

Y Pwyllgor Cyllid

Bil Ombwdsmon Gwasanaethau Cyhoeddus (Cymru) drafft

DB PSOW 10 Awdurdod Parc Cenedlaethol Arfordir Penfro a Pharc

Cenedlaethol Bannau Brycheiniog

Annex A

Consultation questions

Please comment on as many of the questions as relevant to you/your organisation, providing an explanation of each answer given:

General

01. Would the draft Bill improve the effectiveness of the role of the Ombudsman?

If so how?

Response: The previous PSOW highlighted the need for “own initiative” investigations. The proposed powers would facilitate this. On balance the case has been made out in the Committee Report for “own initiative” investigations.

02. What, if any, are the potential barriers to implementing the provisions of the draft Bill? Does the draft Bill take sufficient account of them?

Response: the need for clarity between the jurisdictions of the PSOW and other regulatory an investigatory bodies e.g. Wales Audit Office. The bill also does not recognise the obligations that will be placed on public service bodies that are, already, under a period of unprecedented financial restraints.

03. Are there any unintended consequences arising from the draft Bill?

Response: *There is a real risk of duplication. Also there is an accountability issue that does not seem to be clearly delineated following “own initiative” investigations. Under section 4 “own initiative” investigations, there is no reference to when such a power may be exercised. As planning authorities we are frequently faced with challenges that the process of determining a planning application gives rise to maladministration and this could trigger an “own initiative “ investigation i.e. an officer’s report and recommendations are criticised to the extent that an “own investigation “ commences before the formal determination of the planning application while section 12 refers to the traditional exclusions which normally preclude such a step being taken .This should be referred to in section 4 for greater clarity..*

04. At what point should the impact of this legislation be evaluated?

Response: it is suggested that the period two years is appropriate

Power to investigate on own initiative

05. Do you have any comments on the new power in section 4?

Response:

The boundaries of the powers need to be documented and delineated more clearly. There must be a time limit on the publication of criteria in clause 5 (3). I suggest that a period of one month is sufficient.

06. Does the inclusion of this power raise any unintended consequences in the rest of the draft Bill?

Response:

It raises the possibility of conflict with other regulatory and investigatory bodies with similar powers. No mention is made of potential conflict with criminal allegations of malfeasance /misconduct in public office cases,, which would be a matter for the Crown Prosecution Service and the police to investigate.

07. With whom should the Ombudsman consult under section 4(2)?

Response:

Any party whom he believes may have suffered, any relevant regulatory or investigatory body. He should publish a note for guidance on those parties who he/she considers as likely to be involved in such consultations.

08. Should the Ombudsman have the power to initiate an investigation based on action that took place prior to the draft Bill/Act receiving Royal Assent (see section 4(4))? If so, should there be a cut-off point, beyond which the Ombudsman should not carry out an own initiative investigation?

Response:

No-the Act should not be retrospective No exceptional reason has been given to vary the general rule that legislation is not retrospective in effect. If the case is to be made out for retrospective powers this must be specifically argued in greater detail

09. What kind of issues should be included in the criteria for own initiative investigations under section 5?

Response:

Areas of likely or potential injury to individuals or organisations; matters of widespread local or national interest; potential precedents and cases of a clear wider interest to other regulatory bodies and when it is apparent that there are clear opportunities for policy management and enforcement actions to be undertaken in key areas of perceived public maladministration. Another area could well be the failure to deliver key public services on a case-by-case basis and breaches of the Principles of Good Public Administration and the local authorities Members Code of Conduct..

10. What kind of evidence should be available to the Ombudsman to justify an own initiative investigation (see section 5(2))?

Response: *Personal statements, corroborated where possible, evidence from video conferences, local authority and other public bodies' electronic and paper records. These should be subject of a basic threshold test as to demonstrate a prima facie case does actually exist.*

Who can complain

11. Do you have any comments on the new definition of “member of the public” in section 7(2)?

Response:

No-it is essential that the employees of listed authorities and public bodies are not deterred from making complaints provided they do so in their personal capacity. The integrity of the “Whistle Blowing” policies must not be prejudiced.

Requirements for complaints made and referred to the Ombudsman

12. Do you have any comments on the new requirements for complaints made to the Ombudsman in section 8?

Response:

No-there needs to be consistency and time limit i.e. a limitation period. On balance the period suggested appears to be appropriate and proportionate in all the circumstances that there should be a proviso /caveat aimed at providing for an extension of time where exceptional cases create exceptional circumstances. This should overcome the usual problems associated with the rigid limitation policy which can create unintended hardship. One clearly defined waiver of the time limitation policy should be in cases of fraud, dishonesty or where physical and mental injury has occurred to the complainant

13. How should the proposed guidance for making a complaint to the Ombudsman be published and what formats should be available?

Response:

E lectronically and on paper . It can be deposited in every CAB office, public library, and other advice centres in Wales.

Matters which may be investigated

14. Do you have any comments on the new provision enabling the Ombudsman to investigate the whole complaint when a combination of treatment has been received by public and private health services providers (see sections 10(1)(d) and 10(2))?

Response:

No

15. Does section 10(2) adequately cover anyone who has received a combination of public and private treatment?

Response:

As the responses from two of the National Parks of of Wales which do not provide the services, it is not appropriate for any further comment from these organisations

16. Does the broadening of the matters which may be investigated in section 10(2) raise any unintended consequences in the rest of the draft Bill?

Response:

It may lead to potential difficulties with any police or regulatory investigations taking place where it appears that criminal offences may have been committed. In particular in those cases, potential defendants have a right to silence and to protection from self-incrimination. These can severely inhibit a Police and CPS investigation and constrain it. These concerns really relate to the detail of how an investigation is conducted and may well be capable of being resolved by appropriate protocols being drafted, consulted upon, and published.

17. Is the definition of “private health services” in section 71 broad enough to cover anyone who has received a combination of public and private treatment?

Response:

Yes.

18. Should the Ombudsman have powers to recover costs incurred in investigating private health services?

Response:

Yes, but who will judge what is the appropriate level of costs and what will happen if the body or person investigated refuses to pay? As this could involve a significant financial penalty, this function needs to be the subject of clear guidance. I believe that much more thought needs to be given to the precise mechanics of how cost recovery will work. An alternative model would be to insert a power that where there is a dispute over both liability to pay and the amount to be paid, the PSOW has power to refer this to a Costs Judge to determine and to make any debt and any declaration so made by him shall as a judgement and thus capable of being enforced as such, by any of the methods in force by the courts .So in this way the PSOW is appearing not to be judge, jury and executioner’.

19. Do you have any comments on the new definition of “family health service provider in Wales” in section 71, which is intended to capture, for example, a GP practice as a whole rather than just an individual GP?

Response:

No

Investigation procedure and evidence

20. Do you have any comments on the procedure set out in section 16, in so far as it relates to the procedure for conducting an own initiative investigation?

Response:

There is no time limit referred to in section 16 (4). It is essential that the limits are published. Again section 16 (2)) gives no time for the linkage. I suggest one calendar month. Also, the compensation for loss and expenses in section 16 (10) is to be welcomed but is far too vague in the present draft should be a maximum limit and suggested table guidelines published the current wording is “weak”. It should also not reward the overzealous and/or inefficient complainant.

21. Should the Ombudsman’s power in relation to obtaining information, documents, evidence and facilities also apply to own initiative investigations and investigations into private health services (see section 17)?

Response:

Yes

Listed Authorities

22. Do you have any comments on the restrictions on power to amend Schedule 3 (see section 30(2) in particular), which are significantly narrower than the restrictions found in the 2005 Act?

Response:

No, it seems proportionate in all the circumstances

23. Are there any other bodies that should be included in the list in Schedule 3

‘Listed Authorities’?

Response:

Any statutory Harbour authorities or port authorities that are ,in effect in public control.

They have a significant effect on the marine environment. I also notice

ere is not an express reference to the Wales Audit Office.

Complaints-Handling

24. Do you have any comments on sections 33 – 39 (which mirror sections 16A to 16G of the Scottish Public Services Ombudsman Act 2002)?

Response:

No

25. Is section 38(b) adequate to allow listed authorities to comply with their duties under other enactments, such as Freedom of Information duties?

Response:

Yes-it has the qualities of brevity and clarity

Part 4: Investigation of complaints relating to other persons: social care and palliative care

26. Should Part 4 remain a standalone Part? Or should such investigations be brought within the Part 3 investigations process?

Response:

It should remain a stand-alone part due to its specific subject matter

27. If Part 4 should be brought within Part 3, are there any specific elements of Part 4 that should survive? Or can a blanket approach be applied?

Response:

Part 4 should survive as a stand-alone Part of the Act

Part 5: Investigations: supplementary

28. Do you have any comments on sections 62, 63 and 64, which provide for joint and collaborative working with specified Commissioners and the Auditor

General for Wales?

Response:

There needs to be clear, published protocols in existence that set out in detail how such collaborations with other bodies are to be conducted. There is no fixed view as to whether it should be left to a private ad hoc arrangement, or will be done on a case-by-case basis. Care has to be taken to ensure that this does not lead to inconsistencies and prejudice anybody or

person under investigation as they have a right to know the rules as to how such investigations be conducted, before such an investigation commences in order to defend themselves fairly.

29. Should sections 62 and 63 cover future Commissioners that may be created by the Assembly, including the Future Generations Commissioner for Wales?

Response:

Yes

30. Are there any further technical changes required in Part 5 of the draft Bill, to reflect the broadening of matters which may be investigated?

Response:

Not apparent

Appointment etc

31. The provisions of paragraphs 5 to 8 of Schedule 1 (disqualification) reflect largely the current provisions in the 2005 Act. Do these provisions require updating?

Response:

No

32. Paragraph 7 of Schedule 1 provides that a person who has ceased to hold office as the Ombudsman or as an acting Ombudsman is disqualified from a list of roles (listed in paragraph 7(1)) for a period of two years. Is the two year period appropriate?

Response:

Yes-it should be longer. I suggest four years

33. Do you have any comments on the matters which are included within “paid office” in paragraph 8 of Schedule 1?

Response

:No

Financial implications

34. Do you have a view on the financial implications of the new provisions set out in the draft Bill?

Response:

The cost of having adequate resources to properly investigate matters within the new wider jurisdiction is not apparent

Other comments

35. Do you have any other comments you wish to make about the draft Bill or any specific provision within it?

Response:

Whilst there are good legal reasons why a reference to Schedule 4 of the 2005 “Conduct of local Government Members and Employees” Is omitted, a general explanation given for the wider audience to be reached by the consultation process would have helped. It would be very easy for a lay person as opposed to a trained lawyer to assume that they are, in fact, excluded when they are actually not.