

John Griffiths AM
Chair, Equality, Local Government and Communities
Committee

X March 2018

Dear John,

PUBLIC SERVICES OMBUDSMAN (WALES) BILL

I would like to thank the Equality, Local Government and Communities Committee (ELGC) for its consideration of the Public Services Ombudsman (Wales) Bill and your Stage 1 report on the general principles of the Bill. I welcome the opportunity to respond and I have attached a full response to each of the recommendations as an Annexe to this letter.

I am very pleased your first recommendation is to agree the general principles of the Bill. Of the 19 recommendations in this report, I am pleased to be able to accept 18 of them.

I have written separately to the Constitutional and Legislative Affairs Committee setting out my response to its recommendation.

I hope the attached information helps to inform the ELGC Committee's further scrutiny should the Bill progress to Stage 2. I look forward to working with Committee members on the legislation in the future.

I am copying this letter to the chair of the Constitutional and Legislative Affairs Committee.

Yours sincerely



Simon Thomas AM

Chair

Croesewir gohebiaeth yn Gymraeg neu Saesneg / We welcome correspondence in Welsh or English.



Public Services Ombudsman (Wales) Bill – Stage 1
Equality, Local Government and Communities Committee Report
Recommendations

Recommendation 1

We recommend that the Assembly agrees to the general principles of the Bill.

I am grateful to the National Assembly Committees and those who have contributed to the robust scrutiny of the Bill to date. I am pleased the ELGC Committee has been able to recommend the general principles are agreed.

Recommendation 2

We recommend that the Member in Charge brings forward amendments at Stage 2 to place a requirement on the Ombudsman to consult with regulators before embarking on an own initiative investigation.

I accept this recommendation. The recommendation refers to a requirement for the Ombudsman to consult with regulators before embarking on an own initiative investigation. While I accept this recommendation, I would wish to go further and require the Ombudsman to consult “such persons the Ombudsman considers appropriate, including commissioners and regulators in Wales”.

Recommendation 3

We recommend that the Member in Charge brings forward amendments at Stage 2 so that section 8(9) places a requirement on the Ombudsman to maintain a register of all complaints received, not just oral complaints.

I accept this recommendation. I note that Welsh Government also raised comments in this area, which can be addressed at the same time.

Recommendation 4

We recommend that the Ombudsman reflects on the evidence we have received in relation to operational matters about the making and referral of complaints and takes this into account when developing guidance on making complaints. Areas we believe this should cover includes:

- Verification of oral complaints
- Signposting to relevant advocacy services; and
- Minimising the cost of making a complaint.

I note that this recommendation has been made to the Ombudsman. However, I agree with the principle and given that it reflects good practice, would ask the Ombudsman to reflect the Committee’s recommendation when developing guidance on making complaints.

Recommendation 5

We recommend that the Member in Charge brings forward amendments at Stage 2 to ensure that due allowance is made for existing non-statutory guidance in relation to complaints-handling procedures.

I accept this recommendation. I will make it clear that the model complaints-handling procedures set by the Ombudsman will not over-ride any guidance such as “Putting Things Right – Raising a concern about the NHS in Wales”.

Recommendation 6

We recommend that the Member in Charge brings forward amendments at Stage 2 to strengthen the Welsh language duties and responsibilities.

I accept this recommendation. During evidence to the Committee on 25 January 2018, I agreed that the obligations around the Ombudsman’s Welsh language strategy (section 71 of the Bill) could be strengthened. I will, in consultation with others such as the Welsh Language Commissioner, consider how best be this could achieved.

Recommendation 7

We recommend that the Member in Charge considers the evidence we have received in relation to section 68 and seeks to find a balance between protection against leaking of draft reports, and protection for the Auditor General for Wales so that they will not be discouraged from engaging with the Ombudsman.

I accept this recommendation. Section 68 should be amended to take account of the full range of the Auditor General for Wales’s functions.

Recommendation 8

We recommend that the Member in Charge brings forward amendments at Stage 2 to provide protection to the Auditor General for Wales from defamation claims when working jointly with the Ombudsman.

I accept this recommendation. Section 70 should be amended to ensure the Auditor General for Wales is protected from defamation claims when working with the Ombudsman.

Recommendation 9

We recommend that the Member in Charge considers bringing forward amendments at Stage 2 to take into account the issues raised in relation to the audit provisions within Schedule 1 by the Auditor General for Wales.

I accept the principle of this recommendation. The Auditor General for Wales suggested changes to paragraph 17 of Schedule 1, to: (1) reflect best practice around requiring the Auditor General to be satisfied as to whether the Ombudsman has made arrangements for securing economy, efficiency and effectiveness, and (2) to remove the 4 month deadline for the Auditor General to lay a certified copy of the Ombudsman's accounts before the Assembly.

I accept the first suggested change. The Auditor General raised the issue of the consistency in audit legislation in his [letter to the Finance Committee dated 6 October 2017](#) to which I responded on [7 November 2017](#). I note that the issue is not unique to the audit arrangements for the Ombudsman and recognise that there are inconsistencies in the statutory audit deadline across many public sector bodies. I will consider how best to address this issue and will reflect the outcome during Stage 2.

Recommendation 10

We recommend that the Member in Charge publishes a revised Explanatory Memorandum and Regulatory Impact Assessment before Stage 2 taking account of the Committee's recommendations.

I reject this amendment. I do not feel it would be appropriate to revise the Explanatory Memorandum prior to Stage 2 proceedings. The Standing Orders of the Assembly provides a mechanism for revising the Explanatory Memorandum after Stage 2 proceedings (SO 26.27) which has become standard practice.

Should the Bill proceed, I will publish a revised Explanatory Memorandum after Stage 2 which takes account of any amendments that have been made to the Bill. However, I am willing to consider whether more robust evidence is now available and to assess whether changes are needed to cost estimates in light of it. I will provide the Committee with written updates as this work progresses.

Recommendation 11

We recommend that the Member in Charge undertakes further analysis and updates the RIA with more details in relation to which sectors and listed authorities are most likely to bear the burden of costs associated with the Bill.

I accept this recommendation. The Explanatory Memorandum notes that it is not possible to predict in respect of which public bodies the Ombudsman's future caseload will relate. As such, it is not possible to say, with reasonable certainty, on which public bodies the costs will fall. However, the Explanatory Memorandum could be expanded to include analysis of the Ombudsman's caseload over, say, the last five years. This would give an indication of which parts of the public sector costs may fall.

In giving evidence on [10 October 2017](#) to the Finance Committee in respect of his Estimate 2018-19, the Ombudsman noted changes in the pattern of complaints. For

example, the Ombudsman set out the changes in the number of complaints within one sector, the NHS in Wales. This is noted in the [Finance Committee's Report, Scrutiny of Public Services Ombudsman for Wales's Estimate 2018-19](#).

Therefore, such an analysis would need to be accompanied by narrative to explain the related uncertainties, which would be significant.

Recommendation 12

We recommend that the Member in Charge reconsiders the levels of costs for new staff and recurring staff costs are reconsidered in the RIA.

I accept this recommendation. I note the Expert Adviser's view that the estimates of some **direct** non-salary costs appear too high and may have been overstated, with specific reference to:

- transition (or 'one off') costs for which the estimate is £5,000 for each new member of staff;
- professional fees for which the estimate of cost is £5,000 per annum for each new member of staff for the powers to conduct own initiative investigations and complaints handling procedures (a total of four new members of staff); and
- other office costs for which the estimate is £5,000 per annum for each new member of staff. Such costs are expected to be incurred for all new powers under the Bill excepting that to investigate private health services in a public/private health service pathway for which additional staff are not required.

Any changes would reduce rather than increase the overall costs of the Bill. During evidence on [25 January 2018](#), I confirmed that the estimate of costs had been based on evidence from the Ombudsman.

At the request of the ELGC Committee, I set out, in a letter dated [8 February 2018](#), responses to the Expert Adviser's Report. The letter included information about the basis for the estimates of non-salary staff costs and other costs. It noted, in particular, that the estimate of recurrent other office costs of £5,000 per year for each new member of staff reflected less than 40 per cent of the Ombudsman's current unit costs (£13,000 per annum for each member of staff).

While acknowledging that the figures in the RIA reflect evidence from the Ombudsman and the costs incurred by his office, I will reconsider the levels of the estimates. I will assess whether there is sufficient and appropriate evidence to suggest that the estimates should be revised, amending the RIA as and when appropriate.

Recommendation 13

We recommend that the Member in Charge updates the RIA to provide greater clarity on the possible unit costs for own initiative investigations.

I accept this recommendation. The Stage 1 Report states that "we are broadly reassured by the costs of the own initiative proposal. However, we believe that the RIA would be strengthened if greater clarity was provided on the possible range of costs for own initiative investigations". It refers to evidence from the Cabinet

Secretary for Finance, who gave figures on the cost of an own initiative investigation, stating that the cost was between £9,100 and £13,700.

During evidence to the ELGC Committee on 25 January 2018, I confirmed that the figures quoted by the Cabinet Secretary were not included in the RIA and were slightly misleading. This was because, the figures appear to have been derived from dividing the annual ongoing **direct** cost (£137,000 for year 1) by the estimate of the number of own initiative investigations (10 or 15).

While the number of own initiative investigations has been used to derive the estimate of **indirect** costs, it has not been adopted in the same way to calculate the likely costs borne by the Ombudsman's office.

I will reflect on the presentation of information in the RIA in light of the Committee's recommendation.

Recommendation 14

We recommend that the Member in Charge undertakes a sensitivity analysis based on 40% of complaints to the Ombudsman being received orally, and presents information on the financial impact that changing the percentage of complaints received orally will have on the costs associated with this part of the Bill.

I accept this recommendation. The RIA estimates that 10 per cent of complainants will want their complaint taken over the telephone. This reflects the experience of the Ombudsman's office.

Under the Public Services Ombudsman (Wales) Act 2005 (the 2005 Act), the Ombudsman has discretion to accept oral complaints as being duly made. As noted in the Explanatory Memorandum, not all oral complaints will result in an additional workload for the Ombudsman since a proportion of oral complaints would have been received under the 2005 Act. For example, a proportion of complaints that would have been received in writing under the 2005 Act are likely to switch, as a result of the Bill, to being submitted orally.

That said, I am happy to consider including, in the RIA, sensitivity analysis based on 40 per cent of complaints being made orally.

Recommendation 15

We recommend that the Member in Charge presents further information in the RIA to justify the additional staff costs resulting from the power to accept oral complaints.

I accept this recommendation. The Stage 1 Report notes that the Expert Adviser suggested that the justification of direct costs for the power to accept oral complaints is not sufficient.

The RIA reflects the cost of the Ombudsman employing an additional member of staff and upgrading an existing post.

I will reflect on the RIA in light of the Committee's recommendation and the views of the Expert Adviser.

Recommendation 16

We recommend that the Member in Charge undertake sensitivity analysis around an overall increase in all complaints of 10% and 20%. (not just oral complaints).

I accept this recommendation. The Stage 1 Report notes evidence from the Expert Adviser and stakeholders that suggested uncertainty in respect of the number of complaints that would give rise to additional costs for public bodies (i.e. the cost of the 25 additional complaints).

In deriving the cost, the RIA assumes that the number of additional complaints will remain constant over the five years.

Since the recommendation appears to be made in this context, the recommendation has been interpreted to mean that the RIA should be amended to reflect annual increases of 10 per cent and 20 per cent in the number of additional complaints.

I agree that the number of additional complaints should reflect the projected growth in the Ombudsman's overall caseload. The RIA will be amended accordingly.

Recommendation 17

We recommend that the Member in Charge seeks to provide more detail in the RIA of the cost to the private sector, this should be done in consultation with ISCAS and private sector providers.

I accept this recommendation. The RIA does not include an estimate of the likely cost to the private sector. The Independent Complaints Adjudication Services (ISCAS) gave evidence to the ELGC Committee on 13 December 2017.

As noted in my letter to the ELGC Committee dated 8 February 2018 it is my understanding that ISCAS reports the cost of adjudication and clinical experts. However, under the arrangements proposed in the Bill, these costs would not fall on private healthcare providers (other than in the exceptional circumstances set out in the Bill where providers have obstructed the work of the Ombudsman) where there is a complaint to the Ombudsman involving both public and privately commissioned healthcare. The cost to the private healthcare provider under the proposals in the Bill would be those arising from providing records, details of their investigation and their findings to the Ombudsman. It is my understanding that ISCAS does not report the costs to private healthcare providers of providing information to ISCAS and cooperating with the ISCAS investigation/adjudication.

I will consult ISCAS to ascertain if there is sufficient, appropriate and reliable evidence on which to base estimates. However, as noted in the RIA, ISCAS does not cover all private healthcare providers. Therefore I will also consult with the Welsh Independent Healthcare Association in this regard.

Recommendation 18

We recommend that the Member in Charge revises the Explanatory Memorandum to include the statement from the Auditor General for Wales on charges to the Welsh Consolidated Fund.

I accept this recommendation. The Auditor General for Wales set out this view in his letter to the Finance Committee dated 6 October 2017 to which I responded on 7 November 2017.

I agree to include the Auditor General for Wales's statement in the revised Explanatory Memorandum at the end of Stage 2.

Recommendation 19

We recommend that the Member in Charge revises the Regulatory Impact Assessment to ensure it adheres to the guidance in the HM Treasury Green Book.

I accept this recommendation. The Stage 1 Report refers to the presentation of costs in real terms and constant prices. It also notes the assumption that staff costs will increase by 1 per cent is not consistent with the Green Book given the current rate of inflation.

During evidence to the Committee on 25 January 2018, I noted that amending the RIA to omit the annual salary uplifts would not result in a significant change to the cost estimates. The total impact has been quantified as between £30,148 and £32,245. I will revise the RIA accordingly.