



WALES OFFICE

**Memorandum to
Welsh Affairs Committee
Post – Legislative Assessment of
Public Services Ombudsman (Wales)
Act 2005**



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*Presented to The House of Commons by the Secretary of State
for Wales by Command of Her Majesty
February 2010*

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MEMORANDUM TO THE WELSH AFFAIRS SELECT COMMITTEE

Post-legislative Assessment of the Public Services Ombudsman (Wales) Act 2005

Introduction

1. This Memorandum has been prepared by the Wales Office and Welsh Assembly Government for submission to the Welsh Affairs Select Committee and will be published as part of the post-legislative scrutiny process set out in Cm 7320.

Summary

2. The Public Services Ombudsman (Wales) Act 2005 received Royal Assent on 7 April 2005. The Act established the Public Services Ombudsman for Wales (PSOW) as a unified public sector ombudsman service in Wales bringing together the functions and powers of the Welsh Administration Ombudsman, the Health Service Commissioner for Wales, the Commission for Local Administration in Wales and the Social Housing Ombudsman for Wales. The new Ombudsman was established to investigate allegations of maladministration and service failure on the part of public bodies and of misconduct on the part of members of local authorities. The Act made provision about the Ombudsman's office and powers of investigation (including the authorities and complaints which may be investigated, and matters relating to the Ombudsman's reports and guidance), and abolished the offices whose functions the Ombudsman assumed.

Objectives of the Public Services Ombudsman (Wales) Act 2005 ("the Act")

3. The Act gives effect to the Welsh Assembly Government's policy to develop a unified Ombudsman service covering devolved public service providers in Wales, as an important element of its commitment to driving up standards of public-sector service delivery in Wales. As set out in a consultation document in 2002, 'Ombudsmen's Services in Wales: Time for Change?' the creation of this joined-up complaints system would:

- Make the ombudsman service in Wales more accessible to members of the public. Members of the public were either not aware of the ombudsman service in the first instance or had to distinguish and choose between the existing ombudsmen in deciding to whom they should make their complaint.
- Enable the PSOW to develop a comprehensive and coherent system for investigating complaints across a wide range of public bodies so that complaints are dealt with in accordance with a common set of principles regardless of the type of public body concerned but maintaining flexibility where required.
- Require the PSOW to produce an annual report to the National Assembly for Wales on the discharge of his functions.

Implementation

4. The *Public Services Ombudsman (Wales) Act 2005 (Commencement No. 1 and Transitional Provisions and Savings) Order 2005* commenced the majority of the provisions of the Act from 12 October 2005 and 1 April 2006.

5. The provisions commenced in the first phase (12 October 2005) were those necessary to enable the National Assembly for Wales and the Public Services Ombudsman for Wales to prepare for implementation of the Act on 1 April 2006. See Section 4 on “Secondary Legislation” for further details of subordinate legislation implementing the Act.

6. Two provisions not brought into force were Section 20 and Paragraph 15(5) to Schedule 1. Section 20 provides that if the Ombudsman is satisfied that a listed authority has wilfully disregarded his report without lawful excuse he may issue a certificate to that effect to the High Court. The Ombudsmen currently operating in Great Britain, including the predecessors to the Public Services Ombudsman for Wales, do not have powers to enforce decisions through the Courts.

7. Paragraph 15(5) to Schedule 1 was not brought into force because it would have the effect of making the financial year 2005-06 the first financial year of the Public Service Ombudsman for Wales’ Office for the purpose of providing financial estimates, when in fact the first financial year should be the same as the first year that the new Ombudsman’s office was actually operational which was 2006-07.

8. There have been a number of changes to the Act since Royal Assent. For example, various provisions of the Act were amended by the Government of Wales Act 2006 (GOWA) to reflect the new constitutional arrangements put in place by that Act, in particular the formal separation of the Welsh Assembly Government from the National Assembly for Wales. As a result of these amendments, the National Assembly for Wales as established by GOWA is responsible for nominating to Her Majesty the person to be appointed by her as the PSOW but all powers to make subordinate legislation in the Act were transferred to and vested in the Welsh Ministers.

9. In addition, the list of bodies subject to investigation by the PSOW (which may be amended by order by the Welsh Ministers) has been amended by various pieces of legislation, to reflect the abolition of certain bodies (e.g. the Welsh Development Agency) and add some newly created bodies (e.g. the Committee on Climate Change).

10. Section 25 (Consultation and co-operation with other ombudsmen) was supplemented by the insertion of sections 25A&B by the Commissioner for Older People (Wales) Act 2006 which enable the PSOW to undertake joint working with the Commissioner for Older People.

Secondary Legislation and Guidance

11. All powers to make secondary legislation under the Act rest with the Welsh Ministers, subject to Assembly rather than Parliamentary procedure.

12. The following consequential and transitional secondary legislation has been made under the Act (the full details of which are available at Annex A):–

The Public Services Ombudsman (Wales) Act 2005 (Commencement No.1 and Transitional Provisions and Savings Order) 2005 S.I. 2005/2800

This Order was made by the former National Assembly for Wales on 11 October 2005, in exercise of powers under sections 40, 43(1)(b), 44(1) and 44(2) of the Act. It brought into force the provisions of the Act, except for section 20 and paragraph 15(5) of Schedule 1.

The Public Services Ombudsman (Wales) Act 2005 (Transitional Provisions and Consequential Amendments) Order 2006 (S.I. 2006/362)

This Order was made by the former National Assembly for Wales on 14 February 2006, in exercise of powers under sections 43(1) and (2) and 44(1) of the Act. It came into force on 1 April 2006.

The Public Services Ombudsman for Wales (Jurisdiction and Transitional Provisions and Savings) Order 2006 (S.I. 2006/363)

This Order was made by the former National Assembly for Wales on 14 February 2006, in exercise of powers under sections 10(2), 28(2)(a), 41(1) and (3), 43(1) (b) and 44(2)(b) of the Act. It came into force on 1 April 2006.

The Public Services Ombudsman (Wales) Act 2005 (Consequential Amendments to the Local Government Pension Scheme Regulations 1997 and Transitional Provisions) Order 2006 (S.I. 2006/1011)

This Order was made by the former National Assembly for Wales on 31 March 2006, in exercise of powers under section 43(1) of the Act. It came into force on 31 March 2006.

Section 31 of the Act, gives the Public Service Ombudsman for Wales the power to issue guidance to all bodies within his jurisdiction on the requirements of good administrative practice.

Using this power three sets of guidance have been issued as outlined in Section 16.

Legal Issues

13. The Wales Office and the Welsh Assembly Government are not aware of any [unresolved] legal issues which have arisen publicly, either in courts or elsewhere, in connection with the implementation or operation of the Public Services Ombudsman (Wales) Act 2005.

Other Reviews

14. The Wales Office and the Welsh Assembly Government are not aware of any other post-legislative reviews or assessments of the Public Services Ombudsman (Wales) Act 2005. Paragraph 14 (3) of Schedule 1 to the 2005 Act requires the PSOW to lay an annual report before the Assembly on the performance of his or her functions. Standing Order 7.61(vii) of the Assembly's Standing Orders requires that time be set aside in each Assembly year for members to debate the report.

Preliminary Assessment of the Act

15. The first annual report on the unified service was laid before the National Assembly for Wales on 26 June 2007. The Ombudsman reported that the inaugural year of the new service had gone smoothly. He reported that the number of complaints made to the Ombudsman had risen – 10% up on the combined total of complaints made to the previous four ombudsmen offices in 2005/06. It was believed that this increase was as a result of a higher profile for the Ombudsman's office than had previously been the case, rather than a deterioration in the performance of public bodies.

16. Subsequent annual reports (for 2007/08 and 2008/09) on the unified service have been laid before the National Assembly for Wales. These have both reported a continued rise in the number of complaints received and again it is believed that the upward trend in complaints received is due to increased awareness of the existence of the Ombudsman among members of the public rather than any deterioration in public services.

17. The Ombudsman contributed to the development of complementary sets of guidance – the Principles of Good Administration, the Principles for Remedy and the Principles of Good Complaint Handling. The Ombudsman published the first two Principles as statutory guidance under section 31 of the Act and they have been a beneficial reminder to public authorities within jurisdiction of what is expected of them in the execution of their administrative duties.

**Wales Office
February 2010**

DETAILS OF SUBORDINATE LEGISLATION MADE UNDER THE PUBLIC SERVICE OMBUDSMAN (WALES) ACT 2005

The Public Services Ombudsman (Wales) Act 2005 (Commencement No.1 and Transitional Provisions and Savings Order) 2005 S.I. 2005/2800

Article 3 and Part 1 of Schedule 1 to this Order brought into force on 12 October 2005 various provisions of the Act for the purpose of appointing the Public Services Ombudsman for Wales (“the Ombudsman”), including the provisions relating to persons who are to be disqualified from holding the office of the Ombudsman.

Those provisions also brought into force on 12 October 2005 various powers (vested in the former National Assembly for Wales (“the Assembly”)) to make orders and regulations relating to the functions of the Ombudsman under Part 2 of the Act.

Article 3 and Part 2 of Schedule 1 brought into force on 12 October 2005 the provisions of the Act that remove the duties on the Welsh Administration Ombudsman and the Health Service Commissioner for Wales to prepare and submit to the Assembly Cabinet estimates of the income and expenditure of each office for the financial year ending 31 March 2007.

Those provisions also brought into force on 12 October 2005 the provisions of the Act that remove the duty on the Commission for Local Administration in Wales to prepare and submit to the Assembly an estimate of the expenses that it will incur for the financial year ending 31 March 2007. Although paragraph 7(1) of Schedule 4 to the Local Government Act 1974 requires that the Commission for Local Administration in Wales submit its estimate to the Secretary of State, article 2(a) of and Schedule 1 to the National Assembly for Wales (Transfer of Functions) Order 1999 (SI 1999 No 672) has effect so that the Commission must submit the estimate to the Assembly instead.

Schedule 4 amends Part 3 of the Local Government Act 2000 (“the 2000 Act”) which relates to the conduct of local government members and employees. In this respect Schedule 4 makes the necessary amendments to bring Part 3 of the 2000 Act fully into accord with the Act. Essentially, when Schedule 4 came fully into force, functions of the Commission for Local Administration in Wales (“the Commission”) and those of the Local Commissioner in Wales (“the Commissioner”) under Part 3 of the 2000 Act became functions of the Ombudsman.

Broadly speaking, in relation to relevant authorities in England (as defined in the 2000 Act) and police authorities in Wales the powers in Part 3 of the 2000 Act to make orders and regulations relating to such bodies are vested in the Secretary of State. As regards relevant authorities in Wales (other than police authorities in Wales) those powers are vested in the Assembly. The powers to make orders and regulations relating to the functions of the Commission and the Commissioner under Part 3 of the 2000 Act are vested in the Assembly.

Articles 4(1) and (2) of this Order brought into force, on 12 October 2005, those provisions of Schedule 4 which amend the powers in Part 3 of the 2000 Act to make orders and regulations (as the case may be) in connection with the conduct of members and employees of relevant authorities (within the meaning of Part 3 of the 2000 Act) bringing those provisions, where necessary, fully into accord with the Act.

Until section 35 and Schedule 4 came fully into force on 1 April 2006 the Ombudsman had no functions under Part 3 of the 2000 Act. However, articles 4(1) and (2) of this Order enabled orders and regulations to be made in preparation for the Ombudsman taking over, on 1 April 2006, the functions of the Commission and the Commissioner under that Part of that Act.

Until section 35 and Schedule 4 came fully into force on 1 April 2006, the Commission and the Commissioner continued to have functions under that Part of that Act. Therefore, article 4(3) of this Order provides that the provisions of Part 3 of the 2000 Act that would otherwise be affected by the amendments made by the provisions of the Act brought into force by article 4(1) and (2) of this Order continue to have effect (as if they had not been so amended) for the purpose of making orders and regulations relating to the ongoing functions of the Commission and the Commissioner under Part 3 of the 2000 Act.

Article 5(1) brought the remaining provisions of the Act (except section 20 and paragraph 15(5) of Schedule 1) into force on 1 April 2006.

Article 5(2) and Schedule 2 to this Order contain saving provisions. These provisions relate to the accounts and resources of the Welsh Administration Ombudsman, the Health Service Commissioner for Wales and the Social Housing Ombudsman for Wales. When this Order was made, each of those offices were held by the same person.

The effect of these provisions is that, for the financial year ending 31 March 2006, the requirements in relation to those offices to prepare accounts and to have those accounts audited etc continued to apply. Insofar as those provisions continued to apply, the Ombudsman was regarded as the accounting officer in relation to each of those offices for the purposes of, for example, signing the accounts.

Article 6 of this Order makes provision in relation to any complaint that is duly made or referred to the Ombudsman about a matter which relates to events that occurred before 1 April 2006 and events that occurred after that date. Section 38 (undetermined complaints) only applied where the action complained of took place before 1 April 2006. Where a complaint related to action that occurred on or after that date the provisions of Part 2 will apply to that complaint.

For the purposes of article 6 the Ombudsman was not prevented from investigating a matter only because the matter related to events that occurred before 1 April 2006 (article 6(3)).

However, for the purposes of article 6 the Ombudsman could investigate such a matter insofar as it related to events that occurred before that date only if certain conditions were met (article 6(2)). Those conditions were that:

- (a) the complaint must otherwise have been duly made or duly referred to the Ombudsman, and
- (b) the complaint in respect of the events that occurred before 1 April 2006 could (but for the other provisions of the Act) have been, but had not been, made to the Welsh Administration Ombudsman, the Local Commissioner for Wales, the Health Service Commissioner for Wales or the Social Housing Ombudsman for Wales (“the existing Welsh ombudsmen”).

For example, if, after 1 April 2006, a body was added to Schedule 3 (listed authorities) by Assembly order under section 28(2) but it was not a body that, prior to that date, was within the jurisdiction of one of the existing Welsh ombudsmen then article 6 would not apply. Article 6 only applied where the matter spanned 1 April 2006 and where the body concerned was, after that date, within the jurisdiction of the Ombudsman and before that date within the jurisdiction of one of the existing Welsh ombudsmen.

Article 7 of this Order made transitional provision requiring the Ombudsman to prepare and submit to the Assembly Cabinet an estimate of the income and expenses of that office for the financial year ending 31 March 2007.

The Ombudsman had to submit that estimate to the Assembly Cabinet no later than one month before the beginning of that financial year. The Assembly Cabinet had to consider that estimate and then lay it before the Assembly with such modifications as it thought appropriate. However, if the Assembly Cabinet proposed to lay that estimate before the Assembly with modifications, the Assembly Cabinet had first to consult the Secretary of State.

The Public Services Ombudsman (Wales) Act 2005 (Transitional Provisions and Consequential Amendments) Order 2006 (S.I. 2006/362)

This Order revoked three statutory instruments and amended others in consequence of the Act. This Order also made transitional provisions in respect of the functions of the Local Commissioner in Wales under Part III of the Local Government Act 2000 (c 22).

The amendments and revocations made by this Order were consequential upon the changes brought about by the Act.

The Public Services Ombudsman for Wales (Jurisdiction and Transitional Provisions and Savings) Order 2006 (S.I. 2006/363)

Section 10(2) of the Act enables the Welsh Ministers (but formerly the National Assembly for Wales constituted under the Government of Wales Act 1998) by order, to amend Schedule 2 to the Act (excluded matters) by adding, removing or changing an entry in that Schedule. Schedule 2 sets out various matters that, by

virtue of section 10(1), the Ombudsman is not entitled to investigate. Section 10(3) provides that before making an order under section 10(2) the Welsh Ministers (but formerly the National Assembly for Wales constituted under the Government of Wales Act 1998) must consult the Ombudsman.

Article 2 substitutes a new paragraph 8 of Schedule 2 in consequence of the coming into force of the Inquiries Act 2005 (c 12). Section 49 of and Schedule 3 to the Inquiries Act 2005 repeal section 84 of the National Health Service Act 1977 (c 49). The substitution made by article 2(a) of this Order makes the necessary consequential changes to Schedule 2. Article 2(b) omits paragraph 10 of Schedule 2. Section 4 of the Act sets out who can complain to the Ombudsman. The effect of section 4(2) is that a listed authority acting in its capacity as such cannot make a complaint to the Ombudsman. It is, therefore, considered that paragraph 10 of Schedule 2 is otiose.

Article 3 amends Schedule 3 (listed authorities) by adding reference to the Board of Community Health Councils in Wales as a listed authority, so as to bring it within the Ombudsman's remit.

Section 41(3) provides that the Assembly may, by order, amend the definition of "family health service provider in Wales" (see section 41(1)). Section 41(4) provides that before the Assembly makes such an order it must consult such persons as it thinks appropriate.

Articles 4 to 7 bring the definition of "family health service provider in Wales" more closely into line with the definition in section 2A(2) of the Health Service Commissioners Act 1993 (c 46).

Section 41(1) provides, amongst other things, that in the Act a "relevant tribunal" means a tribunal (including a tribunal consisting of only one person) specified by order made by the Assembly.

Article 8 provides that a valuation tribunal in Wales is a relevant tribunal for the purpose of the Act. It also makes transitional provision (in article 8(2)) in respect of action taken by administrative staff of valuation tribunals in Wales before 15 February 2006 in respect of appeals initiated and disposed of by that date. On that date the Valuation Tribunals (Wales) Regulations 2005 (SI 2005/3364) come fully into force. Those regulations abolish the former valuation tribunals and replace them with new ones.

The Public Services Ombudsman (Wales) Act 2005 (Consequential Amendments to the Local Government Pension Scheme Regulations 1997 and Transitional Provisions) Order 2006 (S.I. 2006/1011)

This Order amends regulation 4(6) of the Local Government Pension Scheme Regulations 1997 (SI 1997/1612) ("the Regulations") by making the Ombudsman a resolution body for the purposes of regulation 4 of the Regulations.

If the Ombudsman makes a resolution under regulation 4(5) of the Regulations, the effect of this Order is that any person for the time being specified in that resolution is not entitled to membership of the Principal Civil Service Pension Scheme unless the circumstances specified in paragraphs (2) and (3) of article 3 apply.

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