

LOCAL GOVERNMENT AND ELECTIONS (WALES) ACT 2021

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4: Local Authority Executives, Members, Officers And Committees

Section 64 and Schedule 8 – Certain investigations by the Public Services Ombudsman for Wales

348. The Public Services Ombudsman for Wales (“the Ombudsman”) has powers under section 69 of the 2000 Act to investigate allegations that a member or co-opted member, including former members and former co-opted members, of a “relevant authority” (see the note on section 62) has, or may have, failed to comply with their authority’s code of conduct.
349. The Welsh Ministers have powers under section 70 of the 2000 Act to make an order which applies or reproduces any provisions of sections 60 to 63 of that Act, as those sections had effect immediately before their repeal by the Localism Act 2011, for the purpose of any investigation under section 69.
350. Prior to their repeal, sections 60 to 63 dealt with the procedure for investigating alleged code of conduct breaches in certain authorities in England. Those sections dealt with matters such as conflicts of interest, powers to obtain and disclose information, and protection from defamation proceedings.
351. The Public Services Ombudsman for Wales (Standards Investigations) Order 2006 (as amended) (2006 No. 949 (W. 98)) was made pursuant to the powers in section 70 of the 2000 Act and governs the procedure for investigations by the Ombudsman under section 69 of that Act.
352. The power in section 70 to apply law which has been repealed does not result in accessible law. Section 64 of, and Schedule 8 to, the Act address this problem by placing equivalent provision for investigations on the face of the 2000 Act in the form of new sections 69A to 69F and by substituting a new section 74. No substantial changes have been made to the effect of the law, but the provisions have, where appropriate, been aligned with the Ombudsman’s powers relating to the investigation of maladministration and service failure in the Public Services Ombudsman (Wales) Act 2019 (“the 2019 Act”).
353. New section 69A(1) provides that where the Ombudsman has a conflict of interest, as defined in subsections (2) or (4), they must exercise the power under paragraph 14 of Schedule 1 to the 2019 Act to delegate:
- the decision as to whether to investigate a case (under section 69) and,
 - where a decision is taken to investigate, any investigation of that case.

354. Paragraph 14 of Schedule 1 to the 2019 Act 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 the 2019 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.
355. Subsections (2) and (3) provide that the requirement to delegate applies if the Ombudsman was a member or officer of the relevant authority or a member of a committee, sub-committee, joint committee or joint sub-committee of the relevant authority at any point within five years of:
- the date on which the Ombudsman received the written allegation (if the case is within subsection (1)(a)); or
 - the date on which the Ombudsman received the written allegation investigated under subsection (1)(a) (if the case is within subsection (1)(b)).
356. Under subsection (4) the requirement to delegate also applies if the Ombudsman considers that they have, or are likely to have, an interest in the matters which may be investigated or the outcome of any investigations which may be undertaken. Subsection (5) requires the Ombudsman to disclose the nature of the interest to the person to whom any investigation under section 69 would or does apply. The Ombudsman must also disclose this information to any person that has made an allegation as described in section 69(1)(a)
357. Subsection (6) provides that should the Ombudsman, in contravention of subsection (1), decide whether to investigate a case or investigate a case the validity of anything done by the Ombudsman if not effected.
358. New section 69B sets out the requirements for investigations under section 69. Subsection (1) requires the Ombudsman to give the person to whom the investigation relates the opportunity to comment on whether they have failed to comply with the code of conduct of the authority of which they are, or were, a member or co-opted member
359. New section 69B(2) requires all investigations to be conducted in private.
360. Subsection (3) 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.
361. New section 69B(4)(a) provides that the Ombudsman may make such inquiries as the Ombudsman thinks appropriate. Subsection (4)(b) provides that it is for the Ombudsman to decide whether a person may be legally represented or be represented in some other way (e.g. by an independent advocate).
362. New section 69B(6) 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
363. New section 69C(1) of the 2000 Act empowers the Ombudsman to require a person to supply information or produce documents relevant to an investigation under section 69 of that Act. This includes information or documents held in an electronic format.
364. New sections 69D(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 this Part 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.

365. 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 69D(5)).
366. New section 69E provides that the Ombudsman, a member of their staff, or a person assisting the Ombudsman, may only disclose information obtained in the exercise of the Ombudsman's functions under Part 3 of the 2000 Act:
- (a) for the purposes of:
- the Ombudsman's functions under Chapter 3 or 4 of Part 3 of the 2000 Act or Part 3 or 5 of the 2019 Act;
 - the functions of the Adjudication Panel of Wales including the functions of its President, Deputy President and tribunals, under Chapter 4 of Part 3 of the 2000 Act;
 - criminal proceedings or the investigation of a criminal offence;
- (b) if the disclosure is made to:
- the Auditor General for the purposes of their functions under Part 2 of the 2004 Act;
 - the Electoral Commission for the purposes of any of its functions.
367. New section 69F enables the Welsh Ministers to amend Chapter 3 of Part 3 of the 2000 Act to make further or different provision about the exercise of the Ombudsman's functions under section 69.
368. New section 74 provides that, for the purposes of the law of defamation, the publication of a matter is absolutely privileged if it is done in exercise of the Ombudsman's functions under Chapters 3 and 4 of Part 3 of the 2000 Act; or in communications with the Ombudsman or a person exercising a function of the Ombudsman for the purposes of, or in connection with, those functions. "Publication" bears its usual meaning under the law relating to defamation.