

## Report to Standards Committee – 7 May 2015

### Consultation on Extension of Powers of Ombudsman

A rather unusual form of consultation was undertaken at short notice by the Assembly Finance Committee. The initial correspondence and the response from the PSOW are attached.

I submitted a response which is set out below. I have not heard any more except for an acknowledgement from the Finance Committee.

Please see the following joint response of the Brecon Beacons and Pembrokeshire Coast National Park Authorities to the consultation on an inquiry into the consideration of powers of the Public Services Ombudsman for Wales.

#### Consultation Questions

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

#### Reply

1.1 In general terms, the Act works well, but I do have concerns that the increase in the extent and workload of the Ombudsman has not been met with a commensurate increase in funding and that in order to ensure that the very high quality work that is currently undertaken in such a broad jurisdiction can be maintained in the future

#### 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.**

2.1 As was set out in the Ombudsman's evidence to the Finance Committee there is a case made out for this. I considered it to be appropriate, as it is clearly accepted practice in many countries in Europe and beyond and so I support the view of the Ombudsman being able to extend the area of his investigations into associated or related bodies, as these emerge during the course of an investigation. There will need to be serious thought given to the drafting of appropriate safeguards and caution will need to be exercised to avoid the potential for duplication of work by other statutory bodies such as the Wales Audit Office.

**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?**

### **Reply**

3.1 Yes, please see below. There needs to be clear safeguards to avoid duplication.

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

### **Reply**

4.1 In dealing firstly with the proposed financial costs I do not consider these to be excessive when bearing in mind the nature of the investigations that are likely to be undertaken. As I have already referred to in the reply above, there will need to be clear safeguards and caution exercised with regard to potential duplication. I believe these can be overcome with clear protocols and guidance given both to the Ombudsman and other relevant public bodies. This should be a matter of concise, drafting and clear boundaries being established and agreed. This should not be insurmountable.

### **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.**

### **Reply**

5.1 There is a difference between complaints from those who are unable to read and write in either English or Welsh, where the Ombudsman should be able to accept complaints orally, in contrast to those who can but simply do not choose to put their complaint to the Ombudsman in writing. It should not be too difficult to establish a procedure whereby any oral complaint, which is made by a person who may have literacy challenges, is properly and accurately set out.

5.2 A simple template could be used and complaints could also be received in electronic form quite easily.

5.3 I believe it is important that the body that is the subject of the complaint should know exactly what the complaint is about so it can deal with it in an appropriate fashion as

promptly as possible. The danger with all complaints being made orally, is that there can be confusion at the outset as to what exactly the complaint is about.

Provided that the oral complaints and the electronic recording of the complaints received can be managed effectively, I do not see any reason why the current system should not be adapted to the receipt of oral and other forms of electronic media complaints. What is the important issue, is that the complaint is clear so all parties concerned know what it is.

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

**Reply**

6.1 Email, text messages and website form should all be acceptable.

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

**Reply**

7.1 As it is envisaged that there will be no cost implications. I have no comment.

**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.**

**Reply**

8.1 As is clear from the evidence from the Ombudsman, considerable progress has been made with regard to establishing a consistent standard for public service providers across Wales with regard to complaints. I agree with his analysis that the problem lies with the enforcement and that is why the Scottish Ombudsman's arrangement which is tried and tested, should be adopted in Wales.

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

**Reply**

9.1 The financial costs seem relatively modest to ensure that all the citizens across Wales receive the same sort of treatment when making complaints and public bodies. There is clearly both an educational role and the regulatory role which has been recognised the fact that into the costs. This is to be supported.

**Ombudsman's jurisdiction**

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

### **Reply**

10.1 Clearly, after 10 years, it is appropriate for a review to be taken place and some current anomalies and "wrinkles" ironed out. In the current jurisdiction, it has become apparent that there are one or two gaps which need to be plugged. But in the widest analysis the current jurisdiction appears to be covering most the relevant areas, that can be covered within the limited budget available. Health and housing are key components, when looked at from a Welsh demographic.

**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?**

### **Reply**

11.1 This is beyond the remit of the National Park Authorities at present, so any comment is passed in relation to the general concept of "Well-being" which is in its widest sense, part of the remit for the inhabitants, and users of the National Parks. This extension is to be welcomed and should be supported for the reasons given by the Ombudsman in his evidence to the Committee.

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.)

### **Reply**

12.1 I do not think it should be the subject of a levy or a charge upon any individual who makes a complaint. If it transpires that the complaint is well founded then consideration may be given to how the costs of the enquiry can be recovered from the private healthcare company or provider concerned. This is a principle that is often adopted in the case of the enforcement of environmental breaches by regulatory authorities against organisations and individuals whose conduct has led to a significant investigation having to be undertaken by a public body, when it is established that they have been at fault. Much more thought will need to be given as to the detail of this however, the principle should be supported.

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

### **Reply**

13.1 The financial provisions for this somewhat sparse and again will require much greater thought has been provided at the moment.

## **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? (i.e this would give complainants the opportunity to decide which route is most appropriate for them.)**

### **Reply**

14.1 Notwithstanding the views of the Law Commission, I believe there are significant legal hurdles would have to be overcome for this to be effective.

14.2 I believe is a significant issue with regard to the Welsh Government's own competence in this area, which only need to be resolved before the matter can be taken any further.

14.3 If it is decided to take this matter further, then again further consideration will need to be given to this proposal, as there are quite clearly different procedures which are used in courts from those used by the Ombudsman, specifically in relation to evidence, the right to cross-examine witnesses and disclosure of relevant documents to all parties. This does not appear to have been as well thought out on a practical level as other aspects of this consultation.

14.4 As presently drafted the proposal does not seem to show any real evidence to support it, other than a reliance on the Law Commission's view. The adoption of such a proposal would also need detailed rules, protocols and in all probability a Practice Direction to be adopted by the Civil Procedure Rules Committee of the Ministry of Justice before any implementation. There is no evidence that any consideration has been given to this. There is also little evidence to support the view that there is an actual prejudice that has become clear and obvious to parties, as things stand now.

14.5 There is no evidence the Courts would accept the premise that a shadow body will be dealing with the same case, under different procedures.

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

### **Reply**

15.1 This may be useful in a limited number of cases and could be relatively easily introduced. I believe. The number of cases is likely to be small and would not require a major jurisdictional change, unlike the broader earlier proposal.

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

### **Reply**

16.1 From drawing on my experience as a practising lawyer for 40 years, and sitting as a part-time judge deals with legal costs cases ( amongst others), in my opinion this is likely to be a significant underestimate and reflects probably the costs that would be incurred in perhaps just one case per year. The scheme should be very carefully costed out, based upon analysis from the Supreme Court, Costs Office as to the average running cost of cases heard in the Administrative Court. No such evidence has been provided.

16.2 With regard to this particular proposal. I consider that much greater care, thought and evidence is required before it is adopted.

### **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?**

#### **Reply**

17.1 Not personally

**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?**

#### **Reply**

18.1 None come readily to mind, who are not already on it.

**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?**

#### **Reply**

19.1 Two years should be sufficient period

**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?**

#### **Reply**

20.1 The principal problem that I foresee is that the proposed removal of the statutory bar which prevents the Ombudsman, from considering a complaint with the case could or has been considered by the courts, needs far greater consideration. This will require far more detailed evidence to be submitted, as to the need for a change in practical terms, the cost and resolving what appears to be significant jurisdictional matters. This could ultimately lead to expensive and somewhat pointless litigation , this could be avoided by not hastily incorporating this provision into legislation.

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

**Reply**

21.1 The number of complaints that have been resolved, the confidence of citizen's in a system that is integrated and able resolve complex interrelated complaint involving a number of different public bodies. There is also a potential for cost saving in avoiding duplicate enquiries and investigations, particularly in the health field.

**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;**

**Reply**

22.1 This will depend upon what changes are actually implemented. But in general, great care should be avoided in proliferating organisations and bodies which may duplicate the role of the Ombudsman.

- 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;

**Reply**

**22.2 The public bodies concerned do need to have the right to challenge any findings made by the Ombudsman, although in practice, there does seem any appetite for this. Nevertheless, there may be such cases which do arise in the future and that does need for there to be a safeguard or check and balance in place, and so it should be retained .To remove this is effectively removing any right of appeal and the perception of being both judge and jury. It should nevertheless, be reviewed so that any challenge or decision to reject any findings ,by the public body concerned , has to be made on clearly set out guidelines, which have been drafted after widespread consultation.**

- 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;

**Reply**

22.3 Yes. The reputation of the Ombudsman has been built up very carefully and appears to generally enjoy weightlifting support from both complainants and public bodies. This

should be no scope for confusion in the minds of citizens, and accordingly the protection of the title is essential.

- 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 procedure exists and has been adopted by 22 local authorities, variance exists in practice.

### **Reply**

22.4 The retention by the Ombudsman of Code of Conduct complaints, in my experience too, plays an important part in the credibility of the scheme.

I do recognise that it may be beneficial for the future to ensure that fewer complaints remain actually with the Ombudsman and more can be referred back to the Monitoring Officers for investigation and disposal through the relevant Standards Committees.

22.5 The introduction of the local resolution procedure in the two National Park Authorities which I am concerned , has been a beneficial development, although neither has actually been called upon to do anything. I am satisfied that Members are aware now, that the complaints of the type that used to be quite common will now be dealt with more locally, more quickly and more robustly .I am satisfied that some in the past were politically motivated and created a real danger of bringing the system into disrepute.

### **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?**

#### **Reply**

23.1 None at the moment

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

#### **Reply**

24.1 I would like to see the rules for the Adjudication Panel revisited so that it can be able to discharge its duties, without some of the limitations that exist upon it at the moment. In particular, is a danger I believe that this body is being over used by lawyers in a way that was not envisaged at its inception and that its original purposes have become inextricably entwined with overly complicated legal submissions and disproportionate legal costs causing a real prejudice to the Ombudsman in particular. The costs limitation is one step towards restoring a level playing field but more needs to be done.

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