

PUBLIC SERVICES OMBUDSMAN (WALES) ACT 2005

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Schedule 2: Excluded Matters

38. This Schedule makes provision as to matters that are excluded from the Ombudsman's jurisdiction. Under section 10(2), the Assembly may by order, add, remove or amend an entry appearing for the time being in this Schedule.

Section 11: Decisions taken without maladministration

39. **Section 11(1)** provides that the Ombudsman cannot question the merits of any decision taken by a listed authority in the exercise of any discretion if that decision was taken without maladministration. Consequently, provided that there is no delay, bias, neglect, turpitude etc. in relation to the decision (including where the decision relates to alleged service failure), the Ombudsman is not entitled to question that decision. So, where a listed authority has, without maladministration, reached a policy decision in which it has weighed up all relevant matters (including, for example, resources), the Ombudsman is not entitled to question that decision.

40. However, by virtue of section 11(2), section 11(1) does not apply to the extent that a decision is taken in consequence of the exercise of professional judgement which appears to the Ombudsman to be exercisable in connection with the provision of:

- (a) health care, or
- (b) social care.

This is intended to cover decisions taken in consequence of the exercise of clinical judgement (to reproduce the effect of section 3(7) of the Health Service Commissioners Act 1993). However, since section 11(2) refers to decisions taken in consequence of the exercise of professional judgement which appears to the Ombudsman to be exercisable in connection with the provision of either health or social care, it is wider than section 3(7) of the 1993 Act, so extending the remit of the Ombudsman.

Decisions not to investigate etc.

Section 12: Decisions not to investigate or to discontinue investigation

41. **Section 12(1)** provides that the Ombudsman must prepare a statement of reasons in relation to any decision by him/her not to begin or to discontinue an investigation. This includes the situation where, under section 3, the Ombudsman has resolved a complaint and therefore decided not to undertake an investigation. Under section 12(2), the Ombudsman must send a copy of that statement to:

- a) the person who made the complaint to him/her; and

- b) the listed authority to which the complaint relates.
42. Under section 12(3), the Ombudsman may send a copy of the statement to any other person.
43. The Ombudsman may publish such a statement if the requirements of section 12(4) are met. The Ombudsman may only publish such a statement if he/she considers that it is in the public interest to do so. In reaching his/her view, the Ombudsman must take account of the interests of the person aggrieved and any other persons he/she thinks appropriate.
44. **Section 12(7) and (8)** provides that when the Ombudsman prepares a statement that:
- a) names any person (other than the listed authority concerned); or
 - b) includes anything which, in the opinion of the Ombudsman, is likely to identify any person and which, in the opinion of the Ombudsman, can be omitted from the statement without impairing its effectiveness,
- the Ombudsman may only include such information in the version of the statement that he/she is required or empowered to send or which he/she publishes if it is in the public interest to include such a name or identifying particulars. In reaching his/her view, the Ombudsman must have regard to the interests of the person aggrieved and any other persons he/she thinks appropriate.
45. In the case of the version of the statement that the Ombudsman is required to send, under section 12(2), to the person who made the complaint and the listed authority, it is not anticipated that it would be difficult for the Ombudsman to show that it is in the public interest to include such information. This is because, in such cases, there is likely to be a strong public interest in those parties knowing the names and identities of persons that the Ombudsman considers it necessary to refer to in the statement. Indeed, in many cases such a statement is likely to name or identify only the person aggrieved, the listed authority that took the action which is the subject of the complaint, and those of its employees who are relevant (e.g. if the employee of the listed authority took the action complained of).

Investigation procedure and evidence

Section 13: Investigation procedure

46. **Section 13(3)** provides that, subject to the requirements in subsections (1) and (2) of that section, it is for the Ombudsman to decide the procedure for conducting an investigation. The Ombudsman could, for example, establish different procedures for different types of complaints and he/she could, in any particular case, depart from any such established procedures if he/she considered it appropriate.
47. **Section 13(4)(a)** makes it clear that the Ombudsman may make such inquiries as he/she thinks appropriate. **Section 13(4)(b)** provides that it is for the Ombudsman to decide whether a person may be legally represented or be represented in some other way (e.g. by an independent advocate).
48. **Section 13(5)** empowers the Ombudsman to make payments towards the expenses of persons assisting him/her in an investigation, provided that they are properly incurred, and to pay certain allowances. It is for the Ombudsman to determine whether it is appropriate to make such payments or to impose any conditions on such payments.
49. **Section 13(6)** puts beyond doubt that the fact that the Ombudsman is investigating a matter does not affect the validity of any action taken by the listed authority in relation to the matter under investigation. Nor is any power or duty of the authority to take further action with respect to that matter affected.

Section 14: Information, documents and evidence

50. The Ombudsman has wide powers to require the production of information or documents in relation to an investigation (section 14(1) and (2)) and to require certain persons to provide him/her with any facilities he/she may reasonably require (section 14(3)). The latter provision may be needed, for example, if the Ombudsman were to require the use of certain computer hardware or software to view documents or information provided.
51. The Ombudsman has the same powers as the High Court in relation, amongst other things, to the taking of evidence from witnesses (section 14(2)).
52. [Section 14\(4\)](#) provides protection for those from whom the Ombudsman may require evidence or the production of information or documents. Such a person cannot be required by the Ombudsman to give any evidence or produce any documents which that person could not be compelled to give or produce before the High Court.
53. [Section 14\(5\)](#) prevents information from being withheld by the Crown on the ground that it is subject to an obligation to keep it secret or a restriction on its disclosure.
54. The effect of section 14(6) is that, in relation to the Ombudsman's power to require evidence or the production of information or documents, the Crown cannot rely on either its special privileges or immunities to defeat the Ombudsman's right of access to such information or on the protection that would otherwise be afforded by section 14(4).

Section 15: Obstruction and contempt

55. [Section 15\(1\)](#) and (2) enable the Ombudsman to certify to the High Court that, in his/her opinion, a person has without lawful excuse obstructed him/her (or a member of his/her staff etc.) in the discharge of his/her functions under Part 2 or that the person has acted in a way that, if the act was done in relation to High Court proceedings, would amount to a contempt of court.
56. The Ombudsman cannot issue such a certificate if the alleged obstruction or contempt arises merely because the person concerned has taken some further action in respect of the matter under investigation (see section 15(3) and section 13(6)).
57. If the Ombudsman issues such a certificate then the High Court may inquire into the matter and if the High Court finds that the person concerned has obstructed the Ombudsman, the High Court may deal with the person as if he/she had committed contempt in relation to the High Court (section 15(5)).

Reports of investigations

Section 16: Reports of Investigations

58. [Section 16\(1\)](#) provides that after conducting an investigation the Ombudsman must, unless he/she decides to report under the alternative procedure set out under section 21, prepare a report on his/her findings and send a copy of that report to the persons specified in section 16(2).
59. In relation to a person who is a family health service provider in Wales or independent provider in Wales the Ombudsman is required to send his/her report to the provider (as the listed authority) and to those persons with whom the provider has contracted, undertaken or arranged to provide the services that are the subject of the complaint. The Ombudsman is not required to send a copy of the report to every person with whom that provider has (or had) contracted, undertaken or arranged to provide any services (section 16(2)(d) and (e)).
60. The Ombudsman may publish his/her report if the requirements of section 16(4) are met. The Ombudsman may only publish such a report if he/she considers that it is in the

public interest to do so. In reaching his/her view, the Ombudsman must have regard to the interests of the person aggrieved and any other persons he/she thinks appropriate.

61. **Section 16(7) and (8)** provides that when the Ombudsman prepares a report that:
- a) names any person (other than the listed authority concerned); or
 - b) includes anything which, in the opinion of the Ombudsman, is likely to identify any person and which, in the opinion of the Ombudsman, can be omitted from the report without impairing its effectiveness,

the Ombudsman may only include such information in the version of the report that he/she is required or empowered to send, or which he/she publishes, if it is in the public interest to include such a name or identifying particulars. In reaching his view, the Ombudsman must have regard to the interests of the person aggrieved and any other persons he/she thinks appropriate.

62. In the case of the version of the report that he/she is required to send, under section 16(1) (b), to the person who made the complaint and the listed authority etc., it is not anticipated that it would be difficult for the Ombudsman to show that it is in the public interest to include such information. This is because, in such cases, there is likely to be a strong public interest in those parties knowing the names and identities of persons that the Ombudsman considers it necessary to refer to in his report. Indeed, in many cases such a report is likely to name or identify only the person aggrieved, the listed authority that took the action which is the subject of the complaint and those of its employees that are relevant (e.g. because it is the employee who took the action that is the subject of the complaint).

Section 17: Publicising reports

63. **Section 17(1) to (4)** requires listed authorities that receive a copy of a report under section 16(1)(b) to make specified arrangements for publicising such reports. The listed authority is required, within specified time-scales, to make copies of the report available at one or more of its offices and via its website (if any). Members of the public have a right, free of charge, to inspect, make copies of and view the report via the authority's website (if applicable). The right to take copies would include downloading an electronic copy via the authority's website. Members of the public also have the right to require the listed authority to supply copies of the report, for which the authority can charge a reasonable sum. It is an offence for any person wilfully to obstruct a member of the public in the exercise of these rights (section 17(7) and (8)).
64. The Ombudsman may, after taking account of the public interest and the interests of the person aggrieved and any other persons he/she thinks appropriate, direct that the publicity requirements are not to apply in relation to a particular report (section 17(9) and (10)). The Ombudsman also has the power to give directions with regard to the discharge by listed authorities of their functions under section 17 (section 17(5) and (6)).

Section 18: Publicising reports: health care providers

65. **Section 18** makes provision for the application of section 17 with modifications in relation to persons who are listed authorities by virtue of being family health service providers in Wales or independent providers in Wales. The effect of the modifications is that it is the person with whom the provider contracted or made arrangements (or to whom he/she undertook) to provide the relevant services on whom the publicity requirements fall, rather than on the listed authority (i.e. the family health service provider or independent provider).

Section 19: Action following receipt of a report

66. **Section 19** provides that if, following an investigation, the Ombudsman reports (under section 16) that the person aggrieved has sustained injustice or hardship as a

consequence of the action investigated, the listed authority concerned is required to consider the Ombudsman's report and notify him/her of the action that it has taken or proposes to take in response and also of the time within which it will take any action that it proposes to take. The listed authority must make the notification within one month starting on the day that it receives the report or such longer period as the Ombudsman in his/her discretion specifies.

Section 20: Non-action following receipt of a report

67. If the Ombudsman is satisfied that the listed authority has wilfully disregarded his/her report without lawful excuse, the Ombudsman may, under section 20(1), issue a certificate to that effect to the High Court.

Section 21: Reports: alternative procedure

68. The full reporting procedure under sections 16 to 19 does not apply if the Ombudsman decides to report under the alternative procedure set out in section 21.
69. If, after an investigation, the Ombudsman concludes that the person aggrieved:
- a) has not sustained injustice or hardship as a consequence of the action investigated; or
 - b) has sustained such injustice or hardship and the listed authority concerned agrees within the permitted period (as defined in section 21(3)) to implement the Ombudsman's recommendations,
- then the Ombudsman may decide to report under the alternative procedure under section 21 but only if he/she is satisfied that the public interest does not require him/her to report under the full reporting procedure set out in sections 16 to 19.
70. A report under the alternative procedure in this section is subject to the same restrictions with respect to naming or identifying individuals as a report under section 16 (section 21(9) and (10)).

Special reports

Section 22: Special reports

71. Under section 22, the Ombudsman may issue a special report if the listed authority has failed to take the steps required in response to a report made under section 16 (full reports), a report made under section 21 (alternative procedure reports) or following a resolution of the complaint under section 3. For example, a listed authority may fail to notify the Ombudsman, within one month of receiving a section 16 report, of the action that it has taken or proposes to take in response to the report. In such cases, the Ombudsman may issue a special report (section 22(2)(a)). The Ombudsman may also, for example, issue a special report if a listed authority has given the notification under section 19 within the time-scale set out there but the Ombudsman is not satisfied:
- a) with the action taken or proposed by the listed authority; or
 - b) with the period within which the listed authority has stated that it will take that action; or
 - c) that the listed authority has taken the action that it stated that it would take within the specified period.
72. The Ombudsman may make whatever recommendations he thinks appropriate in a special report with respect to the action he/she thinks should be taken to remedy the injustice or hardship suffered by the person aggrieved and to prevent similar injustice or hardship being caused again (section 22(8)(b)).

73. **Section 22(9)** sets out to whom the Ombudsman is required to send a copy of a special report. The requirement depends on whether the original report was a full report under section 16, a report made under section 21 (alternative procedure reports) or a statement made following a resolution of the complaint under section 3.

Section 23: Special reports: supplementary

74. **Section 23** makes further provision with regard to special reports. In particular, a special report is subject to the same restrictions with respect of naming or identifying individuals as a report under section 16 (section 23(4) and (5)) and section 23(7) applies sections 17 and 18 (requirements as to publicising reports) to special reports.

Section 24: Special reports relating to the Assembly

75. A special report relating to a complaint against the Assembly must be laid before the Assembly by the First Minister and, unless action to the satisfaction of the Ombudsman has been taken or proposed, then the First Minister must give the Assembly notice of his intention to table a motion asking the Assembly to approve the Ombudsman's recommendations as contained in the special report. The First Minister is able to delegate this function to, for example, another Assembly Minister, under section 62(5) GOWA.
76. **Section 24(3)** requires that the Assembly's standing orders must include provision for any such motion to be moved as soon as reasonably practicable except in cases where action to the satisfaction of the Ombudsman is taken or proposed.

Consultation and co-operation

Section 25: Consultation and co-operation with other ombudsmen

77. **Section 25(1) and (2)** requires the Ombudsman to consult another specified ombudsman whenever he/she thinks that a complaint is about a matter that could be the subject of investigation by that other ombudsman. The other ombudsmen that the Ombudsman is required to consult are specified in section 25(7). There is power for the Assembly, by order, to amend this list of specified ombudsmen (section 25(8) and (9)).
78. Where the Ombudsman is required to consult with another ombudsman on a matter, he/she may also co-operate with that other ombudsman on that matter (section 25(3)). The consultation and co-operation may extend to anything relating to the matter. Examples of matters on which there may be consultation and co-operation are set out in section 25(4), namely:
- a) how an investigation into the complaint should be conducted;
 - b) the form, content and publication of a report following an investigation.
79. **Section 25(5) and (6)** provides that, where such consultation takes place, the Ombudsman and any of the specified ombudsmen (other than the Scottish Public Services Ombudsman) can conduct joint investigations and publish joint reports.
80. In cases of consultation on a complaint, the Ombudsman will be able to use his/her supplementary powers in paragraph 21 of Schedule 1 to the Act to forward a copy of the complaint to the other ombudsman. Furthermore, the Ombudsman could use those supplementary powers to inform the person who has made the complaint how he or she can make a complaint to the other ombudsman.

Disclosure

Section 26: Disclosure of information

81. **Section 26(1)** provides that information obtained in relation to or in connection with complaints about a listed authority is to be kept confidential except in limited circumstances.
82. **Section 26(2)** provides for the exceptions where such information may be disclosed, namely:
- a) for the purposes of deciding whether to investigate a complaint; for the purposes of an investigation; for the purposes of resolving a complaint and for the purposes of reporting on an investigation;
 - b) for the purposes of consulting, co-operating, working and reporting jointly with other ombudsmen in accordance with section 25;
 - c) for the purposes of certain proceedings or for inquiries with a view to taking certain proceedings;
 - d) where the Ombudsman considers it is in the public interest, for the purposes of protection from or avoiding or minimising etc. any threat to the health or safety of any person or persons;
 - e) in the case of information within section 26(3) to (5) to the Information Commissioner.
83. **Section 26(6)** provides that neither the Ombudsman nor a member of his/her staff or other person acting on his/her behalf or assisting him/her can be required in any proceedings (except proceedings specified in section 26(2)) to disclose information coming to his knowledge in deciding whether to investigate a complaint; during an investigation of a complaint; in resolving a complaint; or in consulting, co-operating, working or reporting jointly on a complaint with another ombudsman.

Section 27: Disclosure prejudicial to the safety of the State or contrary to the public interest

84. **Section 27(1)** provides that a Minister of the Crown may give notice to the Ombudsman that disclosure of any document or information or class of document or information specified in the notice would, in the opinion of the Minister, be prejudicial to the safety of the State or otherwise contrary to the public interest.
85. Where such a notice is given this Act neither authorises or requires the Ombudsman, a member of his/her staff or any other person acting on his/her behalf or assisting him/her, to disclose such specified information.
86. Where the Ombudsman or a member of his/her staff etc. is obliged by virtue of some other legal requirement to disclose the information then nothing in this section prevents that person from complying with that obligation.

Section 28: Listed Authorities

87. This section introduces Schedule 3, which lists the persons (in the Act referred to as "listed authorities") who are liable to investigation by the Ombudsman. In the main, the listed authorities set out in Schedule 3 are subject to investigation by one or other of the existing Welsh ombudsmen.
88. **Section 28(2)** gives the Assembly power, by order, to amend Schedule 3 by adding or removing listed authorities or changing their entries. Before doing so the Assembly must consult the Ombudsman and any other persons it thinks appropriate (section 28(4)). **Section 28(3)** provides that an order adding a person to Schedule 3 as a

*These notes refer to the Public Services Ombudsman (Wales)
Act 2005 (c.10) which received Royal Assent on 7 April 2005*

listed authority may apply the Act to that person with modifications. The power to make an order under this section is subject to certain restrictions set out in sections 29 and 30.

89. An order under section 28(2) is to be made by statutory instrument (see section 44(1)) and is Assembly general subordinate legislation (section 44(3)). Consequently, such an order will be subject to the Assembly's subordinate legislation procedures.