

# **PUBLIC SERVICES OMBUDSMAN (WALES) ACT 2019**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These explanatory notes relate to the Public Services Ombudsman (Wales) Act 2019 which was passed by the National Assembly for Wales on 20 March 2019 and received Royal Assent on 22 May 2019. They have been prepared by the Welsh Government on behalf of Llyr Gruffydd AM, the Member in Charge of the Act, to assist the reader of the Act; they do not form part of the Act.
2. These explanatory notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require any explanation or comment, none is given.

### **PART 1**

#### **Section 1 - Overview**

3. This section sets out a basic overview of the Act.

### **PART 2**

#### **Section 2 - The Public Services Ombudsman for Wales**

4. This section provides for the continuation of the office of the Ombudsman. This section also introduces Schedule 1.

### **Schedule 1**

5. Generally, the Schedule makes provision with regard to the office of the Ombudsman, including the Ombudsman's power to appoint staff and expert advisers and to delegate functions; requirements in relation to annual and extraordinary reports and estimates of the income and expenditure of the Ombudsman's office and accounts, audit and value for money examinations into the use of the resources of the Ombudsman's office.
6. Paragraphs 1 to 3 make provision as to the appointment, status and term of office of the Ombudsman.
7. Paragraph 4 makes provision for the appointment of an acting Ombudsman where the office of the Ombudsman becomes vacant. Sub-paragraph (7) provides that, generally, an acting Ombudsman is to be regarded as the Ombudsman during the period for which the acting Ombudsman holds office. Consequently, an acting Ombudsman is able, for example, to exercise the Ombudsman's full range of powers with regard to the obtaining of information, evidence and the production of documents under sections 18, 19 and 20.

8. Paragraph 5 requires the Assembly to decide the terms that apply to the appointment of the Ombudsman or an acting Ombudsman.
9. Paragraphs 6, 7, 8 and 9 make provision with regard to:
  - a) the persons who are disqualified from being the Ombudsman (or acting Ombudsman),
  - b) the offices etc. which the Ombudsman (or acting Ombudsman) is disqualified from holding whilst in office, and
  - c) the offices etc. which a person who has ceased to be the Ombudsman (or acting Ombudsman) is disqualified from holding for the period of three years from the time at which that person ceased to hold office, unless the Assembly approves otherwise.
10. In addition, the Ombudsman is disqualified from being a member of the Assembly by section 16 of the Government of Wales Act 2006
11. Paragraph 10 makes provision with regard to the remuneration of the Ombudsman (or acting Ombudsman as the case may be).
12. Paragraph 11 requires any sums which the Ombudsman must pay as a result of a breach of duty to be charged on the Welsh Consolidated Fund. It also enables the Ombudsman to retain certain fees and costs that would otherwise have to be paid into the Welsh Consolidated Fund. (For further provision about the Welsh Consolidated Fund, see Part 5 of the Government of Wales Act 2006.)
13. Paragraph 121 makes provision for the Ombudsman to appoint such staff on such terms and conditions as the Ombudsman considers necessary. Members of the Ombudsman's staff are not civil servants.
14. Paragraph 132 enables the Ombudsman to obtain such advice (whether on payment or not) as the Ombudsman considers appropriate to assist in the discharge of the Ombudsman's functions.
15. Paragraph 143 provides that the Ombudsman may authorise any person to discharge the Ombudsman's functions on behalf of the Ombudsman. However, the Ombudsman cannot make arrangements, under this Act or otherwise, with the Welsh Ministers, the First Minister or the Counsel General for the exercise by one of the other's functions or for the provision of certain specified services by one to the other.
16. Paragraph 154 makes provision for annual and extraordinary reports by the Ombudsman.
17. Paragraph 165 makes provision so that in each financial year the Ombudsman must prepare an estimate of the income and expenses of the Ombudsman's office which must then be considered by the appropriate Assembly committee. The committee must then lay the estimate, with or without modifications, before the Assembly.

18. Paragraphs 17, 18, 19 and 20 make provision with regard to the accounts that the Ombudsman is required to keep, the audit of those accounts by the Auditor General for Wales, the accounting officer arrangements for the Ombudsman's office, and examinations by the Auditor General for Wales in relation to the economy, efficiency and effectiveness with which the Ombudsman has used the resources of the Ombudsman's office.
19. Paragraph 21 provides the Ombudsman with powers to do things that are supplementary to the carrying out of the Ombudsman's functions. For example, it gives the Ombudsman power to do things like lease offices and vehicles in order to facilitate the discharge of the Ombudsman's functions.
20. Paragraph 22 clarifies that the person who is the Ombudsman the day before this Act is passed continues to be the Ombudsman after this Act is passed (and that there is no break in the 7 year term of appointment).

### **PART 3**

#### **Section 3 - Power to investigate complaints**

21. By virtue of section 3(1) the Ombudsman may investigate a complaint relating to a matter if:
  - a) the complaint has been duly made or referred to the Ombudsman, and
  - b) the Ombudsman is entitled to investigate that matter.
22. Sections 11 to 16 set out the matters that the Ombudsman is entitled to investigate.
23. Section 3(2) sets out the requirements which must be met in order for a complaint to be duly made to the Ombudsman. Section 3(3) sets out the requirements which must be met in order for a complaint to be duly referred to the Ombudsman.
24. Section 3(4) enables the Ombudsman to investigate a complaint, even if those requirements have not been met, as long as it is a matter the Ombudsman is entitled to investigate under sections 11 to 16 and the Ombudsman considers it reasonable to do so.
25. Section 3(5) and (6) provide the Ombudsman with a wide discretion as to whether to begin, continue or discontinue an investigation.
26. Section 3(7) makes it clear that the Ombudsman may begin or continue an investigation even if the complaint has been withdrawn. This covers the situation, for example, where a complaint has been made in relation to a listed authority's action which affects more than one person but where the complaint that has been withdrawn was put forward as the 'lead' complaint. In such cases, where the 'lead' complaint has been withdrawn, it will be open to the Ombudsman to begin or to continue an investigation as the Ombudsman sees fit (subject to the restriction in section 8(5)(a)).

#### **Section 4 - Power to investigate on own initiative**

27. This power allows the Ombudsman to investigate a matter whether the Ombudsman has received a complaint or not, so it allows the Ombudsman to initiate an investigation.
28. This has a significant effect on the interpretation of the Act – when the word “investigation” is used in Part 3, it can mean either an investigation under section 3 or an investigation under section 4. For example, section 19 applies “in relation to an investigation conducted under this Part”. Therefore, section 19 applies in relation to an investigation of a complaint under section 3 and an own initiative investigation under section 4.
29. Like the power under section 3, the power in section 4 can only be used to investigate matters the Ombudsman is entitled to investigate under Part 3. Sections 11 to 16 set out the matters which may be investigated.
30. Section 4(2) sets out requirements that must be met before the Ombudsman can begin an own initiative investigation. The requirements are:
  - a) the Ombudsman must have regard to whether it is in the public interest to begin an own initiative investigation;
  - b) the Ombudsman must have a reasonable suspicion that there is systemic maladministration or a reasonable suspicion that systemic injustice has been sustained as a result of the exercise of professional judgement in connection with the provision of health or social care;
  - c) the Ombudsman must consult such persons the Ombudsman thinks appropriate; and
  - d) the Ombudsman must have regard to the own initiative criteria published under section 5.

#### **Section 5 - Criteria for own initiative investigations**

31. The Ombudsman must publish the criteria that be used by the Ombudsman when deciding whether to carry out an own initiative investigation.
32. Before publishing the criteria, the Ombudsman must lay a draft of the criteria before the Assembly. The draft criteria will be subject to a negative resolution procedure. This means that the Assembly has 40 days to object to the criteria. If the Assembly does not object within those 40 days, the Ombudsman must publish the criteria in the form of the draft laid before the Assembly. If the Assembly resolves not to approve the draft criteria, the Ombudsman must not publish the criteria in the form of the draft, but the Ombudsman may instead lay new draft criteria before the Assembly.
33. Once the criteria have been published the Ombudsman can revise and republish the criteria. But if a revision makes any material changes to the criteria, then the draft revision must be laid before the Assembly and negative resolution procedure will apply to the revision as it applied to the initial criteria

34. The Welsh Ministers may make regulations to amend the criteria published by the Ombudsman. Such regulations follow an affirmative resolution procedure. This means the regulations must be approved by the Assembly – if the Assembly does not approve the regulations then they do not take effect. But if the Assembly does approve the regulations, the Ombudsman must republish the criteria to reflect the changes made by the regulations.
35. Both the Ombudsman and the Welsh Ministers must consult before proposing criteria (or proposing material changes to criteria) under this section.

### **Section 6 - Alternative resolution of matters**

36. This section provides the Ombudsman with a wide power to take steps to resolve matters without proceeding to a formal investigation. The power is available to the Ombudsman to use instead of, or in addition to, the power to investigate.

### **Section 7 - Who can complain**

37. Section 7 lists the categories of persons who are entitled to make a complaint to the Ombudsman. Those persons are:
  - a) a member of the public who claims, or has claimed to have sustained injustice or hardship in consequence of the matters the Ombudsman is entitled to investigate under Part 3. This person is described as the person aggrieved,
  - b) a person authorised, in writing, by the person aggrieved to make the complaint on their behalf, or
  - c) where the person aggrieved cannot give such authorisation, a person the Ombudsman considers appropriate on behalf of the person aggrieved.
38. It is not only individuals who can complain to the Ombudsman. The term “person” has a wider meaning (see Schedule 1 to the Interpretation Act 1978). So, for example, companies or other corporate bodies could complain to the Ombudsman on behalf of a member of the public
39. Listed authorities acting in their capacity as listed authorities cannot complain to the Ombudsman (section 7(2)).
40. However, this does not prevent someone who is, for example, an employee of a listed authority from making a complaint, provided the person is making the complaint in their personal capacity.
41. Listed authorities are listed in Schedule 3.
42. It is for the Ombudsman to determine whether a person is entitled to make a complaint.

### **Section 8 - Requirements: complaints made to the Ombudsman**

43. If a person wishes to make a complaint to the Ombudsman, the complaint must satisfy the requirements of section 8(1) (though the Ombudsman has discretion under section 3(4) to investigate matters where these requirements are not met).

44. Section 8(1) provides that a complaint must be in a form specified by the Ombudsman and contain the information specified by the Ombudsman in order to meet the requirements of section 3(2)(b). The complaint must also be made within 1 year of date when the person aggrieved first had notice of the matter which is the subject of the complaint. The form and content will be specified in guidance published by the Ombudsman. Therefore, persons who wish to make a complaint should read that guidance in order to help them make the complaint. Whether a complaint meets the requirements of section 8(1) is determined by the Ombudsman.
45. Section 8(4) provides for circumstances where a complaint is made other than in writing (for example, a complaint made orally or in British Sign Language). Subsections (4) to (7) set out additional requirements for a complaint made other than in writing. This includes explaining to the person what it means for a complaint to be duly made (i.e. that when a complaint is duly made, it could lead to the Ombudsman beginning an investigation), and checking with the person whether they wish the complaint to continue to be one that is duly made. If the person does not wish the complaint to be treated as one that is duly made the Ombudsman cannot begin a section 3 investigation into the matter (but if the Ombudsman has already begun an investigation into the matter and the person subsequently withdraws the oral complaint, the Ombudsman has discretion as to whether to continue the investigation).
46. Where a person has confirmed that they do not wish a complaint to continue to be treated as duly made the Ombudsman can nonetheless investigate the matter under the own initiative power in section 4 provided that the requirements of that section are met.

### **Section 9 - Requirements: complaints referred to the Ombudsman**

47. This section sets out the requirements that must be met in order for a complaint to be duly referred within the meaning of section 3(3)(b). It provides that a listed authority can refer a complaint to the Ombudsman but only if it was made to the listed authority by a person who would have been entitled to make that complaint directly to the Ombudsman in accordance with section 7.
48. The complaint must have been made to the authority within a year from the day that the person aggrieved first became aware of the matter complained of. The referral by the listed authority to the Ombudsman must be made before the end of one year beginning on the day on which the complaint was made to the listed authority.
49. In addition, the referral must be in whatever form, and contain whatever information, the Ombudsman specifies in guidance published under section 9(2). Therefore, listed authorities who wish to refer a complaint should read that guidance in order to help them refer a complaint.
50. Under section 3(4) the Ombudsman has discretion to accept a referral even if either (or both) of the time limits are not met, or the referral is not in the required form or the referral does not contain the required information.

## **Section 10 - Records of complaints**

51. Section 10 requires the Ombudsman to keep a register of all complaints made or referred to the Ombudsman that the Ombudsman is entitled to investigate under Part 3.
52. This register will include all written complaints (including complaints made in electronic form) and all complaints made other than in writing (including those made orally).

## **Section 11 - Matters which may be investigated**

53. Section 11(1) provides that the Ombudsman is entitled (subject to sections 12 to 15) to investigate:
  - a) alleged maladministration by a listed authority in connection with 'relevant action';
  - b) an alleged failure in a 'relevant service' provided by a listed authority; or
  - c) an alleged failure by a listed authority to provide a 'relevant service'.
54. 'Relevant action' is defined in section 11(4) and 'relevant service' is defined in section 11(5). The definitions are designed to ensure that it is only matters relating to the actions taken by listed authorities in their public capacity that can be investigated.
55. In the case of a listed authority that falls within section 11(4)(e), the Ombudsman is entitled to investigate alleged maladministration in the discharge of that authority's administrative functions. The Welsh Government is one such authority, so the Ombudsman is entitled to investigate alleged maladministration on the Welsh Government's part in discharging any of its administrative functions. However, the Ombudsman is not entitled to investigate any alleged failures in the Welsh Government's exercise of its legislative or judicial functions.
56. In the case of a person added to Schedule 3 ("listed authorities"), by regulations under section 31(2), section 11(4)(d) and section 11(5)(d) provide that the Ombudsman is only entitled to investigate action which that person takes or a service which that person provides in the discharge of that person's functions which have been specified in the regulations as falling within the Ombudsman's remit.
57. The effect of subsection (7) is that where a listed authority appoints a person as a member of staff of a 'relevant tribunal', an administrative function which may be discharged by that person is treated as being an administrative function of the listed authority and so will fall within the remit of the Ombudsman. A 'relevant tribunal' is defined in section 78(1) as a tribunal specified by regulations made by the Welsh Ministers.

### **Section 12 - Exclusion: matters not relating to Wales**

58. Section 12(1) provides that the Ombudsman cannot investigate a matter relating to the discharge by a listed authority of its functions otherwise than in relation to Wales. Section 12(2) makes it clear that this restriction does not apply in relation to the Welsh Government, which has certain functions which are exercisable beyond Wales (for example, functions relating to fisheries or water supply).
59. Section 12(3) puts beyond doubt that any function of a listed authority in relation to the Welsh language or any other aspect of Welsh culture is to be regarded as being discharged in relation to Wales and is, therefore, not excluded from the Ombudsman's jurisdiction by section 12(1).

### **Section 13 - Exclusion: other remedies**

60. In general, the Ombudsman cannot investigate a complaint about a matter if the person aggrieved has (or had) a right of appeal, reference or review (as specified) or a remedy by way of proceedings in a court of law (section 13(1)). However, if the Ombudsman is satisfied that, in the particular circumstances, it is not reasonable to expect the person aggrieved to take up (or to have taken up) that right of appeal, reference, review or remedy, then the exclusion in 13(1) does not apply and the Ombudsman is entitled to investigate the complaint (section 13(2)).
61. Section 13(3) provides that, in general, the Ombudsman may not investigate a matter, unless the Ombudsman is satisfied that
- a) the person aggrieved (or someone acting on that person's behalf) has brought the matter to the attention of the listed authority concerned, and
  - b) the listed authority has been given a reasonable opportunity to investigate and respond to the complaint.
62. However, section 13(4) gives the Ombudsman a discretion to investigate a matter, despite the fact that the requirements in subsection (3) have not been met, if the Ombudsman is satisfied that it is reasonable to do so in the particular circumstances.

### **Section 14 - Other excluded matters**

63. Section 14(1) prohibits the Ombudsman from investigating the excluded matters set out in Schedule 2. Section 14(2) allows the Welsh Ministers, by regulations, to add to, remove or alter the entries appearing, from time to time, in Schedule 2. Before making such regulations, the Assembly must consult the Ombudsman (section 14(3)).



64. Section 14(5) puts beyond doubt that, despite the exclusions in Schedule 2, the Ombudsman may investigate the operation by a listed authority of any procedure established to examine complaints or review decisions. So, for example, the Ombudsman is excluded from investigating a matter that relates to the determination of the amount of rent (paragraph 5 of Schedule 2). But section 14(5) ensures that this does not prevent the Ombudsman from investigating the manner in which a complaint about the determination of rent was considered under an authority's complaints procedure.

## **Schedule 2**

65. This Schedule makes provision as to matters that are excluded from the Ombudsman's jurisdiction.

## **Section 15: Decisions taken without maladministration**

66. Section 15(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, unless there has been delay, bias, neglect, turpitude etc. on the listed authority's part, the Ombudsman cannot 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.
67. Section 15(2) sets out an exception to the rule in section 15(1). It allows the Ombudsman to question the merits of a decision taken without maladministration if the 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.

## **Section 16 - Power to investigate other health-related services**

68. Section 16 allows the Ombudsman to carry out ancillary investigations into health-related services (i.e. certain health-related services not provided by listed authorities), but only where the Ombudsman is also investigating a listed authority.
69. Section 16(1) sets out the scope of section 16. Section 16 applies where:
- a) the Ombudsman has power under Part 3 to investigate alleged maladministration or alleged failure by a "relevant listed authority" (defined in section 16(4) to include Local Health Boards, NHS Trusts, GPs in Wales etc.) in respect of a person, and
  - b) a "health-related service" which is not a relevant service (i.e. which is not a service provided by a listed authority) has also been provided to the person.

70. If, in those circumstances, the Ombudsman considers that the alleged maladministration or alleged failure of the listed authority cannot be investigated effectively or completely without also investigating the health-related service, then, under section 16(2), the Ombudsman may investigate that health-related service as part of the investigation into the relevant listed authority.
71. For example, if a person has received private medical treatment and the person has also received medical treatment from a Local Health Board, then the Ombudsman can investigate the private medical treatment if the Ombudsman thinks that doing so is necessary to investigate effectively or completely the actions of the Local Health Board.
72. Section 16(3) sets out a list of provisions in which any reference to “listed authority” are to be interpreted as including a reference to the person who provided the health-related service. This means that, for example, where the Ombudsman is required to send a copy of an investigation report to a listed authority, the Ombudsman must also send a copy to a provider of a health-related service (where the Ombudsman investigates such a provider under section 16(2)).
73. Section 16(4) defines “health-related service” to include any medical, dental, ophthalmic, nursing, midwifery and pharmaceutical service, plus any other service provided in connection with physical or mental health (but excludes acupuncture, body piercing, electrolysis and tattooing, all of which are regulated under the Public Health (Wales) Act 2017). Therefore, the private medical treatment example above would also include private dental treatment, private ophthalmic treatment etc.
74. Section 16(4) also defines “relevant listed authority” as including the Board of Community Councils in Wales, Local Health Boards, Community Health Councils etc

### **Section 17 - Power to investigate other health-related services**

75. Section 17(1) provides that the Ombudsman must prepare a statement of reasons where the Ombudsman decides, not to begin or to discontinue an investigation. This situation may arise, for example, where the Ombudsman resolves a matter under section 6 and therefore decides not to undertake an investigation.
76. (The requirement in section 17(1) does not apply in relation to an own initiative investigation unless the Ombudsman has consulted a person under section 4(2)(c) about that investigation.)
77. Under section 17(2), the Ombudsman must send a copy of the statement of reasons to:
  - a) any person who made a complaint to the Ombudsman in respect of the matter to which the statement refers; and
  - b) the listed authority to which the matter relates.
78. Under section 17(3), the Ombudsman may send a copy of the statement to any other person the Ombudsman considers appropriate.

79. The Ombudsman may publish such a statement if the Ombudsman considers that it is in the public interest to do so. In reaching this view, the Ombudsman must take account of the interests of the person aggrieved (if any) and any other persons the Ombudsman thinks appropriate.
80. Sections 17(7) and (8) provide 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,
81. The Ombudsman may only include such information in the version of the statement that is sent or published under this section if it is in the public interest to include such a name or identifying particulars. In reaching this view, the Ombudsman must have regard to the interests of the person aggrieved (if any) and any other persons the Ombudsman thinks appropriate.
82. In the case of the version of the statement that the Ombudsman is required to send, under section 17(2), to any person who made a 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 investigation, and those of its employees who are relevant (e.g. if the employee of the listed authority took the action complained of).

### **Section 18 - Investigation procedure**

83. Section 18(1) sets out the requirements for investigations under section 3 (i.e. investigations following a complaint).
84. Sections 18(2) to 18(7) set out the requirements for investigations under section 4 (i.e. investigations using the own initiative power), which include a requirement for the Ombudsman to prepare an 'investigation proposal' and to send the investigation proposal to the listed authority being investigated and any person identified in the investigation proposal in a negative way. The Ombudsman must also give the listed authority and other persons opportunity to comment on the investigation proposal.

85. The Ombudsman does not have to prepare an investigation proposal in the circumstances set out in section 18(3) and (4). This means that if the Ombudsman has begun investigating a matter (either in response to a complaint under section 3 or on the Ombudsman's own initiative under section 4), referred to as the "original investigation, and the Ombudsman has subsequently begun another investigation into a matter under section 4 that has a substantial connection with the original investigation, known as the related investigation then the Ombudsman does not have to prepare an investigation proposal in relation to the related investigation.
86. However, even if the Ombudsman does not have to prepare an investigation proposal, section 18(6) still requires the Ombudsman to bring the investigation to the attention of those being investigated and give them an opportunity to comment.
87. Under section 18(7), an investigation proposal must set out the reasons for the investigation and how the section 5 criteria have been met (i.e. the criteria for own initiative investigations).
88. Section 18(8) requires all investigations to be conducted in private.
89. Section 18(9) provides that, subject to the above requirements, 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 could, in any particular case, depart from any such established procedures if the Ombudsman considered it appropriate.
90. Section 18(10)(a) provides that the Ombudsman may make such inquiries as the Ombudsman thinks appropriate. Section 18(10)(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).
91. Section 18(12) empowers the Ombudsman to make payments towards the expenses of persons assisting 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.
92. Section 18(13) requires the Ombudsman to publish the procedures to be followed in conducting investigations under sections 3 and 4.
93. Section 18(14) 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 19 - Information, documents, evidence and facilities**

94. The Ombudsman has wide powers to require the production of information or documents in relation to an investigation (sections 19(2))

95. The Ombudsman has the same powers as the High Court in relation, amongst other things, to the taking of evidence from witnesses (section 19(3)).
96. The Ombudsman has a power to require certain persons to provide the Ombudsman with any facilities the Ombudsman may reasonably require (section 19(4)). The power may be exercised, for example, to require the use of certain computer hardware or software to enable the Ombudsman to view documents or information.
97. Section 19(5) 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.
98. Section 19(6) disapplies any obligations to maintain secrecy or to otherwise restrict access to information obtained by or supplied to Crown servants.
99. The effect of section 19(7) is that 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 19(5).

#### **Section 20 - Obstruction and contempt**

100. Sections 20(1) and 20(2) enable the Ombudsman to certify to the High Court that, in the Ombudsman's opinion, a person has
  - a) without lawful excuse obstructed the Ombudsman (or a member of the Ombudsman's staff etc.) in the discharge of the Ombudsman's functions under Part 3, or
  - b) that the person has acted in a way, in relation to an investigation, that, if the act was done in relation to High Court proceedings, would amount to a contempt of court.
101. 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 20(3) and section 18(14)).
102. 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 the person had committed contempt in relation to the High Court (section 20(5)).

#### **Section 21 - Obstruction and contempt: costs recovery**

103. Section 21 gives the Ombudsman power to serve a costs recovery notice on a provider of health-related service where, in the course an investigation the Ombudsman has exercised the power under section 16 to investigate a health-related service and that provider has:

- a) obstructed the Ombudsman; or
- b) done something which would amount to contempt of court if the investigation were proceedings in the High Court.

104. A costs recovery notice requires the provider of the health-related service to pay the Ombudsman any costs incurred by the Ombudsman as a result of the obstruction or act that would amount to contempt. The costs that the Ombudsman can recover under this section include the costs of obtaining any expert advice (section 21(5)).
105. Section 21 sets out a series of requirements in relation to the costs recovery process. These include requirements about the content of the notice, timescales for payment, and the right of appeal to the magistrates' court. Section 21(12) sets out the grounds for appealing against a costs recovery notice.

### **Section 22 - Serving a costs recovery notice**

106. Section 22 sets out the requirements that apply to the service of a costs recovery notice under section 21.

### **Section 23 - Reports of investigations**

107. Section 23(1) provides that after conducting an investigation the Ombudsman must prepare a report on the findings of the investigation and send a copy of that report to the persons specified in section 23(2). (This requirement does not apply if the Ombudsman decides to prepare a report under section 27 (alternative procedure) instead).
108. Section 23(2) specifies those persons to whom the report must be sent. Those persons include the person who made the complaint, the listed authority to which the report relates, and any other person who is alleged to have taken or authorised the action complained of or is identified in the report in a negative way. Where the listed authority to whom the report relates is a family health service provider in Wales or an independent provider in Wales, the report must also be sent to the persons mentioned in section 23(2)(d) and (e). The Ombudsman may also send the report to any other persons he considers appropriate (section 23(3)).
109. The Ombudsman may publish the report if the Ombudsman considers that it is in the public interest to do so (section 23(4)). In reaching this view, the Ombudsman must have regard to the interests of the person aggrieved (if any) and any other persons the Ombudsman thinks appropriate.
110. Sections 23(7) and (8) provide 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 is sent, or published, if it is in the public interest to include such a name or identifying particulars. In reaching this view, the Ombudsman must have regard to the interests of the person aggrieved (if any) and any other persons the Ombudsman thinks appropriate.

111. In the case of the version of the report that is sent, under section 23(1)(b), to the person aggrieved (if any) 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 the report. Indeed, in many cases such a report is likely to name or identify only the person aggrieved (if any), the listed authority that took the action which is the subject of the report 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 report).

#### **Section 24 - Publicising reports**

112. Section 24(1) to (4) requires listed authorities that receive a copy of a report under section 23(1)(b) to make specified arrangements for publicising such reports.
113. The listed authority is required to make copies of the report available at one or more of its offices and via its website (if any) for a minimum of 3 weeks. 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 24(7) and (8)).
114. The Ombudsman may, after taking account of the public interest and the interests of the person aggrieved (if any) and any other persons the Ombudsman thinks appropriate, direct that the publicity requirements are not to apply in relation to a particular report (section 23(9) and (10)).
115. The Ombudsman also has the power to give directions with regard to the discharge by listed authorities of their functions under section 23 (section 23(5) and (6)).

#### **Section 25 - Publicising reports: health care providers**

116. Section 25 makes provision for the application of section 24 with modifications where investigations are carried out in relation to listed authorities which are family health service providers in Wales or independent providers in Wales. The effect of the modifications is to ensure that the publishing requirements under section 24 apply to each person who has received a report in accordance with section 23(2)(d) or (e), rather than to the listed authority itself.

### **Section 26 - Action following receipt of a report**

117. Section 26 applies if, following an investigation, the Ombudsman concludes in a section 23 report that any person has sustained injustice or hardship as a consequence of the action investigated. In these circumstances, the listed authority concerned is required to consider the Ombudsman's report and notify the Ombudsman of the action that it has taken or proposes to take in response and also of the time within which it will take such action. 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 specifies.

### **Section 27 - Reports: alternative procedure**

118. The full reporting procedure under sections 23 to 26 does not apply if the Ombudsman decides to report under the alternative procedure set out in section 27.
119. The Ombudsman may apply the alternative procedure if, after an investigation, the Ombudsman concludes that:
- a) no person has sustained injustice or hardship as a consequence of the matter investigated; or
  - b) a person has sustained such injustice or hardship and the listed authority concerned agrees within the permitted period (as defined in section 27(3)) to implement the Ombudsman's recommendations, and the Ombudsman is satisfied that the public interest does not require the full reporting procedure set out in sections 23 to 26 to be applied.
120. A copy of a report under the alternative procedure must be sent to the persons mentioned in section 27(5)(b) and may also be sent to any other persons the Ombudsman thinks appropriate. A report of this kind is subject to similar restrictions to those that apply to a report under section 23 with respect to naming or identifying individuals (section 27(9) and (10)).

### **Section 28 - Special reports**

121. Under section 28, the Ombudsman may issue a special report if the listed authority has failed to take the action required or agreed, in response to: (a) a report made under section 23, (b) a report made under section 27, or (c) the Ombudsman's resolution of a matter.
122. For example, a listed authority may fail to notify the Ombudsman, within one month of receiving a section 23 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 28(2)(a)).
123. The Ombudsman may also issue a special report if a listed authority has given the notification under section 26 within the time-scale set out there but the Ombudsman is not satisfied:



- a) with the action taken or proposed to be taken 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 it would take within the specified period.

124. Where section 28 applies the Ombudsman has a discretion as to whether to issue a special report. If the Ombudsman does so, the special report must set out the facts that entitle the Ombudsman to issue a report of this kind and must make such recommendations as the Ombudsman thinks appropriate with respect to the action the Ombudsman thinks should be taken to remedy or prevent the injustice or hardship and to prevent similar injustice or hardship being caused again (section 28(8)(b)).
125. Section 28(9) sets out the persons to whom the Ombudsman is required to send a copy of a special report. The requirement varies according to whether the special report was preceded by a full report under section 23, or by a report made under section 27 or an agreement made following the resolution of a matter.

### **Section 29 - Special reports: supplementary**

126. Section 29 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 23 (section 29(4) and (5)) and section 29(6) applies sections 24 and 25 (requirements as to publicising reports) to special reports.

### **Section 30 - Special reports relating to the Welsh Government and the National Assembly for Wales Commission**

127. A special report relating to an investigation in respect of the Welsh Ministers or the National Assembly for Wales Commission must be laid before the Assembly.

### **Section 31 - Listed authorities**

128. 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.
129. Section 31(2) gives the Welsh Ministers power, by regulations, to amend Schedule 3 by adding or removing listed authorities or changing their entries. Before doing so the Welsh Ministers must consult the Ombudsman and any other persons they think appropriate (section 31(4)). Section 31(3) provides that an order adding a person to Schedule 3 as a listed authority may apply the Act to that person with modifications.
130. The power to make an order under this section is subject to certain restrictions set out in sections 32 and 33.

### **Schedule 3**

131. This Schedule lists the persons subject to the remit of the Ombudsman.

### **Section 32 - Restrictions on power to amend Schedule 3**

132. Section 32(1) prevents regulations under section 31(2) from changing the status of the Welsh Government or the National Assembly for Wales as listed authorities.
133. Section 32(2) says that the Welsh Ministers can only add listed authorities to Schedule 3 if doing so would be within the legislative competence of the National Assembly for Wales.

### **Section 33: Provisions in regulations adding persons to Schedule 3**

134. Section 33 provides that when adding a person to the list, the Welsh Ministers must, in the regulations, specify which of the person's functions fall within the Ombudsman's remit.

### **Section 34 - Power to issue guidance**

135. Section 34(1) gives the Ombudsman power to issue guidance to listed authorities about good administrative practices. This will enable the Ombudsman to set benchmark marks for listed authorities.
136. Section 34(3) provides that listed authorities are required to have regard to the Ombudsman's guidance under section 34 when discharging their functions. Listed authorities should not depart from that guidance unless there is good reason to do so. When discharging investigation functions under this Act, the Ombudsman can take into account whether or not and to what extent a listed authority has complied with the guidance issued under section 34.

### **Section 35 - Compensation for the person aggrieved**

137. This section confers a power on listed authorities to pay compensation to a person by or on behalf of whom a complaint has been made to the Ombudsman in respect of the matter, which is the subject of the complaint.
138. Some listed authorities may have existing powers that would be wide enough for this purpose (see for example the power available to various local government bodies acting under section 92 of the Local Government Act 2000). Section 35 ensures that all listed authorities have such a power. The power can be exercised even if the Ombudsman is not actually investigating and reporting on the complaint and so, for example, could be used where the Ombudsman is assisting in negotiating an amicable resolution of the matter.

## **PART 4**

### **Section 36 - Complaints-handling: statement of principles**

139. This section requires the Ombudsman to publish a statement of principles concerning complaints handling procedures of the 'listed authorities' in Schedule 3 (section 36(1)). Listed authorities must have complaints-handling procedures that comply with the statement of principles (section 36(2)).

140. Before publishing the first statement of principles, the Ombudsman must lay a draft statement of principles before the Assembly. The draft statement of principles will be subject to a negative resolution procedure. This means that the Assembly has 40 days to object to the draft. If the Assembly does not object within those 40 days, the Ombudsman must publish the statement of principles in the form of the draft laid before the Assembly. If the Assembly objects to the statement of principles as drafted, the Ombudsman must not publish the statement in the form of the draft but subsection (7) permits the Ombudsman may lay a new draft statement before the Assembly.
141. Once the statement of principles has been published, the Ombudsman can revise the statement of principles. But if a proposed revision would make any material changes to the statement of principles, then the negative resolution procedure will apply to the draft revision
142. The Ombudsman must consult before laying the first draft statement of principles (or any draft revisions to it) before the Assembly under this section.
143. Section 36(14) defines “complaints handling procedures” to mean procedures of listed authorities which examine complaints or review decisions in respect of action taken by a listed authority where the matter in question is one which the Ombudsman can investigate under Part 3.

### **Section 37 - Model complaints-handling procedures**

144. This section enables the Ombudsman (after consultation) to publish model complaints handling procedures (“model CHPs”) for listed authorities. Model CHPs must also comply with the statement of principles published by the Ombudsman under section 36.
145. A model CHP published by the Ombudsman may not require a listed authority to do something if the listed authority lacks powers (other than by virtue of the Act) to comply with the requirement (section 37(5)(a)).
146. Also, a model CHP published by the Ombudsman may not conflict with any enactment (including codes, guidance and schemes etc. made under an enactment) that applies to the listed authority (section 37(5)(b)). For example, a model CHP could not be inconsistent with the statutory requirements set out in the Putting Things Right complaints regime that applies to NHS bodies in Wales.
147. Subsection (6) permits the Ombudsman to revise and republish any model CHP but requires the Ombudsman to notify certain listed authorities before doing so. Subsection (7) sets out the effect of a revision and republication on any specification made under section 38(1) in relation to the model CHP.
148. If the Ombudsman withdraws a model CHP, any related specifications under section 38(1) cease to have effect (section 37(9)(b)(I)).

### **Section 38 - Model complaints-handling procedures: specification of listed authorities**

149. This section enables the Ombudsman to specify any listed authority to which a model CHP is relevant. A specified listed authority must have a complaints handling procedure that complies with the relevant model CHP. A listed authority must submit its complaints handling procedure to the Ombudsman, within 6 months of being specified under section 38(1).
150. The listed authority may, with the Ombudsman's consent, modify aspects of the model CHP if this is necessary for its effective operation (section 38(4)).
151. A specification can be revoked by the Ombudsman at any time (section 38(6)).

### **Section 39 - Declarations of non-compliance**

152. This section enables the Ombudsman to declare that a complaints-handling procedure of a specified listed authority does not comply with the relevant model CHP which the Ombudsman has specified (under section 38) as being relevant to that authority. It also enables the Ombudsman to declare, in those circumstances where no model CHP has been specified in relation to a listed authority, that the authority's complaints-handling procedure does not comply with the statement of principles.
153. Before publishing a declaration under this section, the Ombudsman must give reasons for making the declaration and may also specify changes that would result in the declaration being withdrawn.
154. The listed authority must send its complaints-handling procedure to the Ombudsman within 2 months of the declaration, having taken account of the reasons given by the Ombudsman for making the declaration and any changes specified by the Ombudsman as being ones which would result in the declaration being withdrawn.
155. The Ombudsman must publish declarations made under subsections (1) and (2) on the Ombudsman's website (section 39(3)) and may withdraw such declarations at any time (section 39(6)).

### **Section 40 - Submission of complaints-handling procedures: general**

156. This section gives the Ombudsman a power to require a listed authority to submit its complaints-handling procedure within 3 months or such other period as the Ombudsman thinks fit. The listed authority must submit its procedure within that period even if the period allowed for the submission of the procedure under section 387(3) or 398(5) has not yet expired.
157. A listed authority is also required to provide additional information on request. This enables the Ombudsman to get a full picture of a listed authority's complaints-handling procedure.

**Section 41 - Complaints-handling procedures: promotion of best practice etc.**

158. This section imposes duties on the Ombudsman to: (1) monitor listed authorities' practice in handling complaints, (2) promote best practice in relation to the handling of such complaints and (3) encourage cooperation and the sharing of best practice about these matters. This section applies to all complaints, not just complaints the Ombudsman can investigate under Part 3.
159. Listed authorities must co-operate with the Ombudsman in the exercise of these duties unless they lack the necessary powers (other than by virtue of the Act) or where co-operating is inconsistent with any other enactment that applies to the listed authority.

**PART 5**

**Section 42 - Matters to which this Part applies**

160. Section 42 sets out the three matters to which Part 5 applies: (1) action taken by a care home provider in connection with the provision of accommodation, nursing or personal care in a care home in Wales; (2) action taken by a domiciliary care provider in connection with the provision of domiciliary care in Wales; and (3) action taken by an independent palliative care provider in connection with the provision of a palliative care service in Wales.
161. Part 5 does not apply to complaints which may be dealt with under Part 3 or to matters described in Schedule 4 (matters excluded from the Ombudsman's jurisdiction). The Welsh Ministers may by regulations amend Schedule 4 but must consult the Ombudsman before doing so.
162. The terms used in this section are defined in sections 62 to 64.

**Schedule 4**

163. This Schedule makes provision as to matters that are excluded from the Ombudsman's jurisdiction.

**Section 43 - Power to investigate complaints**

164. Section 43 permits the Ombudsman to investigate a complaint relating to a matter to which Part 5 applies only if:
- a) the complaint has been duly made or referred to the Ombudsman; and
  - b) in the case of complaints about independent palliative care providers, that the independent palliative care provider has received public funding within three years preceding the date of the action to which the complaint relates.
165. "Public funding" is defined in subsection (3) and means funding from the Welsh Ministers, a Local Health Board established under section 11 of the National Health Service (Wales) Act 2006, an NHS Trust or a county council or county borough council in Wales. This could, for example, cover grant funding provided by the Welsh Ministers to the independent palliative care service.

166. Sections 43(4) and 48(1) set out the requirements which must be in order for a complaint to be duly made to the Ombudsman. Section 43(5) and section 49(1) set out the requirements which must be met in order for a complaint to be duly referred to the Ombudsman by a provider to whom it relates.
167. Section 43(7) enables the Ombudsman to investigate a complaint, which the Ombudsman is entitled to investigate under Part 5, even if the specific requirements as to the way a complaint is to be made or referred have not been fulfilled, if the Ombudsman considers it reasonable to do so.
168. Section 43(8) provides the Ombudsman with a wide discretion as to whether to begin, continue or discontinue an investigation. Section 43(10) makes clear that the Ombudsman may begin or continue an investigation even if the complaint has been withdrawn. This may be appropriate, for example, where a 'lead' complainant has made a complaint about a provider's action which has also affected other persons, but that person has subsequently withdrawn the 'lead' complaint. In such cases, the Ombudsman may consider it appropriate to begin or to continue an investigation, despite the withdrawal of the 'lead' complaint, so as to protect the interests of the other persons.

#### **Section 44 - Power to investigate on own initiative**

169. Section 44 allows the Ombudsman to initiate an investigation into a matter to which Part 5 applies, whether the Ombudsman has received a complaint or not.
170. This has a significant effect on the interpretation of the Act – when the word “investigation” is used in Part 5, it can mean either an investigation under section 43 or an investigation under section 44. For example, section 53 applies “for the purposes of an investigation under this Part”. Therefore, section 53 applies in relation to an investigation into a complaint under section 43 and an own initiative investigation under section 44.
171. The power in section 44 can only be used to investigate matters the Ombudsman is entitled to investigate under Part 5. Section 42 sets out those matters.
172. Section 44(3) sets out requirements that must be met before the Ombudsman can begin an own initiative investigation. The requirements are:
  - a) the Ombudsman must have regard to whether it is in the public interest to begin an own initiative investigation;
  - b) the Ombudsman must have a reasonable suspicion that there is systemic maladministration;
  - c) the Ombudsman must consult such persons as the Ombudsman thinks appropriate; and
  - d) the Ombudsman must have regard to the own initiative criteria published under section 45.

### **Section 45 - Criteria for own initiative investigations**

173. Section 45 requires the Ombudsman to publish the criteria that the Ombudsman will use when deciding whether to carry out an own initiative investigation under Part 5 (and under section 44(3)(d), the Ombudsman must have regard to these criteria before beginning an own initiative investigation).
174. Before publishing the first criteria, the Ombudsman must lay a draft of the criteria before the Assembly. The draft criteria will be subject to a negative resolution procedure. This means that the Assembly has 40 days to object to the criteria. If the Assembly does not object within those 40 days, the Ombudsman must publish the criteria in the form of the draft laid before the Assembly. If the Assembly resolves not to approve the draft criteria, section 45(3) prohibits the Ombudsman from publishing the criteria in the form of the draft but section 45(6) clarifies that the provisions of section 45(3) do not prevent the Ombudsman from laying new draft criteria before the Assembly.
175. Once the criteria have been published, the Ombudsman can revise and republish the criteria. But if a revision makes any material changes to the criteria, then the draft revision must be laid before the Assembly and the negative resolution procedure will apply to the draft revisions it applied to the draft criteria.
176. The Welsh Ministers may make regulations to amend the criteria. Such regulations follow an affirmative resolution procedure. This means the regulations must be approved by the Assembly – if the Assembly does not approve the regulations then they do not take effect. But if the Assembly does approve the regulations, the Ombudsman must update the published criteria to reflect the changes made by the regulations.
177. Both the Ombudsman and the Welsh Ministers must consult before proposing criteria (or proposing material changes to criteria) under this section.

### **Section 46 - Alternative resolution of matters**

178. Section 46 provides the Ombudsman with a wide power to take steps to resolve matters under Part 5 without proceeding to formal investigation. The power is available to the Ombudsman to use instead of, or in addition to, the power to investigate.

### **Section 47 - Who can complain**

179. Section 47 makes similar provision to section 7 of this Act. It lists the persons who may make a complaint to the Ombudsman under Part 5 of this Act.
180. Section 47 prescribes the persons from whom the Ombudsman may accept a complaint. Those persons are;
- a) a member of the public who claims, or has claimed to have sustained injustice or hardship in consequence of the matters the Ombudsman is entitled to investigate under Part 5. This person is described as the person aggrieved,
  - b) a person authorised, in writing, by the person aggrieved to make the complaint on their behalf, or

- c) where the person aggrieved cannot give such authorisation, a person the Ombudsman considers appropriate.

- 181. It is not only individuals who can complain to the Ombudsman: companies and organisations can also complain to the Ombudsman about injustice or hardship suffered by members of the public, provided that the conditions in subsection (1) are satisfied. Section 47(2) excludes person acting in certain capacities from the definition of “member of the public” for the purposes of this section, for example a person acting in their capacity as a care home provider. However, this does not prevent such a person from making a complaint, provided the person is making the complaint in their personal capacity.
- 182. The Ombudsman has the power to decide whether the requirements of section 47 have been met in a particular case.

### **Section 48 - Requirements: complaints made to the Ombudsman**

- 183. If a person wishes to make a complaint to the Ombudsman, the complaint must satisfy the requirements of section 48(1) (though the Ombudsman has discretion under section 43(7) to investigate matters where these requirements are not met).
- 184. Section 48(1) provides that in order for a complaint to meet the requirements of section 43(4)(c), it must be in a form specified by the Ombudsman and must contain the information specified by the Ombudsman. The complaint must also be made within 1 year of date when the person aggrieved first had notice of the matter which is the subject of the complaint. The form and content will be specified in guidance published by the Ombudsman.
- 185. Section 48(4) provides for circumstances where a complaint is made other than in writing (for example, a complaint made orally or in British Sign Language), Subsections (4) to (7) set out additional requirements for complaints made other than in writing. This includes explaining to the person what it means for a complaint to be duly made (i.e. that when a complaint is duly made, it could lead to the Ombudsman beginning an investigation), and checking with the person whether they wish the complaint to continue to be one that is duly made.
- 186. If the person does not wish the complaint to be treated as one that is duly made, then the Ombudsman cannot begin a section 43 investigation into the matter (but if the Ombudsman has already begun an investigation into the matter and the person subsequently withdraws the oral complaint, the Ombudsman has discretion as to whether to continue the investigation).
- 187. Where a person has confirmed that they do not wish a complaint to continue to be treated as duly made the Ombudsman can nonetheless investigate the matter under the own initiative power in section 44 if the requirements of that section are met.

### **Section 49 - Requirements: complaints referred to the Ombudsman**

- 188. This section sets out the requirements that must be met in order for a complaint to be duly referred within the meaning of section 43(5)(b). A provider can refer a complaint to the Ombudsman only if it is made by a person who would have been entitled to make that complaint directly to the Ombudsman under section 47.



189. The complaint must have been made to the provider within a year from the day that the person aggrieved first had notice of the matter complained of. The referral by the provider to the Ombudsman must also occur before the end of one year beginning on the day on which the complaint was made to the provider.
190. In addition, the referral must be in whatever form, and contain whatever information, the Ombudsman specifies in guidance published under section 48(2). Therefore, providers who wish to refer a complaint should read that guidance in order to help them make the referral.
191. Under section 43(7) the Ombudsman has discretion to investigate a complaint even where either (or both) of the time limits are not met, or where the referral is not in the required form or does not contain the required information.

### **Section 50 - Records of complaints**

192. Section 50 requires the Ombudsman to keep a register of all complaints made or referred to the Ombudsman that the Ombudsman is entitled to investigate under Part 5.
193. This register must include all written complaints (including complaints made in electronic form) and all complaints made other than in writing, (including those made orally\_.

### **Section 51 - Decisions not to investigate complaints or to discontinue investigations**

194. Section 51 provides that the Ombudsman must prepare a statement of reasons in relation to any decision by the Ombudsman not to begin, or to discontinue, an investigation into a complaint or an own initiative investigation in relation to which the Ombudsman has consulted a person under section 44(3)(c).
195. Such a decision may be made, for example, where the Ombudsman has resolved a matter through alternative means under section 46 and has therefore decided not to undertake a formal investigation.
196. Under section 51(2), the Ombudsman must send a copy of that statement to:
- a) any person who made a complaint to the Ombudsman; and
  - b) the provider to whom the matter relates.
197. Under section 51(3) the Ombudsman may also send a copy of the statement to any other person the Ombudsman considers appropriate.
198. The Ombudsman may publish such a statement if the Ombudsman considers that it is in the public interest to do so. In reaching this view, the Ombudsman must take account of the interests of the person aggrieved (if any) and any other persons the Ombudsman thinks appropriate.

199. Sections 51(7) and (8) prohibit the Ombudsman from sending out or publishing a statement that:
- a) names any person (other than the provider to whom the matter relates); or
  - b) includes information which, in the opinion of the Ombudsman, is likely to identify such a person and which, in the opinion of the Ombudsman, can be omitted from the statement without impairing its effectiveness,
- unless the Ombudsman considers that it is in the public interest to include such a name or identifying particulars.
200. This prohibition does not apply in relation to the version of the statement sent to the person aggrieved (if any).

### **Section 52 - Investigation procedure**

201. Section 52(1) sets out the requirements for investigations under section 43 (i.e. investigations following a complaint).
202. Sections 52(2) to 51(7) set out the requirements for investigations under section 44 (i.e. investigations carried out on the Ombudsman's own initiative), which include a requirement for the Ombudsman to prepare an 'investigation proposal' and to send the investigation proposal to the provider being investigated and any person identified in the investigation proposal in a negative way. The Ombudsman must also give the provider and other persons opportunity to comment on the investigation.
203. But the Ombudsman does not have to prepare an investigation proposal in the circumstances set out in section 52(3) and (4). This means that if the Ombudsman has begun investigating a matter (either in response to a complaint under section 43 or using the own initiative power under section 44), referred to as "the original investigation" and the Ombudsman has subsequently begun an investigation into a matter under section 44 that has a substantial connection with the original investigation, referred to as the related investigation, then the Ombudsman does not have to prepare an investigation proposal in relation to the related investigation.
204. However, even if the Ombudsman does not have to prepare an investigation proposal, section 52(6) still requires the Ombudsman to bring the investigation to the attention of those being investigated and give them an opportunity to comment.
205. Under section 52(7), an investigation proposal must set out the reasons for the investigation and how the section 45 criteria have been met (i.e. the criteria for own initiative investigations).
206. Section 52(8) requires all investigations to be conducted in private.

207. Section 52(9) provides that, subject to the other requirements set out in this 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 could, in any particular case, depart from any such established procedures if the Ombudsman considered it appropriate.
208. Section 52(10)(a) provides that the Ombudsman may make such inquiries as the Ombudsman thinks appropriate. Section 52(10)(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).
209. Section 52(12) empowers the Ombudsman to make payments towards the expenses of persons assisting the Ombudsman 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.
210. Section 52(14) requires the Ombudsman to publish the procedures for investigations under sections 43 and 44.

### **Section 53 - Information, documents, evidence and facilities**

211. Section 53 confers wide powers on the Ombudsman to require the production of information or documents in relation to an investigation (section 53(2) and (3)) and to require certain persons to provide any facilities that the Ombudsman may reasonably require (section 53(4)). The latter power may be exercised, for example, to require the provision of certain computer hardware or software to enable the Ombudsman to view documents or information that have been provided.
212. The Ombudsman has the same powers as the High Court in relation to the taking of evidence from witnesses and production of documents (section 53(3)).
213. Section 53(5) 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.
214. Section 53(6) disapplies any privilege which the Crown would otherwise be able to claim as a basis for withholding evidence or documents.
215. The effect of section 53(7) 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 under section 53(5).

### **Section 54 - Obstruction and contempt**

216. Sections 54(1) and (2) enable the Ombudsman to certify to the High Court that, in the Ombudsman's opinion, a person has without lawful excuse obstructed the Ombudsman (or a member of the Ombudsman's staff) in the discharge of functions under Part 5 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.
217. 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 that person had committed contempt in relation to the High Court (section 54(4)).

### **Section 55 - Investigation reports**

218. This section applies to investigations under Part 5 unless section 58 applies.
219. Section 55(2) provides that after conducting an investigation the Ombudsman must prepare and send a report on the findings to the appropriate person, unless the alternative procedure under section 58 applies.
220. Section 55(3) specifies those persons to whom a report must be sent. The Ombudsman may also send a copy of the report to any other persons the Ombudsman thinks appropriate.
221. The Ombudsman may publish the report if the Ombudsman considers that it is in the public interest to do so. In reaching this view, the Ombudsman must have regard to the interests of the person aggrieved (if any) and any other persons the Ombudsman thinks appropriate.
222. Sections 55(8) and (9) prohibit the Ombudsman from sending or publishing a report that:
- a) names any person (other than the provider to whom the report relates); or
  - b) includes information 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,
- unless the Ombudsman considers that it is in the public interest to include such a name or identifying particulars.
223. This prohibition does not apply in relation to the version of the report that is sent to the person aggrieved (if any) or the Welsh Ministers. In reaching a view as to whether it would be in the public interest to include this information in the other versions of the report, the Ombudsman must have regard to the interests of the person aggrieved (if any) and any other persons the Ombudsman thinks appropriate.

### **Section 56 - Further publicity for investigation reports**

224. Section 56 provides that the Ombudsman may publish a notice about an investigation report in a newspaper or other broadcast/electronic media. Any decision to publish such a notice must take account of the public interest, the interests of the person aggrieved (if any) and any other persons the Ombudsman thinks appropriate (see section 56(4)).
225. The notice may (amongst other things) include the matters specified in section 56(2). The provider to whom the report relates must reimburse the Ombudsman for the reasonable costs of arranging the publication of the notice, if requested to do so by the Ombudsman.

### **Section 57 - Action following receipt of investigation reports**

226. Section 57 provides that if, following an investigation, the Ombudsman reports (under section 55) that any person has sustained injustice or hardship as a consequence of the matter investigated, the provider concerned must consider the Ombudsman's report and notify the Ombudsman of the action that the provider has taken or proposes to take in response and also of the time within which such action will be taken.
227. The provider must give the notification within one month of receiving the report or such longer period as the Ombudsman specifies.

### **Section 58 - Reports: alternative procedure**

228. Section 58 provides that the full reporting procedure under sections 55 to 57 does not apply if the Ombudsman decides to report under the alternative procedure set out in this section.
229. The Ombudsman may apply the alternative procedure where the Ombudsman is satisfied that:
- a) no person has sustained, or is likely to sustain, injustice or hardship as a consequence of the action investigated; or
  - b) a person has sustained, or is likely to sustain, such injustice or hardship and
  - c) the provider to whom the matter relates agrees within the permitted period (as defined in section 58(3)) to implement the Ombudsman's recommendations.
230. Where the Ombudsman is satisfied that these conditions are met the Ombudsman may decide to report under the alternative procedure under section 58. However, the Ombudsman may do so only if the Ombudsman is satisfied that the public interest does not require a report under the full reporting procedure set out in sections 55 to 57.
231. A report under the alternative procedure in this section is subject to similar restrictions with respect to naming or identifying individuals to those which apply to a report under section 55 (section 58(9) and (10)).

### **Section 59 - Circumstances in which special reports may be prepared**

232. Under section 59, the Ombudsman may issue a special report in three cases:
233. Case 1. The Ombudsman has concluded in an investigation report that the person has sustained injustice or hardship (or a person is likely to sustain such injustice or hardship) as a result of the matter investigated but:
- i. the Ombudsman has not been notified by the provider, in accordance with section 57 (Action following receipt of investigation reports), about the action that the provider has taken/proposes to take, or about the period within which any proposed action is to be taken, or
  - ii. the Ombudsman, having been notified about such matters in accordance with section 57, is not satisfied with the action/proposed action or the period within which it is to be taken, or is not satisfied that the action has been taken before the end of the permitted period.
234. Case 2. The Ombudsman has prepared a report under section 58(2) (alternative procedure) and is not satisfied that the provider has implemented the recommendations within the permitted period; and
235. Case 3. The Ombudsman has concluded, in resolving a matter under section 46 (alternative resolution of matters), that any person has sustained (or is likely to sustain) injustice or hardship, the provider has agreed to take particular action and the Ombudsman is not satisfied that the provider has taken that action before the end of the permitted period.

### **Section 60 - Special reports**

236. Section 60(1) requires the Ombudsman to set out, in a special report, the facts that entitle the Ombudsman to prepare the report and to make whatever recommendations that the Ombudsman thinks appropriate, with respect to the action the Ombudsman thinks should be taken to remedy the injustice or hardship suffered by the person, and to prevent similar injustice or hardship being caused again.
237. Sections 60(2) and (3) set out the persons to whom the special report must be sent. The requirements that apply where the Ombudsman previously considered the matter in a full report under section 55 differ from those that apply where the Ombudsman previously considered the matter under the alternative procedure under section 58 or by means of an alternative resolution process under section 46.
238. Sections 60(4) to (9) makes further provision with regard to special reports. In particular, a special report is subject to similar restrictions with respect of naming or identifying individuals to those which apply to a report under section 55.

### **Section 61 - Further publicity for special reports**

239. Section 61 provides the Ombudsman with the power to publish a notice about a special report in a newspaper or by means of broadcast and electronic media.

240. In determining whether to publish a notice about a special report in accordance with section 60(1), the Ombudsman must take into account the public interest, the interests of the person aggrieved (if any) and the interests of any other person the Ombudsman considers appropriate. A provider to whom a report relates must, if requested to do so by the Ombudsman, reimburse the Ombudsman for the reasonable costs of arranging publication.

### **Section 62 - Meaning of “care home” and “care home provider”**

241. Section 62 provides definitions of “care”, “care home” and “care home provider” by reference to Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016. It also provides that a care home provider’s actions include actions taken by the provider’s staff and others acting on the provider’s behalf.

### **Section 63 - Meaning of “domiciliary care” and “domiciliary care provider”**

242. Section 63 provides definitions of “domiciliary care” and “domiciliary care provider”. It also provides that a domiciliary care provider’s actions include actions taken by the provider’s staff and others acting on the provider’s behalf.

### **Section 64 - Meaning of “palliative care service” and “independent palliative care provider”**

243. Section 64 provides definitions of “palliative care service” and “independent palliative care provider”. The term “palliative care” is not defined. However, it is generally used to describe the alleviation of pain of those with terminal conditions, the relief of pain without dealing with the cause of the condition and the general improvement in the quality of life of persons with life limiting conditions. Life limiting conditions are normally described as those in which a person’s life expectancy is likely to be shortened as a result of a condition or illness.
244. In deciding whether a particular form of care amounts to palliative care or not, it is anticipated that the Ombudsman will give some weight to the definition of “palliative care” that is used by the World Health Organisation. This definition provides that “palliative care is an approach that improves the quality of life of patients and their families facing the problem associated with life-threatening illness, through the prevention and relief of suffering by means of early identification and impeccable assessment and treatment of pain and other problems, physical, psychosocial and spiritual”. Weight is also likely to be given to the National Institute for Clinical Excellence (NICE) definition, which provides that “palliative care is the active holistic care of patients with advanced progressive illness. Management of pain and other symptoms and provision of psychological, social and spiritual support is paramount. The goal of palliative care is achievement of the best quality of life for patients and their families. Many aspects of palliative care are also applicable earlier in the course of the illness in conjunction with other treatments”.
245. A palliative care service is a service the main purpose of which is to provide palliative care. The term is therefore not intended to cover services that provide a degree of palliative care but where such care is incidental to the main service being provided. It is intended, however, to capture a wide range of palliative care services ranging from community based services to palliative care hospitals. Section 64 provides that an independent palliative care provider’s actions include actions taken by the provider’s staff and others acting on the provider’s behalf.

## **PART 6**

### **Section 65 - Consultation and co-operation with other ombudsmen**

246. Sections 65(1) and (2) require the Ombudsman to consult another specified ombudsman whenever the Ombudsman thinks that a matter could be the subject of investigation by that other ombudsman. The other ombudsmen that the Ombudsman is required to consult are specified in section 65(7).
247. There is power for the Welsh Ministers, by regulation, to amend this list of specified ombudsmen. The regulations may only add a person if it appears to the Welsh Ministers that the person to be added has functions relating to the investigation of complaints.
248. Where the Ombudsman is required to consult with another ombudsman on a matter, the Ombudsman may also co-operate with that other ombudsman on that matter (section 65(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 65(4), namely:
- a) how an investigation should be conducted; and
  - b) the form, content and publication of a report following an investigation.
249. Sections 65(5) and (6) provide 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.
250. In cases of consultation on a matter, the Ombudsman will be able to use the supplementary powers in paragraph 21 of Schedule 1 to this Act to forward information to the other ombudsman. Furthermore, the Ombudsman will be able to use those supplementary powers to inform the person who has made the complaint (if any) how that person can make a complaint to the other ombudsman.

### **Section 66 - Working jointly with specified persons**

251. Section 66 deals with situations where the Ombudsman, when dealing with a matter, identifies matters which could be subject to examination by “specified persons” in section 66(2), i.e. various Welsh commissioners and, in respect of health and social care matters, the Welsh Ministers.
252. This section requires the Ombudsman to inform and consult those specified persons about the matter. The Ombudsman and some of the relevant specified persons may then co-operate, conduct a joint investigation, and prepare a joint report about the matter.
253. The Welsh Ministers also have a power to make regulations to amend the list of specified persons.

### **Section 67 - Working collaboratively with Commissioners**

254. Section 67 contains further provision about collaborative working between the Ombudsman and various Welsh Commissioners in relation to matters could be investigated by both the Ombudsman and the relevant Commissioner.



### **Section 68 - Working with the Auditor General for Wales**

255. This section requires the Ombudsman, if the Ombudsman considers it appropriate, to inform and consult the Auditor General for Wales the Ombudsman's proposals for an investigation and the most effective way of conducting an investigation.
256. The Ombudsman and the Auditor General for Wales may then co-operate, and conduct a joint investigation, and prepare a joint report about the matter.

### **Section 69 - Disclosure of information**

257. Section 69 provides that information obtained by the Ombudsman (or by the Ombudsman's staff or any other person acting on behalf of the Ombudsman) in relation to an investigation, or obtained from the persons mentioned in subsection (1)(b) to (e) under the provisions mentioned in that subsection, is to be kept confidential except in limited circumstances. Section 69(2) sets out the circumstances in which such information may be disclosed.
258. Section 69(7) provides that neither the Ombudsman nor a member of the Ombudsman's staff or other person assisting or acting on the Ombudsman's behalf can be required to give evidence in any proceedings (except proceedings specified in section 69(2)) about:
- a) information obtained to assist the Ombudsman in deciding whether to investigate, during an investigation, in resolving a matter, or in connection with a notification under section 26 or 57; or
  - b) information obtained from another ombudsman in consulting and cooperating with the Ombudsman under section 65.

### **Section 70 - Disclosure prejudicial to safety of State or contrary to public interest**

259. Section 70(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 United Kingdom or otherwise contrary to the public interest. Where such a notice is given, this Act neither authorises nor requires the Ombudsman, a member of the Ombudsman's staff or any other person assisting or acting on the Ombudsman's behalf, to disclose such specified information.
260. Where the Ombudsman or a member of the Ombudsman's 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 71 - Protection from defamation claims**

261. Section 71 provides that the following are absolutely privileged for the purposes of defamation, namely:

- a) the publication (which will bear its usual meaning within the law relating to defamation) of any matter by the Ombudsman, a member of the Ombudsman's staff or another person assisting or acting on the Ombudsman's behalf in the discharge of the Ombudsman's functions under this Act;
- b) the publication of any matter in any report published by a person in the discharge of its functions under section 24 of this Act, including section 24 as modified by section 25, and sections 24 and 25 as they apply to special reports by virtue of section 29(6) (requirement on listed authorities to publish the Ombudsman's report of an investigation); and
- c) the publication of a matter in connection with a complaint, where that matter is published in one of the following communications:
  - i. communications between a listed authority (including a member or co-opted member, officer or member of staff or another person acting on behalf of or assisting in the discharge of the functions of that authority) and the Ombudsman (or the Ombudsman's staff or persons assisting or acting on the Ombudsman's behalf in the discharge of the Ombudsman's functions);
  - ii. communications between a care home provider, domiciliary care provider or independent palliative care provider, (including an officer or member of staff or another person acting on behalf of or assisting in the discharge of the functions of that provider) and the Ombudsman (or the Ombudsman's staff or persons assisting or acting on the Ombudsman's behalf in the discharge of the Ombudsman's functions);
  - iii. communications between a person and an elected member of the National Assembly for Wales; and
  - iv. communications between the person aggrieved or a person making the complaint on behalf of the person aggrieved (if any) and the Ombudsman (or the Ombudsman's staff, persons assisting or acting on the Ombudsman's behalf in the discharge of the Ombudsman's functions).

262. This provision generally replicates similar protection under the legislation relating to other ombudsmen.

## **PART 7**

### **Section 72 - Welsh language standards**

263. Section 72 brings the Ombudsman within the Welsh Language Standards regime. It does so by adding the Ombudsman to the list of bodies in Schedule 6 to the Welsh Language Standards (No. 2) Regulations 2016. This will enable the Welsh Language Commissioner to give the Ombudsman a compliance notice requiring the Ombudsman to conform with the standards set out in those Regulations.

### **Section 73 - Review of Act**

264. Section 73(1) requires the Assembly to prepare and publish a report on the operation and effect of the Act at the end of the 5 year period beginning with the day on which the Act receives Royal Assent. Section 73(2) also gives the Assembly a discretion to prepare and publish such a report on the Act at any other time.
265. When the Assembly prepares a report under this section, the Assembly has a duty to consult such persons as it considers appropriate (see section 73(3)).

### **Section 74 - Investigations commenced before section 3, 4, 43 and 44 come into force**

266. This section provides a saving provision for the Public Services Ombudsman (Wales) Act 2005 (“the 2005 Act”) in relation to investigations that the Ombudsman has commenced under the 2005 Act but has not concluded before the relevant sections of this Act come into force. This means that if the Ombudsman is part way through an investigation on the day sections 3, 4, 43 and 44 come into force, then the investigation carries on under the provisions of the 2005 Act.

### **Section 75 - Repeals, savings and consequential amendments**

267. This section repeals the Public Services Ombudsman (Wales) Act 2005. However:
- (a) the 2005 Act continues to apply to investigations commenced before this Act receives Royal Assent (see section 74), and
  - (b) various provisions of the 2005 Act are saved and will therefore continue to have effect (for example, changes made by section 35 of the 2005 Act in relation to the conduct of local government members and employees remain in force and are not affected); subordinate legislation made under the 2005 is also saved.
268. Section 75 also introduces Schedule 5, which makes various amendments to primary legislation in consequence of this Act.

### **Section 76 - Functions of the Assembly**

269. This section says that the Assembly can make standing orders to deal with the exercise of the functions conferred on the Assembly under the Act.
270. The standing orders may, among other things, provide for the delegation of the Assembly’s functions to an Assembly committee or sub-committee, or to the chair of an Assembly committee or sub-committee. But the standing orders may only delegate those functions conferred on the Assembly by section 73 and paragraphs 5 and 8(1) of Schedule 1.

### **Section 77 - Commencement**

271. This section provides that sections 1 to 76 and the Schedules come into force in accordance with regulations made by the Welsh Ministers.
272. Sections 77 to 82 come into force on Royal Assent.

### **Section 78 - Interpretation**

273. This section defines terms used in the Act.
274. Section 78(3) provides a power for the Welsh Ministers to make regulations to amend the definitions of “family health service provider in Wales”, “independent provider in Wales” and “social landlord in Wales”. Those regulations are subject to a consultation requirement and the affirmative procedure.
275. Section 78(7) enables the Ombudsman to investigate action taken on behalf of a listed authority in the same way as the Ombudsman can investigate action by the listed authority itself.

### **Section 79 - Former health care providers, social landlords, social care providers and palliative care providers: modifications**

276. This section confers power on the Welsh Ministers to make regulations modifying the application of the Act in respect of former family health service providers in Wales, former independent providers in Wales former social landlords in Wales former care home providers in Wales, former domiciliary care providers in Wales, and former independent palliative care providers in Wales.
277. This gives the Welsh Ministers power to modify appropriately the application of the Act in respect of a family health service provider in Wales, an independent provider in Wales, a social landlord in Wales, a care home provider in Wales, a domiciliary care provider in Wales or an independent palliative care provider in Wales but which have subsequently ceased to be such a listed authority.
278. For example, it will enable the Welsh Ministers to modify sections 23 (reports of investigations); 25 (as it relates to publicising reports: health care providers); and section 26 (action following receipt of a report) in such cases.

### **Section 80 - Consequential, transitional provisions etc.**

279. This section allows the Welsh Ministers by regulations to make consequential, incidental, supplementary, transitional, saving etc. provision that is necessary in consequence of the Act.

### **Section 81 - Regulations and directions**

280. This section contains provision applicable to any power in the Act to make regulations or to issue directions. Section 81(1) provides that regulations made under the Act are exercisable by statutory instrument.

### **Section 82 - Short title**

281. This section provides that the short title of this Act is the Public Services Ombudsman (Wales) Act 2019.

## **RECORD OF PROCEEDINGS IN NATIONAL ASSEMBLY FOR WALES**

282. The following table sets out the dates for each stage of the Act's passage through the National Assembly for Wales. The Record of Proceedings and further information on the passage of this Act can be found on the National Assembly for Wales' website at: <http://www.senedd.assembly.wales/mgIssueHistoryHome.aspx?IIId=20012>

<b>Stage</b>	<b>Date</b>
Introduced	2 October 2017
Stage 1 - Debate	21 March 2018
Stage 2 - Scrutiny Committee - consideration of amendments	31 January 2019
Stage 3 Plenary - consideration of amendments	13 March 2019
Stage 4 Approved by the Assembly	20 March 2019
Royal Assent	22 May 2019