

Public Law

2006

A new ombudsman for Wales

Mary Seneviratne

Subject: Administrative law

Keywords: Ombudsmen; Wales

Legislation: Public Services Ombudsman (Wales) Bill (Draft)

[Public Services Ombudsman \(Wales\) Act 2005](#)

***P.L. 6** The Public Services Ombudsman (Wales) Act 2005 creates a new integrated ombudsman service for Wales which brings together the three separate offices of Welsh Administration Ombudsman, Health Service Commissioner for Wales and the Welsh Local Government Ombudsman.¹ This development follows the pattern of reform in Scotland² and the proposed reforms in England,³ which involve integration of the separate ombudsman schemes in the public sector in those countries. The Act was passed on April 6, 2005, and the new system is likely to come into effect on April 1, 2006. Meanwhile, the interim system which has been in place since 2004 will continue.

Background

Proposals for reform of the Welsh system were originally mooted in August 1998, when the Advisory Group to the Welsh Assembly recommended to the (then) Secretary of State for Wales that the posts of three of the ombudsmen in Wales should be combined. At that time, Wales had four separate ombudsman systems dealing with complaints about public services: the UK Parliamentary Ombudsman,⁴ the Welsh ***P.L. 7** Administration Ombudsman,⁵ the Health Service Ombudsman for Wales,⁶ and the Local Government Ombudsman for Wales.⁷ Three of these posts were held by the same person.⁸

In March 2001, the Secretary of State for Wales and the Welsh Assembly Government announced that there was to be a joint review of the public sector ombudsman service in Wales, although it was not until December 2002 that a consultation paper⁹ was issued, setting out the case for change, with the provisional view that there should be one ombudsman for Wales.¹⁰ This proposal received unanimous support,¹¹ and a further consultation paper sought views on the remit of the proposed new office.¹²

The interim system, in place since 2004, involves one person holding all three offices, operating under three separate pieces of legislation. Adam Peat was appointed as Health Service Ombudsman and Local Government Ombudsman in Wales in October 2003, and designated as the non-statutory Public Services Ombudsman for Wales, by the First Minister and the Secretary of State for Wales the following month. He was appointed as Welsh Assembly Ombudsman in November 2004, after the statutory restriction preventing one person holding all three offices simultaneously was removed.¹³

The National Assembly for Wales' law-making powers are limited to the making of delegated legislation where this power has been specifically granted in an Act of Parliament. Thus, legislative recognition for this interim measure could only be effected by the Westminster Parliament, and parliamentary time was allocated in the 2004-05 session. The Bill was introduced in the House of Lords in November 2004, and time was found before the pre-election dissolution of Parliament to secure its passage, helped no doubt by the fact that the Bill was uncontroversial, giving statutory basis to what was the de facto position.

***P.L. 8 An integrated office**

There can now be little dispute that integration of the public sector ombudsman schemes is appropriate and desirable. This is the pattern adopted in Scotland, the de facto position in Northern Ireland, and the proposed scheme for England. The reasons for integration relate to the changes in delivery of public services, jurisdictional gaps and overlaps, efficiencies, customer focus, and opportunities for a higher profile service. An additional factor for Wales is that there were four separate schemes serving a relatively small population.¹⁴

The statutory title of the new ombudsman is the Public Services Ombudsman for Wales, the name “ombudsman” being preferred in the legislation, rather than the traditional “commissioner”. “Ombudsman” has now become the accepted nomenclature, despite the fact that the legislation establishing the public sector ombudsmen in the United Kingdom has in the past used the term “commissioner”. The ombudsman is appointed by Her Majesty the Queen, on the recommendation of the Secretary of State, who can only make the recommendation after prior consultation with the Assembly. The ombudsman is not a civil servant and cannot be a member of the Assembly or any of the local authorities within his remit. The ombudsman can appoint such staff as necessary, and these staff will not be civil servants. Unlike the position in Scotland, the legislation makes no provision for the appointment of deputies, and this was a deliberate strategy, in order to ensure that there would be a truly integrated office.

Although this was an uncontroversial Bill, there was some concern about the terms of appointment of the ombudsman. Traditionally, ombudsmen in the United Kingdom hold office until they retire at 65, although they can ask to be relieved of office earlier, and can be removed on medical grounds or for misbehaviour. The consultation document had raised the question as to whether there should be fixed-term appointments, with or without the possibility of reappointment. In Scotland, the ombudsman is appointed for five years, with the possibility of reappointment for a further term, and in exceptional circumstances, for a third term. The advantage of fixed-term appointments is that they encourage new approaches and ideas, and can thus more easily reinvigorate the office. The disadvantages are the loss of continuity and experience, and, more importantly, the perception that this may challenge the independence of the office.¹⁵ It was decided that a fixed term was appropriate, and the Bill originally had a fixed term of 10 years. In the debate in the House of Lords, a number of Lords expressed disquiet about this 10-year term. All accepted the need for a fixed term appointment, and most felt that **P.L. 9* there should be no opportunity for reappointment.¹⁶ Although it was felt that the term had to be long enough to attract candidates, the general feeling was that a 10-year term would be “almost a guaranteed job for life”.¹⁷ The Bill was amended to a seven-year fixed term, with no possibility of renewal, an amendment which was well supported.¹⁸

The funding for the new office will be provided by the Assembly,¹⁹ from a budget submitted by the ombudsman to the Assembly Cabinet. This budget will be laid before the Assembly with modifications as appropriate, but the Secretary of State must be consulted if there are to be any modifications. There will thus be a strong incentive to pass the budget, which will help to ensure that the independence of the office is not compromised. The Assembly, besides being the paymaster, is also subject to the ombudsman's remit, and it is therefore important that the arrangements for funding ensure that the actual and perceived independence of the office is not undermined.

Remit

Although there is general acceptance of the need for an integrated ombudsman service, there can be disagreement about the appropriate remit. Traditionally, ombudsmen in the United Kingdom have been confined to examining complaints about maladministration, and have had to steer away from any examination of the merits of decisions. Maladministration has never been defined in legislation, but it has proved to be a highly flexible concept, and the Parliamentary Ombudsman has noted that, “properly interpreted”, it can provide “sufficient flexibility to permit investigation” in appropriate cases.²⁰ The Public Services Ombudsman for Wales conforms to this longestablished model, the remit mainly being a combination of the remits of the three existing offices, that is, complaints alleging maladministration. There has, however, been an expansion of the remit in that the ombudsman can also investigate service failure, and failure to provide a service. There is, however, no power to question the merits of decisions taken without maladministration in the exercise of an authority's discretion.

In the area of health and social care there has also been a change. The existing power of the Health Service Ombudsman allows for an investigation into clinical judgment. The new Act allows the ombudsman not only to investigate complaints about clinical care and treatment in the NHS, but also the exercise of professional judgment in connection with health and social care. The widening of the remit was made as a result of a government amendment **P.L. 10* in the House of Lords. Its rationale is that clinical judgment is too narrow a concept, and that it was inconsistent and illogical for the judgment of doctors can be called into question but not that of social workers or occupational therapists, for example, who may be working on the same case.²¹

The ombudsman also has the remit of investigating complaints about the conduct of local government

members and employees, which was part of the remit of the Local Government Ombudsman for Wales.

The bodies subject to the ombudsman's jurisdiction are the Assembly,²² local authorities, fire and police authorities, various Welsh environmental agencies, health and social care authorities, social landlords, schools and other educational establishments. These bodies are listed in Sch.3 to the Act, and there is power for the Assembly to amend this list if necessary. The ombudsman's remit is specifically Welsh, and complaints cannot be investigated if they relate to the functions of the listed authorities outside Wales. This limitation does not apply to cross-border functions, nor to functions in relation to the Welsh language or any other aspect of Welsh culture, as these are regarded as being discharged in relation to Wales.

In addition to the exclusion in relation to non-Welsh matters, the ombudsman's remit is also subject to the usual exclusions in relation to alternative remedies. Thus, the ombudsman cannot investigate a complaint where there is a right of appeal or review to tribunal; where there is an appeal to a Minister or the Assembly; or where there is a remedy by way of proceedings in court. There is, however, a discretion to deal with these, if it is not reasonable to expect a person to use these remedies. In practice, ombudsmen have been fairly generous in exercising this discretion in favour of complainants. The ombudsman cannot investigate complaints which relate to the investigation or prevention of crime, the security of the state, or the commencement or conduct of court proceedings. Employment matters are excluded from remit, as are rent determinations and school internal matters. All these exclusions are similar, but not identical, to those of the Parliamentary Ombudsman, and are an amalgamation of the existing exclusions.

Procedures and powers

One of the problems with the previous legislation was that it was inflexible and restrictive, and with an emphasis on formal investigations and published reports. The approach adopted in the new Act is more flexible, and recognises that current ombudsman practice is focused on finding resolutions to complaints, and using the most appropriate means to do so. The Act specifically provides for the alternative resolution of complaints, in addition to or instead of conducting an investigation. Investigations are to be conducted in private, but subject to that, it is for the ombudsman to decide on the procedure for investigation, and this can involve different procedures for different types of complaints.

***P.L. 11** Complaints must be made in writing (including electronic means), and must be made within a year of the complainant first having notice of the matters alleged in the complaint. A complaint can also be referred to the ombudsman by an authority. Anyone who has sustained injustice or hardship as a result of maladministration or service failure can make a complaint. Complaints can thus be made by individuals, companies and other corporate bodies. There can be legal or other representation for complainants, at the ombudsman's discretion, and payment can be made to those attending or supplying information, for expenses and loss of time. The ombudsman has discretion whether to begin, continue or discontinue an investigation, and can begin or continue to investigate if the complaint is withdrawn. Before a complaint will be accepted, the authority complained about must have had a reasonable opportunity to investigate and respond to it. If the ombudsman decides not to investigate or to discontinue an investigation, a statement of reasons for this decision has to be sent to the complainant, the authority, and others that the ombudsman thinks appropriate.

Like other ombudsmen, the Welsh ombudsman has statutory powers to enable him or her to carry out investigations and other actions. Thus, there are statutory provisions to compel documents and information to be produced. Enforcement, where necessary, can be dealt with by the High Court. Any information obtained by the ombudsman cannot be disclosed except for the purposes of the investigation process. The legislation also provides for the ombudsman to consult and co-operate with other ombudsmen,²³ if the complaint could be investigated by that other ombudsman, and allows for joint investigations and reporting.²⁴

Remedies

The public sector ombudsmen in the United Kingdom make recommendations of various kinds after an investigation. In some cases this involves compensation,²⁵ but it may also be some other action by the authority to rectify the matter. Their awards are not binding, and cannot be enforced by a court of law. This approach has usually presented no problems, with authorities normally complying with the

ombudsman's recommendations.²⁶ The consultation document was clear that the new ombudsman had no need for greater powers of enforcement, and that to add them would make the ombudsman's investigations "much closer in character to judicial investigations, *P.L. 12 with the problems of more formal processes, additional cost and more defensive attitudes by public bodies".²⁷ Indeed, ombudsmen themselves are reluctant to have compulsory powers, on the basis that this is not necessary and might jeopardise the cooperative relationship they have with the authorities they investigate, making the process more legalistic and defensive.²⁸

This area proved to be a controversial aspect of the legislation. The Act contains the usual powers for the ombudsman to issue reports to interested parties after investigations,²⁹ with a requirement for authorities to publicise them and make copies available for inspection.³⁰ Where there is a finding of injustice or hardship, the authority must consider the report and notify the ombudsman of the action it has taken or will take in response.³¹ There is also an alternative procedure for reporting cases where no injustice or hardship has been found, or where an authority has agreed to implement the ombudsman's recommendations within an agreed time-scale, after a finding of injustice or hardship. In these cases, provided the public interest does not require a published report, the report is sent only to the complainant and the authority, and there is no necessity for the authority to publicise it. This procedure gives statutory recognition to the importance of flexibility for the ombudsman, allowing the investigative process to be used for obtaining resolutions and learning lessons, rather than naming and shaming. Where an authority does not implement the ombudsman's recommendations, a special report can be issued, which can be published by the ombudsman at the authority's expense.³² If the special report relates to the Assembly, it must be laid before the Assembly by the First Secretary, who will move that the Assembly resolve to approve the recommendations.

These powers of reporting and issuing special reports where there is a failure to follow the ombudsman's recommendation are in line with other public sector ombudsman remedies. However, concern was expressed during the report stage of the legislation that this was not sufficient, as the ombudsman had no sanction against a totally recalcitrant authority,³³ and that there must be some way of ensuring that the citizen obtained redress in such circumstances.³⁴ There was thus an amendment, narrowly agreed to against government opposition,³⁵ which allows the ombudsman to apply to the High Court where *P.L. 13 an authority has disregarded the recommendations without lawful excuse.³⁶ It will be interesting to see whether this power makes any difference to the operation of the system in Wales.

Advice and accountability

The previous three ombudsmen schemes provided for the publication of annual reports, to be laid before the National Assembly in the case of the Welsh Administration Ombudsman and the Health Service Ombudsman for Wales, and in the case of the Local Government Ombudsman for Wales, publication took place after consultation with the Welsh Local Government Association. The new system will involve the preparation of an annual report, and any other report deemed necessary, which will be laid before the Assembly. The latter reports will also be sent to the relevant authority.

The consultation document raised the issue about whether there should be some formal mechanisms for advising the ombudsman, similar to the existing general power to obtain advice in order to assist them in their work,³⁷ and also whether the ombudsman should have an advisory board, perhaps with members representing the users of public services, and those with knowledge of specific areas of public administration. Although the legislation provides for the ombudsman to seek advice, there is no provision in the Act for the establishment of an advisory board. This omission accords with the general view among ombudsmen that any such board should be organised on a voluntary, non-statutory basis,³⁸ as there is a danger that such a board could compromise the independence of the office.

Conclusion

The ombudsman system in Wales was in need of review, partly as a result of devolution, where the creation of another ombudsman had focused attention on a system with multiple ombudsmen, causing confusion, duplication and inefficiencies. Combining the schemes addresses these problems, and accords with developments elsewhere in the United Kingdom. Although the new ombudsman in Wales incorporates the features of the three schemes it replaces, there are some important differences. First, the Act makes specific reference to the use of other techniques for resolving complaints, rather than directing them into a formal investigative process. There has also been an extension of the remit beyond maladministration, allowing the ombudsman to investigate allegations

of service failure. In relation to health and social *P.L. 14 care, the remit has been extended beyond clinical judgment to professional judgment. In addition, the ombudsman has been appointed for a nonrenewable fixed term. It is of course too soon to evaluate the new office, but the legislative framework, while not presenting any radical changes, seems to provide for a flexible system which can more easily respond to complaints in an appropriate manner. It remains to be seen, of course, whether pressure will now grow for legislation to integrate the schemes in England.

Mary Seneviratne³⁹

P.L. 2006, Spr, 6-14

1. It will also include the Social Housing Ombudsman for Wales.
2. See M. Seneviratne, " 'Joining up' the Scottish Ombudsmen" (2002) 24 J.S.W.F.L. 89; J. McFadden, "The Public Sector Ombudsman System in Scotland" (2001) *Scottish Constitutional and Administrative Law and Practice* 16. The Scottish Public Services Ombudsman Act 2002 established the office.
3. See *Review of the Public Sector Ombudsmen in England* (2000), a report by the Cabinet Office. For a discussion of the proposal see M. Seneviratne, " 'Joining up' the Ombudsmen--the Review of the Public Sector Ombudsmen in England" [2000] P.L. 582; B. Thompson, "Integrated Ombudsmen: Joined-up to a Point" (2001) 64 M.L.R. 459; D. Lewis and R. James, "Joined-up Justice: review of the public sector ombudsmen in England" (2000) 4 *International Ombudsman Yearbook* 109; M. Elliott, "Asymmetric Devolution and Ombudsman Reform in England" [2006] P.L. 81.
4. Since devolution, the remit of the Parliamentary Ombudsman is confined to complaints about those matters not transferred to the National Assembly for Wales, which include, for example, social security and taxation.
5. This office investigated complaints of maladministration by the National Assembly for Wales and Assembly sponsored public bodies.
6. This office investigated complaints about the provision of services by the National Health Service and associated bodies in Wales.
7. This office investigated complaints of maladministration against local authorities and local government-related bodies, and allegations that members of local authorities in Wales had failed to comply with the authority's code of conduct.
8. The Parliamentary Ombudsman was also the Welsh Administration Ombudsman and Health Service Ombudsman for Wales.
9. *Ombudsmen's Service in Wales: Time for Change?* (Wales Office/Welsh Assembly Government, 2002). For detailed discussions of the proposals see M. Seneviratne, "Time for change for the Ombudsmen in Wales" [2003] P.L. 656-662.
10. This will not include the Parliamentary Ombudsman, who will still have jurisdiction over matters reserved for the Westminster Parliament.
11. See written statements by the Secretary of State for Wales, *Hansard*, HC Vol.401, col.12WS (March 11, 2003), and the First Minister to the Assembly, *ibid*.
12. *A Public Services Ombudsman for Wales: Powers and Jurisdiction* (Wales Office/Welsh Assembly Government, 2003).
13. This was done by means of the Regulatory Reform (Local Commissioners for Wales) Order 2004: Ombudsman Appointment in Wales.
14. The three ombudsmen schemes had a relatively small workload. In 2003-04 there were 629 complaints to the Local Government Ombudsman, together with 183 allegations of breach of the code of conduct, 209 NHS complaints, and 64 Welsh Administration Ombudsman complaints: *Written evidence from the Local Government, Health Service and Welsh Administration Ombudsmen to Welsh Affairs Select Committee* (2004-05 HC 234).
15. Although this really becomes an issue where there is a possibility of reappointment. Fixed terms with no opportunity for renewal are not problematic in this respect.
16. *Hansard*, HL Vol.668, col.GC368 (January 25, 2005), Baroness Gale.
17. *ibid* , col.GC368, Lord Roberts of Conwy.

18. *ibid.* , col.GC371, Lord Roberts of Conwy.
19. In the previous system, funding for the Welsh Assembly Ombudsman and the Health Service Ombudsman came directly from a grant from the Assembly, and from a top slice of the local government budget for the Local Government Ombudsman.
20. See written evidence from the Parliamentary Ombudsman, at www.ombudsman.org.uk.
21. See *Hansard*, HL Vol.668, cols GC395-396 (January 25, 2005) Lord Evans of Temple Guiting.
22. The ombudsman is essentially investigating administrative functions, and thus, although the Assembly is within the remit, the ombudsman cannot investigate its legislative or judicial functions.
23. These are the Parliamentary Ombudsman, the Health Service Ombudsman for England, the Local Ombudsmen for England, the Scottish Public Services Ombudsman, a housing ombudsman, and the Children's Commissioner for Wales.
24. There can be no joint reporting with the Scottish Public Services Ombudsman.
25. Public Services Ombudsman (Wales) Act 2005, s.34 makes clear that authorities can make ex gratia payments, by providing that an authority can make payment or provide other benefit to an aggrieved person, and that it does not matter whether the ombudsman has investigated or not, or whether the case is discontinued, or an investigation is not completed, or a complaint is not upheld.
26. Indeed, there has been "no occasion in recent history when it has proved necessary to issue a special, further report". See evidence from Adam Peat (2004-05 HC 234), Q.112.
27. *A Public Services Ombudsman for Wales: Powers and Jurisdiction* (Wales Office/Welsh Assembly Government, 2003), para.33.
28. See evidence from Ann Abraham (2004-05 HC 234), Q.164. Also that of Adam Peat, *ibid.* , Q.112.
29. These can be published, if the ombudsman considers it appropriate and in the public interest to do so. Reports are not to disclose identities of individuals, unless appropriate and in the public interest, but the name of the authority can be disclosed.
30. If this is not done the authority can be fined, as it is a summary offence to wilfully obstruct an inspection.
31. This notification has to be done within a month.
32. This power replicates the powers of the Local Government Ombudsman. In fact, there has never been a special report issued in Wales.
33. *Hansard*, HL Vol.668, col.GC406 (January 25, 2005) Lord Roberts of Conwy.
34. *ibid.* , col.GC408, Lord Livsey of Talgarth.
35. It was 91 votes for and 86 against the amendment.
36. The procedure is for the ombudsman to issue a certificate to the High Court, which would consider the appropriate action to take.
37. e.g. the Health Service Ombudsman for Wales can appoint expert clinicians to advise on the clinical aspects of complaints.
38. The Scottish Public Services Ombudsman does not have such a board. The Parliamentary Ombudsman does have a small advisory board, but it is non-statutory, and has no role in casework, advising purely on governance and strategy. The ombudsman himself did not want a statutory board. See evidence (2004-05 HC 234), Q.129, Q.144-146.
39. Professor of Law, Nottingham Law School, Nottingham Trent University.

