

*These notes refer to the Commissioner for Older People (Wales)  
Act 2006 (c.30) which received Royal Assent on 25 July 2006*

# COMMISSIONER FOR OLDER PEOPLE (WALES) ACT 2006

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## EXPLANATORY NOTES

### COMMENTARY

#### *Section 1: Establishment of the Commissioner*

10. *Subsection (1)* establishes the office of the Commissioner for Older People in Wales or Comisiynydd Pobl Hŷn Cymru ("the Commissioner").
11. *Subsection (2)* gives effect to Schedule 1 which makes further provision about the office of the Commissioner.

#### *Schedule 1: The Commissioner for Older People in Wales*

12. *Paragraph 1* makes provision about the status of the Commissioner. *Paragraph 2* confers a regulation making power on the Assembly to make provision about the appointment and term of office of the Commissioner. *Paragraph 3* makes provision about remuneration and similar matters.
13. *Paragraph 4* makes provision for the appointment of a deputy Commissioner and other staff and *paragraph 5* allows for the delegation of the Commissioner's functions to any person including a member of his staff.
14. *Paragraph 6* amends the Superannuation Act 1972 to add the Commissioner and the Commissioner's staff to the persons covered by that Act. This will enable the Commissioner and the Commissioner's staff to be included in any pension scheme for civil servants established under the 1972 Act.
15. *Paragraphs 7 and 9 to 14* provide for the financing of the Commissioner's office, the preparation of estimates and accounts and the auditing of accounts and the examination of resources.
16. *Paragraph 8* gives a regulation making power to the Assembly to make provision about the making by the Commissioner of reports to the Assembly.
17. *Paragraph 15* deals with the execution of documents by the Commissioner and use in evidence.
18. *Paragraphs 16 and 17* add the Commissioner and members of his staff to the lists of office holders who are disqualified from being members of the House of Commons and the Northern Ireland Assembly. Disqualification from being a member of the National Assembly will be dealt with by way of a disqualification order under section 12(1)(b) of the Government of Wales Act 1998.
19. *Paragraph 18* amends the Welsh Language Act 1993 so as to include the Commissioner in the list of public bodies required to prepare a scheme specifying the measures they propose to take in relation to the use of the Welsh language in the provision of their services.

20. *Paragraph 19* gives the Commissioner wide supplementary powers (the exercise of which is subject to directions from the Assembly). Such powers could be used by the Commissioner to ensure, for example, that older people are aware of his functions, the location of his office, and the ways in which they may communicate with him.
21. *Paragraph 20* amends the Government of Wales Act 1998 so as to exempt the Commissioner from being added to the list of public bodies whose audit and account functions the Secretary of State may by order make provision about.
22. *Paragraph 21* amends the Freedom of Information Act 2000 so as to bring the Commissioner within the remit of that Act and to allow the Information Commissioner to disclose information to the Commissioner which may be relevant to a matter that may be the subject of an examination by him.

## **Section 2: General Functions**

23. *Subsections (1) and (2)* provide for the role of the Commissioner to include promoting awareness of the interests of older people in Wales (as defined in section 24(3)) and of the need to safeguard their interests, promoting the provision of opportunities for, and elimination of discrimination against older people in Wales; encouraging best practice in the treatment of them and reviewing the adequacy and effectiveness of law affecting their interests, but in each case only in relation to fields in which the Assembly has functions.
24. *Subsection (3)* provides for the Commissioner to consider and make representations to the Assembly about any matter relating to the interests of older people in Wales. This power is not limited to fields in which the Assembly has functions.

## **Section 3: Review of discharge of functions**

25. *Subsection (1)* provides a power for the Commissioner to review the effect on older people in Wales, for the purpose of safeguarding and promoting their interests, of the discharge, or proposed discharge, of the Assembly's functions (including the making or proposed making of any subordinate legislation) and the discharge, or proposed discharge in relation to Wales of a relevant function of a person listed in Schedule 2. *Subsection (2)* defines a relevant function. In the case of certain private persons operating in the public healthcare field, the effect is to limit their relevant functions (and so the Commissioner's power of review) to their functions in that field.
26. The Commissioner's power extends to the review of a failure by the Assembly or listed person to discharge a function. In either case, under *subsection (4)* the discharge of a function, or failure to discharge a function, includes one that occurred prior to this section coming into force.

## **Section 4: Power to amend Schedule 2**

27. *Subsection (1)* provides the Assembly with an order-making power to add to, delete from or make alterations to the descriptions of persons listed in Schedule 2. *Subsection (2)* sets out the conditions which must be met in respect of a person (which can be either a body or an individual) before he can be added to Schedule 2. These are that the person must have functions dischargeable in relation to Wales in a field in which the Assembly has functions and must be established by an enactment or by Her Majesty, a Minister of the Crown, a government department, the Assembly or a person listed in Schedule 2. In addition, at least half of the person's expenditure on the discharge of its functions in relation to Wales must be funded directly by the Assembly. But under *subsection (3)* a person can nevertheless be added to Schedule 2 if the person is not so funded by the Assembly, provided the Secretary of State's consent is given. *Subsection (4)* prohibits the Assembly from adding a person to Schedule 2 whose main activity is the investigation of complaints or the supervision or review of actions taken following a complaints investigation. *Subsection (5)* requires the Assembly, where it makes an

order under subsection (1), to specify which of that person's functions will be relevant functions (and so subject to review by the Commissioner). *Subsection (7)* restricts the functions which may be prescribed as relevant functions in such an order. A function of a person added to Schedule 2 can only be a relevant function if it is a function in a field in which the Assembly has functions.

### ***Section 5: Review of arrangements***

28. *Subsections (1) and (2)* set out what the Commissioner may do in respect of determining whether arrangements for advocacy, complaints and whistle-blowing are effective in safeguarding and promoting the interests of relevant older people in Wales (a narrower group than "older people in Wales" – defined in section 6(2)). *Subsection (3)* provides that the Commissioner may also assess the effect of a person's failure to make such arrangements.
29. *Subsections (4) to (7)* give details of the arrangements that the Commissioner may review under *subsection (1)*. *Subsection (4)* defines advocacy arrangements as services (provided by any person) to represent the views of, or to provide advice or support of kinds to be prescribed to, relevant older people in Wales. *Subsection (5)* defines complaints arrangements as those of the Assembly, providers of regulated services in Wales or a person listed in Schedule 3 (along with persons who provide services on such a person's behalf in Wales), which are in place to deal with complaints made by or on behalf of a relevant older person in Wales in respect of relevant services provided. Relevant services are defined in section 6(4).
30. *Subsection (6)* defines whistle-blowing arrangements as those of the Assembly, providers of regulated services in Wales or a person listed in Schedule 3 (along with persons who provide services on such a person's behalf in Wales), which are in place to ensure that action is taken in response to disclosure of potentially adverse information. *Subsection (7)* defines potentially adverse information as that which may appear to show that a criminal offence has been committed, that a legal obligation has not been fulfilled, that the health or safety of a person has been endangered, that the dignity of a person has been violated or that any of these has been deliberately concealed.

### ***Section 6: Review of arrangements: supplementary***

31. This section makes supplementary provision in respect of the functions found in section 5. *Subsection (2)* defines relevant older people in Wales and *subsection (4)* defines a relevant service, which other than in the case of the Assembly is essentially limited to a service provided in Wales. In addition, the definition of relevant service in respect of certain private bodies providing services in the field of public healthcare is limited to services provided in that field. *Subsection (5)* provides that regulations may confer a power on the Commissioner to require any person to provide him with information for the purposes of his functions under section 5 or for the purposes of determining whether a recommendation he has made in a report in connection with his functions under section 5 has been complied with.

### ***Section 7: Power to amend Schedule 3***

32. *Subsection (1)* provides the Assembly with an order-making power to add to, delete from or make alterations to the descriptions of persons listed in Schedule 3. The section sets out certain restrictions and conditions on the exercise of that power. These are similar to those in section 4 in relation to the power to amend Schedule 2 (see paragraph 27).

### ***Section 8: Assistance***

33. *Subsections (1) and (3)* enable the Assembly to make regulations giving the Commissioner power to assist an older person in Wales who is making a complaint or representation to or in respect of the Assembly, a person providing regulated services

in Wales, or a person listed in Schedule 3 (along with a person who provides services on such a person's behalf). The complaint or representation must, when made to, or in respect of, a person providing regulated services in Wales, be about the provision of those regulated services in Wales and, when made to, or in respect of, a person listed in Schedule 3, be about the discharge of (or failure to discharge) any of that person's relevant functions (i.e. those subject to review by the Commissioner under section 3). This could include, for example, a complaint or representation about the way in which a person listed in Schedule 3 has commissioned the provision of services by others. The complaint or representation must, when made to a person who provides services on behalf of a person listed in Schedule 3, be about the provision of a relevant service. This is defined in section 6(4)(f) as a service provided in Wales which, if provided directly by the Schedule 3 person, would be a relevant service. Thus in the case of certain private bodies providing services in the field of public healthcare, it is limited to services provided in that field.

34. The regulations may also give the Commissioner power to assist an older person in Wales who is taking part in any procedure or proceedings (including prospective proceedings) of a description to be prescribed. *Subsection (4)* provides that assistance includes that of a financial, representative or advisory nature and *subsection (2)* provides that it can include assistance to individuals who were, but are no longer, older people in Wales (as defined in section 24(3)). This could include, for example, an older person who has, since the incident complained of, moved out of Wales. Under the provisions of *subsection (5)*, regulations may impose conditions on the giving of assistance, including the requirement for repayment of financial assistance, in prescribed circumstances.

### ***Section 9: Research and educational activities***

35. This section makes provision for the Commissioner to undertake, commission or provide assistance (including financial assistance) for another to undertake or commission research or educational activities in connection with any of his functions. Educational activities may include, for example, the provision of teaching or training to older people and others about best practice in the treatment of older people.

### ***Section 10: Examination of cases***

36. *Subsections (1) to (3)* enable the Assembly to make regulations giving the Commissioner power to examine the cases of particular older people in Wales in connection with his functions, except those of considering and making representations to the Assembly and undertaking research and educational activities about matters in relation to a field in which the Assembly does not have functions (sections 2(3) and 9 respectively). The power can extend to examining the case of someone who was but is no longer an older person in Wales. This could include, for example, examining the case of someone who has since died. Provision is made under *subsection (4)* for regulations to detail the types of cases which may be examined, the circumstances in which an examination may be made and the procedure for conducting an examination. *Subsections (5), (6) and (9)* enable the regulations to make provision for the Commissioner to be able to obtain information, explanations and assistance and to make payments to persons who attend or provide information, explanations or assistance in respect of an examination or for the purposes of determining whether a recommendation that the Commissioner has made in a report following an examination of a case has been complied with. For these purposes, *subsection (7)* provides that the Commissioner shall have the same powers as the High Court in respect of the attendance and examination of witnesses. However *subsection (8)* makes it clear that the Commissioner cannot compel persons to give evidence or provide information where they would not be compelled to do so in civil proceedings before the High Court.

### ***Section 11: Obstruction and contempt***

37. *Subsections (1) and (2)* provide the Commissioner with a power to issue a certificate to the High Court if he is satisfied that, without lawful excuse, a person has obstructed him or a member of his staff in the exercise of any of his functions under regulations providing for the examination of particular cases or those giving him information gathering powers in respect of his review of arrangements function (section 6(5)) and his powers to examine particular cases (section 10(5)). The Commissioner can also issue a certificate if he is satisfied that a person has done something in relation to an examination which would, if the examination were court proceedings, have been contempt of court. Under *subsection (3)* the High Court can then deal with the person concerned as if they had committed contempt in relation to the High Court. This is a common form of enforcement mechanism for offices of this type.

### ***Section 12: Guidance***

38. *Subsections (1) and (2)* allow the Commissioner to issue guidance to the Assembly, any person listed in Schedule 2 and providers of regulated services in Wales on best practice in connection with any matter relating to the interests of older people in Wales. Before issuing such guidance, *subsection (3)* provides that the Commissioner must consult such persons as he thinks appropriate. *Subsections (4) and (5)* provide that the Assembly, any person listed in Schedule 2 and providers of regulated services in Wales must have regard to such guidance and that the Commissioner may, when exercising any of his functions in respect of those persons, take into account the extent to which the person has complied with it.

### ***Section 13: Power of entry and of interviewing***

39. This section gives the Commissioner, or a person authorised by him, the power to enter premises that are not private dwellings, to interview older people with their consent in connection with his powers in sections 3 or 5 to review the functions or the arrangements of specified persons. *Subsection (2)* provides that the interview must be conducted in the presence of another person, if the older person requires someone else to be present, or otherwise in the presence of others only to the extent that the Commissioner and the older person consent to such others being present. The power does not extend to the Commissioner's other functions.

### ***Section 14: Further supplementary functions***

40. *Subsection (1)* enables further functions to be conferred on the Commissioner in regulations made by the Assembly provided they are connected with his existing functions except his powers to consider and make representations to the Assembly (section 2(3)) and to undertake research and educational activities (section 9) to the extent that they are exercised in a field in which the Assembly does not have functions, or his powers of entry and interviewing in section 13. Regulations under *subsection (3)* may however confer on the Commissioner a similar power of entry and of interviewing for the purpose of any further functions conferred on him by regulations made under subsection (1).

### ***Section 15: Reports following discharge of particular functions***

41. *Subsections (1) and (2)* enable the Assembly to make regulations providing for the making by the Commissioner of reports following the exercise of any of his functions, except those of considering and making representations to the Assembly (section 2(3)) and of undertaking research and educational activities (section 9) to the extent that they are exercised in a field in which the Assembly does not have functions. *Subsection (3)* provides that such regulations may stipulate the contents of a report, the publication of a report, who should receive copies, and any further action that must or may be taken by the Commissioner after making the report. The regulations may also stipulate



that the Commissioner may make a joint report with the Children's Commissioner for Wales where they have each discharged their respective functions in relation to the same matter. *Subsections (4) and (5)* prohibit the Commissioner from naming any person, or including any particulars identifying any person, which can be omitted without impeding the report's effectiveness, unless he considers it to be in the public interest to do so.

### ***Section 16: Working jointly with the Public Services Ombudsman for Wales***

42. This section makes provision for the Commissioner to work jointly with the Public Services Ombudsman for Wales (the "PSOW") where there is an overlap in their investigatory functions. *Subsection (1)* provides for the power to work jointly to apply in circumstances where the Commissioner is entitled to examine a particular case of an older person in Wales that could also be the subject of an investigation by the PSOW. Where this circumstance occurs, *subsection (2)* requires the Commissioner to inform and consult with the PSOW about the case, where he considers it appropriate. Once the Commissioner has consulted the PSOW about a case, *subsection (3)* provides that both the Commissioner and the PSOW are given the power to co-operate with each other in relation to the case. This may involve conducting a joint examination and preparing and publishing a joint report on their findings.
43. *Subsections (4) and (5)* provide the Assembly with an order-making power to apply the joint working provisions in this section to other commissioners and ombudsmen with whom, in the future, there may be an overlap in functions. The Assembly must consult with the Commissioner (and any other appropriate persons, which it is anticipated would include the other commissioner or ombudsman) before making such an order.

### ***Section 17: Working collaboratively with other ombudsmen***

44. This section makes provision for the Commissioner to work collaboratively with other ombudsmen where there is no overlap in their functions but where a case raises matters that could be the subject of investigation by both office-holders. *Subsection (6)* specifies that, for the purposes of this section, other ombudsmen are the PSOW and the Children's Commissioner for Wales.
45. *Subsection (1)* provides that the power to work collaboratively shall apply where the Commissioner is examining, or considering whether to examine, a case that relates to, or raises an issue, which could be the subject of an investigation by the Children's Commissioner for Wales or the PSOW (a "connected matter").
46. *Subsection (2)* requires the Commissioner to inform the Children's Commissioner for Wales or the PSOW about a connected matter that he has identified, where he considers it appropriate. *Subsection (3)* provides that where the Commissioner considers that a case raises both a connected matter and a matter that he is entitled to examine (an "older people matter"), he is required to inform and consult with the Children's Commissioner for Wales or the PSOW on his proposals to undertake an examination, where he considers it appropriate.
47. *Subsection (4)* enables the Commissioner and the Children's Commissioner for Wales or the PSOW to co-operate with each other in relation to their separate investigations, to act together in the investigation of the matters raised by the case, and to prepare and publish a joint report containing their respective conclusions. *Subsection (5)* requires the Commissioner, where he identifies a case that raises a connected matter but not an older people matter, and he considers it appropriate, to inform the aggrieved person (or another person involved in that case) about how to refer the matter to the correct person.
48. *Subsections (8) and (9)* provide the Assembly with an order-making power to apply the collaborative working provisions in this section to other commissioners and ombudsmen for whom, in the future, such arrangements may be appropriate. The Assembly must consult with the Commissioner (and any other appropriate persons,

which it is anticipated would include the other commissioner or ombudsman) before making such an order.

### ***Section 18: Power to disclose information***

49. *Subsections (1) to (3)* place a duty upon the Commissioner not to disclose information obtained by him in the discharge of his functions, or from other commissioners or ombudsmen, other than for the purposes specified in *subsection (3)*. These include disclosure to other commissioners, ombudsmen, or public bodies (defined as "permitted persons" in *subsection (9)*) if it is in the public interest and for the purpose of the discharge of that permitted person's functions (*subsection (3)(b)*). There is also a "sunset provision" that enables the Commissioner to disclose information obtained by him more than 70 years before the proposed date of disclosure, if he considers its disclosure to be in the public interest (*subsection (3)(h)*). *Subsection (5)* provides that, in determining whether disclosure is in the public interest, the Commissioner must take into account the interests of the person to whom the information relates and such other persons as he thinks appropriate.
50. *Subsection (10)* provides the Assembly with a power to add to the list of permitted persons, or omit or change the description of a person. This could be used, for example, to accommodate the creation of a new ombudsman with whom it may be appropriate for the Commissioner to share information.

### ***Section 19: Protection against defamation***

51. *Subsection (1)* provides that, for the purposes of the law of defamation, the following are absolutely privileged: (a) the Commissioner's reports, (b) information disclosed by the Commissioner to the PSOW, the Children's Commissioner for Wales or any other ombudsman with whom the Commissioner may co-operate, for the purposes of discharging any of the Commissioner's functions, and (c) communications from the Commissioner to persons listed in *subsection (3)* in connection with the examination by him of an individual's case. Absolute privilege provides a complete defence to defamation proceedings.
52. *Subsection (2)* provides that, for the purposes of the law of defamation, communications from persons listed in *subsection (3)* to the Commissioner in connection with the examination of a case have qualified privilege. Qualified privilege will not prevent a person bringing defamation proceedings. However, it will provide a conditional defence against such proceedings. The persons listed in *subsection (3)* are: the person whose case is being examined, the person whose conduct is the subject of the examination, any person with whom the Commissioner is communicating for the purposes of obtaining information about the case and any person acting on behalf of any of these.

### ***Section 20: Complaints procedure in respect of the Commissioner***

53. *Subsection (1)* provides that the Commissioner must establish a complaints procedure for dealing with complaints made about the discharge of his functions. *Subsection (2)* provides that the procedure must include details of how a complaint may be made, the person to whom a complaint may be made, the timescales in which complaints will be considered, and action that the Commissioner must consider taking in response.
54. *Subsection (3)* gives the Commissioner a power to amend or update the complaints procedure. *Subsections (4) and (5)* provide the Commissioner with a duty to consult and obtain the approval of the Assembly before establishing or amending the complaints procedure, and to send a copy of the procedure to the Assembly.

### ***Section 21: Restrictions***

55. *Subsection (1)* prevents the Commissioner from discharging any of his functions in relation to any matter that is or has been the subject of legal proceedings before a court or tribunal. *Subsection (2)* precludes the Commissioner from exercising any prescribed function, which is dischargeable under statute by another prescribed person or body.

### ***Section 22: Minor and consequential amendments***

56. This section gives effect to Schedule 4 which makes minor and consequential amendments in relation to the Commissioner's powers to work with other commissioners and ombudsmen (as provided for in sections 16 and 17).

### ***Schedule 4: Minor and consequential amendments***

57. *Paragraph 1* amends the Care Standards Act 2000 by inserting new section 75ZA, which mirrors section 17 of the Act. This gives the Children's Commissioner for Wales reciprocal powers to work collaboratively with the Commissioner.
58. *Paragraph 2* amends the Public Services Ombudsman (Wales) Act 2005. It inserts new sections 25A and 25B into that Act, which mirror sections 16 and 17, respectively, of the Act. They give PSOW reciprocal powers to work jointly and collaboratively with the Commissioner.

### ***Section 23: Commencement***

59. *Sections 1 to 22* of (and so Schedules 1 to 4 to) the Act will be brought into force on such a date or dates as determined by the Assembly by order. The remaining provisions will come into force on Royal Assent.

### ***Section 24: Older People in Wales***

60. An older person in Wales is defined for the purposes of the Act as a person who is aged 60 or over and who satisfies at least one of the following criteria: (a) he is ordinarily resident in Wales; (b) he is receiving a regulated service in Wales; or (c) he is receiving relevant services (as defined in section (6)(4)) from, or on behalf of, or under arrangements with, any of the persons listed in schedule 3.

### ***Section 25: Interests of older people in Wales***

61. In considering what constitutes the interests of older people in Wales for the purposes of the Act, the Commissioner must have regard to the United Nations Principles for Older Persons.

### ***Section 26: Regulated services in Wales***

62. *Subsections (2) to (4)* define the term "regulated services in Wales" and provide clarification as to who is to be treated as the provider of particular regulated services.

### ***Section 27: Other interpretative provisions***

63. *Subsection (1)* provides certain definitions for the Act. *Subsections (2) and (3)* provide a power for the Assembly to amend, by order, the definitions of 'family health service provider in Wales' and 'independent provider in Wales' after consulting with such persons as it thinks appropriate.

### ***Section 28: Orders and regulations***

64. *Subsection (1)* provides that, where the Assembly is empowered by the Act to make orders or regulations, these are to be made by statutory instrument. *Subsection (2)* provides that such orders or regulations may make different provision for different



purposes and may include incidental, supplemental, consequential, transitory or saving provision. *Subsection (6)* provides that any order or regulations made by the Assembly under the Act are to be regarded as general subordinate legislation. Any such orders or regulations will, therefore, be subject to the Assembly's subordinate legislation procedures.

65. *Subsection (3)* enables the Assembly to make, by order, consequential amendments to the legislation relating to other commissioners and ombudsmen that are added to, or removed from, the list of persons with whom the Commissioner may work jointly or collaboratively (provided for in sections 16(4) and 17(8) respectively). *Subsection (4(a))* places the Assembly under a duty to obtain the prior consent of a Northern Ireland department if the order confers functions on a person which relate wholly or partly to a transferred matter (i.e. a matter within the competence of the Northern Ireland Assembly). *Subsection (4)(b)* places the Assembly under a duty to obtain the prior consent of the Secretary of State if the function relates to a matter in a field in which the Assembly does not have functions to the extent that the matter is not a transferred matter. This power does not enable the Assembly to make any amendments to Scottish legislation.

### ***Section 29: Extent***

66. The Act principally extends to England and Wales only but amends certain primary legislation which extends to the United Kingdom. Section 28 of the Act also extends to Northern Ireland. However, in practice the effect of the Act's application is largely confined to Wales.