pound has not paid for the service, then we cannot look. So, for example, I do commend the Welsh Assembly for actually moving that into the arena of private social care, for example. I take the view that private social care is not the same as private healthcare, because private social care is forced on people. People don't choose private social care; they're means-tested, and then they're told, 'You have to pay for this'. So, to then say to them, 'You can't have access to the publicly funded ombudsman's office to examine concerns or complaints you have' I think would be wrong. I don't see health in the same way.

[207] What I do see is the issue arising in health—and again, it's a very fine margin—where health provides the initial service, then someone goes into the private sector themselves, and then it comes back into the health service again. So suddenly then, if the ombudsman accepts a complaint, and he is tracking that complaint through that initial interaction, suddenly it moves out of the health service into the private sector and then comes back in again. I think the inability to look at it in that context means that, if you like, the public service, and indeed, the private, are left wondering where did this go wrong—if it went wrong. Did it go wrong when you were in the care of the public system, or did it go wrong when you were in the care of the private system? I suppose that both parties need their vindication, in the sense of 'Well, you've no right to criticise us because, actually, that was not part of the care we delivered or part of the clinical judgment we made.' That's an issue that I think does need to be worked through. So, I could see it in that.

[208] I would be very cautious about embarking on a circumstance where all private healthcare would come into the jurisdiction of the ombudsman, because, again, I think people have made a judgment that they're going to go privately, and there are other recourses for them, as you know, through the consumer organisations and through advocacy groups. I think we're now going to see, in the next number of years, the arrival of the European directives on alternative dispute resolution in terms of private sector contracts and services, which, again, I think will require the private healthcare system to establish arrangements where people can complain about their experiences in the private system. So, I think some of that might take care of itself. So, I think that I would be reluctant to go into that arena at this time.

[209] **Ann Jones:** Okay. I think you've answered the question I was going to ask you about whether ombudsmen should be able to go into private sector healthcare. Currently, we're taking evidence as to whether—I know the current ombudsman here in Wales would like to have that extra power.

[210] **Dr Frawley:** Sorry, could I just finish by saying the other thing I think becomes an issue is, if you go into the private sector, then the whole issue of compliance becomes much more complex? Where someone says, 'We're not going to do that' and you say, 'Well, you know, the ombudsman has told you to do it', I think it'll be very interesting to see how the private sector responds to that.

[211] **Ann Jones:** Okay. Well, that's something. I was going to just move on to the fact that people are putting up reasons why, and one is around additional costs. The suggestion's been made that a levy could be raised on private healthcare providers to pay for the complaints

handling system that may be allowed by the ombudsman. Do you believe that the polluter should pay? Is there an element of should the polluter pay?

[212] **Dr Frawley:** I think if you do that in the private sector, then I think you may find that the private sector will say, ‘Well, why aren’t our public sector colleagues faced with a similar levy and a similar challenge?’ There could be an argument to say that every polluter pays. So, that’s one issue that needs to be addressed. I think a levy—again it depends on the number of complaints and so on—seems to me like a sledgehammer to crack a nut in some situations. I think the polluter pays piece might work in a very limited arena, which was the area I described at the beginning, where, if, in a spectrum of care or service, the private sector was judged to have failed, then it would be accountable for paying for that. But I think to bring it on as a full part of the jurisdiction of an ombudsman would, I think, at this stage, be hard to justify.

[213] **Ann Jones:** Okay; thank you. Thanks, Chair.

[214] **Jocelyn Davies:** I wanted to ask you about your interaction with the courts. How do you currently consider those complaints that could also be considered by the courts?

[215] **Dr Frawley:** Our situation is—. I think there has to be a demarcation between the courts and the ombudsman. I think they’re two different routes to justice, if you like, or redress. I think when people have a remedy in the courts, then they should take that remedy. I think, however, if it’s unreasonable to expect them to do that or if the cost of them doing that is absolutely disproportionate, we should exercise our discretion in ensuring that we look at their issues. But I still think that demarcation is important.

[216] **Jocelyn Davies:** So, has the issue of lifting the statutory bar been considered in Northern Ireland?

[217] **Dr Frawley:** It was considered by the committee and they felt the time was not right for such a development.

[218] **Jocelyn Davies:** So, you were in the same position as our ombudsman: you could use discretion if you considered that it was too expensive or, in the circumstances, that the assumption is—

[219] **Dr Frawley:** Absolutely.

[220] **Jocelyn Davies:** Right, okay. Julie, shall we move on to your questions then?

[221] **Julie Morgan:** Just looking at the wider role of the ombudsman across the whole of the UK, do you feel that any particular changes are needed?

[222] **Dr Frawley:** I alluded to the prisoner issue, which, I think, is one that is now established in Scotland. I think it should be brought in across these islands. I think the other thing I would argue for is the protection of the title. I think that New Zealand has set the tone for this very powerfully and I think the Republic of Ireland is about to go in that direction as well. You know, it’s too easy for people to pick up the title ‘ombudsman’; it’s an established brand and is well thought of. Yet, you can get everyone describing themselves as the ombudsman.

[223] **Julie Morgan:** So, you think that that should be regulated then.

[224] **Dr Frawley:** I do, and I think it should be in the gift of the legislature. They should give their approval or permission. Someone has to submit their model and has to submit their

proposal, and the legislature should have the authority to say, ‘Yes, you are entitled to use this title’; otherwise, I think it’s going to be misrepresented to people.

[225] **Jocelyn Davies:** Nick, did you want to come in on this point?

[226] **Nick Ramsay:** Yes. I’m thinking of the discussion that we had at the last meeting. Is the term ‘ombudsman’—? That’s not the actual term in law, is it? It’s the ‘commissioner’, in law.

[227] **Dr Frawley:** They tend to use the two words interchangeably, but it is, in law, used as commissioner. But my concern is more the public perception of the title. I’m in a difficulty in Northern Ireland, because our committee has decided it should be called the ‘ombudsperson’.

[228] **Nick Ramsay:** Oh gosh, don’t go down that road. [*Laughter.*]

[229] **Dr Frawley:** No, I won’t go down that road. The reality is that ‘ombudsman’ is a Swedish word and ‘ombudsperson’ doesn’t mean anything. So—

[230] **Jocelyn Davies:** You did call me ‘Chairman’ when you sat down. I didn’t mind.

[231] **Dr Frawley:** I think it’s better than a ‘Chair’ though.

[232] **Jocelyn Davies:** This is a chair.

[233] **Dr Frawley:** Yes, that’s what I mean. I don’t want to get in there, but I think ‘ombudsman’ is worth protecting. It’s very important.

12:15

[234] I suppose the other aspect of it is that we need to open up the area of co-operation across offices. I think we should have an opportunity to work with our colleagues in the different jurisdictions, because, as was reflected throughout this evidence, I think there’s so much to learn from each other. But also, I think that we should be doing some joint working on occasions. One of the things that strikes me—and the committee may not be aware of it—is that in Northern Ireland, again uniquely, and the republic, because, obviously, of our political past, we have a vehicle called cross-border body. So, the body created by the European Union, supported by European funds, actually provides services on both sides of the border, and so we work in a joint way—Dublin and Belfast. If the person complaining is in the north, they can actually complain to me. If they’re in the south, they complain to the republic’s ombudsman. I think there are real opportunities there for that sort of exercise. I can’t think of the actual themes and subjects, but I think the flexibility in the legislation to work in that way is something that we should look at, going forward.

[235] **Julie Morgan:** Do you work together much at the moment? I mean, across the UK.

[236] **Dr Frawley:** I must say, again, through the past 10 years, we’ve had four or five very successful meetings a year. Now, it did involve the Local Government Ombudsman in England and the Parliamentary and Health Service Ombudsman in England. It is now, I suppose inevitably, increasingly about the Celtic fringe. I think our scale is the same. I think we have very similar issues. We now have our own devolved administrations. We have common challenges, I think. Again, all of this evidence would demonstrate that we spend a lot of time, you know, talking to each other, and I think the idea of you looking at what’s happening in Northern Ireland or in Dublin or in Edinburgh is helpful. It may not apply here, but it gives you an insight into the direction of travel, some of which you might choose over

others. So, for us as individual ombudsmen, that type of—. I say this, and I'm not going to get any sympathy in this room, but I would say it's quite a lonely place. You can't really go out and say, 'I have a real problem here; I don't know how to deal with this', but I think when you can go to a colleague in Cardiff and say—. I've just invited your ombudsman to become part of my audit committee, because I think we could gain from his insights, and, hopefully, he may learn from ours, and I, as I said, am a member of the Scottish audit committee. Now, all that, I think, is the way we can build relationships, and already, my staff have been to Cardiff. We sit on interview panels in Dublin, because we think there is a common agenda analysis—a different emphasis, different local issues, but the learning, I think, is there all the time.

[237] **Jocelyn Davies:** Well, you're certainly keeping an eye on each other's powers. I've noticed this. [*Laughter.*]

[238] **Dr Frawley:** Oh, no; we're discovered, I'm afraid.

[239] **Jocelyn Davies:** Julie, have you—

[240] **Julie Morgan:** They've been answered.

[241] **Jocelyn Davies:** Okay. Was there anything else you wanted to tell us, because we've run out of questions for you?

[242] **Dr Frawley:** No, Chairman; I'm quite content with that. I'm grateful, as I say, for the opportunity. I hope it's been helpful, and if there's anything else we can do, please don't hesitate to contact us.

[243] **Jocelyn Davies:** Lovely. Thank you very much.

[244] **Dr Frawley:** Thank you very much.

12:18

**Cynnig o dan Reol Sefydlog 17.42 i Benderfynu Gwahardd y Cyhoedd or
Cyfarfod**

**Motion under Standing Order 17.42 to Resolve to Exclude the Public from the
Meeting**

Cynnig:

Motion:

y pwyllgor yn penderfynu gwahardd y cyhoedd o weddill y cyfarfod yn unol â Rheol Sefydlog 17.42(vi).

the committee resolves to exclude the public from the remainder of the meeting in accordance with Standing Order 17.42(vi).

Cynigiwyd y cynnig.

Motion moved.

[245] **Jocelyn Davies:** Well, I now propose we go into private session.

Derbyniwyd y cynnig.

Motion agreed.

Daeth rhan gyhoeddus y cyfarfod i ben am 12:18.

The public part of the meeting ended at 12:18.

