

STANDARDS COMMITTEE

REPORT OF HEAD OF LEGAL SERVICES MR. DAVID MICHAEL

10TH OCTOBER 2014

SECTION B – MATTER FOR INFORMATION

WARDS AFFECTED: ALL

NATIONAL ASSEMBLY FOR WALES FINANCE COMMITTEE EXAMINATION OF OMBUDSMAN POWERS

Purpose of Report

To advise Standards Committee of an enquiry by the Finance Committee of the National Assembly for Wales into the powers of the Public Services Ombudsman for Wales.

Background

As members of the Standards Committee will be aware, the Public Services Ombudsman for Wales (“the Ombudsman”) has a dual jurisdiction; firstly, he investigates complaints of maladministration against Local Authorities and, secondly, investigates complaints of breaches of the Members’ Code of Conduct. It is the second part of the Ombudsman’s jurisdiction which concerns the Standards Committee.

The Finance Committee of the National Assembly for Wales is presently conducting an investigation into the powers of the Ombudsman in respect of both parts of his jurisdiction.

I take the opportunity to reproduce for consideration by Standards Committee some evidence submitted to the Finance Committee by the Welsh Local Government Association (“the WLGA”).

The Finance Committee has requested responses to particular questions. These questions were not directed to each Local Authority but to the WLGA as the representative body. Although the response of the WLGA is labelled draft, my understanding is that it was submitted in the form which is reproduced in the Appendix to this report.

The response from the WLGA deals with both aspects of the Ombudsman's jurisdiction but I will highlight in this report only those aspects of the response which would concern the Standards Committee ie potential breaches of the Code.

The response to questions 5, 6 and 7 indicate that it would be acceptable if complaints were received other than in writing.

At Question 22 the Finance Committee asks a revealing question indicating that the Ombudsman would prefer to focus on service users and service delivery ie the first part of his jurisdiction rather than Code of Conduct complaints. To set this in context, the main workload of the Ombudsman's office now seems to relate to health service bodies. The procedure which the ombudsman follows in practice is that Local Authority complaints about service delivery are referred to the Local Authority's own complaints procedure and very few complaints about service provision are dealt with by the Ombudsman or the Ombudsman's office itself.

In effect, the Ombudsman has sought to implement a similar regime in relation to Code of Conduct complaints in that he will normally expect a Code of Conduct complaint to go through a Local Resolution procedure. However, this is only suitable for Member against Member complaints and may only be suitable where the complaint is not of a serious nature.

Members of Standards Committee will note the response of the WLGA which emphasises the fact that only a proportion of complaints are investigated and very few end up in a referral to either the Standards Committee or the Adjudication Panel for Wales.

Appendices

WLGA response to National Assembly for Wales Finance Committee examination of Ombudsman Powers

Recommendation

That Members note the content of the WLGA response.

List of Background Papers

National Assembly for Wales Finance Committee examination of Ombudsman powers

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Finance Committee Inquiry: Consideration of powers: Public Services Ombudsman for Wales

The WLGA welcomes the opportunity to present evidence to the Committee on its inquiry into the consideration of powers for the Public Services Ombudsman.

The WLGA is aware that this inquiry could potentially lead to new legislation concerning the Ombudsman's powers being introduced, possibly by this Committee, before the end of this Assembly term. Clearly the Committee must conclude its Inquiry, which may or may not lead to proposals to introduce legislation as a result.

The WLGA notes however that a Committee Inquiry which led to the introduction of a significant new piece of legislation could mean a curtailed process around policy review and legislative scrutiny given it is our understanding that a Committee Bill would automatically bypass the Stage 1 Committee process. If this is the case, there would be reduced scope for effective consultation and engagement with the general public and public bodies affected by policy proposals and legislation.

The WLGA therefore would request that should the Committee decide to move to legislation, that a Draft Bill is published to encourage the widest opportunity for consultation before the formal introduction of the Bill.

1. What are your views on the effectiveness of the current Public Services Ombudsman (Wales) Act 2005?

The Act is generally regarded as effective. As noted by the Ombudsman's own submission to the Committee, the Law Commission commented favourably on the Act but put forward a number of proposed amendments to clarify and improve the Ombudsman's role.

Own initiative investigations

2. Currently, the Ombudsman may only investigate a matter that is the subject of a complaint made to him/her. What are your views on 'own initiative' investigations powers, which would enable the Ombudsman to initiate his/her own investigations without having first received a complaint about an issue. Please explain your answer.

3. Do you have any concerns that own-initiative investigation powers could result in the Ombudsman's responsibilities overlapping with the responsibilities of other bodies? How could this be managed?

4. Do you have a view on the likely financial costs and benefits of the Ombudsman having own-initiative powers?

The WLGA recognises the Ombudsman's frustration where his current powers prevent him from exploring suspected wider concerns within public services stemming from an investigation into an initial individual complaint. The WLGA however shares the Welsh Government's concerns over the risks of 'mission-creep' (as stated in a letter to the Communities, Equalities and Local Government Committee from Minister for Local Government and Government Business on 12th February 2014). In principle, it is of course appropriate that such concerns over wider and potentially systemic public service issues should be investigated, however there are a number of investigatory bodies whose role it is to examine matters of governance or public service concerns or improvements. There would be scope for duplication between the Ombudsman and these existing bodies, such as the Auditor General for Wales, as well as potential burden for public service bodies.

Whilst the Welsh Government notes that any such new powers should be carefully circumscribed and available in specific and exceptional circumstances, an alternative model could be that where the Ombudsman has identified wider systemic concerns following an initial investigation into a complaint, he then writes to the Auditor General for Wales (or relevant inspectorate) advising him/her to undertake a special inspection or produce a Public Interest Report into the matter.

Oral Complaints

5. At present, the Ombudsman can only accept complaints in writing.

What are your views on the Ombudsman being able to accept complaints made orally? Please explain your answer.

6. What other type/form of submission should be acceptable (e.g. email, website form, text messages)

7. Do you have a view on the financial costs and benefits of this provision?

The WLGA agrees that alternative arrangements for submitting complaints should be considered to ensure that the Ombudsman is accessible to all. Oral complaints should be acceptable, but such safeguards and procedures will be need to be introduced to ensure such complaints can provide consistency in terms of detail, as well being recorded and stored securely and confidentially.

The financial costs and/or benefits of any such provision would depend on digital solutions, any necessary additional administrative support and the volume of oral complaints received.

Complaints handling across public services

8. At present there is no consistency in the way public bodies deal with complaints. Adoption of the model complaints policy issued by the Welsh government is voluntary. What are your views on the Ombudsman preparing a model complaints policy which public bodies would be obliged to adopt. Please explain your answer.

9. Do you have a view on the financial costs and benefits of this provision?

The WLGA supported the Ombudsman in the development of the model complaints policy which was published in 2011¹. The WLGA understands that 21 of the 22 authorities have implemented the model policy and 1 is reviewing its complaints procedures in line with the model. It is likely that the anticipated mergers of local authorities would see further streamlining and consistency of complaints processes within local government.

Ombudsman's jurisdiction

10. What are your general views on the Ombudsman's current jurisdiction?

11. At present the Ombudsman can investigate private health care that has been commissioned by the NHS. The Ombudsman would like the jurisdiction to be extended to enable him/her to investigate when a patient has received private healthcare (self-funded not commissioned by the NHS) in conjunction with public healthcare. This would enable the complaints process to follow the citizen rather than the sector. What are your views on extending the Ombudsman's jurisdiction in this way?

12. How do you think the investigation of private health care complaints should be funded? (Possibilities include a levy, charging on a case by case basis or no charge.)

13. Do you have a view on the financial costs and benefits of this provision?

The WLGA does not have strong views regarding the Ombudsman's jurisdiction or powers in private healthcare, although the case put forward in the Ombudsman's paper appears compelling.

Links with the courts

14. What are your views on the removal of the statutory bar to allow the Ombudsman to consider a case which has or had the possibility of recourse to a court, tribunal or other mechanism for review? (ie this would give complainants the opportunity to decide which route is most appropriate for them.)

15. What are your views on the Ombudsman being able to refer cases to the Courts for a determination on a point of law?

16. Do you have a view on the financial costs and benefits of this provision?

The WLGA recognises the Ombudsman's rationale for removing the statutory bar with a view to improving the public's accessibility to resolution of complaints. That said, this is the most significant legislative and jurisdictional reform that the Ombudsman proposes which would have implications for law across England and Wales and a potentially significant impact in terms of workload and resources for the

¹ http://www.ombudsman-wales.org.uk/~media/Files/Documents_en/Model%20Complaints%20Policy%20Final%20PSOW.ashx

Ombudsman. It is unclear what data is available or what analysis has been undertaken to assess the impact of such a reform or the Assembly's competence in this arena given the territorial jurisdiction of the courts. The WLGA also notes that in his oral evidence, the Ombudsman suggested that of his 5 proposed areas for reform, removal of the statutory bar (given the above complexity) was not the highest priority reform.

Other issues

17. Do you have any specific examples where the Ombudsman having the additional powers proposed could have been useful in securing a successful conclusion to an issue?

No.

18. Schedule 3 of the current 2005 Act, provides a list of authorities that are within the Ombudsman's jurisdiction to investigate complaints. Please provide details of any other bodies/organisations that should be included in this list?

The list in Schedule 3 appears appropriate, although it should be updated to incorporate bodies established or renamed after the 2005 Act.

19. If extended powers were given to the Ombudsman in a new Bill/Act, at what point should the impact of this legislation be evaluated?

As the Ombudsman and noted in oral evidence to the Committee, there is significant and ongoing reform of public services and the devolution settlement for Wales and there would probably not be an 'ideal time' to take stock. That said, the current timeframe of ten years for reviewing the current Public Services Ombudsman (Wales) Act 2005 is probably too long given the anticipated changes to public services and a five year review would probably be more appropriate.

20. What unintended consequences could arise as a result of these provisions becoming legislation and what steps could be taken to deal with these consequences?

As noted above, the main concern regarding unintended consequences is the potential for jurisdiction between the Ombudsman and the Auditor General for Wales around 'self-initiative' investigations. This could be mitigated by clear criteria for such investigations, agreement of protocols between inspection bodies or a process by which the Ombudsmen requests that other bodies carries out follow-up inspections or investigations after his initial work.

21. What factors should be measured to determine the cost-benefit analysis of this legislation being brought forward?

It is difficult to determine an appropriate cost-benefit analysis given limited data has been presented to date which could be used to assess the likely impact in terms of additional complaints and, subsequently, upheld complaints as a result of any legislative changes. Should this Inquiry lead to legislation, a more thorough Regulatory Impact Assessment should be completed which should assess the potential impact, particularly in terms of workload on the Ombudsman's office and public services as a result. In principle however, it is difficult to quantify the value of a regulatory or complaints regime which seeks to provide assurance and public confidence about public services, provides support and redress to individuals who have had a complaint upheld and contributes to wider service improvements.

22. Do you have any comments on the following issues:

- **jurisdiction – changes to the devolution settlement have led to new areas coming into jurisdiction over time, should consideration be given to other bodies being included in the Ombudsman's jurisdiction;**

See 18 above

- **recommendations and findings - should the recommendations of the Ombudsman to public bodies be binding. This would mean that bodies cannot decide to reject the findings;**

The current approach to Ombudsman recommendations works effectively in Wales. The relationship between the Ombudsman and public services is based on early, open and constructive dialogue, where 'quick fixes' are encouraged. The regulatory relationship would shift significantly if recommendations were made to be binding, with implications for local democratic discretion and/or challenge or appeal.

- **protecting the title - there has been a proliferation of schemes calling themselves ombudsmen, often without satisfying the key criteria of the concept such as independence from those in jurisdiction and being free to the complainant. Should anyone intending to use the title ombudsman gain approval from the Ombudsman;**

The WLGA does not have strong views on this matter.

- **code of conduct complaints – the Ombudsman would prefer to focus on the element of his work that deals with service users and service delivery, rather than local authority and town and community councils' resolutions. Whilst a local resolution procedures exists and has been adopted by 22 local authorities, variance exists in practice.**

The Ombudsman was specifically established to investigate complaints about councillors' conduct as well as complaints about public services. Although the Ombudsman's own workload and priorities have varied during recent years,

his role in independently investigating complaints about councillors' conduct remains a vital back-stop role which local government would wish to retain, particularly for most serious breaches of the code of conduct.

Local resolution procedures have been developed by local authorities, the WLGA and the Ombudsman and they are increasingly effective in managing lower level complaints about the conduct of councillors. These procedures have meant a reduced burden on the Ombudsman's office, but in turn has meant a transfer of workload (but not of resources) to local authorities. The Ombudsman's latest Annual Report shows that code of conduct complaints were down 22% in 2013-14 at 228 new complaints, of which only 111 related to county or county borough councils. Of the 228 complaints, only 41 were investigated and only 6 investigation reports led to referral to either a standards committee or the Adjudication Panel for Wales.

23. Do you have any views on any aspects of future planned or proposed public sector reforms that would impact on the role of the Ombudsman?

See preamble above.

24. Do you have any other issues or concerns about the current Act and are there any other areas that need reform or updating?

No